BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

To: *See Service List*

PLEASE TAKE NOTICE that on the 1st day of June, 2023, the attached documents were filed with the Illinois Pollution Control Board, with true and correct copies attached hereto and which are hereby served upon you. The attached documents include the following:

- Notice of Filing
- Complainant's Motion for Leave to File Sur-Reply to Respondent's Reply to Complainant's Response in Opposition to Respondent's Motion to Dismiss Counts 62 through 73 of the First Amended Complaint
- Complainant's Sur-Reply to Respondent's Reply to Complainant's Response in Opposition to Respondent's Motion to Dismiss Counts 62 through 73 of the First Amended Complaint
- Complainant's Motion for Leave to File Reply to Respondent's Response in Opposition to Complainant's Motion to Strike Respondent's Affirmative and Additional Defenses to the First Amended Complaint and Immaterial Matter
- Complainant's Reply to Respondent's Response in Opposition to Complainant's Motion to Strike Respondent's Affirmative and Additional Defenses to the First Amended Complaint and Immaterial Matter and accompanying Table 1
- Service List and Certificate of Service

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
KWAME RAOUL, Attorney General
of the State of Illinois

/s/ Natalie Long
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Dated: June 1, 2023

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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PETCO PETROLEUM CORPORATION, an Indiana corporation,	)	
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Respondent.	)	

COMPLAINANT'S MOTION FOR LEAVE TO FILE SUR-REPLY TO RESPONDENT'S REPLY TO COMPLAINANT'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS COUNTS 62 THROUGH 73 OF THE FIRST AMENDED COMPLAINT

NOW COMES COMPLAINANT, People of the State of Illinois, by KWAME RAOUL, Attorney General of the State of Illinois, by and through its undersigned counsel pursuant to Section 101.500 of the Illinois Pollution Control Board Regulations, 35 Ill. Adm. Code 101.500, and hereby submits this Complainant's Motion for Leave to File Sur-Reply to Respondent's Reply to Complainant's Response in Opposition to Respondent's Motion to Dismiss Counts 62 through 73 of the First Amended Complaint, stating as follows:

1. On October 20, 2022, by order of the Illinois Pollution Control Board ("Board"), the Board accepted Complainant's First Amended Complaint.

2. On January 18, 2023, Respondent filed a Motion to Dismiss Counts 62 through 73 of the First Amended Complaint ("Motion to Dismiss").

3. On March 10, 2023, Complainant filed Complainant's Response in Opposition to Respondent's Motion to Dismiss Counts 62 through 73 of the First Amended Complaint ("Response").

4. On April 19, 2023, Respondent filed a Motion for Permission to File Reply to Complainant's Response in Opposition to Respondent's Motion to Dismiss Counts 62 through 73 of the First Amended Complaint ("Motion for Permission"), accompanied by a Reply to Complainant's Response in Opposition to Respondent's Motion to Dismiss Counts 62 through 73 of the First Amended Complaint ("Reply").

5. On April 28, 2023, Respondent served the Motion for Permission and Reply on Complainant.

6. On May 1, 2023, the parties participated in a telephone status conference before the Hearing Officer for the Board, wherein it was agreed that any responsive filing to be submitted by Complainant would be filed by June 1, 2023.

7. In its Reply, Respondent both inappropriately seeks to revisit arguments already set forth in its Motion to Dismiss, and to introduce new information that is irrelevant, distinguishable, and/or objectionable.

8. Complainant should be allowed to file Complainant's Sur-Reply to Respondent's Reply to Complainant's Response in Opposition to Respondent's Motion to Dismiss Counts 62 through 73 of the First Amended Complaint ("Sur-Reply"), both to address the irrelevant and distinguishable information presented in Respondent's Reply, and to object where appropriate.

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Board enter an order granting this motion, allowing the filing of Complainant's Sur-Reply to Respondent's Reply to Complainant's Response in Opposition to Respondent's Motion to Dismiss Counts 62 through 73 of the First Amended Complaint, and granting such other relief as the Board deems proper.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. KWAME RAOUL,
Attorney General of the State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/
Asbestos Litigation Division

/s/ Natalie Long
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PETCO PETROLEUM CORPORATION, an Indiana corporation,	)	
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	)	
Respondent.	)	

COMPLAINANT'S SUR-REPLY TO RESPONDENT'S REPLY TO COMPLAINANT'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS COUNTS 62 THROUGH 73 OF THE FIRST AMENDED COMPLAINT

NOW COMES COMPLAINANT, People of the State of Illinois, by KWAME RAOUL, Attorney General of the State of Illinois, by and through its undersigned counsel, and hereby submits this Complainant's Sur-Reply to Respondent's Reply to Complainant's Response in Opposition to Respondent's Motion to Dismiss Counts 62 through 73 of the First Amended Complaint ("Sur-Reply"), stating as follows:

I. INTRODUCTION

Respondent's Reply to Complainant's Response in Opposition to Respondent's Motion to Dismiss Counts 62 through 73 of the First Amended Complaint ("Reply") offers very little new information that has not already been argued in Respondent's Motion to Dismiss Counts 62 through 73 of the First Amended Complaint ("Motion to Dismiss") or addressed in Complainant's Response in Opposition to Respondent's Motion to Dismiss Counts 62 through 73 of the First Amended Complaint ("Response"). What limited new information is offered in Respondent's Reply is irrelevant, distinguishable, and/or objectionable, and should be disregarded.

Complainant should be allowed to proceed with all counts in its First Amended Complaint, and Petco's Motion to Dismiss should be denied.

II. ARGUMENT

A. Petco cites an incorrect legal standard for the underlying case. The five-year statute of limitations set forth in 735 ILCS 5/13-205 (2020) does not apply to enforcement actions brought pursuant to Section 31 of the Illinois Environmental Protection Act. The Section 13-205 statute of limitations also fails to apply when a governmental entity brings an enforcement action in the public interest. Governmental immunity, born out of the common law, extends to actions brought pursuant to a statute.

In its Reply, Petco inappropriately seeks to revisit the arguments already set forth in its Motion to Dismiss. Complainant stands by the arguments set forth in its Response,[1] which it incorporates here by reference, and—rather than repeating all the points set forth in its Response—will limit itself to addressing several discrete points raised by Petco in its Reply.

1. *Complainant provides a "substantive response" to Respondent's argument, insofar as Complainant argues that Respondent seeks to apply the incorrect legal standard.*

Respondent asserts that Complainant does not substantively respond to Petco's contention that the underlying action is a "civil action". Complainant does provide a substantive response; it argues that Petco seeks to apply the wrong legal standard. Whether or not this case is a "civil action" is of no moment. Complainant does not engage on this point further, because this is not the correct legal analysis for the question at hand, namely, whether or not the statute of limitations founds in 735 ILCS 5/13-205 ("Section 13-205") bars Counts 62 through 73 of Complainant's First Amended Complaint. The correct analysis examines governmental immunity, which exists when a governmental entity brings an enforcement action in the public interest.

2. *Applying the doctrine of governmental immunity, also known as the "public interest exception," to the question of the applicability of a statute of limitations does not constitute*

[1] These arguments include: (1) there is no statute of limitations that applies to enforcement actions brought by the State pursuant to Section 31 of the Illinois Environmental Protection Act; (2) the statute of limitations set forth in 735 ILCS 5/13-205 (2020) fails to apply under the common law standard, where governmental immunity exists when a governmental entity brings an enforcement action in the public interest; (3) Complainant seeks to protect rights that are in the public interest, and so governmental immunity prevents the application of a statute of limitations; (4) Section 13-205 does not expressly apply its statute of limitations to governmental entities; (5) the violations alleged in Counts 62 through 73 of Complainant's First Amended Complaint have an effect on the public interest; and (6) the State is obligated to act on behalf of the public as relates to the violations alleged in Counts 62 through 73 of Complainant's First Amended Complaint. (*See, generally*, Compl. Response.)

"leaping" over Section 13-205's provisions; rather, it constitutes application of the correct legal standard.

Respondent states that declining to apply the statute of limitations present in Section 13-205, and instead applying the doctrine of governmental immunity, constitutes "leaping" past an applicable standard that supersedes all other considerations. (*See* Reply, pp. 2, 4.) This contention is incorrect. Applying the appropriate legal standard does not amount to "leaping" anywhere; it amounts to starting and ending at the proper place with the relevant legal analysis. As outlined in Complainant's Response, the violations alleged in Counts 62 through 73 of the First Amended Complaint involve a government entity bringing an action to protect rights that are in the public interest, meaning governmental immunity applies and Petco's Motion to Dismiss should be denied.

