

ILLINOIS POLLUTION CONTROL BOARD
December 3, 2009

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 10-9
) (Enforcement - Land, Cost Recovery)
WASTE HAULING LANDFILL, INC.,)
JERRY CAMFIELD, A. E. STALEY)
MANUFACTURING CO., ARCHER)
DANIELS MIDLAND, INC., 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., TRIPPLE S REFINING)
CORPORATION AND ZEXEL ILLINOIS,)
INC.,)
)
Respondents.)

ORDER OF THE BOARD (by G.T. Girard):

The Board today rules on several motions in this proceeding and directs the hearing officer to decide some procedural motions. The Board grants a motion to appear *pro hac vice* filed by Hexion Specialty Chemicals, Inc. (Hexion) as successor in interest to Borden Chemical Co (Borden). The Board also grants the People's motion to amend the complaint and the motion to dismiss filed by Caterpillar, Inc. (Caterpillar).

Below the Board sets forth the procedural history of this case and then the motion to appear *pro hac vice*. The Board next details the relevant statutory and regulatory provisions. The Board summarizes the motions to dismiss and amend the complaint along with the ancillary motions related to those two motions. The Board will then set forth the reasons for the Board's decision.

PROCEDURAL BACKGROUND

On July 30, 2009, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a one-count complaint against Waste Hauling Landfill, Inc., Jerry

Camfield, A. E. Staley Manufacturing Co., Archer Daniels Midland, Inc., 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., Tripple S Refining Corporation and Zexel Illinois, Inc. (collectively, respondents). The complaint concerns Waste Hauling Landfill, Inc.'s former landfill facility located in the Northwest Quarter of the Northwest Quarter of Section 26, Township 16 North, Range 1 East (Blue Mound Township), Macon County.

On August 6, 2009, the Board accepted the complaint for hearing. The complaint alleges that respondents are liable for past, present, and future response costs incurred by the State pursuant to Section 22.2 of the Environmental Protection Act (Act) (415 ILCS 5/22.2 (2008))¹ and asks that the Board find respondents liable for the response costs incurred by the State and for damages in an amount equal to three times removal costs for the failure to comply with the Illinois Environmental Protection Agency's (IEPA) "Section 4(q) notice"². Comp. at 6.

Since accepting the complaint, the Board has received numerous motions from the parties, many of which are being addressed by the hearing officer. However, the Board will address certain of those motions. Specifically, the Board will address the September 29, 2009 motion filed by Hexion Specialty Chemicals, Inc. seeking to allow Mathew L. Larsen and William J. Denton to appear *pro hac vice*. The Board will then address: 1) the September 2, 2009 motion filed by Caterpillar to dismiss the complaint (Mot.) and the accompanying memorandum (Memo.); 2) the October 2, 2009 Caterpillar motion for leave to file a reply (Reply); and, 3) the September 16, 2009 motion to amend the complaint (Mot.Am.).

HEXION'S MOTION TO APPEAR PRO HAC VICE

According to the motion, Hexion is a successor-in-interest to Borden, a named respondent. The motion indicates that Mr. Larsen and Mr. Denton are both licensed to practice and members in good standing of the Missouri Bar. Mr. Larsen is also a member of the California Bar and Mr. Denton also has membership in the Texas Bar. No response has been filed to the motion to appear *pro hac vice*. See 35 Ill. Adm. Code 101.500(d). The Board grants the motion. See 35 Ill. Adm. Code 101.400(a)(3).

STATUTORY AND REGULATORY BACKGROUND

Section 22.2(f) of the Act provides, in part:

¹ All citations to the Act will be to the 2008 compiled statutes, unless the section at issue has been substantively amended in the 2008 compiled statutes.

² This is a reference to Section 4(q) of the Act (415 ILCS 5/4(q) (2008)) which provides that the IEPA has the authority to notify any person liable pursuant to Section 22.2(f) of the Act (415 ILCS 5/22.2(f) (2008)) for a release of a hazardous substance, which notice must include the identified response action and an opportunity for such person to perform the response action..

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (j) of this Section, the following persons shall be liable for all costs of removal or remedial action incurred by the State of Illinois or any unit of local government as a result of a release or substantial threat of a release of a hazardous substance or pesticide:

- (1) the owner and operator of a facility or vessel from which there is a release or substantial threat of release of a hazardous substance or pesticide
- (2) any person who at the time of disposal, transport, storage or treatment of a hazardous substance or pesticide owned or operated the facility or vessel used for such disposal, transport, treatment or storage from which there was a release or substantial threat of a release of any such hazardous substance or pesticide
- (3) any person who by contract, agreement, or otherwise has arranged with another party or entity for transport, storage, disposal or treatment of hazardous substances or pesticides owned, controlled or possessed by such person at a facility owned or operated by another party or entity from which facility there is a release or substantial threat of a release of such hazardous substances or pesticides. 415 ILCS 5/22.2(f)(1-3) (2008).

