BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

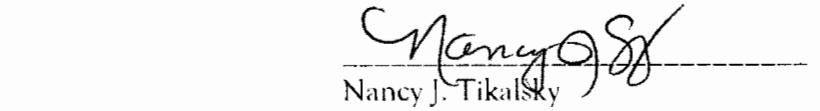
PEOPLE OF THE PEOPLE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB No. 13 - 12
	)	(Enforcement – Air)
NACME STEEL PROCESSING, LLC, a Delaware limited liability corporation,	)	
	)	
	)	
Respondent.	)	

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 AFFIRMATIVE DEFENSES, a copy of which is herewith served upon you.

Respectfully submitted,



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Date: November 30 2012

SERVICE LIST

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a Delaware limited liability corporation,	)	
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Respondent.	)	

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on November 30, 2012, I served true and correct copies of Complainant's MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES, upon the persons and by the methods as follows:

[First Class U.S. Mail]

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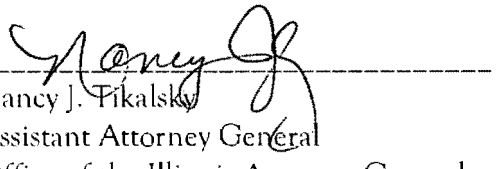

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	)	
Respondent.	)	

MOTION TO STRIKE AND DISMISS RESPONDENT'S 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, 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 three-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."

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").

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. *Prysweller 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. 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).

Affirmative defenses that concern factors in mitigation are not an appropriate affirmative defense to a claim that a violation has occurred. *People v. Texaco Refining and Marketing, Inc.* PCB 02-3, slip op. at 5 (Nov. 6, 2003)(citing *People v. Geon Co., Inc.*, PCB 97-62 (Oct. 2, 1997) and *People v. Midwest Grain Products of Illinois, Inc.*, PCB 97-179 (Aug. 21, 1997)).

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

1. Respondent's 'Failure to State a Claim' Defense is Factually and Legally Insufficient

Respondent's 'failure to state a claim' defense pleads no exculpatory facts whatsoever. Instead, this 'affirmative defense' simply denies some facts alleged in the Complaint and provides no additional facts, statute or caselaw to support it. Therefore, Nacme's 'failure to state a claim' defense is factually and legally insufficient and should be dismissed and stricken.

It is well settled that a simple denial of a fact pleaded in the Complaint is not a sufficient affirmative defense. *Pryweller*, 282 Ill.App.3d at 907; *see also Heller Equity Capital Corp.*, *People v. Wood River Ref. Co*, and *Farmers People Bank*. An affirmative defense must raise *new matter* that, if true, somehow defeats a complainant's claim. *See Condon*, 210 Ill.App.3d at 709. Facts establishing an affirmative defense must be pled with the same degree of specificity required by plaintiff to establish a cause of action. *See Int'l Ins. Co.*, 609 N.E. 2d at 853. Dismissal for failure to state a cause of action is appropriate only when no set of facts can be proven under the pleadings that will entitle the pleader to recovery. *Douglas Theater Corp. v. Chicago Title & Trust Co.*, 288 Ill. App. 3d 880, 883, 681 N.E.2d 564, 566 (1st Dist. 1997).

Factually, Nacme's 'affirmative defense' fails to provide any specific 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 Complaint "fails to state a claim upon which relief can be granted because ... at all times Nacme held a valid state operating permit limiting its emissions to below major source thresholds and which, under applicable precedent, is federally enforceable."

See Answer, p. 13, First Defense (Valid Permit). These facts simply restate and deny facts alleged in the People's Complaint regarding the status of Nacme's potential to emit air pollutants and its People operating permit. *See Complaint pp. 2 -4.* Moreover, this statement clearly fails to specifically set forth any new facts in support of its affirmative defense as to how the Complaint 'fails to state a cause of action'. Nacme's failure to state a claim defense, which denies facts alleged in the People's Complaint and argues a legal conclusion is factually insufficient and should be dismissed and stricken with prejudice.

