ILLINOIS POLLUTION CONTROL BOARD
December 4, 2014

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

ORDER OF THE BOARD (by D. Glosser):

The People of the State of Illinois (People) filed a complaint against NACME Steel Processing, LLC (NACME) on September 5, 2012, alleging that NACME operates a major stationary source without a Clean Air Act Permit Program (CAAPP) permit in violation of various provisions of the Illinois Environmental Protection Act (415 ILCS 5/1 *et seq.* (2012)) (Act). The complaint concerns NACME's steel processing facility located at 429 West 127th Street, Chicago, Cook County.

For the reasons discussed below, the Board finds that issues of material fact exist and summary judgment is not appropriate. Therefore, the Board denies the People's motion for summary judgment.

PROCEDURAL BACKGROUND

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

On June 6, 2013, the Board granted the People's motion to strike certain affirmative defenses filed by NACME. The Board also denied the People's request to strike other defenses and allowed NACME to argue laches and waiver.

On May 16, 2014, the People filed a motion for summary judgment (Mot.) that included an affidavit by Valeriy Brodsky, an employee with the Illinois Environmental Protection Agency (IEPA), Bureau of Air. On June 5, 2014, NACME filed a motion to strike the affidavit. On June 20, 2014, the People responded to the motion to strike. Also on June 20, 2014, NACME filed an interim response to the People's motion for summary judgment.

On August 7, 2014, the Board denied the motion to strike the affidavit of Mr. Brodsky. The Board reserved ruling on the motion for summary judgment and allowed NACME to file a response and the People to file a reply.

On September 16, 2014, NACME filed its response to the motion (Resp.). On September 30, 2014, the People filed its reply (Reply).

COMPLAINT

NACME owns and operates a steel processing facility located at 429 West 127th Street, Chicago (facility). Comp at 2, ¶ 4. The People allege that:

> As a major source since at least April 16, 2002, NACME was required to apply for and submit an application to the [IEPA] for a CAAPP [Clean Air Act Permit Program] or alternatively, a FESOP [Federally Enforceable State Operating Permit]. ... By operating a major source without timely submitting an application NACME violated Section 39.5(5)(x) of the Act, 415 ILCS 5/39.5(5)(x) (2012), and, thereby, violated sections 39.5(6)(b) and 9(b) of the Act, 415 ILCS 39.5(6)(b) and 9(b) (2012). Comp. at 9-10, ¶ 37.

On February 8, 2001, IEPA issued NACME a State Operating Permit (SOP), expiring on October 25, 2005, for control of air emissions at the facility. Comp. at 2, ¶ 7.

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

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

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

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

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

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

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

BACKGROUND

NACME operates a 90-ton per hour continuous coil pickling line. This pickling line is made up of four pickling tanks enclosed in a turbo tunnel enclosure, and a four (4) stage washer. Comp. at 2, Mot. at 7. The pickling tanks are heated to approximately 190 °F, and then various concentrations of hydrochloric acid (HCL) are utilized in a dissolution process to remove impurities from hot rolled steel. This process is known as "pickling", and once it is completed, the steel goes through an aqueous based four stage washer in a process known as "washing." During these two processes, air emissions are captured in ducts and transported via piping to the scrubber. Pickling and washing tanks containing the HCL are equipped with covers to minimize exposure of HCL to the atmosphere when not in use. *Id*.

IEPA issued NACME a SOP on February 8, 2001 as a condition of settlement of a permit appeal. Mot. at 7; Mot. Exh. F, Attach 1. The SOP included an expiration date October 25, 2005. Mot. at 7, Comp. at 2. NACME's SOP permitted a process rate at the Facility of 600,000

tons per year (tpy) and an emission factor of 4.8 lbs of HCL per 1000 tons of steel throughput. Mot. at 7.