3. *Complainant is not required to offer variations of Section 13-205 to show that its provisions do not apply to the case at hand.*

Respondent appears to argue that Complainant should set forth draft language for how Section 13-205 might be written by the General Assembly so as to expressly encompass actions brought by governmental entities. Complainant is not required to provide alternative versions of Section 13-205 in order to argue and demonstrate that it is the incorrect standard for the case at hand. Section 13-205 states what it states; it does not expressly indicate that the statute of limitations applies to government entities; and the interpreting case law shows that Section 13-205 does not apply to a governmental entity seeking to bring an action in the public interest. Section 13-205 therefore does not apply to counts 62 through 73 of the First Amended Complaint.

In support of its argument that Section 13-205 should apply to counts 62 through 73, Respondent cites a concurring opinion in *Garimella v. Board of Trustees of University of Illinois*, 50 Ill. Ct. Cl. 350, 366 (Ct. Cl. 1996). A review of *Garimella*, however, shows that the case is irrelevant to this discussion. *Garimella* arises in the context of the Court of Claims examining

whether it may provide equitable relief when a former student at the University of Illinois brought an action for declaratory judgment and injunctive relief, specific performance, breach of contract, intentional infliction of emotional distress, and punitive damages after being terminated from the university's program. *Garimella*, at 353-54. The Court of Claims examined its ability, or lack thereof, to provide equitable relief within the context of the Court of Claims Act, 705 ILCS 505/8, and determined that it was not empowered to provide the requested equitable relief. *Id.* The case does not relate to Section 13-205; it does not relate to the issue of the application of a statute of limitations; and the language cited by Respondent is taken from a concurring opinion, rather than a majority opinion, and which examines the interpretation of Section 8 of the Court of Claims Act, a statute which is not in dispute in the underlying matter. *Id.* at 366. Respondent's reliance upon *Garimella* should be disregarded.

In further support of its argument, Respondent cites to *County of Du Page v. Graham, Anderson, Probst & White, Inc.*, 109 Ill. 2d 143 (1985). *County of Du Page* supports Complainant's position, rather than the position set forth by Respondent. In *County of Du Page*, the county brought suit against an architectural firm, alleging the defective design and construction of a county building. 109 Ill. 2d 143, 146 (1985). Defendant sought to dismiss negligence and contract counts pursuant to Section 13-214 of the Illinois Code of Civil Procedure, 735 ILCS 5/13-214, which deals specifically with legal actions brought regarding defective construction or construction activities on real property. *Id.* at 147. The Illinois Supreme Court found that because Section 13-214 expressly identifies government actors as being subject to its two-year statute of limitations, governmental immunity did not apply. *Id.* at 153. Conversely, the Illinois Supreme Court in its analysis examined additional case law, finding that where a statute did not expressly

identify government actors as subject to a statute of limitations, then governmental immunity was the appropriate standard. *Id.* at 152-53.

Section 13-205 does not expressly include governmental entities within its statute of limitations. Section 13-205's statute of limitations therefore does not apply in the underlying case.

4. *Governmental immunity for government actors seeking to bring an action in the public interest applies both to common law cases and to actions brought pursuant to a statute.*

Respondent argues that governmental immunity applies only in common law cases, and not in actions brought pursuant to a statute. This is incorrect. In its Response, Complainant cites examples to the contrary. In *Pielet Bros. Trading, Inc. v. Pollution Control Bd.,* 110 Ill. App. 3d 752 (5th Dist. 1982), governmental immunity was found to trump the statute of limitations at issue in a case brought pursuant to the Illinois Environmental Protection Act, the same statute that forms the basis of the underlying case. In *Board of Education v. A, C & S., Inc.,* 131 Ill. 2d 428, 476 (1989), governmental immunity was found to apply in an action brought pursuant to the Asbestos Abatement Act. In *City of Chicago v. Latronica Asphalt & Grading, Inc.,* 346 Ill. App. 3d 264 (1st Dist. 2004), governmental immunity was found to apply in an action brought pursuant to common law and the Chicago Municipal Code. While the doctrine of governmental immunity was born within the context of the common law, it has long since transferred to the realm of statutory actions, including municipal ordinances, as well.

5. *The doctrine of governmental immunity both predates and postdates the 1982 passage of Section 13-205.*

Respondent mischaracterizes Complainant's citation to case law involving the doctrine of governmental immunity that dates back to the late 1800s. (Reply at 6-7.) Complainant cites a string of historical cases with the intent, as outlined in Complainant's motion, to demonstrate that governmental immunity is well-established as a legal doctrine in the State of Illinois. (Response

at 6-7.) Complainant includes cases that both predate and postdate the 1982 passage of Section 13-205, to demonstrate the continuity of the application of the legal doctrine of governmental immunity. Historically grounded in the case law, the doctrine has been applied for over a hundred and fifty years, and continues to be applied up to the current point in time, and by extension should be applied to the case at hand.

6. *The Illinois Pollution Control Board has found Section 13-205 to be a limitation on personal actions to recover damages, as opposed to actions brought in the public interest.*

The case law sets forth that the Illinois Pollution Control Board has found Section 13-205 to be a limitation on *personal* actions to recover damages. *Lake County Forest Preserve*, PCB 92-80, slip op. at 4-5 (July 30, 1992); *Landfill Emergency Action Comm.*, PCB 85-9, slip op. at 4 (March 22, 1985). The Board has also previously found that a private or non-state government entity acting as a "private attorney general" to protect the public's rights and to collect penalties which may be due to the State is immune from Section 13-205. *Id.* In the underlying case, the *actual* Attorney General is seeking to protect the public's rights and to collect penalties due to the State, providing all the more reason for Complainant to be found immune to the provisions of Section 13-205.

7. *The Tims case is distinguishable and should be disregarded.*

Respondent offers the recently decided case *Tims v. Black Horse Carriers, Inc.*, 2023 IL 127801, in support of its position that Section 13-205 should apply to the underlying matter. In the *Tims* case, a private plaintiff filed a class-action lawsuit against a private company alleging violations of the Biometric Information Privacy Act, 740 ILCS 14/15(a) (2018).

The facts of the present case are completely different from those present in *Tims*. In the underlying matter, one of the litigants is a governmental entity, seeking to bring an action in the public interest (rather than two private actors, as in *Tims*); the case is brought pursuant to the Act

(rather than the Biometric Information Privacy Act, as in *Tims*); and no court has sought to apply multiple statutes of limitations to the provisions of the Act (the court having found in *Tims* that multiple statutes of limitations being applied to the same act caused confusion). *Tims* is distinguishable, and should be disregarded.

B. <u>Petco inappropriately seeks to enter into a discussion both of the content of settlement negotiations and overtures for settlement negotiations. This content is objectionable and should be disregarded by the Board.</u>

In its Response, Complainant notes what is publicly available on the docket for the underlying case: that Counts 62 through 73 were brought following an impasse in settlement negotiations between the parties.

Beyond those basic facts, Petco seeks to stray into discussing communications between the parties following the impasse, adding its own spin to those correspondences. Seeking to introduce, and apparently litigate, such correspondences into the record is inappropriate, and Complainant will not follow suit. The record speaks for itself: on April 16, 2021, counsel for Respondent withdrew as attorney of record; on May 11, 2021, Complainant reported to the Board that settlement negotiations had reached an impasse; on June 30, 2021, new counsel for Respondent entered his appearance; and on September 14, 2021, counsel for Respondent expressed an interest in making an effort to resume the terminated settlement negotiations.[2] Efforts to resume settlement negotiations have not been fruitful to date, and so the litigation is proceeding. Any further discussion by Petco of settlement correspondences, or attempted settlement correspondences, are inappropriate and should be disregarded by the Board.

[2] *People v. Petco Petroleum Corp.*, PCB 13-72 (docket available at https://pcb.illinois.gov/Cases/GetCaseDetailsById?caseId=14644).

