BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
vs.	)	No. PCB 04-16
	)	(Enforcement – Air)
PACKAGING PERSONIFIED, INC., an Illinois corporation,	)	
	)	
	)	
Respondent.	)	

NOTICE OF ELECTRONIC FILING

PLEASE TAKE NOTICE that on the 25th day of September, 2009, Complainant filed its Closing Argument and Post-Hearing Brief with the Clerk of the Illinois Pollution Control Board by electronic filing, a true and correct copy of which is attached and herewith served upon you.

PEOPLE OF THE STATE OF ILLINOIS,
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CERTIFICATE OF SERVICE

I, PAULA BECKER WHEELER, an attorney, do certify that I caused to be served this 25th day of September, 2009, the foregoing Closing Argument and Post-Hearing Brief and Notice of Electronic Filing upon the persons listed below, by hand delivery, and by placing same in an envelope bearing sufficient postage with the United States Postal Service located at 100 W. Randolph, Chicago, Illinois.

Paula Becker Wheeler

PAULA BECKER WHEELER

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PEOPLE OF THE STATE OF ILLINOIS,	)	
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Complainant,	)	
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v.	)	PCB 04-016
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PACKAGING PERSONIFIED, INC., an Illinois corporation,	)	
	)	
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COMPLAINANT'S CLOSING ARGUMENT AND POST-HEARING BRIEF

NOW COMES Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, and hereby presents its Closing Argument and Post-Hearing Brief.

I. INTRODUCTION

On June 29th and 30th, 2009, a hearing was held to determine liability and to set a civil penalty for the violations alleged by the State in the People's First Amended Complaint filed on July 5, 2005, and accepted as filed by the Hearing Officer on August 18, 2005, in the above-captioned matter, (hereinafter, "Amended Complaint"). The Amended Complaint incorporated all of the violations alleged in the original complaint filed on December 9, 2002, and added several alleged permit violations. The People's Amended Complaint alleges air pollution violations at Respondent's facility located at 246 Kehoe Boulevard, Carol Stream, DuPage County ("Facility"). The violations include the failure to obtain required permits, operating without a permit, failure to comply with recordkeeping and reporting requirements, failure to comply with Illinois Pollution

Control Board's ("Board") flexographic printing regulations, and violations of the New Source Review and Emissions Reduction Market System programs. The evidence presented to the Board at the hearing shows clearly that the Respondent violated the Illinois Environmental Protection Act ("Act")[1] as alleged by the People. The facts further showed that the duration and gravity of the violations were significant and that the Respondent obtained a significant economic benefit, warranting a substantial civil penalty.

II. SUMMARY OF THE RELIEF SOUGHT BY COMPLAINANT

Complainant seeks a finding of liability on Counts I through X and Count XII of the Amended Complaint; an order requiring Respondent to cease and desist from future violations of the Act and Board Regulations; and an assessment of a civil penalty in the amount of at least $861,274.00.

III. THE EVIDENCE ESTABLISHES THE VIOLATIONS ALLEGED IN THE PEOPLE'S AMENDED COMPLAINT

A. Packaging Constructed Emissions Sources Without a Permit (Count I)

The Act and the Board Air Pollution Regulations prohibit any person from constructing any source that causes or is capable of causing air pollution in the State of Illinois without a permit granted by the Illinois Environmental Protection Agency ("Illinois EPA").[2] Since at least 1989, Packaging Personified, Inc. ("Packaging") has been constructing sources that release volatile organic material ("VOM") into the atmosphere – the emissions sources include two extruders constructed prior to 1992, one extruder and two flexographic printing presses constructed in 1992, one extruder and two

[1] 415 ILCS 5/1 *et seq.*
[2] 415 ILCS 5/9(b) (2008) and 35 Ill. Adm. Code 201.142.

flexographic printing presses constructed in 1995, and one flexographic printing press constructed in 2003.[3] Packaging admits that all four extruders, and four of the five printing presses, were constructed without a permit from the Illinois EPA.[4] Although extruders are currently exempted from the permit requirement pursuant to Section 201.146(cc) of the Board's Air Pollution Regulations, this exemption did not exist at the time the extruders at the Facility were constructed.[5] Based on the evidence, Packaging failed to obtain construction permits as required, and thereby violated 415 ILCS 5/9(b) and 35 Ill. Adm. Code 201.142.

B. Packaging Operated Emissions Sources Without a Permit (Count II)

The Act and the Board Air Pollution Regulations also prohibit any person from operating a source that causes or is capable of causing or contributing to air pollution without a permit granted by the Illinois EPA.[6] Each of the units constructed without a permit, four extruders and four of the five printing presses, were thereafter operated without permits from Illinois EPA after their construction.[7] These emissions sources were operated from seven to more than ten years without any application for coverage under an Illinois EPA operating permit.[8] Respondent admits that in July 2002 it submitted its first application for an operating permit to the Agency for the unpermitted extruders and printing presses.[9] Based on the evidence, Packaging failed to timely obtain operating permits as required, and thereby violated 415 ILCS 5/9(b) and 35 Ill. Adm. Code 201.143.

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[3] Answer to Amended Complaint, Count I, par. 6, and Complainant's Exhibit 5, Admitted Fact Nos. 1 - 14.
[4] Complainant's Exhibit 5, Admitted Fact Nos. 2, 4, 6, 8, 10, 12 and 14.
[5] 35 Ill. Adm. Code 201.146.
[6] 415 ILCS 5/9(b) (2008) and 35 Ill. Adm. Code 201.143.
[7] Answer to Amended Complaint, Count II, par. 18, and Complainant's Exhibit 5, Admitted Fact 22.
[8] Answer to Amended Complaint, Count II, par. 18 (stating "Packaging admits that on or around from 1989 to July 2, 2002, it operated four presses and four extruders without obtaining an operating permit").
[9] Complainant's Exhibit 5, Admitted Fact No. 18.

C. Packaging Failed to Timely Submit Annual Emissions Reports (Count III)

The Board Air Pollution Regulations also require that any person owning or operating any emissions source or air pollution control unit within the State of Illinois submit an annual report detailing the nature and quantity of the air emissions from those sources.[10] Packaging is subject to the regulation as an owner and operator of a stationary source that emits the air pollutant VOM. Packaging admits that it did not submit Annual Emission Reports ("AERs") to the Illinois EPA for the years 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000 and 2001 until August 8, 2002.[11] Based on the evidence, Packaging failed to timely submit AERs as required, and thereby violated 415 ILCS 5/9(a) (2008) and 35 Ill. Adm. Code 201.302(a).

D. Packaging Operated a Major Stationary Source Without a CAAPP Permit (Count IV)

The Illinois EPA has been delegated the authority to implement the federal permitting requirements developed pursuant to Title V of the Clean Air Act and incorporated into Illinois law as the Clean Air Act Permit Program ("CAAPP") through Section 39.5 of the Act.[12] Under the CAAPP, no person may operate a major source of air pollutants without a CAAPP permit. For a source emitting VOM, a major source is defined as any source with the potential to emit ("PTE") 100 tons or more per year of VOM in areas classified as marginal or moderate, 50 tons or more per year in areas classified as serious, and 25 tons or more per year of VOM in an area designated severe

[10] 35 Ill. Adm. Code 201.302(a).
[11] Answer to Amended Complaint, Count III, par. 12, and Complainant's Exhibit 5, Admitted Fact No. 22.
[12] 415 ILCS 5/39.5 (2008).

nonattainment for ozone.[13] DuPage County, where the Facility is located, was designated as severe nonattainment for ozone during the period when the violations occurred.[14]

In 1992, Packaging added one extruder and Presses 1 and 4 to the two extruders already in operation at the Facility.[15] Thereafter, Packaging operated three extruders and two printing lines.[16] The PTE of the press designated "Press 4" was 52 tons per year of VOM.[17] From the date of the installation of Press 4 in 1992, Packaging's Facility had the potential to emit more than 25 tons per year or more of VOM and qualified as a major source. As a major source, it was required to apply for a CAAPP permit no later than September 7, 1996. Packaging admits that it did not apply for a CAAPP permit until July 2, 2002, and that it continues to operate without the requisite permit.[18] Based on the evidence, Packaging operated a major source of VOM in a severe nonattainment area for ozone without a CAAPP permit in violation of Section 39.5(6)(b) of the Act.