NACME submitted an Operating Permit Revision Application with a cover letter requesting an operating permit revision and construction permit on April 11, 2002, (2002 construction permit application). Mot. at 7; Mot. Exh. F, Attach 2. The 2002 Construction Permit Application addressed a modification to the Facility, installing a Turbo Tunnel enclosure, and requested an allowance to operate at a higher process rate of 750,000 tpy. *Id*. On April 12, 2002, IEPA issued a revised construction permit to NACME for the installation of an emissions tunnel. Mot. at 8; Mot. Exh. F, Attach 5. The revised construction permit required retesting of the modified steel pickling process, and allowed NACME to operate its steel pickling process with a rate greater than that allowed by the SOP for the purposes of stack testing only, specifically, at a process rate of 750,000 tpy. *Id*.

NACME conducted a stack test at its Facility on April 16, 2002. Mot. Exh. F, Attach 4. The April 2002 stack test was based on a maximum steel process rate lower than the permitted steel process rate of NACME's SOP renewal application to IEPA. The April 2002 stack test was originally scheduled for late 2001; however the pickling operation was shut down due to financial issues. Resp. Exh. 1 at 2. The line was reopened in February or early March of 2002. *Id*. Only a limited amount of low carbon steel was available and as a result the process rate was lower than normal process rates. *Id*. The process rate was 33.3 tons of steel per hour (tph). *Id*.

NACME submitted its SOP renewal application to IEPA on March 23, 2005 (referred to as the April 2005 SOP renewal application). Mot. Exh. F, Attach 6[1]. On April 13, 2005, IEPA issued a Notice of Incompleteness to NACME's April 2005 SOP renewal application for failure to provide a potential to emit (PTE) calculation for HCL and to demonstrate eligibility for a state operating permit. Mot. Exh. F, Attach 7.

A second application was submitted by NACME for renewal of its SOP on August 23, 2005 (referred to as the September 2005 SOP renewal application). Mot. Exh. F, Attach 8[2]. On September 20, 2005, IEPA issued another Notice of Incompleteness to NACME's September 2005 SOP renewal application. Mot. Exh. F, Attach 9. The notice highlighted NACME's failure to substantiate the requested permit limits with any stack testing results. *Id*. The September 2005 notice notified NACME that it required a construction permit because its September 2005 SOP renewal application requested a modification consisting of an increase in the maximum steel process rate allowed by its SOP. IEPA further informed NACME that IEPA had determined that the estimated PTE for the HCL emissions at the Facility (based on information provided in NACME's September 2005 SOP renewal application) was greater than 10 tpy of HCL from a single source. *Id*. Therefore IEPA informed NACME in writing that it required a CAAPP permit or, alternatively, a FESOP. *Id*.

NACME submitted a CAAPP application to IEPA with a request for a FESOP ("2005 FESOP application") on October 18, 2005. Mot. Exh. F, Attach 10. NACME's 2005 FESOP application requested a maximum steel process rate greater than the maximum steel process rate

[1] The Board notes that the complaint alleges this was submitted on April 4, 2005.
[2] The Board notes that the complaint alleges this was submitted on September 12, 2005

allowed by NACME's SOP. IEPA issued a notice of completeness determination of NACME's FESOP application on December 6, 2005. Mot. Exh. F, Attach 11. Additionally, IEPA informed NACME that "notwithstanding the completeness determination, IEPA may request additional information necessary to evaluate or take final action on the FESOP application." *Id*.

On December 21, 2006, NACME conducted another stack test. Mot. Exh. F, Attach 12. The December 2006 stack test was conducted with a maximum steel process rate greater than the maximum steel process rate allowed by its SOP, and results were reported to IEPA on February 2, 2007. *Id*. The steel process rate was approximately 120 tph. Resp. Exh. 1 at 3. The HCL emission rate was significantly lower than the emission rate measured in 2002. *Id*.

