BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE PEOPLE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB No. 13 - 12
	)	(Enforcement - Air)
NACME STEEL PROCESSING, LLC,	)	
a Delaware limited liability corporation,	)	
	)	
Respondent.	)	

NOTICE OF FILING

To: See Attached Service List.
(VIA ELECTRONIC FILING)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the Complainant's MOTION TO STRIKE AND DISMISS RESPONDENT'S AMENDED AFFIRMATIVE DEFENSES, a copy of which is herewith served upon you.

Respectfully submitted,

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Date: February 8, 2013

THIS FILING IS SUBMITTED ON RECYCLED PAPER

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Respondent.	)	

MOTION TO STRIKE AND DISMISS RESPONDENT'S AMENDED AFFIRMATIVE DEFENSES

Now comes Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the People of Illinois, pursuant to Section 101.506 of the Illinois Pollution Control Board's Procedural Regulations and Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615 (2010), for an order striking and dismissing Respondent's, NACME STEEL PROCESSING, LLC, Amended Affirmative Defenses to the Complaint, and states as follows:

I. INTRODUCTION

On September 5, 2012, People of the People of Illinois ("Complainant" or "People"), filed a one-count Complaint against NACME STEEL PROCESSING, LLC ("Respondent" or "Nacme") alleging violations of the Illinois Environmental Protection Act, 415 ILCS 5/1 *et seq.* ("Act") and the Illinois Pollution Control Board's ("Board") regulations thereunder ("Complaint"). The People's Complaint alleges that Respondents violated violations of Sections 39.5(5)(x), 39.5(6)(b), and 9(b) of the Act, 415 ILCS 5/39.5(5)(x), 39.5(6)(b), and 9(b) (2010). Specifically, the People allege Nacme 'Operated a Major Stationary Source without a Clean Air Act Permit

Program permit" from on or about April 16, 2002, or a date better known to Respondent, through at least February 1, 2012.

On November 2, 2012, the People received service by Nacme of its Answer and Affirmative Defenses to the Complaint, which had been filed with the Board on November 1, 2012 ("Answer"). On November 30, 2013, the People filed with the Board its Motion to Strike and Dismiss Respondent's Amended Affirmative Defenses. On January 8, 2013, the Board issued an Order to grant the parties an agreed motion to allow Respondent to withdraw its Affirmative Defenses and refile Amended Affirmative Defenses to the Complaint. On January 16, 2013, the People received service by Nacme of its Amended Affirmative Defenses to the Complaint, which had been filed with the Board on January 15, 2013 ("Amended Affirmative Defenses")

II. LEGAL STANDARD FOR AFFIRMATIVE DEFENSES

An affirmative defense is *"A Respondent's assertion raising new facts and arguments that, if true will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true."* BLACK'S LAW DICTIONARY (7th edition, 1999). The Board rule regarding affirmative defenses provides, in pertinent part, that:

> 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). In addition, Section 2-613(d) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-613(d) (2010), is instructive, providing that "[t]he facts constituting any affirmative defense...must be plainly set forth in the answer or reply."

Under Illinois case law, the test for whether a defense is affirmative and must be pled by the Respondent is whether the defense gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated. *Condon v. American Telephone and Telegraph*

Company, Inc., 210 Ill.App.3d 701, 709, 569 N.E.2d 518, 523 (2nd Dist. 1991); *Vroegh v. J & M Forklift*, 165 Ill.2d 523, 530, 651 N.E.2d 121, 126 (1995). Accordingly, an affirmative defense confesses or admits the cause of action alleged by the Plaintiff, and then seeks to avoid it by asserting new matter not contained in the complaint and answer. *Worner Agency, Inc. v. Doyle*, 121 Ill. App.3d 219, 222, 459 N.E.2d 633, 635-636 (4th Dist. 1984); see also *People v. Community Landfill Co.*, PCB 97-193, slip op. at 3 (Aug. 6, 1998).

An affirmative defense must do more than offer evidence to refute properly pleaded facts in a complaint. *Pryweller v. Cohen*, 282 Ill.App.3d 89, 668 N.E.2d 1144, 1149 (1st Dist. 1996), *appeal denied*, 169 Ill.2d 588 (1996); *Heller Equity Capital Corp. v. Clem Environmental Corp.*, 272 Ill. App. 3d 173, 178, 596 N.E.2d 1275, 1280 (1st Dist. 1993); *People v. Wood River Refining Company*, PCB 99-120 at 6 (August 8, 2002); *Farmer's People Bank v. Phillips Petroleum Co.*, PCB 97-100, slip op. at 2 n.1 (January 23, 1997) (affirmative defense does not attack truth of claim, but the right to bring a claim).

