OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

January 3, 2005

The Honorable Dorothy Gunn
Illinois Pollution Control Board
James R. Thompson Center, Ste. 11-500
100 West Randolph
Chicago, Illinois 60601

Re: ***People v. Petco Petroleum Corporation***
PCB No. 05-66

Dear Clerk Gunn:

Enclosed for filing please find the original and ten copies of a NOTICE OF FILING and COMPLAINANT'S RESPONSE TO MOTION TO DISMISS in regard to the above-captioned matter. Please file the originals and return file-stamped copies of the documents to our office in the enclosed self-addressed, stamped envelope.

Thank you for your cooperation and consideration.

Very truly yours,

Thomas Davis, Chief
Environmental Bureau
500 South Second Street
Springfield, Illinois 62706
(217) 782-9031

TD/pp
Enclosures

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
vs.	)	**PCB No. 05-66**
	)	
PETCO PETROLEUM CORPORATION, an Indiana corporation,	)	
	)	
Respondent.	)	

NOTICE OF FILING

To: Charles J. Northrup, Jr.
Sorling, Northrup, Hanna, Cullen & Cochran, Ltd.
Suite 800, Illinois Building
607 East Adams
P.O. Box 5131
Springfield, IL 62705

PLEASE TAKE NOTICE that on this date I mailed for filing with the Clerk of the Pollution Control Board of the State of Illinois, COMPLAINANT'S RESPONSE TO MOTION TO DISMISS, 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: _____
THOMAS DAVIS, Chief
Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: January 3, 2005

CERTIFICATE OF SERVICE

I hereby certify that I did on January 3, 2005, send by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box a true and correct copy of the following instruments entitled NOTICE OF FILING and COMPLAINANT'S RESPONSE TO MOTION TO DISMISS:

To: Charles J. Northrup, Jr.
Sorling, Northrup, Hanna, Cullen & Cochran, Ltd.
Suite 800, Illinois Building
607 East Adams
P.O. Box 5131
Springfield, IL 62705

and the original and ten copies by First Class Mail with postage thereon fully prepaid of the same foregoing instrument(s):

To: Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

A copy was also sent by First Class Mail with postage thereon fully prepaid to:

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
Springfield, IL 62794

Thomas Davis, Chief
Assistant Attorney General

This filing is submitted on recycled paper.

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB No. 05-66
	)	(Water-Enforcement)
PETCO PETROLEUM CORPORATION, an Indiana corporation,	)	
	)	
	)	
Respondent.	)	

COMPLAINANT'S RESPONSE TO MOTION TO DISMISS

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, responds to the Motion to Dismiss filed by the Respondent, PETCO PETROLEUM CORPORATION, as follows:

1. Dismissal is sought by the Respondent on the grounds of defective pleading. Section 101.506 of the Board's Procedural Rules provides for such challenges of the sufficiency of the complaint but does not provide a standard of review.

2. Section 2-615 of the Code of Civil Procedure provides for motions for dismissal based upon defects in the pleadings. The standard is whether the pleading or portion thereof is "substantially insufficient in law." The Respondent's challenges are to both the form and substance of the Complaint. Section 2-615(b) requires that "the motion must specify wherein the pleading or division thereof is insufficient." First, the Respondent contends that Counts I, III, and V improperly combine separate causes of action by alleging violations of Section 12(a) of the Act for causing water pollution and violations of Section 12(d) of the Act for creating water pollution hazards. Secondly, the Respondent also suggests that the Section 12(d) is essentially a "lesser included offense" to the Section 12(a) violation. Thirdly, and with a similar

lack of logic, the Respondent contends that Counts II, IV, and VI are "duplicative of Counts I, III, and V to the extent that they all allege violations of Section 12(a) of the Act." Motion at ¶ 10. Lastly, the Respondent contends that allegations pleaded in the six counts do not satisfy the factual specificity requirements of Section 103.204 of the Board's Procedural Rules.

3. Neither Section 2-603 nor Section 2-613 of the Code of Civil Procedure provides that a pleading which improperly combines separate causes of action may, ought or must be dismissed. The Code of Civil Procedure does, in Section 1-106, explicitly mandate liberal construction: "This Act shall be liberally construed, to the end that controversies may be speedily and finally determined according to the substantive rights of the parties." Liberal construction of the Environmental Protection Act is mandated by similar language in Section 2(c). The Respondent has cited no precedential court or Board decision requiring the dismissal of a pleading which improperly combines separate causes of action within a count. The Respondent has not even argued that such a count may be considered "substantially insufficient in law." Moreover, there is no discussion as to what are "separate causes of action." Depending upon legal theories or claims for relief, a single set of facts may give rise to multiple causes of action. *See, e.g.,* Supreme Court Rule 135. However, the Complaint is an environmental enforcement action against a single person alleging violations and seeking penalties for spills from oil production facilities in May, August, and October 2004. From a factual standpoint, it is reasonable to consider that multiple sets of facts could support multiple causes of action, especially if more than one person were alleged to be liable. This is not the situation here. The six counts clearly and concisely set out claims for relief which could have reasonably been combined rather than further separated. In other words, might there be only three separate causes of action for the three incidents at issue? The Respondent's complaints about the Complaint must be considered in the context of the facts set forth in the pleading.