STATUTORY BACKGROUND

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

> No person shall:
>
> (b) Construct, install, or operate any equipment, facility, vehicle, vessel, or aircraft capable of causing or contributing to air pollution or designed to prevent air pollution, of any type designated by Board regulations, without a permit granted by the [IEPA], or in violation of any conditions imposed by such permit. 415 ILCS 5/9(b) (2012)

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

> Applications and Completeness
>
> * * *
>
> (x) . . . The owner or operator of an existing source that has been excluded from the provisions of this Section under subsection 1.1 or paragraph (c) of subsection 3 of this Section and that becomes subject to the CAAPP solely due to a change in operation at the source shall submit its complete CAAPP application consistent with this subsection at least 180 days before commencing operation in accordance with the change in operation. 415 ILCS 5/39.5(5) (2012).

Section 39.5(6) of the Act, states:

> Prohibition
>
> After the applicable CAAPP permit or renewal application submittal date, as specified in subsection 5 of this Section, no person shall operate a CAAPP source without a CAAPP permit unless the complete CAAPP permit or renewal application for such a source has been timely submitted to IEPA. 415 ILCS 5/39.5(6)(b) (2012).

ARGUMENTS FOR SUMMARY JUDGMENT

The Board first summarizes the People's arguments for summary judgment followed by NACME's arguments. The Board will then summarize the People's reply.

People' Motion for Summary Judgment[3]

The People first set forth the standard of review for summary judgment. The People then assert one main argument in support of their motion for summary judgment. Mot. at 16. Specifically, the People argue that NACME operated a CAAPP facility and equipment without a CAAPP or FESOP. The Board will summarize petitioner's argument on this issue below.

Standard of Review

The People argue that summary judgment is appropriate when there is no genuine issue of fact and the record demonstrates a clear right to judgment as a matter of law. *Id*. at 14, citing Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460 (1998). The People claim that the purpose of summary judgment is to aid in expeditious resolution of the litigation. *Id*., citing Atwood v. St. Paul Fire & Marine Ins. Co., 363 Ill. App. 3d 861, 863, 845 N.E.2d 60, 70 (2nd Dist. 2006), Olsen v. Etheridge, 177 Ill. 2d 396, 404, 696 N.E.2d 563, 566 (1997). The People reiterate that the purpose of summary judgment is not to try facts, but rather to determine if an issue of fact exists. *Id*., citing Happel v. Wal-Mart Stores, Inc., 199 Ill. 2d 179,186, 766 N.E.2d 1118, 1123 (2002).

The People maintain that summary judgment should be granted when the filings establish no genuine issue of fact exists and that the moving party is entitled to judgment as a matter of law. Mot. at 15, citing Balla v. Gambro, Inc., 145 Ill. 2d 492, 508, 584 N.E.2d 104, 112 (19910. The People rely on admissions by NACME in the answer to the complaint and request to admit, to support the People's motions. Mot. at 15. Based on the answers and admissions, the People argue that there are no disputed facts as to NACME's conduct and that the People are entitled to summary judgment as a matter of law. *Id.* at 15-16.

NACME Operated a CAAPP Facility and Equipment Without a CAAPP or FESOP Permit

The People argue that NACME was required to have a CAAPP or FESOP permit in order to operate from April 16, 2002, through February 11, 2012, due to the PTE calculation from NACME's April 2002 stack test. Mot. at 16. The People assert that NACME's FESOP applications from 2005, 2007, and 2012 construction permit indicated that the facility's PTE for HCL exceeded 10 tpy. *Id.* at 16. Thus, the People claim that this level of emissions qualifies NACME as a "major source" under the Act, thus requiring a CAAPP or FESOP permit for operation under Section 39.5(2) of the Act (415 ILCS 5/39.5(2) (2012)). *Id.*

[3] The People offered extensive arguments regarding the appropriate penalty to be assessed in this case. However, as the Board denies the motion for summary judgment, the Board will not summarize those arguments here. The People should reargue the penalty issues after hearing.

