BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	PCB No. 13-072
v.	)	(Water – Enforcement)
	)	
PETCO PETROLEUM CORPORATION,	)	
	)	
Respondent.	)	

MOTION FOR RECONSIDERATION OF THE BOARD'S AUGUST 22, 2024 ORDER

COMES NOW Respondent Petco Petroleum Corporation ("Petco"), by and through its undersigned counsel, and, pursuant to 35 Ill. Adm. Code Sections 101.500, 101.520 and 101.902, submits this Motion for Reconsideration of the Board's August 22, 2024 Order ("Board Order"), which denied Petco's Motion to Dismiss based on the five-year statute of limitations in 735 ILCS 5/13-205 and struck the associated affirmative defense. For its Motion, Petco states as follows:

INTRODUCTION

Petco's Motion to Dismiss Counts 62 Through 73 of the First Amended Complaint sought dismissal of twelve counts for alleged violations that occurred over nine years after filing the original Complaint.[1] On August 22, 2024, the Board denied the Motion to Dismiss and struck Petco's affirmative defense based on 735 ILCS 5/13-205. That Board Order is in error and should be reconsidered because it creates a new rule whereby the five-year statute of limitations applicable to "all civil actions not otherwise provided for" (735 ILCS 5/13-205) can apply to enforcement actions filed in circuit court, but does not apply to the same enforcement actions elected to be filed before the Board. This distinction is unjustified, creates an inconsistency in the application of the

[1] On March 10, 2023, the State filed its Response in Opposition to the Motion to Dismiss. On April 19, 2023, Petco filed its Reply. On June 1, 2023, the State filed its Sur-Reply. On July 10, 2023, Petco filed its Sur-Sur-Reply. The Board accepted and considered these filings in handing down the Board Order.

law, and affords different levels of protection for defendants depending on whether they face enforcement claims before the Board or in circuit court. In turn, the Board Order undermines the fundamental protections of the statute of limitations enacted by the General Assembly, such as ensuring disputes are resolved in a timely manner and preventing parties from confronting outdated claims where evidence may have been compromised or lost over time, witnesses may no longer be accessible or may have passed away, and relevant documents may no longer exist. The new rule also creates a forum selection problem, as it incentivizes the State to file all enforcement actions before the Board—particularly stale claims otherwise barred by the five-year statute of limitations if filed in circuit court. Lastly, the Board relies on inapposite federal caselaw that does not inform the proper application of the statute of limitations here, because, unique to Illinois, the Board and circuit courts have concurrent jurisdiction to adjudicate enforcement of alleged violations of Section 31 of the Illinois Environmental Protection Act ("Act").

In sum, the breadth of the Board Order allows the State to resurrect long forgotten notices of violation, occurring under decades of prior Governors and Attorneys General, through filing enforcement actions before the Board that the Board Order recognizes can be time-barred in circuit court. That is not and cannot be the law in Illinois. In light of the policy considerations, the Board should reconsider its analysis and find that the Section 5/13-205 five-year statute of limitations applies with equal weight to enforcement actions brought pursuant to the Act regardless of whether the State chooses to file them before the Board or in circuit court.

LEGAL STANDARD

Section 101.520 of the Board's procedural rules provides that, in ruling on a motion for reconsideration, the Board "will consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error." 35 Ill. Adm. Code 101.520. Consistent with

Illinois caselaw, "the intended purpose of a motion for reconsideration is to bring to the [Board's] attention . . . errors in the court's previous application of the existing law." *Petition of Brickyard Disposal & Recycling, Inc. v. IEPA*, PCB 2016-66, 2017 WL 160287, at *1 (*citing Korogluyan v. Chicago Title & Trust Co.*, 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992)).

Motions for Reconsideration must be filed within 35 days after the receipt of the Order in question. 35 Ill. Admin. Code 101.520(a). The Board Order was filed on August 22, 2024, and sent by the Clerk to Petco on August 23, 2024. Accordingly, this Motion is timely.

ARGUMENT

I. The Board Erred in Failing to Recognize that the Same Enforcement Actions May be Filed Before the Board or in Circuit Court and that the Statute of Limitations Therefore Must Apply Equally in Either Forum

The text of the Act, Board decisions, and Illinois caselaw specify that the Board and circuit courts are proper forums to adjudicate enforcement actions brought under the Act. 415 ILCS 5/31(d)(1) provides that "[a]ny person may file with the Board a complaint, meeting the requirements of subsection (c) of this Section, against any person allegedly violating this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order." Similarly, 415 ILCS 5/42 provides that the State's Attorney of the county in which an alleged violation occurred, or the Attorney General, may bring a civil action in circuit court against any person allegedly violating the Act. These Sections do not create different enforcement causes of action—they simply dictate who can bring Act enforcement actions and in which forums.

