ILLINOIS POLLUTION CONTROL BOARD
June 6, 2013

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 13-12
	)	(Enforcement – Air)
NACME STEEL PROCESSING, LLC, a Delaware limited liability corporation,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by D. Glosser):

The People of the State of Illinois (People) filed a complaint against NACME Steel Processing, LLC (NACME) on September 5, 2012, alleging that NACME operates a major stationary source without a Clean Air Act Permit Program (CAAPP) permit in violation of various provisions of the Illinois Environmental Protection Act (415 ILCS 5/1 *et seq.*) (Act). The complaint concerns NACME's steel processing facility located at 429 West 127th Street, Chicago, Cook County. On November 11, 2012, NACME answered the complaint, and on January 15, 2013, NACME filed an amended answer and affirmative defenses. On February 8, 2013, the People filed a motion to strike the affirmative defenses (Mot.). On March 11, 2013, NACME requested that the Board deny the People's motion to strike the affirmative defenses (Resp.).

On March 25, 2013, the People filed a motion for leave to file reply *instanter* (MotReply) and reply brief (Reply) in support of their motion to strike and dismiss NACME's amended affirmative defenses. On April 1, 2013, NACME filed an objection to the People's motion for leave to file a reply brief (Obj.). .

For the reasons discussed below, the Board grants the People's motion for leave to file a reply and the People's motion to strike NACME's first affirmative defense of a valid federally enforceable state operating permit. The Board denies the People's motion to strike NACME's second and third defenses of laches and waiver.

Below, the Board first describes the procedural background and then discusses the motion for leave to file a reply. The Board next addresses the affirmative defenses by first setting forth the statutory background. Next, the Board summarizes the People's complaint and NACME's affirmative defenses. The Board next summarizes the People's motion to strike the affirmative defenses, NACME's response to the motion to strike, and the People's reply. The Board then outlines the standard of review applicable to motions to strike affirmative defenses. Finally, the Board discusses each of the defenses raised by NACME.

PROCEDURAL BACKGROUND

On September 5, 2012, the People filed the complaint against NACME (Comp.). The complaint alleges NACME violated Sections 9(b), 39.5(5)(x), and 39.5(6)(b) of Act (415 ILCS 5/9(b), 39.5(5)(x), and 39.5(6)(b) (2010)). The complaint alleges that NACME violated these provisions of the Act by operating a major air pollution source without obtaining the proper permits. On September 20, 2012, the Board accepted the People's complaint for hearing.

On November 1, 2012, NACME filed an answer and affirmative defenses to the complaint. On November 30, 2012, the People filed a motion to strike and dismiss the affirmative defenses NACME asserted in response to the complaint. On January 4, 2013, NACME filed a motion, to which the People agreed, to withdraw and re-plead affirmative defenses. By hearing officer order, the motion was granted and a schedule was established by which NACME was to file amended affirmative defenses. *See* Hearing Officer Order (Jan. 9, 2013).

On January 15, 2013, NACME filed an amended answer and amended affirmative defenses (Am. Ans.). On February 8, 2013, the People filed a motion to strike and dismiss NACME's affirmative defenses (Mot.), and on March 11, 2013, NACME filed a response to the People's motion (Resp.).

On March 25, 2013, the People filed a motion for leave to file reply *instanter* and reply brief in support of their motion to strike and dismiss NACME's amended affirmative defenses. On April 1, 2013, NACME filed an objection to the People's motion for leave to file a reply brief.

MOTION FOR LEAVE TO FILE A REPLY

On March 25, 2013, the People filed a Motion for Leave to Reply. The People argue that NACME's response contains multiple factual and legal misrepresentations of the People's position that could result in material prejudice. The People believe that these misrepresentations require a response from the People, and the People request that the Board grant it leave to file a Reply. MotReply at 1.

NACME objects to the filing of the reply and argues that the People ignore Section 101.500 of the Board's rules (35 Ill. Adm. Code 101.500) by submitting the People's reply before the Board grants leave. NACME further asserts that the People offer no support for its basic statement that the People will be prejudiced if not allowed to reply in order to explain alleged "misrepresentations". Obj. at 1.

