

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
vs.)
)
COMMUNITY LANDFILL COMPANY,)
INC., an Illinois corporation,)
)
Respondent.)

PCB No. 97-193
(Enforcement)

RECEIVED
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JAN 30 2004

STATE OF ILLINOIS
Pollution Control Board

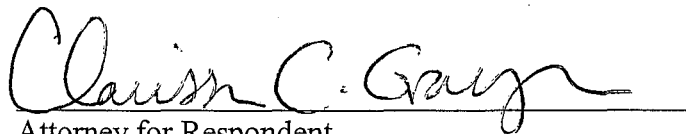
NOTICE OF FILING

TO: Ms. Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph Street, 11-500
Chicago, IL 60601

Mr. Christopher Grant
Assistant Attorney General
Environmental Bureau
188 W. Randolph, 20th Floor
Chicago, IL 60601

Mr. Brad Halloran
Hearing Officer
Illinois Pollution Control Board
100 W. Randolph Street, Suite 11-500
Chicago, IL 60601

PLEASE TAKE NOTICE that on January 30, 2004, we filed with the Clerk of the Illinois Pollution Control Board an original and nine copies of **RESPONDENT COMMUNITY LANDFILL COMPANY'S RESPONSE IN OPPOSITION TO COMPLAINANT'S MOTION TO FILE THIRD AMENDED COMPLAINT**, a copy of which is attached and herewith served upon you.


Attorney for Respondent

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THIS FILING IS SUBMITTED ON RECYCLED PAPER

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**RESPONDENT COMMUNITY LANDFILL COMPANY'S RESPONSE IN OPPOSITION
TO COMPLAINANT'S MOTION TO FILE THIRD AMENDED COMPLAINT**

Respondent, COMMUNITY LANDFILL COMPANY, INC., ("CLC" or "Respondent") by and through its attorneys, LAROSE & BOSCO, Ltd., and in opposition to the People of the State of Illinois' ("People" or "Complainant") Motion to File Third Amended Complaint, responds as follows:

I. Introduction

After nearly seven (7) years of intense litigation including: a complaint filed in 1997, a First Amended Complaint filed in 1998, a Second Amended Complaint filed in 1999, and substantive rulings on liability both for and against CLC in both 2001 and 2002, Complainant only now, in 2004, seeks leave to file a Third Amended Complaint naming Edward Pruum and Robert Pruum, individually, as respondents ("proposed respondents"). Complainant's sole allegations against proposed respondents are based on documents that the Illinois Environmental Protection Agency ("Agency") has had in its possession since 1993, 1995 and 1996, long before the original complaint was filed in 1997.

The Board should deny the Complainant's motion because: 1) it is untimely; 2) allowing the amendment would be prejudicial to Respondent CLC and the proposed respondents; and 3) the Complainant had previous opportunities to amend the complaint but failed to do so.

II. Procedural History

On May 1, 1997, Complainant filed its first complaint in this matter. The original Complaint named CLC as the sole respondent and contained six (6) counts alleging violations relating to managing refuse and litter, leachate flow, landscape waste, financial assurance, failure to file a sig mod and water pollution. Complainant then filed a First Amended Complaint on April 3, 1998; again CLC was the only respondent. The First Amended Complaint included four (4) additional Counts alleging violations relating to overheight of the landfill.

On November 24, 1999, over the Respondent's strenuous objections, Complainant filed a Second Amended Complaint, again only naming CLC as respondent. The Second Amended Complaint included twelve (12) additional Counts alleging violations relating to asbestos, used tires, the gas collection facility, leachate disposal, final cover, financial assurance, and failure to provide revised cost estimates.

This case has been the subject of the exchange of hundreds of documents comprising thousands of pages, numerous depositions, and cross-motions for summary judgment by the parties. On April 5, 2001, the Board ruled against CLC on Counts V and XII of the Second Amended Complaint. CLC filed a motion for reconsideration on May 15, 2001. On July 26, 2001, the Board reversed its decision on Count XII, and found in favor of CLC on liability and dismissed that count. The Board affirmed its ruling against CLC on Count V and ordered a hearing on penalty.