The People assert that the SOP under which NACME was operating was not a CAAPP or FESOP. Mot. at 16. The People argue that the SOP did not apply to a "major source" such as NACME. *Id*. The People further claim that once NACME learned from the results of the April 2002 stack test that its Facility was producing emissions of HCL such that NACME fell under the definition of a "major source" under the Act, NACME was required to cease operations at its Facility. *Id.* at 17.

The People argue that NACME is a person as that term is defined in the Act, and HCL is a contaminant as defined in the Act. Mot. at 21. The People claim that from April 16, 2002, until February 11, 2012, NACME's equipment has been capable of emitting HCL and thus contributing to air pollution. *Id*. 21-22. The People also claim that NACME was required to apply for and submit a CAAPP or FESOP permit application at least 180 days prior to commencing operation. *Id*. at 22. However, the People assert IEPA received NACME's initial complete FESOP application on October 18, 2005, more than 3 and a half years after discovering that the Facility had become a "major source". *Id*.

The People opine that NACME admitted that it intentionally did not submit a construction permit application as requested by IEPA. Mot. at 23. The People claim that IEPA informed NACME on September 20, 2005, that NACME required a construction permit for the process modifications resulting in a steel process rate that was greater than the amount allowed by its then-current SOP. *Id*. The People argue that NACME failed to submit a construction permit until February 12, 2012, over 6 years after IEPA's initial request for submission. *Id*. at 24. The People maintain that a construction permit is required by law for IEPA to allow an increase in the maximum steel process rate from the amount originally allowed in NACME's standard operating permit. *Id*. at 23.

Conclusion

The People argue that summary judgment is appropriate and that NACME should be found in violation of Sections 39.5(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) (2012). Mot. at 24. The People argue that NACME clearly operated its Facility as a "major source" through its potential to emit 10 tpy of HCL, was required to have either a CAAPP or FESOP permit for operation, and failed to do so.

NACME's Response

NACME opposes summary judgment arguing that NACME "finds itself in the unusual position of being cited for not having a permit that IEPA presently admits it is willfully withholding." Resp. at 1. NACME asserts it already has a "federally enforceable air permit". Even if that were not the case, NACME claims that "material question of fact pervade" and summary judgment is precluded. *Id*.

Legal Standard

NACME argues that summary judgment is a "drastic means of disposing of litigation" that "should be allowed only when the right of the moving party is free from doubt." Resp. at 2,

quoting Adams v. N.Ill. Gas Co., 211 Ill. 2d 32, 43; AYH Holdings v. Avreco, Inc., 357 Ill. App. 3d 17, 31 (1st Dist. 2005). NACME further argues that the grant of summary judgment should be allowed with caution to avoid preempting the right of the party to fully present the factual basis where a material dispute exists. *Id*., quoting Schrager v. N. Cmty. Bank, 328 Ill. App. 3d 696, 703 (1st Dist. 2002).

NACME argues that in determining whether an issue of genuine material fact exists, the Board must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the nonmovant. Resp. at 2, quoting Gilgert v. Sycamore Mun. Hosp., 156 Ill. 2d 511, 518 (1993). All inferences must be drawn in favor of the party opposing summary judgment and where the facts allow for more than one conclusion, summary judgment must be denied. Resp. at 2. NACME opines that the People bear the burden of persuasion on the motion and NACME need not prove its case. Resp. at 2, citing Bourgonje v. Machev, 362 Ill. App. 3d 984, 994 (1st Dist. 2005) and Shrager, 328 Ill. App. 3d at 708.

Background

NACME notes that the People assert that NACME failed to timely obtain a proper air emissions permit for its facility, and that assertion is based solely on IEPA's review in 2005 of stack test data from 2002. Resp. at 3. However, NACME argues, the People do not allege that NACME has ever emitted pollutants above the major source thresholds or above the permitted limits. *Id*. NACME asserts that IEPA did look at the issue of whether or not NACME was a major source, when IEPA issued the SOP in 2001. Resp. at 4. NACME maintains that IEPA never suggested that a CAAPP or FESOP was required when examining the application for the permit issued in 2001 and even after IEPA decided that a CAAPP or FESOP was required, NACME was not informed until April 2005. Resp. at 5-7.

