

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 15-112
	)	(Enforcement - Air)
INCOBRASA INDUSTRIES, LTD.,	)	
an Illinois corporation,	)	
	)	
Respondent.	)	

**NOTICE OF FILING**

TO: John T. Therriault	Carol Webb, Esq.
Clerk of the Board	Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
James R. Thompson Center	1021 North Grand Avenue East
100 West Randolph, Suite 11-500	Post Office Box 19274
Chicago, Illinois 60601	Springfield, Illinois 62794-9274
<b>(VIA ELECTRONIC MAIL)</b>	<b>(VIA U.S. MAIL)</b>

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board the **RESPONSE IN OPPOSITION TO COMPLAINANT'S MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES** copies of which are herewith served upon you.

Respectfully submitted,  
INCOBRASA INDUSTRIES, LTD.,  
Petitioner,

Dated: February 8, 2016

By: /s/ Melissa S. Brown  
One of Its Attorneys

N. LaDonna Driver  
Edward W. Dwyer  
Melissa S. Brown  
HEPLERBROOM, LLC  
3150 Roland Avenue  
Springfield, Illinois 62703  
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**CERTIFICATE OF SERVICE**

I, Melissa S. Brown, the undersigned, hereby certify that I have served the attached **RESPONSE IN OPPOSITION TO COMPLAINANT'S MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES**, upon:

John T. Therriault  
Clerk of the Board  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph Street, Suite 11-500  
Chicago, Illinois 60601

Carol Webb, Esq.  
Hearing Officer  
Illinois Pollution Control Board  
1021 North Grand Avenue East  
Post Office Box 19274  
Springfield, Illinois 62794-9274

Ryan G. Rudich  
Assistant Attorney General  
69 West Washington Street, Suite 1800  
Chicago, Illinois 60602

via electronic mail on February 8, 2016; and upon:

/s/ Melissa S. Brown  
Melissa S. Brown

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**RESPONSE IN OPPOSITION TO COMPLAINANT'S  
MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES**

NOW COMES INCOBRASA INDUSTRIES, LTD. ("Incobrasa" or "Respondent"), by and through its attorneys, and submits this response in opposition to the Motion to Strike Respondent's Affirmative Defenses ("Motion") filed by the People of the State of Illinois ("Complainant") on January 11, 2016. In support of its response, Respondent states as follows:

**I. INTRODUCTION**

On July 7, 2015, the Illinois Pollution Control Board ("Board") granted Complainant's Motion for Leave to File its First Amended Complaint ("Amended Complaint") against Respondent. The Amended Complaint asserts numerous counts against Respondent, including: violation of the Illinois Environmental Protection Act ("Act") and Board regulations for failure to install and operate a continuous emissions monitoring system; failing to submit excess emissions reports, failing to maintain a written episode action plan; failing to submit National Emission Standards for Hazardous Air Pollutants ("NESHAP") notifications; failing to keep records; violating Clean Air Act Permit Program ("CAAPP") permit conditions regarding the above; causing emissions in excess of CAAPP permit fee limits; and violating construction permit conditions regarding the above.

On December 8, 2015, Respondent timely filed its Answer to the First Amended Complaint (“Answer”), which included affirmative defenses to the claims made in the Amended Complaint (“Affirmative Defenses”). In response to Respondent’s Answer, Complainant filed a Motion to Strike Respondent’s Affirmative Defenses (“Motion to Strike”) on January 7, 2016. Respondent then filed an Unopposed Motion for Extension of Time to File a Response to Complainant’s Motion to Strike Respondent’s Affirmative Defenses on January 14, 2016. The Board granted Respondent’s motion on January 19, 2016, extending Respondent’s deadline to respond to Complainant’s Motion to Strike to February 8, 2016.

## II. ARGUMENT

### A. Applicable Standard for Motion to Strike

Section 2-615(a) of the Illinois Code of Civil Procedure provides the standard for motions to strike:

All objections to pleadings shall be raised by motion. The motion shall point out specifically the defects complained of, and shall ask for appropriate relief, such as: that a pleading or portion thereof be stricken because substantially insufficient in law, or that the action be dismissed, or that a pleading be made more definite and certain in a specified particular, or that designated immaterial matter be stricken out, or that necessary parties be added, or that designated misjoined parties be dismissed, and so forth.

