ILLINOIS POLLUTION CONTROL BOARD
August 8, 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 January 18, 2023, Petco Petroleum Corporation (Petco) filed its 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 Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed its response to Petco's Motion to Dismiss Counts 62 Through 73 of the First Amended Complaint. With that response, the People also filed a Motion to Strike Respondent's Affirmative and Additional Defenses to the First Amended Complaint and Immaterial Matter, and a Reply to Respondent's Answer to the First Amended Complaint. The parties have since filed responses, replies and sur-replies to these motions.

This order addresses the People's Motion to Strike and related responsive filings. Petco's Motion to Dismiss will be addressed in a separate order of the Board at a later date.

For the reasons detailed below, the Board grants the People leave to file a reply to Petco's response to the motion to strike; grants Petco permission to file a sur-reply to the People's reply to its response; grants the People's motion to strike as to affirmative and additional defenses, in part, and strikes Petco's alleged affirmative defenses C and L with prejudice; strikes Petco's alleged affirmative defenses A, B, D, E, F, G, J, and K and a portion of affirmative defense H without prejudice; directs Petco to amend affirmative defenses B, D, E, F and I, as well as the portion of affirmative defense H; denies the People's motion to strike as to immaterial matter; and will address the remaining portion of affirmative defense H with Petco's motion to dismiss Counts 63 through 72 that concerns the same argument at a later time.

In this order, the Board first provides an abbreviated factual and procedural background of the case and addresses the parties' requests for leave to file replies to the pending motion to strike. Next, the Board provides the legal standard for pleading affirmative defenses. The Board then turns to its discussion of the parties' filings, first providing its analysis of the arguments on the motion to strike each of Petco's affirmative and additional defenses before giving its determination on each affirmative defense. The Board then provides its analysis of the parties' arguments on the motion to strike the other immaterial matter, and concludes with its determination on the motion to strike the immaterial matter. Finally, the Board dispenses with

its order.

ABBREVIATED FACTUAL AND PROCEDURAL BACKGROUND

On June 21, 2013, the People filed a 61-count complaint against 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 July 11, 2013, the Board accepted the complaint for hearing. On August 31, 2022, the People filed Complainant's Motion for Leave to File First Amended Complaint (Am. Comp.), which, among other things, added Counts 62 through 73. On October 20, 2022, the Board granted the People's motion and accepted the amended complaint for hearing.

On January 18, 2023, Petco filed a document consisting of its Motion to Dismiss Counts 62 through 73 of the First Amended Complaint (Mot. to Dis.), and its Answer, Affirmative and Additional Defenses (Aff. Def.). On March 10, 2023, the People filed a document consisting of their Response to Petco's Motion to Dismiss (Resp. Mot. to Dis.), a Motion to Strike Respondent's Affirmative and Additional Defenses to the First Amended Complaint and Immaterial Matter (Mot. to Str.), and Reply to Respondent's Answer to the First Amended Complaint. On April 19, 2023, Petco filed its Response to the People's Motion to Strike (Resp. Mot. to Str.). The People filed their Reply to this Response (Reply Mot. to Str.) on June 1, 2023, along with a motion for leave to file. On July 10, 2023, Petco filed its Sur-Reply to the People's Reply (Sur-Reply), 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 and Complainant's Motion to Strike Respondent's Affirmative and Additional Defenses to the First Amended Complaint and Immaterial Matter. 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.

People's Motion for Leave to File Reply to Petco's Response to Motion to Strike

The People's motion for leave to file a reply to Petco's response to the motion to strike is granted. The motion to strike sufficiently pled the basic 'other immaterial matter' that the People sought to strike. However, Table 1 of the People's reply also provided added organization that gave the Board increased convenience and clarity in ruling on the motion to strike the 'other immaterial matter' alleged by the People. The Board considers the information provided in the People's reply necessary to reaching its determination on the motion to strike.

Petco's Motion for Permission to File Sur-Reply to People's Reply

Petco's motion for permission to file a sur-reply to the People's reply is granted. The sur-reply addressed specific arguments raised in the reply, including specific arguments raised by the information included in Table 1. The Board considers the arguments raised in Petco's sur-reply helpful in reaching its determination on the motion to strike.

APPLICABLE LEGAL STANDARDS

Affirmative Defenses

"An affirmative defense does not negate the essential elements of the plaintiff's cause of action," but rather "admits the legal sufficiency of that cause of action" and "asserts new matter by which the plaintiff's apparent right to recovery is defeated." Vroegh v. J&M Forklift, 165 Ill. 2d 523, 530 (1995); *see also* Worner Agency, Inc. v. Doyle, 121 Ill. App. 3d 219, 222 (4th Dist. 1984) ("The test of whether a defense is affirmative . . . is whether the defense gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated."). "An affirmative defense is respondent's allegation of 'new facts or arguments that, if true, will defeat . . . [complainant's] claim even if all allegations in the complaint are true.'" People v. Community Landfill Co., Inc., PCB 97-193, slip op. at 3 (Aug. 6, 1998), *quoting Black's Law Dictionary* 175 (6th ed. 1990). Accordingly, an affirmative defense is a "response to a plaintiff's claim which attacks the plaintiff's *legal* right to bring an action, as opposed to attacking the truth of claim." Farmers State Bank v. Phillips Petroleum Co., PCB 97-100, slip op. at 2 n.1 (Jan. 23, 1997), *quoting Black's Law Dictionary* 61 (6th ed. 1990) (emphasis in *Black's*).

