BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NACME STEEL PROCESSING L.L.C.'S RESPONSE TO STATE'S MOTION TO DISMISS AMENDED AFFIRMATIVE DEFENSES

I. Introduction

NACME filed three affirmative defenses in this case that the State in its Motion to Dismiss ("Motion") asserts are not supported by allegations of fact that defeat the State's claims. However under the applicable pleading standard NACME has more than adequately supported its affirmative defenses and is entitled to prove them at hearing in this matter.

The operative allegation in the State's Complaint is as follows:

"As a major source since at least April 16, 2002 Nacme was required to apply for and submit an application to the Illinois EPA for a CAAPP or alternatively, a FESOP. By operating a major source without timely submitting an application Nacme violated Section 39.5(5) of the Act…". (State's Complaint, ¶ 37, hereafter, "Compl.")

However, in its Motion the State shifts ground and says that its suit asserts a "claim that Nacme was operating a major source without a CAAPP permit", wholly ignoring its own Complaint and the "alternatively a FESOP" language included there. (Motion, p.4, ¶ 2) The State

shifts ground because it knows that the state operating permit that it has repeatedly admitted NACME holds in fact constitutes a FESOP under applicable law. This fact, when proved at the hearing of this matter, has the legal effect of defeating the State's claim that NACME did not timely apply for "a CAAPP or alternatively a FESOP…".

As to NACME's two other affirmative defenses of laches and waiver, NACME has met the standards under Board's precedent for factual and legal sufficiency, as shown below.

II. Applicable Legal Standard

The Board has defined an affirmative defense as "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 the claim". *People of the State of Illinois v Aargus Plastics, Inc*, PCB 04-09 at 5 (May 20, 2004). In its affirmative defenses NACME attacks not the truth of the State's allegations, but rather its legal right to bring its complaint. The facts establishing an affirmative defense must be pleaded with the same degree of specificity required by a plaintiff to establish a cause of action. In Illinois practice a motion to dismiss an affirmative defense (pursuant to section 2-615) admits all well-pleaded facts constituting the defense, and attacks only the legal sufficiency of those facts. Where the well-pleaded facts of an affirmative defense raise the possibility that the party asserting them will prevail, the defense should not be stricken. *International Insurance Co. v Sargent & Lundy*, 242 Ill.App.3d 614, 609 N.E.2d 842 (Ill. App. 1st Dist. 1993)

A. NACME's First Defense Is Legally and Factually Sufficient

As asserted in its first affirmative defense, a state operating permit, (SOP #96020074) like NACME's, which the State admits remains in effect, is a federally enforceable

permit. See, e.g., *United States* v *East Kentucky Power Cooperative*, 498 F. Supp. 995 (E.Dist. Ky 2007); *United States v Louisiana- Pacific Corporation*, 682 F. Supp. 1141 (D. Colo 1988) (collecting cases) "Federally enforceable" means enforceable by the United States Environmental Protection Agency. 415 ILCS § 39.5

Thus, assuming the truth of the State's allegations for purposes of this Motion, that NACME has the potential to emit pollutants above a major source threshold, NACME in fact has in place, as admitted by the State, a state operating permit that in law is federally enforceable and which limits such admissions to below major source status. This fact, if proved at hearing, defeats the State's legal right to bring its asserted claim.

The facts NACME asserts it will prove at hearing and that defeat the State's legal right to bring its claim are fully set forth in NACME's first affirmative defense, including that:

> The State admits in a "Tier III" inspection report dated September 29, 2010 that the SOP is in effect and, indeed, notes purported violations of the SOP
>
> The State again admits in a "Violation Notice" dated March 3, 2011 that the SOP is in effect and cites NACME for the same purported violations of the SOP.
>
> The State again admits the validity of SOP #96020074 in a notice of intent to pursue legal action dated July 15, 2011, and again cites the same purported violations of the SOP.
>
> In a letter from the Illinois Attorney General's office ("IAG") dated January 5, 2012, the State, again admits the validity of the SOP and again asserts the purported violations of the SOP. (See, NACME Amended Affirmative Defenses, ¶¶ 5-8)

Thus, NACME has adequately pled it first affirmative defense under the applicable legal standard.

B. NACME's Second and Third Defenses are Legally and Factually Sufficient

NACME's second affirmative defense of laches states in relevant part as follows:

> The State was aware, or should have been aware, of its alleged claim many years before it issued its violation notice ("NOV") in March 2011. In fact the State was aware or should have been aware of NACME's alleged potential to emit as a "major source" since at least 2001 when the State first tried, and failed, to designate NACME as a "major" source. The unreasonable and unjustified delay in issuing the NOV prejudiced NACME by subjecting it to greater penalty amounts—$10,000 per day of violation according to the State's NOV. Accordingly, the State's Complaint is barred by the doctrine of laches because the IEPA has known for years of the facts underlying its claim but failed without cause to act until years later, to NACME's prejudice.

NACME's third affirmative defense of waiver states in relevant part as follows:

> The State was aware of its alleged claim many years before it issued its violation notice ("NOV") in March 2011. In fact the State was aware of NACME's alleged potential to emit as a "major source" since at least 2001 when the State first tried, and failed, to designate NACME as a "major" source. This unreasonable delay warrants an inference that the State intended to waive its claim. Accordingly, the State's claim is barred by the doctrine of waiver.

As the Board has held in denying motions to strike affirmative defenses, a party asserting an affirmative defense need not prove the merits of the defense prior to hearing. Rather, the party must plead the defense in order to provide sufficient notice to the complainant to respond to the affirmative defense. Furthermore, the Board cannot determine the merits of the defense without hearing evidence. *People of the State of Illinois v Aargus Plastics, Inc*, at 6. The affirmative defenses upheld in the *Aargus* decision are nearly identical to those asserted here by NACME.

In *People of the State of Illinois v John Crane, Inc.*, PCB 01-76 (May 17, 2001) the Board rejected the state's motion to dismiss both a laches and waiver defense that asserted that the State's "failure to file its NOV on a timely basis prejudiced the respondent by subjecting it to greater penalty amounts". Id. at 5. The affirmative defenses upheld in the *Crane* decision are nearly identical to those asserted here by NACME.

III Conclusion

Under applicable Board precedent NACME has adequately pled affirmative defenses the merits of which should be determined at hearing following the receipt of evidence and, accordingly, the State's Motion should be denied.

Respectfully Submitted,

NACME STEEL PROCESSING, L.L.C.,

Respondent

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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached **NACME STEEL PROCESSING L.L.C.'S RESPONSE TO STATE'S MOTION TO DISMISS AMENDED AFFIRMATIVE DEFENSES**, by U.S. Regular Mail, upon the following persons:

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NACME STEEL PROCESSING, L.L.C.,
Respondent

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Date: March 11, 2013