On October 2, 2002, the Board issued an extensive order regarding the parties' cross-motions for summary judgment. The Board found in favor of CLC on Counts XI, XVIII, and XXII of the

Second Amended Complaint and dismissed those counts against CLC. The Board denied the Complainant's motion for Summary Judgment on Counts I, II, VI, XV, XVII, XIX (in part) and XX of the Second Amended Complaint, and ordered a hearing on liability on those Counts. Finally, the Board found in favor of Complainant on Counts III, IV, V, VII, VIII, IX, X, XIII, XIV, XVI, XIX (in part) and XXI and ordered a hearing on penalty on those counts.

On December 5, 2003, Complainant filed the motion presently before the Board wherein it requested leave to file its Third Amended Complaint. Complainant's proposed Third Amended Complaint names Edward Pruum and Robert Pruum, the principals of CLC, as additional defendants. The People's proposed Third Amended Complaint itself was filed on December 30, 2003 and contains nineteen (19) counts.¹ For the Board's convenience, a chart summarizing the current status of the Counts in the Second Amended Complaint is attached as Exhibit A.

Only Count IV (Failure to Provide and Maintain Adequate Financial Assurance Pursuant to the April 20, 1993 Permit) and Count VII (Depositing Waste in Unpermitted Portion of Landfill) of the proposed Third Amended Complaint contain any specific allegations against Edward Pruum or Robert Pruum. Paragraph 22 of Count VII alleges that "[o]n or about January 17, 1995, the Respondents submitted a Solid Waste Capacity Certification to Illinois EPA, signed by Respondent Edward Pruum, reporting that there was no remaining capacity in Parcel B as of January 1, 1995." (Count VII, ¶ 22 of the proposed Third Amended Complaint.) Paragraph 23 of Count VII alleges

¹ Count XIX of the Second Amended Complaint has been effectively bifurcated by the Board and will be heard in part on the issue of liability and in part on the issue of penalty. Complainant's proposed Third Amended Complaint contains nineteen (19) counts, for which hearings have been ordered on liability on seven (7) counts and on penalty on twelve (12) counts. Count XII of the Second Amended Complaint was dismissed by the Board on July 26, 2001 after reconsidering its April 5, 2001 order. Even if the Board grants Complainant leave to file its third amended complaint, Count XII should not be included.

that “[o]n or about January 15, 1996, the Respondents submitted a Solid Waste Landfill Capacity Certification to Illinois EPA, signed by Respondent Robert Pruim, reporting that the Respondents had received over 540,000 cubic yards for deposit in Parcel B between January 1, 1995 and December 31, 1995.” (Count VII, ¶ 23 of the proposed Third Amended Complaint). Paragraph 21 of Count IV alleges that “[r]espondents Edward Pruim and Robert Pruim failed to increase the total amount of financial assurance to \$1,342,500.00 within 90 days after the Agency approved its cost estimate on April 20, 1993.” (Count IV, ¶ 21 of the proposed Third Amended Complaint).

III. Argument

The Board should deny the People’s motion to file its Third Amended Complaint because it is untimely, prejudicial, and the Complainant had several previous opportunities to amend the complaint but did not.