III. CONCLUSION

Respondent's Reply seeks to reiterate the arguments already set forth in its Motion to Dismiss; this superfluous material should be disregarded. Respondent's Reply further seeks to introduce irrelevant, distinguishable, or objectionable information into the record, all of which should be likewise disregarded. Complainant should be allowed to proceed with all counts in its First Amended Complaint, and Petco's Motion to Dismiss should be denied.

WHEREFORE, Complainant, People of the State of Illinois, respectfully requests that the Board deny Respondent's Motion to Dismiss.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. KWAME RAOUL,
Attorney General of the State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/
Asbestos Litigation Division

/s/ Natalie Long
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Dated: June 1, 2023

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PETCO PETROLEUM CORPORATION, an Indiana corporation,	)	
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	)	
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COMPLAINANT'S MOTION FOR LEAVE TO FILE REPLY TO RESPONDENT'S RESPONSE IN OPPOSITION TO COMPLAINANT'S MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE AND ADDITIONAL DEFENSES TO THE FIRST AMENDED COMPLAINT AND IMMATERIAL MATTER

NOW COMES COMPLAINANT, People of the State of Illinois, by KWAME RAOUL, Attorney General of the State of Illinois, by and through its undersigned counsel pursuant to Section 101.500 of the Illinois Pollution Control Board Regulations, 35 Ill. Adm. Code 101.500, and hereby submits this Complainant's Motion for Leave to File Reply to Respondent's Response in Opposition to Complainant's Motion to Strike Respondent's Affirmative and Additional Defenses to the First Amended Complaint and Immaterial Matter, stating as follows:

1. On October 20, 2022, by order of the Illinois Pollution Control Board ("Board"), the Board accepted Complainant's First Amended Complaint ("First Amended Complaint").

2. On January 18, 2023, Respondent filed its Answer, Affirmative, and Additional Defenses to the First Amended Complaint ("Answer and Defenses").

3. On March 10, 2023, Complainant filed Complainant's Motion to Strike Respondent's Affirmative and Additional Defenses to the First Amended Complaint and Immaterial Matter ("Motion to Strike").

4. On April 19, 2023, Respondent filed Response in Opposition to Motion to Strike Respondent's Affirmative and Additional Defense to the First Amended Complaint and Immaterial Matter ("Response").

5. On April 28, 2023, Respondent served its Response on Complainant.

6. On May 1, 2023, the parties participated in a telephone status conference before the Hearing Officer for the Board, wherein it was agreed that any responsive filing to be submitted by Complainant would be filed by June 1, 2023.

7. In its Answer and Defenses, Respondent failed to allege sufficient facts in support of its affirmative defenses. Now, in its Response, Respondent still fails to allege sufficient facts, but additionally admits it has no facts in support of the majority of its affirmative defenses, and advises that it wishes to use the discovery process as an improper fishing expedition to search for the requisite supporting facts.

8. Respondent additionally misstates the legal standard for alleging an affirmative defense; incorrectly claims that it need not plead facts in support of its affirmative defenses at this stage; inappropriately seeks to dictate Complainant's pleading strategy; misconstrues applicable case law; claims an additional affirmative defense that was not pled as an affirmative defense; and incorrectly argues against Complainant's Motion to Strike Immaterial Matter from Petco's Answer.

9. Complainant should be allowed to file Complainant's Reply to Respondent's Response in Opposition to Complainant's Motion to Strike Respondent's Affirmative and Additional Defenses to the First Amended Complaint and Immaterial Matter ("Reply") to address Petco's admission that it has no facts to support its affirmative defenses and its stated intent to use the discovery process improperly; to correct Respondent's inaccurate recitation of the applicable

legal standards; to address Respondent's false claim that it need not plead sufficient facts at this stage; to correct inaccurate interpretations of case law; to offer relevant case law that responds to points raised by Petco in its Response; to respond and object to the newly claimed affirmative defense; and to argue in support of Complainant's Motion to Strike Immaterial Matter from Petco's Answer.

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Board enter an order granting this motion, allowing the filing of Complainant's Reply to Respondent's Response in Opposition to Complainant's Motion to Strike Respondent's Affirmative and Additional Defenses to the First Amended Complaint and Immaterial Matter, and granting such other relief as the Board deems proper.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. KWAME RAOUL,
Attorney General of the State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/
Asbestos Litigation Division

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Dated: June 1, 2023

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

NOW COMES COMPLAINANT, People of the State of Illinois, by KWAME RAOUL, Attorney General of the State of Illinois, by and through its undersigned counsel pursuant to Section 101.500(e) of the Illinois Pollution Control Board Regulations, 35 Ill. Adm. Code 101.500(e), and hereby submits this Complainant's Reply to Respondent's Response in Opposition to Complainant's Motion to Strike Respondent's Affirmative and Additional Defenses to the First Amended Complaint and Immaterial Matter ("Reply"), stating as follows:

I. INTRODUCTION

The First Amended Complaint in this matter, accepted by the Illinois Pollution Control Board ("Board") on October 20, 2022, sets forth 73 counts for various violations of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/1 *et seq.* (2020).

On January 18, 2023, Respondent filed its Answer, Affirmative, and Additional Defenses to the First Amended Complaint ("Answer and Defenses"). On March 10, 2023, Complainant filed Complainant's Motion to Strike Respondent's Affirmative and Additional Defenses to the First Amended Complaint and Immaterial Matter ("Motion to Strike"). On April 19, 2023, Respondent

filed its Response in Opposition to Motion to Strike Respondent's Affirmative and Additional Defense to the First Amended Complaint and Immaterial Matter ("Response").

Complainant now submits this Reply to Petco's Response, incorporating by reference the arguments already set forth in Complainant's Motion to Strike.

The Response misstates the legal standard for alleging an affirmative defense and inappropriately seeks to dictate Complainant's pleading strategy. In its Response, Petco not only fails to allege sufficient facts in support of its affirmative defenses, it admits it has no facts in support of the majority of its affirmative defenses, and further advises that it improperly wishes to use the discovery process as a fishing expedition to search for the requisite supporting facts. Respondent's affirmative defenses are likewise legally deficient, as addressed below.

Complainant's Motion to Strike Immaterial Matter from Petco's Answer is sufficiently specific in detail, as outlined below.

Complainant's Motion to Strike should be granted, and Petco's factually and legally deficient affirmative defenses should be stricken with prejudice.

II. ARGUMENT

A. Respondent misstates the legal standard for alleging an affirmative defense. Respondent is required to set forth specific facts in support of its alleged affirmative defenses, and fails to do so. Instead, Respondent admits it does not have facts to support its affirmative defenses. Respondent misrepresents the sequence in which it must plead factual support for its affirmative defenses.

In its Response, Respondent states that "it is incorrect that Petco must plead every fact." (Response at 4). At no point in its Motion to Strike does Complainant argue that Petco must plead *every* fact in its affirmative defenses. Indeed, Respondent is not required to lay out *every* fact in support of its affirmative defense; however, Respondent *is* required to set forth *a* fact in support of its affirmative defense, a threshold which Respondent on the whole fails to achieve.

The Board has made plain the pleading standard necessary for affirmative defenses, stating as follows:

> The Board's procedural rules for affirmative defenses state that "[a]ny facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing." 35 Ill. Adm. Code 103.204(d). **In addition, the party asserting the affirmative defense must plead it with the same degree of specificity necessary for establishing a cause of action**. International Insurance, 242 Ill. App. 3d 614, 630, 609, N.E. 2d 842, 853 (1st Dist. 1993). The party pleading an affirmative defense need not set out evidence, so long as the party alleges the ultimate facts to be proven. People v. Carriage 5 Way West, Inc., 88 Ill. 2d 300, 308, 430 N.E. 2d 1005, 1008-09 (1981). However, **legal conclusions that are not supported by allegations of specific facts are insufficient**. LaSalle National Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297.

People v. Six M. Corp., Inc., PCB 12-35, slip op. at 5 (Feb. 12, 2012) (emphasis added); *see also Indian Creek Dev. Co. v. Burlington Northern Santa Fe Ry. Co.*, PCB 07-44, slip op. at 8-12 (June 18, 2009); *People v. Texaco Ref. & Mktg., Inc.*, PCB 02-03, slip op. at 6-7 (Nov. 6, 2003).