Legally, Nacme's 'failure to state a claim' 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, and specifically state facts as to how the Complaint fails to state a cause of action. *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. Instead, this 'affirmative defense' is simply a denial of the People's claim in its Complaint that Nacme was operating a major source without a CAAPP permit. *See Prysweller at 907.*

To begin, the purported affirmative defense does not assert any new matter that might defeat the People's claim. Here, Nacme simply restates and denies the People's allegation in its Complaint regarding the status of Nacme's operations of a major source without the requisite CAAPP permit. In addition, Nacme fails to provide the "applicable precedent" it alludes to that an Illinois state operating permit for air pollution is federally enforceable. Finally, rather than specifically set forth any facts in support of its affirmative defense as to how the complaint fails to state a cause of action, Nacme states a general, argumentative legal conclusion about a fact alleged in the People's Complaint.

Furthermore, if the pleading does not admit the apparent right to the claim and instead merely attacks the sufficiency of the claim, it is not a valid affirmative defense. *See Worner Agency, Inc. v. Doyle*, 121 Ill. App. 3d 219, 222-23 (4th Dist. 1984). By stating that the People's Complaint fails to state a claim for which relief can be granted, Nacme fails to admit the apparent right to the claim. Nacme cannot establish in the same defense that there is both an apparent right to a claim and no claim for which relief can be granted. If Nacme wishes to attack the sufficiency of the claim, it should do so properly, through a motion to strike or dismiss, and not by answering the complaint and asserting an affirmative defense that denies the People's right to bring the claim. For these reasons, the 'failure to state a claim' defense is legally insufficient and should be dismissed and stricken.

Regardless of Nacme's improper attack on the sufficiency of the complaint, the complaint does state a cause of action. The pleadings allege sufficient facts, which if proven, would entitle the plaintiff to recover and, thus, the People's Complaint states a cause of action. *See e.g. Knox College v. Celotex Corp.*, 88 Ill.2d 407 (1981); *Cahill v. Eastern Benefit Systems, Inc.*, 236 Ill. App. 3d 517 (1st Dist. 1992). The Complaint fully alleges the dates, locations, events, and nature of Nacme's operating a major source without the requisite CAAPP permit. *See Complaint pp. 2 – 4.*

Accordingly, Nacme's purported 'failure to state a claim' affirmative defense is without merit because it fails to plainly set forth any specific facts, 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 'failure to state a claim' affirmative defense is factually and legally insufficient and should be dismissed and stricken, with prejudice, as a matter of law.

2. Respondent's Lack of Jurisdiction Defense is Factually and Legally Insufficient

Nacme's 'lack of jurisdiction' defense that alleges that the IEPA did not meet the 31(a)(1) requirements of the Act and that the Attorney General may not bring a motion on her own motion if the IEPA is the source of her knowledge is factually and legally insufficient and should be dismissed and stricken.

Again, this affirmative defense' fails to provide any specific 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.* Nacme's affirmative defense factual allegations that "the IEPA did not issue and serve a violation notice upon NACME within 180 days after it became aware of the alleged violation...." and that "the State's allegation that the complaint is filed on its own motion is belied by the State's letter dated January 5, 2012 which states in relevant part: 'The Illinois Environmental Protection Agency ("Illinois EPA") referred the above-referenced matter to the Office of the Attorney General for the initiation of an enforcement action"...." are simply legal conclusions (wrongfully made as will be noted below) based on shallow facts irrelevant to defeat the People's claim. *See Answer, p. 13.*

The facts of Nacme's 'failure to state a claim' defense fail to provide 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. Here, the IEPA Violation Notice dated March 3, 2011, was within 180 days of its September 28, 2010 inspection of Nacme's facility that initiated IEPA's awareness of Nacme's ongoing violation of operating a major source without a CAAPP permit, which is the subject of the People's Complaint. Subsequently, Nacme had a plethora of notice and opportunity to meet with the IEPA regarding the alleged violation pursuant to Section 31 of the Act, 415 ILCS

5/31 (2010), as follows: Nacme submitted a Compliance Commitment Agreement ("CAA") on April 14, 2011, participated in a teleconference with representatives of the IEPA on May 5, 2011, submitted a revised CAA to IEPA on May 26, 2011, receipt of notice of the rejection of its CCA from the IEPA issued on June 16, 2011, receipt of IEPA Notice of Intent to Pursue Legal Action issued on August 11, 2011, and a meeting with the IEPA on September 7, 2011. Even though the Attorney General did become aware of the alleged violations against Nacme from the IEPA, it is not factually sufficient to defeat the People's claim.