E. Packaging Violated New Source Review Requirements (Count V)

The State of Illinois has delegation authority to enforce the federal New Source Review requirements. Pursuant to this authority, the Board promulgated standards applicable to the construction and modification of major stationary sources of regulated air pollutants ("Major Stationary Source Regulations").[19] The Board's Major Stationary Source Regulations prohibit any person from constructing a major modification or constructing a new major stationary source without complying with lowest achievable

[13] 415 ILCS 5/39.5(2)(a) and (c) (2008).
[14] Hearing Transcript, June 29, 2009, at p. 42.
[15] Answer to Amended Complaint, Count I, par. 6.
[16] *Id.* at Count II, par. 18.
[17] *Id.* at Count V, par. 19.
[18] Complainant's Exhibit 5, Admitted Facts No. 17 and 18.
[19] 35 Ill. Adm. Code, Part 203.

emission rate ("LAER") requirements.[20] A new major stationary source, for an area classified as severe ozone nonattainment, is defined as any building, structure, facility or installation that emits 25 tons or more per year of VOM.[21] A major modification is defined as any change that would result in a significant net emissions increase of a pollutant for which the area is in nonattainment.[22] In an area designated severe nonattainment for ozone, a significant net emissions increase occurs when the net VOM emissions increase is 25 tons or more in actual emissions when aggregated over a 5 year period.[23] The provision became effective November 15, 1992.[24]

Between 1992 and 1995, Packaging installed two extruders and four printing presses.[25] On July 2, 2002, Packaging submitted a CAAPP application to the Illinois EPA containing emissions information on the equipment at the Facility; the application was certified to be "true, accurate and complete" by Dominic Imburgia, President of Packaging Personified.[26] The permit application requires a facility to identify both maximum and typical emissions from a facility. Based on Packaging's CAPP permit application, the typical emissions of the units at the Facility were as follows: 1.08 tons per year ("tpy") of VOM for Presses 1 and 2; 18.9 tpy VOM for Press 4; and 44.2 tpy VOM for Press 5.[27] Additionally, on page I.1-5 of CAAPP Form 200, Packaging represented that actual emissions of the source were not below the applicability levels for a CAAPP permit and the source would not be requesting a federally enforceable state

[20] 35 Ill. Adm. Code 203.601.
[21] 415 ILCS 5/39.5(1) and (2)(c)(iii)(A).
[22] 35 Ill. Adm. Code 203.207.
[23] 35 Ill. Adm. Code 203.209.
[24] *Id.*
[25] Answer to Amended Complaint, Count I, par. 6.
[26] Complainant's Exhibit 9, Application for CAAPP Permit, page 1.1-5.
[27] *Id.* at pages 2.1-11, 3.1-11 and 4.1-11.

operating permit.[28] Based on the calculations submitted and certified by Respondent, the actual aggregated VOM emissions of Packaging's printing equipment exceeded the 25 tons per year threshold once all four presses were operating at the Facility. By 1995 the source qualified as a new major source. As such, Respondent was required to submit a construction permit application demonstrating LAER prior to the construction of Presses 2 and 5 in 1995. Packaging admitted that it did not evaluate LAER for Presses 2 and 5; did not make a LAER demonstration to the Illinois EPA prior to constructing Presses 2 and 5; and did not achieve LAER on Presses 2 and 5.[29] By failing to take these required actions, Respondent violated the Act and the Board's Major Stationary Source Regulations, as well as federal New Source Review requirements.

F. Packaging Failed to Participate in Illinois' Emissions Reduction Market System (Count VI)

In 1997, the Board adopted the Emissions Reduction Market System ("ERMS"), a cap-and-trade system for VOM emissions units in the Chicago ozone nonattainment area, which includes DuPage County.[30] The ERMS program required all existing sources of VOM emissions in the Chicago ozone nonattainment area meeting the applicability requirements to register to participate in the ERMS program by March 1, 1998.[31] Each participating source is required to submit seasonal emissions reports ("SERs") as part of their annual reporting to the Illinois EPA and to hold allotment trading units ("ATUs") in an amount not less than the source's actual VOM emissions during each seasonal allotment period. Sources that emit more VOM than they hold ATUs for are required to

[28] *Id.* at page 1.1-5.
[29] Complainant's Exhibit 5, Admitted Facts No. 26 – 28.
[30] 35 Ill. Adm. Code 205.130 (defining "Chicago ozone nonattainment area").
[31] 35 Ill. Adm. Code 205.310.

purchase ATUs from the market or the Illinois EPA's Alternative Compliance Market Account ("ACMA").[32]

At the time the Packaging Facility was inspected in October 2001, the source had not taken any steps to participate in the ERMS program. Packaging was required to participate based on its location in DuPage County and its emissions of VOM in excess of 10 tons during the seasonal allotment period each year.[33] Packaging did not submit an ERMS baseline application by March 1, 1998, and did not submit seasonal emissions reports for 2000, 2001 and 2002 until June 12, 2003.[34] After the submission of its SERs in 2003, Packaging did not purchase any ATUs to cover its VOM emissions for any previous or subsequent years.[35] By failing to timely enroll in Illinois' ERMS program and maintain ATUs as required by the program, Respondent violated Section 9(a) of the Act and 35 Ill. Adm. Code 205.310.

G. Packaging Violated the Flexographic Printing Rules by Failing to Demonstrate Compliance Pursuant to 218.401(Count VII)

On January 6, 1994, the Board adopted amendments to Part 218 of the Board Air Pollution Regulations, as required by Section 182(b)(2) of the federal Clean Air Act; compliance with these amended regulations was required by no later than March 15, 1995.[36] The Part 218 amendments established VOM emission standards and limitations for printing facilities located in the Chicago ozone nonattainment area and having a potential to emit 25 tons or more of VOM per year ("Flexographic Printing Rules").[37] Section 218.401 specifically applies to flexographic and rotogravure printing facilities. It

[32] 35 Ill. Adm. Code 205.150.
[33] Answer to Amended Complaint, Count VI, par. 17.
[34] *Id.* at Count VI, par. 21 and Complainant's Exhibit 5, Admitted Fact No. 33.
[35] Complainant's Exhibit 5, Admitted Fact No. 36.
[36] R 93-14, Opinion and Order of the Board (January 6, 1994).
[37] 35 Ill. Adm. Code 218.402.

requires the subject source to utilize inks and coatings that meet a standard of 40% VOM by volume of the inks/coatings or 25% VOM by volume of the volatile content.[38] In addition to meeting the standard, the source must also make a demonstration of compliance to the Illinois EPA using the test methods, recordkeeping and reporting requirements identified within the regulation.[39]

If a source cannot meet the VOM content limits in its inks and coatings, Section 218.401 provides that a company may select one of two alternative means of compliance. The first alternative allows a company to meet the VOM standards as a daily weighted average of all of its inks and coatings, even if each individual ink or coating does not conform to the standard.[40] If a source cannot demonstrate compliance by the two options, it must install a control device that meets the required control efficiencies.[41] It must then demonstrate this control to Illinois EPA.

As a flexographic printing operation within DuPage County, having a potential to emit to more than 25 tons of VOM per year, Packaging was required to comply with the Part 218 regulations by the March 15, 1995 deadline.[42] In 1995, Packaging had four printing lines in operation – Presses 1, 2, 4 and 5.[43] As noted, Section 218.401 requires that all inks and coatings utilized at a subject source meet VOM content requirements and that the source demonstrate its compliance with the standards.

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[38] 35 Ill. Adm. Code 218.401(a).
[39] 35 Ill. Adm. Code 218.401(a), (b) and (c)(6).
[40] 35 Ill. Adm. Code 218.401(b).
[41] 35 Ill. Adm. Code 218.401(c).
[42] Answer to Amended Complaint, Count I, par. 4 – 5.
[43] *Id.* at Count I, par. 6.

Packaging admits that Presses 4 and 5 did not utilize compliant inks and could not have complied with Part 218.401 by switching to compliant inks.[44] Packaging also admits that Press 4 operated from the date it was installed in 1992 until it was decommissioned in December 2002 without any control device.[45] As such, Press 4 was not in compliance with Section 218.401 at anytime it was operated. Press 5 operated with a recirculating drying oven that allegedly provided some control of VOM emissions prior to the connection of Press 5 to a regenerative thermal oxidizer ("RTO") in 2003. However, the control efficiency of the recirculating drying oven was never demonstrated to the Illinois EPA. Section 218.401 of the Board's regulations requires, not only that a company limit its VOM emissions by complying with one of the methods provided, but also that the company make a demonstration of that compliance to the Illinois EPA using the test methods provided for in the regulation. Packaging's only assessment of the drying oven was an "informal emissions test."[46] Because Press 5 was not controlled with a demonstrated control device, it was not in compliance with the requirements of 218.401 until it was connected to the RTO.

Packaging has contended that all of the inks used on Presses 1 and 2 at the Facility are and have been compliant with the Section 218.401(a) limits.[47] However, there is no record of the ink usage for the period from 1995 to 2001.[48] Section 218.401 of the Flexographic Printing Rules not only requires that a company limit its VOM

[44] Complainant's Exhibit 5, Admitted Facts No. 41 and 42; Hearing Transcript, June 30, 2009, at p. 13, l. 6 – p. 15, l. 12 (Trzupek explaining why converting to compliant inks was not a viable option for Presses 4 and 5).
[45] Complainant's Exhibit 5, Admitted Fact No. 50.
[46] Hearing Transcript, June 29, 2009, at p. 46; Complainant's Exhibit 8, 2003 Letter Re Informal Emissions Testing.
[47] Answer to Amended Complaint, Count VII, par. 22.
[48] *See* Respondent's Exhibit 51 (records provided electronically to the Complainant dating back to 2001), and Hearing Transcript, June 29, 2009, at p. 244, l. 4 – p. 245, l. 10. (Tim Piper testifying that every record of historical ink usage was provided to the Complainant).

emissions by one of the methods provided, but also that the company make a demonstration of that compliance to the Illinois EPA using the test methods provided for in the regulations.[49] Therefore, Packaging cannot claim compliance for a period for which no records exist.[50] Additionally, the demonstration of compliance for the period from 2001 to March 2009 was not provided in a timely manner. On May 2, 2003, Packaging first provided to the Complainant a sample of its records of the ink usage on Presses 1 and 2 on May 2, 2003.[51] Packaging did not provide the Illinois EPA with all of the documentation available for the inks utilized on those two presses until April 24, 2009.[52] By failing to timely demonstrate compliance to the Illinois EPA, Packaging violated Section 9(a) of the Act and 35 Ill. Adm. Code 218.401.