4. The primary question presented by a motion to dismiss under Section 2-615 is whether sufficient facts are contained in the pleadings which, if proved, would entitle the Plaintiff to relief. *See, e.g., Urbaitis v. Commonwealth Edison*, 143 Ill.2d 458, 475 (1991). To survive a motion to dismiss, a complaint must present a legally recognizable claim as its basis for recovery, and it must plead sufficient facts which, if proved, would demonstrate a right to relief. *See, e.g., People ex rel. Fahner v. Carriage Way West, Inc.,* 88 Ill.2d 300, 308 (1981). It is well settled that, in ruling on a motion to dismiss, a court must accept as true all well pleaded facts alleged in the complaint, as well as all reasonable inferences which can be drawn from those facts. A cause of action should not be dismissed unless it clearly appears that no set of facts can be alleged and proven which would entitle the plaintiff to relief. *See, e.g., Northrup Corp. v. Crouch-Walker, Inc.*, 175 Ill. App.3d 203, 212 (1st Dist. 1988).

5. The provisions of the Code of Civil Procedure cited by the Respondent reiterate the mandatory requirement of liberal construction (Section 2-603(c): "Pleadings shall be liberally construed with a view to doing substantial justice between the parties") and even allow that alternative and inconsistent statements of fact may be pleaded in the same count (Section 2-613(b)). The Respondent's argument is simply that the inclusion of more than one statutory violation within a single count is improper. This simplistic challenge by the Respondent is itself "substantially insufficient in law."

6. The facts that the Board must, in ruling on this motion to dismiss, accept as true are well pleaded in the complaint. These factual allegations are "plain and concise" as required by Section 2-603(a) of the Code of Civil Procedure and satisfy the substantive requirements of Section 103.204(c) of the Board's Procedural Rules; the Code of Civil Procedure at Section 2-612(b) also provides: "No pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he or she is

called upon to meet." Three separate events occurred and three separate sets of facts are alleged: "On May 24, 2004, Petco reported the release of approximately 50 barrels of salt water from a corrosion hole in a four-inch steel disposal pipeline at the R.T. Hopper lease near St. Elmo in Fayette County, Illinois." Count I at ¶ 14. "On August 21, 2004, Petco reported the release of approximately 200 barrels of salt water from a large corrosion hole in a steel pipeline at the Hopper Cummins #3 production well near St. Elmo in Fayette County, Illinois." Count III at ¶ 14. "On October 4, 2004, Petco reported the release of approximately 300 barrels of salt water from a pipeline from the Edith Durbin Sump to the Benny Shaw Water Flood Plant near St. Elmo in Fayette County, Illinois." Count V at ¶ 14. To the extent the facts are known to the Complainant, these allegations apprise the Respondent of the dates, locations, events, and nature of the three releases of salt water which is "a produced fluid generated by Petco's oil production activities and contains a large concentration of chlorides and varying amounts of petroleum constituents, which are 'contaminants' as that term is defined in the Act. . . ." Counts I, III, and V at ¶ 15. The extent and strength of the discharges, and their consequences, are set forth in adequate detail. Count I at ¶s 16 and 18, Count III at ¶s 16, 18, and 19, and Count V at ¶s 16, 18, and 19. The Complaint also describes the proximity of the land upon which contaminants were deposited in relation to the identified receiving streams. The only facts not specified in the pleadings relate to duration. On each of the three dates referenced above, Petco "reported" the particular release, but it is unknown (at least to the Complainant) when the spillages of salt water actually commenced. However, these matters are hardly "defects" in the pleadings much less rendering the allegations "substantially insufficient in law." In considering this motion to dismiss, the Board shall also construe all reasonable inferences in favor of the Complainant. For instance, the first two incidents were caused by corrosion holes in the pipelines; the source of the third release was also a pipeline. In the context of the distances

and quantities at issue, the Board may infer that the duration of the releases was significant; in other words, that the leaks persisted for some time before discovery. Evidentiary facts supporting the allegations will be adduced at trial to address relevant issues such as who discovered the releases, the lack of preventative maintenance practices in effect, the lack of diligence in replacing steel lines with fiberglass, and the infrequency of routine inspections.

