



**LEGAL STANDARD**

Summary judgment is a “drastic means of disposing of litigation” that “should be allowed only when the right of the moving party is clear and free from doubt.” Adams v. N.Ill. Gas Co., 211 Ill. 2d 32, 43 (2004); AYH Holdings v. Avreco, Inc., 357 Ill. App. 3d 17, 31 (1<sup>st</sup> Dist. 2005). It “must be awarded with caution to avoid preempting a litigant’s right to . . . fully present the factual basis of a case where a material dispute may exist.” Schrager v. N. Cmty. Bank, 328 Ill. App. 3d 696, 703 (1<sup>st</sup> Dist. 2002) (citation omitted). It should be granted only where the “pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” 735 ILCS 5/2-1005(c).

In determining whether a genuine dispute of material fact exists, “a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent.” Gilbert v. Sycamore Mun. Hosp., 156 Ill. 2d 511, 518 (1993). To that end, “[a]ll reasonable inferences must be drawn in favor of the party opposing the summary judgment motion.” Taliaferro v. One Grand Place Venture, 256 Ill. App. 3d 429, 433 (1<sup>st</sup> Dist. 1993). Where “the facts allow for more than one conclusion or inference, including one unfavorable to the moving party, the motion for summary judgment should be denied.” Diamond Headache Clinic, Ltd. V. Loeber Motors, Inc., 172 Ill. App. 3d 364, 370 (1<sup>st</sup> Dist. 1988). Thus, a “triable issue precluding summary judgment exists where . . . reasonable persons might draw different inferences from the undisputed facts.” Adams, 211 Ill. 2d at 43.

The movant bears the burden of persuasion on a motion for summary judgment Bourgonje v. Machev, 362 Ill. App. 3d 984, 994 (1<sup>st</sup> Dist. 2005). The non-movant “need not prove his case at this preliminary stage.” Schrager, 328 Ill. App. 3d at 708 (citation omitted)

(“The purpose of summary judgment is not to try an issue of fact but, rather, to determine whether a triable issue of fact exists.”). A “court cannot make credibility determinations or weigh evidence in deciding a summary judgment motions.” Merca v. Rhodes, 2011 IL App (1<sup>st</sup>) 102234

## **BACKGROUND**

### A. The State's Claim

The State alleges that NACME failed to obtain timely a proper air emissions permit for its steel pickling facility. It asserts, based solely on its review in 2005 of the results of a 2002 “stack test” that NACME is a major source for HCL and was required to obtain a Clean Air Act Permit Program (“CAAPP”) permit or in lieu thereof, a FESOP. (State’s Motion for Summary Judgment, p. 16; hereafter “MSJ p. \_\_\_”)

The State does not allege that NACME has ever emitted pollutants above major source thresholds or above the permitted levels contained in any issued or pending permit. (See, also, Britt Wenzel Affidavit, Exhibit 1; hereafter “Wenzel Aff, Ex. \_\_\_”; SOF ¶ 23)

The operative allegations in the State’s complaint are found in paragraphs 36 and 37, to wit:

36. Beginning on at least April 16, 2002, or on a date best known to Nacme, Nacme had changed its operations resulting in a PTE of a single HAP, HCL, of greater than 10 tpy, the major source threshold. Accordingly, the Facility is a “major source” as that term is defined in Section 39.5(2) (c) of the Act, 415 ILCS 5/39.5(2) (c) (2010).

37. As a major source since at least April 16, 2002, or a date better known to Nacme, Naeme was required to apply for and submit an application to the Illinois EPA for a CAAPP or, alternatively, a FESOP, at least 180 days before commencing operation in accordance with the change in operation at the Facility. By operating a major source without timely submitting an application within at least 180 days before commencing operation as a major source, Nacme violated Section 39.5(5) (x) of the Act, 415 ILCS 5/39.5(5) (x) (2010), and, thereby, violated Sections 39.5 (6) (b) and 9(b) of the Act, 415 ILCS5/39.5 (6) (b) and 9(b) (2010).

B. NACME's Relevant Permit History

The State conveniently starts its version of events in April 2002, although it knows that crucial events about which the IEPA had notice long preceded that date. (MSJ p. 1) IEPA permit writer Valery Brodsky has handled NACME permitting decisions since 2000. (SOF ¶ 2) Mr. Brodsky admits that he conducted little analysis in processing NACME's 2000 state operating permit renewal ("SOP") application. (SOF ¶ 5) On October 25, 2000 NACME was issued a lifetime operating permit for its facility with a notation that because NACME was a "support facility" to a nearby steel plant, and not because NACME itself had a potential to emit pollutants above major source thresholds, it was required to obtain a CAAPP permit or in lieu of that, a FESOP. NACME disagreed and appealed the "support facility" permit condition to the Illinois Pollution Control Board in proceeding PCB 01-85. (MSJ p. 7)

As a result of NACME's appeal the IEPA withdrew the support facility condition and on February 8, 2001 NACME was issued SOP No. 96020074 with a stated expiration date of October 25, 2005 (the "SOP"; MSJ p. 7; Valery Brodsky Deposition, Ex. 2, p.107, lines 18-24, (hereafter, "Brodsky Tr. 107:18-24"); 108:1-16;109:24;110:1-7)

During the "support facility" dispute, records produced in this litigation from the IEPA's files reveal that IEPA attorney Julie Armitage stated at the time: "Ask Hank for the concentration level that NACME is committed to...*as we should craft an alternative theory if our major source [support] theory flops on us.*" (Ex. 3; emphasis supplied; SOF ¶ 17)

It is evident from Ms. Armitage's comments, and confirmed by Mr. Brodsky in his deposition, that during this time IEPA was looking closely at NACME's facility in order to determine whether or not it required a major source permit. (SOF ¶ 8; Brodsky Tr. 100: 9-14) Moreover, prior to that time, and no later than February 2000, (and before the support facility

dispute), Mr. Brodsky *was on notice* from 1997 stack test data that he had reviewed and which was in his file that NACME's HCL PTE was evidently above 10 tpy.<sup>1</sup> (SOF ¶ 9)

page 135

16 Q. Okay. And it also makes a reference  
17 to the 1997 stack test, doesn't it?

18 A. Yeah, just to compare calculated --

19 Q. Well, could you just answer my  
20 question?

21 A. Yes.

22 Q. And it says, "This number is  
23 consistent with actual measured uncontrolled  
24 emission in the previous stack test performed on  
page 136

1 5-7-97"; right?

2 A. Yes.

3 Q. So isn't it correct that -- and it  
4 says, "and submitted with the 2-2000  
5 application"; right?

6 A. Yes.

7 Q. So, sir, isn't it correct that in  
8 2000, February of 2000, you knew what the  
9 uncontrolled -- measured uncontrolled emissions  
10 at this facility were, didn't you?

11 A. Yes.

12 Q. And from that you could have readily  
13 calculated what the potential to emit of the  
14 facility was, couldn't you?

15 A. Yes.

16 Q. You didn't do that, did you?

17 A. No.

page 138

6 Q. (By Mr. Walsh) All right. So let's  
7 back up for a moment. In February of 2000, did  
8 you know that the NACME facility was a major  
9 source for hazardous air pollutants?

10 A. Potentially, yes.

11 Q. But you did not require them at that  
12 time to get a Clean Air Act Permit Program permit  
13 or a FESOP; right?

