BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ORIGINAL

PEOPLE OF THE STATE OF ILLINOIS Complainant, v. PACKAGING PERSONIFIED, INC., an Illinois Corporation Respondent.	)	PCB 04-16 (Enforcement – Air)

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NOTICE OF FILING

TO: Paula Wheeler
Assistant Attorney General
Environmental Bureau
69 West Washington Street, 18th Floor
Chicago, Illinois 60602

L. Nichole Cunningham
Assistant Attorney General
Environmental Bureau
69 West Washington Street, 18th Floor
Chicago, Illinois 60602

Christopher Grant
Assistant Attorney General
Environmental Bureau
69 West Washington Street, 18th Floor
Chicago, Illinois 60602

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 W. Randolph – Suite 11 - 500
Chicago, Illinois 60601

PLEASE TAKE NOTICE that on **Friday, November 6, 2009,** we filed the attached **Respondent's Post-Hearing Brief** via hand delivery with the Clerk of the Illinois Pollution Control Board, a copy of which is herewith served upon you.

Respectfully submitted,

PACKAGING PERSONIFIED, INC.

BY: Yesenia Villasenor-Rdy
One of Its Attorneys

Roy M. Harsch
Lawrence W. Falbe
Yesenia Villasenor-Rodriguez
Drinker Biddle & Reath LLP
191 N. Wacker Drive - Suite 3700
Chicago, Illinois 60606-1698
(312) 569-1000

THIS FILING IS SUBMITTED ON RECYCLED PAPER

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing **Respondent's Post-Hearing Brief** was filed via hand delivery with the Clerk of the Illinois Pollution Control Board and served upon the parties below by U.S. First Class Mail and Electronic Mail on **Friday, November 6, 2009.**

Paula Wheeler
Assistant Attorney General
Environmental Bureau
69 West Washington Street, 18th Floor
Chicago, Illinois 60602

L. Nichole Cunningham
Assistant Attorney General
Environmental Bureau
69 West Washington Street, 18th Floor
Chicago, Illinois 60602

Christopher Grant
Assistant Attorney General
Environmental Bureau
69 West Washington Street, 18th Floor
Chicago, Illinois 60602

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 W. Randolph – Suite 11 - 500
Chicago, Illinois 60601

Yesenia Villasenor-Rodriguez

CH01/ 25415963.1

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RESPONDENT'S POST-HEARING BRIEF

NOW COMES Respondent, Packaging Personified ("Packaging"), by and through its attorneys, Drinker Biddle & Reath LLP, and hereby presents its Closing Argument and Post-Hearing Brief in response to Complainant's Closing Argument and Post-Hearing Brief.

I. INTRODUCTION

Packaging Personified ("Packaging") is a small family-owned business that did not learn of its noncompliance with the Illinois Environmental Protection Act (the "Act") and applicable Board regulations (including the substantive Flexographic regulations which comprise the majority of the allegations) until an inspection by the Illinois EPA in October 2001. Packaging does not claim that ignorance of the law is an excuse for its non-compliance. However, Packaging's inadvertent ignorance of the law can certainly be distinguished from that behavior which seeks to purposely evade compliance – which the record clearly shows was not the case here. In fact, Packaging hired an environmental consultant with substantial experience in the industry shortly after it learned of its noncompliance to assist it in understanding and complying with the regulations for which it was cited, and it took these steps even prior to receiving a violation notice ("VN") from the Illinois EPA. While Packaging does not assert that no penalty should be imposed by the Illinois Pollution Control Board ("Board"), it strongly opposes the oppressive and unfair $861,274 penalty proposed by the People of the State of Illinois

("Complainant") based on the circumstances of this case and the discredited testimony presented by Complainant's experts (Mr. David Bloomberg and Mr. Gary Styzen of Illinois EPA).

Furthermore, while there are numerous cases that concern the very same allegations that were brought by the Complainant in this matter, those cases did not proceed to a formal hearing and were settled for significantly less than what is demanded by Complainant here. While Packaging contests numerous facts as presented by the Complainant, the main reason why this case has proceeded to hearing is that the State has been unwilling to accept a settlement offer that is appropriate based on the circumstances and similar caselaw – apparently because of misplaced reliance on the flawed analysis of Illinois EPA's experts as to the alleged 'economic benefit' enjoyed by Packaging as a result of its noncompliance. Moreover, the Complainant's proposed penalty, specifically the economic benefit component, drastically differs with other similar cases and, thus, it appears that Packaging is being singly targeted in an arbitrary and capricious manner. Consequently, Packaging respectfully requests that any penalty that may be imposed by the Board should be consistent with the facts of this case and similar caselaw.

