

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)

Complainant,)

v.)

PETCO PETROLEUM CORPORATION,)

an Indiana Corporation,)

Respondent.)

PCB 05-66

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STATE OF ILLINOIS
Pollution Control Board

MOTION TO DISMISS COMPLAINT

NOW COMES Respondent, PETCO PETROLEUM CORPORATION, ("Petco"), by and through its attorneys, Sorling, Northrup, Hanna, Cullen and Cochran, Ltd., Charles J. Northrup and James G. Fahey, of counsel, and pursuant to 35 Ill. Adm. Code Sections 101.500 and 101.506, hereby moves to dismiss the Complaint filed in this matter for the reasons set forth below. In support, Petco states:

I. PROCEDURAL BACKGROUND

1. On or about October 13, 2004, the People of the State of Illinois ("Complainant"), filed this six count complaint against Petco. The first two Counts relate to a May 24, 2004, release of approximately 50 barrels of salt water from a pipeline associated with Petco's oil production operation in Fayette County, Illinois (See Compl., Count I, par. 14). Count I alleges "water pollution violations" and Count II alleges "water quality violations." The second two Counts relate to an August 21, 2004, release of approximately 200 barrels of salt water from another Petco pipeline in

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Fayette County. Tracking the form of the first two Counts, Count III alleges “water pollution violations” and Count IV alleges “water quality violations.” The final two counts relate to an October 4, 2004, release of approximately 300 barrels of saltwater from another Fayette County Petco facility. Count V alleges “water pollution violations” and count VI alleges “water quality violations.”

2. Since October 13, 2004, the Complainant was unable to serve Petco with the Complaint. On or about November 29, 2004, counsel for Petco agreed to accept service on behalf of Petco. For purposes of time computations, November 29, 2004, was identified as the date of service of the Complaint.

II. ARGUMENT

A. Section 12(d) of the Act - Water Pollution Hazard

3. Counts I, III and V all contain an allegation that provides: “By depositing contaminants upon the land in such a place and manner as to create a water pollution hazard, Petco has violated Section 12(d) of the Act, 415 ILCS 5/12(d) (2002).” (See Compl., Counts I, III and V, par. 17). Counts I, III and V also all contain an allegation that provides: “By causing or allowing the discharge of salt water into “waters” of the State, the Respondent has caused water pollution in the State of Illinois, and thereby violated Section 12(a) of the Act, 415 ILCS 5/12(a) (2002).” (See Compl., Count I, par. 20, Count III, par. 21 and Count V, par. 21.) The inclusion of more than one cause of action (in this case allegations of statutory violation) within a single count is improper, and as such the Complaint must be dismissed. 735 ILCS 5/2-603(a); 735 ILCS 5/2-613(a).

4. While not expressly applicable to Board proceedings, provisions of the Code of Civil Procedure may be used as guidance by the Board. 35 Ill. Adm. Code 101.100(b). Relevant to this case are Code of Civil Procedure sections 2-603(b) and 2-613(a). Section 2-603 provides that “each separate cause of action upon which a separate recovery might be had shall be stated in a separate count...” 735 ILCS 5/2-603(a). Similarly, Code section 2-613 provides that “Parties may plead as many causes of action...as they may have, and each shall be separately designated and numbered...” 735 ILCS 5/2-613(a).

5. In Complainant’s Complaint, allegations of water pollution hazard and water pollution are separate and distinct violations under the Act. Accordingly, they should, as required by the Code of Civil Procedure, be separately numbered and designated. Such specificity is appropriate for clarity, organization and the marshaling of legal and factual arguments that will be used as a guide throughout the remainder of the trial. Perhaps more importantly, the combination of multiple allegations and facts in a single count requires a respondent to guess what facts might be applicable to the different allegations and may allow a complainant to be intentionally vague. The result is that such “blended” allegations and facts impedes the ability of a respondent to prepare an adequate defense. Such a complaint is specifically prohibited by Board rules. (See 35 Ill. Adm Code 103.204(c)(2)(“The complaint must advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense...”))

6. In addition to this pleading defect, any cause of action alleging violations of a “water pollution hazard” should be dismissed as insufficient in law. (See 735 ILCS 5/2-615(a). According to the Complaint, the three releases at issue all resulted in an impact to waters of the State and “water pollution.” Because an allegation of “water pollution hazard” reflects an activity that has not yet ripened into “water pollution,” when such an activity has allegedly ripened into “water pollution” any “water pollution hazard” allegation becomes moot. Accordingly, dual allegations of “water

pollution” and “water pollution hazard,” as plead in this Complaint, cannot co-exist and the Complaint must be dismissed.

7. As noted, the Complainant has alleged that the three releases at issue have resulted in both “water pollution” and “water pollution hazards.” The prohibition against “water pollution hazards” is:

No person shall deposit any contaminant upon the land in such a place and manner so as to create a water pollution hazard. 415 ILCS 5/12(d) (2002).

While the Act does not define what a “water pollution hazard” is, several courts have addressed the issue. A water pollution hazard must at a minimum satisfy the elements of “water pollution,” but also that it means activity that has *not yet* ripened into such a violation. Tri-County Landfill Co. v. Illinois Pollution Control Board, 41 Ill.App.3d 249, 353 N.E.2d 316, 324 (2nd Dist. 1976)(“If 12(d) referring to water pollution hazard is not to be rendered superfluous, it must be construed to refer to conduct not yet amounting to a violation of 12(a)”). Under this case law, and a plain reading of the Act, a “water pollution hazard” violation is a violation that does not become a “water pollution” violation. In this case, it is alleged that the water pollution hazards did turn into water pollution. Accordingly, and as plead, allegations of a “water pollution hazard” cannot stand.

