

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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AUG 18 2004

IN THE MATTER OF:)	
)	
CLEAN-UP PART III AMENDMENTS)	R 04-20
TO 35 ILL. ADM. CODE PARTS)	(Rulemaking -Air)
211, 218 AND 219)	

STATE OF ILLINOIS
Pollution Control Board

NOTICE

TO: Dorothy Gunn, Clerk
 Illinois Pollution Control Board
 James R. Thompson Center
 100 W. Randolph Street, Suite 11-500
 Chicago, Illinois 60601

Richard McGill, Hearing Officer
 Illinois Pollution Control Board
 James R. Thompson Center
 100 W. Randolph, Suite 11-500
 Chicago, Illinois 60601

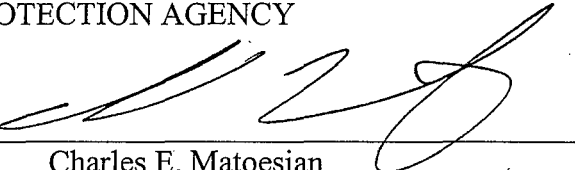
SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have filed with the Office of the Pollution Control Board the OBJECTION TO JEFFERSON SMURFIT'S MOTION FOR LEAVE TO FILE POST-HEARING COMMENTS on behalf of the Illinois Environmental Protection Agency, a copy of which is herewith served upon you.

Date: August 16, 2004

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: _____



Charles E. Matoesian
 Assistant Counsel
 Division of Legal Counsel

1021 North Grand Avenue East
 P.O. Box 19276
 Springfield, IL 62794-9276
 217/782-5544

THIS FILING IS SUBMITTED ON
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

AUG 18 2004

STATE OF ILLINOIS
Pollution Control Board

IN THE MATTER OF:)
)
CLEAN-UP PART III) R04-20
AMENDMENTS TO 35 ILL.) (Rulemaking - Air)
ADM. CODE PARTS 211, 218 AND 219)
)

**OBJECTION TO JEFFERSON SMURFIT'S MOTION FOR LEAVE TO FILE
POST-HEARING COMMENTS**

The Illinois Environmental Protection Agency ("Illinois EPA") hereby submits its Objection to Jefferson Smurfit Corporation's (U.S.) ("Smurfit") Motion for Leave to File Post-Hearing Comments. In support of this Objection, the Illinois EPA states as follows:

1. On May 25, 2004, the Hearing Officer declared that the public hearing comment period for R04-20, a rulemaking to amend Parts 211, 218 and 219 of Title 35 of the Illinois Administrative Code, would close on June 18, 2004.
2. On August 2, 2004, Smurfit filed its Motion for Leave to File Post-Hearing Comments ("Motion"). On the same date, the Illinois EPA received Smurfit's Motion.
3. Nowhere in its motion does Smurfit allege that it will be materially prejudiced if the Board denies its Motion. More importantly, Smurfit will not be materially prejudiced if the Board denies Smurfit's Motion; it is the position of the Illinois EPA that Smurfit's Motion should be denied.
4. Section 102.108(d) of the Board's procedural rules, 35 Ill. Adm. Code 102.108(d), clearly states "[c]omments that are not timely filed or properly served will not be considered, except as allowed by the hearing officer or the Board to prevent material prejudice."

5. The Board rules are clear that comments may only be filed during the prescribed period unless material prejudice will result. 35 Ill. Adm. Code 102.108(d). The Hearing Officer provided notice to the public in accordance with to 35 Ill. Adm. Code 102.416 and two public hearing were held on March 18 and May 6, 2004. The Hearing Officer subsequently allowed comments until June 18, 2004. Smurfit's motion was filed approximately six weeks after the close of the comment period. In fact, nearly six months lapsed from the Illinois EPA's filing of the Rulemaking proposal in January, 2004, to the close of the public comment period. Yet, Smurfit wants the Board to accept that at no time during those five and a half months did it or any of its industry groups have any reason to check the Board's website or to read the Statement of Reasons.

6. Smurfit suggests that the labeling of the proposed rulemaking as a "clean-up" was sufficient to discourage all interest by itself or industry in the proposal and to dissuade further examination of the matter. This is the closest Smurfit comes to claiming material prejudice. Smurfit alleges that the changes affecting capture efficiency testing might have a substantial impact on regulated facilities. However, this claim disregards that the Illinois EPA's proposal provides additional flexibility in capture testing for sources. Illinois EPA has proposed an additional option for measuring compliance that was not previously available, the Data Quality Objective/ Lower Confidence Limit ("DQO/LCL") alternative testing for capture efficiency. [Discussed in U.S. EPA's "Guideline for Determining Capture Efficiency" and John Seitz's memorandum of February 7, 1995, both of which are exhibits for Rulemaking R04-20.]