H. Packaging Violated Flexographic Printing Rules by Failure to Maintain Records (Counts VIII and XII)

Section 218.401 operates in coordination with Section 218.404, the recordkeeping provision in the Flexographic Printing Rules. Section 218.401 indicates that compliance with the VOM limitations specified therein must be demonstrated through, among other actions, the recordkeeping requirements identified in Section 218.404.[53] A facility's obligations under Section 218.404 vary based upon which alternative for compliance the source has chosen to utilize. For all emissions sources using compliant inks, the owner or

[49] 35 Ill. Adm. Code 218.401(a) (stating "Compliance with this Section must be demonstrated through the applicable coating or ink analysis test methods and procedures specified in Section 218.105(a) of this Part and the recordkeeping and reporting requirements specified in Section 218.404(c) of this Part.")
[50] Packaging claims it kept MSDS sheets prior to 2001, but no records of what was used on Presses 1 and 2 prior to 2001 were ever provided to the Illinois EPA.
[51] Complainant's Exhibit 13, May 2003 Letter Re Demonstration of Compliance.
[52] Respondent's Exhibit 51, CD-ROM of Environmental Records.
[53] 35 Ill. Adm. Code 218.401(a) (stating, "Compliance with this Section must be demonstrated through . . . the recordkeeping and reporting requirements specified in Section 218.404(c) of this Part"); 35 Ill. Adm. Code 218.401(b) (stating, "Compliance with this subsection must be demonstrated through . . . the recordkeeping and reporting requirements specified in Section 218.404(d) of this Part"); and 35 Ill. Adm. Code 218.401(c)(6) (stating, "The owner or operator shall demonstrate compliance with this subsection . . . by complying with the recordkeeping and reporting requirements specified in Section 218.404(e) of this Part").

operator must maintain daily records identifying every ink and coating utilized on each printing line and the VOM content of each.[54] If the source is achieving compliance based on daily-weighted averaging, then the owner or operator must maintain a record of the daily-weighted average VOM content of the inks and coatings, in addition to daily records of all inks and coatings used and the VOM content of each.[55] A source that chooses to install an add-on control device must maintain daily records of emissions monitoring data; operating times of the printing lines, control device, capture system and monitoring equipment; all routine and non-routine maintenance; and any outages resulting from maintenance or repair.[56] The source must also record and submit test results and calculations showing that the unit meets the VOM efficiency requirements of Section 218.401.[57] As of August 13, 2003, Packaging was also obligated to maintain these records based on the terms of a construction permit issued specifically for Packaging's Carol Stream Facility ("Construction Permit").[58]

Respondent ultimately achieved compliance in two ways - compliant inks, as provided for in section 218.401(a), and a control device, as provided for in section 218.401(c).[59] The recordkeeping associated with these two compliance methods has not been adequately maintained. Packaging admits that it has not maintained daily records of inks used and the VOM content of those inks, as well as a maintenance log for the capture system, control device and monitoring system, at all times since at least the date it received the Construction Permit.[60] Packaging admits that it has not maintained

[54] 35 Ill. Adm. Code 218.404(c).
[55] 35 Ill. Adm. Code 218.404(d).
[56] 35 Ill. Adm. Code 218.404(e).
[57] *Id.*
[58] Complainant's Exhibit 3, 2003 Construction Permit, Conditions No. 15 and 16.
[59] Complainant's Exhibit 5, Admitted Facts No. 40 and 43.
[60] *Id.*, Admitted Fact No. 56.

monthly records of the names and amounts of solvents used for ink dilution and clean-up, the VOM content of those solvents, and the VOM and Hazardous Air Pollutant ("HAP") emissions for the preceding 12 months, at all times since at least the date it received the Construction Permit.[61] At the inspections in March and May of 2004, conducted by the Illinois EPA to assess Packaging's compliance with the terms of the Construction Permit, Packaging was not able to produce required records for Illinois EPA personnel.[62] By failing to regularly maintain all required records, Packaging violated 35 Ill. Adm. Code 218.404 and Condition 16 of its Construction Permit, and thereby Sections 9(a) and (b) of the Act.[63]

I. Packaging Violated its Construction Permit by Exceeding VOM Usage Limits (Count IX)

The Act provides that compliance with Illinois' environmental laws includes full compliance with the terms and conditions of any permit issued by the Illinois EPA to a source.[64] On August 13, 2003, the Illinois EPA issued a Construction Permit to Packaging.[65] The Construction Permit was directed to the attention of Dominic Imburgia, President of Packaging, and contained compliance obligations specific to Packaging's Carol Stream Facility.[66] Condition 5 of the Construction Permit specified that the total VOM emissions resulting from all printing at Packaging's Facility should not exceed the following limits:[67]

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[61] *Id.*, Admitted Fact No. 57.
[62] *Id.*, Admitted Facts No. 60 and 62.
[63] 415 ILCS 5/9(a) and (b) (2008)
[64] 415 ILCS 5/9(a) (2008).
[65] *See* Complainant's Exhibit 3, 2003 Construction Permit.
[66] *Id.*
[67] *Id.* at Condition 5.

Emission Unit	VOM Usage (Lb/Mo)	VOM Usage (Ton/Yr)	VOM Emissions (Lb/Mo)	VOM Emissions (Ton/Yr)
#1 and #2 Presses	524	2.62	524	2.62
Comexi and #5 Presses	24,960	124.80	3,396	16.98
Cleanup and Other Solvents	980	4.90	980	4.90

Based on these usage limits, Respondent's VOM usage was not to exceed 26,464 lbs/month following the installation of the RTO. Packaging admits that its VOM usage from August 2003 to July 2004 was as follows:[68]

Month/Year	VOM Total Usage (Lb/Mo)
August/2003	31,880
September/2003	40,823
October/2003	38,587
December/2003	24,354
April/2004	18,193
May/2004	24,253
June/2004	32,082
July/2004	21,971

Packaging exceeded the monthly VOM usage limits four times from August 2003 to July 2004. By repeatedly exceeding the VOM usage limits, Packaging violated Condition 5 of its Construction Permit, and thereby Section 9(a) of the Act.[69]

[68] Complainant's Exhibit 5, Admitted Fact No. 55.
[69] 415 ILCS 9(a) (2008).

J. Violation of Construction Permit by Failing to Demonstrate Compliance (Count X)

Condition 4(c) of the Construction Permit requires Packaging to ensure that Presses 1 and 2 met the VOM content standards of Section 218.401(a) of the Flexographic Printing Rules.[70] As stated in Section 218.401(a), "[c]ompliance with this Section [218.401(a)] must be demonstrated through . . . the recordkeeping and reporting requirements specified in Section 218.404(c) of this Part."[71] When Illinois EPA inspected the Facility on April 22, 2004, and on May 14, 2004, to determine Packaging's compliance with the terms of the Construction Permit, Packaging was unable to demonstrate to the Illinois EPA that it was using only compliant inks on Presses 1 and 2.[72] By failing to make a demonstration to the Illinois EPA that Presses 1 and 2 were utilizing only compliant inks, Respondent violated Condition 4(c) of its Construction Permit, and thereby Section 9(b) of the Act.[73]

K. Packaging Violated its Construction Permit by Failing to Conduct Required Testing (Count XI)

Complainant voluntarily dismisses Count XI of the People's Amended Complaint.

L. Packaging Violated its Construction Permit by Failing to Maintain Records (Count XII)

Conditions 15 and 16 of the Construction Permit contain Packaging's daily and monthly recordkeeping requirements for the Facility.[74] Specifically, Condition 15 requires, in part, daily records of ink usage on each press, and the VOM content of those inks, and a maintenance log for all routine and non-routine maintenance, including any

[70] Complainant's Exhibit 3, 2003 Construction Permit, Condition 4(c).
[71] 35 Ill. Adm. Code 218.401(a).
[72] Complainant's Exhibit 5, Admitted Fact Nos. 56, 57 and 59 through 62.
[73] 415 ILCS 5/9(b) (2008).
[74] Complainant's Exhibit 3, 2003 Construction Permit, Conditions No. 15 and 16.

outages resulting from maintenance. Permit Condition 16 requires monthly records of ink usage by press, and the VOM content of the inks; solvent usage for ink dilution and for clean-up, and the VOM content of the solvent; VOM and HAP for the preceding month and preceding 12 months.

