

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 ELECTRONIC FILING

To: See Attached Service List.

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board by electronic filing the following, the PEOPLE'S MOTION FOR LEAVE TO FILE REPLY *INSTANTER* AND REPLY BRIEF IN SUPPORT OF MOTION TO STRIKE AND DISMISS RESPONDENT'S AMENDED AFFIRMATIVE DEFENSES a true and correct copy of which is attached and hereby served upon you.

Respectfully submitted,



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Date: March 25, 2013

**THIS FILING IS SUBMITTED ON RECYCLED PAPER
SERVICE LIST**

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PEOPLE'S MOTION FOR LEAVE TO FILE REPLY *INSTANTER*
AND REPLY BRIEF IN SUPPORT OF MOTION TO STRIKE AND DISMISS
RESPONDENT'S AMENDED AFFIRMATIVE DEFENSES

The PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois, hereby motions to reply *instanter* and replies to Respondent's, NACME STEEL PROCESSING, LLC ("Nacme"), Response to Complainant's Motion to Strike and Dismiss Respondent's Amended Affirmative Defenses. In support of this Motion and Reply Brief, Complainant states as follows:

I. MOTION FOR LEAVE TO REPLY

Section 101.500(e) of the Board's Procedural Rules, 35 Ill. Adm. Code 101.500(e), allows for a reply by a movant in order to avoid prejudice. Nacme's Response contains multiple factual and legal misrepresentations of the People's position both in this matter, which require the People's reply to be corrected. Complainant believes that these misrepresentations could result in material prejudice and therefore requests that the Board grant it leave to file its Reply.

II. REPLY BRIEF

A. Background

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’ (“CAAPP”) 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 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” or “AAD”). On February 8, 2013, Complainant filed with the Board a Motion to Strike and Dismiss Respondent’s Amended Affirmative Defenses. (“People’s Motion”). On February 12, 2013, Complainant

received service of Nacme Steel Processing L.L.C.'s Response to People's Motion to Dismiss Amended Affirmative Defenses filed with the Board on February 11, 2013 ("Nacme's Response").

B. Legal Standard

The People repeat and incorporate by reference herein its Legal Standards, Section II, of its Motion to Strike and Dismiss Respondent's Amended Affirmative Defenses.

C. Arguments

1. Respondent's 'valid federally enforceable people operating permit' affirmative defense and response is factually and legally insufficient.

Plaintiff repeats and incorporates by reference herein its Motion to Strike and Dismiss Respondents' Amended Affirmative Defenses, Section III.1, and further states as follows:

The Respondent continues to dispute and fails to accept as truth the properly plead facts in the People's Complaint that Nacme's State Operating Permit No. 96020074 ("SOP") expired on October 25, 2005 (See Complaint, ¶7); that it failed to prove eligibility for a State Operating Permit; and that Nacme submitted to the Illinois Environmental Protection Agency ("Illinois EPA") a CAAPP application with a request for a Federally Enforceable State Operating Permit ("FESOP") (See Complaint, ¶¶ 10-16). Instead, Respondent muddles the characterization of the different permit programs as if they are all one permit program. 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, the Respondent incorrectly references the Section 39.5 definition of "federally enforceable" in reference to Nacme's SOP issued on October 2, 2001, where its SOP was not

issued under Section 39.5 of the Act but under Section 39. Section 39 of the Act reads in pertinent part:

After June 30, 1998, operating permits issued under this section by the Agency for sources of air pollution that are not subject to Section 39.5 of this Act and are not required to have a federally enforceable State operating permit shall be required to be renewed only upon written request by the Agency consistent with applicable provisions of this Act and its rules.

Accordingly, Nacme's purported 'Valid Federally Enforceable State Operating Permit' affirmative defense is legally insufficient because it fails to give color to the People's claim and fails to assert a new matter by which the apparent right is defeated.

Nacme's 'Valid Federally Enforceable State Operating Permit' amended affirmative defense is factually and legally insufficient and should be dismissed and stricken, with prejudice, as a matter of law.