Therefore, Nacme's 'failure to state a claim' defense is factually insufficient and should be dismissed and stricken with prejudice.

Legally, several Board decisions have decided the issue of whether a cause of action is defeated by the Illinois EPA's failure to comply with Section 31 procedural requirements, and whether the Attorney General may prosecute a case exclusive of procedural requirements prescribed by Section 31 of the Act, 415 ILCS 5/31 (2010). The issue is not one of first impression in Illinois, and has been previously decided during administrative enforcement actions brought before the Board.

a. ***IEPA served Nacme with a timely notice of violations pursuant to the Act***

Nacme's 'lack of jurisdiction' defense that alleges that the IEPA did not meet the 31(a)(1) requirements of the Act when it did not give notice within 180 days of IEPA initial awareness of an alleged violation is factually and legally insufficient and should be dismissed and stricken.

In Crane, the Board found that 180-day timeframe for the IEPA to issue a Notice of Violation upon alleged violators set forth in Section 31(a)(1) is directory. People of the State of Illinois v. John Crane, Inc., 2001 WL 578498 at 5 (Ill.Pol.Control.Board), PCB 01-76, Slip op. at

5. The Board continues to assert that, "the Board is not divested of jurisdiction to hear a complaint if the Agency failed to issue the NOV, and thereby begin the pre-referral process, within 180 days of "becoming aware" of the alleged violations." *See Id.* In furtherance of its analysis, the Board quotes the U.S. Supreme Court's opinion in *Brock* on this matter in general:

> It is a well-recognized rule of statutory construction that unless the legislature prescribes a consequence for the government's failure to act within a specified timeframe, the failure to meet the timeframe does not divest a governmental body of jurisdiction over the matter. In Brock v. Pierce County, 476 U.S. 253, 106 S. Ct. 1834 (1986). *See Id.*

Finally, the Board in Crane affirms that the purpose of Section 31 of the Act provides all respondents in State enforcement actions with notice and opportunity to meet with the IEPA before the IEPA refers the matter to the Attorney General for enforcement. *See Id.*

The People's Complaint allegations demonstrate the ongoing dialogue between the IEPA and Nacme for several years regarding its potential as a major source of HCl emissions before an inspection of the Facility by IEPA on September 28, 2010. As previously stated herein, the IEPA Violation Notice was well within the 180 day of an inspection when the IEPA became aware of the ongoing violations alleged in the Complaint and Nacme had ample notice and opportunity to meet with the IEPA regarding the alleged violation pursuant to Section 31 of the Act, 415 ILCS 5/31 (2010), to address the IEPA's concerns.

Clearly, IEPA met the mandatory Section 31 requirements as required by the Act and the new matter present by Nacme cannot defeat the People's claim against Nacme. Thus, Nacme's 'lack of jurisdiction' affirmative defense as it pertains to the IEPA is factually and legally insufficient and should be dismissed and stricken, with prejudice, as a matter of law.

b. *Attorney General is not subject to Section 31(a) of the Act.*

Respondent's Affirmative Defense pleads no exculpatory facts whatsoever. Instead, this 'affirmative defense' alleging that a statement in a prefiling letter from the Office of the Attorney General alleging that IEPA was the source of the Attorney's General evidence that a violation of the Act may have occurred precludes the Attorney General from filing an action against the Respondent for the aforesaid learned violations is without legal merit and thus, is factually and legally insufficient and should be dismissed and stricken.

In Freeman United, the Board specifically found that precluding the Attorney General from bringing a claim where the IEPA acted as the Attorney's General source of information of an alleged violation of the Act, rather than an outside source, is without merit. *People of the State of Illinois, Complainant, Environmental Law And Policy Center, on behalf of Praire Rivers Network and Sierra Club, Illinois Chapter, Intervenor V. Freeman United Coal Mining Company, LLC*, 2012 WL 5883713 (Ill.Pol.Control.Board) at 30, PCB 10-61 & 11-02 (*consolidated*) at 30.

