BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	PCB No. 13-072
v.	)	(Enforcement - Water)
	)	
PETCO PETROLEUM CORPORATION,	)	
	)	
Respondent.	)	

NOTICE OF FILING

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PLEASE TAKE NOTICE that on this 19th day of December, 2024, the attached Motion for Certification of Question for Interlocutory Appeal was filed with the Illinois Pollution Control Board, which is attached and herewith served upon you on behalf of Respondent Petco Petroleum Corporation.

Respectfully submitted,

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PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	PCB No. 13-072
v.	)	(Water – Enforcement)
	)	
PETCO PETROLEUM CORPORATION,	)	
	)	
Respondent.	)	

MOTION FOR CERTIFICATION OF QUESTION FOR INTERLOCUTORY APPEAL

COMES NOW Respondent Petco Petroleum Corporation ("Petco"), by and through its undersigned counsel, and, pursuant to 35 Ill. Adm. Code Sections 101.500 and 101.908 and Illinois Supreme Court Rule 308, submits this Motion for Certification of Question for Interlocutory Appeal regarding the Board's December 5, 2024 Order denying Petco's Motion to Reconsider and the Board's August 22, 2024 Order denying Petco's Motion to Dismiss Counts 62 Through 73 of the First Amended Complaint ("Motion to Dismiss"). A copy of the December 5, 2024 Order is attached hereto as Exhibit A and a copy of the August 22, 2024 Order is attached hereto as Exhibit B. Both Board Orders address whether the five-year statute of limitations set forth in 735 ILCS 5/13-205 applies to civil enforcement actions brought under 415 ILCS 5/31(d)(1) of the Illinois Environmental Protection Act ("Act"). If this Motion is granted, Petco will file an application for leave to appeal with the clerk of the Illinois Appellate Court, First, Fourth, or Fifth Districts.[1] For its Motion, Petco states as follows:

[1] Appeal to the First, Fourth, or Fifth Districts is appropriate because the Board is officed in Cook and Sangamon Counties and Petco facilities and associated allegations raised in the First Amended Complaint are in or near Fayette County. *See, e.g.,* First Am. Cmplt. at ¶16.

INTRODUCTION

The Orders and issue involved—whether the five-year statute of limitations in 735 ILCS 5/13-205 applies to Board enforcement cases filed under the Act pursuant to 415 ILCS 5/31(d)(1)—is a case of first impression in Illinois. In denying Petco's Motion to Dismiss and Motion to Reconsider, the Board for the first time held that the five-year statute of limitations did not and could never apply, finding that "[f]iling a complaint with the Board pursuant to Section 31 [of the Act] initiates an administrative proceeding, not a civil action, which is brought in court." (Ex. B, August 22, 2024 Order at p. 5). As it noted, the Board previously had "not decided the threshold question of whether a Section 31 enforcement action under the Act is a 'civil action' subject to the statute of limitations found in Section 13-205." (*Id.* at p. 4). The Board thereafter affirmed its view, "den[ying] Petco's Motion to Reconsider the Board's August 22, 2024 Order, and direct[ing] the parties to proceed as directed by that order." (Ex. A, December 5, 2024 Order at p. 4). The Board's Orders create a broad new ruling applicable to all Section 31 enforcement cases. The holding exempts all Section 31 actions before the Board from any statute of limitations, while substantively identical circuit court cases can be time limited. This result undermines concurrent jurisdiction between the courts and Board pursuant to the Act and erodes the principles underlying statutes of limitations.

Given that the Board's bright line holding is new, no Illinois court yet has analyzed and decided whether the five-year statute of limitations applies. But numerous states have found that statutes of limitations otherwise applicable in court, in fact, do apply to administrative cases.[2] The

[2] *See Suburban Home Health Care, Inc. v. Exec. Off. of Health & Hum. Servs.*, 488 Mass. 347, 347, 173 N.E.3d 344, 346 (Mass. 2021); *Hames v. City of Miami Firefighters' & Police Officers' Tr.*, 980 So. 2d 1112, 1115 (Fla. Dist. Ct. App. 2008); *Com., Nat. Res. & Env't Prot. Cabinet v. Kentucky Ins. Guar. Ass'n*, 972 S.W.2d 276 (Ky. Ct. App. 1997); *Bouchard v. State Emps. Ret. Comm'n*, 328 Conn. 345, 359, 178 A.3d 1023, 1031 (Conn. 2018).

rationales of those state courts apply here, where the Board and courts have concurrent jurisdiction over Act enforcement cases and both should be subject to the limitations in Section 5/13-205. If this issue is not addressed now by the courts, respondents will continue to raise this limitations issue again in current and future enforcement cases before the Board without finality.

The courts should resolve this issue on interlocutory appeal to avoid unnecessary expenditure of Board time and resources on a large number of potentially barred claims. An interlocutory appeal would streamline this case by determining whether discovery, motion practice, hearings, and Board findings are necessary for eleven of the seventy-three counts in the First Amended Complaint. Accordingly, this case meets the criteria for certification pursuant to 35 Ill. Adm. Code 101.908 and Illinois Supreme Court Rule 308.