When Illinois EPA inspected the Facility on April 22, 2004, and again on May 14, 2004, to determine Packaging's compliance with the terms of the Construction Permit, Packaging was unable to produce these required daily and monthly records for the Illinois EPA inspector.[75] By failing to demonstrate compliance with its recordkeeping obligations, Respondent violated Conditions 15 and 16 of its Construction Permit, thereby Section 9(b) of the Act.[76]

IV. ANALYSIS OF THE 33(c) FACTORS DEMONSTRATES THAT THE BOARD SHOULD ASSESS A SIGNIFICANT CIVIL PENALTY AGAINST RESPONDENT

In making its orders, the Board is directed to consider matters of record concerning the reasonableness of the alleged pollution, including those factors identified in Section 33(c) of the Act.[77] Section 33(c) of the Act provides as follows:

> In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved including, but not limited to:
>
> (i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
>
> (ii) the social and economic value of the pollution source;

[75] Complainant's Exhibit 5, Admitted Facts 60 and 62.
[76] 415 ILCS 5/9(b) (2008).
[77] 415 ILCS 5/33(c) (2008).

(iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;

(iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and

(v) any subsequent compliance.

A. Packaging's excess VOM emissions interfered with protection of the health and general welfare of the people

During the documented period of noncompliance, Packaging failed to regulate VOM from its emission sources and violated the Board's emission standards for major VOM sources, i.e. sources that have the potential to emit 25 tons or more of VOM per year. VOM is an air contaminant that results in ground-level ozone formation; its release into the environment poses a threat to human health.[78]

The Board's standards for Major VOM sources were adopted because Section 110 of the CAA required states to develop regulations and control strategies to address air pollution within their jurisdictions.[79] The standards are designed so that the National Ambient Air Quality Standards ("NAAQS") are not adversely impacted through industrial development and growth.[80] The Board has specifically adopted regulations to improve ozone air quality in northeast Illinois through establishing VOM emissions standards and limitations for major sources in the Chicago ozone nonattainment area.[81] These limitations required Packaging to either utilize inks in its printing facilities that

[78] Breathing ozone can trigger a variety of health problems including chest pain, coughing, throat irritation, and congestion. It can worsen bronchitis, emphysema, and asthma. Ground-level ozone also can reduce lung function and inflame the linings of the lungs. Repeated exposure may permanently scar lung tissue. Ground Level Ozone, Health and Environment, http://www.epa.gov/air/ozonepollution/health.html (Last updated on May 9th, 2008).
[79] 42 U.S.C. 7410 (2008).
[80] 35 Ill. Adm. Code 205.110.
[81] 35 Ill. Adm. Code, Part 218.

meet a standard of 40% VOM by volume of the inks/coatings or 25% VOM by volume of the volatile content; to meet the VOM standards as a daily weighted average of all of its inks and coatings; or to install a control device that meets the standards.[82] As discussed previously, Packaging failed to comply with these requirements, which increased the Facility's net emissions of VOM.

By operating a printing facility that was located in an ozone nonattainment area that was classified as "severe" and failing to regulate VOM from its emissions sources, Packaging's emissions adversely affected the ozone nonattainment area and air quality in DuPage County. The greater the increase in excess emissions to the atmosphere in this area, the greater potential threat is posed to the NAAQS. Packaging's increased VOM emissions must be considered in conjunction with the cumulative effects of increased emissions elsewhere in the nonattainment area. The cumulative impacts on air quality could be severe if each source in the nonattainment area violated these Board emission standards for VOM.

Packaging's noncompliance for at least eight years impeded the Illinois EPA's efforts to reduce the sources of VOM levels, and thereby seriously interfered with the "protection of the health, general welfare and physical property of the people."[83]

B. Packaging's facility had a diminished social and/or economic value while it operated in violation of the Act

The Complainant does not dispute that any business entity which employs people and supplies products to the open market has a degree of social and economic value. While Packaging's printing and extruding facility serves these roles, a facility that operates in violation of the Act and Board regulations is a social and economic detriment.

[82] 35 Ill. Adm. Code 218.401.
[83] 415 ILCS 5/33(c)(i) (2008).

The Board has previously found that a pollution source typically possesses a social and economic value that is to be weighed against its actual or potential environmental impact.[84] Packaging's failure to reduce its VOM emissions in an area of severe nonattainment for ozone for an extended period of time was a detriment to the site and surrounding area, which therefore diminished the social and economic value of the source.

C. Respondent's facility is suitable for the area in which it is located provided it operates in compliance with the Act

Operation of Packaging's Facility is suitable for the site and surrounding area provided it is operated in compliance with the Act and Board Air Pollution Regulations. However, as shown herein, Packaging failed to comply with almost all of the applicable requirements of the Act and the Board's Air Pollution Regulations. Packaging established a major source of air emissions without demonstrating or achieving LAER at the Facility. It did not install a control device meeting the required efficiency standards until 2003.[85] By failing to comply with requirements that reduce VOM emissions, Respondent's Facility contributed excess VOM to an area that was not in compliance with the NAAQS for ozone. Thus, during the time Respondent was out of compliance, its Facility was not suitable to the area in which it was operating.

D. Compliance was technically practicable and economically reasonable

The evidence shows that it was technically practical and economically reasonable for Packaging to comply with the Act and Board Air Pollution Regulations. Applying for and obtaining construction and operating permits, including a CAAPP permit, from the

[84] 415 ILCS 5/33(c); *See generally, People v. Waste Hauling Landfill, Inc., and Waste Hauling, Inc.*, PCB No. 95-91 (May 21, 1998, slip op. at 27).
[85] Complainant's Exhibit 5, Admitted Fact Nos. 37, 44 and 46 (verifying RTO was installed in 2003, began operating on November 11, 2003, and was stack tested to verify efficiency on February 26, 2004).

Illinois EPA is a simple, low-cost measure that is not unduly burdensome for subject sources. Similarly, enrolling in Illinois' ERMS program, monitoring seasonal emissions each year and purchasing ATUs does not impose an unreasonable cost or time investment on a company like Packaging. Packaging itself asserts that the company's failure to comply with applicable environmental regulations was the result of its ignorance of the law; it does not assert that it was not able to comply with the regulations.[86] As evidence of the feasibility of compliance, Packaging did take actions required for compliance following the Illinois EPA site inspection in October 2001.[87] Additionally, after Illinois EPA's outreach to the entire regulated community, only three companies ultimately sought adjusted standards to obtain an extension on the compliance deadline, and even those companies have since installed control devices meeting the VOM standards.[88] Thus, the evidence shows that it was both technically feasible and economically reasonable to require Packaging to participate in reporting and permitting programs and to limit its VOM emissions in one of the means provided for in Section 218.401 of the Flexographic Printing Rules.

E. After years of continuing violation, Packaging came into compliance

The Complainant acknowledges that Packaging took steps to achieve compliance with its regulatory obligations after the Illinois EPA inspected the facility in 2001. However, Packaging achieved compliance only after continuously violating the Act for at least ten years, from 1992 to 2002.[89]

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[86] *See* Answer to Amended Complaint, Count I, par. 18, Count II, par. 18, Count III, par. 21, Count IV, par. 23, Count V, par. 31 and Count VI, par. 21.
[87] *Id.*
[88] Hearing Transcript, June 29, 2009, at p. 50, l. 2 – 6 and 10 – 17.
[89] *See* Sections III.A to III.L herein, outlining the nature and duration of each violation, *e.g.*, Respondent's operation without a permit for more than 10 years, as admitted by Respondent and noted in footnote 8.

V. AFTER CONSIDERATION OF THE 42(h) FACTORS, THE BOARD SHOULD ASSESS A CIVIL PENALTY OF AT LEAST $861,274.00

A. Statutory Civil Penalties

The evidence at hearing demonstrates that the Respondent has violated the Act and Board Air Pollution Regulations. Section 42(a) of the Act permits the Board to impose penalties against those who violate any provision of the Act or regulation adopted by the Board.[90] The Board may impose a maximum penalty of $50,000.00 for each violation of the Act, and an additional $10,000.00 penalty for each day the violation continues.[91] Additionally, Section 42(h) of the Act requires that the Board ensure "that the penalty is at least as great as the economic benefits, if any, accrued by the respondent."[92]

In its case, the State has proven eleven violations of the Act over a period of more than a decade.[93] The evidence presented at hearing showed that the Respondent received an economic benefit of $711,274.00 resulting from the delayed installation of a pollution control device and avoided annual costs.[94] Based on the extensive period of noncompliance, the number of violations and the economic benefit received by Packaging, Complainant requests that the Board impose a civil penalty of no less than $861,274.00 on Respondent for the violations.

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[90] 415 ILCS 5/42(a) (2008).
[91] *Id.*
[92] 415 ILCS 5/42(h) (2008).
[93] *See* Sections III.A to III.L herein, outlining the nature and duration of each violation.
[94] Hearing Transcript, June 29, 2009, at p. 125, l. 14 -18.