More specifically, NACME argues that in the reply the People merely assert its own interpretation of the law and facts, but the People fail to cite a single case in support of its argument concerning the Federally Enforceable State Operating Permit (FESOP) defense. Furthermore, NACME claims that the People do not rebut NACME's reliance on case law. Obj. at 1.

NACME argues that the People's "misrepresentations" allegation is unsupported. Obj. at 1. NACME maintains that the People fail to show any need to reply in order to "prevent material prejudice", and the reply merely argues a different interpretation of the case law with regards to NACME's waiver defense. *Id.* at 2.

NACME asserts that the People are not materially prejudiced merely because NACME has a different view of the relevant facts and the case law as applied to those facts. Obj. at 2. NACME asks that the Board deny the People's motion for leave to reply. *Id.*

The Board has reviewed the arguments, and the Board disagrees with NACME. The Board finds that material prejudice may result to the People and allowing a reply is appropriate in this instance. The Board grants the motion for leave to file a reply and will consider the People's reply.

AFFIRMATIVE DEFENSES

The following will set forth the statutory background of the allegations in the complaint. Next, the Board summarizes the People's complaint and NACME's affirmative defenses. Then the Board summarizes the People's motion to strike the affirmative defenses, NACME's response to the motion to strike and the People's reply. The Board concludes this section by discussing its decision.

Statutory Background

The following sections are the provisions of the Act that the People allege NACME violated. First, Section 9(b) of the Act, states:

> No person shall:
>
> (b) Construct, install, or operate any equipment, facility, vehicle, vessel, or aircraft capable of causing or contributing to air pollution or designed to prevent air pollution, of any type designated by Board regulations, without a permit granted by the [Illinois Environmental Protection] Agency, or in violation of any conditions imposed by such permit. 415 ILCS 5/9(b) (2010)

Section 39.5(6) of the Act, states:

> Prohibition
>
> After the applicable CAAPP permit or renewal application submittal date, as specified in subsection 5 of this Section, no person shall operate a CAAPP source without a CAAPP permit unless the complete CAAPP permit or renewal application for such a source has been timely submitted to the Agency. 415 ILCS 5/39.5(6)(b) (2010).

Section 39.5(5) of the Act, provides, in pertinent part, as follows:

Applications and Completeness

* * *

(x) … The owner or operator of an existing source that has been excluded from the provisions of this Section under subsection 1.1 or paragraph (c) of subsection 3 of this Section and that becomes subject to the CAAPP solely due to a change in operation at the source shall submit its complete CAAPP application consistent with this subsection at least 180 days before commencing operation in accordance with the change in operation. 415 ILCS 5/39.5(5) (2010).

Complaint

NACME owns and operates a steel processing facility located at 429 West 127th Street, Chicago (facility). Comp at 2, ¶ 4. At the facility, NACME operates a ninety ton-per-hour continuous pickling line, which includes four pickling tanks and a four-stage washer. *Id*. at 2, ¶ 5. The People allege that:

> As a major source since at least April 16, 2002, NACME was required to apply for and submit an application to the [Illinois Environmental Protection Agency] for a CAAPP or alternatively, a FESOP. … By operating a major source without timely submitting an application NACME violated Section 39.5(5)(x) of the Act, 415 ILCS 5/39.5(5)(x) (2010), and, thereby, violated sections 39.5(6)(b) and 9(b) of the Act, 415 ILCS 39.5(6)(b) and 9(b) (2010). Comp. at 9-10, ¶ 37.

On February 8, 2001, the Illinois Environmental Protection Agency (IEPA) issued NACME a State Operating Permit No. 96020074 (SOP), expiring on October 25, 2005, for control of air emissions at the facility. Comp. at 2, ¶ 7.

On April 12, 2002, IEPA issued a revised construction permit to NACME for the installation of an emissions tunnel that required retesting of the modified steel pickling process. The revised permit allowed NACME to operate its steel pickling process at a rate greater than that allowed by the SOP for purposes of stack testing only. Comp. at 2, ¶ 8. The People allege that on April 16, 2002, NACME conducted a stack test at the facility based on a maximum steel process rate lower than the permitted steel process rate of the SOP. *Id*. at 3, ¶ 9. The People maintain that the test resulted in emissions greater than those allowed by the SOP. *Id*.

