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JUL 12 2005

STATE OF ILLINOIS
Pollution Control Board

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

July 11, 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 MOTION TO STRIKE OBJECTIONS TO REQUEST FOR THE ADMISSION OF FACTS 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,

A handwritten signature in black ink, appearing to read "Thomas Davis", is written over a horizontal line.

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

TD/pp
Enclosures

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE

JUL 12 2005

STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
vs.)
)
PETCO PETROLEUM CORPORATION,)
an Indiana corporation,)
)
Respondent.)

PCB No. 05-66

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

Claire A. Manning
Brown, Hay & Stephens
205 South Fifth, Suite 700
P.O. Box 2459
Springfield, IL 62705-2459

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 MOTION TO STRIKE OBJECTIONS TO REQUEST FOR THE ADMISSION OF FACTS, 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: July 11, 2005

CERTIFICATE OF SERVICE

I hereby certify that I did on July 11, 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 MOTION TO STRIKE OBJECTIONS TO REQUEST FOR THE ADMISSION OF FACTS

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

Claire A. Manning
Brown, Hay & Stephens
205 South Fifth, Suite 700
P.O. Box 2459
Springfield, IL 62705-2459

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

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JUL 12 2005

STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.)
)
PETCO PETROLEUM CORPORATION,)
an Indiana corporation,)
)
Respondent.)

PCB No. 05-66
(Water-Enforcement)

**COMPLAINANT'S MOTION TO STRIKE OBJECTIONS
TO REQUEST FOR THE ADMISSION OF FACTS**

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, hereby respectfully moves the Hearing Officer for the issuance of an Order striking the Respondent's objections and compelling responses to the Complainant's Request for the Admission of Facts, and states as follows:

Issues for Resolution

Section 101.610 of the Board's Procedural Rules provides generally that all discovery disputes will be handled by the assigned hearing officer. In particular, Section 101.610(g) provides that the hearing officer is authorized to issue an order "compelling the answers to interrogatories or responses to other discovery requests." Section 101.618(f) states, in pertinent part: "If written objections to a part of the request are made, the remainder of the request must be answered within the period designated in the request." Section 101.618(h) provides: "Any objection to a request or to any answer must be stated with specificity, and will be heard by the hearing officer upon notice and motion of the party making the request."

The Complainant has served a Request for the Admission of Facts upon the Respondent. In timely responding to the Request, the Respondent admitted some facts and objected to certain others, to wit:

3. On May 25, 2004, the surface of the water in the small tributary to Big Creek downstream of the reported release was discolored. "Respondent objects to Request no. 3 as vague and calling for an opinion and/or conclusion of law with respect to the nature of the downstream release as being 'discolored.'"
4. On May 25, 2004, the small tributary to Big Creek downstream of the reported release contained unnatural bottom deposits. "Respondent objects to Request no. 4 as vague and calling for an opinion and/or conclusion of law with respect to the nature of the small tributary as containing 'unnatural bottom deposits.'"
6. On August 21, 2004, the surface of the water in Little Moccasin Creek downstream of the reported release was discolored. "Respondent objects to Request no. 6 as vague and calling for an opinion and/or conclusion of law with respect to the nature of the downstream release as being 'discolored.'"
9. On October 4, 2004, a black suspended precipitate was present on the bottom of Little Creek downstream of the reported release. "Respondent objects to Request no. 9 as vague with respect to the description of a black substance on the bottom of Little Creek as a 'suspended precipitate.' Respondent admits that a black substance was on the bottom of Little Creek on the date referenced."
10. On October 4, 2004, the waters in Little Creek downstream of the reported release were discolored and turbid. "Respondent objects to Request no. 10 as vague and calling for an opinion and/or conclusion of law with respect to the nature of the downstream waters of Little Creek as being 'discolored' and 'turbid.'"
13. The Ada Clow Sump is located in a flood plain and had been flooded in 2002. "Respondent objects to Request no. 13 as being irrelevant to the issues in this proceeding."

18. On November 8, 2004, a black suspended precipitate was present in the water of the tributary of Big Creek downstream of the reported release. "Respondent objects to Request no. 18 as vague with respect to the description of a black substance on the bottom of a tributary of Big Creek as a 'suspended precipitate.' Respondent admits that a black substance was on the bottom of a tributary of Big Creek on the date referenced."

20. On November 8, 2004, the waters of the tributary of Big Creek downstream of the reported release were discolored and turbid. "Respondent objects to Request no. 20 as vague and calling for an opinion and/or conclusion of law with respect to the nature of the downstream waters of a tributary of Big Creek as being 'discolored' and 'turbid.'"