14 A. Yes.

---

<sup>1</sup> It is axiomatic that the State bears the burden of proof on all elements of its claims, including establishing NACME's PTE. NACME cites the 1997 stack test as proving notice to the State of NACME's apparent major source status in 2000 based on the 1997 data, but does not admit the validity of that data which would be the State's burden, not NACME's

(SOF ¶ 12)

IEPA did not however insist at that time that NACME obtain a CAAPP or FESOP and instead issued the SOP. Mr. Brodsky admits that at the time of NACME's permit renewal application in 2000 it was IEPA's practice to tell an applicant where data indicates that a source has emissions above major source thresholds that a state operating permit application is misplaced and instead a CAAPP or FESOP application is required, but that did not happen here:

*page 72*

23 *Q. Well, let's assume for a moment that*  
24 *the Exhibit 4 had stated that the emissions were*  
*page 73*

1 *major, okay, out the stack. If it had indicated*  
2 *that it was more than ten tons per year, you*  
3 *would have then changed tracks; right? It would*  
4 *have been on a different track. You wouldn't*  
5 *have kept looking at it as a state operating*  
6 *permit application. You would have said, "This*  
7 *is the wrong permit application. You need a*  
8 *CAAPP permit or a FESOP because you're a major*  
9 *source."*

10 *A. Yes. You would tell the company, but*  
11 *I cannot change this application.*

(SOF ¶ 10)

At the time of NACME's 2000 application Mr. Brodsky was handling "several dozen" other permit applications, unassisted, and never suggested to NACME that it needed a CAAPP or FESOP in lieu of a SOP. (SOF ¶ 11) Notwithstanding his receipt and review of the 1997 stack test data, and his later involvement in the "support theory" dispute, Mr. Brodsky issued both the October 25, 2000 lifetime state operating permit and the February 8, 2001 SOP to NACME.

Mr. Brodsky testified that he made mistakes in his handling of NACME's SOP permit application but neither he nor his unit manager did anything to inform NACME or cure the error:

He further testified that he knew in February 2000 that NACME was potentially a major source of HCL but he neither insisted that NACME obtain a CAAPP nor did he or his unit manager advise NACME of the error and of the apparent need for a CAAPP until April 2005:

*page 138*

*1 And then USEPA corrected us that it  
2 was wrong understanding of their recent -- the  
3 most recent memo, and we started requiring FESOP  
4 application for sources for which just year ago  
5 we issued state permits.*

*6 Q. (By Mr. Walsh) All right. So let's  
7 back up for a moment. In February of 2000, did  
8 you know that the NACME facility was a major  
9 source for hazardous air pollutants?*

*10 A. Potentially, yes.*

*11 Q. But you did not require them at that  
12 time to get a Clean Air Act Permit Program permit  
13 or a FESOP; right?*

*14 A. Yes.*

*15 Q. And up until April of 2005, in fact,  
16 you never even mentioned that they may need such  
17 a permit; is that correct?*

*18 A. Yes. But we didn't have any  
19 correspondence with the company after 2002.*

*20 Q. Well, be that as it may --*

*21 A. Yes.*

*22 Q. -- between 2000 and 2002, you didn't  
23 mention it, did you?*

*24 A. No. At that time we were wrongly*

*page 139*

*1 continuing transition policy.*

*2 Q. Wrongly continuing the transition  
3 policy?*

*4 A. Yes.*

SOF ¶ 12

Mr. Brodsky admits that IEPA never told NACME of the mistakes made in NACME's permitting including using an expired EPA "transition policy" when it issued NACME its 2000

SOP:

Brodsky, Valeriy

page 141

11 O. Okay. Did you ever tell NACME that  
12 you were reviewing its permit applications under  
13 the USEPA's transition policy?

14 A. No.

15 O. You never said it verbally?

16 A. No.

17 O. You never said it in writing?

18 A. No.

19 O. Is there any document in your file  
20 that reflects that you were observing the  
21 transition policy with respect to NACME's  
22 facility?

23 A. I'm afraid no.

24 O. But you were?

page 142

1 A. Yes, we were following this policy  
2 but --

3 O. You were wrong in following that  
4 policy is what you're saying today?

5 A. For couple of years, yes.

11 O. All right. At the end of 2002 did  
12 you send any communication to NACME, saying, "Oh,  
13 by the way, we misinterpreted the regulations,  
14 and you" -- "we've given you the wrong kind of  
15 permit"?

16 A. No. Until this application, I  
17 believe.

Id.

NACME was not alone in the regulated community in being kept in the dark about

IEPA's permitting errors:

*Brodsky, Valeriy*  
page 143

17 O. (By Mr. Walsh) So is it correct to  
18 say the regulated community in Illinois was  
19 pretty much in the dark about EPA's -- or IEPA's  
20 mistake on the transition policy?

21 A. Unless they checked it on themselves,  
22 yes.



23 Q. Or unless they suddenly received a  
24 notice of violation saying they had the wrong  
page 144  
1 kind of permit, should have had a Clean Air Act  
2 Permit Program permit all along?  
3 A. I am not aware about such notice of  
4 violation, but when they applied for permit  
5 renewal revision in similar situations, they  
6 receive notice of incompleteness with explanation  
7 why they should apply for FESOP.

Id.

Mr. Brodsky's supervisor, Bob Bernoteit, also believed that Mr. Brodsky made a mistake issuing a SOP to NACME in 2000 at time when it was on notice from the 1997 stack test data that NACME's PTE was apparently greater than 10 tpy HCL:

*Bernoteit, Robert*

*page 51*

12 *Q. I'll show you that in a minute here, but my*  
13 *question is did you know that there was a 1997 stack*  
14 *test? You said you remember seeing this and you read*  
15 *it at the time. Does that suggest you knew there was*  
16 *a 1997 stack test out there somewhere?*

17 *A. It's stated here in the calculation sheet.*

18 *Q. Right. So did you know there was a 1997*  
19 *stack test in the file?*

20 *A. I read that eight and a half years ago.*

21 *Q. I'm saying at the time you read it you would*  
22 *have been alerted to the fact there was a 1997 stack*  
23 *test in the file. Right?*

24 *A. At the time I read it, yes.*

*page 52*

1 *Q. And Valeriy was saying that consistent with*  
2 *the 1997 test, the 2000 test is showing a PTE*  
3 *exceeding 10 tons a year. Right?*

4 *A. That's what it appears to say, yes.*

5 *Q. So my question is if the IEPA, if you and*  
6 *Valeriy knew that the source was over 10 tons per*  
7 *year major source, why was it issued a state*  
8 *operating permit in February of 2001?*

9 *A. I don't know.*

10 *Q. Was it a mistake?*

11 *A. All I know is if we knew in 2000 that the*

12 *source had potential emissions greater than 10 tons*  
13 *HCL we should not have issued a lifetime permit to*  
14 *them.*

(SOF ¶ 13)

Although IEPA knew of these permitting errors, it never informed NACME and instead waited until April 2005, when it issued a Notice of Incompleteness in response to NACME's SOP renewal application, to disingenuously suggest to NACME that it may need a CAAPP permit or FESOP. (Ex. 4; State Answer to Request to Admit #5, Ex. 8) In fact, at that time IEPA was already on notice as of February 2000 of NACME's evident PTE and of IEPA's errors in applying the EPA's expired transition policy during the permitting of NACME's facility.

Unaware in 2005 that the IEPA had earlier hidden material facts about its mistakes in the permitting of NACME's facility, NACME followed the IEPA's belated directive in the April 2005 Notice of Incompleteness that it apply for a FESOP with attendant time and expense redundant of what it already expended in acquiring the SOPs. NACME has had a FESOP application pending since 2005. (SOF ¶ 20) NACME's FESOP application was deemed complete in an IEPA letter dated December 6, 2005 (Ex. 5) It was not until April 26, 2012 that IEPA issued a draft FESOP for the facility after many discussions, meetings, requests for information, and the like, during which time at no point did IEPA reveal its prior permitting errors or prior knowledge of NACME's evident PTE. (SOF ¶ 9; MSJ pp. 9-13) Although the FESOP was published for public comment, and NACME was the only commenter, the IEPA has not issued the FESOP in final form solely because it fears that NACME will appeal a condition of the permit. (SOF ¶ 22)

**ARGUMENT**

A. NACME's State Operating Permit is Federally Enforceable Rendering the State's Claim Moot

In law NACME' SOP is a federally enforceable permit, as that phrase is defined in the Illinois Environmental Protection Act (the "Act") rendering the State's lawsuit moot.