Therefore, if a defendant's purported affirmative defense does not admit the opposing party's claim but rather attacks the sufficiency of that claim, it is not an affirmative defense. *See* Worner, 121 Ill. App. 3d at 222. Also, pleading mitigation factors for remedy, including civil penalty, is not a defense at all—let alone an affirmative defense—to a claim of violation. *See, e.g.*, People v. Texaco Refining and Marketing, Inc., PCB 02-3, slip op. at 6, 7 (Nov. 6, 2003) (respondent's pleading that contested necessity of complaint's request for groundwater cleanup plan "pertains to remedy, not the cause of action . . . . [and] does not defeat the People's claims of water pollution or open dumping"; voluntarily coming into compliance "relates to the issue of remedy and not to the cause of action"); People v. Geon Co., Inc. PCB 97-62, slip op. at 4 (Oct. 2, 1997) (mitigation factor concerning penalty is "not an appropriate affirmative defense to a claim that a violation has occurred"); People v. Midwest Grain Products of Illinois, Inc., PCB 97-179, slip op. at 5 (Aug. 21, 1997) ("mitigation issues are only considered once a violation of the Act has been found").

Pleading Affirmative Defenses

The facts alleged to establish an affirmative defense must be pled "with the same degree of specificity that is required of a plaintiff stating a cause of action." Northbrook Bank & Trust Co. v. 2120 Div. LLC, 2015 IL App (1st) 133426 ¶ 15. Accordingly, "to set forth a good and sufficient claim or defense, a pleading must allege ultimate facts sufficient to satisfy each element of the cause of action or affirmative defense pled." Richco Plastic Co v. IMS Co., 288 Ill. App. 3d 782, 784 (1st Dist. 1997). "'[O]nly the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts.'" People *ex rel*. Fahner v. Carriage Way West, Inc., 88 Ill. 2d 300, 308 (1981), *quoting* Bd. of Ed. v. Kankakee Federation of Teachers Local No. 886, 46 Ill. 2d 439, 446-47 (1970).

An affirmative defense "alleges facts sufficient to constitute a legally cognizable defense." Vermeil v. Jefferson Trust & Sav. Bank, 176 Ill. App. 3d 556, 566 (3d Dist. 1988).

"Affirmative defenses . . . . are subject to the same attacks as other pleadings for factual deficiencies." Betts v. Manville Personal Injury Settlement Trust, 225 Ill. App. 3d 882 (4th Dist. 1992). "In reviewing the sufficiency of an affirmative defense, we are to disregard any conclusions of fact or law not supported by allegations of specific fact." Northbrook Bank, 2015 IL App (1st) 133426 ¶ 15. Therefore, "legal conclusions unsupported by allegations of specific facts are insufficient." LaSalle National Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557 (2nd Dist. 1993).

Motions to Strike Affirmative Defenses

A motion to strike an affirmative defense admits well-pled facts constituting the defense, as well as all reasonable inferences that may be drawn from those facts, attacking only the legal sufficiency of the pleading. Raprager v. Allstate Insurance Co., 183 Ill. App. 3d 847, 854 (2nd Dist. 1989). Where an affirmative defense's well-pled facts and reasonable inferences drawn from them "raise the possibility that the party asserting them will prevail, striking of the affirmative defense is improper." *Id*. "Like a motion to dismiss a plaintiff's claim, a motion to dismiss a defendant's affirmative defense should not be granted with prejudice unless it is clearly apparent that there is no set of facts that might entitle the defendant to some relief." U.S. Bank, N.A. v. Kosterman, 2015 IL App (1st) 133627 ¶ 7.

The Board's Procedural Rules

Under the Board's procedural rules, "[a]ll material allegations of [a] complaint before the Board will be taken as admitted if no answer is filed or if not specifically denied by the answer, unless respondent asserts a lack of knowledge sufficient to form a belief." 35 Ill. Adm. Code 103.204(d). "Any 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. *Id*.

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). Other than affirmative defenses, the pleading of defenses in an answer is not addressed by the Board's procedural rules. *See* 35 Ill. Adm. Code 103.204(d). Section 2-613(d) of the Code of Civil Procedure, however, provides that "[t]he facts constituting any affirmative defense . . . and 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(d) (2022).

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). Under Section 2-615(a) of the Code of Civil Procedure, "[a]ll objections to pleadings shall be raised by motion. The motion shall point out specifically the defects complained of, and shall ask for appropriate relief, such as: . . . that designated immaterial matter be stricken out . . . ." 735 ILCS 5/2-615(a) (2022).

DISCUSSION

Petco alleges twelve purported "affirmative and additional defenses". The People have moved to strike all twelve of these defenses with prejudice, arguing that Petco failed to plead each of the alleged affirmative defenses with the required specificity. Mot. to Str., p. 5-6. For many of the alleged affirmative defenses, the People allege that Petco has failed to provide supporting factual information sufficient to adequately plead the defense. *See* Mot. to Str. For each defense, the Board first summarizes the parties' arguments, provides an analysis under the legal standard for pleading affirmative defenses, and determines whether to grant the People's motion to strike for each.