The facts establishing an affirmative defense must be pled with the same degree of specificity required by a plaintiff to establish a cause of action. *International Insurance Co. v. Sargent & Lundy*, 242 Ill.App.3d 614, 630, 609 N.E.2d 842, 853 (1st Dist. 1993); *Community Landfill Co.* at 4. Thus, the issue raised by an affirmative defense must be one outside of the four corners of the complaint.

III. RESPONDENT'S AFFIRMATIVE DEFENSES ARE FACTUALLY AND LEGALLY INSUFFICIENT

1. Respondent's 'Valid Federally Enforceable State Operating Permit' Defense is Factually and Legally Insufficient

Respondent's 'Valid Federally Enforceable State Operating Permit' defense pleads no exculpatory facts whatsoever. Instead, this 'affirmative defense' simply denies facts alleged in the Complaint and provides irrelevant facts to support it. Therefore, Nacme's 'Valid Federally Enforceable State Operating Permit' defense is factually and legally insufficient and should be dismissed and stricken.

Factually, this affirmative defense fails to provide any facts that are new matter relevant to defeat the People's claim that Nacme was operating a major source without a CAAPP permit. *See Condon,* 210 Ill.App.3d at 709; *Int'l Ins. Co.*, 609 N.E. 2d at 853. Nacme's affirmative defense alleges that "the state's claim is defeated because . . . at all relevant times and currently, Nacme holds a valid state operating permit . . . which limits its emissions to below major source thresholds and which is another type of "federally enforceable" permit under applicable law. *See Amended Affirmative Defense, ¶ 1, p. 1, First Defense (Valid ... Permit).* These facts simply provide information regarding a state operating permit for a non-major source operation ("SOP"), which is not the allegation set forth in the People's Complaint. Instead these facts deny facts alleged in the People's Complaint regarding the "major source" status of Nacme's potential to emit air pollutant. *See Complaint pp. 2 -4.* Nacme's failure to provide relevant facts to the allegations in the People's Complaint is factually insufficient and should be dismissed and stricken with prejudice.

Legally, Nacme's 'affirmative defense' fails to meet the fundamental legal requirement that an affirmative defense give color to a plaintiff's claim, assert new matter that defeats it. Instead,

Nacme's 'affirmative defense' simply denies allegations in the People's Complaint that Nacme operated a "major source" without a CAAPP permit or under a construction permit for its CAAPP permit application from on or about April 16, 2002, or a date or dates better known to Respondent through at least February 1, 2012. Additionally, this purported affirmative defense does not assert any new matter that might defeat the People's claim when it claims facts irrelevant to the People's allegations that it was operating under a SOP for a non-major source operation. *See See Condon*, 210 Ill.App.3d at 709; *Int'l Ins. Co.*, 609 N.E. 2d at 853, *Douglas Theater Corp.*, 288 Ill. App. 3d at 883.

Furthermore, the Respondents claim that the SOP for non-major source operations is federally enforceable is irrelevant to the People's allegations that the Respondent's operations were a "major source" operating without a CAAPP permit.

Accordingly, Nacme's purported 'Valid Federally Enforceable State Operating Permit' affirmative defense is without merit because it fails to give color to the People's claim, fails to plainly set forth any relevant facts, and fails to assert a new matter by which the apparent right is defeated. Nacme's 'Valid Federally Enforceable State Operating Permit' affirmative defense is factually and legally insufficient and should be dismissed and stricken, with prejudice, as a matter of law.

2. Respondent's Laches Defense is Factually and Legally Insufficient

Nacme's claim that the People's Complaint is barred by the principle of laches because "the IEPA has known for years, at least since 2000, of the facts underlying its claim" is factually and legally insufficient and should be dismissed and stricken. *See Answer, p. 13.*

Laches is an equitable principle that bars an action where: (1) one party has delayed unreasonably in bringing a lawsuit (*City of Rolling Meadows v. Nat'l Adver. Co.*, 228 Ill. App.3d 737, 593 N.E.2d 551, 557 (1st Dist. 1992)); and (2) because of the delay, the Respondent has been misled or prejudiced, or has taken a different course of action than it might otherwise have taken absent the delay. *Patrick Media Group, Inc. v. City of Chicago*, 255 Ill. App.3d 1, 626 N.E.2d 1066, 1071 (1st Dist. 1993).

