BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF SERVICE

To: See Attached Service List
(VIA ELECTRONIC FILING)

PLEASE TAKE NOTICE that I have today filed with the Illinois Pollution Control Board, the **PEOPLE'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGEMENT.**

Respectfully submitted,

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Date: September 30, 2014

THIS FILING IS SUBMITTED ON RECYCLED PAPER

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CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on September 30, 2014, I served true and correct copies of the **PEOPLE'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGEMENT**, upon the persons and by the methods as follows:

[First Class U.S. Mail]

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Respondent.	)	

PEOPLE'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGEMENT

NOW COMES Complainant, PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois ("Complainant" or "People"), herein provides its Reply in Support of Its Motion for Summary Judgment ("Reply"). In support of this Reply, the People state as follows:

I. Introduction

The People repeat and incorporate by reference herein its Motion for Summary Judgment filed on May 16, 2014 ("MSJ").[1] In sum, the People's Complaint[2] alleges one count against Nacme: that from at least April 16, 2002 through at least February 11, 2012, Respondent conducted pickling operations at its steel processing facility located at 429 West 127th Street, Chicago, Cook County, Illinois ("Facility"), a major source for air emissions, without a Title V Clean Air Act Permit Program ("CAAPP" or "Title V" or "major source") permit or, in the alternative, a Federally Enforceable State Operating Permit ("FESOP") in violation of Sections 39.5(5)(x), 39.5(6)(b), and 9(b) of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/39.5(5)(x), 39.5(6)(b), and 9(b) (2010).

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[1] See People's Motion for Summary Judgment previously filed with the Board.
[2] See Complaint Exhibit A of People's Motion for Summary Judgment.

Nacme's Response in Opposition to the State's Motion for Summary Judgment ("Response") requests the Illinois Pollution Control Board ("Board") to find that genuine issues of material fact pervade the People's MSJ, yet it fails to provide any genuine issues of disputed material facts to the People's claim that Nacme was operating without a CAAPP or FESOP permit from April 2002 to February 2012. Instead, Nacme provides and argues the issues of law that are in dispute. Nacme then provides additional facts and argues its affirmative defenses should bar the People's claim. The People have no dispute with Nacme's Statement of Facts ("SOF"), as the deposition and documents speak for themselves.

First, Nacme reengages its previously stricken argument for its affirmative defense that Nacme's State Operating Permit No. 96020074 ("Nacme's SOP") is federally enforceable and therefore was an appropriate permit for a "major source". Whether Nacme's SOP issued by the Illinois Environmental Protection Agency ("Illinois EPA" or "Agency" or "IEPA") is a FESOP under 39.5 is a question of law. Furthermore, Nacme should not be allowed to circumvent the Board's order on this affirmative defense which was clearly stricken by the Board for inadequate pleading of an affirmative defense. See Board Hearing Officer order dated June 6, 2013, page 12 hereto attached as Exhibit A ("June 2013 Board Order"). The People respectfully request that the Board strike this section of Nacme's Response found at "Argument, Section A" of Nacme's Response, pages 11-12.

Second, Nacme states that the People failed to meet its burden of proof by claiming that the following are genuine issues of material fact: 1.) the People did not offer admissible evidence of NACME's potential to emit ("PTE"); 2.) that Valeriy Brodsky was not disclosed as an expert and is unqualified to determine PTE calculations for hydrochloric acid ("HCL"). Here

again, the Board dismissed this argument in its Order dated August 7, 2014[3]; and 3.) the 2002 Stack Test that Nacme submitted in its SOP renewal application was an anomaly and did not accurately reflect its operating condition.

Finally, Nacme provides Fact Statements to support its Affirmative Defenses of Laches and Waiver, previously allowed to stand by the Board. The People argue that Nacme fails to show how its affirmative defenses of Laches and Waiver meet the higher standard of compelling circumstances when applied to a government entity.

For the following reasons stated herein, the Board should deny Nacme's Affirmative Defenses of Laches and Waiver, find there is no genuine issue of material facts, and grant the People's Motion for Summary Judgment.

II. Procedural

On September 5, 2012, the People filed a one-count Complaint against Nacme alleging violations of the Act, at Facility. On November 2, 2012, the People received service of Nacme's Answer, which had been filed with the Board on November 1, 2012.

On November 30, 2012, the People filed with the Board its Motion to Strike and Dismiss Respondent's Affirmative Defenses. On January 16, 2013, the People received service by Nacme of its Amended Affirmative Defenses to the Complaint, which had been filed with the Board on January 15, 2013. On February 8, 2013, the People filed with the Board its Motion to Strike and Dismiss Respondent's Amended Affirmative Defenses. On March 11, 2013, Nacme filed its Response to People's Motion to Strike and Dismiss Respondent's Amended Affirmative Defenses. On March 25, 2013, People filed its Motion for Leave to File Reply Instanter and Reply Brief in Support of Its Motion to Strike and Dismiss Respondent's Amended Affirmative Defenses. On June 6, 2013 the Board issued an order allowing Nacme's Amended Affirmative

[3] See Board Hearing Officer order dated August 7, 2014 hereto attached as Exhibit B ("August 2014 Board Order")

Defenses on Laches and Waiver only. On May 16, 2014, the People filed its MSJ, including two affidavits, as Exhibit E "Brodsky Affidavit" and Exhibit F "Reuter Affidavit."[4] On June 5, 2013, Nacme filed its Motion to Strike.[5] On August 2014, the Board denied Nacme's Motion to Strike Brodsky's Affidavit.

III. Nacme's Obligation to Comply with Illinois's Environmental Laws.

Nacme summarizes its permitting history beginning in 2000, which may apply to its Laches and Waiver affirmative defenses, but is not a material fact to the People's claim that Nacme operated its Facility without a CAAPP or FESOP permit from April 12, 2002 to February 2012. The Board should find Nacme had an obligation to determine its PTE for uncontrolled HCL, a hazardous air pollutant ("HAP"), air emissions greater than 10 tons per year ("tpy"), and, if appropriate, to either submit the correct operating permit application to the Illinois EPA or obtain regulatory relief.

The People agree that the October 25, 2000 SOP issued by Illinois EPA in February 2001 was part of a settlement agreement to resolve a dispute whether Nacme's Facility's air emissions qualified as Title V Facility in Nacme v. IEPA, PCB 01-85 ("Permit Appeal") hereto attached as Exhibit C. See also MSJ, Exhibit F1, paragraph 1. In its Response, Nacme conveniently fails to attach its Permit Appeal Petition with its attachment, the July 25, 2000 SOP Revision Application, that includes a calculation sheet that proposes controlled HCL air emissions limits at the Facility to be 2.23 tons per year ("PCB Petition"). Id. The 2000 SOP Revision Application fails to provide the PTE of uncontrolled HCL air emissions.