The Board has consistently found that the Attorney General is not barred from prosecuting an environmental violation on her own motion under Section 31 (d) of the Act. *See People v. Eagle-Picher-Boge*, 1999 WL 562193 at 6 (Ill.Pol.Control.Bd), PCB 99-152 (July 22, 1999); *People v. Geon*, PCB 97-62 (Oct. 2, 1997); and *People v. Heuermann*, PCB 97-92 (Sept. 18, 1997). The legislative history of Section 31 indicates that the legislature did not intend to prevent the Attorney General from bringing enforcement actions that are not based on an Agency referral. *People v. Sheridan Sand & Gravel* PCB 06-177, slip op 14-15, *citing People v. Chiquita Processed Foods, L.L.C*, PCB 02-56, slip op 4-5 (Nov. 21, 2002).

The Attorney General's admission that it obtained its information of an alleged violation is clearly not a new fact that the Respondent can succeed on in barring the People's Complaint. Therefore, Nacme's 'lack of jurisdiction' affirmative defense as it pertains to the Attorney General is factually and legally insufficient and should be dismissed and stricken.

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

3. Respondent's Laches Defense is 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 specific facts showing that the People have unreasonably delayed, 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 about "for years, at least since 2000, ..." However, Nacme fails to provide any 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.

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 operating as a major source over the years, and IEPA's requests time and time again that Nacme obtain a CAAPP permit for its facility, Nacme continued to operate without pause. *See Complaint, pp. 2-4.* This 'laches' defense is factually 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.

Even if Nacme has sufficiently stated facts to make a claim of laches, 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, and Nacme's fact of "several years" fails to meet the 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.

4. 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.

5. Respondent's 'Estoppel' Defense is Factually and Legally Insufficient

Respondent's 'estoppel' defense pleads no exculpatory facts whatsoever. Instead, this 'affirmative defense' simply denies some facts alleged in the Complaint that IEPA regularly communicated with Nacme, including IEPA regarded Nacme's facility to be a major source and required a CAAPP permit to operate its facility; and provides no additional facts, statute or caselaw to support it. *See Answer, p. 13.* Therefore, Nacme's 'estoppel' defense is factually and legally insufficient and should be dismissed and stricken.

"[T]o avoid surprise to the opposite party, *an affirmative defense must be set out completely* in a party's answer to a complaint and failure to do so results in waiver of the defense." (*Emphasis added.*) *Miller v. Lockport Realty Group, Inc.*, 377 Ill.App.3d 369, 375 (1st Dist. 2007). In its 'estoppel' defense, Nacme fails to assert which type of "estoppel" it is claiming should apply, and therefore the People are left to guess at the nature of this so-called defense, which is clearly improper. *See Miller v*, 377 Ill.App.3d 375. Furthermore, this is particularly problematic since Black's Law Dictionary lists 30 types of "estoppel." Black's Law Dictionary, (9th ed. 2009). As a result of Nacme's insufficient pleading, its 'estoppel' defense should be dismissed and stricken.

Further, Nacme's estoppel defense fails to give color to the People's claims and instead argues that the People's claims are barred. However, the Illinois Supreme Court has stated that an affirmative defense must admit the legal sufficiency of a cause of action, which Nacme has plainly failed to do. *See Vroegh*, 165 Ill.2d at 530. For these reasons, Nacme's 'estoppel' defense is factually and legally insufficient and should be dismissed and stricken with prejudice.

i. **Elements of Equitable Estoppel**

To the extent that Nacme is attempting to plead equitable estoppel as a defense to the People's claims, it has failed to plead with specificity the elements of equitable estoppel. *See Int'l Ins. Co.*, 242 Ill. App. 3d at 630.

Illinois is a fact-pleading jurisdiction. *Simpkins v. CSX Transp., Inc.*, 965 N.E.2d 1092, 1099, 358 Ill. Dec. 613, 620 (2012). In order to set forth a good and sufficient claim or defense, a pleading must allege ultimate facts sufficient to satisfy each element of the cause of action or affirmative defense pled. *Richco Plastic Co. v. IMS Co.*, 288 Ill.App.3d 782, 784 (1st Dist. 1997). In determining the sufficiency of any claim or defense, the court will disregard any conclusions of fact or law that are not supported by allegations of specific fact. *Knox College v. Celotex Corp.*, 88 Ill.2d 407, 426-27 (1981). As to the defense of equitable estoppel, the Illinois Supreme Court has determined that it must be established by clear and unequivocal evidence. *Geddes v. Mill Creek Country Club, Inc.* 196 Ill.2d 302, 314 (2001); *See also Falcon Funding, LLC v. City of Elgin*, 399 Ill.App.3d 142, 159 (2nd Dist. 2010) (equitable estoppel must be demonstrated by clear and convincing evidence).