Section 22.2(i) of the Act reads as follows:

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 to any such action. 415 ILCS 5/22.2(i) (2008).

Section 22.2(k) of the Act reads in part as follows:

If any person who is liable for a release or substantial threat of release of a hazardous substance or pesticide fails without sufficient cause to provide removal or remedial action upon or in accordance with a notice and request by the Agency or upon or in accordance with any order of the Board or any court, such person may be liable to the State for punitive damages in an amount at least equal to, and not more than 3 times, the amount of any costs incurred by the State of Illinois as a result of such failure to take such removal or remedial action. The punitive damages imposed by the Board shall be in addition to any costs recovered from such person pursuant to this Section and in addition to any other penalty or relief provided by this Act or any other law. 415 ILCS 5/22.2(k) (2008).

Section 58.9(a)(1) of the Act provides, in part:

Notwithstanding any other provisions of this Act to the contrary, including subsection (f) of Section 22.2, in no event may the Agency, the State of Illinois,

or any person bring an action pursuant to this Act or the Groundwater Protection Act to require any person to conduct remedial action or to seek recovery of costs for remedial activity conducted by the State of Illinois or any person beyond the remediation of releases of regulated substances that may be attributed to being proximately caused by such person's act or omission or beyond such person's proportionate degree of responsibility for costs of the remedial action of releases of regulated substances that were proximately caused or contributed to by 2 or more persons. 415 ILCS 5/58.9(a)(1) (2008).

Section 103.204(c)(2) of the Board's procedural rules provides that the complaint must contain:

The dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations. The complaint must advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense. 35 Ill. Adm. Code 103.204(c)(2).

Section 741.105(b) of the Board's proportionate share liability rules provides:

The Board's procedural rules at 35 Ill. Adm. Code 101 and 103 apply to all proceedings under this Part. However, in the event of a conflict between the rules of 35 Ill. Adm. Code 101 and 103 and this Part, this Part applies. 35 Ill. Adm. Code 741.105.

Section 741.205(c) of the Board's proportionate share liability rules states:

A complainant is not required to plead a specific alleged percentage of liability for the performance or costs of a response in a complaint that seeks to require a respondent to perform or pay for a response that results from a release or substantial threat of a release of regulated substances or pesticides. 35 Ill. Adm. Code 741.105.

MOTIONS TO DISMISS, REPLY, AMEND

The Board will first summarize the arguments in the Caterpillar motion to dismiss and the accompanying memorandum, then the motion to amend the complaint along with the response to the motion to dismiss (Resp.) filed by the People on September 17, 2009. Next the Board will summarize the Caterpillar motion for leave to file a reply and the reply.

Caterpillar's Motion to Dismiss

Caterpillar sets forth several reasons that the complaint against Caterpillar should be dismissed. Mot. at 1-3. First, Caterpillar claims that the complain fails to state a valid claim against Caterpillar under Sections 22(f)(1-2) of the Act (415 ILCS 5/22(f)(1-2) (2008)) as the People failed to plead any facts indicating that Caterpillar was the owner or operator of a facility

from which there was a release. Mot. at 1. Next, Caterpillar argues that the Illinois Environmental Protection Agency (IEPA) failed to follow the notification requirements and procedures found in Section 31 of the Act (415 ILCS 5/31 (2008)). *Id.* Caterpillar also argues that the People have failed to plead the allegations with the specificity required by the Board's rules and because Illinois is a fact-pleading state. Mot. at 2. Caterpillar further alleges that the People seek greater recovery against Caterpillar than the Board's rules on proportionate share liability allow and the People have failed to plead sufficient facts to support a valid claim under the proportionate share laws. *Id.* Finally Caterpillar asserts that the People failed to plead sufficient facts to support the prayer for relief. *Id.* The Board will address each of these allegations in turn.

Section 22(f)(1-2) of the Act (415 ILCS 5/22(f)(1-2))

Caterpillar maintains that the sole foundation for the People's allegation against the respondents is in paragraph 23 of the complaint. Memo. at 4. Paragraph 23 states:

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. Comp. at 5-6.

Caterpillar claims that Caterpillar is not a responsible party under Section 22.2(f)(1-2) of the Act (415 ILCS 5/22(f)(1-2) (2008)) and the People have not set forth any facts indicating that Section 22.2(f)(1-2) of the Act (415 ILCS 5/22(f)(1-2) (2008)) applies to Caterpillar. Memo. at 4.

Caterpillar notes that Section 22(f)(1) of the Act pertains to any person who was the owner or operator of a facility from which there was a release and Section 22(f)(2) of the Act pertains to any person who at the time of disposal owned or operated a facility from which there was a release. Memo. at 4. Caterpillar further notes that paragraph 11 of the complaint alleges that Caterpillar sent wastes containing hazardous substances to the landfill during the landfill's operating life. *Id.* Caterpillar maintains that no facts have been alleged that Caterpillar was the owner or operator of the facility as required by Section 22.2(f)(1-2) of the Act (415 ILCS 5/22(f)(1-2) (2008)). Memo. at 4-5. Therefore Caterpillar argues the complaint must be dismissed. Memo. at 5.