LEGAL STANDARD

Under Rule 308(a), a motion for interlocutory appeal may be granted if a two-prong test is satisfied: "(1) whether the Board's decision involves a question of law involving substantial ground for a difference of opinion; and (2) whether immediate appeal may materially advance the ultimate termination of the litigation." *People v. Freeman United Coal Mining Co., LLC*, PCB 10-61, 2013 WL 1776522, at *6–7. If requisite findings are made on both prongs of the tests, the Board may in its discretion allow the appeal. *Id.* (citing *Voss v. Lincoln Mall Mgmt. Co.*, 166 Ill. App. 3d 442, 445, 519 N.E.2d 1056, 1058 (1988)). Issues with broad applicability to enforcement cases filed before the Board are appropriate for certification. *See Illinois Environmental Protection Agency v. City of Galena*, PCB 82–144, 1985 WL 21212, at *5 (certifying question which "has applicability to every enforcement case brought before the Board.").

QUESTION PROPOSED FOR CERTIFICATION

The question of law to certify for interlocutory appeal is: whether the five-year statute of limitations in 735 ILCS 5/13-205, which applies to 'all civil actions not otherwise provided for,' applies to civil enforcement actions filed before the Board pursuant to Section 5/31(d)(1) of the Act, 415 ILCS 5/31(d)(1).

ARGUMENT

I. Court Review Is Warranted on the Board's New Broad Ruling Regarding the Inapplicability of 735 ILCS 5/13-205 in a Case of First Impression

Section 5/13-205 states that "all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued." 735 ILCS 5/13-205. Statutory interpretation requires identifying legislative intent, which is best determined by the plain language of the statute. *See People v. Ramirez*, 214 Ill.2d 176, 179, 824 N.E.2d 232, 234 (Ill. 2005).[3] Pursuant to the Act, "civil penalties" are expressly recoverable in a "civil action," whether filed before the Board or in court. *See People v. NL Indus.*, 152 Ill. 2d 82, 102–03, 604 N.E.2d 349, 358 (Ill. 1992). The Board and circuit courts have concurrent jurisdiction to preside over such enforcement actions. *See People v. Fiorini*, 143 Ill. 2d 318, 337–38, 574 N.E.2d 612, 619 (1991) ("concurrent jurisdiction exists in the circuit court and the [Board] for actions alleging violations of the Act"); *People v. Donald Pointer*, PCB 96-64, 1998 WL 83188, at *1 (Feb. 19, 1998) ("It is well settled that the Board and the circuit courts have concurrent jurisdiction over most violations

[3] Black's Law Dictionary (11th ed. 2019) defines "civil action" as "[a]n action brought to *enforce*, redress, or protect a private or civil right; a noncriminal litigation. — Also termed (if brought by a private person) *private action*; (if brought by a government) *public action*." (emphasis in original and added). A civil enforcement action under the Act meets this definition. The State's civil enforcement case now before the Board is both an action to *enforce* the Act and is brought by the *government* as a public action. Black's Law Dictionary is an authoritative source in Illinois for ascertaining the meaning of undefined statutory terms. *See, e.g., People v. Ward*, 215 Ill. 2d 317, 325, 830 N.E.2d 556, 560 (2005); *Ahmad v. Bd. of Educ. of City of Chicago*, 365 Ill. App. 3d 155, 165, 847 N.E.2d 810, 819, n.3 (1st Dist. 2006).

of the Act."). Appeals from either forum must be taken to Illinois appellate courts. 415 ILCS 5/41(a); *FedEx Ground Package Sys., Inc. v. Pollution Control Bd.*, 382 Ill. App. 3d 1013, 1014–15, 889 N.E.2d 697, 699 (1st Dist. 2008). The Act permits the State and other authorized plaintiffs to file enforcement actions before the Board or in circuit court at their option. The enforcement cause of action brought—pursuing remedies for violations of the Act—is the same irrespective of the litigants or the selected forum. The nature of the cause of action does not change merely because the State chooses to file it before the Board instead of circuit court. As such, the five-year statute of limitations for "all civil actions not otherwise provided for" (735 ILCS 5/13-205) should apply equally to enforcement actions brought in either forum.

The Board's August 22, 2024 Order held that filing a complaint under Section 31 initiates an administrative proceeding, not a "civil action," and concluded that the five-year statute of limitations in 735 ILCS 5/13-205 does not apply to actions filed with the Board. The Board later affirmed, "den[ying] Petco's Motion for Reconsider the Board's August 22, 2024 Order, and direct[ing] the parties to proceed as directed by that order." (Ex. A, December 5, 2024 Order at p. 4). In so holding, the Board has created a broad new ruling and precedent that State actions filed with the Board are not subject to any statute of limitations because they are "administrative actions," while identical actions filed in circuit court are "civil actions." Thus, the State may, at its sole option, choose to file its actions before the Board to avoid the statute of limitations which would apply to identical claims filed in circuit court. This is an absurd result inconsistent with the concurrent jurisdiction framework developed by the General Assembly in the Act. It also undermines the clarity which statutes of limitations afford potential respondents/defendants regarding the timeframe during which legal actions can be brought against them based on past events, thereby ensuring that claims are diligently pursued within a defined period. *See Milnes v.*

Hunt, 311 Ill. App. 3d 977, 981, 725 N.E.2d 779, 782 (2000) ("Statutes of limitations are designed to prevent recovery on stale demands [and] require diligence in initiating actions."); *Softcheck v. Imesch*, 367 Ill. App. 3d 148, 157, 855 N.E.2d 941, 948 (2006) ("Statutes of limitations exist for very legitimate reasons. Memories fade; witnesses disappear; documents are lost or destroyed. The law recognizes the injustice of requiring one to defend against stale claims.").