Under the Act, "*potential to emit means the maximum capacity of a stationary source to emit any air pollutant under its physical and operational design. Any physical or operational limitation on the capacity of a source to emit an air pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted....shall be treated as part of its design if the limitation is enforceable by USEPA*".

415 ILCS 5/39.5 (emphasis supplied) Under the Illinois Environmental Protection Act "*federally enforceable means enforceable by USEPA.*" Id.

The USEPA, which delegates its CAAPP authority to Illinois, considers *any* permit issued under a state permit program meeting EPA's state implementation plan requirements, as does Illinois' permit program, to be federally enforceable.<sup>2</sup> See, *United States v East Kentucky Power Cooperative*, 498 F. Supp. 995 (E.Dist. Ky 2007); *United States v Louisiana- Pacific Corporation*, 682 F. Supp. 1141 (D. Colo 1988) (collecting cases)

Moreover, through its various actions described above the IEPA has admitted that NACME's SOP has remained in effect up to and including the issuance of the draft FESOP on April 26, 2012. (SOF ¶ 25; group Ex. 6). It also, admits as shown above, that it knew of NACME's evident PTE when it issued the SOP, the terms and conditions of which limit NACME to emissions below major source thresholds, and which NACME never exceeded (SOF ¶ 24.

---

<sup>2</sup> Illinois' State Implementation Plan was approved on May 31, 1972 (37 FR 10862)

Indeed, the State has sought to enforce NACME's SOP on more than one occasion and as recently as June 2011. (*Id.*) In addition during periodic inspections of NACME's facility the IEPA has always used the SOP's terms and conditions for measuring NACME's compliance, even following the stated expiration date of the SOP. *Id.*

Because NACME's SOP which has remained in effect and which contains limitations on emissions and other aspects of NACME's operations *is* federally enforceable by the EPA the State's claim that NACME failed to secure a federally enforceable air permit is moot and in any event wholly negated. At the least, there are material questions of fact that arise out of the States' assertion from time to time that NACME's SOP is valid and enforceable so as to preclude summary judgment on the State's simultaneous claim that NACME failed to secure a FESOP.

B. *The State Fails to Meet its Burden of Proof*

(i) *The State Offers no Admissible Evidence of NACME's PTE*

Entirely missing from the State's filing is any legal or technical evidentiary support for its burden of showing that NACME had the potential to emit ("PTE") pollutants above major source thresholds. The State merely proclaims the fact without reference to any technical benchmark and without any expert witness support as to how a facility's PTE is determined within the meaning of the Act.

Worse for the State, Mr. Brodsky outright admits *that in 2002* he had determined, based on the 2002 stack test report, that NACME was *not a major source*, directly contradicting the State's claim. (SOF ¶ 16; MSJ p 2)

20 Q. *And -- okay.*

21 A. *And not enough major source base*

22 *on being --*

23 COURT REPORTER: *I'm sorry?*

24 A. *Being major source. This NESHAP*

*page 121*

1 regulation is applicable to major sources which  
2 actually meet more than ten tons of hazardous air  
3 pollutant per year. NACME emission was below ten  
4 tons.

5 Q. (By Mr. Walsh) It was below ten?

6 A. Yes. So we didn't treat them as a  
7 subject.

8 Q. Okay. How do you know they were  
9 below ten?

10 A. Based on previous stack test.

11 Q. Which ones?

12 A. There were several stack tests, and I  
13 remember in 2002 there was stack test. I don't  
14 remember for what reason. Then we requested this  
15 stack test in this construction permit, and all  
16 stack test shows that they are not major source.

17 Q. And one of those stack tests was the  
18 1997 stack test?

19 A. Yes, starting from '97. Then they  
20 repeated. I don't remember in 2002 when they  
21 resumed their operations. There were several  
22 stack tests which all indicated that they are not  
23 actually major source.

Mr. Brodsky's prior testimony completely contradicts his affidavit attached in support of the State's MSJ where he relies on *the very same* 2002 stack test report to reach an opposite conclusion. (Ex. 6)

(ii) *Mr. Brodsky was not Disclosed as an Expert and is Unqualified.*

Mr. Brodsky was disclosed merely as a Rule 213 (f)(1) witness whose disclosure revealed nothing about his calculation of PTE or the interpretation of stack tests. (Ex. 7) Mr. Brodsky's affidavit presents a previously undisclosed opinion with absolutely no reference to any technical or legal benchmark for how a facility's PTE is determined. Further, in his deposition he denied any expertise in the review of stack tests, noting that the permit section (his section) does not even receive them but instead they are sent to the compliance section for review by a specialist, not by Mr. Brodsky. (SOF ¶ 17) He admits however that EPA Method 26 is the proper method

for measuring emissions for purposes of PTE. He makes no mention of this method in his affidavit or how he concluded that the 2002 stack test was bona fide or met the Method 26 standards. (SOF ¶ 18). He nonetheless offers his opinion based on calculations he performed using data from the 2002 stack test that purports to show that NACME has a PTE above major source thresholds.

In fact Mr. Brodsky is hopelessly confused on how a facility's PTE is determined. In deposition he testified that PTE is determined "at the stack", or in other words, after air pollution devices like NACME's scrubber. (SOF ¶ 16) The State has presented no evidence that PTE measured "at the stack" ever exceeded 10 tpy. Nor has the State presented any evidence establishing NACME's PTE from the measurement of Nacme's emissions taken before its scrubber, at "the inlet" although Mr. Brodsky is familiar with the concept. (SOF ¶ 15)

(iii) *The 2002 Stack Tests Results are Anomalous.*

Finally, further weakening the State's case, in addition to Mr. Brodsky's flip-flop on the meaning of the 2002 stack test, is the fact that the 2002 test results were wholly anomalous. The 2002 results are completely at odds with emissions tests conducted in 2006 and 2011, and by as much as a factor of 20. NACME's consultant Britt Wenzel concludes that the 2002 results do not accurately reflect NACME's normal operating condition. (Wenzel Aff., Ex. 1).

In sum, the State wholly fails to meet its burden of proof. At the least the numerous genuine issues of material fact outlined above precludes summary judgment for the State.

C. *The Evidence Supports NACME's Affirmative Defense that the State Knowingly Waived its Claim.*

Waiver applies when a party intentionally relinquishes a known right or his conduct warrants an inference to relinquish the right. *People v Peabody Coal*, 2003 WL 21405850

(Ill.Pol.Control.Bd. 2003); citing *Hartford Accident and Indemnity Co. v. D.F. Bast, Inc.*, 56 Ill.App. 3d 960, 962, 372 N.E.2d 829, 831 (1st Dist. 1977).

