

ILLINOIS POLLUTION CONTROL BOARD
May 19, 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):

Today’s order grants the complainant’s April 14, 2005 motion for leave to amend the complaint, accepts the amended complaint, and directs the hearing officer to proceed expeditiously to hearing.

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. The Board accepted the original complaint for hearing on October 21, 2005.

In the original complaint, the People allege that Petco 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.

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. The Board denied Petco’s motion to dismiss on February 3, 2005. In the same order, the Board gave Petco until March 5, 2005, to answer the complaint. Petco answered on March 2, 2005.

On April 14, 2005, the People moved to amend the complaint, seeking to correct a violation alleged three times in the complaint, add factual information, and plead seven additional counts (Mot.). On April 25, 2005, Petco objected to the People’s motion to amend in

part (Resp.). For the reasons set forth below, the Board grants the People's motion for leave and accepts the second amended complaint for hearing.

MOTION FOR LEAVE TO AMEND COMPLAINT

The People move to amend the original six-count complaint filed in this proceeding to make corrections, add factual information to count V, and add seven additional counts. Mot. at 1. The People assert that Section 2-616 of the Code of Civil Procedure states in pertinent part:

Amendments. (A) At any time before final judgment, amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined as plaintiff or defendant, dismissing any party, changing the cause of action or defense or adding new cause of action or defenses, and in any matter, either of form or substance, in any process, pleading, bill of particulars or proceedings, which may enable the plaintiff to sustain the claim for which it was intended to be brought or the defendant to make a defense or assert a cross claim. 735 ILCS 5/2-616(a).

Corrections and Newly Alleged Facts

In the amended complaint, the People change the alleged violation of Section 302.203 of the Board's rules to Section 302.208(g) in paragraph 22 of count II, and paragraph 21 of counts IV and VI.

In count V, the People add that in addition to field samples, the Agency also collected samples for laboratory analysis for chlorides at two locations downstream of the discharge into the stream. Am. Comp. at 11.

New Counts VII, VIII, IX, X, XI, XII, and XIII

In the original complaint, the People assert facts related to three distinct events, out of which arose multiple causes of action. The releases allegedly occurred on May 24, 2004, August 21, 2004, and October 4, 2004. In the amended complaint, the People allege facts related to four additional releases. The four newly alleged releases occurred on May 31, 2004, November 8, 2004, December 2, 2004, and February 15, 2005. The People state that the Agency did not provide the People with information regarding the May 31, 2004 release until subsequent to the initial filing. The other three releases, state the People, had not yet occurred as of the date of filing. Mot. at 2.

Counts VII and VIII allege that on May 31, 2004, Petco caused a release of approximately 10-15 barrels of crude oil from the Ada Clow Sump near St. Elmo, Fayette County. Am. Comp. at 13-16. The People allege the release caused water pollution and created a water pollution hazard as a result of the crude oil flowing approximately one-third of a mile over the ground before discharging into Wolf Creek. Am. Pet. at 14. According to the People, the release caused offensive conditions in Wolf Creek because the waters contained visible oil. Am. Comp. at 16.

Counts IX and X describe a release of approximately 100 barrels of salt water and 1 barrel of crude oil on November 8, 2004 from the Mary Scott Disposal Line near St. Elmo, Fayette County. Am. Comp. 17-20. The People state the release contained chlorides and petroleum constituents and discharged directly into a tributary of Big Creek. The People allege the release caused water pollution, offensive conditions, and exceedences of the Board's general use water quality standard for chlorides. Am. Comp. at 18-19.

The People allege in counts XI and XII that on December 2, 2004, Petco released about 1 barrel of crude oil from the Mabel Durbin #1 well near St. Elmo in Fayette County. According to the People, the release flowed above ground before discharging into a tributary of South Fork Creek. Am. Comp. at 20. The People state the release caused water pollution, offensive conditions in the tributary of South Fork Creek, and created a water pollution hazard. Am. Comp. at 20-22.

Finally, in the newly alleged count XIII, the People state that on February 15, 2005, Petco caused a release of approximately 20 barrels of salt water and 3 barrels of crude oil from a pipeline near St. Elmo in Fayette County. The People assert that the release, which came from a pig trap in the pipeline, contained chlorides and petroleum constituents. The People also contend the release created a water pollution hazard. Am. Comp. at 23.

Petco's Objection

Petco objects to two aspects regarding the amended complaint: (1) the newly alleged violations resulting from the May 31, 2004 release incident; and (2) the correction of regulatory violations alleged in "paragraph 22 of Count I." According to Petco, the complainant's right to amend its complaint is not absolute. Obj. at 2; citing Hadley v. Ryan, 345 Ill. App. 3d 297, 280 Ill. Dec. 818 (4th Dist. 2003). Petco asserts that the Board has discretion to allow an amendment. Obj. at 2. Petco further contends that, while liberally allowed, amendments should not be allowed where the moving party knew of the matters asserted at the time the original pleading was drafted, yet offered no excuse to explain the initial failure. Obj. at 2; citing Trans World Airlines, Inc. v. Martin Automatic, Inc., 215 Ill. App. 3d 622, 159 Ill. Dec. 94 (2nd Dist. 1991).

First, Petco argues that the May 31, 2004 incident occurred five months before the People filed the original complaint. Further, Petco notes that the People's own motion states the Agency, on whose behalf the People brought this action, knew of the release. Accordingly, argues Petco, the Board should not allow the newly alleged violations regarding the May 31, 2004 incident. Obj. at 2.

