BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB No. 13-72
	)	(Water - Enforcement)
PETCO PETROLEUM CORPORATION, an Indiana corporation,	)	
	)	
	)	
Respondent.	)	

NOTICE OF FILING

To: *See Service List*

PLEASE TAKE NOTICE that on the 29th day of May, 2025, the attached documents were filed with the Illinois Pollution Control Board, with true and correct copies attached hereto and which are hereby served upon you. The attached documents include the following:

- Notice of Filing
- Complainant's Response in Opposition to Respondent's Motion for Reconsideration of the Board's March 6, 2025 Order
- Service List and Certificate of Service

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
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Dated: May 29, 2025

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	)	
	)	
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COMPLAINANT'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION FOR RECONSIDERATION OF THE BOARD'S MARCH 6, 2025 ORDER

NOW COMES COMPLAINANT, People of the State of Illinois, by KWAME RAOUL, Attorney General of the State of Illinois ("Complainant"), by and through its undersigned counsel pursuant to Section 101.500(d) of the Illinois Pollution Control Board Regulations, 35 Ill. Adm. Code 101.500(d), and hereby submits this Response in Opposition to Respondent's Motion for Reconsideration of the Board's March 6, 2025 Order ("Response"), stating as follows:

I. INTRODUCTION

On April 4, 2025, Respondent Petco Petroleum Corporation ("Respondent" or "Petco") filed its Motion for Reconsideration of the Board's March 6, 2025 Order ("Motion for Reconsideration"). In its March 6, 2025 Order ("March 6, 2025 Order"), the Board denied Petco's previously filed December 19, 2024 Motion for Certification of Question for Interlocutory Appeal ("Motion for Certification"), which Petco filed after the Board entered its December 5, 2024 Order ("December 5, 2024 Order") denying Petco's September 16, 2024 Motion for Reconsideration of the Board's August 22, 2024 Order ("August 22, 2024 Order"), wherein the Board both denied Petco's Motion to Dismiss Counts 62 through 73 of the First Amended Complaint and struck with prejudice Petco's statute of limitations affirmative defense.

Petco seeks now for a third time to relitigate issues that have already been decided. Petco neither offers new evidence nor a change in law to support its request. Petco's Motion for Reconsideration should be denied.

II. LEGAL STANDARD

Section 101.902 of the Illinois Pollution Control Board Regulations, 35 Ill. Adm. Code 101.902 provides as follows:

> Section 101.902 Motions for Reconsideration
> In ruling upon 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. (See also Section 101.520.) A motion for reconsideration of a final Board order is not a prerequisite to appealing the final Board order.

III. ARGUMENT

A. Petco's Motion for Reconsideration fails to correct the deficient language of its proposed question for certification.

In the Board's August 22, 2024 Order, the Board stated that the underlying action is an administrative proceeding, and not a civil action, with the result that Section 13-205 of the Illinois Code of Civil Procedure ("Section 13-205") does not apply. (Aug. 22, 2024 Order at 5.) Petco's Motion for Certification, however, did not ask whether the underlying litigation should be classified as an administrative proceeding or a civil action; instead, Petco presumed the underlying action is a "civil enforcement action", and then sought review to determine if Section 13-205 applied, thereby implicitly requesting that the Board refute its own August 22, 2024 Order. (Mot. for Cert. at 4.)

In its March 6, 2025 Order, the Board observed that Petco's question "presumes a conclusion that refutes the Board's August 22, 2024 finding that the underlying litigation is an

'administrative proceeding'." (March 6, 2025 Order at 6.) In its Motion for Reconsideration, Petco states that an acceptable question would read as follows:

> "Whether the five-year statue of limitations in 735 ILCS 5/13-205, which applies to 'all civil actions not otherwise provided for,' applies to administrative proceedings filed before the Board pursuant to Section 5/31(d)(1) of the Act, 415 ILCS 5/31(d)(1)."

(Mot. for Reconsideration at 12-13.) Petco's approach is both procedurally and substantively improper. Procedurally, the motion currently on file before the Board is a "Motion for Reconsideration of the Board's March 6, 2025 Order"; that is, Petco is requesting that the Board reconsider its findings that are already in the record. Petco's effort to introduce new language, not previously on record, into the Motion for Reconsideration, is an improper attempt to conflate two opposing objectives into the same filing: asking the Board to reconsider a previous ruling, while simultaneously attempting to amend the proposed language that produced that ruling. Petco's request is improper, and should be denied.