B. Section 42(h) Aggravating and Mitigating Factors

Section 42(h) of the Act, authorizes the Board to consider the impact of any matter of record in determining an appropriate civil penalty.[95] Specifically, Section 42(h) provides as follows:

> In determining the appropriate civil penalty to be imposed under subdivision (a) ... of this Section, the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors:
>
> (1) the duration and gravity of the violation;
>
> (2) the presence or absence of due diligence on the part of the respondent in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;
>
> (3) any economic benefits accrued by the respondent because of delay in compliance with requirements, ... ;
>
> (4) the amount of monetary penalty which will serve to deter further violations by the respondent and to otherwise aid in enhancing voluntary compliance with this Act by the respondent and other persons similarly subject to the Act;
>
> (5) the number, proximity in time, and gravity of previously adjudicated violations of this Act by the respondent;
>
> (6) whether the respondent voluntarily self-disclosed, in accordance with subsection (i) of this Section, the non-compliance to the Agency; and
>
> (7) whether the respondent has agreed to undertake a "supplemental environmental project,"...

1. Duration and Gravity

The evidence before the Board in this matter demonstrates that the duration and gravity of Packaging's violations were significant and warrant a substantial civil penalty.

[95] 415 ILCS 5/42(h) (2008).

Complainant requests that the portion of the civil penalty that is attributable to factors other than economic benefit be no less than $150,000.00.

As outlined above, the Respondent violated permitting requirements, reporting requirements, and many of the programs designed to reduce VOM emissions from the Facility – the ERMS program, New Source Review, the Flexographic Printing Rules and its Construction Permit. The violation of these legal obligations resulted in actual excess emissions of VOM to the atmosphere. The Act "authorizes the Board to assess civil penalties for violations regardless of whether these violations resulted in actual pollution."[96] Here, however, the violations did result in actual pollution. Press 4, which has a PTE of 52 tpy, was operated without any controls from 1992 to 2002.[97] This press should have been controlled by the Respondent as of the effective date of Part 218, March 15, 1995.[98] A control device achieving the required capture and control efficiency would have dramatically reduced the VOM emissions from Press 4.

The gravity of the excess VOM emissions from Packaging's Carol Stream Facility is aggravated by its location in an area designated as severe nonattainment for ozone during the relevant period. As Mr. Bloomberg testified, from 1993 to 2003, the Chicago area, including DuPage County, was a severe ozone nonattainment area.[99] VOM is the greatest threat during the ozone formation season from May to September each year. Packaging reports that its seasonal emissions in 2000, 2001, and 2002 ranged from 13.75 to 20.14 tons during those months.[100] Ground-level ozone is a threat to human

[96] *ESG Watts*, 282 Ill. App. 3d at 51.
[97] Respondent's Answer to Amended Complaint, Count V, par. 19; and Complainant's Exhibit 5, Admitted Facts No. 11 and 50.
[98] R 93-14, Opinion and Order of the Board (January 6, 1994).
[99] Hearing Transcript, June 29, 2009, at p. 42, l. 9-12.
[100] Respondent's Exhibit 50, May 2009 Revised SERS.

health and can cause, among other problems, reduced lung functioning and inflammation of the lining of the lungs.[101]

In addition to causing excess VOM emissions, Packaging failed to comply with its permitting and reporting requirements, which are of programmatic significance to the Agency and, therefore, to the People of the State of Illinois. As testified to by Mr. Bloomberg, permits are significant because they "ensure that the State knows what equipment is at sources, how it's being controlled, what's being emitted and whether or not those emissions units are complying with environmental regulations."[102] Annual emissions reports allow the Agency to know the amount and location of air pollutants entering the atmosphere.[103] All of these inform the Agency in its essential functions, including the development of new regulations and compliance with federal requirements, such as the NAAQS.[104]

Given Packaging's industry, there is no excuse for its failure to have been aware of and complying with the requirements. The flexographic printing industry is highly competitive.[105] To run its business, Packaging watches trends in the industry and the behavior of its competitors, and competitors are watching Packaging, as shown by other companies' awareness of Respondent's noncompliance during the time they were petitioning for adjusted standards.[106] Dominic Imburgia's testimony that he was not aware of the existence of the Clean Air Act is not credible.[107] The Company was

[101] *See supra*, ftnt 76, Ground Level Ozone, Health and Environment, http://www.epa.gov/air/ozonepollution/health.html.
[102] Hearing Transcript, June 29, 2009, at p. 52, l. 6-10.
[103] *Id.* at p. 52, l. 18 – p. 53, l. 3.
[104] *Id.* at p. 52, l. 2 – p. 54, l. 5.
[105] *Id.* at p. 187, l. 21-23.
[106] *Id.* at p. 51, l. 6 – 19 (Bloomberg testifying that Illinois EPA learned of Packaging's noncompliance from a competitor who found the noncompliance "unfair").
[107] *Id.* at p. 186, l. 22 – p. 187, l. 1.

complying with its hazardous material regulations during the 1990s.[108] The Agency was conducting outreach to the flexographic industry.[109] Packaging even has an industry publication, *Paper, Film & Foil Converter*, available in its lobby.[110] Although Packaging claims that it was not aware of any of its regulatory obligations, it had ample opportunity and resources to become fully educated and informed regarding its environmental obligations.

The Board should also consider the length of time these violations persisted. Since at least 1992, Respondent has been operating sources that required a permit from the Agency.[111] Packaging did not submit its first permit application to the IEPA until July 2002.[112] Packaging was in violation of the Part 218 regulations from the effective date of the regulation in 1995 until the installation of the RTO in 2003. The extended period of violation should weigh heavily against Packaging.[113]

Based on the evidence before the Board, as highlighted here, gravity and duration should weigh as an aggravating factor against Packaging in the Board's assessment of an appropriate civil penalty.

2. The Evidence Shows a Lack of Due Diligence by Packaging

The evidence shows that Packaging demonstrated an absence of due diligence in complying with the Act, the Board's Air Pollution Regulations and its Construction Permit. As noted above, Packaging alleges that it was unaware of its environmental

[108] *Id.* at p. 258, l. 11 – p. 259, l. 6.
[109] *Id.* at p. 47, l. 9 – p. 49, l. 15 (Bloomberg testifying that Illinois EPA sent letters to all sources, including Packaging, and formed a working group).
[110] Complainant's Exhibit 5, Admitted Fact Nos. 63 – 64.
[111] Answer to Amended Complaint, Count I, par. 6 and Count II, par. 18.
[112] Complainant's Exhibit 5, Admitted Fact Nos. 17 – 18.
[113] *See, People of the State of Illinois v. Panhandle Eastern Pipe Line Company*, PCB 99-191 (November 15, 2001, slip op. at 29) (long period of violations was an aggravating factor for purpose of penalty); *United States v. Marine Shale Processors*, 81 F3d 1329 (5th Cir. 1996) ($2,500,000 penalty for twenty-nine unpermitted minor sources occurred over approximately eleven-year period).

obligations until the Illinois EPA conducted a site inspection in October 2001. Packaging failed to show due diligence prior to 2001 by failing to proactively seek out information about its environmental obligations when an abundance of resources were available that served to provide notice of, and assistance in, ascertaining its legal obligations.

Following the 2001 site inspection, Packaging began to take concrete steps to achieve compliance with the Act and Board Air Pollution Regulations. However, Packaging by no means took all available steps to achieve immediate compliance. Respondent waited fourteen months before decommissioning Press 4 and determined not to expend the time and cost to make a demonstration of compliance for Press 5 until February 2004.[114] Moreover, Rich Trzupek, Respondent's environmental consultant, acknowledges in his testimony that he understood that a formal test would be required and that he explained this to Packaging when he was first retained.[115]

Packaging was also not diligent in ensuring compliance with its Construction Permit after its issuance. At the time the Construction Permit was issued in June 2003, Respondent had been aware of its status as a regulated entity since at least October 2001.[116] The company was already aware that its obligations included control of its VOM emissions and the maintenance of records, as these requirements were identified in the Violation Notice sent to the Respondent on January 25, 2002.[117] When Illinois EPA conducted a site inspection in 2004, however, Respondent was unable to produce required records for the Agency to review even though the Construction Permit clearly

[114] *See* Respondent's Exhibit 4, Expert Report of Chris McClure, p. 4 (Press 4 decommissioned in December 2002); and Complainant's Exhibit 5, Admitted Facts No. 37 and 38 (establishing stack test occurred on February 26, 2004 and 2004 stack test was first approved compliance test).
[115] Hearing Transcript, June 29, 2009, at p. 26., l. 13-18.
[116] *See* Complainant's Exhibit 3, 2003 Construction Permit; and Respondent's Exhibit 9, Illinois EPA Inspection Report (showing date of first inspection was October 5, 2001).
[117] Respondent's Exhibit 10, Notice of Violation dated January 25, 2002.

states the records must be available.[118] Additionally, the VOM usage at the Facility was repeatedly above the permit limit in the period from August 2003 to July 2004.[119] These failures show an absence of due diligence on the part of Packaging and should be weighed against Respondent as an aggravating factor in assessing a penalty.