Nacme's 'laches' defense fails to allege facts fulfilling the elements of laches. Applying the elements of laches to this case, Nacme fails to plead facts showing that the People have unreasonably delayed in bringing this matter before the Board, and that the delay resulted in prejudice to Nacme, or that Nacme has taken a different cause of action than it otherwise would have taken.

First, Nacme alleges that the Complaint is based upon facts that the Illinois EPA and Nacme have both known since potentially 2001. *See p. 3, 12, Amended Affirmative Defenses.* However, Nacme fails to provide facts showing that the delay on the part of the People was unreasonable. In fact, Nacme admits that it was in dialogue with IEPA for several years regarding air emissions at its Facility. Nacme also admits that it received a notice of violation ("NOV"), which was for many more violations of its SOP for multiple years, which are calculated at the same rate as the air pollution and operating without a CAAPP permit violations the People alleged in its Complaint.

Second, Nacme does not assert any facts that support a claim that Nacme was misled or prejudiced, or changed its course of action because of the alleged delay. In fact, despite the ongoing dialogue between IEPA and Nacme regarding it operating as a major source over the years

and as early as 2001 (according to Respondent), IEPA's requests time and time again since at least October 2005 that Nacme obtain a CAAPP permit for its facility, and the citations for violations of its SOP pursuant to an NOV, Nacme continued to operate without pause. *See Complaint, pp. 2-4.* This 'laches' defense is factually and legally insufficient and any supposed prejudice that Nacme experiences could be due to its own continued operations despite its knowledge of IEPA's continued requests for Nacme to either show it was not a major source or submit a CAAPP application and construction permit, and not any imagined delay by the People to bring this action.

Furthermore, the doctrine of laches is disfavored when the defense is raised against a complainant that is exercising its government function and protecting a substantial public interest. Illinois courts have been reluctant to apply laches when it might impair the People in the discharge of its government function. *Cook County v. Chicago Magnet Wire Corp.*, 152 Ill. App.3d 726, 727-28, 504 N.E.2d 904, 905 (1st Dist. 1987).

Several courts have explicitly held that the doctrine of laches does not apply to the exercise of a governmental function. *See e.g. In re Vandeventer's EPeople*, 16 Ill. App.3d 163, 165, 305 N.E.2d 299, 301 (4th Dist. 1973); *In re Grimley's EPeople*, 7 Ill. App.3d 563, 566, 288 N.E.2d 66, 67 (4th Dist. 1972); *Shoretime Builder Co. v. City of Park Ridge*, 60 Ill. App.2d 282, 294, 209 N.E.2d 878, 884-885 (1st Dist. 1965).

As the Illinois Supreme Court stated:

> . . . the reluctance of courts to hold governmental bodies estopped to assert their claims is particularly apparent when the governmental unit is the People. There are sound bases for such policy . . . More importantly perhaps is the possibility that application of laches or estoppel doctrines may impair the functioning of the People in the discharge of

> its government functions, and that valuable public interests may be jeopardized or lost by mistakes or inattention of public officials.

Hickey v. Ill. Cent. R.R. Co., 35 Ill. 2d 427, 447-448, 220 N.E.2d 415, 425-426 (1966). Additionally, the right to a healthy and safe environment is a public right. *Pielet Bros. v. Illinois Pollution Control Board*, 100 Ill. App. 3d 752, 758, 442 N.E. 2d 1374, 1379 (5th Dist. 1982).

The theory of laches, which the Respondent relies on in this affirmative defense, is generally subject to a higher standard when a Respondent attempts to use it against a governmental body or against a statute protective of the environment and public health, as the Respondent is attempting to do in this instance. With its complaint, the People seek to exercise its government function–the enforcement of environmental statutes and regulations. Section 4(e) of the Act, 415 ILCS 5/4(e) (2004), charges the IEPA with the duty to take summary action to enforce violations of the Act. Section 2 of the Act, 415 ILCS 5/2 (2004), states: "It is the purpose of this Act . . . to establish a unified, People-wide program . . . to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them."