Section 31 Notification Requirements

Caterpillar argues that Section 31 of the Act (415 ILCS 5/31 (2008)) outlines notification procedures that IEPA must follow before referring a case to the Attorney General's office for enforcement. Memo. at 5. Caterpillar asserts that the IEPA failed to follow those procedures before this complaint was brought against Caterpillar and thus IEPA was not authorized to refer the matter to the Attorney General's Office. Memo. at 5. In the alternative, Caterpillar argues that because IEPA failed to follow the procedures of Section 31 of the Act (415 ILCS 5/31 (2008)) and could not seek enforcement, the Attorney General is not authorized to bring this matter on behalf of the IEPA and those portions of the complaint should be stricken. *Id.*

Caterpillar asserts that under Section 31(a) of the Act (415 ILCS 5/31(a) (2008)), the IEPA must first send a letter containing a detailed explanation of the violation alleged and although a notice was sent on May 13, 2002, the notice failed to provide necessary facts to support the alleged violations. Memo. at 5. Caterpillar responded to the notice seeking additional information. Memo. at 6. The IEPA is also required under Section 31(b) of the Act (415 ILCS 5/31(b) (2008)) to send written notice that the IEPA intends to pursue legal action and Caterpillar contends that the IEPA did not send such a notice to Caterpillar. *Id.* Caterpillar argues that because the IEPA did not follow the mandatory steps set forth in Sections 31(a) and (b) of the Act (415 ILCS 5/31(a) and (b) (2008)), IEPA could not refer this action to the Attorney General and this action should be dismissed. *Id.*

Caterpillar urges the Board to strike the provisions of the complaint brought on behalf of the IEPA by the People due to IEPA's failure to follow the provisions of Sections 31(a) and (b) of the Act (415 ILCS 5/31(a) and (b) (2008)). Memo. at 7. Caterpillar argues that the People were not authorized to bring the action on behalf of the IEPA and the IEPA should not be allowed to participate "directly or indirectly" in the further litigation of this matter. *Id.*

Caterpillar acknowledges that the Board's precedent allows the Attorney General to bring actions on the Attorney General's own motion at the request of IEPA, even if IEPA failed to follow the provisions of in Sections 31(a) and (b) of the Act (415 ILCS 5/31(a) and (b) (2008)). Memo. at 7, citing People v. Barger, PCB 06-82 (Mar. 16, 2006). However, Caterpillar argues that this precedent "strikes against the purposes of Section 31 and violates the express terms" of the Act. *Id.* Caterpillar opines that the clear purpose of Section 31 is to allow parties the opportunity to seek resolution of an IEPA claim through negotiation prior to referral for litigation. *Id.* Caterpillar was not provided this opportunity and the opportunity for such negotiation is important in cases such as this "where the basis for the allegations . . . are unclear". Memo. at 8.

Caterpillar asserts that Section 31(a) and (b) are rendered meaningless if their purposes can be circumvented by the Attorney General inserting the phrase "on its own motion" into a complaint. Memo. at 8. Caterpillar maintains that:

allowing this matter to go forward, and thus presuming the legislature intended Section 31 to be meaningless and devoid of any force, violates the basic canons of statutory interpretation. *See* Business & Professional People for Public Interest v. Illinois Commerce Com., 146 Ill. 2d 175, 207 (1991) ("When interpreting a statute the primary function of this court is to ascertain and give effect to the intent of the legislature."); Collins v. Board of Trustees of Firemen's Annuity & Benefit Fund, 155 Ill. 2d 103, 111 (1993) ("The statutory language ... is to be given its plain or ordinary and popularly understood meaning, and the fullest rather than narrowest possible meaning to which it is susceptible. *Id.*

Caterpillar argues that Sections 31(a) and (b) require the IEPA to follow specific procedures before referring a case to the Attorney General and the IEPA failed to follow those procedures. Memo. at 8. Therefore, Caterpillar maintains that this action must be dismissed or at least those provisions brought on behalf of the IEPA. Memo. at 8-9.

Fact Pleading Standard

Caterpillar notes that the Board's procedural rules at Section 103.204 require that the complaint include "the dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations. The complaint must advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense." Memo. at 9, quoting 35 Ill. Adm. Code 103.204. Caterpillar contends that the People have failed to provide any dates or descriptions of the nature, extent, duration or strength of the releases or of Caterpillar's alleged contribution to the releases. Memo. at 9.