NACME asserts that when it became aware of IEPA's decision, NACME submitted an application for a FESOP in 2005. Resp. at 10. NACME claims that IEPA did not issue a draft permit until 2012 and still has not issued a final permit. *Id*. NACME claims that IEPA "fears that NACME will appeal a condition in the permit." *Id*.

NACME's SOP is Federally Enforceable

NACME asserts that the SOP issued to NACME in 2001 is a federally enforceable permit as that "phrase is defined" in the Act. Resp. at 11. NACME claims that USEPA considers any permit issued under the state program meeting USEPA's state implementation plan to be federally enforceable. *Id*., *citing* 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). NACME further claims that IEPA admitted that the SOP remained in effect up to and including the issuance of the FESOP. *Id*. NACME asserts that IEPA also knew of NACME's PTE when the SOP was issued, and the SOP terms and conditions limit NACME to emissions below the major source threshold. *Id*. NACME asserts that it has not exceeded the major source thresholds, and IEPA has performed inspections using the terms and conditions from the SOP. *Id*. at 11-12. NACME maintains that because the SOP is federally enforceable, the allegations in the complaint are defeated. *Id*. at 12.

People Fail to Meet Burden of Proof

NACME claims that the People fail to include any legal or technical support that demonstrates that NACME's PTE is above the major source threshold. Resp. at 12. NACME argues that the People merely make the claim and fail to support that claim. *Id*. NACME asserts that Mr. Brodsky, upon whose testimony the People rely, actually stated that, in 2002 he determined that NACME was not a major source. *Id*. NACME maintains that Mr. Brodsky's prior testimony "completely contradicts his affidavit attached" in support of the People's motion for summary judgment. Resp. at 13.

NACME argues that Mr. Brodsky was not disclosed as an expert and the disclosure revealed nothing about his calculation of PTE. Resp. at 13. NACME argues that Mr. Brodsky's affidavit presents a previously undisclosed opinion with no reference to any technical or legal benchmarks for how PTE is to be determined. *Id*. NACME asserts that in Mr. Brodsky's deposition he denied any expertise in stack tests and is confused on how PTE is to be determined. *Id*. at 13-14

NACME further asserts that the 2002 stack test results "were wholly anomalous" and are at odds with stack tests in 2006 and 2011. Resp. at 14.

Evidence Supports NACME's Affirmative Defenses

NACME asserts that the record supports NACME's affirmative defenses that the claim is waived and of laches. Resp. at 14, 15. As to waiver, NACME opines that waiver applies to a party that intentionally relinquishes a known right or the parties conduct warrants an inferences that the right is relinquished. Resp. at 14, citing People v. Peabody Coal, PCB 99-134, slip op. at 8 (June 5, 2003), citing People v. Crane, PCB 01-76 (May 17, 2001) and Hickey v. Illinois Central Railroad Co., 35 Ill. 2d 427, 220 N.E.2d 415 (1966). NACME argues that Mr. Brodsky admits that as early as 2000, NACME's PTE was greater than the major source threshold, but IEPA issued a SOP. Resp. at 15. NACME was not told in 2000 that it might be a major source and NACME argues it in "good faith went to the time and expense of permitting its facility through the SOP procedures." *Id*. NACME asserts that not until 2005, when NACME sought to renew the SOP, did NACME become aware that IEPA believed NACME's operation had a PTE above the major source threshold. *Id*. NACME argues the Mr. Brodsky's actions and the failure to take any corrective steps constitute a waiver by IEPA of the claim. *Id*.