[4] See Exhibits E and F, People's Motion for Summary Judgment previously filed with the Board on May 16, 2014.
[5] See Nacme Steel Processing, LLC's Motion to Strike the Affidavit of Valeriy Brodsky filed with the Board on June 5, 2014. ("Motion to Strike").

In *Toyal*, the Illinois Appellate Court for the Third District affirmed the Board's determination that it was *Toyal's* "obligation to determine what VOM[6] requirements applied to it and to timely achieve compliance or seek regulatory relief." *Toyal Am., Inc. v. Illinois Pollution Control Bd.*, 2012 IL App (3d) 100585, ¶ 49, 966 N.E.2d 73, 82. In *People v. Panhandle Eastern Pipe Line Co.*, the Pollution Control Board held that a company doing business in Illinois has an obligation to comply with the State's environmental laws. *People v. Panhandle Eastern Pipe Line Co.,* PCB 99-191 slip op., 2001 WL 1509515 (Nov. 15, 2001). More significantly for the question at hand, the Board provided the following analysis:

> Companies cannot simply sit back and wait to see if they will be caught by the Agency. For Illinois' system of environmental programs to be effective, self-policing is required of industry. . . . The Board finds that the Agency's execution of these basic governmental functions do not absolve Panhandle of its statutory obligation to determine, on its own, whether it is complying with its permit. . . . ***It is the responsibility of companies doing business in Illinois to determine whether they are complying with Illinois' environmental laws***. Panhandle's reliance on Agency permit renewals and inspections as the *sole* means by which Panhandle determined its compliance was unreasonable.

Id. at 18-19 (emphasis added). Thus, the Board clearly stated that companies have an obligation to determine whether they are complying with the State's environmental laws, regardless of whether the State has been reviewing portions of the company's compliance.

In its PCB Petition in 2000, Nacme states that "The Agency is inaccurate in its assertion that NACME is required to submit a Title V application for its Facility..." Nacme also states that its Facility is not a "support facility" with respect to ACME Steel Company, which Nacme clearly understood was a Title V facility for air emissions. See PCB Petition page 3. Yet, Nacme's July 2000 SOP Revision Application attachment declared a 99.90% control efficiency and its calculation sheet proposed PTE of 2.23 tpy of its actual and controlled HCL air

[6] Volatile Organic Material ("VOM")

emissions. See PCB Petition attachment, pages 10 through 13. By applying simple math calculations using the controlled emissions and control efficiency, Nacme's PTE for uncontrolled HCL air emissions would equal 223 tpy (controlled emissions (2.23) x efficiency (99.99%)), well above the "major source" threshold. See Brodsky Affidavit, paragraph 4. This is a significant lapse in Nacme's obligation to determine its PTE for uncontrolled HCL air emissions and compliance under Illinois' environmental laws.

Although the State may have made a mistake in recognizing this discrepancy in Nacme's early operating permit applications, like *Toyol* and *Panhandle*, Nacme had an affirmative obligation to determine its PTE for uncontrolled HCL air emissions and to submit the appropriate permit application. Instead, it submitted an SOP application and then filed a Permit Appeal insisting that it was not a "major source" for air emissions when the Agency questioned its "major source" status. The mere idea that Nacme believes that it is innocent in the misunderstandings of its permitting history stretches the imagination.

IV. Nacme's SOP is not a FESOP for purposes of the People's claim under Section 39.5 of the Act.

The People iterate their request that the Board strike the section of Nacme's Response found at "Argument, Section A", pages 11-12. Nacme should not be allowed to circumvent the Board's order on this affirmative defense which was clearly stricken by the Board for inadequate pleading of an affirmative defense. In the alternative, the People address the legal issue presented to avoid any confusion between their allegations of violation of Sections 39.5(5)(x), 39.5(6)(b), and 9(b) of the Act, 415 ILCS 5/39.5(5)(x), 39.5(6)(b), and 9(b) (2010), and state operating permits under Section 9.5 of the Act, 415 ILCS 5/9.5.

Nacme admits in its Response that Nacme's SOP was not a Title V "major source" permit under the CAAPP program. See Response, NACME's Relevant Permit History, page 4;

Nacme's SOF, pages 2 and 3. Nacme then proceeds to incorrectly claim that any air permit issued under a state permit program in Illinois is under the USEPA's state implementation plan requirements and, therefore, is magically federally enforceable. Nacme cites no support for this contention other than to cite the USEPA's approval of Illinois' SIP and two cases that are not on point. See 37 FR 10862 (Illinois' SIP, which approves Illinois' plan for the attainment and maintenance of national standards); See Response, page 11 (the two federal cases cited by Nacme involve federally enforceable national standards as "major source" emissions). The People do not dispute that violations under 39.5 of the Act, 415 ILCS 39.5, are federally enforceable violations governed by Illinois' SIP as approved by the USEPA.

However, Illinois' SOP permits are promulgated under Section 9.5 of the Act, 415 ILCS 9.5, which establishes a state program to protect the public from chronic exposure to toxic, low level air contaminants not otherwise adequately covered by federal programs. 415 ILCS 5/9.5. Since the basis of the People's allegations are for violations of Section 39.5 of the Act, 415 ILCS 5/39.5. Clean Air Act Permit Program, and not violations under the SOP program under Section 9.5, 415 ILCS 5/9.5, Nacme's argument that Nacme's SOP is federally enforceable fails.

Hence, the Board should find there is no genuine issue of the material fact that Nacme's SOP is not a Title V (CAAPP) program permit and thereby rule that, as a question of law, the SOP is not, as Nacme argues a federally enforceable permit.

V. Nacme Fails to Present Any Disputed Material Facts to the People's MSJ

Nacme argues that the People have not met its burden of proof and declares that genuine issues of material facts pervade this matter. Yet, Nacme fails to provide any disputed material facts to the People's allegations that Nacme was operating without a CAAPP or FESOP permit from April 2002 to February 2012. Instead, Nacme provides and argues the issues of law that

are in dispute, which makes this matter ripe for Summary Judgment. The Board should find that there are no genuine issues of material facts and enter Summary Judgment in favor of the People and against Nacme.