In its August 22, 2024 Order, the Board stated that it "[a]cknowledges Petco's initial point that, when considering Section 13-205 in the past, the Board has not decided the threshold question of whether a Section 31 enforcement action under the Act is a 'civil action' subject to the statute of limitations found in Section 13-205." (Ex. B, August 22, 2024 Order at p. 4). No Illinois court has addressed whether actions brought before an administrative body qualify as 'civil actions' under Section 5/13-205's statute of limitations. An interlocutory appeal would allow an Illinois court to weigh in on the issue by analyzing the statutory text of the Act, Section 5/13-205, and how the two statutes interact in light of the purposes of statutes of limitations. A court may determine that exempting Board actions from limitations periods is in conflict with the legislative intent behind statutes of limitations, which aim to prevent indefinite exposure to stale claims. Further, certification would be consistent with the principle expressed by the Board that an issue which has broad applicability to enforcement cases before the Board is appropriate for certification. *See Illinois Environmental Protection Agency v. City of Galena*, PCB 82–144, 1985 WL 21212, at *5.

II. The Statutes of Limitations Issue in this Case Presents Substantial Grounds for Difference of Opinion

In its August 22, 2024 Order, the Board cited to two federal cases interpreting the meaning of "civil action" in the context of federal statutory frameworks not applicable to the present case. *See Township of Bordentown, New Jersey v. FERC*, 903 F.3d 234, 266-270 (3d Cir. 2018) (finding a state agency was not barred from conducting adjudicatory hearings regarding the agency's

permitting decisions by a Natural Gas Act provision granting the federal courts of appeals original and exclusive jurisdiction over any "civil action"); *Wind River Mining Corp. v. United States*, 946 F.2d 710, 712 (9th Cir. 1991) (finding that six-year statute of limitations for civil actions brought against the United States (28 U.S.C.A. § 2401) applied to an action filed in federal court pursuant to the Administrative Procedure Act seeking judicial review of a Bureau of Land Management decision.). Neither of those federal cases considered a situation like the one here, where: a) there are two forums with concurrent jurisdiction in which the State may file actions under Section 31 of the Act; and b) the new ruling by the Board distinguishes the substantive statute of limitations applicable to it versus circuit courts. Yet, numerous states have found in cases similar to the present matter that statutes of limitations *do* apply to both court and administrative actions—even when the particular statute of limitations does not expressly reference administrative actions.

For example, in *Suburban Home Health Care, Inc. v. Exec. Off. of Health & Hum. Serv.*, 488 Mass. 347, 347, 173 N.E.3d 344, 346 (Mass. 2021), the Supreme Judicial Court of Massachusetts held that a six-year statute of limitations for actions on contract brought in civil actions, which did not expressly apply to administrative proceedings, nonetheless applied to administrative actions brought by the state to collect overpayments made to providers in the state Medicaid program. The court considered the purposes of statutes of limitations, including: (i) promoting "the efficient, accurate, and equitable resolution of disputes [by] requiring parties to proceed within a reasonable amount of time of notice of the claim when evidence is available and before memories fade"; (ii) "discourage[ing] plaintiffs from sleeping on their rights and provid[ing] defendants with the ability to defend themselves"; and, (iii) "preserv[ing] the integrity and accuracy of the judicial process by ensuring that courts have sufficient, reliable evidence to decide cases." *Id.* at 354. Finding that these policy considerations were implicated by the case and

that the administrative claim at issue was analogous to similar claims brought in court, the Supreme Judicial Court concluded that the statute of limitations applied to both court and administrative actions initiated by the state, irrespective of the claim's technical categorization as administrative or judicial. *Id.* at 356.

Similarly, in *Commonwealth of Kentucky, Natural Resources and Environmental Protection Services Cabinet v. Kentucky Insurance Guaranty Association*, 972 S.W.2d 276 (Ky. Ct. App. 1997), the Kentucky Court of Appeals applied a seven-year statute of limitations for the state's Natural Resources and Environmental Protection Cabinet ("Cabinet") to bring bond forfeiture actions in administrative proceedings, even though the statute did not expressly apply the limitations period to such proceedings. The court noted that the Cabinet's hearing officers have quasi-judicial powers and are authorized by statute "to impose fines, revoke permits and order the forfeiture of performance bonds." *Id.* at 279. The court reasoned that "statutes of limitations are designed to bar stale claims arising out of transactions or occurrences which took place in the distant past" and "the legislative preference for prompt resolution of claims which underlies all statutes of limitation is equally compelling whether the forum is a court or a quasi-judicial tribunal." *Id.* at 280. The Court of Appeals agreed with the trial court's statement that "[i]t would be an absurd result if, for example, the Cabinet could commence a proceeding before a hearing officer of the Cabinet on a cause of action which arose ten years earlier, even though the action would be barred by the statute of limitations in every other tribunal of the Commonwealth." *Id.*

Next, in *Hames v. City of Miami Firefighters' & Police Officers' Trust*, 980 So. 2d 1112, 1115–16 (Fla. Dist. Ct. App. 2008), the Florida District Court of Appeals found that a cause of action "filed as a direct administrative substitute for a civil action" should be subject to the same statute of limitations applicable to the "civil action." The court noted that an exception exists in

Florida law for administrative disciplinary proceedings, which are "more appropriately described as a penal or quasi-criminal action or proceeding than a 'civil action or proceeding.'" *Id.* Thus, unless a claim in Florida is quasi-criminal, the distinction between administrative and court claims for similar causes of action is not relevant for statutes of limitations purposes.

