ILLINOIS POLLUTION CONTROL BOARD
April 3, 2025

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

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

On January 6, 2025, Petco Petroleum Corporation (Petco) filed its Amended Affirmative and Additional Defenses (Am. Defs.) in this matter. On February 5, 2025, the People of the State of Illinois (People) filed a Motion to Strike Petco's Amended Affirmative and Additional Defenses (Mot. to Strike). Petco has filed a response in opposition (Resp.) and the People have filed a reply to the response (Reply). For the reasons detailed below, the Board grants the People's Motion to Strike in part.

In this order, the Board first provides the relevant procedural background in this matter and grants the People's motion for leave to file a reply to Petco's response to the motion to strike. The Board then turns to its discussion of Petco's amended defenses and renders its determination on the motion to strike. To conclude, the Board dispenses with its order and directs the parties to hearing.

RELEVANT PROCEDURAL BACKGROUND

On January 6, 2025, Petco filed its amended affirmative and additional defenses following the Board's orders on extensive motion practice between the parties. The Board's August 8, 2024 order ruled on the People's Motion to Strike Affirmative and Additional Defenses and struck or directed Petco to amend its affirmative defenses, but reserved ruling on Petco's Motion to Dismiss Counts 62 through 73 of the First Amended Complaint and related portion of Petco's Affirmative Defense H pertaining to the statute of limitations argument raised in Petco's Motion to Dismiss. *See* People v. Petco Petroleum Corporation, PCB 13-72 (Aug. 8, 2024). The Board's August 22, 2024 order then denied Petco's Motion to Dismiss and struck the remainder of Affirmative Defense H with prejudice. *See* People v. Petco Petroleum Corporation, PCB 13-72 (Aug. 22, 2024). The Board's August 22 order provides an abbreviated factual and procedural background of this matter, while a more detailed factual and procedural history can be found in the Board's August 8 order. *See* Petco, PCB 13-72 (Aug. 8, 2024); *see also* Petco, PCB 13-72 (Aug. 22, 2024).

On September 30, 2024, Petco filed a Motion for Reconsideration of the Board's August 22, 2024 order. On September 20, 2024, the People filed a response to Petco's motion. At a

status conference on November 14, 2024, the parties agreed to a stay of Petco's deadline to file its amended affirmative defenses until the Board ruled on the pending motion. On December 5, 2024, the Board denied Petco's Motion for Reconsideration of the Board's August 22, 2024 order.

On December 19, 2024, Petco filed a Motion for Certification of Question for Interlocutory Appeal concerning the statute of limitations issue raised in its Motion to Dismiss Counts 62 through 73 of the First Amended Complaint. On January 2, 2025, the People filed a response in opposition to Petco's motion.

On February 5, 2025, the People filed a Motion to Strike Petco's Amended Affirmative and Additional Defenses to the First Amended Complaint. On February 19, Petco filed a response in opposition to the People's motion. At a February 11, 2025 status conference, the parties indicated to the hearing officer that they wished to stay the proceedings until the Board ruled on the pending Motion to Strike. On March 5, 2025, the People filed a reply to Petco's response on opposition to the Motion to Strike, along with motion for leave to file the reply. The People's motion for leave to file the reply is granted.

On March 6, 2025, the Board denied Petco's Motion for Certification of Question for Interlocutory Appeal. The Board reserved ruling on the People's Motion to Strike and Petco's Amended Affirmative and Additional Defenses.

APPLICABLE LEGAL STANDARDS

Affirmative Defenses

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

Therefore, if a defendant's purported affirmative defense does not admit the opposing party's claim but rather attacks the sufficiency of that claim, it is not an affirmative defense. *See* Worner, 121 Ill. App. 3d at 222. Also, pleading mitigation factors for remedy, including civil penalty, is not a defense at all—let alone an affirmative defense—to a claim of violation. *See*, e.g., People v. Texaco Refining and Marketing, Inc., PCB 02-3, slip op. at 6, 7 (Nov. 6, 2003) (respondent's pleading that contested necessity of complaint's request for groundwater cleanup

plan "pertains to remedy, not the cause of action . . . [and] does not defeat the People's claims of water pollution or open dumping"; voluntarily coming into compliance "relates to the issue of remedy and not to the cause of action"); People v. Geon Co., Inc., PCB 97-62, slip op. at 4 (Oct. 2, 1997) (mitigation factor concerning penalty is "not an appropriate affirmative defense to a claim that a violation has occurred"); People v. Midwest Grain Products of Illinois, Inc., PCB 97-179, slip op. at 5 (Aug. 21, 1997) ("mitigation issues are only considered once a violation of the [Illinois Environmental Protection] Act [415 ILCS 5 (2022)] has been found").

