ILLINOIS POLLUTION CONTROL BOARD
March 6, 2025

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

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

This matter is before the Illinois Pollution Control Board (Board) on a motion for certification of question for interlocutory appeal (Mot.) filed on December 19, 2024, by Petco Petroleum Corporation (Petco or Respondent) pursuant to 35 Ill. Adm. Code 101.908 and Illinois Supreme Court Rule 308. The motion requests that the Board certify a question for interlocutory appeal to the Illinois Appellate Court. Mot. at 1. On January 2, 2025, the People of the State of Illinois (People) filed their response (Resp.). For the following reasons, the Board denies Petco's motion.

Below, the Board first describes the relevant procedural background. Next, the Board summarizes Petco's motion for certification of question as well as the People's response. The Board then provides a discussion on the motion and denies Petco's motion.

RELEVANT PROCEDURAL BACKGROUND

On September 16, 2024, Petco filed a motion for reconsideration of the Board's August 22, 2024 order.[1] The Board's August 22, 2024 order denied Petco's motion to dismiss Counts 62 through 73 of the People's First Amended Complaint (Mot. to Dis.) and struck the remaining portion of affirmative defense H related to Petco's argument raised in the motion to dismiss.

On September 30, 2024, the People filed their response. The Board denied Petco's motion for reconsideration on December 5, 2024.

On December 19, 2024, Petco filed this motion for certification of question for interlocutory appeal. On January 2, 2025, the People filed their response.

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

Additionally, on January 6, 2025, Petco filed its amended affirmative and additional defenses. On February 5, 2025, the People filed a motion to strike Petco's amended affirmative and additional defenses. On February 19, 2025, Petco filed its response to the People's motion.

Respondent did not file a formal motion to stay proceedings while the Board considers the pending motions. However, in a status conference on February 11, 2025, the parties indicated to the Board hearing officer that they wished to stay the proceedings in this matter until all pending motions are resolved. Hearing Officer Order, Feb. 11, 2025.

LEGAL BACKGROUND

The Board's procedural rules allow the Board to consider an interlocutory appeal under Supreme Court Rule 308 (Ill. S. Ct. Rule 308). 35 Ill. Adm. Code 101.908. Supreme Court Rule 308(a) provides in part:

> When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved. Such a statement may be made at the time of the entry of the order or thereafter on the court's own motion or on motion of any party. The Appellate Court may thereupon in its discretion allow an appeal from the order. Ill. S. Ct. Rule 308 (2024).

The Board's authority to certify interlocutory appeals is also supported by judicial interpretation. *See* People v. Pollution Control Board, 129 Ill. App. 3d 958,473 N.E.2d 452 (1st Dist. 1984); Getty Synthetic Fuel v. PCB, 104 Ill. App. 3d 285, 432 N.E.2d 942 (1st Dist. 1982). The Illinois Supreme Court has indicated that Rule 308 appeals are to be allowed only in certain exceptional circumstances. People v. Pollution Control Board, 473 N.E.2d at 456, *citing* People ex. rel. Mosley v. Carey, 74 Ill.2d 527 (1979). Accordingly, Rule 308 should be strictly construed and sparingly exercised. People v. Pollution Control Board, 473 N.E.2d at 456.

In order for the Board to grant a 308(a) certification, it must determine that a two-prong test is satisfied: 1) whether the Board's decision involves a question of law involving substantial ground for a difference of opinion; and 2) whether immediate appeal may materially advance the ultimate termination of the litigation. Residents Against a Polluted Environment and the Edmund B. Thornton Foundation v. County of LaSalle and Landcomp Corporation, PCB 96-243 (Nov. 7, 1996); *see also* People v. State Oil Company, et al., PCB 97-103 (May 16, 2002) *and* E.R.1, LLC v. Erma Seiber et. al., PCB 8-30 (Apr. 21, 2011). However, even after the trial court has made the required finding and the application has stated why an immediate appeal is justified, allowance of an appeal is discretionary. Voss v. Lincoln Mall Management, 166 Ill. App. 3d 442, 519 N.E.2d 1056 (1st Dist. 1988); Camp v. Chicago Transit Authority, 82 Ill. App. 3d 1107, 403 N.E.2d 704 (1st Dist. 1980).