Second, Petco objects to the People's correction of regulatory violations "alleged in paragraph 22 of Count I." Obj. at 2; citing Mot. par. 4. Petco asserts paragraph 22 of count I does not exist.

Petco states it does not object to the remaining proposed amendments to the complaint.

BOARD DISCUSSION

The Board grants the People's motion for leave to amend and accepts the People's amended complaint for hearing. In addressing the amendment of complaints in the past, the Board has specifically declined to apply Section 2-616 of the Illinois Code of Civil Procedure finding that the Board's own procedural rules addressed amending pleadings in general: "Proof may depart from pleadings and pleadings may be amended to conform to proof, so long as no undue surprise results that cannot be remedied by a continuance." 35 Ill. Adm. Code 103.210(a) (2000). However, the Board's procedural rules, as amended and effective as of January 1, 2000, are currently silent regarding amending a complaint to make corrections or add violations.

The Board's procedural rules generally provide: "The Board may look to the Code of Civil Procedure and the Supreme Court Rules for guidance where the Board's procedural rules are silent." 35 Ill. Adm. Code 101.100(b). Therefore, the Board looks to Section 2-616 of the Code of Civil Procedure for guidance on amending the complaint.

Regarding the May 31, 2004 allegations, the Board finds the People have presented just and reasonable cause for the amendments. The People clearly state they did not yet have information regarding the release at the date the original complaint was filed. Mot. at 2. Further, the People bring these new allegations against the same party, regarding the same facility that was the focus of the original complaint. Therefore, the Board does not strike the newly alleged May 31, 2004 violations.

The Board also allows the correction of an alleged regulatory violation in count II. The People state in the motion for leave that the amended complaint "corrects the regulatory violation alleged in paragraph 22 of Count I." In response, Petco states that "[n]o paragraph 22 of count I exists." In the original complaint, paragraph 22 of count II and paragraph 21 of counts IV and VI alleged violations of the Board's prohibition against causing or allowing offensive conditions in waters of the State. See 35 Ill. Adm. Code 302.203. The amended complaint changes allegations of the offensive conditions prohibition in those three paragraphs to violations of the Board's general use water quality standard for chlorides. See 35 Ill. Adm. Code 302.208(g). The Board finds that because the People changed the regulatory violation alleged in paragraph 22 of *count II* in the actual amended complaint filed simultaneously with the motion, and the amendment conforms with the amendments made to paragraph 21 of both counts IV and VI, the amendment is reasonable.

ACCEPT FOR HEARING

The Board finds that the complaint meets the content requirements of the Board's procedural rules and accepts the the amended complaint for hearing. See 415 ILCS 5/31(d) (2002); 35 Ill. Adm. Code 103.212(a), (c).

A respondent's failure to file an amended answer to an amended complaint within 60 days after receiving the complaint may have severe consequences. Generally, if Petco fails within that timeframe to file an amended answer specifically denying, or asserting insufficient

knowledge to form a belief of a material allegation in the amended complaint, the Board will consider Petco to have admitted the allegation. 35 Ill. Adm. Code 103.204(d), (f).

The Board directs the hearing officer to proceed expeditiously to hearing. Among the hearing officer's responsibilities is the "duty . . . to ensure development of a clear, complete, and concise record for timely transmission to the Board." 35 Ill. Adm. Code 101.610. A complete record in an enforcement case thoroughly addresses, among other things, the appropriate remedy, if any, for the alleged violations, including any civil penalty.

If a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2002). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an on-going violation, if any, and, second, whether to order the respondent to pay a civil penalty. The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

With Public Act 93-575, effective January 1, 2004, the General Assembly changed the Act's civil penalty provisions, amending Section 42(h) and adding a new subsection (i) to Section 42. Section 42(h)(3) now states that any economic benefit to respondent from delayed compliance is to be determined by the "lowest cost alternative for achieving compliance." The amended Section 42(h) also requires the Board to ensure that the penalty is "at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship."

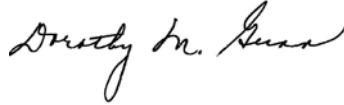
Under these amendments, the Board may also order a penalty lower than a respondent's economic benefit from delayed compliance if the respondent agrees to perform a "supplemental environmental project" (SEP). A SEP is defined in Section 42(h)(7) as an "environmentally beneficial project" that a respondent "agrees to undertake in settlement of an enforcement action . . . but which the respondent is not otherwise legally required to perform." SEPs are also added as a new Section 42(h) factor (Section 42(h)(7)), as is whether a respondent has "voluntary self-disclosed . . . the non-compliance to the [Illinois Environmental Protection] Agency" (Section 42(h)(6)). A new Section 42(i) lists nine criteria for establishing voluntary self-disclosure of non-compliance. A respondent establishing these criteria is entitled to a "reduction in the portion of the penalty that is not based on the economic benefit of non-compliance."

Accordingly, the Board further directs the hearing officer to advise the parties that in summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any (including whether to impose a civil penalty), and supporting its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) proposing a civil penalty, if any (including a specific total dollar amount and the portion of that amount attributable to the respondent's economic benefit, if any, from delayed compliance), and supporting its position with facts and arguments that address any or all of the

Section 42(h) factors. The Board also directs the hearing officer to advise the parties to address these issues in any stipulation and proposed settlement that may be filed with the Board.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 19, 2005, by a vote of 5-0.

A handwritten signature in cursive script that reads "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board