As to laches, NACME argues that IEPA was aware in 2000 that data demonstrated that NACME may be a major source; however, IEPA failed to assert a claim until 2012 when this complaint was filed. Resp. at 16. NACME further argues that IEPA "closely scrutinized" NACME's operations over the years, but failed each time to assert IEPA's claim. *Id*. NACME points to an email as further proof that in 2000 IEPA was looking to classify NACME as a major source. Resp. at 17. NACME claims it could have avoided time and expense of an appeal of the 2000 permit as well as in obtaining the permit had IEPA notified NACME that it might be a major source. Resp. at 17-18. NACME asserts that these are compelling circumstances sufficient to warrant application of laches against the People in this proceeding. Resp. at 18, citing Hickey.

People's Reply

Permit History not a Material Fact

The People note that NACME summarizes its permit history, but argues that history is not a material fact to the People's claim that NACME operated the facility without a CAAPP or FESOP. Reply at 4. The People opine that the Board should find that NACME had an obligation to determine its PTE and apply for the proper permit. *Id*. The People claim that NACME's 2000 SOP permit application included a calculation sheet that proposed control emission rates for HCL. That data establish that uncontrolled emissions of HCL exceed the major source threshold, according to the People. *Id*. at 4, 6.

The People argue that the Board found, and the Appellate Court affirmed, in Toyal Am. Inc. v. IPCB, 2012 IL App (3d) 100585, ¶49, that the respondent (Toyal America) was required to determine what VOM requirements applied and to seek timely relief. Reply at 5. The People also cite People v. Panhandle Eastern Pipe Line Co., PCB 99-191, slip op. at 19-20 (Nov. 15, 2001); arguing that in that case, the Board "clearly stated that companies have an obligation to determine" whether or not the company complies with the law. *Id*.

The People argue that while IEPA may have made a mistake in recognizing that NACME was a major source in the 2000 permit, Toyal and Panhandle establish that NACME had an affirmative obligation to determine if NACME was a major source. Reply at 6.

NACME's SOP not a FESOP under Section 39.5 of the Act

The People note that NACME admits that the SOP issued to NACME was not a Title V permit and then argues that any State permit issued is a permit under USEPA's state implementation plan. Reply at 6-7. The People assert that this is incorrect. *Id*. at 7. The People clarify that Illinois SOP permits are issued pursuant to Section 9.5 of the Act (415 ILCS 5/9.5 (2012)), which establish the Illinois program for protection from chronic exposure to toxic, low level air contaminates not covered by federal programs. The People here allege that NACME does not have a CAAPP permit pursuant to Section 39.5 of the Act (415 ILCS 5/39.5 (2012)). The People do not allege a violation of Section 9.5 of the Act (415 ILCS 5/9.5 (2012)).

NACME Fails to Present Any Disputed Material Facts

The People argue that NACME failed to present any disputed material facts and therefore, summary judgment should be granted. Reply at 7-8. The People maintain that the relevant admissible documentation of NACME's emission data provides sufficient information to calculate NACME's PTE. *Id*. at 8. The permits, permit applications, and stack tests submitted to IEPA by NACME support a finding that NACME's PTE is sufficient to establish that NACME is a major source. *Id*. at 9.

Mr. Brodsky calculated the PTE using the information provided to IEPA and provided an affidavit explaining his calculations. Reply at 9-10. The People assert that NACME fails to claim that the documents or Mr. Brodsky's understanding of the "legal and technical elements to

calculate PTE are in dispute." *Id*. at 9. The People argue that the emission rate and the efficiency value are found in NACME's construction application and FESOP application. *Id*. at 10. The method to calculate PTE is in the definition of PTE.

The People note that NACME takes issue with Mr. Brodsky as an expert witness, but NACME fails to define "lay" or "expert" witnesses. Reply at 10-11. The People argue that the calculation of PTE is within Mr. Brodsky's knowledge gained by working for 19 years at IEPA calculating PTE. *Id*. at 11. The People note that NACME attempts to establish that Mr. Brodsky admitted NACME is not a major source based on the 2002 stack test, but the People claim that is taken out of context. *Id*.