The People assert that on April 4, 2005, NACME submitted a SOP renewal application to IEPA, and on April 13, 2005, IEPA issued a Notice of Incompleteness to NACME for failure to provide a potential to emit (PTE) calculation for hydrochloric acid (HCL) in the pickling tanks and to demonstrate eligibility for a state operating permit. Comp. at 3, ¶ 10-11.

On September 12, 2005, NACME submitted a second SOP renewal application, and on September 20, 2005, IEPA issued a Notice of Incompleteness to NACME for failure to substantiate the requested permit limits with any stack testing results. Comp. at 3, ¶ 12-13. The

People allege that in the September 20, 2005 Notice of Incompleteness, IEPA informed NACME that:

1) NACME required a construction permit, because its September 2005 SOP renewal application requested a modification consisting of an increase in the maximum steel process rate allowed by its SOP; and

2) NACME required either a CAAPP permit or a FESOP, because according to the information NACME provided in its September SOP renewal application, the estimated PTE for HCL emissions at the facility was greater than 10 tons per year of HCL from a single source. Comp. at 3-4, ¶ 14-15.

The People claim that on October 25, 2005, NACME submitted to IEPA a CAAPP application with a request for a FESOP. Comp. at 4, ¶ 16. On December 6, 2005, IEPA issued a notice of completeness of NACME's FESOP application, and IEPA also informed NACME that notwithstanding the completeness determination, IEPA may request additional information necessary to evaluate or take final action on the FESOP application. *Id*. at 4, ¶ 17.

The People allege that on December 21, 2006, NACME conducted another stack test with a maximum steel process rate greater than the maximum steel process rate allowed by its SOP. The People maintain that NACME delivered the results of the tests to IEPA on February 2, 2007. Comp. at 4, ¶ 18. The People maintain that beginning on at least April 16, 2002, NACME changed its operation resulting in a PTE of a single hazardous air pollutant, HCL, of greater than 10 tons per year, the major source threshold. Comp. at 9 ¶35. As of February 1, 2012, NACME failed to submit a construction permit application for process modifications as an amendment to the 2005 FESOP application. *Id*. at ¶19. Therefore, the complaint concludes that the facility qualifies as a "major source" under the Act, and as of April 16, 2002, NACME was required to apply for a CAAPP or FESOP from IEPA at least 180 days prior to commencing operation in accordance with the change in operations at the facility. The People claim that by operating a major source without timely submitting an application within at least 180 days prior to commencing operation as a major source, NACME violated Section 39.5(5)(x) of the Act, 415 ILCS 5/39.5(5)(x), and thereby violated Sections 39.5(6)(b) and 9(b) of the Act, 415 ILCS 5.39.5(6)(b) and 9(b) (2010). *Id*. at 9-10, ¶37.

NACME's Answer And Affirmative Defenses

In its amended answer, NACME admits to some facts and denies others and raises three affirmative defenses. The Board now summarizes each of the three affirmative defenses raised by NACME.

Valid Federally Enforceable State Operating Permit

NACME argues that the People's claim is defeated "because, as repeatedly admitted by the [People], at all relevant times and currently NACME holds a valid SOP #96020074 which limits its emissions to below major source thresholds." Am. Ans. at 1, ¶ 1. Additionally,

NACME contends that, under applicable law, a SOP is another type of "federally enforceable" permit. *Id*.

NACME claims that this is the second time that IEPA has asserted that NACME is a major source requiring a CAAPP or FESOP, the first time dating back to 2001 when IEPA issued NACME's initial operating permit with special conditions. Am. Ans. at 1-2, ¶ 2. NACME claims that through the conditions in the initial 2001 permit issuance, IEPA sought to classify NACME's facility as a "support facility" that automatically qualified it as a major source requiring a CAAPP permit or FESOP. *Id*. NACME alleges that it appealed the permit condition, and as a result, on February 8, 2001 IEPA issued SOP #96020074 without the condition. *Id*.