II. PACKAGING ADMITS THAT IT WAS NON-COMPLIANT WTH THE APPLICABLE REGULATIONS. HOWEVER, THE FACTS DO NOT SUPPORT COMPLAINANT'S EXCESSIVE PENALTY DEMAND

Packaging admits that it was non-compliant with the Flexographic regulations and related provisions in the Act and Board regulations. However, the Complainant has mischaracterized some of the more significant facts that directly impact what, if any, penalty should be imposed in this matter.

First, Packaging's non-compliance with the applicable law was inadvertent and the Complainant's accusations to the contrary are not substantiated in the record. Second, based on Mr. Richard Trzupek's (Packaging's environmental consultant) investigations, Packaging's non-compliance with the substantive requirements of the Flexographic rules was applicable to only

one of its presses - Press #4. Third, Packaging was diligent in its efforts and took immediate steps towards coming into compliance after Illinois EPA's October 5, 2001 inspection prior to the VN dated January 25, 2002. However, achieving full compliance would take some time, as it did with other facilities. Nevertheless, Packaging achieved substantive compliance with the emission limitations provided in the Flexographic regulations by shutting down Press #4 in December of 2002, and not when it installed the regenerative thermal oxidizer ("RTO") in December 2003. Further, the installation of the RTO in 2003 was a result of its business decision to add an eight-color press (Press #6) to accommodate the addition of new operational capabilities in conjunction with, and not because, Press #5 could not otherwise demonstrate compliance with the Flexographic regulations. Fourth, Illinois EPA has treated Packaging less equitably than its competitors that were also noncompliant and, as a result, it has frustrated Packaging's efforts to achieve compliance. Fifth, Packaging has always maintained records of its operations; however, its recordkeeping was just not in the manner that Illinois EPA prefers. Sixth, Complainant mischaracterizes the allegations concerning Packaging's alleged violations of its construction permit. Finally, Illinois EPA's unexplained refusal to issue Packaging's requested Federally Enforceable State Operating Permit ("FESOP") has precluded Packaging's ability to achieve full compliance with the Act and applicable Board regulations.

Consequently, the Complainant's mischaracterizations of the above facts and its use of certain cost inputs as testified by Complainant's experts at the hearing (i.e., Mr. Styzen and Mr. Bloomberg) results in a grossly inflated penalty calculation that is unsupported and incorrect, as discussed further below.

A. Packaging's Non-Compliance with the Applicable Laws Was Inadvertent and the Complainant's Accusations To The Contrary Are Not Substantiated

The Complainant's assertions that Packaging knew that it was subject to the Flexographic regulations and the related Act and Board provisions prior to the Illinois EPA inspection in

October of 2001 are unproven, and simply not true. The Complainant relies upon an Illinois EPA letter dated July 2, 1997 that was addressed to Packaging as evidence of its knowledge of the regulations concerning this matter. (Complainant's Exhibit 4). However, the uncontroverted testimony in this case is clear that Packaging never saw this notice and, had it known of the regulations, it would have complied. Mr. Dominic Imburgia, owner of Packaging, testified at the hearing, that Packaging is a very small family-owned business (6/29 Tr., 182:23-183:11) that was started by Mr. Imburgia and his partner, and it never received the 1997 letter with the information packet from the Illinois EPA:

> Q: Dominic, to the best of your knowledge and belief, before today, have you ever seen that letter?
>
> A: Never, never. And if I did see that letter, I would have responded to it.

(6/29 Tr., 183:4-184:8).

Additionally, Mr. Joseph Imburgia, the current general manager, who at the time of the initial Illinois EPA inspection in 2001 was the plant manager, also testified under oath that he never saw the January 1997 letter, and that Packaging's internal procedures require that any letter from the government would have gone directly to an owner. (6/29 Tr., 191:9-192:21). As shown by the record, Complainant has produced no evidence that calls into doubt the above refuted testimony. Further, Complainant's half-hearted attempt to substantiate its claim that Packaging knew of the regulations as evidenced by an industry journal on a coffee table in the reception area at Packaging's facility falls well short of the mark. (Complainant's Brief, at 25).