As noted, Mr. Brodsky admits that when he issued the SOP he was on notice since at least February 2000 that NACME's PTE was apparently greater than 10 tpy HCL based on the 1997 stack test data showing results of the measurement of uncontrolled emissions at the inlet to NACME's scrubber. (SOF ¶ 9)

As outlined above, the IEPA nonetheless issued, now admittedly in error, NACME's SOP on May 15, 2000 and a revised SOP on February 8, 2001, instead of then insisting that NACME apply for a FESOP. (SOF ¶ 12) Mr. Brodsky admits that in doing this he misapplied a then expired EPA "transition policy" for calculating emissions which gave certain major sources "a pass" from meeting Title V requirements. He further admits that he never told NACME of his mistake. Instead, NACME in good faith went to the time and expense of permitting its facility through the SOP procedures set up by IEPA, although the IEPA knew that those procedures were being misapplied, and then was required to go through redundant permitting procedures for a FESOP which it could have done in the first place back in 2000. In 2005 NACME was unaware that IEPA had already concluded that a FESOP was necessary, and not just optional depending on the results of an additional stack test, also conducted at NACME's expense. (MSJ p 13)

In fact it was not until 2005 when NACME applied to renew its SOP that IEPA even suggested that a FESOP may be required. (SOF ¶ 19). Brodsky's actions in issuing the SOP and failing to take any corrective, or enforcement, steps demonstrates a knowing waiver by IEPA of the claim it now asserts or at the least his conduct warrants an inference of waiver. In any event, there are numerous material issues of fact here bearing on the application of the doctrine of waiver so as to preclude summary judgment at this stage of the proceedings.

D. *The Evidence Supports NACME's Affirmative Defense of Laches*

As this Board noted in its June 6, 2013 order:

*Although the Board recognizes that applying laches to public bodies is disfavored, the Illinois Supreme Court held in Hickey v. Illinois Central Railroad Co., 35 Ill.2d 427, 220 N.E.2d 415 (1966) that the doctrine can apply to governmental bodies under compelling circumstances. Id. at 13*

The compelling circumstances noted in *Hickey* are abundant here. Admissible evidence shows that the IEPA was on notice in February 2000 that data showed NACME to evidently be a “major source”. Disregarding this notice IEPA failed not only to assert its current claim until the filing of this lawsuit on September 5, 2012, but affirmatively acted in issuing SOP’s to NACME in the interim. IEPA not only admits that its September 20, 2005 Notice of Incompleteness is the first time that it notified NACME that it’s evident PTE was greater than 10tpy but also that it took active steps in the interim, issuing SOP’s, that are wholly inconsistent with an intent to press the claim it now asserts. (SOF ¶ 6; MSJ p 11)

The IEPA closely scrutinized NACME’s operations more than once over the years in order to determine whether or not it was a major source, but failed each time to assert the claim it now belatedly asserts, even after notice of the 1997 test data, and all the while knowing of its SOP permitting errors. As early as August 29, 2000 IEPA threatened enforcement action against NACME in a notice of violation (“NOV”) arguing that NACME was a major source because it was a “support” facility to the nearby Acme Steel plant.<sup>3</sup> But it failed to assert any claim then about NACME’s PTE notwithstanding Brodsky’s knowledge of the 1997 stack test results and his admitted mistakes in applying EPA’s expired transition policy. Id.

---

<sup>3</sup> NACME appealed the Nov in PCS 01-85



In fact, the evidence shows that IEPA attorney Julie Armitage even asked IEPA staff in an e-mail copied to Mr. Brodsky to look into NACME's emission levels to see if there was an alternative enforcement theory to the "support facility" theory in the event that theory "flopped". (SOF ¶ 7; Ex. 3) IEPA failed, however, despite Mr. Brodsky's knowledge of the 1997 data and his admitted mistakes in permitting NACME, to assert any alleged violation or require a different permit path based on PTE. Indeed, following the withdrawal of its "support facility" NOV the IEPA issued to NACME a revised SOP on February 8, 2001. (MSJ p 7) NACME could have avoided the time and expense of the support facility appeal if it had been advised by IEPA that it required a FESOP on the basis of being an evident major source based on the 1997 data. But IEPA failed to follow that permit path and instead issued the SOP.

The application of laches to these facts is also supported by *People v Progressive Land Developers*, 216 Ill. App. 3d 73 (Ill. App. 1<sup>st</sup> 1991) There the court stated:

*Laches is an equitable principle which operates to bar an action where, because of the plaintiff's unreasonable delay in bringing suit, the defendant has been misled or prejudiced or has taken a course different from what he otherwise would have taken [citations omitted] To establish unreasonable delay, the [party claiming laches] must show that [the other party] failed to seek prompt redress after acquiring knowledge of the fact supporting his claim. (emphasis supplied)*

Id. at 81

In *Progressive Land Development*, despite denials that the plaintiff did not know of the basis for its claim until later, the evidence showed, like here, that the plaintiff had in fact been on notice of the facts giving rise to its claim for many years. Id. at 82. Here, the State was on notice no later than February 2000 of the facts giving rise to the claim it now asserts - years after the fact.

Finally, in rejecting the attorney general's argument that laches is barred where the state is discharging a governmental action, the *Progressive Land Development* court cites *Hickey* as follows:

*[T]he question to be answered is whether the reasons underlying the reluctance to extend the doctrine of estoppel and laches to governmental bodies outweighs the mischief which may result from [the State's conduct] Id.*

Where, as here, the IEPA is on notice of an evident claim, is aware of errors in the issuance of a permits, which NACME relied on and expended time and money to obtain, and the IEPA does nothing to correct its errors or advise NACME of them but rather waits to assert a stealth claim, the usual deference given to the IEPA when acting in a governmental capacity is outweighed by the mischief it has created.

In sum, the compelling circumstances noted by *Hickey* are more than evident here and on consideration of all these facts the State's claim should be barred by the equitable doctrine of laches. At the least, there are material issues of fact bearing on application of this doctrine here so as to preclude summary judgment at this stage of the proceedings.

### **CONCLUSION**

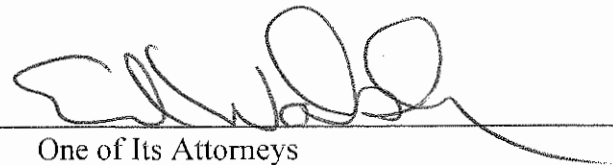
In law, NACME holds a federally enforceable air permit mooting the State's claim. In any event, genuine issues of material fact pervade this matter including on the State's burden of proof and on NACME's affirmative defenses which should be weighed, along with the credibility of witnesses, by the Board at hearing.

Respectfully Submitted,

**NACME STEEL PROCESSING, L.L.C.,**

**Respondent**

By: \_\_\_\_\_



One of Its Attorneys

Edward V. Walsh, III  
Reed Smith, LLP  
10 South Wacker Drive  
Suite 4000  
Chicago, Illinois 60606  
(312) 207-1000

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NACME STEEL PROCESSING, LLC's STATEMENT OF FACTS IN SUPPORT OF ITS OPPOSITION TO THE PEOPLE'S MOTION FOR SUMMARY JUDGMENT

1. NACME Steel Processing, LLC has held permits for its Chicago Facility since at least 200. (Valeriy Brodsky Deposition, p18 lines 2-12, hereafter, "Brodsky Tr. 18:2-12"

2. Permit writer Valery Brodsky has handled NACME permit decisions since 2000. Id.

*Brodsky, Valeriy*  
*page 18*

2 *Q. All right. When did you first become*  
3 *aware of the NACME facility?*  
4 *A. Also I believe around year 2000.*  
5 *Q. And how did you become aware of*  
6 *NACME?*  
7 *A. Application for operating permit*  
8 *renewal, and we issued this permit.*  
9 *Q. All right. So at the time you became*  
10 *aware of NACME, it was already a permitted*  
11 *facility?*  
12 *A. Yes.*  
13 *Q. Did you have anything to do with the*  
14 *earlier permitting?*  
15 *A. No.*

3. On October 25, 2000 NACME was issued a lifetime operating permit for its facility with a notation that because NACME was a “support facility” to a nearby steel plant, and not because it had a potential to emit pollutants above major source thresholds, it required a Clean Air Act Permit Program (“CAAPP”) permit as a major source or in lieu of that, a Federally Enforceable State Operating Permit (“FESOP”). (See State Motion For Summary Judgment p7, hereafter “MSJ p\_\_”, and documents found in PCB 01-85 (hereafter “MSJ p \_\_”))

4. NACME appealed the “support facility” permit condition to the Illinois Pollution Control Board in proceeding PCB 01-85. Id.