Then, the Board turns to the motion to strike other immaterial matter from Petco's answer. The People argue that Petco's Answer includes immaterial matter that should be stricken because the immaterial matter neither constitutes an admission, denial, or statement of lack of knowledge; specifies to which pleading it relates; is separately pleaded, designated, numbered, or divided in accordance with applicable statutory requirements; nor can be identified as a valid affirmative defense requiring an objection or argument not requiring a reply. Mot. to Str., 25-28. The Board analyzes the parties' arguments under the applicable law, and reaches its determination.

Motion to Strike Affirmative and Additional Defenses

"Fails to State a Claim" (Defense A)

Petco's first purported defense alleges that the first amended complaint fails to state a claim upon which relief can be granted, but does not provide any supporting facts or allege to which counts it applies. Aff. Def. at 170. The People argue that the Board should strike this defense with prejudice because it is legally insufficient, and because Petco fails to allege supporting factual information to identify to which of the 73 counts in the first amended complaint that Defense A pertains. Mot. to Str., p. 6-7; *see also* Am. Comp.

The Board agrees with the People's position that Defense A is inappropriate because it merely sets forth a legal conclusion with no supporting factual information. *See* People v. Hicks Oils & Hicksgas, Inc., PCB 10-12, slip op. at 6 (Dec. 17, 2009). The Board is persuaded by the People's argument that Defense A is an improper affirmative defense as it challenges the sufficiency of the claims of the first amended complaint, rather than admitting its allegations and providing new matter that defeats its claims. Accordingly, the Board finds that Defense A is legally insufficient. *See* People v. First Country Homes, PCB 06-173, slip op. at 3 (Sep. 21, 2006); Vroegh v. J&M Forklift, 165 Ill. 2d 523, 530 (1995); Reply Mot. to Str. at 10. Therefore, the Board strikes this affirmative defense without prejudice.[1] This ruling in no way limits

[1] The Board notes that in its response to the Motion to Strike, Petco attempts to bolster its argument for Defense A by raising issues related to the statute of limitations (which is also raised by Defense H) and liability (which is also raised by Defense K). Resp. Mtn. to Str at 7-8; *see* Reply Mot. to Str. at 11. The Board addresses the arguments related to the statute of limitations and liability under Defense H and Defense K, respectively.

Petco's ability to challenge the People's proof of their claims.

"Fails to Comply With and/or Satisfy One or More Statutory and/or Regulatory Prerequisites" (Defense B)

Petco's second purported defense is a blanket claim that the first amended complaint "fails to comply with and/or satisfy one or more statutory and/or regulatory prerequisites to file and maintain the State's action." Aff. Def. at 170. The People motion to strike this defense for failure to allege facts with specificity. Mot. to Str. at 7. The People argue that this defense should be stricken with prejudice because Petco fails to identify what statutory or regulatory prerequisite with which the amended complaint fails to comply, to which count(s) of the amended complaint this defense pertains, or how it differs from Defense C. *Id*. Further, the People assert that Petco does not provide even basic facts or reasoning to support its allegation that the amended complaint fails to comply with statutory or regulatory prerequisites. *Id.* at 8.

Petco responds that it offers this affirmative defense to avoid unfair surprise and that it has adequately pled the ultimate facts that support this affirmative defense at this stage in the proceedings to later demonstrate that the People failed to comply with statutory requirements of the Act. Resp. Mot. to Str. at 9-10; 415 ILCS 5/31 (2022).

The Board finds that while this defense does not identify any affirmative defense or present basic facts to support one, and therefore does nothing to avoid unfair surprise, Petco may identify an affirmative defense and allege specific supporting facts to make this a valid affirmative defense. The Board therefore strikes Defense B without prejudice and gives Petco 30 days to amend it. If Petco fails to do so, the Board will strike Defense B with prejudice, meaning that Petco will be precluded from arguing Defense B, "unless the affirmative defense could not have been known before hearing." 35 Ill. Adm. Code 103.204(d).

"Needs to Allege Compliance with Section 31" (Defense C)

Petco's third defense argues that the first amended complaint fails to allege compliance with Section 31 of the Act. Aff. Def. at 171; *see* 415 ILCS 5/31 (2022). Petco does not state which counts do not comply with Section 31. The People argue that this defense is therefore factually insufficient. Mot. to Str. at 8. The People also argue that Defense C is legally insufficient and that it inaccurately states applicable law, and seek to have it stricken with prejudice. *Id*.

Petco asserts that the amended complaint is barred because the "majority of [the] counts" of the amended complaint did not allege compliance with Section 31 of the Act, which was required because Petco did not have the "legislatively created opportunity to reach compliance through the timely negotiation of a CCA [Compliance Commitment Agreement]". Aff. Def. at 171. The People argue that this defense is legally insufficient because the amended complaint alleges statutory compliance in each count. Mtn. to Str. at 8. The People cite paragraph 1 of the amended complaint:

This action is brought on behalf of the People of the State of Illinois, by Kwame Raoul,

> the Attorney General of the State of Illinois, on his own motion and at the request of the Illinois Environmental Protection Agency ("IEPA"), pursuant to the terms and provisions of Section 31 of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/31 (2020).