The courts properly recognize that the right to amend pleadings is not absolute. Hall v. Northwestern University Medical Clinics, 152 Ill.App.3d 716, 722, 504 N.E.2d 781, 785 (1st Dist. 1987); Trans World Airlines, Inc. v. Martin Automatic, Inc., 215 Ill.App.3d 622, 575 N.E.2d 592, (2nd Dist. 1991). In determining whether to grant leave to amend a complaint, it is well-settled under Illinois law that courts have four factors available for their consideration: (1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified. Universal Scrap Metal, Inc. v. J. Sandman and Sons, Inc., 337 Ill.App. 3d 501, 508, 786 N.E. 2d 574, 581 (1st District 2003); Loyola Academy v. S&S Roof Maintenance, Inc., 146 Ill.2d 263, 273, 586 N.E. 2d 1211, 1215-16 (1992); Enzenbacher v. Browning-Ferris Industries of Illinois, Inc., 332 Ill.App.3d 1079, 1086, 774 N.E. 2d 858, 863 (2nd Dist. 2002). Only three of the four factors listed above apply to the proposed

Third Amended Complaint. The Complainant does not allege that the proposed Third Amended Complaint is an attempt to cure a defective pleading. The remaining three factors weigh heavily against allowing the amendment: (1) the proposed amendment is untimely; (2) previous opportunities to amend the pleading can be identified; and (3) to allow the Third Amended Complaint to be filed would be extremely prejudicial to Respondent CLC and to the proposed respondents.

A. The Proposed Third Amended Complaint is Untimely

The Board must consider whether the proposed amendment is timely. Universal Scrap Metal, Inc. v. J. Sandman and Sons, Inc., 337 Ill.App.3d 501, 508, 786 N.E. 2d 574, 581 (1st District, 2003). In Tongate v. Wyeth Laboratories, 220 Ill.App.3d 952, 580 N.E. 2d 1220, (1st Dist. 1991), the court held that the trial court had not abused its discretion by denying plaintiff's motion for leave to file their amended complaint where it came five weeks before trial, after discovery had been closed, and the case had been pending for nine years. 220 Ill.App.3d at 970, 580 N.E.2d at 1233. The Illinois Supreme Court has recognized the importance of filing amendments within the pleading stage. Loyola Academy v. S&S Roof Maintenance, Inc., 146 Ill.2d 263, 275, 586 N.E.2d 1211, 1217 (1992). In the present matter, the original complaint was filed on May 1, 1997, almost seven (7) years ago. Two additional amended pleadings were filed in 1998 and 1999. The parties' cross-motions for summary judgment on seventeen (17) counts of the Second Amended Complaint were ruled on by the Board on October 4, 2002, fifteen (15) months ago, and on two (2) counts, thirty (30) months ago. In addition, discovery closed on November 25, 2003. No additional information was gleaned by Complainant in the meantime. This case is clearly beyond the pleading stage. The Board should consider that Complainant's motion is untimely and deny it on that ground alone.

B. Complainant has had Previous Opportunities to Amend the Pleadings

The Board must also consider whether the Complainant had previous opportunities to amend the pleading. Universal Scrap Metal, Inc. v. J. Sandman and Sons, Inc., 337 Ill.App.3d 501, 508, 768 N.E. 2d 574, 581 (1st Dist. 2003). In Universal, the First District Appellate Court recently stated that “a plaintiff generally is not allowed to file an amended complaint if the facts the plaintiff seeks to add were known at the time of the original pleading.” 337 Ill.App. 3d 501, 509, 786 N.E. 2d 574, 581.

In its motion to file its proposed Third Amended Complaint, Complainant states that “[b]ased on the additional information received since the Second Amended Complaint was filed, Complainant now seeks to file its Third Amended Complaint.” (Complainant’s Motion to File Third Amended Complaint, ¶ 4). While Complainant does not elaborate on what “additional information” it received, a review of the proposed Third Amended Complaint reveals that only Count IV (Failure to Provide and Maintain Adequate Financial Assurance Pursuant to the April 20, 1993 Permit) and Count VII (Depositing Waste in Unpermitted Portion of Landfill) contain any allegations directed specifically toward either Edward Pruim or Robert Pruim.

In regard to Count VII, Paragraph 22 in Complainant’s proposed Third Amended Complaint alleges:

“On or about January 17, 1995, the Respondents submitted a Solid Waste Capacity Certification to Illinois EPA, signed by Respondent Edward Pruim, reporting that there was no remaining capacity in Parcel B as of January 1, 1995.”