5. Brodsky conducted little analysis in processing NACME’s 2000 renewal permit application. (Brodsky Tr., cited below)

*Brodsky, Valeriy*

*page 43*

21 *Q. Yeah. But the question I have is,*  
22 *when you get the application for an operating*  
23 *permit, are you interested then in going and*  
24 *looking at the construction permit file to see*

*page 44*

1 *what's in there just to inform yourself about*  
2 *what's going on?*

3 *A. It's possible. Not always, but it*  
4 *happens.*

5 *Q. Okay. Do you know if you did that in*  
6 *this case when you inherited the file in 2000?*

7 *A. I'm pretty sure not because it was*  
8 *pretty simple, straightforward case in year 2000;*

9 *so --*

10 *Q. Why was it simple and*  
11 *straightforward?*

12 *A. I believe it was just operating*  
13 *permit renewal.*

14 *Q. Didn't require a lot of analysis?*

15 *A. No.*

6. On February 8, 2001 NACME was issued a state operating permit No. 96020074 for air emissions with a stated expiration date of October 25, 2005 (the "SOP") as part of the settlement of NACME's appeal wherein the State withdrew its support facility contention. (MSJ, p. 7; "Brodsky Tr. 107:18-24"); 108:1-16;109:24;110:1-7, Ex. 1)

7. During the "support facility" dispute records produced in this litigation by the State reveal that IEPA attorney Julie Armitage stated: "Ask Hank for the concentration level that NACME is committed to...as we should craft an alternative theory if our major source theory flops on us." (Ex. 3)

8. During this time IEPA was looking closely at NACME's facility in order to determine whether or not it required a major source permit. (Brodsky Tr. 100: 9-14)

9. No later than February 2000 Valery Brodsky the IEPA permit writer then responsible for NACME's applications, and a twenty year veteran of the agency, was provided by NACME's consultant with partial results of a 1997 stack test. The results showed that NACME's facility apparently had the potential to emit HCL above 10 tons per year. (Brodsky Tr., 12: 14-12, 13:1-16, 135-138; 141:11-24; 142:1-17; 143; 144:1-22.

10. Brodsky admitted that at the time of NACME's permit application it was IEPA's practice that when data indicates that a source has emissions above major source thresholds, an applicant should be told that its state operating permit application is misplaced and instead a CAAPP or FESOP application is required. (Brodsky Tr., cited below)

*page 72*

23 *Q. Well, let's assume for a moment that*

24 *the Exhibit 4 had stated that the emissions were*

*page 73*

1 major, okay, out the stack. If it had indicated  
2 that it was more than ten tons per year, you  
3 would have then changed tracks; right? It would  
4 have been on a different track. You wouldn't  
5 have kept looking at it as a state operating  
6 permit application. You would have said, "This  
7 is the wrong permit application. You need a  
8 CAAPP permit or a FESOP because you're a major  
9 source."  
10 A. Yes. You would tell the company, but  
11 I cannot change this application.

11. At the time of NACME's application Brodsky was handling "several dozen" other permit applications, unassisted, and never suggested to NACME that it needed a CAAPP or FESOP in lieu of a SOP; Id:

page 79

11 Q. Well -- yeah. Well, that's a fair  
12 question. I guess I'd say within a year how many  
13 total facilities are you dealing with in terms of  
14 writing a permit -- reviewing and writing a  
15 permit for in the year 2000?

16 A. Several dozens.

17 Q. Several dozen?

18 A. Yes.

19 Q. Do you have any help?

20 A. No.

21 Q. So you can't delegate it to somebody  
22 to say, "Here, take this and" --

23 A. No. If it's assigned to me, it's my  
24 responsibility to issue. We receive help for  
page 80

1 stack test analysis. We have special person  
2 assigned for stack test reviews, basically, is  
3 all. I do not receive any external help except  
4 when I need to have stack test review done  
5 professionally.

6 Q. All right. So I think we've seen --  
7 well, a state operating permit was subsequently  
8 issued after you did this review; right?

9 A. Yes.

10 Q. And you did not at any time suggest

11 *that this facility instead needed a CAAPP permit*  
12 *or a FESOP, did you?*  
13 *A. No.*

12. Notwithstanding his receipt and review of the 1997 stack test data Brodsky issued both the October 25, 2000 lifetime state operating permit and the February 8, 2001 SOP. He testified in deposition that his handling of NACME's permit application was in error in his application of an expired EPA "transition policy" and neither he nor his unit manager did anything to cure the error; Id:

*page 135*

16 *Q. Okay. And it also makes a reference*  
17 *to the 1997 stack test, doesn't it?*  
18 *A. Yeah, just to compare calculated --*  
19 *Q. Well, could you just answer my*  
20 *question?*  
21 *A. Yes.*  
22 *Q. And it says, "This number is*  
23 *consistent with actual measured uncontrolled*  
24 *emission in the previous stack test performed on*

*page 136*

1 *5-7-97"; right?*  
2 *A. Yes.*  
3 *Q. So isn't it correct that -- and it*  
4 *says, "and submitted with the 2-2000*  
5 *application"; right?*  
6 *A. Yes.*  
7 *Q. So, sir, isn't it correct that in*  
8 *2000, February of 2000, you knew what the*  
9 *uncontrolled -- measured uncontrolled emissions*  
10 *at this facility were, didn't you?*  
11 *A. Yes.*  
12 *Q. And from that you could have readily*  
13 *calculated what the potential to emit of the*  
14 *facility was, couldn't you?*  
15 *A. Yes.*  
16 *Q. You didn't do that, did you?*  
17 *A. No.*  
18 *Q. Why?*  
19 *A. Okay. When USEPA started cleaner air*  
20 *permit program in 1995, they pretty soon realize*  
21 *there is huge number of applications. So they*



22 issued so-called transition policy in 1996, which  
23 allowed us to issue state operating permits for  
24 emission sources with actual emissions less than  
page 137

1 50 percent of major source threshold regardless  
2 on their potential to emit.

3 Q. I'm sorry. Less than 50 percent of  
4 what?

5 A. Major source threshold for any --

6 Q. Okay. So less than five tons in this  
7 case?

8 A. Five tons of single HAP.

9 Q. Okay.

10 COURT REPORTER: Single what?

11 A. HAP. Abbreviation for hazardous air  
12 pollutant.

13 Then USEPA initially issued it for  
14 two years, and then there were two extensions,  
15 and I believe in 1999 they issued letter of  
16 non-extension of their transition policy.

17 But because of vague language in this  
18 memo --

19 COURT REPORTER: Because of what?

20 A. Vague, non-clear language in this  
21 application, we continued to issue such permit  
22 for maybe one, two years even after USEPA issued  
23 this policy -- not issued policy -- didn't  
24 continue this policy.

page 138

1 And then USEPA corrected us that it  
2 was wrong understanding of their recent -- the  
3 most recent memo, and we started requiring FESOP  
4 application for sources for which just year ago  
5 we issued state permits.

6 Q. (By Mr. Walsh) All right. So let's  
7 back up for a moment. In February of 2000, did  
8 you know that the NACME facility was a major  
9 source for hazardous air pollutants?

10 A. Potentially, yes.

11 Q. But you did not require them at that  
12 time to get a Clean Air Act Permit Program permit  
13 or a FESOP; right?

14 A. Yes.

15 Q. And up until April of 2005, in fact,  
16 you never even mentioned that they may need such  
17 a permit; is that correct?

18 A. Yes. But we didn't have any  
19 correspondence with the company after 2002.

20 Q. Well, be that as it may --

21 A. Yes.

22 Q. -- between 2000 and 2002, you didn't  
23 mention it, did you?

24 A. No. At that time we were wrongly  
page 139

1 continuing transition policy.