For more than 20 years, the Illinois Supreme Court has set forth six elements that a party must prove to establish equitable estoppel.

> A party claiming estoppel must demonstrate that: (1) the other person misrepresented or concealed material facts; (2) the other person knew at the time he or she made the representations that they were untrue; (3) the party claiming estoppel did not know that the representations were untrue when they were made and when that party decided to act, or not, upon the representations; (4) the other person intended or reasonably expected that the party claiming estoppel would determine whether to act, or not, based upon the representations; (5) *the party claiming estoppel reasonably relied upon the representations in good faith to his or her detriment*; and (6) the party claiming estoppel would be prejudiced by his or her reliance on the representations if the other person is permitted to deny the truth

> thereof. (*Emphasis added.*) *See, e.g., Orlak v. Loyola University Health System*, 228 Ill.2d 1, 21-22 (2007); *DeLuna v. Burciaga*, 223 Ill.2d 49, 82-83 (2006); *Geddes*, 196 Ill.2d at 313-14; *Parks v. Kownacki*, 193 Ill.2d 164, 180 (2000); *Vaughn v. Speaker*, 126 Ill.2d 150, 162-63, 127 Ill.Dec. 803, 533 N.E.2d 885 (1988).

The Illinois Supreme Court has also held that the party asserting a claim of equitable estoppel "must have relied upon the acts or representations of the other *and have had no knowledge or convenient means of knowing the true facts*" and such reliance should be reasonable. (*Emphasis added.*) *Blisset v. Blisset*, 123 Ill.2d 161, 169 (1988).

Nacme allegations fails to set out the specific facts to address these elements that the Supreme Court mandates it to establish by clear and unequivocal/convincing proof. *See Richco Plastic Co.* 288 Ill.App.3d at 784. Nacme makes no showing of facts that the IEPA misrepresented or concealed material facts or knowingly made untrue representations regarding Nacme's potential to be a major source and its need to obtain a CAAPP permit, much less Nacme's reliance on such misrepresentations because no misrepresentations occurred.

Moreover, the allegations set forth in Nacme's 'estoppel' consist primarily of argument and legal conclusion and self-serving characterization as denials of allegations set out in the People's Complaint. The Court of Appeals has held that argumentative matters contained in an affirmative defense do not require a reply. *In re Marriage of Sreenan*, 81 Ill.App.3d 1025, 1028 (2nd Dist. 1980). Therefore, Nacme's 'estoppel' defense is factually and legally insufficient and should be dismissed and stricken with prejudice.

ii. Equitable Estoppel is Disfavored Against Public Bodies Generally, and is *Not Available* in Cases Involving a Public Right, Like This One.

Finally, Principles of estoppel do not usually apply to public bodies and the doctrine is not favored. *Hickey v. Illinois Central R.R. Co.*, 35 Ill.2d 427, 447 (1966); *American Nat. Bank & Trust Co. of Chicago v. Village of Arlington Heights*, 115 Ill.App.3d 342, 347 (1st Dist., 1983). Furthermore, it is a well-established rule of law that the doctrine of estoppel may not be asserted against the State in actions involving public rights. In *Tri-County Landfill v. Pollution Control Board*, the court held that estoppel would deny the People of Illinois their constitutional right to a healthful environment. 41 Ill.App.3d 249, 255 (2nd Dist. 1976); *see also Dean Foods Co. v. Pollution Control Bd.*, 143 Ill.App.3d 322, 338 (2nd Dist.1986) (doctrine of estoppel was not applicable because the protection of the environment and the people who inhabit it were involved). The Court of Appeals in *Tri-County Landfill* and *Dean Foods* reasoned that permitting estoppel would be permitting the denial of the public's right to a clean environment. *Id.* The right to a clean environment has been held to be a public right. *Pielet Bros. Trading v. Pollution Control Board*, 110 Ill.App.3d 752, 758 (5th Dist. 1982).