Caterpillar asserts that Illinois is a fact-pleading state. See People ex rel. Fahner v. Carriage Way West, Inc., 88 Ill. 2d 300,308 (1981). Memo. at 9. Caterpillar maintains that fact pleading is a higher standard than mere notice-pleading. See Adkins v. Sarah Bush Lincoln Health Center, 129 Ill. 2d 497,518 (1989). Caterpillar points to prior Board decisions noting that the Board has indicated that:

In assessing the adequacy of pleadings in a complaint, the Board has accordingly stated that "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. Hamman Farms, PCB 08-96 (Oct. 16, 2008), quoting Grist Mill Confections, PCB 97-174, slip op. at 4. "Legal 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 (2d Dist. 1993). "A complaint's failure to allege facts necessary to recover 'may not be cured by liberal construction or argument.'" *Id.*, quoting Estate of Johnson v. Condell Memorial Hospital, 119 Ill. 2d 496,510 (1988), and People ex rel. Kucharski v. Loop Mortgage Co., 43 Ill. 2d 150, 152 (1969). Memo. at 9-10.

Caterpillar further notes that the Board has indicated that "even though charges in an administrative proceeding need not be drawn with the same refinements as pleadings in a court of law, the Act and the Board's procedural rules provide for specificity in pleadings, and the charges must be sufficiently clear and specific to allow preparation of a defense." Jerry R. West, II v. Nokomis Quarry Company, PCB No. 09-45 (June 4,2009) (internal citations omitted). Memo. at 10. Caterpillar maintains that when complaints fail to meet the fact pleading standard, the Board has dismissed the matter or stricken the violating counts. See, e.g., Rocke v. IPCB., 397 N.E.2d 51, 55 (1st Dist. 1979), and Lloyd A. Fry Roofing Co. v. IPCB, 20 Ill. App. 3d 301,305 (1st Dist. 1974). *Id.*

Caterpillar argues that the People have failed to meet the standard of Section 103.204 or in Illinois' fact-pleading requirements. Memo. at 10. Caterpillar asserts that regarding the releases from the Waste Hauling Landfill generally, the complaint fails to alleged when releases occurred, what was released, the volume of the release or provide any other detail into the nature of the release. Memo. at 10. Caterpillar further asserts that regarding Caterpillar's contributions specifically, the complaint fails to state what materials Caterpillar sent, when those material were

sent, the volume of those materials or any other details regarding Caterpillar's alleged involvement with the Waste Hauling Landfill. *Id.* Therefore, Caterpillar argues the complaint should be dismissed. Memo. at 11.

Proportionate Share

Caterpillar notes that pursuant to Section 58.9 of the Act (415 ILCS 5/58.9 (2008)) a respondent cannot be forced to pay or perform more than the respondent's proportionate share of the cleanup. Memo. at 11, citing 415 ILCS 5/58.9(a)(1) (2008). Caterpillar opines that at most Caterpillar would be liable for Caterpillar's proportionate share of liability at the Waste Hauling Landfill and Caterpillar cannot be forced to pay more. Memo. at 11. Caterpillar argues that to the extent that the People are seeking to impose a greater share of liability upon Caterpillar the claim is in direct contravention of the Act and must be dismissed. *Id.*

Caterpillar maintains that to the extent the People are seeking to recover from Caterpillar the appropriate proportionate share, the complaint fails to provide a concise statement of the relief being sought contrary to Section 103.204. Memo. at 11. Further, Caterpillar maintains that the People have failed to plead facts sufficient to support a valid claim under Illinois' proportionate share regulations. *Id.* Caterpillar argues that under Section 741.205, the People must prove not only that the respondent caused or contributed to the release but also the degree to which the cleanup is proximately caused by the respondent's contribution. Memo. at 11-12. Caterpillar cites to People v. Michel Grain Company, Inc., PCB 96-143 (Aug. 22, 2002) for support. Memo. at 12. In that case, Caterpillar notes that the Board explained that proportionate share liability "limits a cost recovery remedy while imposing a burden on complainant to show, among other things, that respondent proximately caused or contributed to the release or substantial threat of release." Memo. at 12, quoting Michael Grain, PCB 96-143 slip. op at 3.

Caterpillar asserts that neither the IEPA nor the People have specified the nature or degree of Caterpillar's involvement. Memo. at 12. Caterpillar contends that the People have failed to plead sufficient facts regarding the basis for and extent of Caterpillar's liability in the complaint. *Id.* Thus, Caterpillar maintains that the complaint must be dismissed. Memo. at 13.

Prayer for Relief

Caterpillar notes that in paragraph C under the Prayer for Relief in the complaint, the People seek damages equal to three times the removal costs incurred by IEPA. Memo. at 13, Comp. at 6. Caterpillar opines that though the People cite no authority for this request, presumably the request is based on Section 22.2(k) of the Act (415 ILCS 5/22.2(k) (2008)). Memo. at 13. Caterpillar contends that Section 22.2(k) of the Act (415 ILCS 5/22.2(k) (2008)) provides for treble damages only when respondent did not have sufficient cause to decline to undertake removal action and no facts are alleged to support a contention that Caterpillar had sufficient cause to conduct the removal. Memo at 13-14.