Lastly, in *Bouchard v. State Emps. Ret. Comm'n*, 328 Conn. 345, 359, 178 A.3d 1023, 1031 (Conn. 2018), the Connecticut Supreme Court held that a six-year statute of limitations for contract actions applied by analogy to administrative claims by former state employee retirees against a state retirement commission seeking recalculation of retirement benefits. Surveying state law on the statute of limitations issue, the court "agree[d] with those courts that have recognized that the same policy reasons for applying a statute of limitations can apply irrespective of whether the proceeding is initiated in a judicial or administrative forum." The court reasoned, in part, that applying a statute of limitations to the administrative action was proper where the same action could be initiated in court without exhausting administrative remedies and where a legislatively prescribed window for appeal proceeds a final administrative decision. *Id.* at 363-64 (noting "it is difficult to square this expression of legislative intent with one intending an unlimited period to commence the administrative proceedings giving rise to such an appeal").

In this case, an enforcement action brought by the State at its election before the Board is not just analogous or similar to a claim brought in circuit court, but substantively identical by virtue of the concurrent jurisdiction held by the Board and Circuit Courts. As in *Bouchard*, the Act does not require exhaustion of administrative remedies due to the concurrent jurisdiction of the Board and Illinois circuit courts. The Act prescribes a thirty-five day period for appeal of final Board decisions (415 ILCS 5/41(a)), which is similar to the thirty day period for appeal of a circuit court's final judgment (Ill. Sup. R. 303(a)). Finding that no limitations period applies to

enforcement actions filed with the Board, such that a case could be brought five, ten, or one hundred years after the alleged offense, cannot reasonably be squared with a thirty-five day appeal period following the administrative decision.

As such, the logic and policy considerations of the state decisions discussed above apply even stronger to the circumstances of this case. Unlike in those states, however, Illinois courts have not had an opportunity to rule on the statutes of limitations issue presented here. The serious policy implications of the Board's rulings and the contrary decisions of courts in other states present substantial grounds for difference of opinion and thus warrant an interlocutory appeal.

III. Immediate Appeal Will Materially Advance the Ultimate Termination of This Litigation

The statute of limitations issue is not isolated or minor in this case because it is dispositive on eleven of the State's counts in the First Amended Complaint. An interlocutory appeal would materially advance the termination of this case by determining the number and scope of the State's claims that can proceed to an evidentiary hearing, which directly impacts the scope of discovery, motion practice, evidentiary presentation, and Board findings which may be required to conclude this case. Moreover, this case was originally filed in 2013, and the First Amended Complaint was filed in 2022. Therefore, proceeding to an interlocutory appeal on the important statute of limitations issue will preserve Board resources while not, by comparison, materially impacting the duration of the Board's proceedings in this case.

CONCLUSION

For the foregoing reasons, Respondent Petco Petroleum Corporation respectfully requests that the Illinois Pollution Control Board grant this Motion for Certification of Question for Interlocutory Appeal on a case of first impression before the Board and likewise Illinois Courts, and grant such other and further relief as the Board deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on December 19, 2024, the foregoing was filed with the Illinois Pollution Control Board and served upon the following persons by email:

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/s/ *Tim Briscoe*

Exhibit A

ILLINOIS POLLUTION CONTROL BOARD
December 5, 2024

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 13-72
	)	(Enforcement - Water)
PETCO PETROLEUM CORPORATION,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by J. Van Wie):

On September 16, 2024, Petco Petroleum Corporation (Petco) filed a Motion to Reconsider (Mot.) an August 22, 2024 Board order.[1] The Board's August 22, 2024 order denied Petco's Motion to Dismiss Counts 62 through 73 of the People's First Amended Complaint and struck the remaining portion of Petco's Affirmative Defense H raised in its motion to dismiss. On September 30, 2024, the People of the State of Illinois (People) filed their response. For the reasons detailed below, the Board denies Petco's Motion to Reconsider.

In this order, the Board first provides the legal background on motions to reconsider. The Board then turns to its discussion of Petco's arguments and renders its determination on the motion to reconsider. To conclude, the Board issues its order.

LEGAL BACKGROUND

The Board's procedural rules allow parties to file a motion for reconsideration of a Board order. In ruling on a motion for reconsideration, the Board will consider factors including new evidence or a change in the law to conclude that the Board's decision was in error. 35 Ill. Adm. Code 101.902. In addition to these two grounds, the Board will consider whether it erred in applying existing law. Chatham BP v. IEPA, PCB 15-173, slip op. at 2 (Nov. 5, 2015), *citing* Korogluyan v. Chicago Title & Trust Co., 213 Ill.App.3d 622 (1st Dist. 1991). "[T]he intended purpose of a motion for reconsideration is to bring to the court's attention newly discovered evidence which was not available at the time of the hearing, changes in the law, or errors in the court's previous application of the existing law." Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment v. Midwest Generation, LLC, PCB 13-15, slip op. at 8-9 (Feb. 6, 2020), *citing* Korogluyan v. Chicago Title & Trust Co. at 627 (1st Dist. 1991). A motion to reconsider may also specify "facts in the record

[1] People v. Petco Petroleum Corporation, PCB 13-72 (Aug. 22, 2024). This order provides an abbreviated factual and procedural background of this matter. For more detailed factual and procedural history, *see also* People v. Petco Petroleum Corporation, PCB 13-72 (Aug. 8, 2024) (ruling on the People's Motion to Strike Affirmative Defenses but reserving ruling on Petco's Motion to Dismiss and related portion of Affirmative Defense H).

