BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

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PLEASE TAKE NOTICE that on this 19th day of February, 2025, the attached Petco Petroleum Corporation's Response in Opposition to Motion to Strike Respondent's Amended Affirmative and Additional Defenses, which is attached and herewith served upon you on behalf of Respondent.

Respectfully submitted,

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PETCO PETROLEUM CORPORATION,	)	
	)	
Respondent.	)	

RESPONSE IN OPPOSITION TO MOTION TO STRIKE RESPONDENT'S AMENDED AFFIRMATIVE AND ADDITIONAL DEFENSES TO THE FIRST AMENDED COMPLAINT

COMES NOW Respondent Petco Petroleum Corporation ("Petco"), by its undersigned counsel, and for its Response in Opposition to the Motion to Strike Respondent's Amended Affirmative and Additional Defenses to the First Amended Complaint, states as follows:

INTRODUCTION

The State again moves to strike each of Petco's affirmative and additional substantive defenses ("Amended Defenses"), despite this case being twelve years old, involving seventy-three fact-intensive counts, and years of interactions between Petco and two state agencies with concurrent jurisdiction over the operations involved in this case. Pursuant to the Board's Order dated August 8, 2024 ("August 8th Order"), Petco repled its Amended Defenses with the detail necessary to fairly apprise the State of the nature and grounds of Petco's defenses—providing specific factual support for their application to the allegations in the First Amended Complaint. In accordance with the Board's regulations and Illinois law, the Amended Defenses properly raise additional and affirmative matter by which the State's claims may be defeated.

First, the additional facts and details in the Amended Defenses do not violate the August 8th Order or create "new" defenses requiring striking, as the State asserts. All of the Amended

Defenses stem from and can be traced to the defenses raised in Petco's Affirmative and Additional Defenses pled in response to the Amended Complaint ("Original Defenses").

Second, Petco is not required to draw a hyper-technical distinction between which defenses are affirmative defenses versus those that are additional defenses. Rather, Petco must fairly apprise the Board of the factual and legal predicates for Petco's defenses against the claims in the State's First Amended Complaint, which the Amended Defenses accomplish.

Third, the facts repled in the Amended Defenses meet the fact-pleading requirements and legal standards set forth in Board and Illinois precedent. Although this case has been on the Board's docket for over a decade, no discovery has occurred on any of the seventy-three counts or Petco's defenses. Like any other respondent before the Board, Petco must plead its defenses with specificity, which it has done, then substantiate its defenses with facts and evidence revealed through the discovery and prosecution of this case beyond the pleadings stage.

Finally, each of Petco's Amended Defenses are legally viable and pled with the requisite factual details. The defenses plead facts about, for example: i) specific counts in which the statutory standard for liability may not be met due to causation issues; ii) the substantial time horizon during which this case has not been prosecuted and how this prejudices Petco; and iii) the actions and fees that Petco incurred in enforcement actions initiated by the Illinois Department of Natural Resources ("IDNR") regarding the same operations at issue in this case and the associated circumstances limits the relief available to the State here. Petco's Amended Defenses are factually and legally sufficient, such that the Motion to Strike should be denied.

LEGAL STANDARD

The Board's regulations provide that "[a]ny facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the

affirmative defense could not have been known before hearing." 35 Ill. Adm. Code 103.204(d). "The party pleading an affirmative defense need not set out evidence, so long as the party alleges the ultimate facts." *Elmhurst Mem'l Healthcare v. Chevron U.S.A. Inc.*, PCB 09-066, 2011 WL 2838628, at *26 (June 7, 2011). Respondents also may plead defenses in accordance with 735 ILCS 5/2-613. *See People of the State of Ill. v. Inverse Investments L.L.C.*, PCB 11-79, 2012 WL 2469685, at *5 (June 21, 2012). Section 5/2-613(d) provides: "any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply." 735 ILCS 5/2-613.