Furthermore, Caterpillar maintains that even if Caterpillar were liable, liability would be limited. Memo. at 14. Caterpillar argues that Caterpillar does not own Waste Hauling Landfill and has no authority to enter the property. Memo. at 14. Therefore, Caterpillar opines that even

if Caterpillar were liable, Caterpillar is liable only for the proportionate share of removal attributable to Caterpillar. *Id.* Caterpillar argues that the complaint must thus be dismissed. *Id.*

People's Motion to Amend the Complaint

The People state that since the filing of the complaint a typographical error was discovered in paragraph 23 of the complaint. Mot.Am. at 1. Specifically a reference to subparagraph 3 of Section 22.2(f) of the Act (415 ILCS 5/22.2(f)(3) (2008)) was omitted and should be included. Section 22.2(f)(3) of the Act (415 ILCS 5/22.2(f)(3) (2008)) imposed liability for response and removal costs on “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.” Mot.Am. at 1, quoting 415 ILCS 5/22.2(f)(3) (2008).

People's Response to Motion to Dismiss

The People note that the amendment of the complaint corrects a typographical error in paragraph 23 of the complaint to include an allegation to an alleged violation of Section 22.2(f)(3) of the Act (415 ILCS 5/22.2(f)(3) (2008)). Resp. at 1-2. The People argues that this amendment results in the complaint stating a cause of action against entities such as Caterpillar which sent wastes containing hazardous substances to the Waste Hauling Landfill. Resp. at 2.

As to Caterpillar assertions that Section 58.9(a)(1) of the Act (415 ILCS 5/58.9(a)(1) (2008)) requires dismissal of the complaint, the People argue this is incorrect as proportionate share is a burden of proof issue rather than a pleading requirement. Resp. at 2. In support of this argument the People note that the Board has held that proportionate share is a limitation on remedies, not a bar to a cause of action. Resp. at 2, referencing Proportionate Share Liability: 35 Ill. Adm. Code 741, R97-16 (Dec. 17, 1998) and Cole Taylor Bank v. Rowe Industries et. al., PCB 01-173 (June 2, 2002).

The People maintain that Section 741.205 establishes the complainant's burden of proof when bringing an action to recover costs of a response and subsection (c) specifically provides that a complainant is not obligated to plead a specific alleged percentage of liability to state a claim. Resp. at 2. The People contend that pleading Section 58.9(a)(1) of the Act (415 ILCS 5/58.9(a)(1) (2008)) as an affirmative defenses would be appropriate. *Id.*

The People assert that both the General Assembly and the Board have recognized that cost recovery actions are markedly different from the enforcement proceedings. Resp. at 3. The People contend that because of this difference, Caterpillar's “attempt to bootstrap the complaint into the procedures applicable to enforcement must be rejected.” *Id.* The People assert that the Board's rules at Part 741 establish the procedures under which the Board will allocate proportionate shares of costs of a response and that any conflict between Part 741 and the Board's procedural rules should be resolved in favor of Part 741. *Id.*, citing 35 Ill. Adm. Code 741.100 and 741.105. The People argue that thus the procedures establishing pleading requirements for enforcement actions are not applicable to cost recovery proceedings. *Id.*

More specifically, the People note that Section 103.204 is a requirement for an enforcement proceeding and the definition of enforcement proceeding does not specifically include cost recovery complaints. Resp. at 3. The People state that similarly Section 31 of the Act (415 ILCS 5/31 (2008)) applies to complaints in an enforcement action which is triggered by a violation of the Act and the provision do not apply to cost recovery. *Id.* Therefore, the People maintain Section 31 of the Act (415 ILCS 5/31 (2008)) does not apply to cost recovery cases. *Id.*

For these reasons the People ask that the motion to dismiss be denied. Resp. at 4.

Caterpillar's Reply

On October 2, 2009, Caterpillar filed a motion for leave to file a reply which indicates that the reply "concurrently moves" that the prior motion to dismiss be treated as a motion to dismiss the amended complaint. On October 28, 2009, the Board received a response to the motion for leave to file a reply arguing that the reply should be denied "since the reply constitutes a thinly veiled attempt to rewrite the original motion." The Board disagrees and finds that material prejudice may result if the reply is not considered. Therefore, the Board grants the motion for leave to file the reply and will consider the reply.