Pleading Affirmative Defenses

"[T]he party who asserts an affirmative defense has the burden of proof and must establish it by a preponderance of the evidence". Shackleton v. Fed. Signal Corp., 196 Ill. App. 3d 437, 444 (1st Dist. 1989) (*citing* Lawrence v. Bd. of Education, 152 Ill. App. 3d 187 (5th Dist. 1987)); Baylor v. Thiess, 2 Ill. App. 3d 582, 584 (2d Dist., 1971); Krueger v. Dorr, 22 Ill. App. 2d 513, 527 (2d Dist., 1959); *see also* EPA v. Peter D. Giachini, PCB No. 77-143, slip op. at 8 (May 24, 1979). The facts alleged to establish an affirmative defense must be pled "with the same degree of specificity that is required of a plaintiff stating a cause of action." Northbrook Bank & Trust Co. v. 2120 Div. LLC, 2015 IL App (1st) 133426 ¶ 15. Accordingly, "to set forth a good and sufficient claim or defense, a pleading must allege ultimate facts sufficient to satisfy each element of the cause of action or affirmative defense pled." Richco Plastic Co v. IMS Co., 288 Ill. App. 3d 782, 784 (1st Dist. 1997). "'[O]nly the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts.'" People ex rel. Fahner v. Carriage Way West, Inc., 88 Ill. 2d 300, 308 (1981), *quoting* Bd. of Ed. v. Kankakee Federation of Teachers Local No. 886, 46 Ill. 2d 439, 446-47 (1970). An affirmative defense "alleges facts sufficient to constitute a legally cognizable defense." Vermeil v. Jefferson Trust & Sav. Bank, 176 Ill. App. 3d 556, 566 (3d Dist. 1988).

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

Motions to Strike Affirmative Defenses

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

The Board's Procedural Rules

Under the Board's procedural rules, "[a]ll material allegations of [a] complaint before the Board will be taken as admitted if no answer is filed or if not specifically denied by the answer, unless respondent asserts a lack of knowledge sufficient to form a belief." 35 Ill. Adm. Code 103.204(d). "Any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing. *Id*.

The Board may look to the Code of Civil Procedure "for guidance where the Board's procedural rules are silent." 35 Ill. Adm. Code 101.100(b). Other than affirmative defenses, the pleading of defenses in an answer is not addressed by the Board's procedural rules. *See* 35 Ill. Adm. Code 103.204(d). Section 2-613(d) of the Code of Civil Procedure, however, provides that "[t]he facts constituting any affirmative defense . . . and any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply." 735 ILCS 5/2-613(d) (2022).

Section 101.506 of the Board's procedural rules generally provides for "motions to strike, dismiss, or challenge the sufficiency of any pleading filed with the Board." 35 Ill. Adm. Code 101.506.

DISCUSSION

Petco's Amended Defenses are not Delineated as Affirmative or Additional

In its filing, Petco listed all its amended defenses as "Amended Defense" without specifying whether they were an affirmative defense to the allegations of the amended complaint, or what Petco refers to as an "additional defense". *See generally*, Am. Defs. A-G; *see* 35 Ill. Adm. Code 103.204(d). The Board notes that Petco's non-delineated defenses are not pled with the specificity required for the Board to properly evaluate whether they meet the heightened pleading standard for affirmative defenses. This is necessary because of the burden-shifting to the pleading party that occurs with a properly plead affirmative defense. *See* Shackleton, 196 Ill. App. 3d at 444 (*citing* Lawrence, 152 Ill. App. 3d 187); Baylor, 2 Ill. App. 3d at 584; Krueger, 22 Ill. App. 2d at 527; *see also* Giachini, PCB 77-143, slip op. at 8. The Board notes that future filings by Petco must delineate with specificity what the motion is detailing. Also, in future proceedings, any defenses meant to be affirmative defenses (e.g., in a respondent's answer to a complaint, or amended in response to Board order) should be identified as affirmative defenses. If defenses are not identified specifically as affirmative defenses, they will be stricken for being insufficiently pled.

