

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

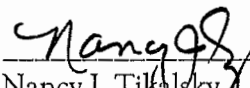
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| PEOPLE OF THE PEOPLE OF ILLINOIS, |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | PCB No. 13 - 12 |
| |) | (Enforcement - Air) |
| NACME STEEL PROCESSING, LLC, |) | |
| a Delaware limited liability corporation, |) | |
| |) | |
| Respondent.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

NOTICE OF ELECTRONIC FILING

To: See Attached Service List.

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board by electronic filing the following, PEOPLE'S OBJECTIONS TO NACME'S MOTION TO COMPEL DEPOSITIONS a true and correct copy of which is attached and hereby served upon you.

Respectfully submitted,



 Nancy J. Tikalsky
 Assistant Attorney General
 Office of the Illinois Attorney General
 Environmental Bureau
 69 West Washington Street, Suite 1800
 Chicago, Illinois 60602
 (312) 814-8567

Date: May 22, 2013

THIS FILING IS SUBMITTED ON RECYCLED PAPER

SERVICE LIST

Edward V. Walsh, III
ReedSmith LLP
10 South Wacker Drive
Chicago, Illinois 60606-7507

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
100 W. Randolph Street, Suite 11-500
Chicago, Illinois 60601

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CERTIFICATE OF SERVICE

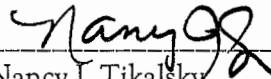
I, the undersigned attorney at law, hereby certify that on May 22, 2013, I served true and correct copies of Complainant's, PEOPLE'S OBJECTIONS TO NACME'S MOTION TO COMPEL DEPOSITIONS, upon the persons and by the methods as follows:

[First Class U.S. Mail]

[Electronic]

Edward V. Walsh, III
ReedSmith LLP
10 South Wacker Drive
Chicago, Illinois 60606-7507

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
100 W. Randolph Street, Suite 11-500
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**PEOPLE’S OBJECTIONS TO NACME’S MOTION
TO COMPEL DEPOSITIONS**

Complainant, PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois, hereby objects to Nacme’s Motion to Compel Depositions (“Motion”) and responds pursuant to Illinois Pollution Control Board (“Board”) Procedural Rule (“Board rules”) 101.500, 35 Ill. Adm. Code 101.500. For the reasons set forth below, Nacme has no right to demand that employees who reside or maintain an office address outside Cook County appear in Cook County for a witness deposition or that Ms. Julie Armitage, an attorney for Illinois EPA, be deposed on privileged communications. In support of its response the People state as follows:

INTRODUCTION

On September 5, 2012, the People of Illinois (“Complainant” or “People”), filed a one-count Complaint against NACME STEEL PROCESSING, LLC (“Respondent” or “Nacme”) alleging violations of the Illinois Environmental Protection Act, 415 ILCS 5/1 *et seq.* (“Act”) and the Illinois Pollution Control Board’s (“Board”) regulations thereunder (“Complaint”). The Complaint alleges that Respondents violated 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" from on or about April 16, 2002 through at least February 1, 2012.

On May 1, 2013, Nacme emailed a request to the People seeking deposition dates for three (3) employees of the Illinois Environmental Protection Agency ("Illinois EPA") ("Illinois EPA witnesses"), who reside or maintain an office address outside Cook County, to appear in Cook County for depositions. The People responded by email that under Board rules, all witnesses were subpoena witnesses and, therefore, subject to the Board rule that all witnesses were to be deposed where they reside or maintain an office address.

The People also responded by email that one of the Illinois EPA witnesses, Julie Armitage, an attorney at the Illinois EPA, would not be produced for a deposition. Nacme responded that it had received, through a Freedom of Information Act ("FOIA") request to Illinois EPA, documents that Ms. Armitage authored. After reviewing the documents produced by Nacme in response to the People's Document Production Requests received on April 30, 2013 and finding no documents authored by Ms. Armitage, the People requested that Nacme produce these documents or the specific bates stamp numbers of the claimed documents. The People have neither received any documents from Nacme authored by Ms. Armitage, nor the specific bates numbers of the documents Nacme claims Ms. Armitage authored.