Caterpillar argues that the People's response fails to address several of Caterpillar's agreements, misinterpreted others, and incorrectly applies certain statutory and regulatory provisions. Reply at 2. For example, Caterpillar argues that the People have alleged a violation of the Act, that Caterpillar did not perform remedial work and is seeking treble damages pursuant to Section 22.2(k) of the Act (415 ILCS 5/22.2(k) (2008)). Reply at 3. Therefore Caterpillar maintains that Section 31 of the Act (415 ILCS 5/31 (2008)) does apply. *Id.*

Caterpillar maintains the People failed to address the argument that Illinois is a fact pleading state and that requires that the People set for the ultimate facts to support the cause of action. Reply at 4. Furthermore Caterpillar contends that the Board procedural rules at Section 103.204 do apply to the proceeding by the express terms of Part 741. Reply at 4-5, citing 35 Ill. Adm. Code 741.105(b). Caterpillar argues that only in the case of conflict between Part 741 and the Board's procedural rules does the Part 741 exclusion apply. Reply at 5. Caterpillar opines that the People have indentified no conflict and furthermore a review of Part 741 indicates that nowhere is fact versus notice pleading discussed in Part 741. *Id.*

Caterpillar argues that this proceeding is an enforcement proceeding which seeks both cost recovery and penalties. Reply at 5. Caterpillar notes that the People are seeking a penalty in addition to cost recovery and the People captioned this case an enforcement matter. *Id.* Furthermore, Caterpillar notes that the Board captions cost recovery cases as enforcement actions and did so in this case. Reply at 5-6. For these reasons, Caterpillar maintains that the requirements of Part 103 are applicable to this case. Reply at 7.

Caterpillar acknowledges that the People need not plead a specific percentage of liability; however the facts must be plead sufficient to state a cause of action. Reply at 7-8. Caterpillar opines that this would include dates, location, events, nature, extent, duration and strength of

discharges or emissions. Reply at 8, citing Hamman Farms, PCB 08-96. Furthermore, Caterpillar asserts that a concise statement of the relief requested is also required. Reply at 8. Caterpillar maintains that because of these pleading deficiencies, Caterpillar cannot adequately prepare a defense. Reply at 8. For these reasons Caterpillar argues that the amended complaint should be dismissed. *Id.*

DISCUSSION

The Board will first set forth the legal standard for considering a motion to dismiss on the sufficiency of the pleadings. The Board will then address the motion to amend and the motion to dismiss.

Standard For Granting Motion to Dismiss

In ruling on a motion to dismiss, the Board looks to Illinois civil practice law for guidance. *See, e.g.,* Yorkville v. Hamman, PCB 08-96, slip. op. at 14-15 (Oct.16, 2008); People v. The Highlands, LLC, PCB 00-104, slip op. at 4 (Oct. 20, 2005); Sierra Club and Jim Bensman v. City of Wood River and Norton Environmental, PCB 98-43, slip op. at 2 (Nov. 6, 1997); Loschen v. Grist Mill Confections, Inc., PCB 97-174, slip op. at 3-4 (June 5, 1997). In ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See e.g.,* Beers v. Calhoun, PCB 04-204, slip op. at 2 (July 22, 2004); *see also* In re Chicago Flood Litigation, 176 Ill. 2d 179, 184, 680 N.E.2d 265, 268 (1997); Board of Education v. A, C & S, Inc., 131 Ill. 2d 428, 438, 546 N.E.2d 580, 584 (1989). “To determine whether a cause of action has been stated, the entire pleading must be considered.” LaSalle National Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297, 1303 (2nd Dist 1993), citing A, C & S, 131 Ill. 2d at 438 (“the whole complaint must be considered, rather than taking a myopic view of a disconnected part[.]” A, C & S quoting People ex rel. William J. Scott v. College Hills Corp., 91 Ill. 2d 138, 145, 435 N.E.2d 463, 466-67 (1982)).

The law is well established that the “trial court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party.” People v. Peabody Coal Co., PCB 99-134, slip. op. at 1-2 (June 20, 2002); People v. Stein Steel Mills Services, Inc., PCB 02-1, slip op. at 1 (Nov. 15, 2001). The appellate court explained in the Village of Mettawa:

It is impossible to formulate a simple methodology to make this determination, and therefore a flexible standard must be applied to the language of the pleadings with the aim of facilitating substantial justice between the parties. Gonzalez v. Thorek Hospital & Medical Center, 143 Ill. 2d 28, 34, 570 N.E.2d 309 (1991). The disposition of a motion to strike and dismiss for insufficiency of the pleadings is largely within the sound discretion of the court. Groenings v. City of St. Charles, 215 Ill. App. 3d 295, 299, 574 N.E.2d 1316 (2nd Dist. 1991). Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303.

Illinois requires fact-pleading, not the mere notice-pleading of federal practice. Adkins v. Sarah Bush Lincoln Health Center, 129 Ill. 2d 497, 518, 544 N.E.2d 733, 743 (1989); College Hills Corp., 91 Ill. 2d at 145, 435 N.E.2d at 466-67. In assessing the adequacy of pleadings in a complaint, the Board has accordingly stated that “Illinois is a fact-pleading state which requires the pleader to set out the ultimate facts which support his cause of action.” Grist Mill Confections, PCB 97-174, slip op. at 4, citing Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303; see also College Hills, 91 Ill. 2d at 145, 435 N.E.2d at 466-67; City of Wood River, PCB 98-43, slip op. at 2 (petitioner is not required “to plead all facts specifically in the petition, but to set out ultimate facts which support his cause of action”). “[L]egal conclusions unsupported by allegations of specific facts are insufficient.” Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303, citing Estate of Johnson v. Condell Memorial Hospital, 119 Ill. 2d 496, 509-10, 520 N.E.2d 37 (1988). A complaint’s failure to allege facts necessary to recover “may not be cured by liberal construction or argument.” Condell Memorial Hospital, 119 Ill. 2d at 510, 520 N.E.2d at 43, quoting People ex rel. Kucharski v. Loop Mortgage Co., 43 Ill. 2d 150, 152 (1969). A complaint’s allegations are “sufficiently specific if they reasonably inform the defendants by factually setting forth the elements necessary to state a cause of action.” College Hills, 91 Ill. 2d at 145, 435 N.E.2d at 467.