2 Q. Wrongly continuing the transition  
3 policy?

4 A. Yes.

Brodsky, Valeriy

page 141

11 Q. Okay. Did you ever tell NACME that  
12 you were reviewing its permit applications under  
13 the USEPA's transition policy?

14 A. No.

15 Q. You never said it verbally?

16 A. No.

17 Q. You never said it in writing?

18 A. No.

19 Q. Is there any document in your file  
20 that reflects that you were observing the  
21 transition policy with respect to NACME's  
22 facility?

23 A. I'm afraid no.

24 Q. But you were?

page 142

1 A. Yes, we were following this policy  
2 but --

3 Q. You were wrong in following that  
4 policy is what you're saying today?

5 A. For couple of years, yes.

6 Q. And so couple of years. You mean by  
7 the end of what? 2002 --

8 A. Yes.

9 Q. -- you got it right?

10 A. Yes. Approximately 2002.

11 Q. All right. At the end of 2002 did  
12 you send any communication to NACME, saying, "Oh,  
13 by the way, we misinterpreted the regulations,  
14 and you" -- "we've given you the wrong kind of  
15 permit"?

16 A. No. Until this application, I

17 believe.

Brodsky, Valeriy

page 143

8 Q. Okay. Do you recall ever sending a  
9 letter to any other company, saying, "We  
10 misapplied the transition policy with respect to  
11 your facility"?

12 Could you read that question back,  
13 please.

14 (The requested portion was read  
15 back by the court reporter.)

16 A. No.

17 Q. (By Mr. Walsh) So is it correct to  
18 say the regulated community in Illinois was  
19 pretty much in the dark about EPA's -- or IEPA's  
20 mistake on the transition policy?

21 A. Unless they checked it on themself,  
22 yes.

23 Q. Or unless they suddenly received a  
24 notice of violation saying they had the wrong  
page 144

1 kind of permit, should have had a Clean Air Act  
2 Permit Program permit all along?

3 A. I am not aware about such notice of  
4 violation, but when they applied for permit  
5 renewal revision in similar situations, they  
6 receive notice of incompleteness with explanation  
7 why they should apply for FESOP.

8 Q. Are there memos or some other form of  
9 communication that went out about the transition  
10 policy and correcting its misapplication internal  
11 to IEPA?

12 A. No.

13 Q. Okay. So did senior management at  
14 IEPA know that the permit section was misapplying  
15 the transition policy?

16 A. I'm not sure about senior management,  
17 but on the level of our FESOP unit, we were told  
18 stop applying transition policy.

19 Q. All right. So within your unit the  
20 unit managers knew that the transition policy was  
21 being misapplied?

22 A. Yes.

13. Brodsky's supervisor, Bob Bernoteit, believed that Brodsky made a mistake issuing a SOP to NACME in 2000 at time when it knew based on a 1997 stack that NACME's PTE was greater than 10 tpy HCL; Id:

Bernoteit, Robert

page 51

12 Q. I'll show you that in a minute here, but my  
13 question is did you know that there was a 1997 stack  
14 test? You said you remember seeing this and you read  
15 it at the time. Does that suggest you knew there was  
16 a 1997 stack test out there somewhere?

17 A. It's stated here in the calculation sheet.

18 Q. Right. So did you know there was a 1997  
19 stack test in the file?

20 A. I read that eight and a half years ago.

21 Q. I'm saying at the time you read it you would  
22 have been alerted to the fact there was a 1997 stack  
23 test in the file. Right?

24 A. At the time I read it, yes.

page 52

1 Q. And Valeriy was saying that consistent with  
2 the 1997 test, the 2000 test is showing a PTE  
3 exceeding 10 tons a year. Right?

4 A. That's what it appears to say, yes.

5 Q. So my question is if the IEPA, if you and  
6 Valeriy knew that the source was over 10 tons per  
7 year major source, why was it issued a state  
8 operating permit in February of 2001?

9 A. I don't know.

10 Q. Was it a mistake?

11 A. All I know is if we knew in 2000 that the  
12 source had potential emissions greater than 10 tons  
13 HCL we should not have issued a lifetime permit to  
14 them.

14. Brodsky was familiar with the concept of potential to emit as that phrase is used in the Illinois Environmental Protection Act; Id:

Brodsky, Valeriy

page 24

23 Q. Okay. Thank you.

24 Do you know what "potential to emit"

page 25

1 means?

2 A. Yes.

3 Q. What does it mean to you?

4 A. Potential to emit means capability of  
5 the source to emit pollutant -- certain pollutant  
6 on the maximum operation, presuming maximum  
7 operation time.

8 Q. Okay. I think you said the same  
9 thing. I'm going to read from the statute and  
10 see if you agree with me. "Potential to emit  
11 means the maximum capacity of a stationary source  
12 so emit any air pollutant under its physical and  
13 operational design." Is that a correct  
14 statement?

15 A. Yes.

16 Q. And how does -- how does one  
17 determine potential to emit?

18 A. As it said in the regulation, we need  
19 to determine what is physical capacity of the  
20 source to emit, what are operational physical  
21 limitation on its operations, and presume maximum  
22 annual hours of operations.

23 Q. So it can be a matter of simple math,  
24 I think. Do you agree with that?

page 26

1 A. In very simple cases, yes,

15. Brodsky was familiar with the concept of controlled and uncontrolled emissions;

Id:

page 55

1 Q. And that -- what does that mean to  
2 you? HCL is hydrochloric acid, but what do the  
3 numbers mean, to your understanding?

4 A. Usually we, first of all, look in  
5 this number, low line, what is emission rate  
6 pounds per hour.

7 Q. Okay.

8 A. And it indicates very low emission

9 rate.

10 Q. And this is at the scrubber outlet;  
11 correct?

12 A. Yes.

13 Q. And there's something called a  
14 scrubber inlet too; right?

15 A. Yes.

16 Q. What's the difference between the  
17 two?

18 A. Inlet usually, to any control device,  
19 contains high emission level. Outlet, much  
20 lower. It's purpose of control device to  
21 decrease emission of some particular pollutant.

22 Q. So the inlet emissions -- the inlet  
23 to the scrubber -- are uncontrolled emissions  
24 from a facility, a source; right?

page 56

1 A. Yes.

16. Brodsky testified that NACME's facility is not a major source; Id:

page 57

14 Q. Okay. Well -- and then what do you  
15 do with that information? What does it help you  
16 decide?

17 A. Again, in this particular case  
18 only -- let's turn back. When we are dealing  
19 with HCL, it's hazardous air pollutant.

20 Q. When you're dealing with a what?

21 A. HCL.

22 Q. HCL? Okay.

23 A. Yes. Not with acid but with gas.

24 HCL --

page 58

1 COURT REPORTER: Start over. I'm  
2 lost.

3 A. Okay.

4 Q. (By Mr. Walsh) HCL.

5 A. When we are dealing with hydrogen  
6 chloride emission, abbreviation HCL, because this  
7 is hazardous air pollutant, we need to verify  
8 that emission from this source cannot exceed  
9 major source threshold.

10 Q. And how did you do that in this case  
11 working off of this application?

12 A. In this case it's very easy. I

13 multiplied hourly emission rate by potential  
14 hours of operation, 8760 hours per year, and  
15 receive result much lower than ten tons per year.