22. The crude oil reportedly released on December 2, 2004, affected an area approximately 600 square feet before discharging into a tributary of South Fork Creek. "Respondent objects to Request no. 22 as vague and calling for an opinion and/or conclusion of law with respect to whether a 600 square foot area was 'affected.'"

26. The salt water and crude oil reportedly released on February 15, 2005, impacted an area approximately 12,000 square feet. "Respondent objects to Request no. 26 as vague and calling for an opinion and/or conclusion of law with respect to whether a 12,000 square foot area was 'impacted.'"

The Complainant moves to strike the above-referenced objections on the following grounds and to compel the Respondent to provide either admissions or denials in good faith and after proper investigation.

The Requests to Admit are not "Vague"

A request to admit deals with a question of fact, even an ultimate fact which might give rise to a conclusion of law. *P.R.S. International, Inc. v. Shred Pax Corp.*, 184 Ill.2d 224, 236

(1998). In this case, the Illinois Supreme Court explicitly acknowledged that the purpose of the rule governing requests to admit is not to discover facts, nor is it limited to obviating the difficulty involved regarding proof of evidence that is incontrovertible; rather, it is to establish some of the material facts in a case without the necessity of formal proof at trial, or, in other words, to separate the wheat from the chaff by circumscribing contested factual issues for clear and succinct presentation to the trier of fact. See *Bright v. Dicke*, 166 Ill.2d 204, 208 (1995); 23 Am.Jur.2d § 314 (1983). This is the context in which the hearing officer must determine whether a party has properly requested admission of a fact. For instance, the question of whether an action was taken, an event occurred, or a consequence resulted is one of fact, and even if the admission of that fact plainly requires the fact finder to conclude that a party breached a contract or was negligent or caused pollution as a matter of law, a request for that admission is proper. See, e.g., *Hubeny v. Charise*, 305 Ill. App. 3d 1038, 1044 (2nd Dist. 1999); P.R.S., 184 Ill. 2d at 236-37.

None of the requests objected to as being "vague" is factually deficient. Each is fixed in time and place in relation to a reported release. Each request is a concise statement of fact regarding the consequence resulting from the reported release. Each request simply poses a question: Was the surface of the creek discolored? Were the waters turbid? Did the creek contain black suspended precipitate or unnatural bottom deposits?

Other requests regarding the reported releases, indicating dates and estimated quantities of crude oil and/or salt water, were admitted by the Respondent; none of those requests was objected to as being "vague." Therefore, the occurrences are not disputed. The Respondent is obligated to either admit or deny the objective physical effects of the releases upon the environment. Moreover, the Respondent is obligated to state an objection with specificity. What is purportedly so vague about the terms "discolored" and "turbid" and "suspended precipitate" and "unnatural bottom deposits?" Some of these terms are specifically

employed in the regulation at issue, 35 Ill. Adm. Code 302.203, which defines “offensive conditions” and most are in common usage in assessing whether “water pollution” as statutorily defined and prohibited may have occurred. As argued below, these terms are factual and not “legal.” In fact, these terms are “technical” in the sense of directly pertaining to the technique of assessing pollutional impacts of a discharge of contaminants. These terms are well-defined through the practice of environmental law and the objections of vagueness must be rejected.

The Respondent also objects to the terms “suspended precipitate,” “impacted” and “affected,” but does not suggest in what manner such may be too vague for a good faith response. In order to properly raise an objection, the Respondent is required by Section 101.618(h) to articulate such with specificity. The term “suspended precipitate” is utilized in Requests no. 9 and 18. Request no. 9 pertains to the impacts of the 300 barrels of salt water, released on October 4, 2004, upon Little Creek. Request no. 18 pertains to how the November 8, 2004, release of approximately 100 barrels of salt water and 1 barrel of crude oil may have affected Big Creek. The evidence presented in the circuit court actions¹ was not contested by the Respondent regarding the chloride levels of salt water from oil production activities and the effects of such upon freshwater streams. This evidence included analytical data that this type of salt water typically contains 50,000 to 60,000 ml/L of chlorides (plus varying amounts of petroleum constituents) and expert opinion testimony regarding the toxicological, chemical and physical impacts, especially upon the smaller streams with lower flows. In this context, the term “suspended precipitate” is both scientifically precise and commonly understood. The effects of a hundred barrels (or less) of salt water with high concentrations of chlorides are readily subject to observation; it sinks toward the bottom and does not readily disperse due to its high salinity and

¹*People v. Petco Petroleum*, Jefferson County No. 99-CH-55; *People v. Petco Petroleum and Jay Bergman*, Sangamon County 2000-CH-458.

lower ambient temperature. Petco's field workers and spill responders have certainly acquired the experience to understand these facts.