Focused on the principles of disclosure and fair notice, defenses need only "specify the disputed legal issues and inform the Complainant and the Board of the legal theories that will arise." *Inverse Investments, L.L.C.*, PCB 11-79, 2012 WL 2469685, at *5 (citing *Handelman v. London Time Ltd.*, 124 Ill. App.3d 318, 464 N.E.2d 710 Ill. Dec. 806 (1st Dist. 1984)). "[P]leadings are not intended to create technical obstacles to reaching the merits of a case at trial; rather, their purpose is to facilitate the resolution of real and substantial controversies." *La Salle National Trust, N.A. v. Village of Mettawa*, 249 Ill. App. 3d 550, 557 (2nd Dist. 1993).

ARGUMENT

I. Petco's Affirmative and Additional Defenses Meet the Requisite Pleading Standards and Add Factual Details Consistent with the Board's August 8th Order

The State contends that Petco's Defenses i) fail to relate to Petco's Original Defenses or are otherwise new defenses, ii) do not distinguish between defenses which are affirmative versus additional defenses, and iii) lack the factual necessity to withstand its Motion to Strike at this stage of the proceeding. The State is incorrect on each point.

First, each of Petco's Amended Defenses relate to the Original Defenses. Petco has made minor modifications to the letter designating the defenses and has added factual detail consistent

with the Board's August 8th Order. To demonstrate the direct relationship between the pled defenses, the following list pairs each Amended Defense to the associated Original Defenses:

- **Amended Defense A** stems from Original Defense H with detail added on the application of the five-year statute of limitations set forth in 735 ILCS 5/13-205 to the specific counts of the First Amended Complaint.
- **Amended Defense B** stems from Original Defense K with detail added on the specific counts First Amended Complaint which, as pled, demonstrate that Petco was not the cause of the alleged violation with reference to specific counts in the First Amended Complaint.
- **Amended Defense C** stems from Original Defense I, but focuses on the doctrine of laches with specific factual detail added on the substantial time over which this action stretched, how the passage of time prejudices Petco, and which Counts in the First Amended Complaint allege violations which occurred over nine years prior to the filing of the First Amended Complaint.
- **Amended Defense D** stems from Original Defenses D, E, and F, each of which pertained to the IDNR enforcement activities under the Illinois Oil and Gas Act ("IOGA") regarding the same operations at issue in this Board action and the actions taken by Petco per the IDNR's authority and direction. Petco added significant factual details including on Petco's implementation of compliance recommendations from a report prepared by Blackshare Consulting pursuant to an agreement with the IDNR. This defense avers that any injunctive relief which may be granted in this action should be limited by and consistent with the agreement with the IDNR and associated implementation elements.

The additional details comply with the Board's August 8th Order and do not render this an "entirely new defense" as claimed by the State (Motion at p. 11).

- **Amended Defense E** also stems from Original Defenses D, E, and F regarding the IDNR enforcement activities and Petco's implementation of the agreement with the IDNR. This defense seeks a set-off of any monetary penalties assessed in this case for the substantial costs which Petco has incurred (over $2 million not including labor costs) implementing the agreement with the IDNR.
- **Amended Defense F** stems from Original Defenses D, E, F, and J regarding the IDNR enforcement activities and Petco's bond postings in for administrative appeals of the IDNR Director's Decisions. Any penalties assessed in the present action should be set off by the amounts posted as bonds for the operations corresponding to the State's counts. Petco's defense identifies specific IDNR case numbers for which bonds have been paid.
- Finally, **Amended Defense G** also stems from Original Defenses D, E, F, and J. In this defense, Petco invokes the doctrine of accord and satisfaction regarding the same bond payments addressed in Amended Defense F. Under that doctrine, any penalties assessed in the present action should be reduced by the amounts posted as bonds for the operations corresponding to the State's counts. Petco's defense again references the specific IDNR case numbers for which bonds have been paid. The additional details comply with the Board's August 8th Order and do not render this an "new defense" as claimed by the State (Motion at p. 17).