Substantively, Petco's approach also fails. Petco's initial issue is not, as Petco claims in its Motion for Reconsideration, whether Section 13-205 applies to administrative proceedings; rather, Petco's issue is whether the underlying case *is appropriately characterized as an administrative proceeding*. As reflected in Respondent's filings, Petco's position is that the underlying case: (a) is a civil action, not an administrative proceeding; and therefore (b) subject to Section 13-205. Petco does not believe there is any distinction to the characterization; the Board, however, through its rulings indicates otherwise. Petco's formulated question remains substantively deficient, and Petco's request should be denied.

B. The Board has found previously that Section 13-205 does not apply to cases brought by the State before the Board pursuant to Section 31.

In Petco's Motion for Reconsideration, it expresses concern that the Board does not set forth its reasoning for finding that the public interest exception to Section 13-205 would apply to the underlying matter.

Petco fails to recognize that the Board has previously found that the Section 13-205 statute of limitations simply does not apply to actions brought by the State before the Board pursuant to Section 31 of the Act. *People of the State of Ill. v. John Crane Inc.* (May 17, 2001), PCB 01-76, slip op. at 5; *see also Pielet Bros. Trading, Inc. v. Pollution Control Bd.*, 110 Ill. App. 3d 752, 758 (5th Dist. 1982); *People v. Am. Disposal Co. and Consol. Rail Corp.* (May 18, 2000), PCB 00-67, slip op. at 3. See also *Complainant's Resp. in Opp. to Respondent's Mot. to Dismiss Cts. 62 through 73 of the First Am. Compl.*, at 6 (March 10, 2023). The Board's March 6, 2025 Order aligns with existing case precedent.

Petco fails to offer new evidence or a change in the law to warrant granting a motion for reconsideration pursuant to 35 Ill. Adm. Code 101.902. Petco's Motion for Reconsideration therefore should be denied.

C. The Board did not err in concluding that the public interest exception applies to the underlying case.

In its Motion for Reconsideration, Petco takes issue with the Board's examination of the public interest exception, noting the Board had previously declined to take up the issue. (Mot. for Reconsideration at 4-6.) While Petco is correct that the Board previously declined to examine the public interest exception in this case, Petco fails to recognize that Petco itself created the new circumstances which prompted the Board's present consideration of the public interest exception.

In its August 22, 2024 Order, the Board did not consider it necessary to examine the public interest exception to Section 13-205, because the Board found that Section 13-205 does not apply to "administrative proceedings". (Aug. 22, 2024 Order at 5.) Because of the Board's finding, the Board did not advance to considering the public interest exception at that time. *Id.*

Upon filing its Motion for Certification, however, Petco introduced a new standard of analysis into the situation, namely, the two-prong test for certification of a question for interlocutory appeal under Rule 308. Rule 308 sets forth that for certification to be warranted, two requirements must be present, namely: (1) an order containing a question of law involving substantial ground for a difference of opinion; and (2) whether an immediate appeal may materially advance the ultimate termination of the litigation.

In its March 6, 2025 Order, the Board examined both prongs of the Rule 308 test. When considering the first prong of the Rule 308 test, the Board found that: (a) an issue of first impression does not automatically rise to the level of a question that presents a substantial ground for a difference of opinion; (b) Petco's framing of its question was potentially improper; and (c) the question of whether a proceeding before the Board is a "civil action" or an "administrative proceeding" does not rise to the level of being a question that presents a substantial ground for a difference of opinion. (March 6, 2025 Order at 6-8.)

Only after reaffirming the initial findings of the August 22, 2024 Order did the Board go on to consider the public interest exception in its March 6, 2025 Order. In its analysis, the Board stated that even if the underlying case were found to be a "civil action", rather than an "administrative proceeding", the public interest exception would apply, and therefore yield the same result produced by the findings of the Board's March 6, 2025 Order, namely, a finding that the Section 13-205 statute of limitations does not apply. (March 6, 2025 Order at 6-7.)

The Board's consideration of the public interest exception did not occur in its August 22, 2024 Order, because its finding that the underlying case is an "administrative proceeding" not subject to Section 13-205 addressed the nonapplicability of the statute of limitations. The Board's consideration of the public interest exception in its March 6, 2025 Order occurred only in response to Petco's Motion for Certification—which raised Rule 308's two-prong test—when determining if there is a "substantial ground for a difference of opinion" as to the Board's previous decision.