The evidence before the Board concerning Packaging's actions subsequent to learning of its noncompliance shows that Packaging acted with concern and diligence, not indifference or willful ignorance. Simply put, a company that purposefully tries to evade compliance with the law would not have expended the efforts, resources, time, and money that Packaging has

committed. Further, Packaging's actions to achieve compliance were taken even prior to receiving the VN from the Illinois EPA. (6/29 Tr., 185:14-23 and 6/30 Tr., 8:19-9:2). Moreover, Packaging's commitment to compliance with the Flexographic regulations is exemplified in the fact that Packaging continues to work with the same consultant, Mr. Trzupek, an expert with years of experience in the industry, with whom it began working shortly after the Illinois EPA's inspection about eight years ago. (6/30 Tr., 7:1-12). Additionally, Packaging has been cooperative with the Illinois EPA since the inspection in November of 2001. The evidence in the record does not show otherwise.

Illinois EPA's so-called industry "outreach" consisted solely of sending an initial letter that was never received by Packaging. Illinois EPA never followed up with a phone call to Packaging, to confirm whether it had received the notice and information packet. During the hearing, Mr. Bloomberg testified that Illinois EPA attempted to conduct another round of outreach several years later by phone to follow up with "some" of the target companies, but evidently Packaging was not one of those. (6/29 Tr., 63:23-64:17). Based on the number of other printers that were out of compliance with the Flexographic regulations, and the fact that only four facilities (later it was reduced to three) out of the over 50 facilities listed in Illinois EPA's list of Flexographic Printers in the Chicago Area were part of this "working group," implies that Packaging was not the only facility that did not receive the July 1997 Illinois EPA correspondence, and that Illinois EPA's "outreach" was largely unsuccessful. (6/29 Tr., 59:1-20 and Respondent's Exhibit 23).

While ignorance of the law is not an excuse for non-compliance, the significance of whether Packaging was the recipient of Illinois EPA's attempts to conduct an "outreach" is important because it illustrates that Packaging did not attempt to willfully evade the regulations, and Packaging was no different than many other facilities that were unaware and inadvertently

non-compliant with the regulations after the effective date. The three facilities that participated in this "working group" were out of compliance with the regulations until the adjusted standards for each facility was approved by the Board in 2001. (Respondent's Exhibits 5, 6, and 7). Based on the above, there is nothing in the evidence that shows that Packaging was purposefully evading the regulations or that it exemplified bad-faith behavior that would justify the enormous penalty proposed by Complainant.

B. Only One Press (Press #4) Was Non-Compliant With The Applicable Regulations

Shortly after the Illinois EPA's inspection, Packaging hired Mr. Trzupek, a consultant with over 25 years of experience in the industry and an expert in conducting different stack test methods, to conduct investigations and determine what it needed to do to come into compliance. (6/30 Tr., 4:15-8 and 6/30 Tr., 8:11-18). At the time of the Illinois EPA October 2001 inspection, Packaging had four presses at its facility - Press #1, Press #2, Press #4, and Press #5. (6/29 Tr., 193:20-21). Mr. Trzupek conducted an initial investigation to determine the state of compliance for each of Packaging's four presses. (6/30 Tr., 11:17-20). Mr. Trzupek concluded that Presses #1 and #2 met the VOM content requirements of the Flexographic regulations found at 35 Ill. Adm. Code Section 218.401. (6/30 Tr., 11:22-24). Specifically, these two presses were inline presses that utilized water-based inks and ran in conjunction with an extruder. (6/29 Tr., 193:20-194:3). Mr. Trzupek's evaluation was based on the facility records and the self-evident fact that it didn't make sense to run solvent-based inks on slow presses. (6/30 Tr., 12:5-13:5).

With respect to Presses #4 and #5, Mr. Trzupek concluded that they were both "central impression presses," and were much larger and faster than the presses identified above. (6/30 Tr., 13:6-15). Mr. Trzupek advised Packaging that Press #4 was not in compliance with 218.401. (6/30 Tr., 13:16-22). Mr. Trzupek discussed the possible alternatives for bringing Press #4 into compliance which initially included an adjusted standard, a dedicated control

device, shutting Press #4 down, cross-line averaging (although it was quickly determined that this option was not feasible), and the use of water-based inks. (6/30 Tr., 13:23-15:12). However, Mr. Trzupek advised Packaging that the better option would be to shut it down or install an add-on control system (either new or used). (6/30 Tr., 15:13-19). Ultimately, Packaging in December of 2002 which occurred made the decision to shut down Press #4 prior to the initiation of this enforcement action. (6/29 Tr., 220:11-19).

