

ILLINOIS POLLUTION CONTROL BOARD
February 3, 2005

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB 05-66
)	(Enforcement – Water)
PETCO PETROLEUM CORPORATION, an)	
Indiana corporation,)	
)	
Respondent.)	

ORDER OF THE BOARD (by N.J. Melas):

On October 13, 2004, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a complaint against Petco Petroleum Corporation (Petco). *See* 415 ILCS 5/31(c)(1) (2002); 35 Ill. Adm. Code 103.204. The complaint concerns Petco’s oil production and Class II injection wells facilities near St. Elmo, Fayette County. For the reasons below, the Board denies Petco’s motion to dismiss.

In this case, the People allege that Petco Petroleum violated Section 12(a) and (d) of the Environmental Protection Act (Act) (415 ILCS 5/12(a) and (d) (2002)) and Sections 302.203, 304.105, and 304.106 of the Board’s effluent and water quality standards (35 Ill. Adm. Code 302.203, 304.105, and 304.106) by causing or allowing water pollution and violating the chloride water quality standard. The complaint further states that Petco caused these violations by three different releases of salt water from the facility that entered waters of the State. The People ask the Board to order Petco Petroleum to cease and desist from further violation and pay a civil penalty of \$50,000 per violation and \$10,000 for each day the violations continued.

On December 28, 2004, Petco filed a motion to dismiss based on several defects in the pleadings. Petco argued the Board should dismiss the People’s complaint for the following reasons: (1) counts I, III, and V improperly combine separate causes of action by alleging violations of Sections 12(a) and (d) in the same count; (2) a violation of Section 12(d) is a lesser included offense of Section 12(a); and (3) counts II, IV, and VI are duplicative of counts I, III, and V because they all allege violations of Section 12(a) of the Act. The People responded on January 6, 2005.

For the reasons set forth below, the Board denies Petco’s motion to dismiss.

MOTION TO DISMISS

For purposes of ruling on a motion to dismiss, all well plead facts contained in the pleading must be taken as true and all inferences from them must be drawn in favor of the non-movant. People v. Stein Steel Mills Services, Inc., PCB 02-1 (Nov. 15, 2001). A complaint

should not be dismissed for failure to state a claim unless it clearly appears that no set of facts could be proven under the pleadings that would entitle complainant to relief. Shelton v. Crown, PCB 96-53 (May 2, 1996).

Petco's Arguments

Petco argues that by alleging violations of more than one causes of action within a single count is improper and, therefore, the complaint must be dismissed. For example, Petco states that counts I, III, and V all allege violations of both Sections 12(a) (prohibition of water pollution) and 12(d) (prohibition of causing a water pollution hazard) of the Act. 415 ILCS 5/12(a), (d) (2002). Petco states that allegations of a water pollution hazard and water pollution are separate and distinct violations under the act and must be plead in separate counts. Mot at 3; citing 735 ILCS 5/2-603(b), 613(a). Because the Agency failed to do so, the complaint must be dismissed. Petco argues it suffered prejudice because the complaint lacked clarity and because Petco could not decipher which facts were applicable to the alleged violations. Further, Petco states it could not prepare an adequate defense, and such a lacking complaint is prohibited by Board rules. Mot. at 3; citing 35 Ill. Adm. Code 103.204(c)(2). Petco cites the Board procedural rule regarding specificity of the complaint:

Section 103.204(c)(2) requires:

The dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations. Mot. at 6; citing 35 Ill. Adm. Code 103.204(c).

Petco argues that a water pollution hazard is a lesser included offense of water pollution and the two cannot co-exist in a single complaint. Mot. at 3-4. Petco cites Tri-County Landfill Co. v. PCB, 41 Ill. App. 3d 249, 353 N.E.2d 316, 324 (2nd Dist. 1976), for the principle that a water pollution hazard means that the activity has not yet ripened into a violation of water pollution. Petco also cites several instances of Illinois caselaw where courts have held that it is improper to carve more than one offense from the same act and that it is improper to convict a defendant of both an offense and a lesser included offense. Mot. at 4; citing People v. Priest, 297 Ill. App. 3d 797, 232 Ill. Dec. 385, 388, 698 N.E.2d 223, 225 (4th dist. 1998); citing People v. King, 66 Ill. 2d 551, 566, 6 Ill. Dec. 891 (1977). Accordingly, Petco maintains the allegations of water pollution hazard must be dismissed.

According to Petco, counts II, IV, and VI are duplicative of counts I, III, and V because they all allege violations of Section 12(a) of the Act. Mot. at 6; citing 415 ILCS 5/12(a) (2002). Further, Petco again claims these allegations are so vague, they do not provide Petco with reasonable opportunity to defend itself. Mot. at 6; citing 35 Ill. Adm. Code 103.204(c)(2). Specifically, Petco argues the complaint lacks facts and the “consequences” of the alleged violations.