16 Q. All right. Can you take -- walk me  
17 through how you did that? What did you -- 8760  
18 times what? What did you multiply it --

19 A. 0.02.

20 Q. 0.02. So you took the scrubber  
21 outlet number and multiplied it by --

22 A. Yes.

23 Q. -- 8760?

24 A. And in this way I determine that  
page 59

1 their actual emission doesn't exceed major source  
2 threshold.

page 119

21 Q. All right. But as you just  
22 testified, the NESHAP for triple C -- subpart  
23 triple C is the NESHAP for HCL process facilities  
24 and hydrochloric acid regeneration plants; right?

page 120

1 A. Yes.

2 Q. Okay. And you said that already had  
3 been in effect since the late '90s; right?

4 A. Yes. Approximately.

5 Q. And in all the documents that we've  
6 reviewed today, you had never made a notation  
7 that this facility was possibly subject to NESHAP  
8 part triple C, did you?

9 A. Yes.

10 Q. You did not?

11 A. I didn't mention before.

12 Q. So is it -- is it fair to say that  
13 the USEPA was pushing IEPA to make sure they were  
14 doing NESHAP reviews of facilities as these new  
15 NESHAP regs came online?

16 A. No, I wouldn't say they were pushing  
17 us. They just promulgated new and new NESHAPs,  
18 but this particular NESHAP is applicable only to  
19 major sources.

20 Q. And -- okay.

21 A. And not enough major source base  
22 on being --

23 COURT REPORTER: I'm sorry?

24 A. Being major source. This NESHP  
page 121

1 regulation is applicable to major sources which  
2 actually meet more than ten tons of hazardous air  
3 pollutant per year. NACME emission was below ten  
4 tons.

5 Q. (By Mr. Walsh) It was below ten?

6 A. Yes. So we didn't treat them as a  
7 subject.

8 Q. Okay. How do you know they were  
9 below ten?

10 A. Based on previous stack test.

11 Q. Which ones?

12 A. There were several stack tests, and I  
13 remember in 2002 there was stack test. I don't  
14 remember for what reason. Then we requested this  
15 stack test in this construction permit, and all  
16 stack test shows that they are not major source.

17 Q. And one of those stack tests was the  
18 1997 stack test?

19 A. Yes, starting from '97. Then they  
20 repeated. I don't remember in 2002 when they  
21 resumed their operations. There were several  
22 stack tests which all indicated that they are not  
23 actually major source.

17. Mr. Brodsky is not a specialist in the review of stack tests, they are not sent to his section, permitting, but rather are delegated for review by a specialist in the compliance section;

Id:

Brodsky, Valeriy

page 127

23 (Exhibit No. 25 was

24 marked for identification.)

page 128

1 Q. (By Mr. Walsh) Let me show you  
2 what's been marked Exhibit 25. Do you recognize  
3 that?

4 A. Yes.

5 Q. I'm sorry. And what do recognize it  
6 to be?

7 A. This is stack test review done by  
8 specialist.

9 Q. Done by specialist. You testified



10 earlier that you sometimes -- or you don't  
11 yourself review stack tests but you delegate  
12 that --

13 A. Yes.

14 Q. -- to someone who is a specialist in  
15 that area; is that right?

16 A. Yes.

17 Q. And was the person that it was  
18 delegated to Ken --

19 A. Ewele.

20 Q. -- Ewele? That's his name?

21 A. Uh-huh.

22 Q. And did you, yourself, delegate it to  
23 him?

24 A. It's pretty much automatic procedure  
page 129

1 because stack test report even doesn't go to  
2 permit section. It goes to compliance unit which  
3 perform these stack test reviews.

4 Q. All right. So is it your  
5 recollection that you knew this was happening?  
6 It didn't come to you, and then you delegated it  
7 out, or that it -- how did it go? How did it  
8 work procedurally?

9 A. Stack test report arrives to  
10 compliance unit, and it's assigned on one of the  
11 reviewer. He performs this review, and then we  
12 receive copy of the result.

13 Q. You receive a copy --

14 A. Yes.

18. Mr. Brodsky was only generally familiar with stack tests and the EPA method to  
be followed in conducting such tests; Id:

page 61

9 Q. Going back to Exhibit 8, the last  
10 page, at the top it says date 5-7-97. Do you  
11 recall why the date --

12 A. Oh, yeah.

13 Q. Do you recall why it says that?

14 A. It's the date when this test was  
15 performed.

16 Q. When you say "this test," what do you

17 mean "this test"?

18 A. This is a summary -- typical summary  
19 from the stack test.

20 Q. And can you tell me what a stack test  
21 is?

22 A. Stack test is instrumental  
23 measurements of emission from particular emission  
24 units usually done in the stack.

page 62

1 Q. And is there a particular method that  
2 is supposed to be followed -- an EPA method?

3 A. Yes, there is.

4 Q. What -- I'm sorry. What is the EPA  
5 method?

6 A. There is set of methods, how to  
7 measure air movement velocity, volume,  
8 temperature, and what analyzing methods should be  
9 used for detecting hydrogen chloride emission.

10 Q. Okay. And do you recall what the EPA  
11 back in this era in 2000 -- or let's say '97 --  
12 what the EPA method would have been? Is there a  
13 number?

14 A. If -- yes. If it didn't change  
15 because I remember recent number is Method 26.

16 Q. Is what?

17 A. Method 26.

18 Q. Method 26?

19 A. 26.

20 Q. And do you agree that, if one does  
21 not follow the correct method, the validity of  
22 the results could be affected?

23 A. Yes.

19. It was not until 2005 when Mr. Brodsky first concluded that NACME was a major source for HCL despite having reviewed the 1997 stack test results and other stack test results including from 2002;, Id:

page 134

11 Q. (By Mr. Walsh) Let me show you  
12 what's been marked Exhibit 28. Do you recognize  
13 that exhibit?

14 A. Yeah.

15 Q. And you prepared it; right?

16 A. Yes.

17 Q. On or about April 12, 2005?

18 A. Yes.

19 Q. And there's some -- well, I won't  
20 characterize it. Paragraph 3 has a summary of  
21 what the company does; right?

22 A. Yes.

23 Q. And it talks about a stack test that  
24 was performed in April of 2002, which I think is  
page 135

1 the one we looked at just a little bit earlier,  
2 Exhibit 26; right?

3 A. Yes.

4 Q. All right. And then you note some  
5 calculations and some statistics; right?

6 A. Yes.

7 Q. And then at the very end of the  
8 number 3, you say, "It results in HCL PTE  
9 exceeding ten tons per year, dash, major source,  
10 subject to CAAPP, slash, FESOP"; right?

11 A. Yes.

12 Q. Is that the first time you had stated  
13 this in writing during this process that started  
14 in 2000?

15 A. It appears, yes.

Brodsky, Valeriy  
page 135

16 Q. Okay. And it also makes a reference  
17 to the 1997 stack test, doesn't it?

18 A. Yeah, just to compare calculated --

19 Q. Well, could you just answer my  
20 question?

21 A. Yes.

22 Q. And it says, "This number is  
23 consistent with actual measured uncontrolled  
24 emission in the previous stack test performed on  
page 136

1 5-7-97"; right?

2 A. Yes.

20. NACME has had a FESOP application pending since 2005; Id:

*Bernoteit, Robert*

*page 15*

- 1 *A. I don't remember, recall the timing of the*  
2 *FESOP application. I checked this morning and it*  
3 *looked like it was originally submitted in 2005.*  
4 *Q. All right. So there's been a FESOP*  
5 *application pending since 2005 according to what you*  
6 *looked at today. Is that right?*  
7 *A. Yes.*

21. NACME's FESOP application was deemed complete in an IEPA letter dated December 6, 2005 (Ex. 4)

22. It was not until April 26, 2012 that IEPA issued a draft FESOP for the facility. Although the FESOP was published for public comment, and NACME was the only commenter, the IEPA has not issued the FESOP in final form solely for fear that NACME will appeal a condition of the permit; Id:

*Bernoteit, Robert*

*page 15*

- 8 *Q. And let's just get it out of the way now.*  
9 *The current draft FESOP that was issued about five*  
10 *months ago, what's the status of that permit?*  
11 *A. It is, we sent it to public notice. We*  
12 *received comments from the company or their*  
13 *representatives that they do not agree with our*  
14 *decision to apply the new source performance standard*  
15 *for coil coating in the permit and so we are*  
16 *currently holding that permit.*  
17 *Q. All right. Are you holding the permit*  
18 *because of the pendency of this litigation?*  
19 *A. That may be a factor. My understanding it*  
20 *was that it had more to do with the potential appeal*  
21 *of the permit.*  
22 *Q. So you're holding the, you're holding the*  
23 *permit. Who makes the decision to issue or not? Is*  
24 *that yours?*

*page 16*

1 A. Ultimately, yeah, that, now it would be my  
2 decision, but back when the permit was at notice it  
3 would have been my predecessor, Ed Brodsky.