In regards to Press #5, the compliance solution to this problem required additional investigation because Mr. Trzupek was advised by Packaging that Press #5 utilized solvent-based inks, and it had a recirculating oven that destroyed the volatile organic compound ("VOC") emissions in the tunnel dryer. (6/30 Tr., 15:22-16:4). Based on that information, Mr. Trzupek conducted further investigations to determine the destruction and capture efficiency of the dryer by means of an informal stack test and engineering study. (6/30 Tr., 16:4-17). Complainant's allegations regarding Mr. Trzupek's failure to conduct a formal test are misplaced because it was not Mr. Trzupek's intention to conduct a full stack test to demonstrate compliance. This was because, at that time, Illinois EPA was interested in obtaining information regarding the historical emissions and Packaging did not have a permit issued yet, which would have required the full stack test. (6/30 Tr., 40:15-23). Consequently, Mr. Trzupek intended to determine the capture efficiency and emission rate numbers and "not to prove it in a compliance situation according to a permit condition." (6/30 Tr., 19:16-19).

Mr. Trzupek outlined the details of the engineering study and the results thereof in a letter dated March 31, 2003. (Respondent's Exhibit 21). As testified by Mr. Trzupek at the June 30, 2009 hearing, the analysis of the emission rate was determined using a standard methodology consisting of four U.S. EPA methods - methods 1, 2, 3, and 25A (6/30 Tr., 17:12-19) whereby, methods 1, 2, and 3 were used to measure the flow rate, and method 25A was utilized to measure

the VOC concentration at each location. (6/30 Tr., 17:14-18). The testing ran for about an hour and, based on that information, Mr. Trzupek was able to accurately evaluate the destruction efficiency of the oven. (6/30 Tr., 17:20-18:3). With respect to determining the capture efficiency, Mr. Trzupek measured the amount of ink and solvent used during the test period to determine what was actually occurring in the oxidation section of the dryer. (6/30 Tr., 18:4-10). Based on Mr. Trzupek's investigations he determined that the capture efficiency was 82.6%, and the destruction efficiency was 93.6%, for an overall control of 77.3% percent. Therefore, Press #5 was in substantive compliance with the Flexographic regulations. (6/30 Tr., 18:11-17).

Despite providing the above information to Illinois EPA in March 2003, Packaging never received any feedback from the Illinois EPA regarding whether it had accepted or had any objections to the engineering evaluations for Press #5. (6/30 Tr., 23:9-22 and Respondent's Exhibit 21). Further, Complainant's assertions that Mr. Trzupek's engineering analysis was insufficient because it was not a formal stack test are misplaced. Specifically, Packaging submitted its CAAPP application in 2002; however, Illinois EPA had not acted on its submittal and, thus, Packaging did not have a permit mandating the formal stack test.

Even though Packaging didn't conduct the full stack test, the evidence shows that the formal compliance test would have concluded the same results - Press #5 was in substantive compliance with the Flexographic regulations. Mr. Trzupek testified under oath that he had several conversations with Mr. Kevin Mattison of the Illinois EPA in which he confirmed and discussed that the full-blown stack test would have demonstrated compliance and, in fact, would have shown a higher efficiency due to the higher solvent load when operating at a maximum production rate and the dryers ability to increase efficiency based on such. (6/30 Tr., 21:5-22:5).

Based on the circumstances, it made sense that Packaging would not go through the time and expense of conducting the formal stack test which would have required the installation of a

temporary total enclosure until it decided which option it would choose for compliance for Press #4 and further, what additional expansion to its production it would take. Moreover, Packaging had to evaluate its compliance option for that press from a holistic perspective by determining the needs of its overall business (i.e., would it expand its operations to add additional printing capabilities available with an eight-color press?) and, thus, choosing a compliance option that would be practicable and financially feasible in light of the above considerations.

Based on the above, Mr. Trzupek's investigations concluded that Press #4 was the only press that was not in compliance with the Flexographic regulations, while Presses #1, #2, and #5 were all in substantive compliance.