ARGUMENTS OF THE PARTIES

Below, the Board summarizes the arguments made by the parties on Petco's motion for certification of question for interlocutory appeal.

Petco's Motion for Certification of Question

In support of its motion for certification, Petco states that the Board's December 5, 2024 order denying Petco's motion to reconsider and the Board's August 22, 2024 order denying Petco's motion to dismiss Counts 62 through 73 of the First Amended Complaint involves a question of law as to which there are substantial grounds for differences of opinion. Mot. at 6. Additionally, Petco asserts that an immediate appeal from the orders may materially advance the ultimate termination of the litigation. *Id.* at 10. In its motion, Petco proposes one question for certification: whether the five-year statute of limitations in 735 ILCS 5/13-205, which applies to "all civil actions not otherwise provided for," applies to civil enforcement actions filed before the Board pursuant to Section 31(d)(1) of the Environmental Protection Act, 415 ILCS 5 (2022) (Act). *Id.* at 4; *see also* 735 ILCS 5/13-205 (2022), 415 ILCS 5/31(d)(1) (2022).

Petco initially characterizes the underlying litigation as a "civil enforcement action" and contends that the Board's order denying the motion to dismiss is a proper subject for interlocutory appeal under Supreme Court Rule 308. Mot. at 3. Moreover, Petco asserts that "court review is warranted" on the Board's ruling regarding the inapplicability of the statute of limitations to this matter as it is "a case of first impression." Mot. at 4. Petco therefore concludes that novel issues may properly be certified for appellate review because they present legal questions of first impression. *Id*. Specifically, Petco alleges that the Board's "new broad ruling" that State actions brought before the Board under Section 31 of the Act are not subject to a statute of limitations because they are "administrative actions" creates an inconsistent policy that allows the State to bring stale claims before the Board, but not in circuit court. *See*, *id.* at 5. In support of its policy argument, Petco maintains that no Illinois court has addressed the question it presents to the Board for certification, and concludes that an Illinois court should weigh in on the issue by analyzing the statutory texts and their interactions to determine the legislative intent, and that such court could disagree with the Board. *Id.* at 6.

Petco additionally maintains that there are substantial grounds for difference of opinion on whether Section 13-205 applies. Mot. at 6. Petco contends that the federal case law cited by the Board in its August 22, 2024 order does not consider the question presented here. *Id.* at 7. In support of its assertion, Petco cites case law from non-Illinois state courts that it argues are "contrary decisions" on the question presented, constitute substantial grounds for difference of opinion, and thus warrants Petco's interlocutory appeal. *Id.* at 10.

Finally, Petco argues that certification of the question will materially advance the litigation. Mot. at 10. Petco bases its argument on the claim that the statute of limitations issue is dispositive of eleven of the seventy-three counts in this enforcement action. Mot. at 10. Petco claims an interlocutory appeal would determine the number and scope of the People's claims that can proceed to evidentiary hearing and thus "preserve Board resources while not [ ] materially impacting the duration of the Board's proceedings in this case." *Id*. Specifically, Petco

maintains that a determination through an interlocutory appeal on these 11 counts will "directly impact the scope of discovery, motion practice, evidentiary presentation, and Board findings that may be required to conclude this case." *Id*.

Respondent did not request a stay of the proceedings in its motion, but the parties have communicated to the Board hearing officer that they do not wish to continue the proceedings until the pending motions are resolved. *See* Hearing Officer Order, PCB 13-72, Feb. 11, 2025.