Sufficient facts must be alleged to satisfy each element of an affirmative defense. *Hartmann Realtors v. Biffar*, 2014 IL App (5th) 130543, ¶ 20; *Indian Creek Dev. Co.*, slip op. at 19 (citing *Richco Plastic Co. v. IMS Co.*, 288 Ill. App. 3d 782, 784-85 (1st Dist. 1997)).

The standard for an affirmative defense is clear: while a respondent need not set forth the entire corpus of evidentiary support for an affirmative defense in the pleading stage, a respondent must plead an affirmative defense with the same degree of factual specificity that complainant is required to plead when initiating a cause of action; each element of an affirmative defense must be supported by facts; and the mere assertion of legal conclusions, standing alone without any factual support, is insufficient to constitute an affirmative defense.

As laid out in Complainant's Motion to Strike, Respondent's affirmative defenses—including affirmative defenses A, B, C, E, F, G, H, I, and J—are characterized by a total or near-

total absence of factual support, resting instead either on conclusory statements of legal theories, or the vaguest of alleged facts that confuse rather than clarify the affirmative defenses pled.

A key purpose of the pleading stage is thwarted if the factual information provided is so scarce as to render the affirmative defenses meaningless. The pleading stage is designed to flush out the issues to be argued before a trier of fact. *Handelman v. London Time, Ltd.*, 124 Ill. App. 3d 318, 320 (1st Dist. 1984). In order for there to be a meaningful presentation of the issues to the trier of fact, the parties must conduct discovery. In order to conduct meaningful discovery, the parties must know the factual bases for any legal theories alleged by either party. Complainant is entitled to know the factual support for Respondent's affirmative defenses, so that Complainant may prepare for discovery and for any hearing before the Board. If Complainant is denied knowledge of the salient facts, Complainant is prejudiced in its ability to perform either task.

Complainant's lack of knowledge of the factual bases of Respondent's assertions would further allow Respondent to dictate the scope of discovery. Respondent would enjoy a tactical advantage over Complainant, having the opportunity to observe the unfolding litigation and discovery, and subsequently decide which facts to allege and which to withhold. If a respondent is allowed to survey the landscape before deciding what to disclose, a disincentive exists that weighs against full disclosure of the relevant facts, the party being in a position to choose when and how much to disclose what it knows. Similarly, any motions brought by Complainant, such as summary judgment, would be stymied, with the affirmative defenses being immune from attack until Respondent chooses to plead supporting facts.[1]

[1] Respondent's proposed course of action further leads to an absurd result. If Respondent plans to obtain supporting facts through discovery on Complainant, Complainant is unable to proceed forward with discovery on Respondent. This sequence produces an impasse, requiring Complainant to await Respondent's performance of its discovery, so that Complainant might perform discovery upon Respondent, and only then be situated to press forward. Should Respondent simply opt not to perform discovery, that raises the interesting dilemma of whether the litigation would be able to proceed at all.

Ultimately, Respondent's position—that of seeking to plead legal theories now, and supporting facts later—inverts the litigation process, rendering the pleadings dependent upon discovery, rather than discovery dependent upon the pleadings. Permitting Respondent to proceed in such a fashion would make it next to impossible for Complainant to conduct discovery or motion practice regarding any of the affirmative defenses, mount a response to the affirmative defenses, or otherwise respond.[2]

Indeed, Petco's Response clarifies why it seeks leeway on the procedural requirement of pleading facts in support of its affirmative defenses: Petco *admits* it lacks factual support for the lion's share of its affirmative defenses, stating repeatedly that "pertinent facts necessary to prove this defense may need to be discovered during the pendency of this action". (Response at Sections II.B, II.C, II.D, II.E, II.F, II.I, II.J). Petco does not set forth the requisite facts in support of its affirmative defenses, because it does not *have* the requisite facts to support its affirmative defenses, *because there are no facts that support its affirmative defenses.*

Instead of pleading facts, Petco asserts conclusory legal theories, which Petco hopes to bolster through information obtained via discovery. Respondent's approach is inappropriate. Petco's factually insufficient affirmative defenses—or additional defenses, or defenses, or whatever nomenclature Petco elects to use for its deficiently pled legal conclusions—should be stricken with prejudice.

B. <u>Respondent's defenses are improperly brought pursuant to 735 ILCS 5/2-613(d).</u>

In its Response, Petco argues that, pursuant to Section 2-613(d) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-613(d) (2020), it may bring both affirmative defenses *and* defenses in its

[2] If Respondent believes during the discovery process that it has identified a new affirmative defense, or additional information that supports an existing affirmative defense, Respondent may seek leave to file a supplemental answer pursuant to Section 103.204(d) of the Board's Rules, 35 Ill. Adm. Code 103.204(d). In no way does this mechanism obviate the requirement to plead, upfront, facts in support of any affirmative defense alleged at the outset of a case.

Answer. Petco cites *People v. Inverse Investments, L.L.C.*, PCB No. 11-79 (June 21, 2012) in support of its argument, arguing that the principles of disclosure and fair notice dictate that Petco plead any defenses, in addition to affirmative defenses, "to avoid unfair surprise." (Response at 5).

It is true that the Board in *Inverse Investments* allowed a respondent to bring a defense, rather than an affirmative defense, in response to a motion to strike. Generally speaking, however, the cases have set forth the standard that if Respondent raises a mere defense at this stage in the pleadings, rather than an affirmative defense, it is properly stricken. *Farmers Auto. Ins. Ass'n v.* Neumann, 2015 IL App (3d) 140026 (3d Dist. 2015). If Respondent seeks to attack the sufficiency of the claim and does not attack the complainant's legal right to bring an action, respondent brings an invalid affirmative dense. *People v. First Country Homes, L.L.C.*, PCB 06-173, slip op. at 6 (Sept. 21 2006); *People v. Six M. Corp., Inc.*, PCB 12-35, slip op. at 5 (Feb. 12, 2012).

Such is the case for many of the affirmative defenses brought by Petco, as discussed further below. Respondent does not introduce new affirmative matter that attacks Complainant's legal right to bring an action; rather, Respondent seeks to attack the sufficiency of the claim. Such allegations are properly stricken at this stage.

Moreover, if Petco is truly concerned about avoiding unfair surprise in the defenses that it pleads, it is worth examining Petco's defenses to see if what is pled accomplishes that end goal. According to Petco's Response, four of the defenses outlined in Petco's Answer are brought "to avoid unfair surprise": Affirmative Defenses B, D, F, and J.

Affirmative Defense B argues that Complainant failed to fulfill some unidentified legal requirement. The defense is devoid of any supporting facts that would clarify the legal requirement(s) in question. Petco's Response identifies Section 31 of the Act as a potential contender for the legal requirement at issue, though Petco does not clarify if Section 31 is the only

legal requirement in question, or if Complainant allegedly failed to fulfill additional legal requirements. If Section 31 is the sole source of concern, that is not a cognizable defense when a case is brought pursuant to the Attorney General's own motion, as outlined below. *People v. Prof'l Swine Mgmt., LLC*, PCB 10-84, slip op. at 37 (Nov. 7, 2013). If Respondent plans to argue that another legal requirement has not been fulfilled, its pleadings to date have not so advised Complainant; such a claim would still be a surprise.

Affirmative Defense D argues that the Illinois Department of Natural Resources ("Illinois DNR"), and not the Illinois EPA, is vested with the authority to enforce the Illinois Oil and Gas Act ("IOGA"). This information is the opposite of a surprise; this is information set forth in statute. There is no disagreement that Illinois EPA cannot enforce the IOGA. The IOGA, however, is not at issue in this action; the Act is the source of the State's authority to bring the underlying complaint. The defense, then, is completely irrelevant and should be stricken.

Likewise, while Affirmative Defense F claims to be pled to avoid unfair surprise, the absence of clearly identified supporting facts belie that notion. Petco admits in its Response that it does not have supporting facts for this defense. Moreover, as discussed *infra*, failed attempts at compliance with the Act is not a defense. *People v. Texaco Ref. & Mktg., Inc.*, PCB 02-03, slip op. at 12-13 (Nov. 6, 2003). Affirmative Defense F is neither a defense, nor an affirmative defense, and should be stricken.

Affirmative Defense J similarly lacks any facts that would support the alleged defense. The Illinois EPA has not received any payments pursuant to any administrative orders from Petco relating to the counts in the underlying complaint. Moreover, Affirmative Defense J is not a defense; instead, it argues remedy in the form of a civil penalty, and the appropriate penalty to be

assessed. Advocating a reduced penalty is not a defense, as it does not go to ultimate liability. Affirmative Defense J should be stricken with prejudice.