Exhibit A

which were overlooked." Wei Enterprises v. IEPA, PCB 04-23, slip op. at 3 (Feb. 19, 2004).

DISCUSSION

Petco Alleges a Recognized Ground to Reconsider

In support of its motion to reconsider, Petco argues that the Board erred in finding that the catch-all statute of limitations in Section 13-205 of the Code of Civil Procedure does not apply to enforcement actions brought by the State before the Board. As noted, error in applying existing law is a recognized ground for reconsideration. *See* Chatham BP, PCB 15-173, slip op. at 2. Petco also argues that the Board's determination creates a new rule allowing for parties to bring stale claims before the Board.

Petco Reiterates an Argument Addressed in Prior Board Order

A motion to reconsider must do more than merely reiterate arguments already made by the movant and rejected by the Board. In its motion, Petco argues that the Board erred in determining that this action brought before the Board under Section 31 of the Environmental Protection Act (415 ILCS 5 (2022)) (Act) is not a "civil action" to which the catch-all statute of limitations in Section 13-205 of the Code of Civil Procedure (715 ILCS 5 (2022)) applies. Mot. at 2; 415 ILCS 5/31 (2022), 715 ILCS 5/13-205 (2022).

In support of this argument, Petco makes the same assertions that it made in its original motion to dismiss. It even cites the same case law. First, Petco argues that the Board and circuit courts have concurrent jurisdiction over most enforcement actions brought by the People for violations of the Act. Mot. at 3-4, 6, *citing* People v. Donald Pointer, PCB 96-64, slip op. at 1 (Feb. 19, 1998); Mot. to Dis. at 8-9, *citing* People v. Donald Pointer, PCB 96-64, slip op. at 1 (Feb. 19, 1998). Additionally, Petco argues that the legislature's intent was for the Section 13-205 catch-all statute of limitations for civil actions to apply because it did not expressly codify a common law exception in the statute. Mot. at 9, *citing* People v. Ramirez, 214 Ill.2d 176, 179 (2005) (concerning statutory construction giving effect to legislative intent); Mot. to Dis. at 7, *citing* People v. Ramirez, 214 Ill.2d 176, 179 (2005); *see also* Mot. to Dis at 2, 9, 12. Finally, Petco argues that the claims added by the People's First Amended Complaint are stale, and that the Board's finding that Section 13-205 does not apply to People's actions to enforce the Act before the Board could allow for actions that are time-barred in circuit court to be brought to the Board hundreds of years after a violation occurs. Mot. at 6-7, 10, *citing* People v. NL Indus., 152 Ill. 2d 82, 102-103 (1992) (concerning civil penalties in civil actions); Mot. to Dis. at 3, 8, *citing* People v. NL Indus., 152 Ill. 2d 82, 102-103 (1992).

Petco repeats its assertion that Section 13-205 should apply to any action brought by the People. Mot. at 4-5; *see* Mot. to Dis. at 3, 9, 13. Petco's motion to dismiss raised the threshold question of whether a People's enforcement action brought before the Board is a "civil action" to which Section 13-205 applies. Mot. to Dis. at 2 ("An enforcement action under the Act is a civil action, regardless of the venue in which it is filed or appealed."), 9-10; Mot. at 5-7, 9-10 (arguing that a private versus public complainant makes no difference for Section 13-205). The Board agreed to decide the threshold question and found that the People's First Amended Complaint

filed with the Board is an administrative proceeding and not a "civil action," which is brought in court. The Board concluded that the First Amended Complaint is therefore not subject to the catch-all statute of limitations in Section 13-205 for "civil actions not otherwise provided for". People v. Petco, PCB 13-72, slip op. at 5.

The Board has already evaluated and ruled on the threshold applicability of Section 13-205 in its order. Because Petco's arguments were already raised and rejected, they cannot be bases for reconsideration.

Petco's "New Rule" Argument Does Not Establish That the Board Misapplied Existing Law

Petco also asks the Board to reconsider because it claims the Board's finding "creat[es] a new rule" that undermines uniform application of the Section 13-205 statute of limitations and its protections against stale claims. Mot. at 5. The Board interprets this as part of Petco's argument that the Board erred in not applying the express language of Section 13-205 to this Section 31 enforcement action brought by the State before the Board. However, Petco's policy argument fails to establish that the Board's determination that Section 31 enforcement actions brought by the State before the Board are not "civil actions" subject to Section 13-205.

Instead, Petco merely restates that the Board should recognize the concurrent jurisdiction of the Board and circuit courts to hear enforcement actions alleging violations of the Act, and accordingly find that, whether the action is brought by the People before the Board or in circuit court, it is a "civil action" subject to Section 13-205. *See*, Mot. at 2, 4, 10; Mot. to Dis. at 2, 8. Petco's only new assertion, that the Board's order cited inapposite federal caselaw to support its determination that actions brought before the Board are administrative proceedings rather than civil actions, also relies on Petco's original venue selection argument. *See* Mot. at 4, 6-7 (arguing that because the Board and circuit courts have concurrent jurisdiction over Section 31 enforcement actions, they are "civil actions" to which Section 13-205 applies whether the State files with the Board or circuit court); *see also* Mot. to Dis. at 8-9. Petco does not challenge the court's reasoning in the *Township of Bordentown* or *Wind River Mining* determinations that proceedings brought before state agencies, rather than in courts, were administrative proceedings rather than civil actions. People v. Petco Petroleum Corporation, PCB 13-72, slip op. at 4 (Aug. 22, 2024), *citing* Twp. of Bordentown v. FERC, 903 F.3d 234, 267 (3d Cir. 2018); Wind River Mining Co. v. U.S., 946 F.2d 710, 712 (9th Cir. 1991)[2]; Mot. at 8. Petco attempts to distinguish these cases by arguing that these federal courts did not address the application of a statute of limitations for civil actions or the resulting policy implications of that application in either forum. Mot. at 8. Yet, Petco's review does not undermine the courts' characterizations of administrative proceedings conducted by state agencies. It just reiterates Petco's argument that Section 13-205 should apply to Section 31 enforcement actions brought by the State before the Board to avoid allowing the State to bring stale claims before the Board that Petco contends would be barred in circuit court. Mot. at 1, 8-10; Mot. to Dis. at 12, 16-17.