735 ILCS 5/2-615(a). A motion to strike an affirmative defense should not be granted when “the well-pleaded allegations that set forth the defense, if taken to be true, express[] a legally sufficient defense.” *Joppa High Sch. Dist. No. 21, Massac Cnty. v. Jones*, 35 Ill. App. 3d 323, 325 (5th Dist. 1976) (citing *Morrissey v. Morrissey*, 299 Ill. App. 173 (1st Dist. 1939)). A motion to strike admits well-pleaded facts constituting the affirmative defense and should only attack the legal sufficiency of the facts. *See People v. Draw Drape Cleaners, Inc.*, PCB 3-51, 2003 WL 913442, at 2 (Ill. Pol. Control Bd. Feb. 20, 2003). “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." *Id.*

**B. Applicable Standard for Affirmative Defenses**

Section 103.204(d) of the Board's regulations allows for the filing of an affirmative defense within an answer. Section 103.204(d) states:

Except as provided in subsection (e), the respondent may file an answer within 60 days after receipt of the complaint if respondent wants to deny any allegations in the complaint. All material allegations of the complaint 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. 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. Admin. Code § 103.204(d).

Section 2-613 of the Illinois Code of Civil Procedure provides the standards for affirmative defenses:

(a) Parties may plead as many causes of action, counterclaims, defenses, and matters in reply as they may have, and each shall be separately designated and numbered.

\* \* \*

(d) The facts constituting any affirmative defense, . . . and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint, counterclaim, or third-party complaint, in whole or in part, 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(a), (d).

A defense is affirmative in nature if, by raising it the defendant will give color to the plaintiff's cause of action and then asserts new matters which apparently defeat the plaintiff's right to remedy. . . . Therefore, in order to plead an affirmative defense, a defendant need not admit the elements of plaintiff's cause of action are true, but only allege that if plaintiff proves those elements, then plaintiff's right to relief is defeated by new matters . . . .

*Betts v. Manville Pers. Injury Settlement Trust*, 225 Ill. App. 3d 882, 904 (4th Dist. 1992);  
*People v. Frank Merkendorfer, et al.*, PCB 96-208 (Ill. Pol. Control Bd. Aug. 1, 1996).

**C. Respondent's Affirmative Defenses are Factually and Legally Sufficient**

**1. Respondent's First Affirmative Defense is Legally Sufficient**

Complainant alleges in the Amended Complaint that Respondent failed to maintain records of monthly SO<sub>2</sub> emissions from Boiler A, thereby violating Condition 7.4.9(b) of CAAPP permit 98070042. Amended Complaint, at Count VI, ¶ 42. In its First Affirmative Defense, Respondent argues that this claim is barred because Respondent did in fact maintain monthly records of SO<sub>2</sub> emissions from Boiler A during this time period. *See Answer, Affirmative Defense 1.* Complainant moves to strike Respondent's First Affirmative Defense on the grounds that it is a denial of the Amended Complaint's allegation and "does not admit the legal sufficiency of the Complainant's allegations and assert a new matter that would defeat its right to prevail." Motion to Strike at 4. Contrary to Complainant's assertion, Respondent's First Affirmative Defense is properly pled and should not be stricken. To properly plead an affirmative defense, a defendant must plead "facts constituting any affirmative defense" – defined as a defense that "avoid[s] the legal effect of or defeat[s] the cause of action set forth in the complaint." 735 ILCS 5 / 2-613(d). In its affirmative defense, Respondent pleads specific facts that defeat the cause of action in allegation 42 of Count VI. *See Answer, Affirmative Defense 1.* Therefore, Complainant's First Affirmative Defense was properly pled and should not be stricken.