Based on the text of the Act, it is axiomatic that the Board and circuit courts have concurrent jurisdiction to preside over enforcement actions. *See People v. Fiorini*, 143 Ill. 2d 318, 337–38, 574 N.E.2d 612, 619 (1991) ("concurrent jurisdiction exists in the circuit court and the [Board] for actions alleging violations of the Act"); *People v. Donald Pointer*, PCB 96-64, 1998

WL 83188, at *1 (Feb. 19, 1998) ("It is well settled that the Board and the circuit courts have concurrent jurisdiction over most violations of the Act."). Appeals from either forum must be taken to Illinois appellate courts. 415 ILCS 5/41(a); *FedEx Ground Package Sys., Inc. v. Pollution Control Bd.*, 382 Ill. App. 3d 1013, 1014–15, 889 N.E.2d 697, 699 (1st Dist. 2008). The Act simply permits the State and other authorized plaintiffs to file enforcement actions before the Board or in circuit court at their option.

Implicit in the Board Order is an assumption that there are separate causes of action which can be filed before the Board or in circuit court. That is incorrect. The language of the Act and the above-cited authories show that a prosecuting entity (a State's Attorney, the Attorney General, or a private party) may bring civil actions before the Board or a circuit court alleging violations of the Act. Here, the State's Complaint focuses on alleged violations of Section 12 of the Act, 415 ILCS 5/12, concerning water pollution, a provision which can and has been prosecuted by State's attorneys, the Attorney General, and private parties in circuit courts and before the Board. *E.g.*, *People v. Buchanan Energy(s), LLC*, No. 2014 CH 001274, 2015 WL 10015821, at *2 (Ill. Cir. Ct. DuPage Cnty. Feb. 5, 2015) (State's Attorney and Attorney General); *Paul Christian Pratapas v. Lexington Trace LLC*, PCB 24-42, 2024 WL 1543149, at *4 (Apr. 4, 2024) (private party).

The enforcement cause of action brought—pursuing remedies for violations of the Act—is the same irrespective of the litigants or the selected forum. The nature of the cause of action does not change merely because the State chooses to file it before the Board instead of circuit court. Accordingly, the five-year statute of limitations for "all civil actions not otherwise provided for" (735 ILCS 5/13-205) should apply with equal measure to enforcement actions filed in either forum. The Board should reconsider its decision that the statute of limitations does not apply to substantively identical causes of action to those which may be filed in circuit court.

II. The Board Erred in Creating a New Rule That Undermines Uniform Application of the Statute of Limitations

Recognizing that prior cases analyzing Section 5/13-205 have not squarely addressed the meaning of "civil action" in the statute, the Board "acknowledge[d] Petco's initial point that, when considering Section 13-205 in the past, the Board has not decided the threshold question of whether a Section 31 enforcement action under the Act is a 'civil action' subject to the statute of limitations found in Section 13-205." (Order at 4). The Board, therefore, found it appropriate to rule on whether an enforcement action filed before the Board was a "civil action" within the meaning of Section 13-205. Notably, the State's briefs did not squarely address and thus conceded Petco's point that enforcement actions under Section 31 of the Act are civil actions. *See* State's Response in Opposition to Motion to Dismiss at 5 ("Infusing fresh meaning into the phrase "civil action" does not give rise to the ability of a party to apply a statute of limitations defense to a governmental entity, acting in the public interest, particularly when the State brings an enforcement action pursuant to Section 31 of the Act.") and 10 ("Whether or not an action is a 'civil action' is beside the point. The key question to consider is whether an action brought by a governmental entity involves a public right or a private right."); State's Sur-Reply at 2 ("Whether or not this case is a 'civil action' is of no moment.").

Nonetheless, the Board moved past the parties' briefs and found that "filing a complaint with the Board under Section 31 initiates an administrative proceeding—not a 'civil action,' which is brought in court." (Order at 4). Applying this distinction between an administrative proceeding and an action in court, the Board held that the five-year statute of limitations applicable to "all civil actions not otherwise provided for" (735 ILCS 5/13-205) does not apply to actions filed with the Board.

In holding that an enforcement action brought under Section 31 of the Act before the Board is not subject to the five-year statute of limitations in Section 13-205, the Board has created a scenario where the limitations period could only apply if the State, at its sole option, elects to file the enforcement action in circuit court rather than before the Board. Yet, as discussed above, circuit courts and the Board have concurrent jurisdiction to hear enforcement actions brought under the Act. *See Fiorini*, 143 Ill. 2d at 337–38, 574 N.E.2d at 619; *Donald Pointer*, PCB 96-64, 1998 WL 83188, at *1.