As such, the State's contention that Petco's Amended Defenses are unrelated to the Original Defenses is without merit.

Second, Petco is not required to precisely categorize each defense as an affirmative versus additional defense as contended by the State (Motion at p. 5). "[P]leadings are not intended to create technical obstacles to reaching the merits of a case at trial; rather, their purpose is to facilitate the resolution of real and substantial controversies." *La Salle National Trust, N.A. v. Village of Mettawa*, 249 Ill. App. 3d 550, 557 (2nd Dist. 1993). Respondents before the Board may plead defenses in accordance with 735 ILCS 5/2-613. *Inverse Investments L.L.C.*, PCB 11-79, 2012 WL 2469685, at *5. Section 5/2-613(d) specifically states: "any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply." 735 ILCS 5/2-613. Accordingly, the principles of disclosure and fair notice dictate that Petco plead its defenses to provide disclosure and avoid unfair surprise. To that end, defenses only need "specify the disputed legal issues and inform the Complainant and the Board of the legal theories that will arise." *Inverse Investments, L.L.C.*, PCB 11-79, 2012 WL 2469685, at *5. Petco's Amended Defenses satisfy these standards.

Lastly, the State's persistent effort to strike Petco's Amended Defenses on the grounds of insufficient factual detail is unjustified. The State brings its Motion pursuant to the Board rule covering motions to strike (35 Ill. Adm. Code 101.506), not the Board rule for Motions for Summary Judgment (35 Ill. Adm. Code 101.516). Yet, the State's Motion to Strike seeks a heightened pleading standard for the Amended Defenses, which impermissibly would require Petco to establish facts and evidence in such detail so as to effectively convert this pre-discovery pleading into a summary judgment proceeding. This is inconsistent with the Board rules and Illinois practice. *See Rolf Schilling v. Gary D. Hill*, PCB 10-100, 2010 WL 4566094, at *8 (Nov. 4, 2010) (under Illinois' fact-pleading standards, which do not require a party to set out its

evidence, the Board must construe the pleadings "liberally to do substantial justice between the parties."). The Motion to Strike should be denied.

II. Each Amended Defense Meets the Requisite Pleading Standards

A. Amended Defense A for the Five-Year Statute of Limitations (735 ILCS 5/13-205)

The State's contention that the statute of limitations issue is a "matter already having been fully litigated" (Motion at p. 6) is untrue. The issue is live before the Board via the pending Motion for Certification of Question for Interlocutory Appeal (filed on December 19, 2024). The Amended Defenses specifically explained Petco's justification for reasserting the defense, as follows:

> On August 22, 2024, the Board issued its Order denying Petco's Motion to Dismiss based on the five-year statute of limitations in 735 ILCS 5/13-205 and struck the associated affirmative defense with prejudice. On December 5, 2024, the Board issued an Order that denied reconsideration and affirmed the denial of Petco's Moton to Dismiss. On December 19, 2024, Petco filed a Motion for Certification of Question for Interlocutory Appeal. Petco herein reasserts this affirmative defense with additional specificity from the First Amended Complaint, so that Petco may preserve the potential viability of this affirmative defense while the Motion for Certification of Question for Interlocutory Appeal is pending and ultimately during appeal if certification is granted.

(Amended Defenses at p. 1, n.2). The Motion to Strike completely ignores Petco's express rationale for seeking to preserve the potential viability of the statute of limitations defense and makes no mention of the pending Motion for Certification. Until the Board and/or an Illinois court issues a final ruling on the statute of limitations issue, Petco is entitled to assert and preserve this affirmative defense. Disclosure, providing fair notice and facts, and preservation of affirmative matters are the indeed the point of pleading affirmative and additional defenses.