C. Packaging Immediately Took Steps To Achieve Compliance and Was Diligent In Its Efforts.

As provided above, Mr. Trzupek immediately began to work on gathering the necessary data so that Packaging could begin reporting on emissions, and it began preparing the original CAAPP application forms. (6/30 Tr., 8:11-9:2). However, like other similarly-situated facilities, it would take time for Packaging to come into substantive compliance. It took these steps prior to receiving the VN from the Illinois EPA dated January 25, 2002. (6/29 Tr., 185:14-23 and Respondent's Exhibit 10). Consequently, as a result of its due diligence, Packaging was able to affirmatively outline the steps it had already taken, and those it would complete to come into full compliance with the Flexographic regulations as recommended by Illinois EPA in the VN. (6/30 Tr., 8:19-9:22 and see Respondent's Exhibit 11). Indeed, Packaging prepared and submitted the various deliverables outlined in its VN response, which included a CAAPP permit application dated June 28, 2002 (within 6 months of receiving the VN).[1] (6/30 Tr., 9:23-10:9 and

[1] Complainant's contentions that Packaging intentionally provided incorrect information regarding typical emissions as part of its CAAPP application is incorrect. (Complainant's Brief at, 6-7). Specifically, Complainant statements misconstrue and attempt to attach an improper regulatory significance to "Typical" emissions numbers provided in

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Respondent's Exhibit 56). Illinois EPA even issued a completeness determination dated July 3, 2002 for this submittal. (6/30 Tr., 10:24-11:8 and Respondent's Exhibit 14).

Packaging submitted the past annual emission reports for years 1995 through 2001 in a letter dated August 7, 2002. (6/30 Tr., 11:9-16 and Respondent's Exhibit 13). Packaging also provided Illinois EPA with the historical emissions data for Presses #4 and #5 in a letter dated December 16, 2002. (Respondent's Exhibit 12). Significantly, Packaging had completed all of the above in about a year since learning of its non-compliance. However, Packaging did have decisions to make with respect to how best remedy its non-compliance, and this was discussed with Illinois EPA on several occasions including its meeting with Illinois EPA in September 2002 regarding the VN. (6/30 Tr., 23:14-18). Complainant's aspersions that Packaging failed to shut down its press until December of 2002, are partly explained by the fact that Packaging was evaluating what its compliance options were at that time (i.e., was Illinois EPA going to support the grant of an adjusted standard?). Notably, the recommendations set forth in the VN did not include any specific instructions requesting that Packaging shut down the offending press(es) that were allegedly out of compliance, nor can Complainant point to any similar request to any other Flexographic printers with which it settled cases. (Respondent's Exhibit 9).

Because Mr. Trzupek had worked with the three facilities that each initially obtained relief from the Flexographic regulations by means of an adjusted standard (i.e., Formel, Vonco,

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an permit application. "Typical" emissions numbers are not used by Illinois EPA for any permitting purpose. The instructions for filling out a 220-CAAPP form (referenced by the Complainant) state, "The applicant may provide information on typical operating parameters in terms of expected ranges, rather than as single numbers." Clearly, the fact that a range is acceptable to Illinois EPA in this data field demonstrates that IEPA does not expect to rely on "typical" operating data for any regulatory purpose. Additionally, the instructions make clear the purpose of providing this data is not needed to determine or regulate emissions, or needed to determine rule applicability or compliance. The Complainant therefore has no reason to rely upon "typical" data in a permit application to determine actual emissions, or to imply that if "typical" operating data does not match actual emissions the permit application was improperly prepared. If "typical" data was meant to be used in such a manner, there would be no reason for facilities to report actual emissions in their Annual Emissions Reports.

and BEMA), he knew what those facilities had done to comply with the regulations. Thus, early on in its discussions with Illinois EPA, Mr. Trzupek inquired whether the Illinois EPA would support an adjusted standard on behalf of Packaging similar to what was requested by the above entities.[2] (6/30 Tr., 24:8-11). Illinois EPA quickly responded that it would not support an adjusted standard, and Mr. Trzupek advised Packaging of same. (6/30 Tr., 24:8-15).

At the hearing, Mr. David Bloomberg, Illinois EPA's current Air Compliance Manager who has worked at Illinois EPA for 21 years, testified that he recalled that former counsel for Packaging, Mr. Steger, made this request and Illinois EPA's response was similarly negative. (6/29 Tr., 62:8-16). Inexplicably, however, in its brief, Complainant misleadingly asserts that Packaging never petitioned for an adjusted standard. (Complainant's Brief, at 36). While it is true that Packaging did not formally file a request before the Board, the record shows that Packaging did consult with Illinois EPA on this issue, and Illinois EPA made it clear that it refused to support such a request. It would have been a waste of time and resources had Packaging gone through a formal process of applying for an adjusted standard because, as acknowledged by both Mr. Trzupek and Mr. Bloomberg, the Board rarely, if ever, grants an adjusted standard or variance when the Illinois EPA does not support the request. (6/30 Tr., 24:21- 25:5 and 62:17-63:4).