7. The Respondent's objections as to factual specificity are simply unreasonable. Petco contends that it is "entitled, by the express language of Rule 103.204, to know at this early stage the full allegations against it, including the extent, duration and strength of the alleged releases, which Petco asserts would have been minor." Motion at ¶ 11. However, there is a reasonable distinction between pleading and proof. As to the issue of "strength," Complainant has alleged that the salt water produced by Petco's operations "contains a large concentration of chlorides and varying amounts of petroleum constituents." This is sufficient to inform a violator in the context of an enforcement allegation. More information may be expected at trial regarding the nature of salt water from oil production activities and its pollutional impacts upon the already impaired streams in the vicinity of St. Elmo in Fayette County. For instance, Petco is well aware that, in the previous circuit court cases against the company for approximately 200 previous spills, testimony was provided that a sample of the salt water contained 80,000 mg/L chlorides.

8. The Respondent also argues that the Complaint contains no facts as to the "consequences" of the spills. In response, the Complainant suggests that the consequences of each of the three incidents are more than adequately pleaded. Each resulted in a water pollution hazard, a subsequent pollutional discharge into waters, and violations of the water quality standards. For instance, the estimated 50 barrels of salt water in May 2004 were deposited in such a place and manner that the salt water flowed across the land for

approximately 50 yards before entering the creek, which was impacted for a distance of a quarter-mile. These impacts included the discoloration of the surface water, unnatural bottom deposits, and documented chloride levels within the stream of 10,300 and 13,900 mg/L. As alleged in the Complaint, "Petco's discharge of salt water to the small stream altered its physical and chemical properties so as to likely create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life." Count I at ¶ 19. This pleading is sufficient to inform a violator of the specific allegations against which it may defend. Contrary to Petco's assertions, it is not necessary at this stage to provide "the Board and the public" with anything further; that will occur at a hearing on the Complaint.

9. The Respondent's objection that Counts II, IV, and VI are "duplicative" of Counts I, III, and V, fails to abide with the liberal construction of the Act as mandated by Section 2(c). Section 12(a) may be violated by a discharge of contaminants that 1) causes water pollution or 2) violates a Board regulation or standard. In other words, the State has pleaded two separate and distinct violations, to wit: 1) water pollution that 2) also resulted in offensive conditions and/or chloride levels in excess of the 500 mg/L water quality standard.

10. The Respondent's objection that the Section 12(d) is essentially a "lesser included offense" to the Section 12(a) violation also does not warrant extensive discussion even though, in contrast to the other challenges discussed above, the Respondent actually cites case law. *Tri-County Landfill Co. v. Illinois Pollution Control Board*, 41 Ill.App.3d 249 (2nd Dist. 1976), however, does not support the argument that proof of a water pollution violation essentially supercedes or precludes the finding of a water pollution hazard violation. The appellate court upheld the Board's findings of violation of both Sections 12(a) and 12(d) of the Act: "The Board

found a hazard to exist because there was no assurance that [groundwater] pollution would not occur. . . ." 41 Ill.App.3d at 257. The appellate court also upheld findings that the surface waters had been polluted. There was simply no discussion in that appellate decision to suggest that a Section 12(a) violation precludes a Section 12(d) violation.

11. As to the argument that a Section 12(d) violation is a "lesser included offense" to a Section 12(a) violation, the Respondent has cited *People v. King*, 66 Ill.2d 551 (1977), and another criminal case applying the "King Doctrine" regarding verdicts and sentencing on lesser included offenses. There is, of course, no legal problem with charging or pleading such offenses. Petco cites a third case, *Kintner v. Board of Fire and Police Commissioners*, 194 Ill.App.3d 126 (1st Dist. 1990), as authority for the applicability of the "King Doctrine" to civil administrative proceedings. However, *People v. King* is not the case mentioned in the *Kintner* decision. *Kintner* does cite a totally different case, *King v. City of Chicago*, 60 Ill.App.3d 504 (1st Dist. 1978). Jerry King was convicted of rape and other criminal offenses in *People v. King*; Romeo King was a police officer subject to a disciplinary proceeding in the *Kintner* case. Therefore, once again,[1] the Respondent's "lesser included offense" argument may be rejected.

12. In summary, there are no legitimate grounds for dismissal and no compelling reason to revise the Complaint. The Respondent must answer the allegations of the Complaint by admissions and denials as appropriate but without equivocation and evasion. In other words, as mandated by Section 2-610 of the Code of Civil Procedure, Petco's responsive pleadings must be specific in order to provide "an explicit admission or denial of each allegation."

---

[1]Petco had made this identical argument in the circuit court, citing *Kintner v. Board of Fire and Police Commissioners* as authority for the applicability of the "King Doctrine" to civil administrative proceedings. The State responded as it has here, but it appears that Petco's legal research is still deficient.

WHEREFORE, the People of the State of Illinois respectfully request that the Board deny the Motion to Dismiss.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,

LISA MADIGAN
Attorney General
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement Division

BY: _____
THOMAS DAVIS, Chief
Environmental Bureau
Assistant Attorney General

Assistant Attorneys General
500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: January 3, 2005