A. People offered indisputable admissible evidence of NACME's PTE

Nacme contends that the People failed to provide any legal or technical evidence to support its allegation that Nacme's PTE for HCL was at or above 10 tpy, the "major source" threshold for HCL. Again, Nacme fails to state a fact it disputes pertaining to the emissions data it submitted to the State in its permit applications or the simple math formulas the People used to calculate PTE for uncontrolled emissions. Instead, Nacme provides an Affidavit of Britt Wenzel ("Wenzel Affidavit") that attests to and verifies his knowledge of the Nacme Facility as follows: 1.) several stack tests measured only scrubber outlet emissions ("actual emissions" or "controlled emissions"); 2.) the various values of the actual emissions of its stack tests; and 3.) the scrubber efficiency at the time of its stack tests is unknown. See Response, Exhibit 1, Wenzel Affidavit. Nacme fails to dispute Brodsky's formula or to provide alternative methods of calculating the PTE of uncontrolled HCL air emissions.

The People provided the relevant admissible documentation of Nacme's Facility emissions data and control efficiency provided by Nacme in its permit applications and stack test results necessary to calculate PTE, and the calculations utilized to determine Nacme's PTE in its MSJ Exhibit E: Brodsky's Affidavit, and Exhibit F: IEPA Reuter Affidavit of authenticated documents from IEPA file[7] as follows:

1. Nacme's SOP
2. 2002 Construction Permit Application

[7] All permit applications are signed by Nacme attesting to the truth, accuracy and completeness in accordance with the applicable regulations. See Exhibit F of People's Motion for Summary Judgment. All certified public records of Nacme's documents are party-opponent admissions. Ill. R. Evid. Rule 801(d)(2) and 803(8).

3. 2002 Construction Permit

4. April 2002 Stack Test

6. April 2005 SOP Renewal Application

7. April 2005 Notice of Incompleteness

8. September 2005 SOP Renewal Application

9. September 2005 Notice of Incompleteness

10. 2005 FESOP Application

12. December 2006 Stack Test Report

13. 2007 FESOP Application

14. 2012 Construction Permit

Permits, permit applications and stack test results submitted to the Illinois EPA by Nacme are admissible evidence and admissions of Nacme's emissions and the source of the numerical elements used by Illinois EPA to calculate PTE pursuant to the Act. In addition, the People provide the definition of PTE in its MSJ[8] and Nacme admits in its Statement of Facts that, in his deposition, Brodsky is familiar with the concept of PTE[9] and controlled and uncontrolled emissions.[10] Nacme fails to claim that neither the documents nor Brodsky's understanding of the legal and technical elements to calculate PTE are in dispute.

Furthermore, paragraph 4 of Brodsky's affidavit reads, in relevant part, as follows:

> ".... I calculated the PTE HCL (before control) on the maximum hourly controlled emission rate and the efficiency of the control at 99.90% efficiency stated in the 2002 Construction Permit[11] and the 2005 FESOP Application as the manufacturer's guaranteed efficiency result, ... *(emphasis added)*

[8] MSJ at page 20.
[9] See SOF 14, pages 9 and 10.
[10] See SOF 15, pages 10 and 11.
[11] Due to a Scribner's error, this should read 2002 Construction Permit Application. MSJ Exhibits F2 and F3 are both named 2002 Construction Permit: F2 is mislabeled 2002 Construction Permit and should be 2002 Construction

Paragraph 4 of Brodsky's Affidavit is a statement to show specifically why Brodsky, the permit reviewer, based his calculations on a 99.90% efficiency value of the Facility control equipment. The statement is a statement of fact based on Brodsky's personal knowledge of the numeric percentage he used to represent efficiency control in calculating PTE of the uncontrolled HCL air emissions at Nacme's Facility. Then, Brodsky identifies two documents, 2002 Construction Permit *Application* and the 2005 FESOP Application submitted by Nacme wherein Nacme admits the efficiency value of and name of the manufacturer of the control equipment (Pro-Eco) at the facility.[12] *See* MSJ Exhibit F2, 2002 Construction Permit Application at pages IEPA FOIA 0378 and 0382; and MSJ Exhibit F10, 2005 FESOP Application at pages NMLP 0319 and 0324. *See also* MSJ Exhibit F6, September 2005 SOP Renewal Application, page 0950 as cited on page 9-10 of the MSJ.

The "method" of calculation is found in the definition of PTE; a legal question that does not require a complicated mathematical analysis. Rather it is a simple math formula consisting of multiplication and division, as admitted by Brodsky in his Deposition. *See* Response, Exhibit 2, Brodsky Deposition at pages 25, 26, and 28. Brodsky's affidavit states facts of numerical values found in documents submitted by Nacme to the Agency[13] that he applied to the calculations he made to determine PTE of uncontrolled HCL air emissions at the Facility as that term is defined by the Act. Nacme does not counter or dispute Brodsky's methods of calculating the PTE of uncontrolled HCL air emissions at Nacme's Facility.

Second, Nacme fails to define lay opinion or expert opinion. Nacme fails to provide valid arguments when it claims that Brodsky's knowledge of calculating PTE is an "expert"

Permit Application as is apparent by the first page of the Nacme letter to Illinois EPA (Exhibit F3 is properly named the 2002 Construction Permit issued).

[12] See footnotes 6 and 10.

[13] See footnote 6.

knowledge or opinion, rather than what it may be, a lay opinion or conclusion based on special knowledge. Instead, Nacme incorrectly claims that the PTE HCL emissions calculations for the Facility in paragraphs 3, 4, 5 and 10 of Brodsky's affidavit that are "technical analysis based on mathematical calculations" are vague expert testimony that requires expert knowledge. See MSJ, Exhibit E, Brodsky Affidavit. Rather, the calculations are the application of special knowledge performing simple math of multiplication and division applied to a formula that Brodsky learned during his 19 years working at the Agency calculating PTE.

Then, Nacme attempts to claim that Brodsky admits that the 2002 Stack Test performed at the Nacme Facility shows it is not a major source. In fact, the discussion Nacme cites from Brodsky's deposition was about the application of National Emission Standards for Hazardous Air Pollutants ("NESHAP") regulations to facilities with CAAPP permits and FESOP permits. Brodsky clearly distinguishes between PTE and actual emissions in this conversation when he says, "...NESHAP regulation is applicable to major sources which *actually* meet more than ten tons of hazardous air pollutant per year" and "There were several stack tests which all indicated that they are not *actually* major source." See Response, page 12 (citing Exhibit 2, Brodsky Deposition, page 120, line 24 – page 121, line 4 and page 121 lines 21 – 23) (emphasis added). Clearly, Brodsky is talking about the reason NESHAP regulations do not apply to the Nacme Facility whose actual emissions are less than the major source threshold of 10 tpy of HCL.

Nacme would like the Board to believe that by claiming that the requirement not to measure uncontrolled emissions to the stack during stack testing results[14] in the inability of Nacme to know the control efficiency of its emissions and therefore calculate its PTE for uncontrolled HCL air emissions. Yet, in its permit applications[15], and communications to the

[14] See Brodsky Deposition, pages 66 - 67
[15] See MSJ, Exhibit F.