[2] A typographical error in the Board's August 22, 2024 order incorrectly cited the plaintiff in this case as "Wood River Mining Co.". The Board corrects this to "Wind River Mining Co.".

The Board finds that Petco does not establish that the Board misapplied existing law to create a "new rule" that would undermine Section 13-205's application to "civil actions not otherwise provided for". Petco's motion challenges the Board's determination of the threshold question of Section 13-205 applicability, yet in support of its position, merely restates the arguments of its original motion to dismiss. Because the Board already evaluated these arguments and made a determination on them, the Board finds Petco does not establish a basis for reconsideration.

CONCLUSION

Petco's motion for reconsideration alleges a recognized ground for reconsideration, but to support it merely repeats the argument on the applicability of Section 13-205 to enforcement actions before the Board that the Board rejected in its prior order. Petco fails to substantiate a new argument for reconsideration. The Board therefore denies Petco's Motion to Reconsider the Board's August 22, 2024 order, and directs the parties to proceed as directed by that order.

Petco is directed to file its amended affirmative defenses by January 6, 2025, which is the first business day after 30 days from the date of this order.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on December 5, 2024, by a vote of 4-0.

Don A. Brown

Don A. Brown, Clerk
Illinois Pollution Control Board

Exhibit B

ILLINOIS POLLUTION CONTROL BOARD
August 22, 2024

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 13-72
	)	(Enforcement - Water)
PETCO PETROLEUM CORPORATION,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by J. Van Wie):

On June 21, 2013, the People of the State of Illinois (People), by the Attorney General, filed a 61-count complaint against Petco Petroleum Corporation (Petco). The complaint concerns Petco's operation of numerous oil production facilities located in or near Fayette County, including production wells, injection wells, and pipelines. On August 31, 2022, the People filed a Motion for Leave to File First Amended Complaint (Am. Comp.), which, among other things, added Counts 62 through 73.

On January 18, 2023, Petco filed a Motion to Dismiss Counts 62 Through 73 of the First Amended Complaint, and Answer, Affirmative, and Additional Defenses to the First Amended Complaint. On March 10, 2023, the People filed their response to Petco's Motion to Dismiss Counts 62 Through 73 of the First Amended Complaint, as well as a Motion to Strike Petco's Affirmative and Additional Defenses.

The Board has ruled on the People's motion to strike, leaving only Petco's motion to dismiss pending in this matter.[1] This order addresses the motion to dismiss and the remaining portion of Petco's Affirmative Defense H, which deals with the same statute of limitations argument raised in the motion to dismiss.

In this order, the Board first provides an abbreviated procedural history of the filings related to the motion, and grants the parties leave to file their replies to the motion. The Board then summarizes the parties' arguments on Petco's motion to dismiss the twelve additional counts of the Amended Complaint on the grounds that the statute of limitations bars these claims. Next, the Board provides the legal standard for motions to dismiss. The Board then turns to its discussion of the parties' arguments. The Board concludes to deny Petco's Motion to Dismiss Counts 62 through 73 of the First Amended Complaint. The Board also strikes the remaining portion of Affirmative Defense H with prejudice as it pertains to the statute of limitations raised in the Motion to Dismiss.

[1] *See* People v. Petco Petroleum Corporation, PCB 13-72 (Aug. 8, 2024) (reserving ruling on the portion of Petco's Affirmative Defense H that deals with the statute of limitations argument raised in Petco's Motion to Dismiss).

Exhibit B

ABBREVIATED PROCEDURAL HISTORY

On January 18, 2023, Petco filed a document consisting of its Motion to Dismiss Counts 62 through 73 of the First Amended Complaint (Mot.), and its Answer, Affirmative and Additional Defenses (Aff. Defs.). On March 10, 2023, the People filed a document consisting of their Response in Opposition to Petco's Motion to Dismiss (Resp.), a Motion to Strike Respondent's Affirmative and Additional Defenses to the First Amended Complaint and Immaterial Matter, and Reply to Respondent's Answer to the First Amended Complaint.[2]

On April 19, 2023, Petco filed its Reply to the People's Response to its Motion to Dismiss (Reply), along with a motion for permission to file. The People filed their Sur-Reply to this Response (Sur-Reply) on June 1, 2023, along with a motion for leave to file. On July 10, 2023, Petco filed its Sur-Sur-Reply to the People's Reply (Sur-Sur-Reply), again along with a motion for permission to file.

Also on July 10, 2023, Petco filed its Motion for Oral Argument on its Motion to Dismiss Counts 62 Through 73 of the First Amended Complaint. On July 21, 2023, the People responded to Petco's Motion for Oral Argument. On January 18, 2024, the Board denied Petco's request for oral argument.