Petco cannot both create new circumstances that compel the Board to contemplate the public interest exception after the Board's initial ruling, then claim that the Board improperly considered the public interest exception subsequent to the Board's initial ruling. The Board advanced to considering the public interest exception when determining if Rule 308 applied to justify an interlocutory appeal in response to Petco's Motion for Certification; Petco now complains at the Board's efforts to thoroughly consider Petco's Motion for Certification. Petco cannot have it both ways.

Further, while case law does set forth factors for consideration when examining the public interest exception, the Board has also recognized that the public interest exception applies to cases brought pursuant to the Act without setting forth the Board's full analysis. See, e.g., *People of the State of Ill. v. John Crane Inc.* (May 17, 2001), PCB 01-76, slip op. at 5 (finding "there is no statute of limitations that applies to enforcement actions brought by the State pursuant to Section 31 of the Act" citing *Pielet Bros. Trading, Inc. v. Pollution Control Bd.*, 110 Ill. App. 3d 752, 758 (5th Dist. 1982)).

Moreover, it is difficult to see how Petco might argue that Complainant is acting here to protect a private, rather than a public, right, and Complainant does not attempt to make that argument. Indeed, there is a strong public interest in protecting the public health and the

environment. *People v. Conrail Corp.*, 251 Ill. App. 3d 550, 560 (4th Dist. 1993). Article XI, Section 1, of the Illinois Constitution, IL. CONST. ART. XI, Sec. 1, provides as follows:

> The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy.

Accordingly, statutes which were enacted for the protection and the preservation of public health are to be given extremely liberal construction for the accomplishment and maximization of their beneficial objectives. *Id.*; *see also* 415 ILCS 5/2(c) (2022) (providing that the Illinois Environmental Protection Act is to be given liberal construction to effectuate its purposes).

The purpose of the Illinois Environmental Protection Act, 415 ILCS 5/1 *et seq.* (2022) ("Act"), is to protect the health and welfare of the citizens of the State of Illinois. *Tri-County Landfill Co. v. Illinois Pollution Control Bd.,* 41 Ill. App. 3d 249, 253-54 (2d Dist. 1976) ("Again, it would appear clear that the intent of the legislature was to enact sweeping legislation covering all sources of pollution both public and private.") Section 2 of the Act, 415 ILCS 5/2 (2022), states in relevant part:

> (a) The General Assembly finds:
>
> (i) that environmental damage seriously endangers the public health and welfare, as more specifically described in later sections of this Act;
>
> (ii) that because environmental damage does not respect political boundaries, it is necessary to establish a unified state-wide program for environmental protection and to cooperate fully with other States and with the United States in protecting the environment;
>
> (iii) that air, water, and other resource pollution, public water supply, solid waste disposal, noise, and other environmental problems are closely interrelated and must be dealt with as a unified whole in order to safeguard the environment;

* * *

(v) that in order to alleviate the burden on enforcement agencies, to assure that all interests are given a full hearing, and to increase public participation in the task of protecting the environment, private as well as governmental remedies must be provided;

* * *

(b) It is the purpose of this Act, as more specifically described in later sections, to establish a unified, state-wide program supplemented by private remedies, to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them.

415 ILCS 5/2 (2022). The framework implemented by the Act is specifically intended to unify environmental enforcement at the State level, with an eye toward a comprehensive approach vis-à-vis the enforcement of public rights. Violations of the Act are violations of the public rights of the citizens of the State of Illinois, whose health and welfare the State is entrusted to protect.

By extension, the Illinois Attorney General's Office ("Illinois AGO") is empowered to bring an action in the name of the citizens of the State of Illinois when there have been violations of the Act. 415 ILCS 5/42(e) (2022). The vindication of said public rights occurs through the efforts of the Illinois Environmental Protection Agency ("Illinois EPA" or "Agency") and the Illinois AGO, and public funds are therefore expended to accomplish the same. The underlying case is clearly one where Complainant seeks redress for violations of public rights, meaning that the public interest exception would apply to the First Amended Complaint. See, e.g., *Pielet Bros. Trading, Inc. v. Pollution Control Bd*., 110 Ill. App. 3d 752, 758 (5th Dist. 1982).