Agency about the applicable control efficiency at the Facility, it provides control efficiency values.

Clearly, the People have provided ample indisputable facts to support its allegation that in 2002 Nacme's PTE for uncontrolled HCL air emissions was at or above 10 tpy, the "major source" threshold for HCL.

B. People offered indisputable evidence that Valeriy Brodsky has the requisite qualifications to calculate PTE.

Nacme iterates is argument in its Motion to Dismiss Brodsky's Affidavit that Brodsky was not disclosed as an expert witness on methods of calculating PTE, or interpreting stack test results. The Board ruled that Nacme was on notice of Brodsky's potential testimony and that Brodsky's Affidavit was well within the scope identified in the People's 213(f)(1) witness disclosure[16]. See August 2014 Board Order at page 5. Moreover, during the deposition of Valeriy Brodsky, Brodsky testified to his qualifications and knowledge of PTE and associated calculations and the numerical emissions factors represented in a PTE calculation.[17] *See* Response, Exhibit 2, Brodsky Deposition at pages 12 – 31.

The People contend that Brodsky's ability to determine the PTE HCL air emissions from data provided by Nacme's permit applications and stack test results submitted to the Agency are based on the special knowledge he has acquired after 19 years reviewing and writing air pollution permits for the Agency. In addition, as the Agency permit reviewer for the Nacme Facility since 2000, Brodsky is uniquely qualified to perform simple mathematical calculations to derive PTE HCL air emissions at the Facility.

[16] See Response, Exhibit 7.
[17] Nacme falsely claims that its more than 3 hour deposition of Valeriy Brodsky did not depose Brodsky on his qualifications or methodology used to derive the PTE calculations and emissions factors, and "the like". *See generally*, Response, Exhibit 2, Brodsky's Deposition.

Illinois courts have found that 'opinions and conclusions of a non-expert witness are admissible if the witness has special knowledge of and familiarity with a given subject matter.' *People v. Stamps*, 108 Ill. App. 3d 280, 294, 438 N.E.2d 1282, 1294 (1982)(where a witness was not qualified as an expert witness, but his testimony was admissible for the purpose of explaining certain terms of the trust agreement in order to make the trust comprehensible); *See also State Farm Mutual Auto Insurance Co. v. Short* (1970), 125 Ill.App.2d 97, 260 N.E.2d 415; *Lawson v. Belt Ry. Co. of Chicago* (1975), 34 Ill.App.3d 7, 339 N.E.2d 381, 394-395 (where "an experienced switchman who had worked in close proximity to moving trains for some 11 years, and unquestionably had a special knowledge and familiarity with equipment connected with that employment." was allowed to testify to the type of boxcar that hit him even though he did not see it).

In *Gowdy v. Richter* the court rejected defendant's argument that testimony about proceeds of a stock sale had ultimately become part of the $400,000 supplied to a third party conclusionary and, therefore, not admissible, where it found witness had special role in promotion of the stock and where witness was in the position of knowing which persons were supplying the needed consideration. *Gowdy v. Richter*, 20 Ill. App. 3d 514, 527, 314 N.E.2d 549, 559 (1974). The *Gowdy* court then proceeded to explain that even if the testimony was the witness' opinion, the fact that the witness had special knowledge of the matter in question qualifies the testimony as an exception to the lay witness opinion rule. *Id. (citing State Farm Mut. Auto. Ins. Co. v. Short* (1970), 125 Ill.App.2d 97, 260 N.E.2d 415.)

In *Bloomgren v. Fire Ins. Exchange* the court states that records which concern causes and effects, involving the exercise of judgment and discretion, expressions of opinion, or the drawing of conclusions are generally not admissible as exceptions to the hearsay rules "unless

they concern matters to which the official would be qualified to testify about at trial." *Bloomgren v. Fire Ins. Exchange,* 162 Ill.App.3d 594, 599, 517 NE2d 290 (3rd Dist. 1987).

In this case, during Brodsky's deposition, Nacme questioned Brodsky about manuals and training that assisted Brodsky in his job at the Agency. The deposition included questions about Brodsky's work reviewing permit applications and drafting permits, including calculating PTE for controlled and uncontrolled air emissions, as well as his knowledge to read stack test results. *See* Response, Exhibit 2, Brodsky Deposition at pages at 59-61. Brodsky's affidavit and deposition provide the foundation for his unique position at the Agency as a permit reviewer since 1994 to the present, and as the permit reviewer for Nacme since 2000. *See* Brodsky's affidavit, page 1, ¶1. See Response, page 4, (citing SOF 2); and Exhibit 2, Brodsky Deposition, page 18. Brodsky's affidavit also attests that his duties in this position have and continue to require him to review air permit applications, draft related permits, and ensure his review and drafts are performed in compliance with the Act. *See* Id. at page 1, ¶2.

Clearly, Brodsky is qualified to exercise his judgment and discretion when he calculates the PTE HCL emissions at Nacme's Facility based on his special knowledge of 19 years of implementing the Act. Like the witness in *Stamps,* the calculations in Brodsky's affidavit are undisputed facts offered to provide the Board with a better understanding of how he calculated the PTE HCL air emissions for the Nacme Facility based on his 19 years of special knowledge calculating PTE as he understands that term to be defined under the Act. Ultimately, it is the Board's judgment to determine whether his calculations do, in fact, meet the definition of PTE in the Act.

Moreover, the calculations used by Brodsky are do not require expert knowledge as Nacme contends. In fact, Brodsky states in his deposition, that PTE calculation in this case is

simple math. *See* Response, Exhibit 2, Brodsky Deposition at pages 25, 26, and 28. Also, in his deposition, Brodsky disclosed his knowledge of how PTE was calculated. *See Id.* page 28.

It may take special knowledge of a long time permit reviewer but it does not require an expert to locate numerical representations in stack tests and permit applications and to perform simply calculations for PTE as defined by the Act. Rather, it is a combination of special knowledge to locate stack test emissions results and control efficiency numeric values in permit applications, and the ability to perform simple math of multiplication and division to derive the PTE HCL emissions as defined by the Act for the Nacme Facility. This special knowledge of PTE calculations falls well within the purview of lay witness testimony. The method of calculation Brodsky chooses is from his special knowledge acquired calculating PTE for 19 years for the Agency.

Nacme's claims that Brodsky admitted at deposition that he has no expertise in the review of stack tests is taken out of context. Instead, Brodsky states that he does not review whether stack tests meet the required methodology required by the Clean Air Act, which is assigned to another individual[18], but reviews the stack tests for emissions results once they are approved to have met the standard methodology for the purposes of reviewing air permit applications. See Brodsky Deposition at pages 61 – 62, 65, 81, 85-93.