The People argue that Illinois courts have found that non-expert testimony is admissible if the witness has special knowledge of and familiarity with the subject matter. Reply at 13, citing People v. Stamp, 108 Ill. App. 3d 280, 294, 438 N.E.2d 1282, 1294 (1st Dist.1982). The People maintain that Mr. Brodsky clearly is qualified to exercise his judgment and discretion to calculate PTE. *Id*. at 14. The People further maintain that calculation of PTE does not require expert knowledge as the numerical representations necessary to make the calculation are in the permit application. *Id*. at 15.

2002 Stack Test Was Submitted by NACME

The People argue that the 2002 stack test was submitted by NACME in the 2005 applications, and if NACME believes the 2002 stack test is an anomaly, then NACME should have retested. Reply at 16. The People argue that instead of retesting, NACME has operated the facility since 2002 without any knowledge other than the stack test that the facility emissions exceed a PTE of 10 tpy of HCL. *Id*. The People assert that under Toyal and Panhandle, NACME has an obligation to know the air pollution laws and permit regulations. *Id*. at 16-17. The People maintain that NACME fails to dispute the facts presented and the numerical values of the emission tests. *Id*. at 17. Therefore, the People claim that summary judgment should be granted in favor of the People. *Id*.

NACME's Affirmative Defenses

The People argue that NACME fails to support its alleged affirmative defenses and the Board should find that there are no disputed facts and the People's allegations are not barred. Reply at 17. The People argue that "[a]n affirmative defense must do more than offer evidence to refute properly pleaded facts in a complaint. Pryweller v. Cohen, 282 Ill. App. 3d 89, 668 N.E.2d 1144 (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 (1st Dist. 1993); People v. Wood River Refining Company, PCB 99-120 slip op. at 6 (Aug. 8, 2002); Farmer's People Bank v. Phillips Petroleum Co., PCB 97-100, slip op. at 2 n.1 (Jan. 23, 1997) (affirmative defense does not attack truth of claim, but the right to bring a claim)." *Id*. at 18.

With laches, the People argue that NACME fails to show a "compelling circumstance" a required element in the affirmative defense of laches. Reply at 19. The People argue that laches requires that a party was delayed unreasonably in bringing an action and that delay misled or prejudiced the other party. *Id*. Generally, application of laches against a public body is disfavored,

but where compelling circumstances are present, laches may be applied. *Id*. In this case, the People argue that due diligence was exercised in asserting the violations against NACME. *Id*. at 22. The People further argue that NACME was not prejudiced by the timing of the People's complaint. *Id*. at 24.

As to waiver, the People argue that NACME incorrectly argues that the possession of emission data in 2000, but failing to raise a claim then, constitutes waiver. Reply at 25. The People note that waiver is the intentional relinquishment of a known right. *Id*., citing People v. Douglas Furniture of Cal., Inc., PC 97-133, slip op. at 10 (May 1, 1997). The People maintain that NACME fails to establish that the People took a "clear, unequivocal and decisive act" establishing an intention not to bring an action. *Id*. at 26.

Conclusion

The People maintain that there is no dispute that NACME is a major source based on its PTE of uncontrolled HCL emissions. Reply at 29. Further there is no dispute that NACME failed to apply for a CAAPP permit and operated without the required air permit from April 16, 2002 until February 2012. *Id*.