**2. Respondent's Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Eleventh, Twelfth, and Thirteenth Affirmative Defenses are Factually and Legally Sufficient**

Below in subparagraphs 2(a) – (j), in the order as they appear in Complainant's Amended Complaint, Respondent addresses the ten paragraphs to which Respondent asserted its Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Eleventh, Twelfth, and Thirteenth Affirmative Defenses. Section 2(k) contains Respondent's argument demonstrating the legal sufficiency of each of the Affirmative Defenses.

a. Allegation 42 of Count VI

In allegation 42 of Count VI, Complainant alleges that Respondent violated Condition 7.4.9(b) of CAAPP permit 98070042 by failing to maintain records of rolling 12-month SO<sub>2</sub> emissions from Boiler A. Amended Complaint at Count VI, ¶ 42. Condition 7.4.9(b) states:

In addition to the records required by Condition 5.6, the Permittee shall maintain records of the following items for the affected boilers to demonstrate compliance with Conditions 5.5.1, 7.4.5 and 7.4.6, pursuant to Section 39.5(7)(b) of the Act:

\* \* \*

- (b) Emissions of NO<sub>x</sub>, CO, PM/PM<sub>10</sub>, SO<sub>2</sub>, and VOM from Boiler A, based on operating data from the boiler and emission monitoring data (NO<sub>x</sub>) or appropriate emission factors, with supporting calculations (tons/month and tons/year)...

Amended Complaint at Count VI, ¶ 41. Condition 7.4.9(b) does not specify that records of SO<sub>2</sub> emissions must be kept on a rolling 12-month basis. *See id.* Therefore, allegation 42 of Count VI fails to state a cause of action. *See Answer, Affirmative Defense 2.* Moreover, Respondent has maintained records of calendar-year SO<sub>2</sub> emissions. *Id.*

b. Allegation 44 of Count VI

In allegation 44 of Count VI, Complainant alleges that Respondent violated Condition 7.1.9(a) of CAAPP permit 98070042 by failing to maintain records of the running 12-month total

of the quantity of grain processed from the facility's grain handling operations. Amended

Complaint at Count VI, ¶ 44. Condition 7.1.9(a) of CAAPP permit 98070042 states:

In addition to the records required by Condition 5.6, the Permittee shall maintain records of the following items for the affected grain handling operation to demonstrate compliance with conditions 5.5.1, 7.1.5 and pursuant to Section 39.5(7)(b) of the Act:

- (a) Grain Processed (bushels/month and bushels/year)

*Id.* at Count VI, ¶ 43. Condition 7.1.9(a) does not specify that the records of the quantity of grain processed from the facility must be kept on a rolling 12-month basis. *See id.* Therefore, allegation 44 of Count VI fails to state a cause of action. *See Answer, Affirmative Defense 3.* Moreover, Respondent has maintained records on a calendar-year basis for grain processed by the grain handling operation. *Id.*

c. Allegation 44 of Count VI

In allegation 44 of Count VI, Complainant alleges that Respondent violated Condition 7.1.9(d) of CAAPP permit 98070042 by failing to maintain records of the running 12-month total of particulate matter ("PM") emissions from the facility's grain handling operations. Amended Complaint at Count VI, ¶ 44. Condition 7.1.9(d) states:

In addition to the records required by Condition 5.6, the Permittee shall maintain records of the following items for the affected grain handling operation to demonstrate compliance with conditions 5.5.1, 7.1.5 and pursuant to Section 39.5(7)(b) of the Act:

\* \* \*

- (d) PM emissions from the affected grain handling operation (tons/month and tons/year) with supporting calculations

*Id.* at Count VI, ¶ 43. Condition 7.1.9(d) does not specify that records of PM emissions from the affected grain handling operation must be kept on a rolling 12-month basis. *See id.* Therefore, allegation 44 of Count VI fails to state a cause of action. *See Answer, Affirmative Defense 4.*



Moreover, Respondent has maintained records on a calendar-year basis for PM emissions from the grain handling operations. *Id.*

d. Allegation 52 of Count VI

In allegation 52 of Count VI, Complainant alleges that Respondent violated Condition 7.5.9(a) of CAAPP permit 98070042 by failing to maintain records of running 12-month totals of the amount of fuel combusted from the facility's grain dryer operations. *Id.* at Count VI, ¶ 52.