C. <u>Respondent inappropriately seeks to dictate Complainant's pleading strategy.</u>

Petco appears to take issue with Complainant's pleading strategy. When this case was first initiated, Complainant filed its initial Complaint; Petco responded with an "Answer and Affirmative Defenses"; and Complainant responded with "People's Response to Affirmative Defenses". Now, Complainant has filed the First Amended Complaint; Petco submitted its "Answer, Affirmative and Additional Defenses to the First Amended Complaint"; and Complainant responded by filing a Motion to Strike.

Petco attempts to paint the change in Complainant's pleading strategy as an admission of *something*, though it is unclear what Petco believes Complainant is purportedly admitting. Petco's characterization of Complainant's pleading strategy is inaccurate and improper.

The initial Complaint and "Answer and Affirmative Defenses" are one set of pleadings. The subsequent First Amended Complaint and Petco's "Answer, Affirmative and Additional Defenses to the First Amended Complaint" are another set pleadings. Different pleadings may occasion a different pleading strategy. Complainant chose to respond to the initial "Answer and Affirmative Defenses" via a response; Complainant now chooses to respond to the subsequent "Answer, Affirmative and Additional Defenses to the First Amended Complaint" with a motion to strike.

The difference between the chosen mode of response is one of strategy. Absent the making of some admission of fact in a previous pleading, or their subsequent incorporation into an amended pleading, there are no restrictions imposed by a previous set of pleadings on a subsequent set of pleadings. *See, for example, Roy v. Coyne*, 259 Ill. App. 3d 269, 287 (1st Dist. 1994); *Illinois*

Power Co. v. EPA, PCB 75-109, slip. op. at 1 (Feb. 2, 1978). Every set of pleadings is to be judged on its own merits.

Complainant previously attacked Respondent's affirmative defenses via a response which objected to, and therefore denied, all assertions made in Respondent's "Answer and Affirmative Defenses". Complainant now attacks Respondent's affirmative defenses via a motion to strike. Complainant is free to adapt its pleading strategy; Complainant's pleading strategy is not dictated by counsel for Respondent. Respondent's attempts to intimate some form of admission due to Complainant's adapted pleading strategy is inappropriate and should be disregarded.

D. <u>Complainant's Motion to Strike identifies with specificity the objectionable immaterial matter in Respondent's Answer, wherein Respondent seeks to introduce into its Answer evidence and arguments that exceed the authorized responses.</u>

Section 103.204(d) of the Board regulations, 35 Ill. Adm. Code 103.204(d), makes plain that a respondent in its answer is required to admit, deny, or state that it lacks knowledge sufficient to form a belief. Complainant cites to specific paragraphs, of specific counts, which include immaterial matter that goes beyond the scope of an admission, denial, or statement of lack of knowledge. The extraneous material from those paragraphs should be stricken.[3]

Moreover, there appears to be little doubt in Petco's mind which immaterial matter Complainant references; after arguing that Complainant fails to identify with specificity the cited content, Respondent musters specific defenses of the professed unidentifiable information. (Response at 6-7). Petco argues that it should be allowed to qualify its water sampling results, thereby seeking to cast doubt on the results that it submitted to the State. (Response at 6). In so doing, Petco seeks to argue the merits of the case via its Answer, which is inappropriate at this stage in the pleadings. Petco further seeks to introduce evidence of repairs that it allegedly

[3] Complainant maintains its arguments in its Motion to Strike are sufficiently specific to identify the immaterial matter that should be stricken. Nevertheless, in support of its arguments, Complainant attaches Table 1 to this Reply.

performed, arguing that these facts impact the duration, severity, and scope of the violations, and therefore impact any penalty sought. (Response at 6-7). Again, Petco prematurely seeks to argue the facts of the case, rather than comply with the pleading standards for its Answer.

As set forth in Section 103.204(d), Respondent has three options for pleading its Answer; anything beyond those three options, whether it be to explain, illustrate, qualify, clarify, or specify further information, is immaterial and inappropriate at this stage. The immaterial matter cited in Complainant's Motion to Strike should be stricken from Respondent's Answer.

E. <u>Respondent fails to meet the factual and legal standards required to plead its affirmative defenses.</u>

Complainant has outlined in detail in its Motion to Strike the myriad factual and legal deficiencies present in each and every one of Respondent's affirmative defenses. Complainant will limit itself to addressing discrete points raised by Petco in its Response regarding each affirmative defense.

1. <u>Affirmative Defense A: Petco fails to plead any facts in support of its Affirmative Defense A. Petco erroneously conflates multiple affirmative defenses. Petco inappropriately attempts to argue liability via an affirmative defense.</u>

In its Response, Petco claims it has pled "the ultimate fact" in its Affirmative Defense A. Petco then references its statute of limitations affirmative defense and its pending Motion to Dismiss Counts 62 through 73 of the First Amended Complaint, then attempts to argue the issue of control, and, ultimately, liability. Complainant will address each of these detours in turn.

Petco has not pled "the ultimate fact" in its Affirmative Defense A; indeed, it has not pled *any* fact. It has set forth a legal conclusion, with no supporting information. Affirmative Defense A is therefore factually insufficient.

Moreover, the Board has previously found that alleging a complainant's "failure to state a claim" seeks to attack the sufficiency of a complaint, and therefore is not an affirmative defense,

thereby rendering Respondent's Affirmative Defense A legally insufficient. *People v. First Country Homes, L.L.C.,* PCB 06-173, slip op. at 5-6 (Sept. 21, 2006); *People v. Cmty Landfill Co.,* PCB 97-193, slip op. at 4-5 (March 17, 2005). Despite Respondent's improper attack on the complaint's sufficiency, Complainant sets forth not just *a* cause of action, but myriad causes of action. The First Amended Complaint alleges dates, relevant persons, locations, events, resultant environmental harm, and documented evidence in support of all 73 counts. Petco's Affirmative Defense A is not only factually and legally insufficient, but generally incorrect.

Petco also conflates its statute of limitations affirmative defense and its attempt to argue ultimate liability with its assertion that the First Amended Complaint fails to state a claim. These things are not the same. A statute of limitations argument is an affirmative defense; the question of ultimate liability goes to the heart of Complainant's claim; an argument for failure to state a claim examines the sufficiency of a complaint. Procedurally, only the statute of limitations is available as an affirmative defense, and is addressed in Complainant's Motion to Strike, as well as further below. (Mot. to Strike at 14-16).

While conflating its attempt to argue ultimate liability with its improperly pled argument for failure to state a claim, Petco takes issue with Counts XXIV, XLII, LII, and LVII of the First Amended Complaint, prematurely seeking to argue liability on those counts, alleging that Respondent lacked control over the pollution.[4] As previously set forth in Complainant's Motion to Strike:

> The Illinois Appellate Court explained in Worner Agency v. Doyle, 121 Ill. App. 3d 219, 221, 459 N.E.2d 663, 635 (4th Dist. 1984), that if the pleading does not admit the opposing party's claim, but instead attacks the sufficiency of that claim, it is not an affirmative defense. Likewise, **a defense that merely attacks the sufficiency of a claim fails to be an affirmative defense**. *Id.*, 121 Ill. App. 3d at 222-223, 459 N.E.2d 633at

[4] Whether Respondent takes similar issue with the other 69 counts in the First Amended Complaint is unclear; had Respondent pled facts in support of its Affirmative Defense A, this ambiguity might have been addressed.

> 636. In other words, **"[t]he test of whether a defense is affirmative and must be pleaded by a defendant is whether the defense gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated."** *Id.*, 121 Ill. App. 3d at 222, 459 N.E.2d at 636. (emphasis added)

(Mot. to Strike at 3-4). *See also People v. Six M. Corp., Inc.*, PCB 12-35, slip op. at 5 (Feb. 12, 2012).

Petco seeks to argue whether Petco is responsible for the contamination that occurred in Counts XXIV, XLII, LII, and LVII. This question goes to the heart of Complainant's case on those counts. Petco does not give color to Complainant's claim and then assert new matter; rather, Petco essentially argues that Complainant's claim is wrong. Petco fails to state an affirmative defense; Affirmative Defense A should thus be stricken.