Mtn. to Str. at 8. Every subsequent count in the first amended complaint incorporates paragraph 1 as if fully set forth therein, i.e., that the complaint is brought by the Attorney General on his own motion, and on behalf of the Illinois EPA, pursuant to Section 31 of the Act, and that both are appropriate legal mechanisms to bring a complaint under the Act. *Id.* at 9; *see generally*, Am. Comp. The People also argue for Defense C to be stricken with prejudice for incorrectly stating applicable law because when the Attorney General brings a complaint on his own motion, as here, there is no need to allege compliance with Section 31 of the Act. Reply at 15.

The Office of the Attorney General may, on its own motion, bring actions before the Board to enforce the environmental requirements of the Act on behalf of the People of the State of Illinois. 415 ILCS 5/31(d) (2022); 35 Ill. Adm. Code 103; *see* People v. Barger Engineering, Inc., PCB 06-82, slip op. at 6 (Mar. 16, 2006) ("The Attorney General may bring an enforcement action pursuant to Section 31(d) of the Act . . . on the Attorney General's own motion regardless of the Agency's actions."); People v. Eagle-Picher-Boge, LLC, PCB 99-152, slip op. at 7 (July 22, 1999) ("Section 31(d) of the Act specifically authorizes any person to file a complaint before the Board. *** The Attorney General is a 'person' as that term is defined in Section 3.26 of the Act . . . .").

The administrative prerequisites of Section 31 apply to the IEPA, not the Attorney General. Barger Engineering at 6; Eagle-Picher Boge at 7; *see* 415 ILCS 5/31(d) (2022). The Board has found that a People's complaint brought by the Attorney General on the Attorney General's own motion and at the request of IEPA is not subject to dismissal for IEPA failing to follow Section 31, even if the People's complaint "may be based on information provided by the Agency." Barger Engineering, PCB 06-82, slip op. at 6-7. What matters is that the People's complaint was brought on the AG's "own motion." *Id.* at 7 (emphasis in original); *see also* People v. Sheridan-Joliet Land Development, LLC, PCB 13-19, PCB 13-20 (consol.), slip op. at 19 (Aug. 8, 2013) ("the complaints in these cases state that they are brought on the Attorney General's own motion as well as at the Agency's request. *** As such, none of the complaints' claims would be subject to dismissal even if the Agency had not complied with Section 31.").

The Attorney General brings each count of this complaint on his own motion. Am. Comp. par. 1 (incorporated as par. 1-17 in Cts. I-LXXIII). Accordingly, any IEPA noncompliance with Section 31 is not a valid affirmative defense. As there is clearly no set of facts on which Petco could prevail, the Board strikes Defense C with prejudice, meaning that Petco is precluded from arguing Section 31 noncompliance.

IEPA Does Not Have Authority Over Petco's Operating Permit (Defense D)

Petco's fourth purported defense is that only the Illinois Department of Natural Resources (IDNR) has the authority to enforce the requirements of Petco's operating permit issued under the Illinois Oil and Gas Act (IOGA) (225 ILCS 725 (2022)), and therefore IEPA does not have

any authority over Petco's operating permit under the Act. Aff. Def. at 171. The People assert that Defense D is legally insufficient and seek to have it stricken with prejudice. Mtn. to Str. at 9. The People argue that because this action alleges violations of environmental harm, it is properly brought under the Act. *Id.* at 10; *see* 415 ILCS 5 (2022). The People further support their position by distinguishing the authority of the Office of the Attorney General to bring an enforcement action under the Act from the jurisdiction over permitting, maintenance, and lawful operation of oil and gas wells granted to the IDNR by the IOGA. Mtn. to Str. at 10; *see also* Mtn. to Str., Exh A (Memorandum of Agreement between IEPA and IDNR regarding jurisdiction over oil and gas operations under respective statutory authorities).

Petco does not provide any factual information about its permit to support its contention that IEPA lacks authority over the permit under the Act. The counts in this action do not allege violations of Petco's IOGA operating permit, nor do they allege violations of IOGA. The Attorney General brought this action on his own motion under the Act and this action alleges violations of the Act and Board regulations. Am. Comp. at 1. The IEPA has the authority to investigate violations and enforce environmental requirements of the Act and Board regulations. *See* 415 ILCS 5/31 (2022). Regardless, the Board finds that Petco has raised the new issue of enforcement authority over its permit, even though it does not identify the elements or offer factual support for that defense.

The Board finds that while this defense does not identify any affirmative defense or elements required to establish one, and therefore does nothing to avoid unfair surprise, Petco may identify an affirmative defense and allege specific supporting facts to make this a valid affirmative defense. The Board therefore strikes Defense D without prejudice and gives Petco 30 days to amend it. If Petco fails to do so, the Board will strike Defense D with prejudice, meaning that Petco will be precluded from arguing Defense D, "unless the affirmative defense could not have been known before hearing." 35 Ill. Adm. Code 103.204(d).

IDNR Has Already Prosecuted These Matters (Defense E)

Petco alleges in Defense E that because "most, if not all, of the factual underpinnings" for the claims brought by the State were already investigated and adjudicated to finality by IDNR under its authority and jurisdiction, and IDNR either found no violation or fined Petco for the violation, any claims of the amended complaint that relate to IDNR's investigation should be dismissed because Petco cannot be prosecuted twice for the same offense. Aff. Def. at 171. Petco alleges that the State lacks authority to prosecute Petco on any counts which allege facts identical to those which have been so adjudicated by IDNR. *Id.* The People argue that the Board should strike this affirmative defense with prejudice because it is factually and legally insufficient. Mtn. to Str. at 10.