As set forth in the Motion for Certification, 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 an issue of first impression in the State of Illinois. In denying Petco's Motion to Dismiss and Motion to Reconsider, the Board held for the first time 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." (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." (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 interpretation effectively eliminates any statute of limitations for Board enforcement actions, creating an inconsistent and unfair system where respondents face indefinite liability, while identical cases in circuit court are time-barred. The holding undermines concurrent jurisdiction between the courts and Board pursuant to the Act and erodes the principles underlying statutes of limitations. Accordingly, the statute of limitations issue here has not yet been resolved. The Board should deny the Motion to Strike as to this defense.

B. Amended Defense B for Causation Issues

In the August 8th Order, the Board found that the prior version of this defense (designated as defense K in the Original Defenses) was a legal conclusion not supported by sufficient factual details. In the present Defense B, Petco adds the requisite factual detail with reference to the specific factual allegations included in the First Amended Complaint and Petco's

Answer with respect to: Count XXIV (alleged release was "potentially due to pressure caused by tree roots"); Count XLII (alleged release may have been "due to vandalism"); Count LVII (alleged release was caused "when high surface waters tore a tree free of the creek bank [and it later] dropped onto and broke the flow line at the creek crossing"; and, Count VII (Petco answered that an alleged release was due to damage from a severe windstorm). For each of those counts, Petco is entitled to discover and plead facts showing that factors outside of Petco's control caused or contributed to the alleged releases and thus Petco did not violate Section 12(a) of the Act, 415 ILCS 5/12.

By its terms, the text of the statute requires the State to make a showing that a respondent "cause[d] or threaten[ed or allow[ed] the discharge." *Id.* Liability under the statute is found when [the State] shows the alleged polluter had the capability of controlling the pollution or at least had control of the premises where the pollution occurred." *People of the State of Ill. v. Lincoln, Ltd.*, 410 Ill. Dec. 534, 543, 70 N.E.3d 661, 671 (1st Dist. 2016); *see also Phillips Petroleum Co. v. Ill. Env't Prot. Agency*, 72 Ill. App. 3d 217, 220, 390 N.E.2d 620, 623 (2nd Dist. 1979) (finding there was insufficient evidence to hold the owner of a tank car of anhydrous ammonia that punctured while under the control of a transporting entity open violated the Act."). The State draws a hair-splitting distinction between tort and statutory liability that is belied by the terms of Petco's Defense B, which clearly raise the issue of whether the facts surrounding the alleged release give rise to a violation of the statute due to the level of control Petco exercised over the circumstances of the release. In several instances as alleged in the First Amended Complaint, addressed in Petco's Answer, and which are to be discovered, Petco did not have control over the "source that caused, threatened, or allowed the pollution." Petco should not be liable because it did not exert the "control" required for finding a violation of the Act. Petco

adequately has pled and should have the opportunity to demonstrate that Complainant fails to state a claim with respect to several of the counts in its First Amended Complaint specifically identified by this defense.

C. Amended Defense C for Laches

The Board has denied multiple motions to strike filed against the affirmative defense of laches which were pled by defendants with a similar degree of factual detail as Petco's defense here. For instance, in *People v. Nacme Steel Processing, LL*C, PCB 13-12, 2013 WL 2997070 at *6 (June 6, 2013), the defendant argued that the complaint was barred by laches because the State had "known for years of the facts underlying its claim but failed to act until years later" and that the delay in taking action could prejudice the defendant by exposing it to greater penalty amounts. The State's motion to strike raised substantially similar arguments as those raised here: that the defendant failed to plead sufficient fact showing an unreasonable delay and prejudice, and that the laches defense is disfavored when raised against the government. *Id.* at *8. The Board denied the State's motion, finding that "while not specific, [defendant] has alleged sufficient facts to raise the affirmative defense of laches" and that "the Board cannot decide on the merits of the defense *before hearing the evidence*." *Id.* at 12-13 (emphasis added).