Moreover, and as already set forth more fully in Complainant's Response in Opposition to Respondent's Motion to Dismiss Counts 62 through 73 of the First Amended Complaint, and incorporated herein by reference, Petco appears to believe mistakenly that liability cannot be found when a discharge of contaminants occurs through accidental means, or even through vandalism. (Compl. Response in Opp. to Mot. to Dismiss at 16-17).[5] A person may violate the Act without intent, or even knowledge of the pollution. In any event, Petco raises evidentiary questions, which are premature at this stage.

Respondent looks to *Phillips Petroleum Co. v. Ill. Env't Prot. Agency*, 72 Ill. App. 3d 217 (2d Dist. 1979) regarding the issue of control. *Phillips* is distinguishable from the case at hand. In

[5] "The Act is *malum prohibitum;* for a violation to be found, it is not necessary to prove guilty knowledge or *mens rea*." *People v. A.J. Davinroy Contractors*, 249 Ill. App. 3d 788, 793 (5th Dist. 1993) (citing *Meadowlark Farms, Inc. v. Pollution Control Bd.*, 17 Ill. App. 3d 851 (5th Dist. 1974)). What must be shown is that "the alleged polluter has the capability of control over the pollution or that the alleged polluter was in control of the premises where the pollution occurred." *A.J. Davinroy Contractors*, 249 Ill. App. 3d at 793 (citing *Phillips Petroleum Co. v. Pollution Control Bd.*, 72 Ill. App. 3d 217 (2d Dist. 1979)). This extends to incidents of vandalism; where the owner of the source of pollution has not taken extensive precautions to prevent vandalism or other intervening causes, a finding of liability may be appropriate. *Perkinson v. Pollution Control Bd.*, 187 Ill. App. 3d 689, 694-95 (3d Dist. 1989).

Phillips, a petroleum company owned a tank car that was transported across railroad lines owned and operated by a separate entity. When the car derailed and was punctured, the court found the petroleum company did not have sufficient control over the tank car to find liability. In the underlying case, however, Petco operates the wells and equipment in question. The wells and equipment are not mobile; they are not being transported by some entity across state lines; they remain *in situ*, under Petco's operation and control. The entire purpose of an operator of oil equipment is for the operator to operate the equipment, with these responsibilities extending to addressing hazards that compromise equipment integrity (Count XXIV); taking measures to prevent or address vandalism (Count XLII); and ensuring equipment is installed in a fashion that prevents discharges (Count LVII).

As to Respondent's brief discussion of *People v. A.J. Davinroy Contractors*, 249 Ill. App. 3d 788 (5th Dist. 1993), Respondent asserts the *Davinroy* court found that alleged polluters are not necessarily under a theory of strict liability. Complainant is not arguing a strict liability standard in the First Amended Complaint, and so this point is irrelevant.

Petco's Affirmative Defense A should be stricken with prejudice.

2. Affirmative Defense B: Petco fails to plead any facts in support of its Affirmative Defense B. Petco admits it does not have facts in support of its Affirmative Defense B. Petco admits it seeks to use the discovery process improperly as a means by which to search for facts to substantiate its Affirmative Defense B.

Petco alleges it has pled the "ultimate facts" in its Affirmative Defense B. Petco has pled neither the "ultimate facts", nor any facts, in its Affirmative Defense B. It has set forth a legal conclusion, with no supporting information. Affirmative Defense B is therefore factually insufficient.

In its Affirmative Defense B, Petco alleges that the First Amended Complaint "fails to comply with and/or satisfy one or more statutory and/or regulatory prerequisites". It is unclear from Affirmative Defense B just how many prerequisites have been allegedly cast to the winds.

In its Response, Petco appears to raise a singular concern regarding the fulfillment of Section 31 of the Illinois Environmental Protection Act, 415 ILCS 5/31 (2020). Petco does not clarify whether Section 31 is the only statutory and/or regulatory prerequisite with which it believes the First Amended Complaint failed to comply with and/or satisfy. If purported failure to comply with Section 31 is the only contention stemming from Affirmative Defense B, it becomes unclear how Affirmative Defense B differs from Affirmative Defense C. Complainant has already addressed the matter of Section 31 in its Motion to Strike regarding Affirmative Defense C. (Mot. to Strike at 8-9). In any event, the total absence of factual support leaves the heart of Respondent's Affirmative Defense B something of a mystery.

Respondent's Affirmative Defense B is apparently equally mysterious to Respondent, for Respondent admits it does not have supporting evidence, and instead hopes to cast about for supporting facts through the discovery process. As set forth in Section II.A, *supra*, this is an inappropriate usage of discovery.

Likewise, and as set forth in Section II.C, *supra*, Petco's contention regarding Complainant's choice in pleading strategy—naming, filing a motion to strike to Petco's affirmative defenses, rather than another response—is without merit.

Petco's Affirmative Defense B should be stricken with prejudice.

3. Affirmative Defense C: Petco fails to plead facts, and admits it has no facts, in support of Affirmative Defense C. Petco admits it seeks to use discovery improperly to search for facts to substantiate Affirmative Defense C.

As set forth in Complainant's Motion to Strike, Petco both fails to plead facts in support of its Affirmative Defense C, and fails to state correctly the applicable law. (Mot. to Strike at 8-9). Where the Attorney General brings a complaint on his own motion, as in the underlying case, Section 31 has no bearing on the allegations in the complaint. *People v. Prof'l Swine Mgmt., LLC,* PCB 10-84, slip op. at 37 (Nov. 7, 2013).

In its Response, Petco both admits it has no evidence to support Affirmative Defense C, and that it wishes to use discovery as a fishing expedition to search for the requisite supporting facts. Petco's intentions are improper.

Likewise, and as set forth in Section II.C, *supra*, Petco's contention regarding Complainant's choice in pleading strategy—naming, filing a motion to strike to Petco's affirmative defenses, rather than another response—is without merit.

Petco's Affirmative Defense C should be stricken with prejudice.

4. Affirmative Defense D: This action is brought pursuant to the Act on behalf of Illinois EPA; this action is not brought pursuant to the IOGA on behalf of Illinois DNR.. Respondent admits it has no facts in support of Affirmative Defense D, and that Respondent seeks to use discovery improperly to search for facts to substantiate Affirmative Defense D.

As set forth and addressed in Complainant's Motion to Strike, Petco appears to believe erroneously that this action is brought, or should be brought, pursuant to the IOGA on behalf of Illinois DNR. In actuality, this case is appropriately brought pursuant to the Act on behalf of Illinois EPA. (Mot. to Strike at 9-10). Cases for violations of the Act, even when related to oil and gas wells, are properly brought on behalf of Illinois EPA. *See, for example, People v. Ogoco, Inc.*, PCB 06-16 (Sept. 21, 2006).

Petco fails to provide facts in support of Affirmative Defense D. In its Response, Petco both admits it has no evidence to support Affirmative Defense D, and that it wishes to use discovery to search for factual support for its otherwise unsupported Affirmative Defense D. Petco's intentions are improper.

As set forth in Section II.C, *supra*, Petco's contention regarding Complainant's choice in pleading strategy—naming, filing a motion to strike to Petco's affirmative defenses, rather than another response—is without merit.

Petco's Affirmative Defense D should be stricken with prejudice.

5. Affirmative Defense E: This action may be brought pursuant to the Act on behalf of Illinois EPA. Respondent admits it has no facts in support of Affirmative Defense E, and admits it seeks to use discovery improperly to search for facts to substantiate Affirmative Defense E.

As set forth and addressed in Complainant's Motion to Strike, Petco appears to believe erroneously that this action may not be brought pursuant to the Act on behalf of Illinois EPA; Respondent is incorrect. (Mot. to Strike at 10-11).

Petco fails to provide facts in support of its Affirmative Defense E. In its Response, Petco both admits it has no evidence to support Affirmative Defense E, and that it seeks to use discovery to search for factual support for its unsupported Affirmative Defense E. Petco's intentions are inappropriate.

As set forth in Section II.C, *supra*, Petco's contention regarding Complainant's choice in pleading strategy—naming, filing a motion to strike to Petco's affirmative defenses, rather than another response—is without merit.

Petco's Affirmative Defense E should be stricken with prejudice.