The People respond that Petco fails to provide facts to support this defense, including which releases or payments made by Petco were involved. Mtn. to Str. at 10. Further, the People argue that Petco does not identify an actual affirmative defense. *Id.* The People assert that Defense E rests on the same legal misconception as Defense D, which is Petco's conflation of the Attorney General's authority under the Act with the IDNR's authority under the IOGA. *Id.* at 11. The People conclude by arguing that this action alleges violations of the Act and is

therefore properly brought under the Act, and separate from any investigations conducted by IDNR and resultant legal action brought by IDNR under IOGA. *Id*. Accordingly, the People request that the Board strike Defense E with prejudice.

Petco's argument seems to boil down to its claim that the "factual underpinnings" for the claims brought by the State were already investigated and adjudicated to finality by IDNR, and IDNR either found no violation or fined Petco for the violation, so any claims of the amended complaint that relate to IDNR's investigation are precluded. Petco does not provide any facts to support its allegation or to identify what IDNR's investigation entailed or determined. Petco then asserts in its response that IDNR did not adjudicate these matters to finality under the IOGA (Resp. Mtn. to Str. at 11), but again does not provide supporting facts or documentation.

The Board finds that Petco does not plead sufficient facts to support its claim that the matters of this complaint are precluded. *See* People v. Tradition Investments, LLC, PCB 11-68, slip op. at 14 (Oct. 6, 2011) (whether sufficient facts are pled in affirmative defense to establish a claim of preclusion); *see also* Richco Plastic at 784-85 ("A pleading must allege ultimate facts sufficient to satisfy each element of the cause of action or affirmative defense pled"). The Board further finds that an investigation undertaken by IDNR under the IOGA is not an affirmative defense to the People bringing this action under the Act, because IDNR does not have any authority to enforce the provisions of the Act alleged to have been violated in the amended complaint. However, the Board finds that Petco has raised the new issue of IDNR's prior prosecution that may relate to the well(s) at issue in this action, even though Petco does not identify the elements or offer factual support for that defense.

The Board finds that while this defense does not identify any affirmative defense or elements required to establish one, Petco may identify an affirmative defense and allege specific supporting facts to make this a valid affirmative defense. The Board therefore strikes Defense E without prejudice and gives Petco 30 days to amend it. If Petco fails to do so, the Board will strike Defense E with prejudice, meaning that Petco will be precluded from arguing Defense E as an affirmative defense, "unless the affirmative defense could not have been known before hearing." 35 Ill. Adm. Code 103.204(d). As part of its defense, Petco may provide additional information about what IDNR has adjudicated as it relates to specific well locations, supported with documentation, for the Board to consider in its analysis of Sections 33(c) and 42(h) of the Act. *See* 415 ILCS 5/33(c), 42(h) (2022).

Any Release That Has Occurred Despite Petco's Best Efforts Under Prior Judicial Orders Is Not a Violation (Defense F)

Defense F is Petco's assertion that its past compliance efforts under prior judicial orders preclude the People's claims of the first amended complaint. The People respond that Defense F is factually and legally insufficient and neither provides facts nor legal theory to meet the pleading requirements for affirmative defenses, forcing them and the Board to detangle the details and the logic of this defense. Mtn. to Str. at 11. Arguing that this defense is an acknowledgement of Petco's past violations of the Act, the People refute Petco's claim that these attempts excuse it from liability for new violations: "Trying hard to solve a violation, failing to do so, and creating new violations in the interim, [which] is not an affirmative defense." *Id*. The

People accordingly request that Defense F be stricken with prejudice for failure to meet the pleading requirements of an affirmative defense. *Id*.

The Board finds that Petco's claim that the allegations of the amended complaint are barred by Petco's best efforts to comply with prior orders pertaining to those allegations is not an affirmative defense, but rather a mitigation factor. *See* People v. First Country Homes, L.L.C., PCB 06-173, slip op. at 4 (Sep. 21, 2006), citing People v. Texaco Refining and Marketing, Inc., PCB 02-3, slip op. at 4-5 (Nov. 6, 2003). When a claimed affirmative defense relates solely to mitigation factors, the defense should be stricken as an improper affirmative defense. Tradition Investments, PCB 11-68, slip op. at 14 (citing People v. William Charles Real Estate Investment, PCB 10-108, slip op. at 12, (Mar. 17, 2011)). The Board finds that while information about prior compliance efforts may be relevant to the Board's determination of whether a remedy is appropriate under Section 33(c), these mitigating factors do not constitute an affirmative defense to defeat the People's claims. *See* First Country Homes, PCB 06-173, slip op. at 4; 415 ILCS 5/33(c) (2022). However, the Board cannot make a determination on the relevance of any alleged prior judicial orders because Petco has not identified a related affirmative defense and has not alleged ultimate facts on each element of that defense.

