OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

February 17, 2004

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

Re: ***People v. Emmett Utilities and Russell D. Thorell***
PCB No. 04-81

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 BY RESPONDENT RUSSELL D. THORELL 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. 04-81**
	)	**(Enforcement)**
EMMETT UTILITIES, INC., an Illinois corporation, and RUSSELL D. THORELL, individually and as president of EMMETT UTILITIES, INC.,	)	
Respondent.	)	

NOTICE OF FILING

To: Mr. John Meyers
Rabin, Myers & Hanken, P.C.
1300 South Eighth Street
Springfield, IL 62703

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 BY RESPONDENT RUSSELL D. THORELL , 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: May 14, 2004

CERTIFICATE OF SERVICE

I hereby certify that I did on May 14, 2004, 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 BY RESPONDENT RUSSELL D. THORELL

To: Mr. John Meyers
Rabin, Myers & Hanken, P.C.
1300 South Eighth Street
Springfield, IL 62703

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 to:

Carol Sudman
Hearing Officer
Illinois Pollution Control Board
1021 N. 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. 04- 81
	)	(Enforcement)
EMMETT UTILITIES, INC.,	)	
an Illinois corporation, and	)	
RUSSELL D. THORELL, individually and	)	
as president of EMMETT UTILITIES, INC.	)	
	)	
Respondents.	)	

COMPLAINANT'S RESPONSE TO MOTION TO DISMISS BY RESPONDENT RUSSELL D. THORELL

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, hereby respectfully responds to the Motion to Dismiss filed by Respondent Russell D. Thorell, and states as follows:

The Board's Order dated May 6, 2004, which Complainant received on May 13, 2004, allows the Complainant leave to respond to Thorell's Motion to Dismiss. This motion raises, in a cursory fashion, two legal grounds for dismissal. First, Respondent contends that "Illinois does not recognize a 'responsible corporate officer' doctrine." Secondly, Respondent, while not even mentioning estoppel, cites a Circuit Court ruling which rejected the People's attempt to pierce the corporate veil of Emmett Utilities, Inc., and thereby impose personal liability upon Thorell. Respondent also suggests that the Complaint lacks specificity.

When ruling on a motion to dismiss, the Board takes all well-pleaded facts as true and draws all inferences from them in favor of the non-movant; dismissal is proper only if it is clear that no set of facts could be proven that would entitle complainant to relief. *See, e.g., People v. Peabody Coal Co.*, PCB 99-134, slip opinion at 1-2 (June 20, 2002).

The legal precedent for personal liability is provided by *People v. C.J.R. Processing, Inc.,* 269 Ill. App.3d 1013, 647 N.E.2d 1035, 207 Ill. Dec. 542 (3rd Dist.1995), which held that "corporate officers may be held liable for violations of the [Illinois Environmental Protection] Act when their active participation or personal involvement is shown." Personal involvement and active participation on the part of Thorell in the acts and omissions resulting in the violations are alleged on the basis of *People v. C.J.R. Processing*, which found that the definition of "person" in the Environmental Protection Act did not exclude corporate officers.[1]

In general, a corporate officer or employee is not individually liable for the corporation's actions. The applicable law is clear, however, that an individual acting in a corporate capacity may be individually liable either as a responsible corporate officer, as a direct participant under general legal principles, or under specific statutes or provisions. These doctrines can apply to both criminal and civil liability, though their application in either context varies with the circumstances. Over the past sixty years, the law has developed these bases of individual responsibility to heighten attention to regulatory compliance and also to prevent operators from placing upon the public the cost of their irresponsible operations.

The responsible corporate officer doctrine derives from a 1943 case in which the United States Supreme Court interpreted the federal Food, Drug, and Cosmetic Act to impose criminal liability on any person within a corporation "responsible" for introducing an adulterated or misbranded drug into interstate commerce. *United States v. Dotterweich,* 320 U.S. 277, 64 S.Ct. 134, 88 L.Ed. 48 (1943). "[An] offense is committed . . . by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws. . . ." *Id.* at 284, 64 S.Ct. 134. The Court reasoned, "[T]he only way in which a corporation can act is

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[1] "'Person' is any individual, partnership, co-partnership, firm, company, limited liability company, corporation, association, joint stock company, trust, estate, political subdivision, state agency, or any other legal entity, or their legal representative, agent or assigns." 415 ILCS 5/3.315.

through the individuals who act on its behalf." *Id.* at 281, 64 S.Ct. 134. This liability was justified on the basis that the Food, Drug, and Cosmetic Act "touch[es] phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection." *Id.* at 280, 64 S.Ct. 134.