This case is an action involving a public right. The People are seeking an order requiring Nacme to take immediate action to correct the violations, including but not limited to obtain a CAAPP permit for its Facility. The Attorney General has brought this action to protect the People of the State of Illinois' right to a clean and healthy environment. Consequently, an 'estoppel' defense is unavailable to Nacme as a matter of law in this case and its 'estoppel' defense should be dismissed and striken with prejudice.

6. Respondent's 'No Economic Benefit' Defense is Factually and Legally Insufficient

Respondent's so-called 'no economic benefit' affirmative defense is directed at the remedy the People seek rather than at the claims they assert. Instead of attempting to defeat the People's allegations of operating a facility without a CAAPP permit, Respondents deny the allegations of the People's Complaint and argue that the civil penalties the People seek as a remedy "are applicable."

The Board has consistently held that a purported defense, which speaks to the imposition of a penalty and not the cause of action, is not an affirmative defense to that cause of action. *People of the People of Illinois v. Midwest Grain Products of Illinois, Inc.*, PCB 97-179 (August 21, 1997) (citing *People of the People of Illinois v. Douglas Furniture of California, Inc.*, PCB 97-133 (May 1, 1997). Affirmative defenses that concern factors in mitigation are not an appropriate affirmative defense to a claim that a violation has occurred. *People v. Texaco Refining and Marketing, Inc.* PCB 02-3, slip op. at 5 (Nov. 6, 2003)(citing *People v. Geon Co., Inc.*, PCB 97-62 (Oct. 2, 1997) and *People v. Midwest Grain Products of Illinois, Inc.*, PCB 97-179 (Aug. 21, 1997)).

Here, Respondent 'no economic benefit' defense does not assert matter by which the People's causes of action are defeated but denies an allegation of the People's Complaint that its state operating permit expired in 2005. *See Condon*, 210 Ill.App.3d at 709. Rather, it seeks to defeat the People's request for the relief it seeks, *i.e.* civil penalties and injunctive relief. Thus, it is factually and legally insufficient affirmative defense and should be dismissed and stricken.

Whether the People are entitled to a civil penalty is inconsequential to a finding of Respondent's liability. Respondent is misguided by its use of an alleged affirmative defense to argue matters that are at best mitigation factors for consideration when determining a reasonable

civil penalty after liability is determined. The affirmative defense must attack the basis of the opponents claim, not attack the relief requested from that claim. Since the Respondent's alleged affirmative defense does not defeat the People's underlying cause of action, the defense is legally insufficient and should be dismissed and stricken.

Additionally, this purported affirmative defense is nothing more than an argument by Respondent. If Respondent is found to be liable for the violations alleged, the People will argue that the imposition of a civil penalty is appropriate and would aid in enforcement of the Act by deterring Respondent and other similarly situated individuals and entities from committing future violations, as well as all of the other Section 42(h) factors, 415 ILCS 5/42(h) (2010), which the Respondent argue in their so-called affirmative defense. Respondent would argue that a penalty "need not be assessed even if violations are found." The issue is debatable.

The Second District Appellate Court has held that argumentative matters contained in an affirmative defense do not require a reply. *In re Marriage of Sreenan*, 81 Ill.App.3d 1025, 402 N.E.2d 348, 351 (2nd Dist. 1980); *Korleski v. Needham*, 77 Ill.App.2d 328, 222 N.E.2d 334, 339 (2nd Dist. 1966). Respondent's purported affirmative defense is an argument, to which the People have a counterargument. Under *Sreenan* and *Korleski*, it does not require a reply and is not a proper affirmative defense as a matter of law and should be dismissed and stricken.

Accordingly, Respondent's 'no economic benefit' defense is factually and legally insufficient and should be dismissed and stricken, with prejudice, as a matter of law.

7. **Respondent's No Harm to Environment Defense is Factually and Legally Insufficient**

Again, Respondent's so-called 'no harm to environment' affirmative defense is directed at the remedy the People seek rather than at the claims they assert. Instead of attempting to defeat the People's allegations that Nacme was a major source and was operating at its facility without a CAAPP permit, Respondents deny the allegations of the People's Complaint and argue that the civil penalties the People seek as a remedy are not applicable. *See Answer, p. 14.*

To the extent that Respondent asserts that the People's claim set forth in the People's Complaint does not warrant penalties as applicable, Plaintiff restates and incorporates by reference herein its motion to dismiss Respondent's 'no economic benefit' defense.