The Board finds that while this defense does not identify any affirmative defense or elements required to establish one, and therefore does nothing to avoid unfair surprise, Petco may identify an affirmative defense and allege specific supporting facts to make this a valid affirmative defense. Accordingly, the Board strikes Defense F without prejudice and gives Petco 30 days to amend it. If Petco fails to do so, the Board will strike Defense F with prejudice, meaning that Petco will be precluded from arguing Defense F as an affirmative defense, "unless the affirmative defense could not have been known before hearing." 35 Ill. Adm. Code 103.204(d). As part of its defense, Petco may provide additional information about prior orders and compliance efforts at specific well locations for the Board to consider in its Section 33(c) and 42(h) analysis. See 415 ILCS 5/33(c), 42(h) (2022).

Adequate Remedies at Law Bar the State's Claims for Equitable Relief (Defense G)

The People argue that Defense G should be stricken with prejudice for failure to state an affirmative defense. Mot. to Str. at 13. The People refute Petco's claim that they are barred from seeking equitable relief in this matter because there are adequate remedies at law as merely a conclusory statement, and not an affirmative defense. *Id*. Further, the People assert that the civil penalties sought against Petco for alleged violations of the Act cannot take the place of the equitable relief sought, that the Board order Petco to cease and desist from violations of the Act that are the subject of the complaint. *Id.* at 14. The People distinguish these as different but appropriate types of relief for violations of the Act brought under the Act. *Id*.

Petco responds that it has pled facts to show that all 73 counts of the alleged violations pertain to past violations and that this action was brought seeking penalties, and that, therefore, the People's request that Petco cease and desist from future violations of the Act and associated regulations is moot. Resp. Mot. to Str. at 12. The People reply that whether a claim for injunctive relief is moot pertains to remedy, not the cause of action, and therefore is not an affirmative defense. Reply Mtn. to Str. at 18 (citing Texaco Refining at 12-13).

The Board agrees with the People that the issue of whether the equitable relief requested is moot pertains to remedy, not a defense of the alleged violations raised in the cause of action, and thus is not an affirmative defense. Texaco Refining at 12-13. The Board disagrees with Petco's assertion that remedies at law bar the People's request for equitable relief, and finds that the People have made a basic showing that equitable relief may be warranted. The Board will determine if equitable relief is appropriate based on the facts of this matter at the appropriate time in the proceedings, at which time Petco is not precluded from raising arguments pertaining to injunctive relief. The Board accordingly strikes Defense G without prejudice.

Five-Year Statute of Limitations and/or Other Limitations Rule, Regulation or Doctrine Bar the State's Claims (Defense H)

The People argue that Petco does not identify to which claims Defense H applies. Mtn. to Str. at 14. Petco responds that Defense H applies to Counts 62 through 73 of the first amended complaint, which Petco also separately moves to dismiss. *See* Resp. Mtn. to Str. at 13. Petco does not identify which specific "other rule, regulation or doctrine" bars the claims of the first amended complaint. Nor does Petco offer any factual information in support of its allegation that these claims are barred.

The Board finds that while this defense does not identify any affirmative defense or elements required to establish one, Petco has raised the potential existence of an affirmative defense and may identify it and allege specific supporting facts to make this a valid affirmative defense. The Board therefore strikes Defense H without prejudice as to the "other rule, regulation or doctrine" that may apply, and gives Petco 30 days to amend Defense H as to this issue. If Petco fails to do so, the Board will strike this portion of Defense H with prejudice, meaning that Petco will be precluded from arguing Defense H as an affirmative defense, "unless the affirmative defense could not have been known before hearing." 35 Ill. Adm. Code 103.204(d).

The Board will rule on the five-year statute of limitations issue raised by Defense H that is at the heart of Petco's motion to dismiss when ruling on the motion to dismiss.

Estoppel, Collateral Estoppel, Waiver, Release, Res Judicata, and/or Laches Bar the State's Claims (Defense I)

The People argue that Defense I should be stricken because it is factually and legally insufficient. Mot. to Str. at 16-17. The People assert that Defense I merely lists multiple legal and equitable doctrines without specifying how any of these doctrines defeat specific causes of action, and that, for each of the legal doctrines listed in Defense I, Petco fails to show that the elements required for each doctrine were met, and fails to allege specific facts to support those elements. Mtn. to Str. at 16-22. Petco responds that it has pled the facts necessary to assert these doctrines as an affirmative defense and that it should have the opportunity to demonstrate how they apply during the proceedings (Resp. Mtn. to Str. at 14), yet offers no facts to show how the doctrines listed defeat any of the People's claims. *See* Richco Plastic at 784-85; *see also* 35 Ill. Adm. Code 103.204(d); *see also* 735 ILCS 5/2-613(d) (2022).

The Board finds that Petco has failed to make even a basic factual demonstration of how any of the doctrines listed under this defense apply in this matter. Therefore, the Board cannot make a determination as to whether any of the doctrines listed in this defense may defeat any of the claims of the amended complaint. The Board therefore strikes Defense I without prejudice and gives Petco 30 days to amend Defense I, or it will be stricken with prejudice. If Petco fails to amend this defense for any of the listed doctrines, the Board will strike that portion of Defense I with prejudice, meaning that Petco will be precluded from arguing that doctrine as an affirmative defense, "unless the affirmative defense could not have been known before hearing." 35 Ill. Adm. Code 103.204(d).