In *United States v. Park,* 421 U.S. 658, 673-74, 95 S.Ct. 1903, 44 L.Ed.2d 489 (1975), the Supreme Court, drawing on *Dotterweich,* concluded that there is a *prima facie* violation of the Food, Drug, and Cosmetic Act by a responsible corporate officer when "the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so." The responsible corporate officer doctrine has been applied to public welfare offenses whenever "a statute is intended to improve the common good and the legislature eliminates the normal requirement for culpable intent, resulting in strict liability for all those who have a responsible share in the offense." *Matter of Dougherty,* 482 N.W.2d 485, 489 (Minn.Ct.App.1992).

Although it originated as a criminal law doctrine, the responsible corporate officer doctrine has been applied to civil liability under a number of federal statutes. *See, e.g., United States v. Northeastern Pharm. & Chem. Co.,* 810 F.2d 726, 743-44 (8th Cir.1986) (addressing personal liability under CERCLA); *United States v. Hodges X-Ray, Inc.,* 759 F.2d 557, 560-61 (6th Cir.1985) (assessing a violation of the Radiation Control for Health and Safety Act : "The fact that a corporate officer could be subjected to criminal punishment upon a showing of a responsible relationship to the acts of a corporation that violate health and safety statutes renders civil liability appropriate as well."); *United States v. Conservation Chem. Co.,* 660 F.Supp. 1236, 1245-46 (N.D.Ind.1987) (president and principal stockholder of a corporation operating hazardous waste facility may be personally liable for violation of RCRA).

The responsible corporate officer doctrine is distinct from piercing the corporate veil, and explicitly expands liability beyond veil piercing. *See United States v. Dotterweich*, 320 U.S. 277, 282 ("If the [FDCA] were construed [to limit liability only to the corporation], the penalties of the law could be imposed only in the rare case where the corporation is merely an individual's alter ego."). The same is plainly true of statutory liabilities.[2] A corporate officer is not liable simply because of his position within the corporation and may be held personally liable if he was actively involved in the activity that violates the statute. *United States v. Conservation Chem. Co.*, 733 F.Supp. 1215 (N.D.Ind. 1989).

Similarly, several other States have adopted the responsible corporate officer doctrine as appropriate under legislation addressing public safety, in particular environmental regulatory laws. *See, e.g., Matter of Dougherty,* 482 N.W.2d at 488-90 (Minnesota's hazardous waste laws are public welfare statutes and subject to the responsible corporate officer doctrine); *State ex rel. Webster v. Mo. Resource Recovery, Inc.,* 825 S.W.2d 916, 924-26 (Mo.Ct.App.1992) (applying the doctrine to Missouri's hazardous waste management law); *State, Dep't of Ecology v. Lundgren,* 94 Wash.App. 236, 971 P.2d 948, 951-53 (1999) (sole shareholder of a corporation that operated sewage treatment plant is personally liable for violation of Washington's Water Pollution Control Act); *Commissioner v. RLG, Inc.*, 755 N.E.2d 556 (Sup.Ct. 2001) (evidence of active involvement of officer in violations of environmental laws was

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[2] Under State law, a corporate officer may also be liable for tortious conduct. *See, Mannion v. Stallings & Co.*, 204 Ill. App. 3d 179, 191-92, 561 N.E.2d 1134, 1141 (1st Dist. 1990). Moreover, individual liability may be imposed where the conduct is unauthorized: "all persons who assume to exercise corporate powers without authority to do so shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof." 805 ILCS 5/3.20 (2000). *See, e.g., Estate of Plepel v Industrial Metals, Inc.*,115 Ill.App.3d 803, 71 Ill. Dec. 365, 450 N.E.2d 1244 (1st Dist. 1983); *Chicago Title & Trust Co. v Brooklyn Bagel Boys, Inc.,* 222 Ill.App.3d 413, 164 Ill. Dec. 930, 584 N.E.2d 142 (1st Dist. 1991), *appeal denied* 144 Ill 2d 632; *H & H Press v Axelrod*, 265 Ill.App.3d 670, 202 Ill. Dec. 687, 638 N.E.2d 333 (1st Dist. 1994). For instance, the court in *Cardem, Inc. v. Marketron Int'l*, 322 Ill.App.3d 131, 25 Ill. Dec. 376, 749 N.E.2d 477 (2nd Dist. 2001), held that an officer of a corporation that has been involuntarily dissolved and is later reinstated is not relieved of personal liability for debts incurred by the business during the dissolution.

sufficient to impose personal liability); and *State v. Rollfink,* 162 Wis.2d 121, 475 N.W.2d 575, 576 (Sup.Ct.1991) (corporate officer may be held personally liable for violations of Wisconsin's solid and hazardous waste laws if the "officer is responsible for the overall operation of the corporation's facility which violated the law").