3. Economic Benefit

a. An Appropriate Civil Penalty Must Include Recovery of All Economic Benefit from Packaging's Violation of 35 Ill. Adm. Code 218.401

The Act requires that, absent the narrowest of circumstances, a civil penalty must recover all economic benefit accruing to a respondent as a result of the violation. Specifically, Section 42(h) of the Act, 415 ILCS 5/42(h) (2008) provides, in pertinent part:

> In determining the appropriate civil penalty to be imposed . . . the Board shall ensure, in all cases, that the penalty is at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship.

Although Packaging started as a small family business, it is now a nationally competitive company with facilities in multiple states.[120] In the Carol Stream Facility alone, there are approximately 100 employees.[121] As such, it is neither arbitrary nor

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[118] Complainant's Exhibit 3, 2003 Construction Permit, par. 17 ("All records and logs required by this permit shall be retained at a readily accessible location at the source for at least three years from the date of entry and shall be made available for inspection and copying by the Illinois EPA or USEPA upon request. Any records retained in an electronic format (e.g., computer) shall be capable of being retrieved and printed on paper during normal source office hours so as to be able to respond to an Illinois EPA or USEPA request for records during the course of a source inspection.")

[119] *See* Section III.I herein, establishing VOM usage exceedances; and Complainant's Exhibit 3, Admitted Fact No. 55.

[120] Hearing Transcript, June 29, 2009, at p. 187, l. 21 – p. 188, l. 2 (Packaging competes nationally) and p. 220, l. 20-23 (Packaging acquired a facility in Sparta, MI in late 2002).

[121] *Id.* at p. 188, l. 12 – 15.

unreasonable to recover all of the economic benefit accruing to Packaging for delaying and avoiding capital expenditures needed to control VOM for a period of seven years.

b. The Economic Benefit Derived from the Violations was at Least $711,274.00

Mr. Gary Styzens testified on behalf of the State on the issue of Packaging's accrued economic benefit from the violations alleged in the People's Amended Complaint. Mr. Styzens is employed by Illinois EPA ("Agency") as an Economic Benefit Analyst and Manager.[122] Mr. Styzens' educational background includes extensive undergraduate course work in business and accounting and a Master's Degree in Business Administration.[123] He has examined numerous professional articles, court and Board opinions, and state and federal guidance addressing the topic of economic benefit.[124] He is also a Certified Internal Auditor.[125] Mr. Styzens has extensive experience in estimating the economic benefit of noncompliance in environmental contexts. His prior expert testimony on behalf of the Agency includes four Board matters and one case tried in Circuit Court.[126] Aside from his normal salary, he did not receive any additional compensation for his testimony at hearing.[127]

Mr. Styzens' testimony outlined the methodology that he employed to arrive at his estimate of economic benefit. His analysis identifies expenditures for pollution control that were delayed or avoided by a company.[128] Delayed costs result in financial advantage based on the concept of the time value of money, which recognizes that money

[122] *Id.* at p. 98, l. 14 - 17.
[123] *Id.* at p. 99, l. 6-24.
[124] *Id.* at p. 106, l. 1-6.
[125] *Id.* at p. 100, l. 7-10.
[126] *Id.* at p. 102, l. 16-22; p 103, l. 1-9.
[127] *Id.* at p. 99, l. 1-5.
[128] *Id.* at p. 104, l. 15-17.

that is not spent on pollution control can be invested in other ways.[129] The focus of this analysis dealt with Packaging's failure to timely install an RTO, which was eventually the means by which the company achieved compliance with the Board's Flexographic Printing Rules.

Prior to hearing, Mr. Styzens prepared an expert report that describes and memorializes his calculations and opinions ("Styzen's Expert Report").[130] Based on information provided by Packaging, he determined that the company had delayed the cost of investing in an RTO requiring a one-time capital investment of $250,000.[131] Because Packaging did not provide the Agency with information on its annual avoided costs, Mr. Styzens utilized estimates generated by the Respondent's expert for a different company. The numbers were generated by Mr. Trzupek as an estimate of the annual costs to operate and maintain an RTO of approximately the same size installed by Packaging.[132] With this information, Mr. Styzens calculated an economic benefit of $711,274.00.[133] This number is based upon the two components of possible financial gain identified above: $88,404.00 is attributable to delayed costs, or the time value of the $250,000.00 expenditure and $622,870.00 is attributable to annual avoided costs, and includes principal and interest through December 2008.[134]

i. Calculation of Delayed Costs

To calculate the portion of the economic benefit associated with delayed compliance, Mr. Styzens began with the actual expenditure made by Packaging in 2003,

[129] *Id.* at p. 105, l. 14-19.
[130] *See* Complainant's Exhibit 10, Styzens' Expert Report. Mr. Styzens developed his opinion in accordance with the same method which formed the basis of his testimony in *People v. Panhandle Eastern Pipeline Company*, PCB 99-191.
[131] Hearing Transcript, June 29, 2009, at p. 110, l. 12-20.
[132] *Id.*, at p. 119, l. 6-15.
[133] *Id.*, at p. 125, l. 14-18.
[134] *Id.*, at p. 107, l. 11-14.

$250,000.00.[135] That number was then adjusted to the value of those dollars in 1997, taking into account inflation.[136] To adjust the number for inflation occurring between 1997 and 2003, Mr. Styzens utilized the Plant Cost Index, an inflation index specific to the industrial context.[137] Mr. Styzens then employed the marginal income tax rate to reduce the value of the capital expenditure, acknowledging that companies receive tax benefits from exemptions for environmental expenditures and tax credits for the depreciation of equipment.[138]

After adjusting the $250,000.00 for inflation, Mr. Styzens then calculated interest on that amount from 1997 to 2003 to determine the time value of the delay.[139] The interest rate used for this calculation was the bank prime loan rate published monthly by the Federal Reserve.[140] Mr. Styzens testified at hearing that he prefers to use, and typically does use, a company-specific interest rate based on the weighted average cost of capital ("WACC").[141] However, to use the WACC, you must have company-specific financial information for the relevant years.[142] In this case, the WACC was not employed because Mr. Styzens did not have a sufficient number of financial statements from Packaging for the time period at issue, 1997 to 2003.[143] The bank prime loan represented the best alternative to a WACC because it is a reasonable estimate of financial gain on monetary investments for the specific time period.[144] It is published by a third party, and

[135] *Id.*, at p. 112, l. 9.
[136] *Id.*, at p. 112, l. 9-18.
[137] *Id.*, at p. 113, l. 2-8.
[138] *Id.*, at p. 114, l. 4-12.
[139] *Id.*, at p. 117, l. 3-10.
[140] *Id.*, at p. 113, l. 9-19.
[141] *Id.*, at p. 115, l. 19-24.
[142] *Id.*
[143] *Id.*, at p. 116, l. 16-18.
[144] *Id.*, at p. 116, l. 2-10.

so it provides a neutral benchmark.[145] Moreover, it is a conservative estimate as reflected by the fact that this rate is only extended by banks to the most financially secure companies.[146]

After calculating interest for the seven year period of noncompliance on the inflation-adjusted delayed capital expenditures, Mr. Styzens made the final adjustment for tax implications due to depreciation. He then calculated the net after-tax economic benefit based on the time value of money for the 7 year noncompliance period ending in 2003;[147] the calculated economic benefit was $71,705.00.[148] Because this economic benefit was not recovered in 2003, additional interest continues to accrue.[149] Compound interest taken on the $71,705.00 from 2003 to December 2008 results in an economic benefit attributable to delayed expenditures of $88,404.00.[150]

ii. Calculation of Avoided Costs

Avoided costs in this case would have resulted from Packaging's ability to have avoided the costs associated with operating, maintaining, and staffing the RTO during the entire period of noncompliance.[151] The largest of these various components is the annual cost to operate an RTO, which requires electrical and gas inputs.[152] Mr. Styzens testified that requests were made to Packaging to provide the actual costs for operating, maintaining and staffing the RTO after the time it was installed.[153] Because this information was not available or not provided, Mr. Styzens utilized estimates for annual

[145] *Id.*
[146] *Id.*, at p. 116, l. 1-10.
[147] *Id.*, at p. 117, l. 3-10.
[148] *Id.*, at p. 115, l. 15-16.
[149] *Id.*, at p. 117, l. 3-10.
[150] *Id.*, at p. 117, l. 19 – p. 118, l. 1.
[151] *Id.*, at p. 119, l. 1-5.
[152] *Id.*, at p. 119, l. 18-20.
[153] *Id.*, at p. 119, l. 8-15.

operating and maintenance on an RTO of a similar size and nature.[154] Although Packaging now asserts that the annual cost estimates used by Mr. Styzens are high, his estimate was based on information generated by Packaging's own expert in a prior proceeding before the Board.[155] The estimate was developed by Mr. Trzupek over several years. It was relied upon by the Illinois EPA as actual approximated operating costs when it determined to support the previous petitioners in the proceedings before the Board.[156] It was provided in sworn testimony for the Board to rely upon in making a determination for a similarly situated company.[157] As such, the estimate utilized in Styzens Expert Report can be considered a reasonable estimate of annual control costs where actual costs are not available.