To the extent Respondent objects to any reliance by the Board on the *Pielet* case, Respondent's objection is unjustified. Although *Pielet* does examine Section 14 of the Limitations Act, rather than Section 13-205, the court's findings in *Pielet* extend beyond the Limitations Act.

The court makes an initial broad finding, which it then applies narrowly to the circumstances of that particular case, holding that:

> Unless the terms of a statute of limitations expressly include the State, county, municipality or other governmental agencies, the statute, so far as public rights are concerned, as distinguished from private and local rights, is inapplicable to them. (*Clare v. Bell* (1941), 378 Ill. 128, 130-31, 37 N.E.2d 812, 814.) The question is whether the State (or its agency or subdivision) is asserting public rights on behalf of all the people of the State or private rights on behalf of a limited group. (*In re Estate of Bird* (1951), 410 Ill. 390, 394, 102 N.E.2d 329, 331.) Here, the Agency argues, and we agree, that what the Agency seeks is to protect the public's right to a clean environment. Moreover, not only does section 14 of the Limitations Act fail to expressly include the State or the Agency, but section 14 is one of a group of sections that, in general, pertain to personal actions. See *People ex rel. Stubblefield v. City of West Frankfort* (1950), 340 Ill. App. 443, 447, 92 N.E.2d 531, 533.

Pielet Bros. Trading, Inc. v. Pollution Control Bd., 110 Ill. App. 3d 752, 758 (5th Dist. 1982). *Pielet* clearly applies to a situation where, as here, the State seeks to assert public rights on behalf of the people of the State of Illinois; the Board thus correctly relies upon *Pielet* in its March 6, 2025 Order.

All told, Petco fails to offer new evidence or a change in the law to warrant granting a motion for reconsideration pursuant to 35 Ill. Adm. Code 101.902. Petco's Motion for Reconsideration therefore should be denied.

D. <u>Petco fails to identify substantial grounds for differences of opinion pursuant to the first prong of the Rule 308 test. The case law cited by Petco does not represent divergent applications of the statute of limitations to administrative proceedings.</u>

Petco asserts that "substantial grounds for differences of opinion"—as referenced in the first prong of the two-part test in Illinois Supreme Court Rule 308—exist as to the question of whether a statute of limitations may apply to a case brought before the Board. Petco claims that a difference in forum—i.e., whether a case is brought before the Board or before the circuit court—

"cannot dictate whether a statute of limitations applies." (Mot. for Reconsideration at 6.) Petco offers no authority to support this assertion.

Petco also claims that the cases it cites from the four states of Massachusetts, Kentucky, Florida, and Connecticut represent a "consensus among a substantial number of states" that the application of statutes of limitations should not be determined by forum and may extend to administrative proceedings. While case law from four of the fifty states in the Union may represent an interesting trend in the law, it hardly represents a consensus among a "substantial number".

Petco further claims that although its cited cases deal with contract actions, the subject matter is an arbitrary distinction. Petco is incorrect. This is not an arbitrary distinction, and the cases themselves say as much. See, e.g., *Suburban Home Health Care, Inc. v. Executive Office of Health & Human Services*, 488 Mass. 347 (Mass. 2021) (finding that statutes of limitations may apply to certain, but not all, administrative proceedings, with "actions of contract" being one such scenario). It is precisely *because* the cases are contract claims that a statute of limitations is found to apply in the administrative proceedings in question. The nature of the cases goes to the heart of the question that Petco raises.

Were Complainant attempting to prevail on a contract claim against Petco, then the case law offered by Petco might be noteworthy. But the underlying case is not a contract action; it is an environmental enforcement action brought pursuant to State statute. The case law offered by Petco is neither binding upon, nor relevant to, these proceedings. By extension, Petco's portrayal of the cited cases as representing significant divergent opinions on the question of whether a statute of limitations may apply to an administrative proceeding is a mischaracterization at best.

Petco fails to offer new evidence or a change in the law to warrant granting a motion for reconsideration pursuant to 35 Ill. Adm. Code 101.902. Petco's Motion for Reconsideration should be denied.

E. The Board's determination that the Section 13-205 statute of limitations does not apply to cases brought before the Board neither rewards delay nor encourages forum-shopping.

Petco once more repeats its claim that the Board's determination that the Section 13-205 statute of limitations does not apply to cases brought before the Board rewards delay in enforcement and encourages forum-shopping.