Petco Raises Defenses that are not Defenses to the Alleged Causes of Action

An affirmative defense is a "response to a plaintiff's claim which attacks the plaintiff's legal right to bring an action, as opposed to attacking the truth of claim." Farmers State Bank,

PCB 97-100, slip op. at 2 n.1, *quoting* Black's Law Dictionary 61 (6th ed. 1990) (emphasis in Black's). In its August 8, 2024 order, the Board directed Petco to specifically amend each of its affirmative and additional defenses to meet the legal requirements for affirmative defenses. After reviewing Petco's amended defenses, the Board finds that only one is properly raised.

The Board has Already Rejected the Statute of Limitations Argument Raised by Amended Defense A

Petco's Amended Defense A argues that the claims of the First Amended Complaint are barred by the 5-year statute of limitations found in Section 13-205 of the Code of Civil Procedure. Am. Defs. A; *see* 735 ILCS 5/13-205 (2022). The Board has already rejected Petco's statute of limitations argument several times. *See*, Petco, PCB 13-72 (Aug. 24, 2024) (finding Section 13-205 statute of limitations does not apply to Section 31 People's enforcement actions before the Board and denying Petco's motion to dismiss additional counts of first amended complaint and Defense H relating to statute of limitations issue); Petco, PCB 13-72 (Dec. 5, 2024) (denying Petco's motion to reconsider August 24, 2024 Board order on statute of limitations applicability for failure to raise new arguments not already rejected by the Board's prior order); Petco, PCB 13-72 (Mar. 6, 2025) (denying Petco's motion for certification of question for interlocutory appeal on issue of statute of limitations applicability for failure to meet Rule 308(a) requirements for interlocutory appeal). The Board denies Petco's Amended Defense A in accordance with the Board's prior orders.

Amended Defenses B, D, and E are not Properly Raised as Defenses to the Allegations of the Amended Complaint

It is well established that pleading mitigation factors for remedy, including civil penalty, is not a defense at all—let alone an affirmative defense—to a claim of violation. *See*, e.g., Texaco., PCB 02-3, slip op. at 6, 7; Geon Co., PCB 97-62, slip op. at 4; Midwest Grain Products, PCB 97-179, slip op. at 5. Petco's Amended Defenses B, D, and E allege past mitigation activities undertaken by Petco at sites relevant to the allegations of the First Amended Complaint. However, action undertaken as mitigation for penalty pertains to remedy once a violation has been found and is not a defense to a claim of violation. *See* Texaco, PCB 02-3, slip op. at 6, 7. The Board will address Petco's Amended Defenses B, D, and E each individually.

Amended Defense B. Petco's Amended Defense B claims that the People cannot prove that Petco was the cause-in-fact and/or proximate cause of the alleged discharges alleged in the First Amended Complaint or that Petco had the capability of controlling such discharges. Petco's Amended Defense B fails to state affirmative matter to defeat the People's claim and again asserts the incorrect legal standard for an alleged violation of Section 12(a) of the Illinois Environmental Protection Act (Act), which is "cause, threaten, or allow", not cause-in-fact or proximate cause. 415 ILCS 5/12(a) (2022). The Board accordingly finds that the assertion that Petco was the cause-in-fact and/or proximate cause of the alleged discharges is legally incorrect and strikes this portion of Amended Defense B (previous Defense K) with prejudice as an affirmative defense.

As to the portion of Amended Defense B alleging that Petco had the capability of

controlling such discharges, the Board found in its August 8, 2024 order that Petco's previous assertion of this defense (Defense K) was not an affirmative defense, but allowed Petco, as part of its defense, to provide additional information about these arguments at specific well locations for the Board to consider as part of its Section 33(c) and 42(h) analysis. *See* 415 ILCS 5/33(c), 42(h) (2022). The Board does likewise here. The Board strikes Amended Defense B with prejudice as an affirmative or other defense to the cause of action but allows Petco to raise this issue for the Board to consider as part of its Section 33(c) and 42(h) analysis. *See* 415 ILCS 5/33(c), 42(h) (2022).