The cost estimate provided by Mr. Trzupek in the *Formel* proceeding, for estimated annual cost to control, was between $10,000.00 and $20,000.00 per ton per year.[158] If the low end of the estimate were applied as an estimate in this case, that would yield an annual cost of control of approximately $200,000.00 per year.[159] Mr. Styzens used a much more conservative estimate of the annual recurring costs, $86,000.00.[160]

Because the avoided costs will never actually be expended by Packaging, the full amount of the avoided cost must be recouped with interest in order for the company to be stripped of its economic benefit. A similar process to that described for delayed

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[154] *Id.*
[155] *Id.*, at p. 33, l. 18-24.
[156] Hearing Transcript, June 30, 3009, at p. 157, l. 13 – p. 158, l. 22 (Illinois EPA's reliance was confirmed by Mr. Bloomberg, who was an active participant in the drafting of the regulations. Bloomberg also testified that if the estimates proffered at the adjusted standard petitions by Mr. Trzupek had been on the magnitude of those put to the Board at the Packaging hearing, the Agency would not have supported granting an adjusted standard to the previous petitioners.).
[157] Complainant's Exhibit 14, Trzupek Testimony at Formel Adjusted Standard Hearing.
[158] Hearing Transcript, June 29, 2009, at p. 33, l. 15-17.
[159] *Id.*, at p. 35, l. 13-21.
[160] *Id.*, at p. 123, l. 12 – p. 124, l. 3.

expenditures is used to determine the financial benefit received by a company for the time value of the avoided costs, or the benefit of being free to direct the money saved in annual recurring costs to alternative investments.[161] After computing the total costs avoided for the seven years, adjusting for tax and inflation and calculating interest, Mr. Styzens determined that the economic benefit of the annual avoided costs, taken through 2003, was $505,212.00.[162] Because this amount was not recouped by the Agency in 2003, interest continues to accrue.[163] When calculated through December 2008, the value of the interest is $117,658.00, resulting in total economic benefit from annual avoided costs of $622,870.00.[164] The total economic benefit is the sum of the delayed and avoided costs, $711,274.00.

c. Packaging's alternative economic benefit analyses should be rejected

At the hearing in this matter, Packaging presented economic benefit estimates for three alternative scenarios of achieving compliance with Section 218.401 of the Act: (1) moving Press 4 to Michigan, (2) obtaining an adjusted standard and (3) purchasing a smaller used RTO.[165] These compliance scenarios should be rejected by the Board. They are speculative, beyond the boundaries of the compliance alternatives presented in the Board's Regulations and do not represent the company's actual determination of the most cost effective means of achieving compliance within the particulars of its business.

[161] *Id.*, at p. 120, l. 3-14.
[162] *Id.*, at p. 120, l. 3-14 and p. 121, l. 1-20.
[163] *Id.*, at p. 122, l. 11-16.
[164] *Id.*, at p. 122, l. 17-22.
[165] *See generally* Testimony of Chris McClure on June 30, 2009; and Respondent's Exhibit 4, Expert Report of Christ McClure.

i. Moving Press 4 to Michigan should be rejected as a compliance alternative

Packaging's first alleged alternative was the option to shut down Press 4 and move it to Michigan. As noted by Mr. Styzens in his testimony at hearing, however, this option fails to take into account the entire period of noncompliance from 1997 to 2003.[166] Packaging did not purchase the Sparta, Michigan plant until late 2002.[167] This alternative, therefore, would not have been a viable option in 1997, 1998, 1999, 2000, 2001 and most of 2002. This option also does not take into account the fact that Press 5 was also out of compliance with Section 218.401.[168] As testified to by Mr. Bloomberg, and acknowledged by Mr. Trzupek, Packaging did not demonstrate compliance to the Agency on Press 5 until it purchased the $250,000.00 RTO, connected it to Press 5 and completed a stack test per the requirements of the regulations.[169] Additionally, though physically possible, it is unrealistic that Packaging could have sustained its business with the operation of only one solvent-based press even if Press 5 had been shown to be compliant. By the time Press 4 was decommissioned in December 2002, Packaging had been running two solvent-based printing lines for more than seven years.[170] In 2004, Packaging installed Press 6 and resumed operating with two solvent-based printing lines, which it continues to do to this day.[171]

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[166] Hearing Transcript, June 29, 2009, at p. 128, l. 14-22.
[167] *Id.*, at p. 220, l. 20-23.
[168] *See* discussion in Section III.G herein.
[169] Heating Transcript, June 29, 2009, at p. 45, l. 3 – p. 47, l. 4 (Bloomberg testifying that the informal test on the recirculating drying oven was inadequate to demonstrate compliance, but the formal test on the RTO in early 2004 did establish compliance with the regulation); Complainant's Exhibit 8, Letter from Huff & Huff; and Transcript, June 29, 2009, at p. 26, l. 8 - 27, l. 1 (Trzupek acknowledging that a formal test is required and one was not conducted until the RTO was installed).
[170] Answer to Amended Complaint, Count I, par. 6 (establishing that Press 4 was installed in 1992 and Press 5 in 1995, and both presses operated through the end of 2002).
[171] Complainant's Exhibit 5, Admitted Fact No. 15.

In its submittals to the Agency, Packaging never represented that it intended to merely shut down Press 4, but asserted that it would "replace" Press 4 and add a control device. Specifically, in making an attempt to demonstrate compliance with Part 218, Respondent made the following statement:

> Packaging Personified complies with the above referenced rule [218.401-218.404] by the following methods:
>
> * * *
>
> Press 4: This unit does not currently comply with the requirements of the flexographic printing rule. As previously indicated to the Illinois EPA, this press will be withdrawn from service and replaced with a new press that would be controlled by a thermal oxidizer. . . . [172]

This mutual understanding is confirmed by the Construction Permit issued for Press 6 in June 2003, which states:

> This permit is hereby granted to the above-designated Permittee to CONSTRUCT emission unit(s) and/or air pollution control equipment consisting of one flexographic printing press (Comexi press) as replacement of existing press #4, and one regenerative thermal oxidizer (RTO) controlling one new press (Comexi press) and one existing press (press #5), as described in the above-referenced application.[173]

ii. Obtaining an adjusted standard should be rejected as a compliance alternative

Packaging asserts that its second alternative for achieving compliance was to obtain an adjusted standard from the Board. This alternative is speculative and does not provide a justifiable basis for calculating economic benefit. Packaging does not have a reliable rationale for presuming that it would have been granted an adjusted standard. Other companies that sought an adjusted standard made lengthy, costly and robust demonstrations to the Board under sworn testimony and subject to cross-examination.

[172] Complainant's Exhibit 13, Letter to Agency re Demonstration of Compliance dated May 2, 2003.
[173] Complainant's Exhibit 3, 2003 Construction Permit, p. 1.

Respondent has not undergone this rigorous demonstration; it has never petitioned for an adjusted standard; and it should not be credited for having made such a showing to the Board.[174] This is especially true considering that the company was not complying with any of its permitting and reporting requirements and did not respond to the Agency's outreach in 1997.[175] Although Packaging claims that it did not receive the 1997 letter and information packet, the Illinois EPA sent the outreach letter to the company at its Carol Stream address, where it has operated for 34 years, and directed the letter to the attention of Dominic Imburgia, who was the president of Packaging at that time.[176] Moreover, other companies not only responded to the Illinois EPA's outreach, but had contacted the Agency prior to 1997 in order to alert the Agency of their compliance concerns.[177] These companies proactively sought to cooperate with the Illinois EPA which Packaging has not done and should not be credited for having done.