People's Response

In response the People first argue that there were three distinct events, out of which arose multiple causes of action. The People further contend there is no precedent for the principle that a pleading that improperly combines separate causes of action must be dismissed. Rather, the People contend that the standard of review for a motion to dismiss is whether the complainant has stated a claim on which the Board can grant relief. AG Resp. at 3; citing Urbaitis v. Commonwealth Edison, 143 Ill. 2d 458, 475 (1991); People ex rel. Fahner v. Carriage Way West, Inc., 88 Ill. 2d 300, 308 (1981); Northrup Corp. v. Crouch-Walker, Inc., 175 Ill. App. 3d 203, 212 (1st Dist. 1988).

According to the People, the complaint is “plain and concise” and sets forth the “consequences” as required by the Board’s procedural rules and Code of Civil Procedure. See 35 Ill. Adm. Code 103.204(c). The People state that in accordance with Section 103.204(c), the People alleged the dates of discharges, extent and strength of the discharges, their consequences, and identified the receiving streams. The People admit the complaint did not define the duration of the violations. The People contend that an indefinite duration of the violations does not make the allegations insufficient in law requiring dismissal of the complaint. AG Resp. at 4.

The People also maintain that they adequately described the consequences of the alleged violations. Illustrating this point, the People state that in May 2004, salt water flowed across the land for approximately 50 yards before entering the creek, which was impaired for a distance of a quarter-mile. AG Resp. at 5-6. The People described the water as discolored with unnatural bottom deposits and documented high chloride levels.

The People disagree that a violation of Section 12(d) of the Act constitutes a lesser included offense of Section 12(a). The People contend that Petco misapplied Tri-County Landfill Co. v. IPCB, 41 Ill. App. 3d 249 (2nd Dist. 1976). According to the People, Tri-County does not hold that a Section 12(a) violation precludes a Section 12(d) violation. The People assert that the appellate court in Tri-County found violations of both Section 12(a) and (d), stating that the Board found a water pollution hazard existed because there was no proof that groundwater pollution would not occur. AG Resp. at 6-7; citing Tri-County, 41 Ill. App. 3d at 257.

For these reasons, the People claim that grounds do not exist for dismissal of this action and there is no reason to revise the complaint. The People urge the Board to deny Petco’s motion.

Board Analysis

The Board is not persuaded by Petco’s arguments and denies Petco’s motion to dismiss. First, a water pollution hazard does not constitute a lesser-included offense of water pollution. Petco appropriately cited Tri-County Landfill for the proposition that “section 12(d) . . . must be construed to refer to conduct not yet amounting to a violation of section 12(a).” Tri-County Landfill, 353 N.E.2d at 324. However, the two violations are not mutually exclusive. The violations are statutory: a respondent may have acted to endanger the citizens of the state of Illinois, to actually cause water pollution, or both.

Second, the People have adequately plead the counts of the complaint pursuant to Section 103.204(c)(2) of the Board's procedural rules. For example, counts I and II allege that on May 24, 2004, Petco caused a release of approximately 50 barrels of salt water from a disposal pipeline at the R.T. Hopper lease. Comp. at 3-4. The People allege the release contained chlorides and petroleum constituents. According to the People, the release flowed about 150 feet above ground before entering a tributary to Big Creek, and the release caused discoloration, bottom deposits, and exceedences of the Board's general use water quality standards for up to one-quarter mile of the stream. Comp. at 3-6.

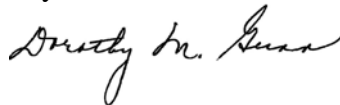
Counts III and IV describe a release of approximately 200 barrels of salt water on August 21, 2004 from a steel pipeline at the Hopper Cummins #3 production well. The People stated the release flowed about 50 feet above ground before entering Little Moccasin Creek, a tributary to Big Creek. Upon investigation, the Agency observed discoloration of the surface water, dead and dying fish, and exceedences of the Board's general use water quality standards for up to one-half mile of these streams. Comp. at 6-10.

The People allege in counts V and VI that on October 4, 2004, Petco released approximately 300 barrels of salt water from a pipeline from the Edith Durbin Sump to the Benny Shaw Water Flood Plant. According to the People, the release flowed above ground through a previously dry creek bed before entering Little Creek. The Agency observed the site on October 4, 2004 finding black precipitate on the bottom of Little Creek and exceedences of the Board's general use water quality standards up to three-quarters of a mile downstream of the discharge. Compl. at 10-11.

For these reasons, the Board finds the People's complaint adequately pled and denies Petco's motion to dismiss. A timely filed motion to dismiss under Section 103.212(b) or 101.506 stays the 60-day period to file an answer. 35 Ill. Adm. Code 103.204(e). Both sections require the respondent to file the motion within 30 days of the date it is served with the complaint. Although the People filed the complaint with the Board on October 13, 2004, and the Board accepted the matter for hearing on October 21, 2004, Petco was not served with the complaint until November 29, 2004. Mot. at 2. Accordingly, Petco's motion, filed December 28, 2004, was timely under Section 101.506 of the Board's procedural rules, and thus, stayed the 60-day period to file an answer. See 35 Ill. Adm. Code 103.204(e). The stay is lifted as of the date of this order and Petco has until March 5, 2005, or 30 days from the date of this order, to answer the complaint.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 3, 2005, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board