Amended Defense D. Petco states that its Amended Defense D is a summary of its previous Defenses D, E, and F that give color to the People's claims and introduce additional affirmative matter regarding the appropriate scope of relief. The Board disagrees. Petco has failed to allege any additional information or facts that make this a valid affirmative defense. As detailed in the Aug. 8, 2024 Board order, the Illinois Department of Natural Resources (IDNR) and Illinois Environmental Protection Agency (IEPA) have different functions under the Illinois Oil and Gas Act (IOGA) and the Act. The People's case alleges violations of the Act. Any case brought by the IDNR under the IOGA would have no bearing on this matter. Therefore, the Board strikes Amended Defense D (which comprises prior alleged Defenses D, E and F) with prejudice as an affirmative defense or other defense to the cause of action. However, Petco may provide additional information about prior orders and compliance efforts at specific well locations for the Board to consider in its Section 33(c) and 42(h) analysis. *See* 415 ILCS 5/33(c), 42(h) (2022).

Affirmative Defense E. Amended Defense E describes Petco's remedial actions taken at specific well locations. *See* Am. Defs. E. The Board has held that mitigation of damages is not a viable affirmative defense under the Act. Mot. to Strike at 14, *citing* Texaco, PCB 02-3, slip op. at 6, 7; Midwest Grain Products, PCB 97-179, slip op. at 5; People v. QC Finishers, Inc., PCB 01-07, slip op. at 5 (June 19, 2003); Geon Co., PCB 97-62, slip op. at 4. Accordingly, the Board strikes Amended Defense E with prejudice as an affirmative defense or other defense to the cause of action. However, Petco may provide additional information about remedial actions taken at specific well locations identified in the Amended Complaint for the Board to consider as part of its Section 33(c) and 42(h) analysis. *See* 415 ILCS 5/33(c), 42(h) (2022).

Amended Defenses F and G Concern Payments not Relevant to this Proceeding

Petco's Amended Defense F argues for the applicability of a "set-off" based on bonds paid by Petco to the IDNR to appeal IDNR Director's Decisions. Am. Defs. F. Specifically, Petco has provided a list of 171 numbered IDNR Director's Decisions issued to Petco through September 1, 2019, without any explanation of how any of those numbered decisions relate to the allegations in the Amended Complaint. Am. Defs. F. According to Petco, it has posted over $800,000 as bond to contest those decisions, which are administrative appeals of IDNR Director's Decisions in relation to alleged violations of the IOGA. *Id*. Similarly, Petco's Amended Defense G argues that Petco is entitled to accord and satisfaction based on these bond payments to IDNR. Am. Defs. G.

As discussed above, remediation action can be considered as part of the Board's 33(c)

and 42(h) analysis of mitigating factors, making the raising of Amended Defenses F and G improper as affirmative defenses. Further, Petco seems to conflate the People, who brought this action, with IEPA, on whose behalf this action was brought, and IDNR, to whom Petco has made past bond payments, to argue that payments made to one agency can "offset" future penalty payments made to another merely because they are both agencies of the State of Illinois. This is not accurate. Any bond payments made or owing to another state agency cannot be considered by the Board as "offset" amounts for future penalties for violations found under the Act in a People's enforcement case. The Board therefore finds that Amended Defenses F and G are not proper affirmative defenses or other defenses to the cause of action and strikes Petco's Amended Defenses F and G with prejudice.

Amended Defense C, Laches, is Properly Raised

Petco's Amended Defense C asserts that the substantial time over which this case has drawn out demonstrates a lack of due diligence on the part of the People in bringing these claims to a conclusion through prosecution before the Board or through a negotiated settlement. Am. Defs. C. Petco alleges that it is prejudiced by these circumstances because the passage of time risks compromising evidence that may support Petco's defense by rendering witnesses no longer accessible and/or diminishing the completeness of witness memories, and leading to the loss of pertinent information and/or documents. *Id*.

The People assert that the docket for the underlying case shows that the parties engaged in extensive settlement negotiations over the course of many years, from shortly after the inception of the case in 2013 until negotiations were reported to be at an impasse in 2021, which the People allege supports their argument that Petco fails to show a lack of due diligence on the part of the People to bring the additional counts of the First Amended Complaint. Mot. to Strike at 10; *see generally*, People v. Petroleum Petco Corporation, PCB 13-72.