“Despite the requirement of fact pleading, courts are to construe pleadings liberally to do substantial justice between the parties.” Grist Mill Confections, PCB 97-174, slip op. at 4, citing Classic Hotels, Ltd. v. Lewis, 259 Ill. App. 3d 55, 60, 630 N.E. 2d 1167 (1st Dist. 1994); see also College Hills, 91 Ill. 2d at 145, 435 N.E.2d at 466 (“In determining whether the complaint is adequate, pleadings are liberally construed. The aim is to see substantial justice done between the parties.”). Fact-pleading does not require a complainant to set out evidence: “To the contrary, only the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts.” People ex rel. Fahner v. Carriage Way West, Inc., 88 Ill. 2d 300, 308, 430 N.E.2d 1005, 1008-09 (1981), quoting Board of Education v. Kankakee Federation of Teachers Local No. 886, 46 Ill. 2d 439, 446-47 (1970); City of Wood River, PCB 98-43, slip op. at 2. Moreover, “pleadings are not intended to create technical obstacles to reaching the merits of a case at trial; rather, their purpose is to facilitate the resolution of real and substantial controversies.” Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303, citing College Hills, 91 Ill 2d at 145.

People’s Motion to Amend

The People seek to amend the complaint by correcting a typographical error and add the reference to Section 22.2(f)(3) of the Act (415 ILCS 5/22.2(f)(3) (2008)). Caterpillar responds to the motion to amend in the reply by noting the failure of the People to respond to several arguments of Caterpillar and the insufficiency of the amended complaint. Caterpillar renews the motion to dismiss the amended complaint. The Board grants the motion to amend the complaint. Below in addressing the motion to dismiss the Board will consider the motion to dismiss as to the amended complaint.

Caterpillar’s Motion to Dismiss

As summarized above Caterpillar argues that the complaint and amended complaint should be dismissed on several grounds. Specifically, Caterpillar claims that the complain fails to state a valid claim against Caterpillar under Sections 22(f)(1-2) of the Act (415 ILCS 5/22(f)(1-2) (2008)) and that the IEPA failed to follow the notification requirements and procedures found in Section 31 of the Act (415 ILCS 5/31 (2008)). Mot. at 1. Caterpillar also argues that the People have failed to plead the allegations with the specificity required by the Board's rules and Illinois' fact-pleading requirements. Mot. at 2. Caterpillar further alleges that the People seek greater recovery against Caterpillar than the Board's rules on proportionate share liability allow and the People have failed to plead sufficient facts to support a valid claim under the proportionate share laws. *Id.* Finally Caterpillar asserts that the People failed to plead sufficient facts to support the prayer for relief. *Id.*

The Board will address the arguments in turn below.

Section 22.2(f)(1) and (2)

As to Caterpillar's first argument regarding the allegations by the People in paragraph 23 and the citation to Section 22.2(f)(1) and (2) of the Act (415 ILCS 5/22.2(f)(1) and (2) (2008)), the amended complaint adds the reference to Section 22.2(f)(3) of the Act (415 ILCS 5/22.2(f)(3) (2008)). Therefore, that argument is moot.

IEPA's Alleged Failure to Follow Section 31 requirements

To rule upon Caterpillar's motion to dismiss, the Board need not decide whether the Section 31 pre-referral provisions apply here. Caterpillar acknowledges that the Board's precedent allows the Attorney General's Office to bring an enforcement action on the Attorney General's own motion, even if the action was also brought at the request of IEPA where IEPA failed to follow the procedures of Sections 31(a) and (b) of the Act (415 ILCS 5/31(a) and (b) (2008)). Regardless of whether these Section 31 procedures apply the Board remains unconvinced that the Board's prior precedent should be changed. As the Board stated in Barger:

The Board has consistently held that the procedures of Section 31(a) and (b), while being a precondition for referral by the Agency to the Attorney General, are not a limitation on the Attorney General. People v. Chiquita Processed Foods L.L.C., PCB 02-56 (Nov. 21, 2002). The Attorney General may bring an enforcement action pursuant to Section 31(d) of the Act (415 ILCS 5/31(d) (2004)) on the Attorney General's own motion regardless of the Agency's actions. People v. Community Landfill Company, Inc., PCB 97-193 slip. op. at 4 (Mar. 16, 2000). Barger PCB 06-82 slip. op. at 3.