Accordingly, Respondent's 'no harm to environment' defense is factually and legally insufficient and should be dismissed and stricken, with prejudice, as a matter of law.

8. **Respondent's No Aid to Enforcement of the Act Defense is Factually and Legally Insufficient**

Once again, Respondent's so-called 'no aid to enforcement of the act' affirmative defense is directed at the remedy the People seek rather than at the claims they assert. Instead of attempting to defeat the People's allegations that Nacme was a major source and was operating at its facility without a CAAPP permit, Respondent denies the allegations of the People's Complaint and argues that the civil penalties the People seek as a remedy are not applicable.

To the extent that Respondent asserts that the People's claim set forth in the People's Complaint does not warrant penalties as applicable, Plaintiff restates and incorporates by reference herein its motion to dismiss Respondent's 'no aid to enforcement of the act' affirmative defense.

Accordingly, Respondent's 'no aid to enforcement of the act' defense is factually and legally insufficient and should be dismissed and stricken, with prejudice, as a matter of law.

9. Respondent's No Potential to Emit Defense is Factually and Legally Insufficient

Respondent's 'no potential to emit' affirmative defense pleads no exculpatory facts whatsoever. Instead, this 'affirmative defense' simply denies and argues facts alleged in the People's Complaint without providing any relevants facts, statute or caselaw to support it. Therefore, Nacme's 'no potential to emit' defense is factually and legally insufficient and should be dismissed and stricken.

It is well settled that a simple denial of a fact pleaded in the Complaint is not a sufficient affirmative defense. *Prywelle*r 282 Ill.App.3d at 907. An affirmative defense must do more than offer evidence to refute properly pleaded facts in a complaint. *See Id.* An affirmative defense must raise *new matter* that, if true, somehow defeats a complainant's claim. *See Condon*, 210 Ill.App.3d at 709. 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. *Womer Agency, Inc. v. Doyle*, 121 Ill. App.3d at 222.

First, Respondent's so-called 'no potential to emit' affirmative defense simply denies the People's allegation in its Complaint regarding the status of Nacme's 'potential to emit' above major source levels, and operating a major source without the requisite CAAPP permit. Second, Nacme fails to set forth a specific fact that will defeat the states claim but presents evidence to refute the People's Complaint and argues a legal conclusion about an irrelevant fact that its facility has a scrubber that prevents emissions above the level of a major source, which has no bearing on

measuring the facilities 'potential to emit' at the level of a major source, as defined by the Act and quoted in the Complaint. *See Answer, p. 14, See Complaint, p. 8.*

Third, by denying a claim of the People's Complaint that Nacme is not a major source, Nacme fails to admit the apparent right to the People's claim. Nacme cannot establish in the same defense that there is both an apparent right to a claim and no claim for which relief can be granted. Instead of attempting to defeat the People's allegations that Nacme was a major source and was operating at its facility without a CAAPP permit with new matter, Respondent denies the allegations of the People's Complaint and argues an irrelevant fact, which simply fails to admit the People's right to its claim. Accordingly, Nacme's 'no potential to emit' defense fails to meet the factual or legal standard of pleading required for an affirmative defense and should be dismissed stricken, with prejudice, as a matter of law.

Again, Respondent's 'no potential to emit' defense is purely argumentative. The Second District Appellate Court has held that argumentative matters contained in an affirmative defense do not require a reply. *In re Marriage of Sreenan*, 81 Ill.App.3d 1025, 1028, 402 N.E.2d 348, 351 (2nd Dist. 1980); *Korleski v. Needham*, 77 Ill.App.2d 328, 337, 222 N.E.2d 334, 339 (2nd Dist. 1966). As clearly demonstrated above, Respondent's purported affirmative defense is merely unsupported argument, to which the People, however, has a counterargument. Under *Sreenan* and *Korleski*, Respondent's purported defense does not require a reply and is not a proper affirmative defense as a matter of law. Therefore, Respondent's argument that the its Facility has 'no potential to emit' is an erroneous attempt at establishing an affirmative defense, and should be dismissed and stricken.

For these reasons, Respondent's 'no potential to emit' defense is factually and legally insufficient and should be dismissed and stricken, with prejudice, as a matter of law.

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.

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