(Proposed Third Amended Complaint, Count VII, ¶ 22).

Paragraph 23 of Count VII in Complainant’s proposed Third Amended Complaint alleges:

“On or about January 15, 1996, the Respondents submitted a Solid Waste Landfill Capacity Certification to Illinois EPA, signed by Respondent Robert Pruim, reporting that the Respondents had received over 540, 000 cubic yards for deposit in Parcel B between January

1, 1995 and December 31, 1995.”

(Proposed Third Amended Complaint, Count VII, ¶ 23).

The documents referred to in Count VII of the proposed Third Amended Complaint have been in the Agency’s possession since January, 1995 and January, 1996 respectively. They were available to Complainant fully twenty-eight (28) and sixteen (16) months respectively before the original complaint was filed by Complainant. By the time Complainant filed its Second Amended Complaint on November 24, 1999, the records had been in the Agency’s possession for nearly five (5) and four (4) years respectively. Only now, eight (8) and nine (9) years later respectively, does the Complainant seek to amend the complaint based on these documents.

Similarly, in regard to Count IV, Paragraph 21 in Complainant’s proposed Third Amended Complaint alleges:

“Respondents Edward Pruim and Robert Pruim failed to increase the total amount of financial assurance to \$1,342,500.00, within 90 days after the Agency approved its cost estimate on April 20, 1993.”

Obviously, any alleged failure to increase the amount of financial assurance within 90 days after April 20, 1993, was known to Complainant in approximately July, 1993, **more than ten (10) years ago**. This was known to the Complainant for nearly four (4) years before it filed the original complaint in May, 1997, which has already been amended twice.

Count I of the proposed Third Amended Complaint also contains several general allegations against Edward Pruim and Robert Pruim which were known to the Agency at the time the Complaint was filed on May 1, 1997. These allegations include that Edward Pruim and Robert Pruim: served as officers and directors of CLC; signed and submitted permit applications and reports; arranged for surety bonds and letter of credit; and ensured CLC’s compliance with pertinent environmental laws

and regulations (Complainant's proposed Third Amended Complaint, Count I). These general allegations were all known to Complainant at the time the original complaint was filed through documents in the Agency's own files. Any assertion by the Complainant to the contrary, i.e. that this is "additional information", can only be considered disingenuous.

Complainant has offered no good reason for not having pleaded these matters in the original pleading, let alone in the first and second amended pleadings, as is required under Illinois law. First National Bank & Trust Co. of Evanston v. Sousanes, 66 Ill.App.3d 394, 396, 384 N.E.2d 30,31 (1st Dist. 1978). It has offered no good reason simply because it cannot. Complainant's only excuse must be that it simply did not bother to go through its own files until nearly seven years after it had filed the original pleading, which has already been amended twice. Not only did Complainant have ample opportunity to amend the pleading, the documents supporting the allegations contained in the proposed Third Amended Complaint were **in the Complainant's own files at the time that all the pleadings were filed**. Based on consideration of this factor alone, the Board should consider that Complainant has had ample opportunity to amend its own complaint based on records in its possession, and therefore deny Complainant's present motion to file a Third Amended Complaint solely on that ground.

C. Prejudice and Surprise to CLC and the Proposed Individual Respondents

Complainant's motion contains the bold and inaccurate assertions that its proposed Third Amended Complaint will not delay resolution of this matter and that it does not believe that additional discovery would be required. (Complainant's Motion to File Third Amended Complaint, ¶ 7). On the contrary, if this court allows Complainant's proposed Third Amended Complaint to be filed, proposed respondents Edward Pruim and Robert Pruim would have every right to protect their

interests, and would do everything possible to do so. Proposed respondents would seek to conduct full written and oral discovery in order to ascertain what information Complainant possesses and exactly how Complainant intends to prove its allegations against the **individual** proposed respondents. Complainant's assumption that no additional discovery would be needed is simply untrue.