NACME asserts that in October 2005, NACME applied for the FESOP that IEPA claims it is required to have; however, NACME argues it did not receive a draft of the FESOP from IEPA until April 26, 2012. Am. Ans. at 2, ¶ 3. NACME claims that the draft contained an unacceptable condition that would have converted NACME into a "new source," but that NACME's subsequent appeal of this condition was held not ripe by the Board. *Id*.

NACME argues that a state operating permit is a federally enforceable permit where the state has acknowledged its validity. Am. Ans. at 3, ¶ 9. NACME asserts that IEPA has on four occasions acknowledged that NACME's SOP is still valid and in effect, particularly where IEPA has threatened to sue NACME for alleged violations of the SOP. *Id* at 2, ¶ 4. First, NACME cites a "Tier III" inspection report dated September 29, 2010, wherein IEPA indicates that the SOP is in effect and notes purported violations of the SOP. *Id.*, citing Exhibit A. Second, NACME cites a "Violation Notice" issued by IEPA dated March 3, 2011, which cites NACME for the same purported violations, indicating IEPA's acknowledgement of the effectiveness of NACME's SOP. *Id*. at 2, ¶ 6, citing Exhibit B. NACME claims that "the notice also states that NACME 'may be required to obtain a CAAPP permit or FESOP'." *Id*.

Third, NACME alleges that in a notice of intent to pursue legal action from IEPA dated July 15, 2011, IEPA again states the same purported violations against NACME, and notes that NACME 'may be required' to obtain a CAAPP permit or FESOP. Am. Ans. at 2, ¶ 7, citing Exhibit C. Finally, NACME claims that in a January 5, 2012 letter from the Illinois Attorney General's Office, IEPA again admits the validity of the SOP by asserting the same purported violations against NACME, stating that NACME "may be required" to obtain a CAAPP permit or FESOP. *Id*. at 3, ¶ 8.

NACME thus argues that because IEPA has recognized NACME's SOP as a valid permit, NACME has a type of federally enforceable state operating permit that limits emissions to below major source status. Am. Ans. at 3, ¶ 11. NACME therefore concludes that the existence of this valid FESOP bars the People's claim in this case. *Id.*

Laches

In its second affirmative defense, NACME argues the People's complaint is barred by the doctrine of laches because IEPA "has known for years of the facts underlying its claim but failed to act until years later, to NACME's prejudice." Am. Ans. at 4, ¶ 12. NACME contends that the

People were "aware, or should have been aware, of its alleged claim many years before it issued its violation notice in March 2011." *Id.* at 3, ¶ 12. NACME maintains that IEPA had been aware that NACME had the potential to emit as a major source since 2001, when IEPA had initially tried and failed to designate NACME as a major source. *Id.* NACME thus concludes that it was prejudiced by IEPA's unreasonable and unjustified delay in issuing the notice of violation, because the People's complaint would subject NACME to a penalty of $10,000 per day of violation. *Id.*

Waiver

In its third affirmative defense, NACME argues that the People's complaint is barred by the doctrine of waiver because IEPA "was aware of NACME's alleged potential to emit as a 'major source' since at least 2001 when [IEPA] first tried, and failed, to designate NACME as a 'major source'." Am. Ans. at 4, ¶ 13. NACME thus concludes that the People's "unreasonable delay" in bringing the claim "warrants an inference that the [People] intended to waive its claim" and that the People are thereby barred from bringing this action against NACME. *Id.*

People's Motion To Strike And Dismiss

Generally the People argue that the test for whether a defense is an affirmative defense that must be pled by a 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 lll.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). The People state that an affirmative defense confesses or admits the cause of action alleged, and then seeks to avoid it by asserting new matter not contained in the complaint and answer. Womer 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). The People opine that an affirmative defense must do more than offer evidence to refute properly pled facts in a complaint. Pryweller v. Cohen, 282 Ill.App.3d 89, 668 N.E.2d 1144, 1149 (1st Dist. 1996), *appeal denied,* 169 lll.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 (Aug. 8, 2002); Farmer's People Bank v. Phillips Petroleum Co. PCB 97-100, slip op. at 2 n.1 (Jan. 23, 1997) (affirmative defense does not attack the truth of the claim, but the right to bring a claim).

The People maintain that 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, PCB 97-192 slip op. at 4. The People argue that the issue raised by an affirmative defense must be one outside of the four corners of the complaint. Mot. at 3.