The People's Response

The People argue that respondent's motion fails to satisfy the Board's two-prong test for granting 308(a) certification. Resp. at 2. Initially, the People argue that Petco's question itself should be rejected as inappropriate because the question implicitly requires the Board to refute its August 22, 2024 Order determining the underlying cause of action is an "administrative proceeding," rather than a civil action, via the process of certification. Resp. at 5. However, the People maintain that despite the inappropriate formulation of the question, Petco still fails to satisfy the two-prong test for granting 308(a) certification. *Id*. The People further argue that Petco fails to establish the existence of "exceptional circumstances" to warrant certification of its question, and refute the legitimacy of Petco's policy arguments and appropriateness of its venue selection on appeal. *Id.* at 12-13. Thus, the People object to respondent's motion for certification of question for interlocutory appeal. *Id.* at 14-15.

As to the first prong, the People argue that a matter of first impression does not inherently confer a substantial ground for difference of opinion. *See*, Resp. at 5, *citing* People v. Freeman United Coal Mining Co., LLC et al., PCB 10-61 (Apr. 18, 2013), slip op. at 7. The People support their position with two arguments. First, the People dispute Petco's policy argument that the Board's characterization of this action as an administrative proceeding rather than a civil action subject to Section 13-205 allows the State to file with the Board "any litigation that otherwise would be time-barred in the circuit courts." Resp. at 6. In support of their position, the People point to the extensive case law in the record showing the Board's previous findings that the Section 13-205 statute of limitations does not apply to actions brought by the State before the Board under Section 31 of the Act. *Id.*, *citing* People v. John Crane Inc., PCB 01-76 (May 17, 2001), slip op. at 5; 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., PCB 00-67 (May 18, 2000), slip op. at 3; *see also* People Resp. to Mot. to Dis. Am. Comp.

Additionally, the People assert that it is well-established law that no statute of limitations applies to a governmental entity acting in the public interest under the doctrine of governmental immunity, otherwise known as the "public interest exception." Resp. at 6, *citing* City of Chicago v. Latronica Asphalt & Grading, Inc., 346 Ill. App. 3d 264 (1st Dist. 2004); *see also* People Resp. to Mot. to Dis. Am. Comp. The People argue that Petco seeks to relitigate an issue not in doubt, because Section 13-205 does not apply regardless of whether the State brings an action before the Board as an administrative proceeding or in circuit court, due to the public interest exception. Resp. at 6-7. Therefore, the People refute Petco's policy argument as moot. *Id.* at 7, 12.

Second, the People assert that Petco relies on case law that does not support its argument or is distinguishable from this case. Resp. at 7. The People note that Petco does not cite any Illinois case law in support of its position, and argue that appellate law from other states' courts of appeal is not binding precedent in Illinois, including before the Board. *Id*. The People distinguish the cases Petco cites: for instance, on the grounds that they concern contract disputes to which statutes of limitations apply, or on the grounds that they concern a government entity seeking to recoup expended monies, versus environmental enforcement actions brought under state environmental law that fall within the public interest exception to the Section 13-205 statute of limitations; or because the cases support the People's position that a statute of limitations does not apply to government actors seeking to hold persons or entities accountable for their actions in administrative proceedings. *Id.* at 7-8.

As for the second prong of the test, the People first argue that Petco is incorrect to assert that an interlocutory appeal would determine the scope of discovery, motion practice, evidentiary practice, and Board findings in the underlying case. Resp. at 10. The People contend that this is because Petco's question is framed to circumvent the Board's finding that the underlying action is an "administrative proceeding" rather than a "civil action." *Id*. Specifically, the People argue that a rightly worded question to determine if the underlying action is a "civil action" would not resolve whether Section 13-205 is applicable. This is because the Board would still have to consider, for the first time, whether the public interest exception applies to defeat the Section 13-205 statute of limitations. *Id.* The People therefore argue that the underlying case would continue because the public interest exception would prevent the application of Section 13-205 even in that case. *See*, *id*.