Moreover, if the Board allows Complainant's Third Amended Complaint to be filed, the parties will be forced into participating again in continued and protracted motion practice. Initially, the proposed respondents and CLC would file motions to dismiss on the ground that the Third Amended Complaint does not properly state a claim against the individual proposed respondents. Simply alleging that Edward Pruim and Robert Pruim were corporate officers with supervisory capacity is insufficient for a finding of liability. Deby, Inc. v. Cooper Indus., 2000 WL 263985 (N.D. Ill. Feb. 29, 2000). In the event that this matter were to proceed under the proposed Third Amended Complaint after motions to dismiss, motions for summary judgment would then be filed by both Edward Pruim and Robert Pruim, as well as by Complainant. In other words, if the Board grants Complainant's motion, this case will start all over again.

The surprise and prejudice to CLC and the proposed respondents stems from the same facts as were presented in the two previous arguments concerning untimeliness and information relied on having been available to Complainant for between eight (8) and eleven (11) years. The facts behind the allegations concerning Edward Pruim and Robert Pruim were known to Complainant when the original complaint was filed on May 1, 1997, almost seven (7) years ago.

On October 2, 2002, the Board made substantial rulings both for and against CLC as sole respondent on the parties' cross-motions for summary judgment based on the Second Amended

Complaint. These substantive rulings include: rulings on Counts XI, XVIII, and XXII in favor of CLC thereby dismissing those counts; rulings on Counts I, II, VI, XV, XVII, XIX (in part) and XX in favor of CLC, finding that genuine issues of material fact precluded summary judgment and ordering a hearing on liability; and rulings in favor of Complainant on Counts III, IV, VII, VIII, IX, X, XIII, XVI, XIX (in part) and XXI, and ordering a hearing on penalty. In addition, on July 26, 2001, the Board, after CLC filed a motion for reconsideration, ultimately ruled in favor of CLC on Count XII of the Second Amended Complaint, thereby dismissing that count, and in favor of Complainant on Count V of the Second Amended Complaint and ordering a hearing on that count. In summary, at this point, the Board has ordered a hearing on liability for seven (7) counts, and a hearing on penalty for twelve (12) counts, all against CLC alone.²

If the Complainant is permitted to file its Third Amended Complaint naming Edward Pruim and Robert Pruim as additional respondents, those counts that have already been the subject of summary judgment on liability in favor of Complainant would need to be re-litigated by the parties. This would add a completely new layer to the litigation. With the exception of Counts IV and VII of the proposed Third Amended Complaint, Complainant has made no differentiation between CLC and the proposed respondents as far as which respondent each count is directed to.

The Board should deny Complainant's motion to file its Third Amended Complaint based on a finding that it would cause surprise to and would prejudice CLC and the proposed respondents.

IV. Conclusion

This matter has been pending for nearly seven (7) years, and has been the subject of intense litigation and the exchange of thousands of pages of documents. Most incredibly, Complainant seeks

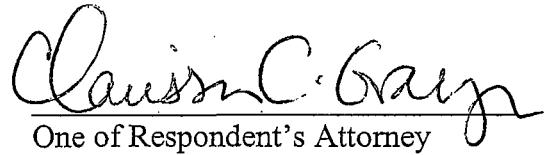
²See footnote No. 1 and Exhibit A.

to file a Third Amended Complaint based on documents that have been available to Complainant since 1993, 1995 and 1996, prior to the Complainant filing its original complaint in 1997. The Board should not allow Complainant to do so.