The Penalties Sought by the State in This Action Should Be Reduced by Petco's Past Civil Penalty Payments (Defense J)

The People assert that seeking a reduction in civil penalty for costs spent on remediation is not an affirmative defense, and, further, that this defense is insufficiently pled because Petco gives no facts that identify what payments it is referencing. Mot. to Str. at 23. The People argue that respondent's costs incurred remediating a problem for which it was responsible is not a factor that could lower applicable civil penalties under the Act, and that past civil penalties paid by respondent in past legal actions are of no relevance to the penalties sought for new violations under the Act. *Id.* at 23-24; *see also* 415 ILCS 5/42(h) (2022) (factors that the Board may consider when calculating a civil penalty in an action brought under the Act). Accordingly, the People request that the Board strike Defense J with prejudice.

Petco asserts that its past payments of civil penalties should be credited to reduce the cost of any penalties sought in this matter. However, past payment of civil penalties pertains to remedy and is not an affirmative defense. Accordingly, the Board strikes Defense J without prejudice. However, as part of its defense, Petco may provide additional information about prior payments of civil penalties at specific well locations for the Board to consider as part of its Section 33(c) and 42(h) analysis. *See* 415 ILCS 5/33(c), 42(h) (2022).

Petco Was Not the Cause-In-Fact and/or Proximate Cause of the Alleged Discharges (Defense K)

The People argue that Defense K should be stricken with prejudice because it is legally insufficient because Petco relies on the incorrect standard of liability for this affirmative defense. Mot. to Str. at 24. Moreover, the People argue that Petco's claim that the People cannot meet the standard for liability under Section 12(a) of the Act is an attack on the sufficiency of the claim on the issue of liability, and is prematurely pled at this stage in the proceedings. Reply Mot. to Str. at 20-21. Petco argues that the claims of the first amended complaint are barred because "the State cannot prove that Petco was the cause-in-fact and/or the proximate cause of the alleged discharges". Def. K. The People argue that Petco is applying a tort standard of liability, and that the correct standard of liability for enforcement actions under the Act is whether respondent caused, threatened, or allowed the discharge of contaminants into the environment. Mot. to Str. at 24; 415 ILCS 5/12(a) (2022). Because Petco relies on an incorrect standard of liability, and attacks the pleadings, the People request that the Board dismiss this affirmative defense with

prejudice. Mot. to Str. at 25; Reply Mot. to Str. at 22.

Petco essentially argues that the State's claims are barred because Petco's causation of the alleged violations cannot be proved, but Petco does not provide any specific facts to support this assertion. Additionally, Petco's assertion that it is not the ultimate cause-in-fact or proximate cause of alleged violations is a legal conclusion concerning liability in tort. Legal conclusions filed as affirmative defenses, but unsupported by allegations of specific facts, are insufficient. Hicks at 6, citing LaSalle National Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557. The Board accordingly finds that this is not an affirmative defense, and strikes Defense K without prejudice. However, as part of its defense, Petco may provide additional information about these arguments at specific well locations for the Board to consider as part of its Section 33(c) and 42(h) analysis. *See* 415 ILCS 5/33(c), 42(h) (2022).

Reservation of Right to Amend Answer Later in Proceedings (Defense L)

Petco asserts that its final listed defense is a reservation of its right to amend and supplement its answer, affirmative and additional defenses later in the proceedings. Def. L. The People argue that the Board should strike Defense L with prejudice because a reservation of rights is not a proper affirmative defense. Reply to Mot. to Str. at 21-22; *see* Resp. to Mot. to Str. The Board agrees with the People that reservation of a right to amend and supplement defenses is not an affirmative defense. *See* 35 Ill. Adm. Code 103.204(d). Therefore, the Board strikes this affirmative defense with prejudice.

Motion to Strike "Immaterial Matter"

The People move to strike "other immaterial matter" alleged in Petco's answer that they argue does not comply with the Board's pleading standards and, where the Board's rules are silent, the Illinois Code of Civil Procedure. *See* 35 Ill. Adm. Code 103.204(d), 101.100(b); 735 ILCS 5/2-610(a), 2-615(a) (2022). In their motion, the People list 57 paragraphs of Petco's answer, each allegedly containing objectionable language that they assert is "immaterial". Mot. to Str. at 28. Later, in their reply, the People identify the language within each of those paragraphs that the People find objectionable – 50 individual sentences and 7 instances of the word "preliminary". Reply Mot. to Str., Table 1. However, nowhere do the People argue *why* any of this language in Petco's answer is immaterial. Mot. to Str. at 25-28; Reply Mot. to Str. at 9-10, Table 1.

Whether matter in a pleading is immaterial, and therefore may be struck as such, requires determining its relevance. *See* Doe v. Coe, 2019 IL 123521, ¶¶ 24-29 ("[A] fact is 'relevant' if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."), *quoting* People v. Pawlaczyk, 189 Ill. 2d 177, 193 (2000). Petco argues that the answers being challenged are relevant and that the People do not plead with specificity the other affirmative matter they seek to strike. Sur-Reply at 2-3; Resp. Mot. to Str. at 3. The Board need not decide these questions. The People, as movant, have failed to show or even argue that any of the language in Petco's answer is irrelevant to this action, and therefore did not point out specifically how the language was immaterial. *See* 735 ILCS 5/2-615(a) (2022) ("The motion shall point out specifically the

defects complained of, and shall ask for appropriate relief, such as: . . . that designated immaterial matter be stricken out . . . ."). Given this absence of support, the Board denies the People's motion to strike the identified language as "immaterial matter." "However, the Board will disregard any irrelevant allegations." People v. Professional Swine Management, LLC, PCB 10-84, slip op. at 40 (Feb. 2, 2012) (denying motion to strike); *see also* Lowe Transfer, Inc. v. County Bd. of McHenry County, PCB 03-221, slip op. at 7 (Oct. 2, 2003) (denying motion to strike).