Petco's Motion for Permission to File Reply to People's Response in Opposition to Motion to Dismiss / People's Motion for Leave to File Sur-Reply to Petco's Reply / Petco's Motion for Permission to File Sur-Sur-Reply to People's Sur-Reply

Petco's Motion for Permission to File a Reply to the People's Response to the Motion to Dismiss, the People's Motion for Leave to File a Sur-Reply to Petco's Reply, and Petco's Motion for Permission to File a Sur-Sur-Reply to the People's Reply are granted. Petco's reply and sur-sur-reply argued new caselaw in support of Petco's argument on statutory interpretation. The People's sur-reply addressed specific arguments in the reply, including specific arguments on the caselaw raised in Petco's reply. The Board considers the information provided in these pleadings helpful to reaching its determination.

APPLICABLE LEGAL STANDARDS

In ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See*, *e.g.*, Beers v. Calhoun, PCB 04-204, slip op. at 2 (July 22, 2004); *see also* In re Chicago Flood Litigation, 176 Ill. 2d 179, 184, 680 N.E.2d 265, 268 (1997); Board of Education v. A, C & S, Inc., 131 Ill. 2d 428, 438, 546 N.E.2d 580, 584 (1989). "To determine whether a cause of action has been stated, the entire pleading must be considered." LaSalle National Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297, 1303 (2nd Dist. 1993), citing A, C & S, 131 Ill. 2d at 438, 546 N.E.2d at 584 ("[T]he whole complaint must be considered, rather than taking a myopic

[2] The procedural history on the People's Motion to Strike and related responsive filings is addressed in the Board's August 8th order on that motion. *See supra* fn. 1.

view of a disconnected part[,]" A, C & S, quoting People ex rel. William J. Scott v. College Hills Corp., 91 Ill. 2d 138, 145, 435 N.E.2d 463, 466-67 (1982)).

"[I]t is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief." Smith v. Central Illinois Regional Airport, 207 Ill. 2d 578, 584-85, 802 N.E.2d 250, 254 (2003); *see also* Chicago Flood, 176 Ill. 2d at 189, 680 N.E.2d at 270 ("[T]he trial court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party."); People v. Peabody Coal Co., PCB 99-134, slip. op. at 1-2 (June 20, 2002); People v. Stein Steel Mills Services, Inc., PCB 02-1, slip op. at 1 (Nov. 15, 2001).

Section 101.506 of the Board's procedural rules generally provides for "motions to strike, dismiss, or challenge the sufficiency of any pleading filed with the Board." 35 Ill. Adm. Code 101.506. Further, the Board "may entertain any motion the parties wish to file that is permissible under . . . the Code of Civil Procedure." 35 Ill. Adm. Code 101.500(a). The Board may look to the Code of Civil Procedure "for guidance where the Board's procedural rules are silent." 35 Ill. Adm. Code 101.100(b).

DISCUSSION

Petco moves to dismiss Counts 62 through 73 of the Amended Complaint on the grounds that they are barred by the five-year statute of limitations in Section 13-205 of the Illinois Code of Civil Procedure (735 ILCS 5/13-205 (2022)) (Section 13-205) for "civil actions". Mot. at 2. Petco argues that this case lacks unique circumstances that have previously led the Board to evaluate the statute of limitations question on a case-by-case basis. *Id.* at 10. Instead, Petco asserts that the Board should consider the language of the statute of limitations at issue and determine that an enforcement action brought under the Environmental Protection Act (415 ILCS 5 (2022)) (the Act) is a "civil action" under Section 13-205, regardless of venue (i.e., Board or circuit court). Mot. at 2, 9. Petco asserts that there is no need to analyze whether the public interest exception to the statute of limitations exists for the government's action, arguing that that analysis is only proper when dealing with a common law statute of limitations, not when dealing with statutory text, such as is the case here. *Id.* at 11-12. Petco argues that the public interest exception must be codified in statute to apply, so Section 13-205's catch-all language on civil actions applies to the government because the Act does not codify any exceptions. Reply at 4; Sur-Sur-Reply at 3-4.

The People disagree, first contending that Petco uses the incorrect legal standard for its motion to dismiss because any enforcement action brought by the government in the public interest is not a "civil action" to which a statute of limitations applies. Resp. at 5. Specifically, the People assert that there is no statute of limitations that applies to enforcement actions brought by the State pursuant to Section 31 of the Act. *Id.* at 6, *citing* People of the State of Ill. v. John Crane Inc., PCB 01-76, slip op. at 5 (May 17, 2001). The People contend that Section 13-205 does not expressly apply to government entities. Resp. at 10, 19. The People argue, alternately, that the statute of limitations in Section 13-205 also fails to apply using the common law standard, which applies an analysis of whether the government entity is acting in the public interest to determine if the government's action is immune to a statute of limitations. *Id.* at 6; *see*

also Sur-Reply at 5, *citing* Pielet Bros. Trading, Inc. v. Pollution Control Bd., 110 Ill. App. 3d 752 (5th Dist. 1982). The People argue that governmental immunity to the statute of limitations has been found to apply both under statute and common law where the government is acting in the public interest. Sur-Reply at 5, *citing* City of Chicago v. Latronica Asphalt & Grading, Inc., 346 Ill. App. 3d 264 (1st Dist. 2004).