The Board will now summarize the People's arguments with respect to each of the affirmative defenses asserted by NACME separately.

Valid Federally Enforceable State Operating Permit

The People argue that NACME's "Valid Federally Enforceable State Operating Permit" defense is factually and legally insufficient. Mot. at 4. The People first argue that NACME's first affirmative defense fails to set forth any relevant facts. The People claim that NACME fails to provide any new facts relevant to the People's claim that NACME was operating a major source without a CAAPP permit. *Id*., citing Condon, 210 Ill.App.3d at 709 and International Insurance, 609 N.E. 2d at 853. The People contend that NACME merely presents facts that are not related to the complaint by arguing that "at all relevant times and currently, NACME holds a valid state operating permit . . . that limits its emissions to below major source thresholds and that is another type of 'federally enforceable permit' under applicable law." *Id*. The People argue that NACME's claim merely "denies facts alleged in the complaint regarding the major source status of NACME's PTE." *Id*. The People therefore conclude that NACME's first affirmative defense is factually insufficient. *Id*.

Second, the People contend that NACME's first affirmative defense fails to meet the fundamental legal requirement that "an affirmative defense give color to a plaintiff's claim, or assert new matter that defeats it." Mot. at at 5. The People argue that NACME simply denies the People's allegations that NACME has operated a major source without a CAAPP permit. *Id*. Additionally, the People claim that NACME failed to assert any new matter by claiming that it was operating under a SOP for a non-major source operation. *Id*. Rather, the People claim that NACME's argument about its federally enforceable SOP for non-major source operations is irrelevant to the People's claim that NACME was operating a major source operation without a CAAPP permit. *Id*. The People therefore conclude that NACME's first affirmative defense is factually and legally insufficient.

Laches

The People contend NACME's second affirmative defense, which asserts the People's claim is barred by the doctrine of laches, is factually and legally insufficient. Mot. at 5. The People argue NACME's second affirmative defense fails to plead facts sufficient to fulfill the elements of a valid laches defense, because NACME has failed to show that 1) the People have unreasonably delayed bringing their claim; and 2) the delay resulted in prejudice to NACME, or NACME has taken a different course of action than it otherwise would have taken. *Id*. at 6, citing Patrick Media Group, Inc. v. City of Chicago, 255 Ill. App.3d 1, 626 N.E.2d 1066, 1071 (1st Dist. 1993).

First, the People argue that NACME failed to plead facts showing that the People's delay in bringing the claim was unreasonable. The People cite NACME's admitted continual dialogue with IEPA regarding air emissions at the Facility, including discussions on SOP violations. Mot. at 6. The People claim that these SOP violations are calculated at the same rate as the air pollution and operating without a CAAPP permit violations. *Id*.

Second, the People argue that NACME failed to plead facts showing that NACME was misled or prejudiced, or changed its course of action because of the alleged delay. The People claim that since at least 2005, NACME was well aware that IEPA had requested on multiple

occasions that NACME obtain a CAAPP permit for its facility, but "NACME continued to operate without pause." Mot. at 6. The People thus contend that NACME's laches defense is factually and legally insufficient, and argue that any prejudice NACME experiences might be attributed to its own failure to either demonstrate it was not operating as a major source, or to apply for and obtain a CAAPP and construction permit for the Facility.

Additionally, the People contend "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." Mot. at 6, citing Cook County v. Chicago Magnet Wire Corp., 152 Ill. App.3d 726, 727- 28, 504 N.E.2d 904, 905 (1st Dist. 1987). The People cite numerous cases where Illinois courts have been reluctant to allow the affirmative defense of laches where it might impair the People's ability to perform its government function. *Id*, citing In re Vandeventer's Estate, 16 Ill. App.3d 163, 165, 305 N.E.2d 299, 301 (4th Dist. 1973); In re Grimley's Estate, 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).

The People claim that in this case, they seek to exercise the government function of enforcing environmental statutes and regulations, and as a result, NACME has a higher burden of proving its affirmative defense of laches. *Id*. at 7. The People argue that NACME's arguments are insufficient to satisfy this higher burden of proof, because NACME failed to submit facts that show it has been misled or prejudiced, or taken a different course of action than it might otherwise have taken due to the People's delay in bringing the complaint. *Id*. at 8. The People therefore conclude that NACME's second affirmative defense of laches is factually and legally insufficient.