In its Defense C, Petco pleads the requisite facts supporting a laches defense: (a) that the state waited nine years to file its First Amended Complaint, a substantial period of time that demonstrates a lack of due diligence in prosecuting its claims, and (b) that "Petco is prejudiced by these circumstances because the passage of time risks compromising evidence that may support Petco's defense by rendering witnesses no longer accessible and/or diminishing the completeness of witness memories, and leading to the loss of pertinent information and/or documents." The State's contention that Petco fails to plead how the passage of time prejudices

Petco is plainly contradicted by the text of the defense. Further, without discovery, it is premature to assess the full extent of prejudice suffered by Petco due to the State's delay in moving this action forward. Petco's Defense C is pled in compliance with the requisite standards and the Board should deny the State's Motion as to this defense.

D. Amended Defense D for Injunctive Relief Issues

The State argues that enforcement actions taken by the IDNR are irrelevant to this case because the IDNR and the IEPA derive their authority from separate statutes and enforce different regulatory frameworks. The State further contends that, because the IDNR lacks authority to enforce the Act, any actions Petco has taken in response to the IDNR's enforcement should not impact the relief sought in this proceeding. However, this argument disregards the reality that the two agencies have overlapping regulatory authority over Petco's operations, as explicitly recognized in the agencies' Memorandum of Agreement ("MOA") (which the State attached as Exhibit A to its March 10, 2023 State Motion to Strike).

While the IEPA and the IDNR derive their authority from different statutes, the agencies exercise concurrent jurisdiction over Petco's operations. Were that not the case, the MOA would be unnecessary. The MOA acknowledges that the IEPA is responsible for enforcing the Act, while the IDNR enforces permit violations under its regulatory framework. However, it also explicitly requires coordination between the agencies, including holding regular quarterly meetings, preparing reports on MOA implementation, and sharing information. This recognition of overlap in regulatory oversight underscores that neither agency operates in complete isolation from the other.

The MOA does not address a situation like the present case, where the IDNR has already pursued enforcement against Petco for the same alleged releases of oil and brine that give rise to the IEPA's claims under the Act. The State's argument that the IDNR's enforcement is

irrelevant to this case ignores that the same alleged events and constituents are at issue. Petco has already taken remedial action and made payments to the IDNR and thereby the State, which should be considered in determining the scope and nature of liability, as well as the monetary and injunctive remedies sought in this proceeding.

Petco's Defenses D, E, and F give color to the State's claims and introduce additional affirmative matter regarding the appropriate scope of relief. These defenses directly challenge the State's attempt to impose duplicative and punitive penalties and injunctive measures based on the same factual allegations addressed in the IDNR enforcement. The Motion to Strike should be denied.

E. Amended Defense E for Set-Off Based on Expenses to Implement Blackshare Recommendations

A setoff may be pled as an affirmative defense "when it is based on a transaction independent of the plaintiff's cause of action." *Lake County Grading Co. v. Advance Mechanical Contractors, Inc.*, 654 N.E.2d 1109, 1118 (Ill. App. 1995). A setoff specifically seeking a reduction in damages due to such extrinsic matter is appropriately pled as an affirmative defense. *Decker v. St. Mary's Hosp.*, 266 Ill. App. 3d 523, 528, 639 N.E.2d 1003, 1007 (1994), *overruled on other grounds by Star Charters v. Figueroa*, 192 Ill. 2d 47, 733 N.E.2d 1282 (2000); *accord Hoagland v. Armor*, No. 17-cv-3046, 2017 WL 4547913, at *3 (C.D. Ill. Oct. 12, 2017) (finding setoff was properly brought as an affirmative defense where the right to setoff concerned allegations outside the plaintiff's prima facie case and could not be raised by denials alone).