Nacme attempts to declare Brodsky confused about how to determine PTE and then mischaracterizes a quote in Brodsky's deposition that never uses the term or acronym PTE and is clearly discussing *actual* emissions after control that show Nacme's PTE controlled HCL air emissions are below 10 tpy. See Response, Exhibit 2, Brodsky's Deposition p. 59, lines 1 and 2.

[18] See Reuter Supplemental Affidavit, August 21, 2002 Memorandum from Ken Erewele, CES/Compliance to Julie Armitage re: Final Test Report on emissions testing on April 16, 2002 at Nacme Facility ("2002 Stack Test – Validity Certification") hereto attached as Exhibit D3.

As a whole, all Brodsky's Affidavit's statements, Brodsky's Deposition and the attached documents of the People's MSJ Exhibit F, present foundation and facts with particularity based on Brodsky's personal knowledge and special knowledge as a lay witness in this matter. Nacme can warp Brodsky's deposition testimony anyway it likes but, taken in context, Brodsky's deposition testimony clearly shows his competence in understanding how to read stack test results and calculate PTE to determine controlled and uncontrolled emissions. In fact, Nacme agrees that Brodsky understands all the necessary concepts that go into deriving PTE from stack test results and control efficiency factors.[19] Finally, Nacme failed to dispute the facts presented in Brodsky's Affidavit, and failed to present alternative formulas or methods for calculating PTE uncontrolled emissions as it is defined by the Act.

Thus, the Board should find there are no genuine issues of material facts of Brodsky's special knowledge and experience calculating PTE HCL air emissions for the Nacme operations.

C. 2002 Stack Test that Nacme submitted in its SOP renewal application was clearly Nacme's submission to Illinois EPA to use to determine emissions data for Nacme's Facility

Whether or not the 2002 Stack Test[20] at the Nacme facility was an anomaly, as Nacme claims, or not, Nacme submitted this stack test with its April 2005 and September 2005 SOP Renewal Applications and 2005 September FESOP Application attesting to the truth, accuracy and completeness of each application. (See MSJ Exhibit F6, 8 and 10) If Nacme believed the 2002 Stack Test to be an anomaly, then it should have retested the Facility instead of operating its Facility for 4 more years without any other knowledge besides this stack test that its Facility emissions PTE exceeded the 10 tpy of HCL. As in *Toyol* and *Panhandle,* Nacme had an

[19] See Response, SOF 14, 15 and 18.
[20] See FN 18.

affirmative obligation to know the air pollution laws and permit regulations of Illinois, to know its PTE and to submit the proper application to the Illinois EPA.[21]

Nacme again fails to dispute the facts presented by the People of the numerical values of emissions in its stack test results or that Nacme presented the 2002 Stack Test results in its 2005 SOP Renewal Applications and 2005 FESOP Application. Therefore, there are no genuine issues of facts with Nacme's 2002 Stack Test results or the calculations for the PTE of uncontrolled HCL air emissions at its Facility.

Accordingly, the Board should find that there are no genuine issues of fact and enter Summary Judgment in favor of the People and against Nacme.

VI. Nacme's Affirmative Defenses of Waiver and Laches fail.

Nacme fails to support its affirmative defenses of waiver and laches with compelling circumstances where it 1.) implies that a mistake by the Agency in 2000 and 2001 bars the People from prosecuting Nacme for violations of the Act from April 16, 2002 to February 2012; and 2.) Nacme's obligation but failure to submit a CAAPP permit application in light of the PTE levels of the uncontrolled HCL air emissions at its Facility.[22] For the following reasons, the Board should find Nacme's affirmative defenses lack compelling circumstances and hold there are no facts of dispute to Nacme's affirmative defenses and that Nacme fails to find that the People's allegations are not barred by Nacme's affirmative defenses.

A. Legal Standard

An affirmative defense is *"A Respondent's assertion raising new facts and arguments that, if true will defeat the plaintiff's or prosecution's claim, even if all allegations in the*

[21] See Reply Section III.
[22] See Exhibit C, Permit Appeal 01-85, Board Petition; Thomas Reuter Supplemental Affidavit - March 22, 2000 Agency Facsimile - 1997 Stack Test Data hereto attached as D1; MSJ, Exhibit F4, F6, F8.

complaint are true." BLACK'S LAW DICTIONARY (7th edition, 1999). The Board rule regarding affirmative defenses provides, in pertinent part, that:

> Any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing.

35 Ill. Adm. Code 103.204(d). In addition, Section 2-613(d) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-613(d) (2010), is instructive, providing that "[t]he facts constituting any affirmative defense...must be plainly set forth in the answer or reply."

Under Illinois case law, the test for whether a defense is affirmative and must be pled by the Respondent is whether the defense gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated. *Condon v. American Telephone and Telegraph Company, Inc.*, 210 Ill.App.3d 701, 709, 569 N.E.2d 518 (2nd Dist. 1991); *Vroegh v. J & M Forklift*, 165 Ill.2d 523, 530, 651 N.E.2d 121 (1995). Accordingly, an affirmative defense confesses or admits the cause of action alleged by the Plaintiff, and then seeks to avoid it by asserting new matter not contained in the complaint and answer. *Worner Agency, Inc. v. Doyle*, 121 Ill. App.3d 219, 222, 459 N.E.2d 633 (4th Dist. 1984); see also *People v. Community Landfill Co.*, PCB 97-193, slip op. at 3 (Aug. 6, 1998).

An affirmative defense must do more than offer evidence to refute properly pleaded facts in a complaint. *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 at 6 (August 8, 2002); *Farmer's People Bank v. Phillips Petroleum Co.*, PCB 97-100, slip op. at 2 n.1 (January 23, 1997) (affirmative defense does not attack truth of claim, but the right to bring a claim).

The facts establishing an affirmative defense must be pled with the same degree of specificity required by a plaintiff to establish a cause of action. *International Insurance Co. v. Sargent & Lundy*, 242 Ill.App.3d 614, 630, 609 N.E.2d 842 (1st Dist. 1993); *Community Landfill Co.* at 4. Thus, the issue raised by an affirmative defense must be one outside of the four corners of the complaint.

B. Nacme's Laches Affirmative Defense Fails.

Nacme fails to show compelling circumstances, a required element in a Laches affirmative defense against a government body. In short, Nacme contends that 1) the People lacked due diligence by bringing an alleged excessively delayed lawsuit; 2) prejudice resulted when Nacme chose to file a Permit Appeal in 2000 to refute the Agency's determination that Nacme was a "major source" as a support facility; and 3.) prejudice resulted when Nacme was unable to obtain it FESOP from 2005 through 2012 because it refused to provide a construction permit for its increase in throughput requested in its 2005 FESOP Application as requested by the Illinois EPA for its CAAPP operating permit application.