This is precisely the governmental function the People's Complaint serves. As such, Nacme has a higher burden for proving the defense of laches. Accordingly, Nacme's fact that the "State was aware or should have been aware of Nacme's alleged potential to emit as a "major source" since at least 2001...." and Respondent's failure to provide facts that show Respondent has been misled or prejudiced, or has taken a different course of action than it might otherwise have taken absent the delay fails to meet the higher standard to support a claim of laches. Therefore,

Nacme's affirmative defense of laches is factually and legally insufficient and should be dismissed and stricken, as a matter of law, with prejudice.

3. Respondent's Waiver Defense is Factually and Legally Insufficient

Nacme's fact that the IEPA knew or should have known of its purported enforcement rights against NACME, but relinquished those rights by failing to take action timely" is insufficient to support a claim of waiver and should be dismissed and stricken. Nacme does not allege specific facts that support an affirmative defense of waiver; the well-pled facts do not raise the possibility that Nacme will prevail in its affirmative defense of waiver. *See Int'l Ins. Co.*, 609 N.E.2d at 853. Thus, Nacme's first affirmative defense of waiver should be stricken.

A waiver is the intentional relinquishment of a known right. *See People of the State of Illinois v. Douglas Furniture of Cal., Inc.*, PCB No. 97-133, 10 (May 1, 1997) (citing *Hartford Accident & Indem. Co. v. D.F. Bast, Inc.*, 56 Ill. App.3d 960, 372 N.E.2d 829 (1st Dist. 1977)). There must be both knowledge of the existence of the right and an intention to relinquish it (*People Farm Fire & Cas. Co. v. Kiszkan*, 346 Ill. App.3d 292, 299 805 N.E.2d 292, 298 (1st Dist. 2004)), or conduct that warrants an inference of that intention. *City of Chicago v. Chicago Fiber Optic Corp.*, 287 Ill. App.3d 566, 575, 678 N.E.2d 693, 700 (1st Dist.1997). "The party claiming implied waiver has the burden of proving a clear, unequivocal, and decisive act of the opponent manifesting his intention to waive his rights." *Id.*

Nacme alleges that the IEPA's failure to assert the enforcement against the violations alleged in the Complaint for several years constitutes waiver. None of these facts show a "clear, unequivocal, and decisive act" of the People manifesting an intention to waive the People's right to

bring a cause of action against Nacme. In fact, Nacme admits the ongoing dialogue with IEPA about the facility's status as a major source and Nacme's need to obtain a CAAPP permit.

Nacme's allegation does not provide a specific fact that shows an intention by IEPA to relinquish its right to enforcement action against Nacme, nor does it create an inference that the People relinquished its right to enforce the Act against Nacme. Moreover, an allegation of mere inaction is insufficient to support a claim of waiver, as waiver specifically requires an intentional relinquishment of the right to bring a lawsuit. *See Id.* The People did not knowingly or intentional relinquish its right to bring an enforcement action against Nacme when it exercised its discretion in bringing an action against Nacme after spending years of meeting with Nacme and communicating concerns of possible violations of the Act with nominal results of compliance on Nacme's part.

In addition, the fact that Section 31 of the Act directs the Illinois EPA to engage in the notification, meeting, and Compliance Commitment Agreement process, which can be lengthy, prior to referring violations to the Office of the Attorney General for enforcement, negates any inference that initiating enforcement after a certain lapse of time can be construed as an intention not to sue.

Nacme's 'waiver' defense fails to meet the burden of proving a "clear, unequivocal, and decisive act" by the People relinquishing the People's right to sue. Accordingly, Nacme's 'waiver' defense is factually and legally insufficient and should be dismissed and stricken, as a matter of law, with prejudice.

WHEREFORE, Complainant, PEOPLE OF THE PEOPLE OF ILLINOIS, respectfully requests that the Board enter an order striking and dismissing all nine of Respondent's, NACME STEEL PROCESSING, L.L.C., affirmative defenses, with prejudice.

PEOPLE OF THE PEOPLE OF ILLINOIS, LISA MADIGAN
Attorney General of the People of Illinois

By: _____
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DATED: February 8, 2013

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CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on February 8, 2013, I served true and correct copies of Complainant's MOTION TO STRIKE RESPONDENT'S AMENDED AFFIRMATIVE DEFENSES, upon the persons and by the methods as follows:

[First Class U.S. Mail]

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