ARGUMENTS

Nacme may not demand Cook County as a place for deposition for Illinois EPA employees who reside or maintain an office address outside of Cook County

The People restate Section II. ¶¶ 22 - 27 of its Motion to Compel Answer and Responses to Written Discovery and for Protective Order and/or Board's Supervision of Discovery, hereto attached in pertinent as Exhibit A, and further state that Board rule 101.622 (f) provides that "[U]nless the hearing officer orders otherwise, any witness subpoenaed for a deposition may be required to attend only in the county in which he resides or maintains an office address." 35 Ill. Adm. Code 101.622 (f). Furthermore, Section 101.622 (a) of the Board rules requires a subpoena to be issued by the Board's clerk for all deposition and hearing testimony witnesses. 35 Ill. Adm. Code 101.622 (a). Therefore, under the Board rules, all deposition witnesses are to be subpoenaed and deposed in the county in which the witness resides or maintains an office address, unlike circuit court civil actions.

Since the Illinois EPA witnesses Nacme requested to depose in Cook County reside or maintain an office address outside of Cook County, Nacme has no right to demand that the People produce the Illinois EPA witnesses for depositions in Cook County. Accordingly, the People respectfully request that the Hearing Officer enter an Order denying Nacme's Motion to compel witnesses who reside or have an office address outside of Cook County to be deposed in Cook County.

NACME may not depose Ms. Armitage under the attorney/client privilege without good cause shown

Board rule 101.616 (a) provides that “[A]ll relevant information and information calculated to lead to relevant information is discoverable, excluding those materials that would be protected from disclosure in the courts of this State pursuant to statute, Supreme Court Rules or common law, ...” 35 Ill. Adm. Code 101.616 (a). Board rule 101.616 (e) further provides that “[U]nless a privilege is asserted, it is not a ground for objection that the testimony of a deponent or person interrogated will be inadmissible at hearing, if the information sought is reasonably calculated to lead to relevant information.”

The Supreme Court rules provide that “[A]ll matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure.” Illinois Supreme Court Rule 201(b)(2). In light of these rules, discovery does have some limits on it. The taking of depositions is not meant to be an unfettered process, there are limits.

The Complaint alleges that the Nacme violated certain provisions of the Act when it operated as a “major source” from on or about April 2002 without a Clean Air Act Program Permit (“CAAPP”). Nacme has argued in this case that the timeliness of bringing an action against Nacme is a defense in this action, and hence Nacme is seeking to obtain information on the enforcement process utilized by the Illinois EPA when making a decision to refer a matter to the Illinois Attorney General for prosecution.

This subpoena for deposition indicates that Nacme seeks to depose Ms. Julie Armitage. Ms. Armitage is employed by the Illinois EPA and is an attorney with the Illinois EPA Division of Legal Counsel (“DLC”). As an attorney with the Illinois EPA,

Ms. Armitage provides legal counsel to employees at the Illinois EPA. Any and all relevant questions which would be posed by Nacme to Ms. Armitage would be protected by the attorney/client privilege between her as an attorney with Illinois EPA and Illinois EPA employees, and would be prohibited by Illinois Supreme Court 201(b)(2).

In its letter dated May 7, 2013, Nacme claims that it has provided the People with approximately 3,000 pages of documents, wherein 440 of these documents were IEPA FOIA documents that Nacme had obtained ("FOIA documents"). Nacme claims that the FOIA documents contained documents for which Ms. Armitage authored or was a recipient. First, upon reviewing the documents produced by Nacme, including but not limited to the FOIA documents, the People have not found a single document authored by Ms. Armitage. As for documents for which Ms. Armitage was a "recipient", there are innumerable documents containing Ms. Armitage's initials approving a step of the enforcement process conducted pursuant to her duties as an attorney with the Illinois EPA DLC. Second, the People informed Nacme that it could not find any documents authored by Ms. Armitage and requested that Nacme either produce the documents or the specific bate stamp numbers for the documents it was referencing. To date, Nacme has failed to produce either the documents or the specific bate stamp numbers of the documents referenced.