The People next contend that, even if the number of counts were reduced as the result of an appeal, it would not materially advance the termination of litigation in this case. Resp. at 11. Because Petco's question only pertains to the 12 counts added by the First Amended Complaint, even if Petco prevailed, the remaining 61 counts of the total 73 counts would be unaffected and necessarily proceed to penalty hearing. *Id*. The People also argue that 12 of 73 counts is not a significant enough portion to expedite the parties' presentation or the Board's consideration of the remaining 61 similar alleged violations in the complaint. *Id*. Moreover, the People assert that Petco failed to present evidence for its conclusory statements on this argument. *Id*. The People thus conclude that an interlocutory appeal in this case would have no material effect on the termination of the litigation.

Furthermore, the People argue that Rule 308 appeals are to be allowed only in exceptional circumstances, and that because Petco has neither made, nor proved a claim that the underlying case is one of "exceptional circumstances," it fails to meet the required burden. Resp. at 12, *citing* People v. Freeman United Coal Mining Co., LLC et al., PCB 10-61 (Apr. 18, 2013), slip op. at 7. The People support their position by noting that Petco did not file a response objecting to the People's motion for leave to file the First Amended Complaint, and waited four months after the Board accepted the First Amended Complaint to file a motion to dismiss. Resp. at 12.

Finally, the People assert that Petco's venue request seeks more venue options than would be afforded to appeals of final Board orders, which are limited to the appellate court of the

district in which the cause of action arose, and that it would be inconsistent to grant an interlocutory appeal in any venue other than the Fifth District Appellate Court. Resp. at 14.

DISCUSSION

The Board will examine Respondent's arguments under each prong of the two-prong Rule 308 test to reach its conclusion.

Whether the Order Involves a Question of Law that Presents Substantial Ground for Difference of Opinion

Petco first contends that "court review is warranted on the Board's new broad ruling on the inapplicability of 735 ILCS 5/13-205 is a case of first impression." Mot. at 4. The contention that a question presents a matter of first impression does not automatically satisfy the first prong of the Board's test for granting Rule 308(a) certification. Freeman United Coal Mining Co., LLC, PCB 10-61, slip op. at 6. A question may be of first impression and yet may still not involve an issue on which there are substantial grounds for difference of opinion. *Id*.

The Board also is not persuaded that Petco's question about the applicability of Section 13-205 raises substantial ground for a difference of opinion merely because Petco presumes to re-characterize this administrative proceeding as a "civil enforcement action" for the purpose of answering a question the Board did not address in its Order on which this interlocutory appeal is based. Mot. at 4. To this point, the People argue that Petco's question is improper because it presumes a conclusion that refutes the Board's August 22, 2024 finding that the underlying litigation is an "administrative proceeding." Resp. at 5. Indeed, Petco's question requires the Board and an appellate court to accept that the underlying litigation is a "civil enforcement action," rather than an "administrative proceeding," so that the appellate court can decide whether actions brought by the State before the Board pursuant to Section 31 of the Act are subject to the Section 13-205 statute of limitations. Mot. at 4-6.

But, regardless of the potential impropriety of the basis of Petco's question, the Board is not persuaded by Petco's argument that it is necessary for a court to analyze the interaction between Section 13-205 and Section 31 of the Act to determine whether State enforcement actions brought before the Board are "civil actions" subject to Section 13-205 statute of limitations simply because an Illinois court has not done so yet. Mot. at 6. The fact that this is a question of first impression does not establish substantial grounds for difference of opinion on the applicability of a statute of limitations to an action brought by the People before the Board to enforce Section 31 of the Act. *See*, Freeman United Coal Mining Co., LLC, PCB 10-61, slip op. at 6.