The application of *C.J.R. Processing* to the facts of the present case could benefit from a close review of the Minnesota case, because the latter takes a pragmatic approach to what the Illinois case has termed "active participation or personal involvement." In *Dougherty*, the court agreed that the defendant had not personally committed the alleged violations, but rather found him personally liable as a responsible corporate officer. Following *United States v. Park,* 421 U.S. 658, 673-74, the Minnesota court formulated the standard as follows:

> Three essential elements must be satisfied before liability will be imposed upon a corporate officer under the responsible corporate officer doctrine: (1) the individual must be in a position of responsibility which allows the person to influence corporate policies or activities; (2) there must be a nexus between the individual's position and the violation in question such that the individual could have influenced the corporate actions which constituted the violations; and (3) the individual's actions or inactions facilitated the violations.

482 N.W.2d at 490.[3] According to the facts alleged in the Complaint, and for purposes of the motion to dismiss taken as true, Thorell meets each of these criteria. He plainly had a position that allowed him to influence the utility's policies and functions. Thorell often dealt directly with regulatory and enforcement matters with the Illinois EPA, thereby establishing the necessary nexus between his position and environmental compliance. Finally, his acts controlling all expenditures by Emmett Utilities and his omissions regarding equipment maintenance allowed the problems to occur.

The facts of this case are analogous to *Dougherty,* where that defendant "was in a

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[3] The same standard was adopted by the Indiana Supreme Court in *Commissioner v. RLG, Inc.*, 755 N.E. 2d 556 at 561.

position of responsibility as president," the violations were within his "sphere of influence," he "was the primary contact with all regulatory bodies," and he "failed to prevent the violations and take proper corrective action once the violations occurred." *Dougherty,* 482 N.W.2d at 490. Emmett Utilities has no subordinate or intermediate officer principally responsible for compliance, and Thorell was directly involved in all of the various corporate activities. Either may be sufficient, and in concert they demonstrate that Thorell had both the responsibility and authority to prevent the regulatory violations in the first instance and to correct the violations once they were brought to his attention. Lastly, the court in *Dougherty* also utilized the statutory definition of "person" as a legal premise for liability; rejecting the argument that neither "corporate officer" nor "shareholder" was explicitly included, the court found the provision to be "a singularly encompassing definition." *Dougherty,* 482 N.W.2d at 491.

The recent decisions in *People v. Tang*, __ Ill. App. 3d __, 281 Ill.Dec. 875 (1st Dist. 2004), and *People v. Ag Pro, Inc.*, __ Ill. App. 3d __, 281 Ill. Dec. 386 (2nd Dist. 2004), are pertinent because each cites and discusses *People v. C.J.R. Processing* and the issues attendant to the imposition of individual liability upon a corporate officer. However, contrary to Respondent's argument that "the First District Appellate Court [in *Tang]* has pretty much rejected, or at least severely limited, the doctrine," the court did not criticize the Third District's 1995 decision in *C.J.R. Processing* but rather addressed the pleading requirements to properly allege the necessary active participation or personal involvement of a corporate officer. More importantly, in the *Ag Pro* case (which Respondent totally ignores) the Second District Appellate Court clearly adopted the *C.J.R. Processing* rationale in affirming the imposition of individual liability upon a corporate officer.

The *Ag Pro* court reviewed the factual findings of the trial court in the context of the *C.J.R. Processing* standard: "This 'personal involvement' or 'active participation' does not . . .

mean that the corporate officer has to perform the actual physical act that constitutes a violation in order to be held individually liable." 281 Ill. Dec. at 397-98. The trial court had found that the company's president "had control over the pollution or was in control of the area from where the pollution occurred, *and did not take precautions to prevent the pollution.*" 281 Ill. Dec. at 398; emphasis added. These are the fundamental grounds as to any liability for environmental violations. *See Meadowlark Farms, Inc. v. Pollution Control Board*, 17 Ill. App. 3d 851, 308 N.E.2d 829 (5th Dist. 1974) (ownership of the source of pollution and the capability of controlling the pollutional discharge); *Phillips Petroleum Co. v. Pollution Control Board*, 72 Ill. App. 3d 217 (2nd Dist. 1979); and *Perkinson v. Pollution Control Board*,187 Ill. App. 3d 689 (3rd Dist. 1989) (failure to take reasonable precautions to prevent such occurrences). The evidence as discussed by the appellate court clearly involved not just acts but omissions as well.

As stated by the appellate court, the issue in *Tang* was one of sufficiency of the pleadings, which had been dismissed by the trial court:

> In this case, we are not asked to determine whether, as a general proposition, a corporate officer may ever be held liable for corporate wrongs under the [Environmental Protection] Act; both parties concede that, under certain circumstances, a corporate officer may be individually liable. Instead, we must determine whether the pleadings in this case are sufficient to state a claim for Tang's individual liability. Apparently, only one Illinois case has specifically addressed the issue of a corporate officer's potential individual liability under the Act. The trial court relied on this case in rendering its decision, and both parties claim the case supports their contentions on appeal.