Waiver

The People argue that NACME's third defense of waiver is insufficient, because NACME has failed to allege facts sufficient to support the affirmative defense of waiver. Mot. at 9. The People claim that a waiver is the intentional relinquishment of a known right. *See* People v. Douglas Furniture of Cal., Inc., PCB No. 97-133, slip op. at 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)). Further, the People opine there must be both knowledge of the existence of the right and an intention to relinquish it, 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 People state that "[t]he 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.*

The People contend NACME's allegation that the People delayed filing the complaint for several years does not provide "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." *Id*. at 9-10. The People maintain that NACME has not put forth a single fact that demonstrates an intention by IEPA or the People to relinquish the right to bring an enforcement action against NACME for the alleged violations. *Id*. at 10. The People claim that, because IEPA spent years meeting with NACME regarding the facility's status as a major source and communicating concerns of possible violations, the decision to file the complaint was merely an exercise of

discretion. *Id*. The People cite Section 31 of the Act (415 ILCS 5/31 (2010)), which directs IEPA to engage in a multi-step process to address violations with non-compliant parties, as an indication that "any inference that initiating enforcement after a certain lapse of time can be construed as an intention not to sue" is negated. *Id*.

NACME's Response to the People's Motion

On March 11, 2013, NACME filed its response to the People's motion to dismiss the amended affirmative defenses, claiming it has adequately pled all three affirmative defenses. Resp. at 1-2. NACME notes that the Board had 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." Resp. at 2 quoting People of the State of Illinois v Aargus Plastics, Inc., PCB 04-09 slip op. at 5 (May 20, 2004). NACME argues that its affirmative defenses do not attack the truth of the allegations, but rather challenge the legal right to bring the complaint. Resp. at 2. NACME claims that under Illinois law, a motion to strike affirmative defenses must admit well-pled facts and attack the legal sufficiency of the defenses. *Id*., citing International Insurance, 609 N.E. 2d 842.

First, NACME argues that its first affirmative defense of a valid federally enforceable state operating permit is adequate, because the existence of the SOP, as a state operating permit, which is federally enforceable by law and that limits emissions to below major source levels, will defeat the People's legal right to bring the enforcement action. *Id*. at 2.

Additionally, NACME claims its second and third defenses of laches and waiver are valid because "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." Resp. at 4. NACME points to Aargus, noting that the Board upheld affirmative defenses in that case nearly identical to those pled here. *Id*. NACME also relies on People of the State of Illinois v. John Crane, Inc., PCB 01-76 (May 17, 2001), in which the Board also allowed the defenses of laches and waiver to be heard. NACME concludes that the Board should reject the People's motion to strike affirmative defenses, because the merits of a defense may only be decided by hearing evidence, and the People's failure to file a timely notice of violation prejudices NACME by subjecting it to greater penalty amounts. *Id*. NACME asserts that here, as in the other Board decisions, the defenses of laches and waiver are affirmatively pled defenses whose merits should be determined at hearing. *Id*. at 4-5.

People's Reply

In its reply, the People first reassert that NACME's FESOP affirmative defense and response is factually and legally insufficient and should be dismissed and stricken with prejudice. *Id.* The People argue that NACME disputes and fails to accept the following facts: 1) NACME's SOP expired on October 25, 2005; 2) NACME failed to prove eligibility for a SOP; and 3) NACME submitted to IEPA a CAAPP application with a request for a FESOP. Furthermore, the People maintain that NACME muddles the characterization of the different permit programs as if they are all one permit program. *Id.* at 3. The People argue that NACME incorrectly references the Section 39.5 of the Act (415 ILCS 5/39.5 (2010)) definition of "federally enforceable" while

NACME's SOP was issued under Section 39 of the Act (415 ILCS 5/39 (2010)). *Id.* The People also allege that NACME's FESOP 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. *Id.*