An adjusted standard is extraordinary relief that is beyond the scope of the economic benefit analysis. It is not a means of achieving compliance with environmental regulations but of avoiding compliance with a particular rule or regulation. Part 218.401 provides within the regulations the option for achieving compliance with its requirements. It identifies three distinct options: ensure that only compliant inks are used, utilize a mixture of inks that are able to comply with the VOM restrictions by

[174] Complainant's Exhibit 5, Admitted Fact No. 54.
[175] *See generally* discussion in Section III.A – III.L herein regarding periods of noncompliance with applicable regulations; Hearing Transcript, June 29, 2009, at p. 49, l. 2-18 (Bloomberg testifying to Packaging's failure to respond to the Agency outreach).
[176] Hearing Transcript, June 29, 2009, at p. 48, l. 8 – p. 49, l. 1 (Bloomberg testifying to the 1997 letter being sent); Hearing Transcript, June 29, 2009, at p. 186, l. 17-21 (Dominic Imburgia testifying as to length of time at the Carol Stream address); Complainant's Exhibit 4, Cover Letter for 1997 Information Packet; and Complainant's Exhibit 5, Admitted Fact Nos. 68-70 (location and president of Packaging in 1997).
[177] Hearing Transcript, June 29, 2009, at p. 43, l. 9-16, 24 – p. 44, l. 6.

means of a daily weighted average or install a control device.[178] Packaging did, in fact, install a control device, just as the regulation anticipates, and this action should be assessed for purposes of the economic benefit analysis.

iii. Purchasing a used RTO should be rejected as a compliance alternative

The third option alleged by Packaging to be a viable compliance alternative is the purchase of a used RTO large enough to control only one press. This "alternative" fails for multiple reasons. As in the "move to Michigan" alternative, this option fails to account for the fact that Press 5 was not in compliance with the Flexographic Printing Rules and that it is unlikely that Packaging could have sustained its business with only one solvent-based printing line.[179] Packaging has been operating with two solvent-based presses at most times since 1995, and the bulk of its production is done with solvent-based inks on the printing lines designed for this type of printing.[180]

Additionally, accepting a smaller used RTO as a basis for calculating economic benefit is inconsistent with the principle that the best estimation of a company's lowest cost alternative is what the company actually did. As discussed in guidance literature on this issue, the presumption is that a company will make business decisions that are efficient and effective, that create the most benefits to the company for the lowest costs:

> The best evidence of what the violator should have done to prevent the violations is what it eventually did (or will do) to achieve compliance. This rule is instructive in those cases where the violator may appear to be installing a more expensive pollution control system than EPA staff believe is necessary to achieve compliance. In such situations, the proper

[178] 35 Ill. Adm. Code 218.401.
[179] *See* discussion in Section III.G herein (Press 5 not in compliance).
[180] Answer to Amended Complaint, Count I, par. 6 (establishing that Press 4 was installed in 1992 and Press 5 in 1995, and both presses operated through the end of 2002); Complainant's Exhibit 5, Admitted Fact No. 15 (Press 6 installed in 2004); and Hearing Transcript, June 30, 2009, at p. 15, l. 2-4 (Trzupek testifying, "I don't know the exact percentage, but I think on an annual basis even then 99 percent of their [Packaging's] inks were solvent-based inks.")

> cost inputs in the BEN model are usually still based on the actual (more expensive) system being installed. This is because the EPA should not second guess the business decisions of a violator. A violator often will have sound business reasons to install a more expensive compliance system (e.g., it may be more reliable, easier to maintain, or have a longer useful life).[181]

On January 10, 2003, Respondent purchased an RTO for $250,000.00.[182] This is what the company actually did. The evidence confirms that Packaging was making the decision that was in the best economic interests of the company. Packaging evaluated multiple options at the time it made the decision to purchase the $250,000.00 RTO.[183] As Joe Imburgia, the General Manager of Packaging, testified, "at one point in time it was floated that we [Packaging] would continue to operate press four and buy a used small oxidizer and I generally had no interest in that."[184] This is also consistent with the testimony of Mr. Bloomberg regarding the problems that other companies have encountered after purchasing used control systems.[185]

iv. Conclusion

For all of these reasons, Packaging's alternative economic benefit scenarios should be rejected. Respondent received an economic benefit from delaying the installation of the $250,000 RTO and avoiding the costs of its operation and maintenance for seven years. It should not be allowed now to avoid the leveling effect of being disgorged of its unfair economic advantage over its competitors who made the necessary expenditures to comply.

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[181] Respondent's Exhibit 4, Expert Report of Chris McClure, Attachment 8, US EPA "BEN User's Manual" at 3-9.
[182] Complainant's Exhibit 6, Invoice for Purchase of RTO.
[183] Hearing Transcript, June 29, 2009, at p. 234, l. 18 – p. 234, l. 24.
[184] *Id.* at p. 191, l. 19-21 (position) and p. 234, l. 22-24 (quote regarding used equipment).
[185] *Id.* at p. 54, l. 6-22.

4. The civil penalty requested by the Complainant is necessary to deter future violations of the Act

Deterrence is an important objective for the Board in establishing an appropriate civil penalty, even where a violator has already achieved compliance.[186] Courts have found that the Act's provisions for civil penalties is to "provide a method to aid enforcement of the Act".[187] In *People of the State of Illinois v. State Oil Company*, the Board found that imposing a civil penalty on State Oil, who continued to operate for another eight months after receipt of a violation notice, served the purpose of having a "prospective deterrent effect on current and future Act violators."[188]

In this case, Packaging failed to expend resources to determine its legal obligations and then relied on that ignorance to avoid capital investments required to achieve compliance. While other companies were outreaching to the Agency to work on compliance plans,[189] Packaging was not expending any time or resources on the problem of excess VOM emissions. It waited 14 months after the October 2001 inspection, and 11 months after the January 25, 2002 VN, to shut down Press 4. Two and half years passed after the 2001 site inspection before compliance was demonstrated on Press 5. In that same time frame, Packaging spent money on acquiring the Sparta, Michigan facility in late 2002. A substantial monetary penalty would encourage future compliance by Packaging and others in the regulated community. It would provide an incentive for

[186] *See ESG Watts, Inc. v. Pollution Control Board,* 283 Ill. App. 3d 43, 51 (4th Dist. 1996) (Respondent's compliance came only after initiation of enforcement, and associated hardships imposed on Illinois EPA warranted a "stiff" penalty to assure deterrence).
[187] *Southern Asphalt Co. v. PCB*, 60 Ill. 2d 204, 207, 326 N.E.2d 406, 408 (1975).
[188] *People v. State Oil Company*, PCB 97-103, 2003 WL 1785038 *13 (March 20, 2003) ("Levying a civil penalty against State Oil and the Anests in this case aids in the enforcement of the Act because it informs violators that they may not delay efforts to comply with the Act while pursuing sale of the offending property.").
[189] Hearing Transcript, June 29, 2009, at p. 43, l. 9-16, 24 – p. 44, l. 6.

similarly situated companies to keep abreast of information on their environmental obligations and take seriously their VOM control requirements.[190]

A civil penalty that recoups the full economic benefit received by Respondent, and includes a sizeable component for gravity and duration, will serve to deter future violations of the Act. The portion of the penalty reflecting gravity and duration should be a high priority, as the economic benefit component serves only to level the playing field. The remainder of the penalty ensures that the decision not to comply does not merely delay otherwise identical expenditures. As such, a civil penalty that recoups the full economic benefit and assesses additional penalties for gravity and duration is a critical disincentive for those who would violate the Act. A civil penalty of at least $861,274.00 will serve to deter future violations by the Respondent and to otherwise aid in enhancing voluntary compliance with the Act by the Respondent and other persons similarly situated.

5. Previously adjudicated violations of the Act

Complainant is not aware of any previously adjudicated violations of the Act.

6. Voluntary Self-Disclosure

Respondent did not voluntarily self-disclose its noncompliance with the Act, Board Air Pollution Regulations or its Construction Permit.

7. Supplemental Environmental Project

This factor is not applicable to the present case as no supplemental environmental project has been proffered by Respondent or accepted by the Illinois EPA.

[190] *See, ESG Watts Inc. v. PCB*, 282 Ill. App. 3d 43, 52, 668 N.E.2d 1015, 1021 (4th Dist. 1996) ("the deterrent effect of penalties on the violator and potential violators is a legitimate goal for the Board to consider when imposing penalties.").

VI. REQUESTED PENALTY

The evidence presented at hearing showed that the Respondent received an economic benefit of $711, 274.00 resulting from the delayed installation of a pollution control device and avoided annual costs. The civil penalty should disgorge the Respondent of its full economic benefit and reflect other aggravating factors applicable to Respondent's eleven violations of the Act and Board Regulations occurring over a period of more than a decade. Complainant requests that the Board impose a civil penalty of no less than $861,274.00 on Respondent for the violations.

VII. ATTORNEY FEES AND COSTS

Although Complainant believes that Packaging's continued violations clearly satisfy the "willful, knowing or repeated violation" standard contained in 415 ILCS 5/42(f) (2008), Complainant does not request the assessment of attorney fees and costs. Complainant asks the Board to take note of this waiver in its assessment of an appropriate civil penalty.

VIII. CONCLUSION

The evidence proves that Packaging is liable for eleven different violations of the Act and Board Regulations alleged in the People's Amended Complaint. These violations persisted for over a decade and resulted in excess VOM emissions in an area classified as severe ozone nonattainment. As shown by the evidence, the Respondent enjoyed a economic benefit of $711,274.00 by delaying and avoiding expenditures that were necessary to comply with the Act and Board Regulations. Packaging should be stripped of this unfair economic advantage. Because mere recovery of the economic benefit would only serve to level the economic playing field, a significant additional

penalty must also be recovered to ensure that there is an effective deterrent against future violations. The number, nature, and duration of Packaging's violations warrant a civil penalty, in addition to the economic benefit, of at least $150,000.00.

Based on the evidence before the Board, Complainant respectfully requests that this Board enter an order finding against Respondent as to liability on Counts I through X and Count XII of the Amended Complaint; requiring Respondent to cease and desist from future violations of the Act and Board Regulations; and assessing of a civil penalty no less than $861,274.00.

RESPECTFULLY SUBMITTED

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