Slip opinion at 11. After a summary of the *C.J.R. Processing* decision, the First District outlined some of the principles of corporation law in Illinois and reviewed the out-of-jurisdiction cases; "the cases are useful to our analysis because they are premised on the same general principles of corporation law. . . ." Slip opinion at 15. These cases "confirm that more than a corporate title is required in order for an officer to be held liable for corporate violations of environmental

protection laws. There is, however, no precise definition as to what must be alleged to state a claim for personal liability." Slip opinion at 18.

In discussing several of the federal cases that upheld individual liability, the *Tang* court emphasized that federal actions must only satisfy a notice-pleading standard while Illinois is a fact-pleading jurisdiction. The court upheld the dismissal of the pleadings due to the conclusory nature of the allegations. "These allegations are significantly deficient as compared to the allegations in *C.J.R.* and other cases finding individual liability." Slip opinion at 27. Therefore, it is not accurate to argue as Thorell does that the *Tang* court rejected or limited the responsible corporate officer doctrine. Indeed, after a careful reading of this decision, it is hardly even fair to say that the First District "distinguished" the *C.J.R. Processing* decision, especially in light of its conclusion:

> From our analysis of *C.J.R.*, the other cases cited by the parties, and the [Environmental Protection] Act itself, we conclude that in order to state a claim for personal liability against a corporate officer under the Act, a plaintiff must do more than allege corporate wrongdoing. Similarly, the plaintiff must allege more than that the corporate officer held a management position, had general corporate authority, or served in a supervisory capacity in order to establish individual liability under the Act. The plaintiff must allege facts establishing that the corporate officer had personal involvement or active participation in the acts resulting in liability, not just that he had personal involvement or active participation in the management of the corporation.

Slip opinion at 25-26. The court essentially adopted the *C.J.R. Processing* standard of "personal involvement or active participation." 269 Ill. App. 3d at 1020 ("We hold . . . corporate officers may be held liable for violations of the Act when their active participation or personal involvement is shown.").

Complainant has not merely alleged "corporate wrongdoing," or that Thorell was personally involved or actively participated in the "management" of Emmett Utilities, Inc., but rather that his omissions and acts resulted in the violations. The allegations of fact are well-

pleaded and provide a cause of action against Thorell for the public water supply violations. For instance, Count I, paragraph 12, states as follows: "On August 28, 2003, the Illinois EPA contacted RUSSELL THORELL and directed the Respondents to replace the well pump and to restore service. RUSSELL THORELL stated that the Respondents would not replace the well pump and restore service until a pending rate increase might be granted by the Illinois Commerce Commission." In addition, Count II, paragraphs 14 and 15, state as follows: "By allowing the well pump to fail on August 27, 2003. . . . [and] By subsequently failing or refusing to repair or replace the well pump, the Respondents failed to provide continuous operation and maintenance of public water supply facilities so that the water shall be assuredly safe in quality and adequate in quantity for ordinary domestic consumption. . . ."

If the State can prove that Thorell *refused* to replace or repair the well pump, then he should be held responsible. This type of "active" omission is qualitatively different evidence than proof of neglect and lack of maintenance. The failure of a 20 year old piece of critical equipment is one thing; the failure of the sole corporate officer to report the water outage and to arrange for the well pump to be replaced is another thing altogether. For the purposes of the motion to dismiss, the Board must accept that such refusal and failures indeed occurred.

As to the water pollution violations in the three other counts of the Complaint, the State alleges that Thorell and the utility "have allowed discharges of untreated effluent, raw sewage, and overflows from the treatment system and sanitary sewers." ¶ 12, Counts III, IV and V. Overflows of untreated or raw sewage are expressly prohibited, of course, but the key point is that such overflows are preventable. Thorell failed to prevent the overflows and thereby "allowed" such pollutional discharges. As a responsible corporate officer, Thorell controlled the source of pollution "*and did not take precautions to prevent the pollution.*" *AgPro*, 281 Ill. Dec.

at 398 (emphasis added). These are proper inferences to draw from the well-pleaded factual allegations.

Lastly, Complainant has not made any attempt to pierce the corporate veil as was unsuccessfully done in the previous circuit court action. The case before the Board is premised upon an entirely different set of facts. It is important to note that personal liability is distinct from the derivative liability that results from piercing corporate veil. *See, e.g., Northeastern Pharm. & Chem. Co.,* 810 F.2d at 744; *New York v. Shore Realty Corp.,* 759 F.2d 1032, 1052 (2nd Cir. 1985) (corporate officer may be held personally responsible without piercing the corporate veil).

WHEREFORE, Complainant respectfully asks that the Motion to Dismiss be DENIED.

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: May 14, 2004