Therefore, the People respectfully request the Hearing Officer enter an Order denying Nacme's Motion to compel the deposition of Ms. Julie Armitage.

Moreover, it appears that Nacme is seeking to depose individuals with knowledge of activities and information prior to April 2002, the initiation of the violations alleged in the Complaint against Nacme. First, to the extent this inquiry seeks

to gather information about the enforcement processes of the Illinois EPA it is again protected by attorney/client privilege and this line of inquiry is barred.

Second, Illinois Supreme Court Rule 201(b)(1) places a relevancy limit on discovery. Any inquiry into the permitting history of Nacme prior to the stack test conducted in April 2002 by Nacme, which was the basis of determining Nacme to be a “major source”, is not relevant to the violations alleged in the Complaint. Finally, if a deposition is permitted to inquire into the non-privileged areas, the person most knowledgeable with regard to this air permitting matter is Mr. Valeriy Brodsky, Environmental Protection Engineer with Bureau of Air with the Illinois EPA. The People are working with Nacme to set a date and place for his deposition.


Accordingly, the People respectfully request that the Hearing Officer enter an Order denying Nacme’s Motion to Compel any witness on his or her knowledge of Nacme’s permitting history prior to April 2002.

CONCLUSION

For the foregoing reasons, the State requests that Nacme’s Motion to Compel Depositions be denied pursuant to Section 101.502 of the Board rules, 35 Ill. Adm. Code 101.502 and bar Nacme from deposing any witness on his or her knowledge of Nacme’s permitting history prior to April 2002.

WHEREFORE, the Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that this Hearing Officer enter an order denying Nacme's Motion to Compel Depositions, barring Nacme from deposing any witness on his or her knowledge of Nacme's permitting history prior to April 2002, and granting any other relief it deems appropriate and just.

PEOPLE OF THE STATE OF ILLINOIS *ex rel.* LISA MADIGAN, Attorney General of State of Illinois,

By: 
NANCY J. TIKALSKY
Assistant Attorney General
Environmental Bureau
69 West Washington Street, Suite 1800
Chicago, Illinois 60602
(312) 814-8567



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**PEOPLE’S MOTION TO COMPEL ANSWER AND RESPONSES TO WRITTEN
DISCOVERY AND FOR PROTECTIVE ORDER AND/OR
BOARD’S SUPERVISION OF DISCOVERY**

NOW COMES the Complainant, PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois (“People” or “Complainant”), and pursuant to Illinois Pollution Control Board (“Board”) Procedural Rule 101.616 (d) and 219, 35 Ill. Adm. Code 101.616(d) and 219, moves the Board for an order compelling the Respondent, NACME STEEL PROCESSING, LLC, (“NACME” or “Respondent”) to respond to Complainant’s outstanding discovery requests, to complete its witness disclosure, and to conduct depositions according to the Board procedural rules; and for the Board to grant a protective order and/or Board’s supervision of discovery. In support thereof, the Complainant states and alleges as follows:

the Complainant has been and will continue to be put in a position of disadvantage by Respondent's failure to comply with the Board's order, as Complainant cannot adequately prepare for fact depositions until Respondent's complete responses are provided.

21. Accordingly, Respondent has placed the People at a disadvantage by failing to comply with the Hearing Officer's order dated April 23, 2013 to provide adequate witness disclosures in preparation for oral discovery. Therefore, the People are entitled to a Protective Order and/or the Board's Supervision of Discovery.

II. Respondent has placed the People at a disadvantage by refusing to conduct depositions in accordance with Board procedural rules and the People are, therefore, entitled to a Protective Order and/or the Board's Supervision of Discovery.