Petco's request for a set-off is appropriate because the costs it incurred in implementing the compliance recommendations from Blackshare Consulting were directly related to the alleged violations at issue in this case. These expenditures—totaling over $2 million, excluding labor costs—were undertaken to address and mitigate the very environmental concerns raised by

the State in this enforcement action. Petco should be permitted to develop a full evidentiary record demonstrating the financial and operational impact of its compliance efforts and how they mitigate the penalties sought by the State in this case, which seeks to ignore the substantial corrective actions already completed. This attempt to disregard Petco's costs incurred with respect to the IDNR matters contradicts fundamental principles of fairness and proportionality in environmental enforcement. Ignoring these expenditures results in an unjust double recovery for the State—first by requiring costly compliance efforts through the IDNR, and second by imposing additional penalties through the IEPA, as if those compliance efforts had never occurred. Petco's defense is legally viable and the Motion to Strike should be denied.

F. Amended Defense F for Set Off Based on Bonds Paid by Petco to the IDNR to Appeal Director's Decisions

In the August 8th Order, the Board acknowledged that the issue raised by Petco in Original Defense E was "IDNR's prior prosecution that may relate to the well(s) at issue in this action" (August 8th Order at 9) and permitted Petco to replead this defense with greater factual support, which Petco has done. Amended Defense F pleads that any monetary penalties assessed in this action should be set-off by the amounts which Petco has posted as bond in administrative appeals of the IDNR Director's Decisions in relation to alleged violations of the Illinois Oil and Gas Act, 225 ILCS 725. Under 62 Ill. Adm. Code 240.180, any person seeking to contest a Director's Decision in which a civil penalty has been assessed must submit the assessed amount to the IDNR in order to appeal the Director's Decision. Defendant has tendered to the IDNR over Eight Hundred Thousand Dollars ($800,000) pursuant to Section 240.180 related to Director's Decisions issued to Petco through September 1, 2019 in Director's Decisions, including, but not limited to the IDNR case numbers specifically identified in Amended Defense F.

In Footnote 3 of the Motion to Strike, the State relies on 62 Ill. Adm. Code 240.1510, which defines a bond as "surety bond or other security in lieu thereof." However, this definition does not support the State's assertion that allowing a set-off against the civil penalty would somehow "devalue" the bonds. The purpose of these bonds is to secure financial responsibility for alleged violations, not to serve as an additional financial penalty. Failing to account for these prior financial commitments when assessing penalties would result in an inequitable outcome, effectively subjecting Petco to duplicative penalties for the same alleged violations. The Board should reject this attempt to artificially separate related enforcement actions, as doing so would undermine the fundamental principle that penalties should be proportionate and take into account prior compliance efforts. A set-off would not compromise the integrity of the bonds in any way but would appropriately recognize Petco's prior financial commitment to addressing the same underlying issues in both the IDNR and Illinois Attorney General enforcement actions. The Motion to Strike should therefore be denied.

G. Amended Defense G for Accord and Satisfaction Based on the Bond Payments

Under Amended Defense G for accord and satisfaction, any penalties assessed in the present action should be reduced by the amounts posted as bonds for the operations corresponding to the State's counts. Petco's defense again references the specific IDNR case numbers for which bonds have been paid, providing the requisite factual detail and notice to the state of the nature of Petco's defenses. Petco posted bond payments totaling over $800,000 in connection with appeals of IDNR enforcement actions under the Oil and Gas Act.

The payments were made in the context of a genuine dispute regarding penalties owed. These bond payments were made with the understanding that they could satisfy the IDNR's penalty demands, either during the pendency of the appeals or permanently. Petco should have

an opportunity to demonstrate the circumstances and intent of the parties surrounding the bond payments. Petco adequately has pled the ultimate facts and should have the opportunity to demonstrate that the civil penalties have been paid to the State and/or should be credited against the amounts sought in this matter to avoid double-collecting based on a common set of underlying alleged violations. Accordingly, the Motion to Strike should be denied.

CONCLUSION

For the reasons addressed herein, Respondent Petco Petroleum Corporation has met the requisite pleading standards and respectfully requests that the Board deny the Motion to Strike Respondent's Amended Affirmative and Additional Defenses to the First Amended Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 19, 2025, the foregoing was filed via the Board's electronic filing system and served via electronic mail on the clerk and all counsel of record.

/s/ Paul T. Sonderegger