6. Affirmative Defense F: Respondent fails to state an affirmative defense. Failed efforts to comply with the Act is not an affirmative defense. Respondent admits it has no facts in support of Affirmative Defense F, and that it seeks to use discovery improperly as a means to substantiate Affirmative Defense F.

As set forth and addressed in Complainant's Motion to Strike, Petco fails to state an affirmative defense. (Mot. to Strike at 11-13).

Petco fails to provide facts in support of Affirmative Defense F, rendering it factually insufficient. In its Response, Petco references prior adjudications, judicial orders, and "certain actions" Petco was required to take to "some of the very same wells" discussed in the First Amended Complaint, yet fails to identify with specificity any of those items. (Response at 11-12).

In its Response, Petco admits it has no evidence to support Affirmative Defense F, and that it wishes to use discovery to search for factual support for its otherwise unsupported Affirmative Defense F. Petco's intentions are inappropriate.

Failed efforts to comply with the requirements of the Act are not an affirmative defense, or even a defense, rendering Affirmative Defense F legally insufficient. *People v. Texaco Ref. & Mktg., Inc.*, PCB 02-03, slip op. at 13 (Nov. 6, 2003).

As set forth in Section II.C, *supra*, Petco's contention regarding Complainant's choice in pleading strategy—naming, filing a motion to strike to Petco's affirmative defenses, rather than another response—is without merit.

Petco's Affirmative Defense F should be stricken with prejudice.

7. Affirmative Defense G: Respondent seeks to defend against the relief sought, rather than liability. Affirmative Defense G is therefore not an affirmative defense.

In its Response, Petco asserts the equitable relief to which it objects should be apparent. However, in its Affirmative Defense G, Petco states that "Any claims for equitable relief . . . are barred" (emphasis added). The drafting of Petco's Affirmative Defense G leaves ambiguous if

Petco is limiting its objection to the relief sought in paragraph C of the Prayer for Relief in the First Amended Complaint, or casting a more expansive net. In its Affirmative Defense G, Respondent does not offer further clarification, nor supporting facts, therefore rendering Affirmative Defense G factually insufficient.

Petco's Response clarifies that Affirmative Defense G seeks to prevent Complainant from seeking equitable relief in addition to civil penalties. Respondent essentially argues that equitable relief in the underlying case is moot. The Board has previously found that whether a claim for injunctive relief is moot pertains to remedy, not the cause of action, and therefore is not an affirmative defense. *People v. Texaco Ref. & Mktg., Inc.*, PCB 02-03, slip op. at 12-13 (Nov. 6, 2003). Moreover, subsequent compliance with the Act is not a defense to liability. *Id*.

Likewise, Complainant is entitled to seek the equitable relief requested in paragraph C of the Prayer for Relief in the First Amended Complaint. The sheer volume of counts alone – seventy-three in total – in the First Amended Complaint suggest that a cease and desist order would be appropriate under the circumstances.

Respondent's Affirmative Defense G is factually and legally insufficient and should be stricken with prejudice.

8. Affirmative Defense H: No statute of limitations applies to the allegations brought in the First Amended Complaint.

As set forth in Complainant's Motion to Strike, Complainant's Response in Opposition to Respondent's Motion to Dismiss Counts 62 through 73 of the First Amended Complaint, and Complainant's Sur-Reply to Respondent's Reply to Complainant's Response in Opposition to Respondent's Motion to Dismiss Counts 62 through 73 of the First Amended Complaint, the last being filed contemporaneously, and all being incorporated hereto, no statute of limitations applies to the allegations brought in the First Amended Complaint.

In addition to the arguments set forth in the above-referenced filings, it is instructive to note that the Board has found Section 13-205 to be a limitation on *personal* actions to recover damages. *Lake County Forest Preserve*, PCB 92-80, slip op. at 4-5 (July 30, 1992); *Landfill Emergency Action Comm.*, PCB 85-9, slip op. at 4 (March 22, 1985). The Board has previously found that a private or non-state government entity acting as a "private attorney general" to protect the public's rights and to collect penalties which may be due to the State is immune from Section 13-205. *Id.* In the underlying case, the *actual* Attorney General is seeking to protect the public's rights and to collect penalties due to the State, providing all the more reason for Complainant to be found immune to the provisions of Section 13-205.

Respondent's Affirmative Defense H should be stricken with prejudice.

9. Affirmative Defense I: Estoppel, collateral estoppel, waiver, release, res judicata, and/or laches do not bar Complainant's action.

As set forth in Complainant's Motion to Strike, Petco fails to plead facts in support of its Affirmative Defense I, rendering it factually insufficient. The ultimate facts sufficient to satisfy each element of an affirmative defense must be alleged, a legal standard which Petco fails to meet. *Indian Creek Dev. Co.*, slip op. at 19. Petco likewise fails to identify which affirmative defense in Affirmative Defense I applies to which counts in the First Amended Complaint, rendering Affirmative Defense I legally insufficient. (Mot. to Strike at 16-22).

In its Response, Petco both admits it has no evidence to support its Affirmative Defense I, and that it wishes to use discovery to search for factual support for its otherwise unsupported Affirmative Defense I. Petco's intentions are inappropriate.

Petco's Affirmative Defense I should be stricken with prejudice.

10. Affirmative Defense J: Respondent fails to state an affirmative defense.

As set forth in Complainant's Motion to Strike, Petco's Affirmative Defense J is both factually and legally insufficient. (Mot. to Strike at 23-24). In its Affirmative Defense J, Petco asserts that it has submitted unidentified "payments" to the State of Illinois for unidentified counts in the First Amended Complaint. Petco does not identify the administrative orders it references; the amount of any purported payment; the date on which it would have been tendered; nor the recipient of those payments. Petco's omissions render Affirmative Defense J factually insufficient.

Moreover, Complainant has already corrected Respondent on this point: Illinois EPA has not received any payment for the violations brought in the First Amended Complaint. (Mot. to Strike at 23).

The underlying action is brought on behalf of Illinois EPA, pursuant to the Act; no administrative orders have been entered on behalf of Illinois EPA regarding the counts alleged in the First Amended Complaint; and no administrative orders pursuant to any enforcement mechanisms used by Illinois EPA have been entered regarding the counts alleged in the First Amended Complaint.

Petco further admits in its Response that it has no evidence to support its Affirmative Defense J, and that it wishes to use discovery to search for factual support for its otherwise unsupported Affirmative Defense J. Petco's intentions are inappropriate.

Petco's Affirmative Defense J should be stricken with prejudice.

11. Affirmative Defense K: Respondent fails to state an affirmative defense.

As explained in its Motion to Strike, Respondent fails to state an affirmative defense in its Affirmative Defense K. (Mot. to Strike at 24-25). Petco claims it can demonstrate that Complainant is unable to meet the standard for liability set forth under Section 12(a) of the Act, 415 ILCS

5/12(a) (2020). In so doing, Petco fails to give color to Complainant's claim and then assert new matter; instead, Petco merely attacks the sufficiency of Complainant's claim, seeking to argue the ultimate issue of liability, which is premature at this stage in the proceedings. Affirmative Defense K therefore fails as an affirmative defense.

Beyond failing as an affirmative defense, Petco mistakes the standard for liability under the Act. As set forth more fully at Section II.E.1, *supra*, liability under the Act may be found even in the absence of intent or knowledge of the pollution. Operation of a source of pollution is sufficient to establish control for the purposes of liability under the Act.

As discussed in Section II.E.1, *supra*, the facts of the underlying case and the *Phillips* case are distinguishable. Petco is the operator of the wells and equipment in question; Petco is therefore in a prime position to exert control over the same; indeed, as the operator, it is Petco's responsibility to do so.

Affirmative Defense K both fails as an affirmative defense and as a defense. Affirmative Defense K should be stricken with prejudice.

12. Paragraph L: Respondent fails to state an affirmative defense.

In its Motion to Strike, Complainant did not move to strike paragraph L of Respondent's Affirmative Defenses because the language set forth in paragraph L on its face defends nothing, but instead seeks to reserve a right.