22. On May 1, 2013, 1:14 pm, Respondent emailed Complainant for its first request for mid- to late- May dates for the depositions of three (3) named Illinois EPA employees on Nacme's Witness Disclosure to be held in Chicago. On May 1, 2013, 5:07 pm, the People responded that pursuant to the Board procedural rule, witnesses are to be deposed in the county where maintain an office address. All named Illinois EPA witnesses in Nacme's Witness Disclosure have an employment address in Springfield, IL. See email correspondence hereto attached as Exhibit F.

23. On May 2, 2013, Complainant received a 201k letter from Respondent regarding discovery disputes on place and notice of depositions ("Nacme's Deposition 201k letter"). In Nacme's Deposition 201k letter, Respondent declared that Illinois EPA witnesses to be party witnesses and as such that the Board procedural rules on subpoenaing witnesses and notice requirements. See Nacme's Deposition 201k letter hereto attached as Exhibit G.

24. On May 3, 2013, the People sent a 201k letter by email attachment at 11:52 am, which responded to Complainant's Nacme's Deposition 201k letter. Complainant that all witnesses in a Board enforcement matter are subject to the Board's procedural rules for subpoenas and depositions or, if agreement between the parties on place and time, a Notice of Deposition was acceptable to Complainant. In addition, the People explained that neither state agencies nor their employees are Complainant's in matters before the Board or Plaintiff's in Court and that the People of the State of Illinois is the Complainant in this matter. See People's 201k letter hereto attached as Exhibit C.

25. On May 3, 2013, 2:27 pm, Respondent issued Notice of Depositions of Illinois EPA witnesses set for May 10, 2013, pursuant to Supreme Court Rule 203 instead of Board Procedural Rule 101.612 that applies to depositions in Board hearings without an agreement on date and place made between Complainant and Respondent. Complainant responded by email that a subpoena and 10 days notice is required by the Board's procedural rules. Respondent response refuses to comply with the Board's procedural rules on depositions. See May 3, 2013, email correspondence hereto attached as Exhibit G.

26. The Board's Procedural Rules 101.616 (a), (b), and (f), 35 Ill. Admin. Code 101.616 (a), (b), and (f) read, in pertinent part, as follows:

a) Upon request by any party to a contested proceeding, the Clerk will issue subpoenas for the attendance of witnesses at a hearing or deposition. Subpoena forms are available at the Board's Chicago office. The person requesting the subpoena is responsible for completing the subpoena and serving it upon the witness.

b) Service of the subpoena on the witness must be completed no later than 10 days before the date of the required appearance. A copy of the subpoena must be filed with the Clerk and served upon the hearing officer within 7 days after service upon the witness. Failure to serve both the Clerk and the hearing

officer will render the subpoena null and void. Service and filing must be in accordance with Subpart C of this Part.

* * *

f) Unless the hearing officer orders otherwise, any witness subpoenaed for a deposition may be required to attend only in the county in which he resides or maintains an office address. ...

27. It is clear that these Board procedural rules directly address how Respondent is to request the attendance of any witness at a deposition, the notice requirements for serving a subpoena, and the place of the taking of a deposition of witnesses. Nowhere in these rules does the Board distinguish between party or non-party witnesses but, rather, these Board procedural rules speak to all witnesses in a Board enforcement action.

28. As of the date of filing of this Motion, Respondent is issuing Notices of Depositions of Illinois EPA employees without adequate notice or subpoena in direct contravention to the Board's procedural rules 101.616 (a) and (b), 35 Ill. Admin. Code 101.616 (a) and (b).

29. As of the date of filing this Motion, Respondent has stated it will file a Motion to Compel the deposition of other Illinois EPA employees who have an office address in Springfield, Illinois to be deposed in Chicago in direct contravention to the Board's procedural rule 101.616 (f), 35 Ill. Admin. Code 101.616 (f).

30. As of the date of filing of this Motion, Respondent continues to refuse to comply with the Board's procedural rules. Complainant, after reasonable attempts at personal consultation and attempts to resolve the above discovery differences in the short period of time Respondent has allowed for discussion, has been unable to reach an accord with Respondent.