Therefore, the Board finds that the Attorney General can properly bring the action on the Attorney General's own motion even if the IEPA failed to follow the pre-referral procedures of Section 31 of the Act (415 ILCS 5/31 (2008)).

Fact Pleading and Proportionate Share Liability

Caterpillar has argued that the complaint is insufficiently pled to support allegations for proportionate share liability and to support the prayer for relief. Memo. at 11, 13. Caterpillar also argues that the complaint does not fulfill the requirements of the Board's procedural rules at Section 103.204 and that the complaint fails to meet the requirements of Illinois law because Illinois is a fact pleading state. Memo. at 11. The People argue that Section 103.204 does not apply because there has been no alleged violation of the Act. Resp. at 3. The People do not assert that proportionate share liability is inapplicable to the People's cost recovery claim against Caterpillar. Rather the People argue that the proportionate share statute and rules establish a burden of proof and the complainant is not obligated to plead a specific percentage of liability to state a claim.

Illinois law is well-settled that complaints must be pled under the requirements of fact pleading and that notice pleading is insufficient. Adkins, 129 Ill. 2d 497, 518. For a complaint to be sufficient in Illinois the complaint must set out the ultimate facts which support the cause of action. Hamman, PCB 08-96, slip. op. at 15, citing, Grist Mill Confections, PCB 97-174, slip. op. at 4 and Village of Mettawa, 249 Ill. App. 3d at 557. In the Board's Part 103 procedural rules which concern enforcement, the Board has adopted provisions that reflect Illinois requirements for fact pleading at Section 103.204.

Title VIII of the Act concerns enforcement. *See* 415 ILCS 5/30-34 (2008). The People's amended complaint states that the complaint is brought "pursuant to the terms and provisions of Title VIII (Sections 30-34)" of the Act 415 ILCS 5/30-34 (2008)." Section 22.2(i) of the Act provides that "[t]he 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." 415 ILCS 5/22.2(i) (2008). The Board's Part 741 proportionate share liability rules specifically contemplate the use of the Board's Part 103 procedural rules. 35 Ill. Adm. Code 35 Ill. Adm. Code 741.105(b). The Board finds that Section 103.204 applies in this instance. . *See* Szewczyk v. Board of Fire and Police Com'rs of Village of Richmond, 381 Ill. App. 3d 159, 885 N.E.2d 1106 (2nd Dist. 2008) (where ever possible the statute and rules should be read and construed to be consistent with one another).

Section 103.204 requires that the complaint include "dates, location, events, nature, extent, duration and strength of discharges . . ." 35 Ill. Adm. Code 103.204(c)(2). Section 103.204 also requires that the complaint advise respondents so as to reasonably allow preparation of a defense. *Id.* The complaint and amended complaint here set forth allegations that Caterpillar is a corporation authorized to do business in Illinois and "sent wastes to the Landfill during its operating life and those wastes contained hazardous substances." Am. Comp at 3. The amended complaint goes on to state that respondents "are each liable for past, present, and future removal costs . . ." Am. Comp. at 5. The amended complaint includes a pleading that under Section 22.2(f) persons who disposed of waste containing hazardous substances are liable for costs of removal and clean-up. Am. Comp. at 5. And in the "Prayer for Relief" the amended complaint seeks a finding that respondents are liable for "damages equal to three times the past, present, and future removal costs . . . because of respondents' refusal to perform the work set forth in the Section 4(q) notice issued by the Illinois EPA." Am. Comp. at 6.

The complaint contains no dates as to the life of the facility, facts as to when Caterpillar allegedly sent waste, or what hazardous substance may have been involved. Although a complaint need not allege the percentage of liability for cleanup cost(35 Ill. Adm. Code 741.205(c)), the complaint must include facts sufficient to advise Caterpillar so as to reasonably allow for the preparation of a defense. Hamman Farms, PCB 08-86, slip. op at 21; Jerry R. West, II v. Nokomis Quarry Company, PCB No. 09-45 (June 4, 2009); 35 Ill. Adm. Code 103.204(c)(2).

In construing the pleadings most favorably for the People, the amended complaint is not sufficiently pled under either Illinois laws governing civil procedure or the Board's procedural rules. The amended complaint fails to allege when Caterpillar may have disposed of hazardous substances at the landfill or even what hazardous substances may have been disposed of at the Landfill. Furthermore in the "Prayer for Relief" the People seek treble damages for failure to perform work under a Section 4(q) letter, but there are no allegations that letters were sent. Given these inadequacies alone, the Board finds that the amended complaint fails to specify the facts necessary to support a cause of action under Section 22.2(f) of the Act (415 ILCS 5/22.2(f) (2008)). Therefore, the Board dismisses Caterpillar from this proceeding, without prejudice. The People may refile a complaint against Caterpillar, which comports with the requirements of Illinois law concerning fact pleading.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on December 3, 2009, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board