The People also argue that the specified language in the 57 paragraphs of Petco's answer is "inappropriate" because it goes beyond what is permitted by Section 103.204(d) of the Board's procedural rules. Mot. to Str. at 25. In relevant part, that rule addresses answering the allegations of a complaint:

> [R]espondent must file an answer within 60 days after receipt of the complaint if respondent wants to deny any allegations in the complaint. All material allegations of the complaint will be taken as admitted if no answer is filed or if not specifically denied by the answer, unless respondent asserts a lack of knowledge sufficient to form a belief. 35 Ill. Adm Code 103.204(d).

The People interpret this rule as prohibiting all but "three options" for answering a complaint's allegations: "respondent in its answer is required to admit, deny, or state that it lacks knowledge sufficient to form a belief." Mot. to Str. at 26. The People argue that the sentences in Petco's answer that do not constitute an explicit admission, denial, or statement of knowledge are therefore immaterial and inappropriately included in Petco's answer. Mtn. to Str. at 27. Because the Board's regulations are silent as to the inclusion of immaterial matter in an answer, the People point to the Illinois Code of Civil Procedure provision that allows for motions to strike designated immaterial matter. *Id.* at 25, citing 735 ILCS 5/2-610(a), 2-615(a) (2022). Petco disagrees, asserting that "[t]here is no prohibition" against it "pleading salient facts responsive to the [People's] allegations . . . ." Sur-Reply at 3.

The Board finds that the People read too much into this procedural rule. It is not a prohibition of any kind. Rather, the rule describes when an answer is due "if respondent wants to deny any allegations in the complaint." 35 Ill. Adm. Code 103.204(d). It also describes the legal consequences "if no answer is filed or if not specifically denied by the answer, unless respondent asserts a lack of knowledge sufficient to form a belief." *Id*. By its terms, the rule does not prohibit answers to allegations from going beyond a bare admission, denial, or statement of lack of knowledge. The Board's procedural rules are not meant to be a hyper-technical sword for complainants. *See e.g.*, People v. Inverse Investments, LLC, PCB 11-79 (June 21, 2012) (denying People's motion to strike a defense for not being an affirmative defense, even though Board's procedural rule only covers affirmative defenses). Additionally, that Section 2-610(a) of the Code of Civil procedure requires an answer to "contain an explicit admission or denial of each allegation" doesn't mean that it prohibits everything else. Although the Board may look to the Illinois Supreme Court Rules and the Code of Civil Procedure for "guidance" when its procedural rules are silent, the Board cannot do so to impose a new pleading requirement. "[T]he Board uses [] outside procedural rules for guidance; they do not control proceedings before the Board." Susan Bruce v. Highland Hills Sanitary District, PCB 15-139,

slip op. at 2 (Mar. 17, 2016) (emphasis in original).

Further, the Board is not persuaded by the People's argument that they are unable to "adequately determine whether [Petco's] immaterial statements constitute a valid affirmative defense requiring objection or an argument not requiring a reply" (Mot. to Str. at 28), as Petco's only stated "affirmative and additional defenses" (Ans. at 150-52) are "clearly identified" (People v. Six M. Corp., Inc., PCB 12-35, slip op. at 3 (Mar. 28, 2019)); 35 Ill. Adm. Code 103.204(d) (affirmative defenses must be plainly stated). The 57 affirmative statements the People seek to strike are not properly pled affirmative defenses. *See* Six M. at 4.

"[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). Because the affirmative statements in Petco's answer are not pled as affirmative defenses, the Board denies the People's motion to strike the identified language in Petco's answer as inappropriately pled. Accordingly, the Board denies the People's motion to strike the affirmative statements in the answer to the amended complaint identified in the People's reply. However, as noted above, "the Board will disregard any irrelevant allegations." Professional Swine, PCB 10-84, slip op. at 40.

ORDER

1. Complainant's Motion to Strike Respondent's Affirmative and Additional Defenses is GRANTED, IN PART.

2. Defenses C and L are STRICKEN WITH PREJUDICE.

3. Defenses A, B, D, E, F, G, J, and K are STRICKEN WITHOUT PREJUDICE.

4. Defense H is STRICKEN WITHOUT PREJUDICE, IN PART, insofar as it pertains to unspecified alleged defenses of limitations.

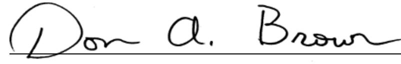
5. Complainant's Motion to Strike Immaterial Matter is DENIED.

6. Respondent has until September 9, 2024, the first business day after 30 days from the date of this order, to amend Defenses B, D, E, F and I, as well as the portion of Defense H pertaining to unspecified allegations of limitations, or they will be stricken with prejudice.

7. The statute of limitations issue presented in Defense H and in Respondent's Motion to Dismiss will be ruled on in a separate 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 August 8, 2024, by a vote of 4-0.



Don A. Brown, Clerk
Illinois Pollution Control Board