4 Q. Ed Brodsky. So as we sit here today if I  
5 understand your testimony, are you sitting on the  
6 permit, meaning not issuing it in its final form  
7 because you anticipate it will be appealed?...

15 Q. All right. So now you've issued for public  
16 comment and NACME's commented. It's been five  
17 months, but is the only reason that you're not  
18 issuing the permit is because you're afraid there's  
19 going to be an appeal of it?...

24 A. We do not want to draw an appeal on this  
page 17

1 permit.

2 Q. Well, I understand that. Is that a typical  
3 reason that you would not issue a permit is because  
4 you fear someone's going to appeal it?

5 A. When there is a disagreement with an  
6 applicant concerning the terms and conditions of the  
7 permit we want to work it out with them prior to  
8 issuance.

9 Q. Have you tried to do that?

10 A. We have on record an e-mail from NACME's  
11 consultant that the permit was acceptable to them  
12 prior to notice.

13 Q. Okay.

14 A. So we are unsure at this time how to  
15 proceed.

16 Q. And how are you going to resolve that  
17 uncertainty?

18 A. Well, knowing that this is under enforcement  
19 we are waiting for enforcement to be resolved now.

20 Q. What does that have to do with it?

21 A. We want to make sure that the source is in  
22 compliance and that they will not appeal the permit  
23 moving forward.

24 Q. So the source is in compliance with what?  
page 18

1 A. With all the applicable requirements that  
2 they would be subject to.

3 Q. And where are those found?

4 A. Those are found in the Clean Air Act, the  
5 federal rules and regulations, the Illinois  
6 Environmental Protection Act and the Board's rules  
7 and regulations.

8 Q. And also in the permit. Right?

9 A. Permit conditions would be applicable in  
10 this case, yes.

11 Q. What permit conditions are applicable to the  
12 facility now if you know?

13 A. I do not recall beyond the regulations that  
14 are in dispute.

15 Q. Is there any other reason that IEPA hasn't  
16 issued the permit in final form other than it fears  
17 there's going to be an appeal of the permit?

18 A. My recollection was the appeal and then we  
19 were alerted to the fact that they were still under  
20 an enforcement case.

21 Q. But you understand that the enforcement case  
22 is for failure to have a FESOP. Right? A CAAPP or a  
23 FESOP?

24 A. Not knowing all the details of the  
page 19

1 enforcement case my understanding that that was an  
2 element.

3 Q. Okay. So if I understand your testimony  
4 there's been a FESOP permit pending since 2005.  
5 Right?

6 A. Yes.

7 Q. And there's an enforcement case about, at  
8 least an element of which your understanding is about  
9 failure to have a FESOP. Right?

10 A. Yes.

11 Q. And you're telling me today that the FESOP  
12 that is pending is being held because, in part  
13 because of the enforcement case. Is that right?

14 A. In part perhaps and in part because of  
15 potential for an appeal. (underlining supplied)

23. Bob Bernoteit believes that NACME is in compliance with the terms and  
conditions of the draft FESOP; Id:

page 21

13 Q. First answer the question. Have you formed  
14 any opinions and then I'll ask you about the  
15 opinions.

16 A. Okay. Yes, I have an opinion.

17 Q. You have more than one or just one?

18 A. I just have one.

19 Q. What is the opinion?

20 A. My opinion is that NACME is in compliance  
21 with the terms and conditions of the draft FESOP.  
22 Q. It is in compliance?

23 A. Yes.

24. NACME has always operated within the limits of its SOP, including with regard to emissions and throughput limitations. (Britt Wenzel Affidavit, Ex. 1)

25. The State has admitted on numerous occasions that NACME's SOP is still valid and in effect. Indeed, the State threatened more than once recently to seek enforcement of the SOP.

a. The State admits in a "Tier III" inspection report dated September 29, 2010 that the SOP is in effect and, indeed, notes purported violations of the SOP (See, Group Ex. 6)

b. The State again admits in a "Violation Notice" dated March 3, 2011 that the SOP is in effect and cites NACME for the same purported violations of the SOP. The notice also states that NACME "may be required to obtain a Clean Air Act Permit Program ("CAAPP") permit or Federally Enforceable State Operating Permit (FESOP)". Id.

c. The State again admits the validity of SOP #96020074 in a notice of intent to pursue legal action dated July 15, 2011, and again cites the same purported violations of the SOP. The State also again notes that NACME "may be required" to obtain a CAAPP permit or FESOP. Id.

d. In a letter from the Illinois Attorney General's office ("IAG") dated January 5, 2012, the State, again admits the validity of the SOP and again asserts the purported

violations of the SOP. It also again states that NACME “may be required” to obtain a CAAPP permit or a FESOP. Id.

26. Prior to issuance of the draft FESOP permit, IEPA issued a “draft preliminary permit” which included a condition that an oil application process at NACME’s facility was to be considered a “coating operation” and that NACME as a result was subject to new source performance standards. Following an exchange of correspondence with IEPA, NACME appealed this decision in August 2012 but the Board ruled in PCB 13-07 that NACME’s appeal was premature because the Agency had not in the Board’s view made a final decision on the issue. Since then IEPA has sat on the issuance of a final FESOP.

Respectfully Submitted,

**NACME STEEL PROCESSING, L.L.C.,**

**Respondent**

By: 

One of Its Attorneys

Edward V. Walsh, III  
Reed Smith, LLP  
10 South Wacker Drive  
Suite 4000  
Chicago, Illinois 60606  
(312) 207-1000



**CERTIFICATE OF SERVICE**

I, the undersigned, certify that I have served the attached **NACME STEEL PROCESSING, LLC's BRIEF IN RESPONSE TO STATE'S MOTION FOR SUMMARY JUDGMENT**, by e-mail or U.S. Regular Mail, upon the following persons:

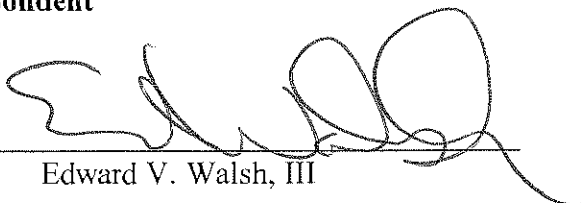
Nancy J. Tikalsky (via mail)  
Assistant Attorney General  
Office of the Illinois Attorney General  
Environmental Bureau  
69 West Washington Street, Suite 1800  
Chicago, Illinois 60602

John T. Therriault, Assistant Clerk (via e-mail)  
Illinois Pollution Control Board  
100 West Randolph Street, Suite 11-500  
Chicago, Illinois 60601

Bradley P. Halloran, Hearing Officer (via e-mail)  
Illinois Pollution Control Board  
100 West Randolph Street, Suite 11-500  
Chicago, Illinois 60601

**NACME STEEL PROCESSING, L.L.C.,  
Respondent**

By:

  
\_\_\_\_\_  
Edward V. Walsh, III

Date: September 16, 2014