The policy implications of the Board Order are significant. The decision allows the government to circumvent the statute of limitations by merely electing to file before the Board, rather than in circuit court. It undermines the clarity which statutes of limitations afford potential defendants regarding the timeframe during which legal actions can be brought against them based on past events, ensuring that claims are diligently pursued within a defined period. *See Milnes v. Hunt*, 311 Ill. App. 3d 977, 981, 725 N.E.2d 779, 782 (2000) ("Statutes of limitations are designed to prevent recovery on stale demands [and] require diligence in initiating actions.").

Statutes of limitations also provide a fundamental legal protection designed to ensure timely resolution of disputes and to prevent parties from facing stale claims where evidence has diminished or lost over time, witnesses are no longer reasonably accessible or deceased, and relevant documents may no longer be available due to conventional document retention policies or other circumstances. *See Doe v. Hastert*, 2019 IL App (2d) 180250, ¶ 54, 133 N.E.3d 1249, 1260 (*citing United States v. Kubrick*, 444 U.S. 111, 117 (1979)); *Softcheck v. Imesch*, 367 Ill. App. 3d 148, 157, 855 N.E.2d 941, 948 (2006) ("Statutes of limitations exist for very legitimate reasons. Memories fade; witnesses disappear; documents are lost or destroyed. The law recognizes the injustice of requiring one to defend against stale claims.").

Moreover, taken to its logical extreme, the Board Order unwittingly allows the State to exhume long-dead notices of violation, sent decades ago under different executive, administrative, and/or legal leadership of the State, by filing enforcement actions with the Board instead of circuit court. While the Board's docket is quite busy now, the Board Order ensures the probability of filing a deluge of enforcement cases that heretofore were inactive and final due to inaction.

In short, allowing the statute of limitations to be applied differently depending on the government's selected forum undermines fundamental protections and creates arbitrarily different outcomes. Stale enforcement actions are stale whether they are filed with the Board or in court.

III. The Board Relies on Inapposite Federal Cases that Do Not Support the New Rule

The Board Order cites two federal cases interpreting the meaning of "civil action" in different contexts concerning federal statutes. (Order at 4). In *Township of Bordentown*, the issue was whether a state environmental agency was barred from conducting adjudicatory hearings regarding the agency's permitting decisions by a federal Natural Gas Act ("NGA") provision granting to the federal courts of appeals "original and exclusive jurisdiction over any civil action for the review of an order or action [by a state agency] pursuant to Federal law." *Township of Bordentown, New Jersey v. FERC*, 903 F.3d 234, 266-270 (3d Cir. 2018) (quoting the NGA at 15 U.S.C. § 717r(d)(1)). The Third Circuit held that the agency was not barred by this statute, reasoning in part that such proceedings before the agency were not civil actions, which distinguished those proceedings from actions filed in courts clearly falling within the scope of the statute. *Id.* at 267-69. It further explained that the NGA's overall structure indicated a Congressional intent to not disrupt or preempt state agencies from conducting their own internal decision-making on natural gas infrastructure permitting. *Id.*

Accordingly, the Third Circuit's decision was consistent with the policy interests underlying the NGA, which allowed state and federal authorities to weigh-in on permitting matters while funneling appeals directly to the federal appellate courts as a matter of original and exclusive jurisdiction. The *Township of Bordentown* Court was not presented with and did not consider a situation like that presented here, where there are two forums with concurrent jurisdiction in which the State may file actions under Section 31 and the new Board rule distinguishes the substantive statute of limitations applicable to it versus circuit courts. *Township of Bordentown* is inapposite to the question presented here.

In *Wind River Mining*, the issue was whether a generally-applicable six-year statute of limitations for civil actions brought against the United States (28 U.S.C.A. § 2401) applied to an action filed in federal court pursuant to the Administrative Procedure Act seeking judicial review of a Bureau of Land Management ("BLM") decision. *Wind River Mining Corp. v. United States*, 946 F.2d 710, 712 (9th Cir. 1991). The Ninth Circuit held that the statute was applicable, stating in dicta that an "administrative proceeding" was not a civil action, but that "a complaint filed in federal district court seeking *review* of an administrative decision" was a civil action. *Id.* at 712. The case likewise did not confront policy implications of creating a rule that distinguishes the substantive law applied in two different forums having concurrent jurisdiction over the same enforcement cause of action. *Wind River Mining*, therefore, does not address the Board's and circuit courts' concurrent jurisdiction to preside over enforcement actions brought under the Act.

As such, both *Township of Bordentown* and *Wind River Mining* addressed federal statutory frameworks not applicable to the present case, where the latter involves concurrent jurisdiction and the same substantive enforcement law that should apply regardless of the forum in which the

State chooses to file. These federal cases do not support the Board Order and handing down a rule that allows the statute of limitations to vary based on forum selection.