Based on the clarification provided in Petco's Response, and with the understanding that Petco considers paragraph L to be an affirmative defense, Complainant notes the Board has previously found that a reservation of rights is not a proper affirmative defense. "A reservation of rights to assert additional defenses does nothing to attack the People's right to bring the claims it sets forth in the complaint." *Texaco Ref. & Mktg*, slip op. at 30. The Board has stricken such

reservations, as they do not constitute an affirmative defense, while noting that Section 103.204(d) of the Board's procedural rules sets forth the mechanism by which respondents may seek leave to file additional affirmative defenses. *People v. Prof'l Swine Mgmt., LLC,* PCB 10-84, slip op. 40 (Nov. 7, 2013). The Board should likewise strike Respondent's Affirmative Defense L with prejudice.

F. Respondent should not be granted leave to replead its Answer and Affirmative and Additional Defenses.

Petco's Affirmative Defenses are both factually and legally insufficient. In its Response, Petco has made it clear that it does not have facts in hand to support its affirmative defenses; indeed, Petco has *admitted* it does not have the necessary factual support to sustain its affirmative defenses. Granting Petco leave to replead at this juncture would be an exercise in futility and a waste of judicial resources; there is nothing to replead. Petco admits it has no new information to furnish in support of its affirmative defenses at this point in time. The affirmative defenses are, on their face, factually and legally insufficient, and should be stricken with prejudice.

WHEREFORE, Complainant, People of the State of Illinois, respectfully requests that the Board grant Complainant's Motion to Strike Respondent's Affirmative and Additional Defenses to the First Amended Complaint and Immaterial Matter.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. KWAME RAOUL,
Attorney General of the State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/
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/s/ Natalie Long
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Table 1

Citation	Immaterial Matter
Count I, ¶ 18	"Answering further, Petco states that new polymer flow lines and headers have been installed at this location."
Count I, ¶ 22	"Answering further, Petco states that it sought proper permitting for the controlled burns."
Count I, ¶ 24	"preliminary"
Count I, ¶ 25	"Answering further, Petco's chloride testing was on-site and preliminary."
Count I, ¶ 27	"Answering further, Petco's chloride testing was on-site and preliminary."
Count I, ¶ 29	"preliminary"
Count III, ¶ 18	"Answering further, Petco states that the riser pipe has been properly repaired."
Count III, ¶ 21	"preliminary"
Count III, ¶ 22	"Answering further, Petco states that its chloride testing was on-site and preliminary."
Count VI, ¶ 18	"Answering further, Petco states that new fiberglass disposal lines have been installed at this location."
Count VII, ¶ 18	"Answering further, Petco states that the vent pipe broke due to a severe windstorm, and Petco has since secured all vent pipes at its tank batteries."

Count VIII, ¶ 18	"Answering further, Petco states that the transite pipelines at this location have been replaced by PVC pipelines."
Count IX, ¶ 18	"Answering further, Petco states that Bronze aluminum stuffing boxes have been installed with polished rods that prevent wear and corrosion."
Count X, ¶ 18	"Answering further, Petco states that new polymer lines have been installed underneath the creek bed at this location."
Count XI, ¶ 18	"Answering further, Petco states that new injection lines have been installed at the location of this incident, which are now supported by gravel and sand."
Count XI, ¶ 21	"Answering further, Petco states that its chloride testing was on-site and preliminary."
Count XI, ¶ 22	"Answering further, Petco states that its chloride testing was on-site and preliminary."
Count XII, ¶ 18	"Answering further, Petco states that battery backups have been installed in the new alarm system throughout Loudan [sic] field to prevent future occurrences."
Count XIII, ¶ 18	"Answering further, Petco states that all clamps in Loudan [sic] field have been or are going to be replaced with stainless steel bolts to prevent future occurrences. The flow line at this location has also been replaced."
Count XIV, ¶ 18	"Answering further, Petco states that a new collar was installed at this location."
Count XV, ¶ 18	"Answering further, Petco states that new fiberglass lines were installed underneath the creek bed from well to header at this location."

Count XVI, ¶ 18	"Further answering, the injection line at this location has been plugged."
Count XVII, ¶ 18	"Further answering, the entire disposal line at this location has been replaced with a polymer line."
Count XVIII, ¶ 18	"Further answering, a new T-joint and valve were installed at this location to allow for faster containment."
Count XIX, ¶ 18	"Finally, Petco further answers that the flowline at this location has been replaced with a PVC line."
Count XX, ¶ 18	"Finally, Petco further answers that the fiberglass flowline has been installed at this location underneath the creek bed."
Count XXI, ¶ 18	"Finally, Petco answers that polymer flowline has been installed at this location."
Count XXII, ¶ 18	"Finally, Petco further answers that an underground fiberglass flow line has been installed at this location."
Count XXX, ¶ 18	"Petco further states that the drain valve at this location is enclosed by a guard."
Count XXXIV, ¶ 18	"Further answering, the clamps and bolts at this location are now stainless steel, and the steel lines have been changed to polymer and PVC."
Count XXXVIII, ¶ 18	"Further answering, the flowlines at this location are now fiberglass, a new header has been installed, and a new pumpover line has been installed underneath the creek bed."
Count XXXIX, ¶ 18	"Further answering, the flowline at this location is now fiberglass from the well to the header."

Count XLV, ¶ 18	"Petco states that the disposal line at this location has been replaced with a PVC line."
Count XLVI, ¶ 20	"Further answering, Petco's chloride testing was on-site and preliminary."
Count XLVI, ¶ 21	"preliminary"
Count XLVI, ¶ 22	"preliminary"
Count XLVI, ¶ 26	"Further answering, Petco's chloride testing was on-site and preliminary."
Count XLVI, ¶ 27	"preliminary"
Count XLVIII, ¶ 19	"Further answering, Petco's chloride testing was on-site and preliminary."
Count XLIX, ¶ 19	"Further answering, Petco's chloride testing was on-site and preliminary."
Count XLIX, ¶ 20	"Further answering, Petco's chloride testing was on-site and preliminary."
Count LI, ¶ 18	"Further answering, a new sump has been built at this location which releases into a separate pit, and new polymer lines have been installed at this location."
Count LII, ¶ 18	"Further answering, a new fiberglass line has been bored underneath the creek bed at this location."
Count LII, ¶ 22	"Further answering, Petco's chloride testing was on-site and preliminary."

Count LII, ¶ 23	“preliminary”
Count LIII, ¶ 18	“Further answering, a new polymer disposal line has been installed at this location.”
Count LIII, ¶ 20	“Further answering, Petco’s chloride testing was on-site and preliminary.”
Count LIV, ¶ 22	“Further answering, Petco’s chloride testing was on-site and preliminary.”
Count LIV, ¶ 23	“Further answering, Petco’s chloride testing was on-site and preliminary.”
Count LIV, ¶ 24	“Further answering, Petco’s chloride testing was on-site and preliminary.”
Count LVI, ¶ 18	“Further answering, a new “T” connection has been installed at this location.”
Count LVI, ¶ 19	“Further answering, Petco’s chloride testing was on-site and preliminary.”
Count LVII, ¶ 18	“Further answering, a new fiberglass flowline has been installed at this location underneath the creek bed.”
Count LVIII, ¶ 18	“Petco states that a new fiberglass flowline has been installed at this location underneath the creek bed.”
Count LIX, ¶ 18	“Further answering, anew fiberglass flowline has been installed at this location underneath the creek bed.”
Count LX, ¶ 18	“Further answering, all alarms in Louden field are constantly being upgraded.”

SERVICE LIST

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CERTIFICATE OF SERVICE

I, Natalie Long, an Assistant Attorney General, certify that on the 1st day of June, 2023, I caused to be served the foregoing Notice of Filing, Complainant's Motion for Leave to File Sur-Reply to Respondent's Reply to Complainant's Response in Opposition to Respondent's Motion to Dismiss Counts 62 through 73 of the First Amended Complaint, Complainant's Sur-Reply to Respondent's Reply to Complainant's Response in Opposition to Respondent's Motion to Dismiss Counts 62 through 73 of the First Amended Complaint, Complainant's Motion for Leave to File Reply to Respondent's Response in Opposition to Complainant's Motion to Strike Respondent's Affirmative and Additional Defenses to the First Amended Complaint and Immaterial Matter, Complainant's Reply to Respondent's Response in Opposition to Complainant's Motion to Strike Respondent's Affirmative and Additional Defenses to the First Amended Complaint and Immaterial Matter, and Service List and Certificate of Service on the parties named on the attached Service List, by email or electronic filing, as indicated on the attached Service List.

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