8. The Complainant is essentially attempting to impose two violations for one act. The one act at issue being the alleged release of salt water into waters of the State. Not only does it defy common sense that a potential violator could be sanctioned for the final act as well as the intermediate steps leading up to it, but such dual violations have been recognized as improper in other areas of law. In People v. King, the Illinois Supreme Court held that it is (1) improper to carve more than one offense from the same act and (2) that when there are multiple acts, it is improper to convict a defendant of both an offense and a lesser included offense. People v. Priest, 297 Ill.App.3d 797, 232 Ill. Dec. 385, 388, 698 N.E.2d 223, 226 (4th Dist. 1998) citing People v. King, 66 Ill.2d

551, 566, 6 Ill.Dec. 891 (1977). The “lesser included offense” aspect of the King case has been applied in civil administrative actions. See Kinter v. Board of Fire and Police Commissioners, 194 Ill.App.3d 126, 141 Ill.Dec. 80, 550 N.E.2d 1126, 1128 (1st Dist. 1990). Under the first prong of what has become known as the “King Doctrine,” there is no dispute that the three alleged acts of “water pollution hazard” are the same specific acts alleged as “water pollution.” They are plead in the same counts with the same facts. With respect to the second prong of the “King Doctrine,” even if there were multiple acts, those acts constitute a “lesser included offense.” A lesser offense is defined as an “offense that does not have any element not included in the greater offense.” Priest, 297 Ill.App.3d at 804, 232 Ill.Dec. at 389, 698 N.E.2d at 227, citing People v. Jones, 149 Ill.2d 288, 292-93, 172 Ill.Dec. 401 (1992). This definition is clearly satisfied by the allegations in this case, especially in that the two “offenses” are plead in the same counts. Accordingly, the Complaint as currently drafted cannot stand.

B. Section 12(a) of the Act - Water Pollution

9. The Complaint also alleges violations of Section 12(a) of the Act related to “water pollution”. These allegations, as referenced above, are included along with “water pollution hazard” allegations in Counts I, III and V, but are also alleged in Counts II, IV and VI. Counts II, IV and VI are styled as “Water Quality Violations” and relate to the same three incidents referenced in Counts I, III and V. As alleged by the Complainant, these “Water Quality Violations” constitute violations of Section 12(a) of the Act. The basis of these “Water Quality Violations” are two distinct regulatory provisions. The first referenced regulatory provision(s) relates to a prohibition against causing “offensive conditions.” To support these allegations, the Complainant refers to a number of characteristics including bottom deposits, visible oil, discoloration and turbidity. (See Compl., Count II, par. 21, Count IV, par. 20, Count VI, par. 20). The second referenced regulatory provision relates to the exceedances of the general use water quality standard for chlorides. (See Compl.,

Count II, par.22, Count IV, par. 21, Count VI, par. 21). These allegations are poorly plead and fail to meet the Board's complaint requirements as set out in 35 Ill.Adm. Code 101.103(c). For the specific reasons set forth below, the Complaint in this matter must be dismissed.

10. Counts II, IV and VI appear simply to be duplicative of Counts I, III and V to the extent that they all allege violations of Section 12(a) of the Act. The allegations contained in Counts II, IV and VI merely appear to be the same allegations plead with greater regulatory specificity. This blending of allegations with respect to violations, followed by what appears to be nothing more than a recast, albeit more specific, of the same alleged violations fails to provide Petco with a reasonable opportunity to defend itself as required by Board regulations. 35 Ill.Adm. Code 103.204(c)(2).

11. Section 103.204(c) of the Board's procedural rules require a number of specific facts to be alleged in a complaint. In part, Section 103.204(c) 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. 35 Ill.Adm. Code 103.204(c).

The Complaint drafted in this case, however, lacks a number of these facts. Nothing is included with respect to extent, duration or strength of the alleged releases. Petco 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. Without such accurate, specific and required pleading, a respondent may not be fully apprised of a Complainant's allegations or the best manner in which to mount a defense. In addition, such a brief pleading may provide the Board and the public with an improper and inaccurate perception of the alleged violator. Perhaps more fatal to Complainant's Complaint is that it contains no facts related to the "consequences" of the alleged violations. The "consequences" of the alleged violations in this case are important because they frame a portion of the burden that the Complainant must bear

with respect to allegations of water pollution as well as penalty issues under Section 42 of the Act.

The absence of any such factors requires the Board to dismiss this Complaint.

WHEREFORE, Respondent Petco Petroleum Corp., respectfully requests that for the reasons stated above the Board dismiss the Complaint filed in this matter, or for any such other relief the Board deems proper.

Respectfully submitted

PETCO PETROLEUM CORPORATION, Respondent

By: _____


One of Its Attorneys

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PROOF OF SERVICE

The undersigned hereby certifies that an original and ten (10) copies of the foregoing document were served by Federal Express to:

Ms. Dorothy Gunn, Clerk
Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

and one copy to:

Ms. Carol Webb
Hearing Office
Illinois Pollution Control Board
1021 North Grand Ave. East
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Springfield, IL 62794-9274

Mr. Tom Davis
Illinois Attorney General's Office
Environmental Division
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and by depositing same in the United States mail in Springfield, Illinois, on the 27th day of December, 2004, with postage fully prepaid.