In the People's second argument, the People again allege that NACME's laches and waiver affirmative defenses and response are factually and legally insufficient. *Id.* The People concede that NACME is not required to prove the merits of its affirmative defense, but NACME is required to plead new facts that will defeat the People's claim. Here, the People argue NACME failed to do so. *Id.*

The People also assert that NACME mischaracterizes the facts in Crane and Aargus. *Id.* at 5. The People state that even if NACME accepts the well-pled facts of the complaint as true, NACME has not provided any facts that demonstrate that NACME was misled or uninformed about its various permit violations. To the contrary, the People claim the facts show that NACME was well informed of IEPA's opinion that it was a "major source" operating with an incomplete permit application and in violation of conditions of its expired SOP. *Id.* In addition, the People argue that NACME does not present facts "nearly identical" to Crane or Aargus as NACME claims, and NACME fails to present any new facts that meet the threshold requirement of an affirmative defense. *Id.* at 6.

The People argue that NACME's waiver defense and response fail to meet the threshold that a "clear, unequivocal, and decisive act" by the People, which relinquishes the People's right to sue occurred. *Id.* The People argue that NACME's laches defense and response fails to provide facts that, if true, show NACME may have been misled or prejudiced, or has taken a different course of action than it might have otherwise taken. *Id.* Therefore, the People argue that NACME's amended affirmative defenses should be stricken pursuant to Section 101.506 of the Board's rule (35 Ill. Adm. Code 101.506) and Section 2-615 of the Illinois Code of Civil procedure, 735 ILCS 5/2-615 (2010). *Id.*

Discussion of Affirmative Defenses

The Board sets forth the standard of review to be applied by the Board when dealing with motions to strike affirmative defenses. The Board next separately addresses each of the three defenses pled.

Standard Of Review

The Board defines an affirmative defense as the "[r]espondent's allegation of 'new facts or arguments that, if true, will defeat … the government's claim even if all allegations in the complaint are true.'" Community Landfill, PCB 97-193, slip op. at 3 (quoting *Black's Law Dictionary*). A defense that merely attacks the sufficiency of a claim fails to be an affirmative defense. Worner Agency v. Doyle, 121 Ill. App.3d 219, 222-223, 459 N.E.2d 633, 636 (4th Dist. 1984). The Illinois Appellate Court stated that "[t]he test of whether a defense is affirmative and must be pled by a defendant is whether 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, 459 N.E.2d at 636.

The Board's procedural rules on affirmative defenses state that "[a]ny 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, the party asserting the affirmative defense must plead it with the same degree of specificity necessary for establishing a cause of action. International Insurance, 242 Ill. App.3d 614, 6320, 609 N.E.2d 842, 853 (1st Dist. 1993). The party pleading an affirmative defense need not set out evidence, so long as the party alleges the ultimate facts to be proven. People v. Carriage 5 Way West, Inc., 88 Ill.2d 300, 308, 430 N.E.2d 1005, 1008-09 (1981). However, legal conclusions that are not supported by allegations of specific facts are insufficient. LaSalle National Trust N.A. v. Village of Mettawa, 249 Ill. App.3d 550, 557, 616 N.E.2d 1297 (2nd Dist. 1993).

The Board previously held that "[a] motion to strike an affirmative defense admits well-pled facts constituting the defense, as well as all reasonable inferences that may be drawn therefrom, and attacks only the legal sufficiency of the facts." Elmhurst Memorial Healthcare and Elmhurst Memorial Hospital v. Chevron U.A.A., Inc. and Texaco, Inc., PCB 09-066, slip op. at 21 (March 18, 2010), *citing* Raprager v. Allstate Insurance Co., 183 Ill. App.3d 847, 854, 539 N.E.2d 787, 791 (2nd Dist. 1989). An affirmative defense should not be stricken "[w]here the well-pled facts [of an affirmative defense] … raise the possibility that the party asserting the defense will prevail…." Raprager, 183 Ill. App.3d at 854, 539 N.E.2d at 791.

Valid Federally Enforceable State Operating Permit

NACME raises the defense that it holds a valid FESOP. NACME argues that a SOP, like SOP #96020074 that NACME currently holds, and that the state acknowledges is in effect, is a federally enforceable permit. Am. Ans. at 1, ¶ 1. NACME claims that assuming the People's allegation in the complaint is true (*i.e.* that NACME has the potential to emit pollutants above a major source threshold), NACME already has in place a valid FESOP (SOP #96020074) that automatically defeats the People's claim.