7. Capture efficiency testing has been a requirement in the Illinois State Implementation Plan since 1987. It is required of major sources that are using add-on

controls to comply with regulations in 35 Ill. Adm. Code Parts 215, 218, and 219. Prior to the proposed DQO/LCL alternative testing method, permanent total enclosure ("PTE") or temporary total enclosure ("TTE") has been required. To prove compliance with the capture efficiency requirement, all major sources, including Smurfit, had only the PTE or TTE choices. With the inclusion of the DQO/LCL alternative, major sources will now have a third option. The Illinois EPA does not require DQO/LCL, and thus, is not imposing it on any source. The source retains the discretion to decide which method it will utilize to demonstrate its capture efficiency. It is at U.S. EPA's recommendation that Illinois EPA has proposed including the alternative DQO/LCL. However, the Illinois EPA continues to prefer the use of PTE or TTE since U.S. EPA has found them to be the most accurate. Furthermore, Illinois EPA reserves the right to require the use of PTE or TTE if DQO/LCL is not conclusive.

8. Smurfit contends that this rulemaking has gone beyond the announced scope of making noncontroversial changes because it believes the Illinois EPA has put additional restrictions on protocols approved by U.S. EPA. This is simply not true; however, the Illinois EPA reserves comments in this regard pending the Board's reaction to this Objection.

9. Regardless of the merits or lack thereof of Smurfit's comments, Smurfit will not be materially prejudiced when it may still file comments during First Notice's 45 day public comment period. 35 Ill. Adm. Code 102.604. The existence of the First Notice comment period recognizes that nothing in the previous proceedings is final. Moreover, it gives the general public a chance to view the proposal before it is recommended for acceptance.

10. Finally, Smurfit's attorney, Roy C. Cobb is not admitted to practice law in the State of Illinois. Section 101.400 of 35 Ill. Adm. Code states in part:

- a) Appearances. A person who is a party in a Board adjudicatory proceeding may appear as follows:
 - 1) Individuals may appear on their own behalf or through an attorney-at-law licensed and registered to practice law. (Section 1 of the Attorney Act [705 ILCS 205/1])
 - 2) When appearing before the Board, any person other than individuals must appear through an attorney-at-law licensed and registered to practice law. (Section 1 of the Corporation Practice of Law Prohibition Act [705 ILCS 220/1] and Section 1 of the Attorney Act [705 ILCS 205/1])
 - 3) Attorneys who are licensed to practice in a state other than Illinois and who are not licensed and registered to practice in the State of Illinois may request to appear *pro hac vice* on a particular matter on a motion filed with the Board.

11. While Mr. Cobb, practices in Clayton, Missouri, he has neither filed a Motion to be admitted *Pro Hac Vice* nor has he been admitted to practice in the State of Illinois according to a search of the Attorney Registration and Disciplinary Commission website. While the Board's procedural rules afford an attorney licensed to practice in a State other than Illinois the opportunity to practice in Illinois if the appropriate motion is filed, Mr. Cobb has not filed such a motion. *See*, 35 Ill. Adm. Code 101.400(a)(3).¹

¹ Moreover, the validity of 35 Ill. Adm. Code 101.400(a)(3) is questionable given that the Illinois Supreme Court ruled in *People ex rel. The Chicago Bar Ass'n v. Goodman* (1937), 366 Ill. 346, 352, cert.denied, 302 US 728, 58 S. Ct 49, that the General Assembly had no authority to bestow upon a layman the right to practice law. The Supreme Court again reiterated this proposition in *Lozoff v. Shore Heights, Ltd.* (1977), 66 Ill. 2d 398. In this decision, the Supreme Court found that it possessed exclusive power to determine those that may practice law in Illinois.

12. If the Board denies Smurfit's Motion, Smurfit will not be materially prejudiced because the comments were filed by an attorney not licensed in Illinois well after the close of comment period; Smurfit may still properly file comments during the First Notice comment period. Accordingly, Smurfit's Motion for Leave to File Post-Hearing Comments should be denied.

WHEREFORE, the Illinois EPA respectfully requests that Smurfit's Motion for Leave to File Post-Hearing Comments be denied or, in the alternative, requests that if the Board allows Smurfit leave to file post-hearing comments, the Illinois EPA be granted leave to file additional post-hearing comments.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: 

Charles E. Matoesian
Assistant Counsel
Division of Legal Counsel

DATED: August 16, 2004

Illinois Environmental Protection Agency
1021 North Grand Avenue East
Post Office Box 19276
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STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

PROOF OF SERVICE

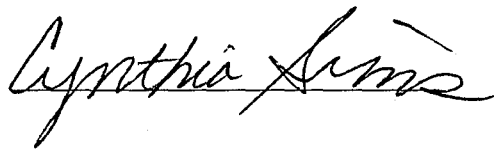
I, the undersigned, on oath state that I have served the attached Objection to Jefferson Smurfit's Motion for Leave to File Post-Hearing Comments upon the person to whom it is directed, by placing it in an envelope addressed to:

TO: Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph Street, Suite 11-500
Chicago, Illinois 60601

Richard McMill, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph, Suite 11-500
Chicago, Illinois 60601

SEE ATTACHED SERVICE LIST

and mailing it by First Class Mail from Springfield, Illinois on August 16, 2004, with sufficient postage affixed.



SUBSCRIBED AND SWORN TO BEFORE ME

this 16th day of August, 2004

Brenda Boehner
Notary Public



THIS FILING IS SUBMITTED ON RECYCLED PAPER

SERVICE LIST R 04-20

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