IV. The Text of Section 13-205 Bars Counts 62 Through 73 of the First Amended Complaint Because Those Counts Were Initiated Well Over Five Years After the Enforcement Actions Allegedly Accrued

As the Board Order notes, this case presents the first instance in which the Board has "decided the threshold question of whether a Section 31 enforcement action under the Act is a 'civil action' subject to the statute of limitations found in Section 13-205." (Order at 4). Section 13-205 provides in relevant part that "all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued."

At the core of statutory interpretation is identifying and giving effect to the legislature's intent. *See People v. Ramirez*, 214 Ill.2d 176, 179, 824 N.E.2d 232, 234 (Ill. 2005). The best indication of legislative intent is the statutory language, given its plain and ordinary meaning. *See id.*[2] The language of Section 13-205 is clear and unambiguous and provides the limitations period applicable to this case because the statute's use of the term "all" means that all civil actions, whether initiated by a State's Attorney, the Attorney General, or a private party, are subject to the five-year limitations period if there is no other express period. Moreover, the State seeks "a civil penalty of $50,000.00 for each violation of the Act and the Board's regulations, and an additional civil penalty of $10,000.00 for each day each violation continued." (1st Am. Comp. at 111, Prayer

[2] Black's Law Dictionary (11th ed. 2019) defines "civil action" as "[a]n action brought to *enforce*, redress, or protect a private or civil right; a noncriminal litigation. — Also termed (if brought by a private person) *private action*; (if brought by a government) *public action*." (emphasis in original and added). A civil enforcement action under the Act meets this definition. The State's civil enforcement case now before the Board is both an action to *enforce* the Act and is brought by the *government* as a public action. The Board should look to this definition from Black's Law Dictionary, which in Illinois is an authoritative source of ascertaining the meaning of undefined statutory terms. *See, e.g., People v. Ward*, 215 Ill. 2d 317, 325, 830 N.E.2d 556, 560 (2005); *Ahmad v. Bd. of Educ. of City of Chicago*, 365 Ill. App. 3d 155, 165, 847 N.E.2d 810, 819, n.3 (1st Dist. 2006).

for Relief). Pursuant to the Act, "civil penalties" are expressly recoverable in a "civil action," whether or not the case is filed before the Board or in circuit court. *See People v. NL Indus.*, 152 Ill. 2d 82, 102–03, 604 N.E.2d 349, 358 (Ill. 1992). Based on the Act's text, the Board should find that an enforcement claim is a civil action irrespective of whether the State elects to file it before the Board or in circuit court. The substantive cause of action is the same regardless of the forum.

In light of the statute's plain meaning and the issues of uniformity and policy discussed herein, the State's amended allegations in this case demonstrate why the five-year limitations period applies. The twelve new counts allege violations occurring approximately eight to nine years prior to the date of the First Amended Complaint and were raised over nine years after filing the original Complaint. Like any other defendant before the Board or a court, Petco should be entitled to the protections against such dated claims afforded by the applicable statute of limitations set by the General Assembly in 715 ILCS 5/13-205. Moreover, holding that the statute of limitations bars Counts 62 through 73 does not defeat the State's right to enforce the Act. To the contrary, the civil enforcement actions in Counts 1 through 61 will continue to be adjudicated. Therefore, Petco requests that the Board reconsider and proactively address and correct the policy consequences of the Board Order. The Board should find that Counts 62 through 73 are time-barred pursuant to 715 ILCS 5/13-205.

CONCLUSION

For the foregoing reasons, Respondent Petco Petroleum Corporation respectfully requests that the Illinois Pollution Control Board grant this Motion and reconsider the Board's August 22, 2024 Order denying Petco's Motion to Dismiss Counts 62 Through 73 of the First Amended Complaint and grant such other and further relief as the Board deems appropriate.

Respectfully submitted,

/s/ *Paul T. Sonderegger*

Paul T. Sonderegger, #6276829
Tim Briscoe, #6331827
One U.S. Bank Plaza
St. Louis, MO 63101
(314) 552-6000
FAX (314) 552-6154
psonderegger@thompsoncoburn.com
tbriscoe@thompsoncoburn.com

OF COUNSEL:
THOMPSON COBURN LLP

Attorneys for Respondent Petco Petroleum Corporation

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on September 16, 2024, the foregoing was filed with the Illinois Pollution Control Board and served upon the following persons by email:

Don Brown
Assistant Clerk
Illinois Pollution Control Board
100 W. Randolph Street
Suite 11-500
Chicago, IL 60601
Don.Brown@illinois.gov

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Ave. East
Springfield, IL 62794
P.O. Box 19274
Carol.Webb@Illinois.gov

Natalie Long
Assistant Attorney General
Office of the Attorney General
500 South Second St.
Springfield, IL 62701
natalie.long@ilag.gov

Kevin Barnai
Assistant Attorney General
Office of the Attorney General
500 South Second St.
Springfield, IL 62701
kevin.barnai@ilag.gov

/s/ *Paul T. Sonderegger*