Condition 7.5.9(a) states:

In addition to the records required by Condition 5.6, the Permittee shall maintain records of the following items for the affected grain dryers to demonstrate compliance with Conditions 5.5.1, 7.5.5 and 7.5.6, pursuant to Section 39.5(7)(b) of the Act:

- (a) Amount of fuel combusted (mmscf/month and mmscf/year);

*Id.* at Count VI, ¶ 51. Condition 7.5.9(a) does not specify that records of the amount of fuel combusted must be kept on a rolling 12-month basis. *See id.* Therefore, allegation 52 of Count VI fails to state a cause of action. *See Answer, Affirmative Defense 6.* Moreover, Respondent has maintained records on a calendar-year basis for the amount of fuel combusted by the grain dryers. *Id.*

e. Allegation 52 of Count VI

In allegation 52 of Count VI, Complainant alleges that Respondent violated Condition 7.5.9(b) of CAAPP permit 98070042 by failing to maintain records of running 12-month totals of emissions of NO<sub>x</sub>, PM, SO<sub>2</sub>, and VOM from the facility's grain dryer operations. Amended Complaint at Count VI, ¶ 52. Condition 7.5.9(b) states:

In addition to the records required by Condition 5.6, the Permittee shall maintain records of the following items for the affected grain dryers to demonstrate compliance with Conditions 5.5.1, 7.5.5 and 7.5.6, pursuant to Section 39.5(7)(b) of the Act:

\* \* \*

- (b) Emissions of NO<sub>x</sub>, PM, SO<sub>2</sub>, and VOM from the affected grain dryers, based on fuel consumption and the applicable emission factors, with supporting calculations (tons/month and tons/year).

*Id.* at Count VI, ¶ 51. Condition 7.5.9(b) does not specify that the records of emissions of NO<sub>x</sub>, PM, SO<sub>2</sub>, and VOM from the affected grain dryers must be kept on a rolling 12-month basis.

*See id.* Therefore, allegation 52 of Count VI fails to state a cause of action. *See* Answer, Affirmative Defense 7. Moreover, Respondent has maintained records on a calendar-year basis for emissions from the grain dryers. *Id.*

f. Allegation 54 of Count VI

In allegation 54 of Count VI, Complainant alleges that Respondent violated Condition 7.6.9(a) of CAAPP permit 98070042 by failing to maintain records of the running 12-month annual pour weight generated during oil refinery hotwell operations. Amended Complaint, Count VI, ¶ 54. Condition 7.6.9(a) states:

In addition to the records required by Condition 5.6, the Permittee shall maintain records of the following items for the affected oil refinery hotwell to demonstrate compliance with Conditions 5.5.1, 7.6.5(a) and pursuant to Section 39.5(7)(b) of the Act:

- (a) Annual pour weight (tons/month);

*Id.* at Count VI, ¶ 53. Condition 7.6.9(a) does not specify that the records of annual pour weight generated during oil refinery hotwell operations must be kept on a rolling 12-month basis. *See id.* Therefore, allegation 54 of Count VI fails to state a cause of action. *See* Answer, Affirmative Defense 8. Moreover, Respondent has maintained records on a calendar-year basis of pour weight generated during oil refinery hotwell operations. *Id.*

g. Allegation 54 of Count VI

In allegation 54 of Count VI, Complainant alleges that Respondent violated Condition 7.6.9(c) of CAAPP permit 98070042 by failing to maintain records of the running 12-month VOM and HAP emissions generated during oil refinery hotwell operations. *Id.* at Count VI, ¶ 54. Condition 7.6.9(c) states:

In addition to the records required by Condition 5.6, the Permittee shall maintain records of the following items for the affected oil refinery hotwell to demonstrate compliance with Conditions 5.5.1, 7.6.5(a) and pursuant to Section 39.5(7)(b) of the Act:

\* \* \*

- (c) VOM and HAP emissions with supporting calculations (tons/month and tons/year)