1. Legal Standard

Laches is an equitable principle that bars an action where: (1) one party has delayed unreasonably in bringing a lawsuit (*City of Rolling Meadows v. Nat'l Adver. Co.*, 228 Ill. App.3d 737, 593 N.E.2d 551 (1st Dist. 1992)); and (2) because of the delay, the Respondent has been misled or prejudiced, or has taken a different course of action than it might otherwise have taken absent the delay. *Patrick Media Group, Inc. v. City of Chicago*, 255 Ill. App.3d 1, 8, 626 N.E.2d 1066 (1st Dist. 1993). Although *laches* as applied to public bodies is disfavored, it can apply by showing a third element of compelling circumstances even when the public body is operating in

its governmental capacity. *Hickey* v. *Illinois Central Railroad Co.,* 35 Ill. 2d 427, 447-48 (1966), 220 NE2d 415.

The doctrine of laches is disfavored when the defense is raised against a complainant that is exercising its government function and protecting a substantial public interest. Illinois courts have been reluctant to apply laches when it might impair the People in the discharge of its government function. *Cook County v. Chicago Magnet Wire Corp.*, 152 Ill. App.3d 726, 727-28, 504 N.E.2d 904 (1st Dist. 1987).

Several courts have explicitly held that the doctrine of laches does not apply to the exercise of a governmental function. *See e.g. In re Vandeventer's Estate*, 16 Ill. App.3d 163, 165, 305 N.E.2d 299 (4th Dist. 1973); *In re Grimley's Estate*, 7 Ill. App.3d 563, 566, 288 N.E.2d 66 (4th Dist. 1972); *Shoretime Builder Co. v. City of Park Ridge*, 60 Ill. App.2d 282, 294, 209 N.E.2d 878 (1st Dist. 1965).

As the Illinois Supreme Court stated:

> . . . the reluctance of courts to hold governmental bodies estopped to assert their claims is particularly apparent when the governmental unit is the People. There are sound bases for such policy . . . More importantly ... is the possibility that application of laches or estoppel doctrines may impair the functioning of the People in the discharge of its government functions, and that valuable public interests may be jeopardized or lost by the negligence, mistakes, or inattention of public officials.

Hickey 35 Ill. 2d at 447-448. See also *Ferretti v. Department of Labor* (1987), 115 Ill.2d 347, 352, 506 N.E.2d 560 (holding that State is not estopped from reassessing taxpayer liability, even where a tax return had been previously approved by State).

In *Van Milligan* the Illinois Supreme Court recognized that "there is substantial precedent in this State that has applied *laches* against a governmental body's actions only under compelling circumstances. There is considerable reluctance to impose the doctrine of *laches* to the actions of

public entities unless unusual or extraordinary circumstances are shown. This is so because *laches* "may impair the functioning of the [governmental body] in the discharge of its government functions, and * * * valuable public interests may be jeopardized or lost by the negligence, mistakes, or inattention of public officials." *Van Milligan v. Bd. of Fire & Police Comm'rs of Vill. of Glenview*, 158 Ill. 2d 85, 90-91, 630 N.E.2d 830 (1994)(citing *Hickey* 35 Ill.2d at 447-448)

The Board has considered *laches* in several other cases but has never held that a State enforcement action was thereby barred. In effect, the Board may have previously been convinced that due diligence might have been lacking in some other case, or even that some prejudice resulted thereby, but the Board has never found that the requisite compelling circumstances were present to justify the application of the doctrine of *laches* against the People of the State of Illinois.

It is an indisputable fact that the People are operating in a governmental capacity in prosecuting this case in order to protect the public's interest. With its complaint, the People seek to exercise its government function—the enforcement of environmental statutes and regulations. The right to a healthy and safe environment is a public right. *Pielet Bros. v. Illinois Pollution Control Board*, 100 Ill. App. 3d 752, 758, 442 N.E. 2d 1374 (5th Dist. 1982).
Section 4(e) of the Act, 415 ILCS 5/4(e) (2010), charges the IEPA with the duty to take summary action to enforce violations of the Act. Section 2 of the Act, 415 ILCS 5/2 (2010), states: "It is the purpose of this Act . . . to establish a unified, state-wide program . . . to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them." This is precisely the governmental function the People's Complaint serves.

Thus, Nacme has a higher burden for proving the defense of laches by establishing the requisite compelling circumstance element of its laches defense. See *People v. Freeman United Coal Mining Company, LLC*, 2012 WL 5883713 (Ill.Pol.Control.Bd.), 31.

2. The People exercised due diligence in asserting Nacme's violations of the Act.

Nacme fails to show a lack of due diligence because the alleged delay in formal enforcement occurred (due to the length of time) because of Nacme's own failure to submit the correct permit application for the PTE uncontrolled HCL air emissions at its Facility.

Nacme argues that the twelve years from the February 2000 permit issuance, when the Agency should have known an SOP was inappropriate, to the September 2012 filing of the People's Complaint is an "unreasonable delay" that such delay "clearly evidences a lack of diligence." Response at 16-18. First, the People's Complaint seeks to redress violations of the Act from April 16, 2002, when Nacme conducted a stack test that resulted in PTE of uncontrolled HCL air emissions to be at "major source" levels and failed to timely file a CAAPP application until February 2012.

The first element of *laches* is the "lack of due diligence by the party asserting the claim." In *Panhandle*, an affirmative defense of laches was reviewed by the Board based on IEPA's alleged "inaction over the course of many years" and failure to exercise due diligence in inspections, reviews of emissions reports, and renewal of minor source permits. *Panhandle Eastern Pipe Line Co.*, PCB 99-191 slip op., 2001 WL 1509515 at 19. *Panhandle* asserted that IEPA failed over an eight-year period "to discover that operation of engines 1116-1119 caused NOx[23] emissions to exceed the annual NOx limit" resulting in undue delay of the enforcement action. *Id. Panhandle* argued that IEPA should have discovered the exceedances years before they filed the enforcement action because they had supplied the Agency with all of the

[23] Nitric Oxide ("NOx")

information needed to determine it was in violation of its permit. *Id.* The Board noted that *Panhandle* was also aware of the emissions information showing that they violated their permits and that it could have and should have been aware of the fact that its new engines would violate the permits. *Id.* at 20.