Complainant has previously responded to this assertion in detail. While the circuit courts and the Board approach Section 13-205 from different angles, the result is the same: Section 13-205's statute of limitations does not apply to the State in either forum when it brings actions in the public interest. An action brought by the State under the Act in the circuit courts would be exempt from the application of Section 13-205 due to the public interest exception. An action brought by the State under the Act before the Board is exempt because it is an administrative proceeding. While the approach differs, the result is the same: the Section 13-205 statute of limitations does not apply, and Respondent's concerns regarding forum-shopping and disparate levels of legal protection afforded to responding parties therefore are moot.

Petco fails to offer new evidence or a change in the law to warrant granting a motion for reconsideration pursuant to 35 Ill. Adm. Code 101.902. Petco's Motion for Reconsideration should be denied.

F. Petco fails to plead exceptional circumstances that would warrant appellate review.

Petco argues that the Board has made a finding of first impression; that this finding of first impression will have dramatic consequences for litigation brought by the State pursuant to the Act;

and, consequently, the Board's determination that Section 13-205 does not apply to cases brought before the Board due to their character as "administrative proceedings" presents "exceptional circumstances" that warrant appellate review. Petco is incorrect.

Although the Board's finding may be a matter of first impression, the Board's finding will not open the floodgates of litigation before the Board by the State, as elaborated, *supra*. The circuit courts have been clear that the public interest exception applies to cases brought by the State under the Act. The Board has previously similarly applied the public interest exception to cases brought by the State under the Act. The Board has simply reached the same conclusion it would have reached pursuant to a different analysis. The Board's finding that Section 13-205 does not apply because the underlying case is an administrative proceeding may be a novel finding, but it does not rise to the level of exceptional circumstances that merit appellate review.

Petco fails to offer new evidence or a change in the law to warrant granting a motion for reconsideration pursuant to 35 Ill. Adm. Code 101.902. Petco's Motion for Reconsideration should be denied.

G. <u>Interlocutory appeal would fail to advance ultimate termination of the litigation.</u>

Once more, Petco argues that interlocutory appeal would advance the ultimate termination of the litigation; once more, Petco fails to offer new evidence or a change in the law to warrant granting a motion for reconsideration pursuant to 35 Ill. Adm. Code 101.902.

Petco has previously raised this argument. Complainant has previously set forth how a difference between 61 counts and 73 counts, all of a similar pattern, is not so great that it will significantly contribute to a lessened burden for the parties in discovery or argument, or for the Board's consideration of what the parties submit, or allow for a significantly expedited presentation and consideration of the same.

Even if Petco were to prevail on its question through interlocutory appeal, only 12 of 73 counts would be affected. A penalty hearing on each of the other violations would still be necessary, and thus the ultimate termination of these proceedings would in no way be affected if interlocutory appeal were granted on this question. *See, e.g., People v. Freeman United Coal Mining Co., LLC, et al.*, PCB No. 10-61, 2013 WL 1776522, at *8.

Moreover, the burden on the movant under Rule 308 is to provide *considerable evidence* that a question will significantly advance the ultimate termination of the case. *People v. Freeman United Coal Mining Co., LLC, et al.*, PCB No. 10-61, 2013 WL 1776522, at *6. Petco does not provide considerable evidence; it merely offers conclusory statements, which fail to provide the support needed to meet the second element of the Rule 308 two-prong test.

Petco's question for certification will not materially advance the ultimate termination of the litigation. Petco's Motion therefore fails to meet the second element of the Rule 308 two-prong test. Petco fails to offer new evidence or a change in the law to warrant granting a motion for reconsideration pursuant to 35 Ill. Adm. Code 101.902. Petco's Motion for Reconsideration therefore should be denied.

H. CONCLUSION

WHEREFORE, Complainant, People of the State of Illinois, respectfully requests that the Board deny Respondent's Motion for Reconsideration of the Board's March 6, 2025 Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Natalie Long, an Assistant Attorney General, certify that on the 29th day of May, 2025, I caused to be served the foregoing Notice of Filing, Complainant's Response in Opposition to Respondent's Motion for Reconsideration of the Board's March 6, 2025 Order, and Service List and Certificate of Service on the parties named on the attached Service List, by email or electronic filing, as indicated on the attached Service List.

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