*Id.* at Count VI, ¶ 53. Condition 7.6.9(c) does not specify that emissions records must be kept on a rolling 12-month basis. *See id.* Therefore, allegation 54 of Count VI fails to state a cause of action. *See Answer, Affirmative Defense 9.* Moreover, Respondent has maintained records on a calendar-year basis for VOM and HAP emissions from the oil refinery hotwell. *Id.*

h. Allegation 26 of Count VIII

In allegation 26 of Count VIII, Complainant alleges that Respondent violated Condition 1.1.9(a) of construction permit 07050034 by failing to maintain records of rolling 12-month natural gas usage from Boiler B. Amended Complaint at Count VIII, ¶ 26. Condition 1.1.9(a) of construction permit 07050034 states:

The Permittee shall maintain records of the following items:

- (a) Natural gas usage for the affected boiler (ft<sup>3</sup>/month and ft<sup>3</sup>/year);

*Id.* at Count VIII, ¶ 25. Condition 1.1.9(a) does not specify that records of natural gas usage be kept on a rolling 12-month basis. *See id.* Therefore, allegation 26 of Count VIII fails to state a

cause of action. *See* Answer, Affirmative Defense 11. Moreover, Respondent has maintained records of natural gas usage from Boiler B on a calendar-year basis. *Id.*

i. Allegation 26 of Count VIII

In allegation 26 of Count VIII, Complainant alleges that Respondent violated Condition 1.1.9(b) of construction permit 07050034 by failing to maintain records of rolling 12-month NO<sub>x</sub> and CO emissions from Boiler B. *Id.* at Count VIII, ¶ 26. Condition 1.1.9(b) states:

The Permittee shall maintain records of the following items:

\* \* \*

- (b) NO<sub>x</sub> and CO emissions from the affected boiler, tons month and tons/year, based on fuel consumption and the applicable emission factors, with supporting calculations.

*Id.* at Count VIII, ¶ 25. Condition 1.1.9(b) of construction permit 07050034 does not specify that records of NO<sub>x</sub> and CO emissions be kept on a rolling 12-month basis. *See id.* Therefore, allegation 26 of Count VIII fails to state a cause of action. *See* Answer, Affirmative Defense 12. Moreover, Respondent has maintained records of NO<sub>x</sub> and CO emissions from Boiler B on a calendar-year basis. *Id.*

j. Allegation 30 of Count VIII

In allegation 30 of Count VIII, Complainant alleges that Respondent violated Condition 2.1.8(d)(iv) of construction permit 06050042 by failing to maintain 12-month rolling annual records of VOM and HAP emissions from the Biodiesel Plant. Amended Complaint at Count VIII, ¶ 30. Condition 2.1.8(d)(iv) of construction permit 06050042 states:

(d) The Permittee shall maintain records of the following items:

\* \* \*

- iv. VOM and HAP emissions with supporting calculations (tons/month and tons/year).

*Id.* at Count VIII, ¶ 28. Condition 2.1.8(d)(iv) of construction permit 06050042 does not specify that records of VOM and HAP emissions must be maintained on a 12-month rolling basis. *See id.* Therefore, allegation 30 of Count VIII fails to state a cause of action. *See Answer, Affirmative Defense 13.* Moreover, Respondent has maintained records of VOM and HAP emissions from the Biodiesel Plant on a calendar-year basis. *Id.*

k. Affirmative Defenses 2, 3, 4, 6, 7, 8, 9, 11, 12, 13 are Legally and Factually Sufficient and Should Not be Stricken

Complainant moves to strike Respondent's Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Eleventh, Twelfth, and Thirteenth Affirmative Defenses, arguing that "Respondent's contentions that the Complainant's allegations as pled fail to state a cause of action is appropriately raised at this stage only in a motion to dismiss." Motion to Strike at 4-5. However, "[t]he failure of a complaint to state a cause of action is a fundamental defect which may be raised at any time by any means and cannot be waived." *Foley v. Santa Fe Pacific Corp.*, 267 Ill. App. 3d 555, 561 (1st Dist. 1994). Further, Section 2-613(d) of the Illinois Code of Civil Procedure provides that "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 ILC 5/2-613(d); *see People v. Inverse Investments, LLC*, PCB 11-79, 2012 WL 246986, at 1, 5 (Ill. Pol. Control Bd. June 21, 2012). As seen above, the permit conditions cited to and relied upon by Complainant in allegations 41-44 and 51-54 of Count VI and allegations 25-26, 28, and 30 of Count VIII of the Amended Complaint do not require records to be kept on a rolling 12-month basis as Complainant alleges. *See Answer, Affirmative Defenses 2-4, 6-9, 11-13.* Respondent raised these issues, as well as the fact that Respondent maintained such records on a calendar-year basis, in its Affirmative Defenses so as