Petco supports its defense of laches by arguing that the People were aware, or should have been aware, of its alleged violations many years before the People filed the First Amended Complaint. Resp. at 10. Petco claims that the unreasonable and unjustified delay in issuing the First Amended Complaint prejudiced Petco by subjecting it to greater penalty amounts. *See* Resp. at 10, *citing* People v. Nacme Steel Processing, LLC, PCB 13-12, slip op. at 12-13 (June 6, 2013). The People reply that Petco has not alleged sufficient facts to establish that the People have exhibited unreasonable delay in asserting the claim and that Petco has been prejudiced to prevail on its claim of laches. Reply at 4.

"The two fundamental elements of laches are lack of due diligence by the party asserting the claim and prejudice to the opposing party. There is considerable reluctance to impose the doctrine of laches to the actions of public entities unless unusual or extraordinary circumstances are shown." Van Milligan v. Bd. of Fire & Police Comm'rs, 158 Ill. 2d 85, 89–91 (1994) (internal citations omitted). The defense of laches is an affirmative defense as the defense "gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated." Worner, 121 Ill. App.3d at 222. The issue then is whether the affirmative defense has been sufficiently pled. The Board has denied a motion to dismiss the affirmative defense of laches where a respondent: 1) pled facts that the People knew or should have known of the

respondent's activities, and, 2) claimed that respondent was prejudiced by the People's failure to raise the claim. *See* People of the State of Illinois v. Tradition Investments, LLC, PCB 11-68, slip op. at 13-14 (October 6, 2011); People of the State of Illinois v. Peabody Coal Company, PCB 99-134, slip op. at 8 (June 5, 2003); People of the State of Illinois v. John Crane, Inc., PCB 01-76, slip op. at 8 (May 17, 2001).

Pursuant to Section 103.204(d) of the Board's rules, "any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing." 35 Ill. Adm. Code 103.204(d). Although the Board recognizes that applying laches to public bodies is disfavored, the Illinois Supreme Court held in Hickey v. Illinois Central Railroad Co., 35 Ill.2d 427, 220 N.E.2d 415 (1966) that the doctrine can apply to governmental bodies under compelling circumstances.

While the affirmative defense of laches carries an elevated standard of proof when applied to the People, the Board cannot decide on the merits of this defense before hearing the evidence. *See* Peabody, PCB 99-134, slip op. at 8. The Board therefore finds that while not specific, Petco has alleged the bare minimum of facts to raise the affirmative defense of laches. *See* Fahner, 88 Ill. 2d at 308 ("[O]nly the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts." (*quoting* Kankakee Fed., 46 Ill. 2d at 446-47 (1970)). Accordingly, the People's motion to strike is denied as to Amended Defense C. In this proceeding, the Board notes that Petco must also meet the burden of proving that "compelling circumstances" warrant the application of laches at hearing.

Direction to Proceed to Hearing

Given the substantial pre-hearing motion practice and filings that have been addressed by the Board in this case, the Board directs the parties to proceed to hearing in accordance with the Board's October 20, 2022 order. People v. Petco Petroleum Corporation, PCB 13-72 (Oct. 20, 2022) (accepting First Amended Complaint for hearing). The Board directs the hearing officer to proceed expeditiously to hearing. At the next status conference, the parties are directed to discuss a schedule setting discovery deadlines for 60 to 90 days from the date of this order.

ORDER

1. The People's Motion to Strike is GRANTED as to Amended Defense A. Petco's Amended Defense A is STRICKEN WITH PREJUDICE as an affirmative or other defense to the cause of action in accordance with the Board's prior orders rejecting the five-year statute of limitations argument raised by this defense.

2. Petco's Amended Defenses B, D, and E are STRICKEN WITH PREJUDICE as affirmative or other defenses to the cause of action. However, Petco may raise mitigation factors as they pertain to the Board's Section 33(c) and 42(h) analysis at the relevant future point in the proceedings. The People's Motion to Strike is GRANTED as to Amended Defenses B, D, and E.

3. Petco's Amended Defenses F and G are not proper affirmative or other defenses to the cause of action and are STRICKEN WITH PREJUDICE as affirmative or other defenses to the cause of action. The People's Motion to Strike is GRANTED as to Amended Defenses F and G.

4. The People's Motion to Strike is DENIED as to Amended Defense C. Petco's Amended Defense C, laches, is allowed to proceed to hearing.

5. The parties are directed to proceed to hearing in this matter and to discuss a schedule setting discovery deadlines for 60 to 90 days from the date of this order.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 3, 2025, by a vote of 5-0.

Don A. Brown

Don A. Brown, Clerk
Illinois Pollution Control Board