Further, Illinois law has established that when a government entity brings a cause of action under Section 31 of the Act, the applicability of a statute of limitations to that action is a question of whether the State was acting in the public interest under the public interest exception analysis. The Board and the Appellate Court have found that there is no statute of limitations that applies to enforcement actions brought by the State pursuant to Section 31 of the Act. People v. John Crane Inc., PCB 01-76 (May 17, 2001), slip op. at 5, *citing* Pielet Bros. Trading,

Inc. v. Pollution Control Board, 110 Ill. App. 3d 752, 758, 442 N.E.2d 1374, 1379 (5th Dist. 1982). In other words, even if the underlying litigation were to be characterized as a "civil enforcement action," rather than an "administrative proceeding," the 12 counts Petco seeks to time-bar by certification of its question would still be subject to the well-established public interest exception analysis on the application of the statute of limitations, regardless of forum. *See*, *e.g.*, John Crane Inc., PCB 01-76, slip op. at 5; Pielet Bros. Trading, Inc., 110 Ill. App. 3d at 758; People v. Am. Disposal Co. and Consol. Rail Corp., PCB 00-67 (May 18, 2000), slip op. at 2-3; City of Chicago v. Latronica Asphalt & Grading, Inc., 346 Ill. App. 3d 264 (1st Dist. 2004). Therefore, the Board finds that Petco has not presented a question of law as to which there is substantial ground for difference of opinion. Ill. S. Ct. Rule 308 (2024).

Similarly, the Board finds Petco's reliance on out-of-state case law does not present persuasive authority or controlling authority to establish substantial ground for difference of opinion here. *See* People v. Community Landfill Company, Inc., et al., PCB 97-193 cons. 04-207 (Aug. 20, 2009), slip op. at 38 (finding that People's reliance on non-Illinois jurisdictions' case law presented no persuasive authority or controlling authority which alters well-settled holding by Illinois courts). Indeed, Petco asks that an appellate court review two Illinois statutes, yet supports its argument with cases from other jurisdictions that do not involve the interpretation of an Illinois statute. *See*, Mot. at 7-9. While out-of-state case law may be instructive, it is not controlling. *See* Bi-State Disposal, Inc., v. Illinois Environmental Protection Agency, PCB 89-49 (Jun. 8, 1989), slip op. at 5 (Board declined to give great weight to U.S. Virgin Islands case that did not involve Illinois statute and conflicted with Illinois case law).

Even looking to the out-of-state cases as non-precedential guidance, the Board finds that the cases Petco cites are readily distinguishable from State actions brought to enforce statutory environmental law in the public interest, as Petco's cited cases concern contractual disputes or cases where reimbursement of funds were sought. *See*, Suburban Home Health Care, Inc. v. Executive Office of Health & Human Services, 488 Mass. 347 (Mass. 2021) (finding government was time-barred by statute of limitations from seeking to recoup government overpay after waiting over a decade); Commonwealth of Kentucky, et al. v. Kentucky Insurance Guaranty Association, 972 S.W.2d 278 (Ky. Ct. App. 1997) (finding bond forfeiture proceeding was "administrative counterpart" to common law contract action and therefore subject to statute of limitations); Hames v. City of Miami Firefighters' & Police Officers' Trust, 980 So. 2d 1112 (Fla. Dist. Ct. App. 2008) (finding statute of limitations did not apply to actions of trust fund for retired police officer dispensation in administrative disciplinary proceeding); Roger J. Bouchard, et al. v. State Employees Retirement Commission, 328 Conn. 345 (Conn. 2018) (finding state retirees' claims analogous to contract action and thus applying statute of limitations to their claims). The Board thus finds that respondent's 'first impression-slash-policy' argument fails to provide sufficient indication that substantial ground for difference of opinion exists on the question presented to the Board for certification.