As to the terms "impacted" and "affected," such were used in the preceding paragraph in the context of the streams into which large quantities of salt water were discharged. As used in Request no. 22, "affected" is used in the context of a barrel of crude oil spilled upon the ground. As used in Request no. 26, "impacted" is used in the context of approximately 20 barrels of salt water and 3 barrels of crude oil which leaked from a pipeline. These are not even terms of art but rather words of common usage.²

The Requests to Admit do not Call for an Opinion

The Respondent's objections are somewhat ambiguous as pleaded and lack the required specificity. The objections (whether evidentiary or legal) must fail. The requests to admit seek to determine whether facts are true and not whether, *if such facts are true*, the Respondent has an opinion consistent or inconsistent with the allegations. Alternatively, the Respondent may be attempting to object that the requests purportedly call "for an opinion . . . of law."

As noted above, even if the admission of a fact plainly requires the fact finder to conclude that a party breached a contract or was negligent or caused pollution as a matter of law, a request for that admission is proper. In other words, a request to admit that the waters were "discolored" and "turbid" does not call for an "opinion" (either evidentiary or legal) that offensive conditions or pollution resulted from the releases of crude oil or salt water. Admissions of such facts would, of course, provide a record for the Board to determine that such violations occurred. This is the Complainant's legitimate objective.

The requests call neither for an "opinion" regarding facts nor for a legal "opinion."

²Interestingly, Petco is still challenging the following terms as vague in its appeal of the Sangamon County case: "pattern," "documented event," "substantial environmental harm," and "environmental damage to property." (No. 4-04-0868, Appellee Br. 53-58).

The Requests to Admit do not Call for a Conclusion of Law

It is well settled that a request seeking the admission of a conclusion of law is improper. For instance, Request no. 10 could not state: "On October 4, 2004, the waters in Little Creek downstream of the reported release were *polluted*." Similarly, a request as follows would also be improper: "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*." However, a request seeking an admission that "Petco's discharge of salt water to the small stream altered its physical and chemical properties," being merely factual, would not be improper as calling for a "legal" conclusion.

A request to admit that the waters were "discolored" and "turbid" does not call for a legal conclusion simply because such terms are utilized in regulatory provisions. These terms are descriptive of physical and empirical conditions.

The Respondent's arguments seem to be that any terms not defined in the Act or regulations are "vague" and any terms so defined are "legal" terms calling for a conclusion of law. This approach must be rejected and the Respondent compelled to answer.

The Request to Admit no. 13 is Relevant

This request seeks the admission that the Ada Clow Sump is located in a flood plain and had been flooded in 2002. The Respondent has admitted that the 10 to 15 barrels of crude oil released on May 31, 2004, was within a cement pit until heavy rains and flooding caused the sump pump to malfunction, which then allowed the crude oil to overflow the pit. The relevance of this facility's location is clear in the context of Section 33(c)(iii) of the Act: "the suitability or unsuitability of the pollution source to the area in which it is located." Likewise, prior flooding is

relevant to certain criteria listed in Section 42(h) of the Act, such as due diligence and economic benefit. Moreover, the relevance of a requested admission is not limited to the subject matter involved in the pending matter but also relates to any potential claim or defense of the Respondent. In other words, the scope of disclosure cannot be restricted merely in reference to the allegations of violation.

Conclusion

The Complainant has complied with Section 101.618(d), which requires the "written request for admission of the truth of specific statements of fact." Each of the ten requests to which the Respondent has objected as set forth above is a specific statement of fact. Each is concisely stated without misleading qualifications and confusing or ambiguous language. Yet, the Respondent has attempted to evade admissions by interposing objections without the specificity required by Section 101.618(h). The Complainant asks that the hearing officer strike the objections and issue an order compelling the Respondent to answer these requests to admit.

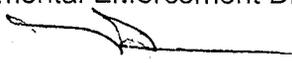
WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, hereby respectfully requests that the Hearing Officer issue an Order striking the objections and the Respondent to respond to the Request for the Admission of Facts.

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

500 South Second Street
Springfield, Illinois 62706
Dated: July 8, 2005