The parties have addressed significant caselaw on the public interest exception analysis on whether government actions have immunity to a statute of limitations. However, the Board acknowledges Petco's initial point that, when considering Section 13-205 in the past, the Board has not decided the threshold question of whether a Section 31 enforcement action under the Act is a "civil action" subject to the statute of limitations found in Section 13-205. *See* Mot. at 2, 9. Instead, the Board has taken the approach of *if* Section 13-205 applied, it did not bar the complaint for various reasons in that specific case, such as governmental limitations immunity or the discovery rule. *See*, *e.g.*, People v. Amsted Rail Co., PCB 16-61, slip op at 3-4; Johns Manville v. IDOT, PCB 14-3, slip op at 15-17 (Dec. 15, 2016). The Board finds that it is appropriate here to determine whether an enforcement action brought before the Board under Section 31 of the Environmental Protection Act (415 ILCS 5/31 (2022)) is a "civil action" subject to the express language of Section 13-205 of the Code of Civil Procedure (735 ILCS 5/13-205 (2022)).

The People's first amended complaint was brought before the Board on behalf of the People under Section 31 of the Act, on the Attorney General's own motion and at the request of Illinois Environmental Protection Agency (IEPA). *See generally*, First Am. Comp.; 415 ILCS 5/31 (2022). Regardless of whether it is by the Attorney General on behalf of the People or by a private citizen, an enforcement action brought under Section 31 of the Act before the Board is not a "civil action" within the meaning of Section 13-205's catch-all text, "and all *civil actions* not otherwise provided for." 735 ILCS 5/13-205 (2022) (emphasis added). Rather, filing a complaint with the Board under Section 31 initiates an administrative proceeding – not a "civil action," which is brought in court. In NL Industries, the Illinois Supreme Court held that the Board and the circuit courts have concurrent jurisdiction to hear cost-recovery actions. *See* People v. NL Industries, 152 Ill. 2d 82, 99-101 (1992). As support for this holding, the Supreme Court highlighted the Act's text that distinguished between the Board and the courts, including Section 22.2a(a) ("an administrative action brought before the Board *or a civil action brought before a court*"); and Section 33(d) ("final order issued by the Board pursuant to Section 33 of this Act may be enforced *through a civil action* for injunctive or other relief"). *Id.* at 99-101 (emphasis added); *see also* 415 ILCS 5/45(e) (2022).

Federal courts interpreting the meaning of "civil action", as used in federal statutes, have found that the term excludes administrative proceedings. *See*, *e.g.*, Twp. of Bordentown v. FERC, 903 F.3d 234, 267 (3d Cir. 2018) ("Our review assures us that a 'civil action' refers only to civil cases brought in courts of law or equity and does not refer to hearings or other quasi-judicial proceedings before administrative agencies."); Wood River Mining Co. v. U.S., 946 F.2d 710, 712 (9th Cir. 1991) ("an administrative proceeding is not a 'civil action' within the meaning of [28 U.S.C. § 2401, a statute of limitations].")

The Board does not find persuasive Petco's statement that "[a]n enforcement action under the Act is a civil action, regardless of the venue in which it is filed or appealed." Mot. at 2. Petco cites Stateline Recycling to argue that "actions brought by the State to enforce provisions of the Act are 'civil enforcement actions.'" *Id.* at 8, *citing* People v. Stateline Recycling, LLC, 2020 IL 124417, ¶1. But Stateline is distinguishable from this action because the AG in Stateline filed the action in *circuit court*, not before the Board. Stateline Recycling, LLC, 2020 IL 124417, ¶¶ 1-2, 12-14. And although the Fifth District Appellate Court's 1982 Pielet Bros. decision did involve a State complaint before the Board under Section 31, at issue was a different statute of limitations—one that used the word "actions" (current Section 13-202), not "civil actions." *See* Pielet Bros. Trading, Inc. v. Pollution Control Bd., 110 Ill. App. 3d 752 (5th Dist. 1982). Pielet Bros. therefore is not support for finding that a Section 31 action is a "*civil* action."

Lastly, it is not necessary here for the Board to undertake the public rights exception analysis raised by the People to determine whether the counts of the Amended Complaint are subject to the Section 13-205 statute of limitations. The Board finds that in this instance it is sufficient to find that the People's Amended Complaint is not a "civil action" subject to the catch-all statute of limitations in Section 13-205. Filing a complaint with the Board pursuant to Section 31 initiates an administrative proceeding, not a civil action, which is brought in court. Therefore, the Board finds that the catch-all text of Section 13-205 that applies to "civil actions" does not apply to this action.

Because an enforcement action brought before the Board under Section 31 of the Environmental Protection Act is not a "civil action" for purposes of Section 13-205 of the Code of Civil Procedure, the Board finds that the additional counts of the People's Amended Complaint are not a "civil action" barred by Section 13-205's catch-all statute of limitations. Accordingly, the Board denies Petco's Motion to Dismiss. As such, the Board also strikes with prejudice the remaining portion of Petco's Affirmative Defense H that pertains to the same Section 13-205 statute of limitations argument raised in the motion to dismiss. *See* Aff. Defs., H.

ORDER

1. The Board denies Petco's Motion to Dismiss Counts 62 Through 73 of the First Amended Complaint.

2. The Board strikes the remaining portion of Affirmative Defense H pertaining to the statute of limitations argument raised in the Motion to Dismiss with prejudice.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 22, 2024, by a vote of 4-0.

Don A. Brown

Don A. Brown, Clerk
Illinois Pollution Control Board