2. Respondent's laches and waiver affirmative defenses and response are factually and legally insufficient.

Plaintiff repeats and incorporates by reference herein its Motion to Strike and Dismiss Respondent's Amended Affirmative Defenses, Sections III.2, and 3, and further states as follows:

Once again, Nacme fails to assert new matter that will defeat the People's claim. The Complainant concedes that Respondent is not required to prove the merits of its affirmative defenses. Nonetheless, Respondent is required to plead new matter that, if true, will defeat the People's claims in Nacme's Amended Affirmative Defense. See *People v. Community Landfill Company*, PCB 97-193, slip. op. at 3 (Aug. 6, 1998)(emphasis added); See also, *Hickey v. Illinois Central Railroad Company*, 35 Ill.2d 427, 448-449, 220 N.E.2d 415, 426 (citing *City of Quincy v. Sturhahn* 18 Ill.2d 604, 614, 165 N.E.2d 271, 277 (Ill.1960) ruling that some positive acts by the

government officials is required which may have induced the action of the adverse party under circumstances where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had previously done). In Hickey, government officials time and time again over a fifty year period consistently disclaimed interest in land and acted as if Illinois Central Railroad Co. owned the land, which Illinois Central Railroad Co. relied on in executing leases, making conveyances, and granting options that resulted in the building of highrises and uses of the land by other private entities.

In addition, Nacme mischaracterizes the facts in Crane and Argus. In Crane, Crane asserts that the Illinois EPA represented that Crane was in compliance. *People v. John Crane, Inc.*, PCB 01-76, slip op. at 8 (May 17, 2001). In Aargus, Aargus pled in its affirmative defense that the Illinois EPA had not informed Aargus of any violations after numerous inspections. *People v. Aargus Plastics, Inc.*, 2004 WL 1184776, 7 -8.

Here, if Nacme accepts the well plead facts of the Complaint as true, as well as the facts of permit violations it provides in Nacme's Amended Affirmative Defenses, Nacme admits that the Illinois EPA informed Nacme on various occasions beginning in at least 2005 and as early as 2001, that the People believed Nacme to be a "major source" and that it was in violation of Illinois air permit laws. (See Complaint, ¶¶ 14-16; AAD ¶¶ 2 - 8). Taken these facts as true, Nacme has not provided any fact that shows it was misled or uninformed about its various permit violations, which might defeat the People's claim. In fact, these facts show just the opposite; that Nacme was well informed of Illinois EPA's opinion that it was a "major source" operating with an incomplete permit application and in violation of conditions of its expired SOP.

Accordingly, Nacme does not present facts “nearly identical” to Crane or Argus as Nacme claims, but fails to present any new facts that meet the threshold requirement of an affirmative defense that Respondent assert new matter that, if true, will defeat the People’s Complaint. See *Community Landfill Company*, at 3 (emphasis added). Nacme’s ‘waiver’ defense and response fails to meet the threshold that a “clear, unequivocal, and decisive act” by the People, which relinquishes the People’s right to sue. In addition, Respondent’s ‘laches’ defense and response fails to provide facts that, if true, show Respondent may have been misled or prejudiced, or has taken a different course of action than it might have taken otherwise. See *Hickey at 448-449*.

Therefore, Nacme’s ‘Waiver’ and ‘Laches’ amended affirmative defenses are factually and legally insufficient and should be dismissed and stricken, with prejudice, as a matter of law.

III. CONCLUSION

The Respondent’s affirmative defenses are not, if true, capable of defeating the People’s claim that Respondent operated as a “major source” without a CAAPP permit. Therefore, Respondent’s Amended Affirmative Defenses should be stricken 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).

WHEREFORE, the Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Board enter an order striking and dismissing all of Respondent's, NACME STEEL PROCESSING, LLC, Amended Affirmative Defenses to the Complaint.

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DATED: March 25, 2013