The Respondent here tries first to equate the Illinois EPA's receipt of the emissions data necessary to calculate PTE uncontrolled HCL air emissions that the Nacme had provided in its initial SOP application in 2000 with a lack of due diligence *on the part of the Illinois EPA.* The Board may, of course, consider the Nacme's own lack of due diligence in submitting an improper permit application (SOP) given the "major source" PTE uncontrolled HCL air emissions at its Facility[24]. During the processing of Nacme's 2000 SOP application, the Illinois EPA was indeed in possession of the emissions data necessary to calculate PTE. Unfortunately, through unexplainable error, the Agency failed to recognize that the PTE for the Facility exceeded the major source threshold.[25] The Agency's failure to request a CAAPP permit application from Nacme and its issuance of an SOP was not an intentional act to deceive, as Nacme claims, nor a compelling lack of due diligence. In fact, like *Panhandle* and *Toyal*, it was Nacme's obligation to submit the proper applications to the Agency[26].

Like *Panhandle,* Nacme had an affirmative duty to determine whether it was in compliance with the environmental laws of Illinois. The failure of the Agency to identify the violation from 2000 to 2005 and, subsequently, Nacme's refusal to provide the necessary construction permit from 2005 to February 2012, does not allow Nacme to assert Laches and negate its obligation.

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[24] See Exhibit D1, Reuter Supplemental Affidavit, March 22, 2000 Agency Facsimile - 1997 Stack Test Data.
[25] See Response, pages 4 – 5, Exhibit 3; SOF 8, 17.
[26] Including a construction permit application for its requested increase in throughput when the Agency requested it repeatedly from 2005 through 2012. See MSJ, Brodsky Affidavit ¶8.

3. Nacme was not prejudiced by the timing of the People's Complaint

Nacme provides the vague assertion that it was prejudiced by the time and expense when 1.) it filed a permit appeal with the Board wherein it misled the Board about its PTE levels being at or above "major source" levels; 2.) it relied on and expended time and money from 2000-2005 to obtain an SOP that was clearly the wrong application given the emissions data Nacme submitted to the Agency; and 3.) its delay in obtaining compliance with the CAAPP during its 7 year refusal to provide the Construction Permit to the Agency for a change in operations requested by the Agency on several occasions from 2005 - 2012. (See MSJ, Exhibit E, Brodsky Affidavit ¶8)

Nacme's facts are insufficient to meet the compelling standard. Nacme claims that it was prejudiced with the cost and expense of filing a Permit Appeal in 2000 when Illinois EPA failed to inform Nacme about something that it was Nacme's obligation to know,i.e., that its PTE for uncontrolled HCL air emissions exceeded the "major source" threshold. Nacme has an affirmative obligation to submit the correct permit application for its Facility. It was Nacme who provided the Agency with the 1997 Stack Test emissions data with its 2000 SOP application and Nacme who had an obligation to submit a CAAPP Application at that time.[27]

However, the SOP with a 5 year expiration issued in February 2001 was a settlement agreement with Nacme to resolve the Permit Appeal and get the Facility under an operating permit so the Agency could monitor its operations. In its Permit Appeal Petition, Nacme ingenuously states that it is not a "major source" despite the 1997 Stack Test emissions data clearly showing that Nacme's PTE was at or above the "major source" threshold[28]. Had Nacme submitted the proper application that reflected its PTE in 2000 there would be no need for the

[27] See Exhibit C, Permit Appeal 01-85, Board Petition.
[28] See Exhibit D1, Reuter Supplemental Affidavit, March 22, 2000 Agency Facsimile - 1997 Stack Test Data.

People to cite it for violations. If Nacme had provided the Agency with the Construction Permit for its change in operations that Nacme requested in its CAAPP permit application and that the Agency requested in 2005, instead of in February 2012, Nacme would not have had an additional 7 years of non-compliance. It is Nacme, not the Agency or the Attorney General, that has caused the mischief in its delay of compliance and threatened the environment with air pollution.

Respondent's failure to meet its obligation to know and remain in compliance with Illinois environmental laws fails to meet the higher standard to support a claim of laches. Accordingly, the Board should reject Nacme's Laches affirmative defense.

C. Nacme's affirmative defense of Waiver fails.

Nacme incorrectly concludes that the People's possession of the emissions data in 2000, but failure to recognize the PTE levels at or exceeding "major source" levels for HCL and issuing an SOP, is clear, unequivocal and demonstration of the People's intention to waive its rights to bring a claim for non-compliance under the Act.

1. Legal Standard

A waiver is the intentional relinquishment of a known right. *See People of the State of Illinois v. Douglas Furniture of Cal., Inc.*, PCB No. 97-133, 10 (May 1, 1997) (citing *Hartford Accident & Indem. Co. v. D.F. Bast, Inc.*, 56 Ill. App.3d 960, 372 N.E.2d 829 (1st Dist. 1977)). There must be both knowledge of the existence of the right and an intention to relinquish it (*People Farm Fire & Cas. Co. v. Kiszkan*, 346 Ill. App.3d 292, 299 805 N.E.2d 292 (1st Dist. 2004)), or conduct that warrants an inference of that intention. *City of Chicago v. Chicago Fiber Optic Corp.*, 287 Ill. App.3d 566, 575, 678 N.E.2d 693 (1st Dist.1997). "The party claiming implied waiver has the burden of proving a clear, unequivocal, and decisive act of the opponent manifesting his intention to waive his rights." *Id. See Also Ryder v. Bank of Hickory Hills*, 146

Ill.2d 98, 107, 585 N.E.2d 46, (Ill.,1991) (where a Bank asserted its acceleration rights by letter to mortgagee and then accepted payments for outstanding installment payments, the Bank did not clearly demonstrate an intention to waive its acceleration rights.)

2. Nacme fails to show a clear, unequivocal and decisive act by the People manifesting its intention to waive its right to prosecute its claim.

Nacme operated its Facility from April 2002 through February 2012 without the requisite CAAPP permit. Like *Ryder*, the Agency's failure to recognize the Facility's PTE levels at or exceeding "major source" thresholds for HCL in 2000 when it issued Nacme an SOP in 2000 based on Nacme's SOP application is not a decisive act to relinquish its right to prosecute Nacme for violations of the Act. Nacme admits that Brodsky testified he conducted little analysis of the 2000 operating permit (See Nacme SOF, Fact 5), that Brodsky was simultaneously handling several dozen other permit applications unassisted (See Response SOF 11), that the Agency potentially knew, not actually knew, that Nacme was a "major source," and that the Agency may have been misapplying a CAAPP transition policy in 2000 (See Response SOF 12). Then, Brodsky states in his deposition that he did not have any interaction with Nacme after the 2002 stack test until Nacme submitted its April 2005 SOP Renewal Application.[29] It is an undisputable fact that the Illinois EPA apparently did not recognize Nacme was a "major source" until it reviewed the 2002 Stack Test while processing Nacme's 2005 SOP Renewal Application. See Response, pages 4 – 5, Exhibit 3; SOF 8, 17. None of these actions show intentional waiver of the Agency's right to prosecute Nacme for violating the Act but evidence of unintentional errors and oversight by the Agency. As in *Hickey* and *Van Milligan,* the Agency's mistakes should not circumvent the People's enforcement of Illinois' environmental laws that serve a valuable public interest to protect the public from air pollutants.