LEGAL STANDARD

Standard of Review for Summary Judgment

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Id.* Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to relief "is clear and free from doubt." Dowd & Dowd, Ltd., 181 Ill. 2d at 483, 693 N.E.2d at 370, citing Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on the pleadings, but must "present a factual basis which would arguably entitle [it] to judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

Burden of Proof

In an enforcement proceeding before the Board, the burden of proof is by a preponderance of the evidence. Lefton Iron & Metal Company, Inc. v. City of East St. Louis, PCB 89-53 at 3, (Apr. 12, 1990); Bachert v. Village of Toledo Illinois, *et al.*, PCB 85-80 at 3, (Nov. 7, 1985); Industrial Salvage Inc. v. County of Marion, PCB 83-173 at 3-4, (Aug. 2, 1984), *citing* Arrington v. Water E. Heller International Corp., 30 Ill. App. 3d 631, 333 N.E.2d 50,58, (1st Dist. 1975). A proposition is proved by a preponderance of the evidence when it is more probably true than not. Industrial Salvage at 4, *citing* Estate of Ragen, 79 Ill. App. 3d 8, 198 N.E.2d 198, 203, (1st Dist. 1979). A complainant in an enforcement proceeding has the burden of proving violations of the Act by a preponderance of the evidence. Lake County Forest Preserve District v. Neil Ostro, PCB 92-80, (Mar. 31, 1994). Once the complainant presents

sufficient evidence to make a prima facie case, the burden of going forward shifts to the respondent to disprove the propositions (Illinois Environmental Protection Agency v. Bliss, PCB 83-17, (Aug. 2, 1984)). *See* Nelson v. Kane County Forest Preserve, *et. al.*, PCB 94-244 (July 18, 1996); People v. Chalmers, PCB 96-111 (Jan. 6, 2000).

DISCUSSION

After reviewing the filings, including the affidavits, depositions, permits, and permit applications, the Board is unconvinced that summary judgment is appropriate. The Board finds that the record includes sufficient questions of fact that the Board cannot find the People's motion is clear and free from doubt. While the record includes substantial information, the Board must construe the evidence strictly against the People and in favor of NACME. *See* Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370.

In order to prevail on summary judgment , the People must demonstrate that the evidence clearly establishes that a CAAPP or FESOP permit was required for NACME's facility, and if so, on what date such a permit was required. The Board finds that on this record, the People have failed to establish that the People's right to judgment is clear and free from doubt. Below, the Board gives examples of some of the remaining issue of fact.

The Board notes that one area where the facts are in contrast is that the People rely on calculations performed by Mr. Brodsky and his affidavit regarding those calculations in an attempt to establish a violation occurred. Conversely, NACME provided Mr. Brodsky's deposition to the Board and pointed to alleged inconsistencies in his statements between the deposition and the affidavit. The Board finds that these alleged inconsistencies are sufficient to find that issues of material fact remain.

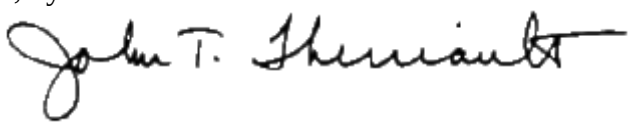
In addition, NACME argues that the 2002 stack test relied upon by the People and Mr. Brodsky in calculating PTE is an anomaly. The Board has reviewed the depositions of Mr. Brodsky and Mr. Wenzel's affidavits concerning the stack tests. As indicated above, in ruling on the motion, the Board must construe the stack test evidence strictly against the People and in favor of NACME. Given this, the Board finds that issues of material fact exists regarding the relationship of the 2002 stack test to later stack test results. Further the Board finds that issues of material fact remain as to whether the stack tests establish that NACME is a major source, and therefore required to have a CAAPP or a FESOP.

The Board finds that the People's requested relief is not clear and free from doubt. *See* Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370. Construing the evidence in the record most favorably for NACME, the Board finds that issues of material fact are present and summary judgment is not appropriate. Therefore, the Board denies the motion for summary judgment and directs the parties to hearing.

The Board makes no ruling on the affirmative defenses at this time and will not discuss the arguments of the parties. The parties should reargue these issues in final briefs after the hearing.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on December 4, 2014, by a vote of 4-0.



John T. Therriault, Clerk
Illinois Pollution Control Board