to not take Complainant by surprise during a subsequent stage of the case. Respondent also raised these arguments in its Affirmative Defenses so that Respondent would not be seen as waiving its right to assert the defenses at a later time. Accordingly, Respondent's Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Eleventh, Twelfth, and Thirteenth Affirmative Defenses are proper at this stage and should not be stricken.

Moreover, Respondent was not required to admit the allegations that are the subject of these Affirmative Defenses because such allegations were not well-pleaded. Respondent is only required to take "all well-pleaded facts and all reasonable inferences that may be drawn from those facts as true." *Reynolds v. Jimmy John's Enterprises*, 2012 IL App (4th) 120139, ¶ 25 (2013). Allegations 41-44 and 51-54 of Count VI and allegations 25-26, 28, and 30 of Count VIII were not well-pleaded because Complainant cited to permit provisions that did not require the maintaining of records on a rolling 12-month basis, as the basis for those allegations. See Amended Complaint, Count VI and VIII. Therefore, Respondent was not required to admit such allegations. *Reynolds*, 2012 IL App (4th) 120139, ¶ 25.

Furthermore, even if Respondent's factual allegations in the Amended Complaint are assumed as true, Complainant's allegations as to maintaining records on a rolling 12-month basis were legally insufficient. A "motion to strike an affirmative defense admits all well-pleaded facts constituting the defense, together with all reasonable inferences which may be drawn therefrom." *Raprager v. Allstate Ins. Co.*, 183 Ill. App. 3d 847, 854 (2d Dist. 1989) (internal citations omitted); see *People v. Chiquita Processed Foods, LLC*, PCB 2-56, 2002 WL 745635 at 4 (Ill. Pol. Control Bd. Apr. 18, 2002). "Where the well-pleaded facts and inferences drawn therefrom raise a possibility that the party asserting the defense will prevail, striking of the affirmative defense is improper." *Raprager*, 183 Ill. App. 3d at 854; *Chiquita Processed Foods*,

2002 WL 745635 at 4. In its Affirmative Defenses, Respondent contends that allegations 41-44 and 51-54 of Count VI and allegations 25-26, 28, and 30 of Count VIII of the Amended Complaint fail to state a cause of action because the permit conditions cited by Complainant do not require that such records be kept on a rolling 12-month basis. See Answer, Affirmative Defenses 2-4, 6-9, and 11-13. The Board has held that “[a] valid affirmative defense presents new facts or arguments that, if true, will defeat the claimant’s claim even if all allegations in the complaint are true.” *Elmhurst Memorial Healthcare, et al., v. Chevron U.S.A., Inc., et al.*, PCB 9-66, 2011 WL 2838628, at 27 (Ill. Pol. Control Bd. July 7, 2011). Here, Respondent’s assertion that the permit conditions cited by Complainant do not require that records be kept on a rolling 12-month basis defeats Complainant’s claim that Respondent violated its CAAPP and construction permits for failure to keep records on a rolling 12-month basis. Therefore, Respondent’s Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Eleventh, Twelfth, and Thirteenth Affirmative Defenses are proper and should not be stricken.

**3. Respondent’s Fifth Affirmative Defense is Factually and Legally Sufficient**

Plaintiff alleges in its Amended Complaint that Respondent violated Condition 7.2.9(a) of CAAPP permit 98070042 by failing to maintain records of the condition of equipment and the key operating parameters of air pollution control equipment at least once per day. Amended Complaint at Count VI, ¶ 46. Condition 7.2.9(a) of CAAPP permit 98070042 provides:

In addition to the records required by Condition 5.6, the Permittee shall maintain records of the following items for the affected material handling units to demonstrate compliance with Conditions 5.5.1, 7.2.5 and 7.2.6, pursuant to Section 39.5(7)(b) of the Act:

- (a) Condition of equipment at least once per day and key operating parameters for air pollution control equipment, at least once per day;

*Id.* at Count VI, ¶ 45. However, Condition 7.2.5 of CAAPP permit 98070042 specifies *periodic* inspection of cyclones and filters and visual inspections of air pollution control equipment on a *regular* basis. *See* Answer, Affirmative Defense 5. There is no requirement for daily inspections. *Id.* Complainant moves to strike Respondent's Fifth Affirmative Defense on the basis that it "does not give color to the Complainant's allegations and assert a new matter that defeats it; it merely denies that Complainant has stated a valid cause of action, which does not constitute an affirmative defense." Motion to Strike, at 5. There is no requirement in Condition 7.2.5 for daily inspections, only *periodic* inspections. *See* Answer, Affirmative Defense 5. Respondent has maintained records of the key operating parameters of air pollution control equipment for the material handling operations on a weekly basis. *Id.* Respondent's Fifth Affirmative Defense contains "new facts or arguments that, if true, will defeat the claimant's claim even if all allegations in the complaint are true." *Elmhurst Memorial Healthcare*, PCB 9-66, 2011 WL 2838628, at 27. Therefore, Respondent's Fifth Affirmative Defense is proper and should not be stricken.

**4. Respondent's Tenth Affirmative Defense is Factually and Legally Sufficient**

In Count VII, Complainant alleges that Respondent violated its CAAPP permit during the years 2009 and 2011 for VOM emissions and 2007, 2008, 2009, and 2011 for PM emissions. Amended Complaint at Count VII, ¶ 23. However, in its Tenth Affirmative Defense, Respondent argues that it did not fail to pay accurate fees during those years because the emissions for all pollutants did not exceed the total allowable emissions for purposes of the permit fee in Condition 5.5.1. *See* Answer, Affirmative Defense 10. Complainant moves to strike Respondent's Tenth Affirmative Defense on the basis that it does not "admit the apparent right to the claim and instead merely attacks the sufficiency of the claim." Motion to Strike at 5.



Additionally, Complainant contends that Respondent's Tenth Affirmative Defense does not assert any facts in addition to those alleged by Complainant and therefore must be stricken. Motion to Strike at 5-6. However, the Board has held that "[a] valid affirmative defense presents new facts or arguments that, if true, will defeat the claimant's claim even if all allegations in the complaint are true." *Elmhurst Memorial Healthcare*, PCB 9-66, 2011 WL 2838628, at 27. Respondent's Tenth Affirmative Defense contains specific facts that defeat the cause of action in allegation 23 of Count VII. *See Answer*, Affirmative Defense 10. Therefore, Complainant's Tenth Affirmative Defense was properly pled and should not be stricken.

### **III. CONCLUSION**

Respondent's Affirmative Defenses are proper, legally sufficient, and should not be stricken as Complainant requests in its Motion to Strike. However, if the Board finds that one or more of Respondent's Affirmative Defenses are not valid affirmative defenses, Respondent requests that the Board grant it leave to file a motion to dismiss. Complainant argues that "Respondent's contention that the Complainant's allegations as pled fail to state a cause of action is appropriately raised at this stage only in a motion to dismiss." Motion to Strike at 4-5. In the alternative to denying Complainant's Motion to Strike, Respondent requests that the Board grant it leave to file a motion to dismiss in order to properly plead the arguments contained in its Affirmative Defenses, as Complainant suggests.

WHEREFORE, Respondent, INCOBRASA INDUSTRIES, LTD., respectfully prays that the Board deny Complainant's, PEOPLE OF THE STATE OF ILLINOIS, Motion to Strike Respondent's Affirmative Defenses and award INCOBRASA INDUSTRIES, LTD. all other relief just and proper in the premises, or, in the alternative, Respondent, INCOBRASA

INDUSTRIES, LTD., respectfully prays that the Board grant it leave to file a motion to dismiss to plead the arguments contained in its affirmative defenses.

Respectfully submitted,

INCOBRASA INDUSTRIES, LTD.,  
Respondent,

Dated: February 8, 2016

By: /s/ Melissa S. Brown  
One of Its Attorneys

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