[29] See Response, page 7, Exhibit 2, Brodsky Deposition, page 138, lines 15-19.

In contrast, Nacme has an affirmative obligation to know the air pollution laws in Illinois when operating its Facility. This includes knowing what its PTE uncontrolled HCL air emissions are and if it exceeds the regulatory PTE limit of a "major source" for HCL. In *Toyal*, the issue was a dispute over the appropriate penalty for a failure to comply with VOM standards under the Environmental Protection Act. See *Toyal, Am., Inc.,* PCB 00-211, 2010 WL 2825692 (Jul. 15, 2010). *Toyal* was a major source and the Pollution Control Board found that "*Toyal* was not diligent in keeping current with the regulatory climate in which it was operating in the mid-1990's. *Id.* at 55. It was *Toyal's* obligation to determine what VOM requirements applied to it, and to timely achieve compliance or seek regulatory relief. *Toyal* did neither." *Id.* While in *Toyal*, the Board was determining an appropriate penalty amount and not whether a violation occurred, it nonetheless stated that the Respondent had an affirmative duty to be aware of the regulations applicable to it and to comply with those regulations. *Id.*

The Illinois Appellate Court for the Third District affirmed the Board's determination, stating "[t]he Board correctly points out that it was petitioner's obligation to determine what VOM requirements applied to it and to timely achieve compliance or seek regulatory relief." *Toyal Am., Inc.,* 2012 IL App (3d) 100585, ¶ 49, 966 N.E.2d 73, 82. Likewise, the broad statement that it was the company's obligation to determine what requirements applied to it is applicable to Nacme.

In *Panhandle* the respondent was a gas compressor station who violated requirements of the Prevention of Significant Deterioration ("PSD") program. *Panhandle Eastern Pipe Line Co.,* PCB 99-191 slip op., 2001 WL 1509515 at 1. *Panhandle* had "minor source" construction permits from IEPA that limited NOx emissions in a manner that would avoid the applicability of the PSD regulations by keeping the construction projects from becoming major modifications.

Id. *Panhandle* admitted that the four new engines built pursuant to the "minor source" construction projects consistently emitted NOx in excess of the limits. *Id.* Despite admitting that it violated the emissions limits set by its permits *Panhandle* asserted that no violation took place based on five affirmative defenses, two of which were waiver and laches. *Id.* at 2. The Board found that *Panhandle* did violate the requirements of the PSD program, assessed a civil penalty, and ordered *Panhandle* to cease and desist from further violations. *Id.* at 2.

Panhandle asserted the defense of waiver, claiming that it "reasonably and detrimentally relied on the Agency's alleged misrepresentations that *Panhandle* was in compliance with the NOx emission limit in the PSD avoidance permit." *Id.* at 17. This reliance was based on the fact that over several years IEPA had performed annual inspections and found no violations for the four new engines, IEPA renewed the minor source operating permits several times, and IEPA failed to take any enforcement action upon receiving annual emission reports. *Id.* *Panhandle* asserted that through the above actions, IEPA had waived its right to enforce against *Panhandle*. *Id.* The Board found that *Panhandle* had not demonstrated waiver by the State as none of IEPA's activities constituted a relinquishment of its right to bring an enforcement action. *Id.* at 18.

Nacme's allegation does not provide a specific fact that shows a clear intention by the Agency to relinquish its right to enforcement action against Nacme, nor does it create an inference that the People relinquished its right to enforce the Act against Nacme. Moreover, an allegation of mere inaction is insufficient to support a claim of waiver, as waiver specifically requires an intentional relinquishment of the right to bring a lawsuit. *See Id.* The People did not knowingly or intentionally relinquish its right to bring an enforcement action against Nacme when 1.) from 2000-2002, the Agency by unexplained error, did not recognize Nacme's "major

source" status; 2.) from 2002 – 2005, the Agency permitting unit had very limited contact with Nacme; and 3.) from 2005-2012, after meeting with and communicating to Nacme about its violations of the Act and how to come into compliance with nominal results of compliance and eventually, outright refusal of cooperation from Nacme, the People exercised its discretion in bringing an enforcement action against Nacme.

In addition, the fact that Section 31 of the Act directs the Illinois EPA to engage in the notification, meeting, and Compliance Commitment Agreement process, which can be lengthy, prior to referring violations to the Office of the Attorney General for enforcement, negates any inference that initiating enforcement after a certain lapse of time can be construed as an intention not to sue.

Nacme's 'waiver' defense fails to meet the burden of proving a "clear, unequivocal, and decisive act" by the People relinquishing the People's right to enforce the environmental laws on behalf of the public. Accordingly, the Board should reject Nacme's waiver defense.

The Board should find Nacme's affirmative defenses lack compelling circumstances for the lapse in Nacme's obligation to determine its PTE for uncontrolled HCL, a HAP, air emissions greater than 10 tpy, and its failure to either submit the correct operating permit application to the Illinois EPA or obtain regulatory relief. In the end, the Board should hold there are no facts of dispute to Nacme's affirmative defenses and that Nacme fails to find that the People's allegations are not barred by Nacme's affirmative defenses.

VII. Conclusion

In the end, there is no dispute that Nacme's Facility is a "major source" based on its PTE for uncontrolled HCL air emissions; there is no dispute that Nacme failed to apply for and obtain a CAAPP permit and operated without the require air permit from April 16, 2002 to February

2012. Like all regulated entities, Nacme does not get a "pass" because the Agency did not "catch" Nacme's "error" in its applications; it is Nacme's obligation to apply for and obtain the applicable permit prior to operating its Facility.

For all the reasons set forth in this Reply and in the People's Motion for Summary Judgment, the People respectfully request that the Board enter summary judgment in favor of the PEOPLE on its Complaint and against NACME STEEL PROCESSING, LLC.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
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Dated: September 30, 2014

REPLY IN SUPPORT OF PEOPLE'S MOTION FOR SUMMARY JUDGMENT

EXHIBIT LIST

EXHIBIT A	June 2013 Board Order
EXHIBIT B	August 2014 Board Order
EXHIBIT C	Permit Appeal 01-85, Board Petition
EXHIBIT D	Thomas Reuter Supplemental Affidavit

1. March 22, 2000 Agency Facsimile - 1997 Stack Test Data
2. April 19, 2000 Agency Facsimile - 99.99% Capture Efficiency
3. August 21, 2002 Agency Memorandum 2002 Stack Test – Validity Certification