The People assert that NACME fails to provide any new facts relevant to the People's claim that NACME was operating a major source without a CAAPP permit and that NACME fails to give color to the People's claims.

The Board has reviewed the pleadings and finds that NACME's assertion of the existence of a FESOP is not an affirmative defense. NACME's claims are denials of the allegations in the complaint, not an argument that that will defeat the claim even if true. Specifically, the Board finds that NACME's claim that a valid FESOP exists does not "give color" to the People's allegations, but instead denies them. Therefore, the Board finds that NACME's alleged affirmative defense of the existence of a FESOP must be stricken.

Laches

NACME raises the defense of laches arguing that IEPA was aware, or should have been aware, of its alleged violation many years before IEPA issued its violation notice in March 2011. NACME argues that IEPA was aware or should have been aware of NACME's alleged potential to emit as a major source since at least 2001, when IEPA first tried, and failed, to designate NACME as a major source. Am. Ans. at 4, ¶ 12. NACME claims that the unreasonable and unjustified delay in issuing the notice of violation prejudiced NACME by subjecting it to greater penalty amounts. *Id*.

The People argue that for NACME to prevail on a defense of laches, NACME must establish that the People have exhibited unreasonable delay in asserting the claim and that NACME has been prejudiced. Mot. at 5, citing City of Rolling Meadows v. Nat'l Adver. Co., 228 Ill. App.3d 737, 593 N.E.2d 551, 557 (1st Dist. 1992); Patrick Media Group, Inc. v. City of Chicago, 225 Ill. App.3d 1, 626 N.E.2d 1066, 1071 (1st Dist. 1993).

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, 459 N.E.2d at 636. The issue then is whether the affirmative defense has been sufficiently pled. In prior cases, the Board 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 the defense before hearing the evidence. *See* Peabody, PCB 99-134, slip op. at 8.

The Board therefore finds that while not specific, NACME has alleged sufficient facts to raise the affirmative defense of laches. In this proceeding, the Board notes that NACME must also meet the burden of proving that "compelling circumstances" warrant application of laches. The People's motion to strike is denied as to the affirmative defense of laches.

Waiver

NACME's argument for waiver is similar to its arguments for laches. NACME asserts that the People's claim is barred by the doctrine of waiver because the People knew or should

have known of NACME's potential to emit as a major source since 2001. Am. Ans. at 4, ¶ 13. Conversely, the People argue that NACME has not pled sufficient facts to form a valid affirmative defense of waiver. Specifically the People allege that because NACME failed to provide facts establishing "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" the defense must be struck. Mot. at 9-10.

The doctrine of waiver applies when a party intentionally relinquishes a known right or his conduct warrants an inference to relinquish the right. *See* Hartford Accident and Indemnity Co. v. D.F. Bast, Inc., 56 Ill. App.3d 960, 962, 372 N.E.2d 829, 831 (1st Dist. 1977); People v. Douglas Furniture of California, Inc., PCB 97-133, slip op. at 5 (May 1, 1997). *See also* Peabody, PCB 99-134, slip op. at 8; Crane, PCB 01-76 at 20. NACME alleges it will show that through the continued correspondence between IEPA and NACME, IEPA and the People relinquished their right to bring the claim alleged in the complaint. Resp. at 3-4. Furthermore, NACME states that it will show it has been prejudiced. *Id.* The Board will allow NACME the opportunity to meet the burden of establishing waiver against the People. The Board therefore denies the People's motion to strike this affirmative defense.

CONCLUSION

The Board finds that NACME's alleged affirmative defense that a valid FESOP exists is not an affirmative defense and should be struck. The Board further finds that NACME's affirmative defenses of laches and waiver are sufficiently pled and NACME may proceed with those affirmative defenses.

IT IS SO ORDERED.

I, John Therriault, Clerk of the Illinois Pollution Control Board, hereby certify that the Board adopted the above opinion and order on June 6, 2013, by a vote of 5-0.

John Therriault, Assistant Clerk
Illinois Pollution Control Board