WHEREFORE, based on the foregoing, Respondent Community Landfill Company respectfully requests that the Board deny Complainant's Motion to File Third Amended Complaint, and find that:

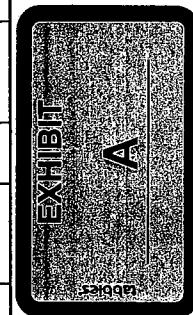
- (1) Complainant has had previous opportunities to amend the pleadings, and has failed to do so, even though the documents in support of its proposed Third Amended Complaint were in the Agency's possession prior to its filing its original complaint;
- (2) the proposed Third Amended Complaint is untimely; and
- (3) the proposed Third Amended Complaint is prejudicial to sole Respondent Community Landfill Company.

Respectfully Submitted,


One of Respondent's Attorney

Mark A. LaRose
Clarissa C. Grayson
LaRose & Bosco, Ltd.
734 North Wells Street
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(313) 642-4414
Atty No. 37346

2 nd amended complaint count no.	Allegation	Disposition on Summary Judgment	Proposed 3 rd amended complaint count no.
I	Failure to adequately manage refuse and litter	Ordered hearing on CLC liability	I
II	Failure to prevent or control leachate flow	Ordered hearing on CLC liability	II
III	Failure to properly dispose of landscape waste	CLC liable - ordered hearing on penalty only	III
IV	Failure to provide and maintain adequate financial assurance	CLC liable - ordered hearing on penalty only	IV
V	Failure to file required sig mod	CLC liable - ordered hearing on penalty only	V
VI	Water pollution	Ordered hearing on CLC liability	VI
VII	Depositing waste in an unpermitted portion of a landfill	CLC liable - ordered hearing on penalty only	VII
VIII	Conducting waste disposal operation without a permit	CLC liable - ordered hearing on penalty only	VIII
IX	Open dumping	CLC liable - ordered hearing on penalty only	IX
X	Violation of SC-3 - overheight	CLC liable - ordered hearing on penalty only	X
XI	Improper handling of asbestos	In favor of CLC; Dismissed	
XII	Conducting waste disposal operation without a permit	Dismissed against CLC in Board's order on reconsideration 7/26/01	XI (should not be in)
XIII	Improper disposal of used tires	CLC liable - ordered hearing on penalty only	XII



XIV	Violation of permit condition - movable fencing	CLC liable - ordered hearing on penalty only	XIII
XV	Violation of permit condition - operation of gas facility	Ordered hearing on CLC liability	XIV
XVI	Violation of permit condition - gas system - erosion, ponding, one inch cracks, etc.	CLC liable - ordered hearing on penalty only	XV
XVII	Violation of permit condition - leachate disposal	Ordered hearing on CLC liability	XVI
XVIII	Violation of permit condition - final cover	In favor of CLC; Dismissed	
XIX	Failure to provide and maintain adequate financial assurance - 10/24/96 permit	a) CLC liable in part for financial assurance from \$1,342,500 to \$1,431,360 - hearing on penalty b) Hearing on liability as to when gas management system began operating	XVII
XX	Violation of permit condition - operating permit and IEPA approval	Ordered hearing on liability	XVIII
XXI	Failure to provide revised cost estimate by 12/26/94	CLC liable - ordered hearing on penalty only	XIX
XXII	Failure to provide revised cost estimate by 7/26/98	In favor of CLC; Dismissed	

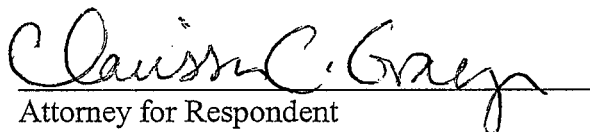
CERTIFICATE OF SERVICE

The undersigned, an attorney, on oath states that she caused to be served a copy of the foregoing **RESPONDENT COMMUNITY LANDFILL COMPANY'S RESPONSE IN OPPOSITION TO COMPLAINANT'S MOTION TO FILE THIRD AMENDED COMPLAINT** to the following parties of record, by placing same in U.S. Mail, postage prepaid, this 30th day of January, 2004:

Ms. Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
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Chicago, IL 60601

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