Whether an Immediate Appeal May Materially Advance the Ultimate Termination of the Litigation

The Board is also not persuaded that if a question concerns a complainant's ability to bring only a fraction of the counts of alleged violations in a complaint, the question "materially

advances the termination of this case." Mot. at 10. The Board is not persuaded that an interlocutory appeal that could dismiss just 12 counts will significantly "determine the number and scope of the State's claims that can proceed to an evidentiary hearing," or "the scope of discovery, motion practice, evidentiary presentation, and Board findings" in this case. *Id*. This case has been ongoing since 2013, during which time the parties have been unable to reach a resolution. *See* People v. Petco Petroleum Corporation, PCB 13-72 (Jul. 11, 2013), Complaint. The Board notes Petco did not object to the People's motion for leave to file a first amended complaint. By accepting the unopposed First Amended Complaint for hearing, the Board determined that the additional claims alleged in it were similar in nature and arose from similar facilities operated by Respondent, such that addressing the violations within this case, rather than opening a new case, would more effectively use the parties' and Board's resources, and that Petco would be neither surprised nor prejudiced by the additional claims. *See* People v. Petco Petroleum Corporation, PCB 13-72 (Oct. 10, 2022), slip op. at 1; *see also* 35 Ill. Adm. Code 103.204(c), (f), 103.212(c).

Furthermore, the Board finds that Petco presents no significant evidence to indicate that granting certification of this question for interlocutory appeal will materially advance the termination of these proceedings, most notably because Petco's question applies only to the twelve counts added by the First Amended Complaint. *See*, Am. Comp.; *see also*, Mot. to Dis. Thus, even if the applicability of a statute of limitations somehow limited the People's ability to bring the "stale" claims of the First Amended Complaint, such limitation would only affect 12 of the 73 total counts of violations before the Board. Mot. at 6, 10; *see also* Mot. to Dis. (alleging that the twelve additional counts added by the People's First Amended Complaint are time-barred by the Section 13-205 statute of limitations). The Board notes that the continued, unaffected existence of the remaining 61 similar counts in this matter and their proceeding through evidentiary hearing, discovery, motion practice, and penalty hearing, contradicts Petco's argument that certification of its question would materially advance the ultimate termination of this litigation. *See* People v. Petco Petroleum Corporation, PCB 13-72 (Jul. 11, 2013) (accepting People's complaint for hearing). Petco's claims are therefore without sufficient evidence to satisfy the second prong of the Board's test for a Rule 308(a) certification.

Exceptional Circumstances

In order to establish that the exceptional relief of a Rule 308(a) interlocutory appeal is warranted, a movant must provide considerable evidence that a question will significantly advance the ultimate termination of the case before the Board. The Board finds that Petco has neither claimed, nor presented evidence of, the existence of exceptional circumstances in this case so as to warrant certification for interlocutory appeal under Rule 308(a). People v. Freeman United Coal Mining Co., LLC et al., PCB 10-61, slip op. at 7 (Apr. 18, 2013).

Granting certification under Supreme Court Rule 308(a) is up to the discretion of the Board, and following well-established precedent, certification for interlocutory appeal is to be granted only in exceptional circumstances and where both prongs of the Rule 308(a) test have been satisfied. The Board finds that Respondent's arguments fail to establish that, under Supreme Court Rule 308(a), this situation rises to a level warranting such exceptional relief.

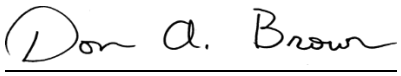
CONCLUSION

The Board finds that Petco has failed to prove that the exceptional relief of an interlocutory appeal pursuant to Supreme Court Rule 308(a) is warranted. Simply because a question presents a matter of first impression does not automatically mean it constitutes a question of law involving substantial ground for difference of opinion on which certification should be granted. Furthermore, Petco has not put forth any persuasive argument to the Board that an immediate appeal on its question of Section 13-205 applicability will materially advance the ultimate termination of this litigation. Therefore, the Board denies Respondent's motion for certification of question for interlocutory appeal.

At the request of the parties, the proceedings in this matter are stayed pending the Board's forthcoming order on the People's motion to strike Petco's amended and affirmative additional defenses.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on March 6, 2025, by a vote of 5-0.



Don A. Brown, Clerk
Illinois Pollution Control Board