

ABBREVIATED PROCEDURAL HISTORY

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

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

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

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

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

APPLICABLE LEGAL STANDARDS

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

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

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

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

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

DISCUSSION

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

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

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

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

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

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

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

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

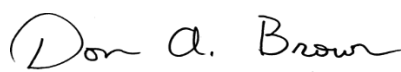
Because an enforcement action brought before the Board under Section 31 of the Environmental Protection Act is not a “civil action” for purposes of Section 13-205 of the Code of Civil Procedure, the Board finds that the additional counts of the People’s Amended Complaint are not a “civil action” barred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

ORDER

1. The Board denies Petco’s Motion to Dismiss Counts 62 Through 73 of the First Amended Complaint.
2. The Board strikes the remaining portion of Affirmative Defense H pertaining to the statute of limitations argument raised in the Motion to Dismiss with prejudice.

IT IS SO ORDERED.

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



Don A. Brown, Clerk
Illinois Pollution Control Board