As a result of Illinois EPA's decision to not support a request for an adjusted standard, Packaging ultimately decided to shut down Press #4 in late 2002 because, by then, it knew that it would not be granted the adjusted standard and, hence, it had to consider the remaining alternatives including the evaluation of using new or used add-on control. Packaging decided to

[2] Illinois EPA misleadingly implies that the 14 month delay between Packaging's discovery that Press #4 was not in compliance and its decision to shut down the press was basically spent doing nothing in terms of working towards a compliance solution that was both technically and fiscally feasible for packaging.

shift the printing operations from Press #4 to Press #5 because the cost of add-on control was cost prohibitive.[3] (6/30 Tr., 25:18-26:5). Packaging also submitted a construction application dated March 4, 2003, for the construction of Press #6 and for the installation of the RTO which was approved by Illinois EPA on August 13, 2003. (Respondent's Exhibits 17 and 18 and Complainant's Exhibit 3). By letters dated May 2, 2003, May 8, 2003, and June 12, 2003, Packaging provided Illinois EPA with additional information including Material Data Safety Sheets ("MSDSs"), Seasonal Emission Reports ("SERs") and other requested information. (See Respondent's Exhibit 9, 18, and 24).

Later, Packaging rescinded its CAAPP request and submitted an application for a Federal Enforceable State Operating Permit ("FESOP") in a letter dated August 30, 2004. (Complainant's Exhibit 1). Subsequently, Packaging submitted a joint construction permit/FESOP modification seeking to modify the VOM usage and emissions limitations associated with Presses #5 and #6 due to expected increases in production at the facility (although by then, these sources were located in a 100% total permanent enclosure and were controlled by the RTO). (Complainant's Exhibit 11).

Complainant fails to acknowledge that Packaging made more than reasonable efforts to come into compliance (in a very reasonable time period) with all of Illinois EPA's requests, beginning with the recommended actions provided in the VN, and that it kept Illinois EPA apprised of its actions to come into compliance. However, like other facilities that failed to comply with the Flexographic regulations, it obviously would take time for Packaging to prepare and deliver the information to demonstrate full compliance with the regulations for the years in which it was noncompliant. In fact, Packaging's efforts to comply were within a very reasonable

[3] Ultimately, Press #4 was moved to a facility that Packaging later acquired in Sparta, Michigan in 2003 that had an existing control device to utilize. (Respondent's Exhibit 2).

time period that was deemed reasonable in other similar cases as discussed further below. (See *People v. Golden Bag,* PCB 06-144 (September 3, 2009)).

D. Despite Packaging's Efforts, Illinois EPA Has Treated Packaging Differently Than Its Competitors.

Packaging took affirmative steps towards compliance as even acknowledged by Complainant in its brief and set forth above. (Complainant's Brief, at 20 and 26). Yet, despite its good-faith efforts, Packaging has been treated differently by Illinois EPA than its competitors. No apparent reason exists as to why Packaging has been treated differently when its competitors were also out of compliance for very similar violations (i.e., failure to have a state operating permit, failure to obtain construction permits, failure to have CAAPP, the failure to participate in the ERMs program, failure to comply with the Flexographic regulations including emissions and recordkeeping requirements and potential New Source Review ("NSR") violations) and for a similar duration. Notably, to Packaging's knowledge, this is the only enforcement case concerning the Flexographic regulations that has actually proceeded to a formal hearing. Additionally, it appears that Packaging has been the only Flexographic facility that has yet to receive an operating permit, which would limit its VOM emissions to less than major source threshold, to satisfy any outstanding issues concerning NSR as alleged in the Illinois EPA 2002 VN.[4] As a result, Packaging has unnecessarily expended an exorbitant amount of money in legal fees and engineering expenses since it began remedying its noncompliance in 2001.

It is important that the Board understand that when Bema, Vonco, and Formel applied for the adjusted standard, it was understood that the cost of control was not feasible due to the small size of the operations. However, it was agreed and understood if the facilities grew their respective business, they would lose their adjusted standard because then they could spread the

[4] Notwithstanding this assertion, it appears that Illinois EPA has not issued Golden Bag an operating permit.

cost of fully complying with the Flexographic regulations across their expanded operations. Consequently, when these facilities did in fact expand their operations, Illinois EPA issued these facilities an operating permit that required that they comply with the Flexographic regulations, and it limited them to a less-than-major source threshold. (6/30 Tr., 90:15-91:4).

Packaging was similarly situated in that it too had small operations, and it could not afford to install the control device unless it could expand its operations, which would allow it to spread the costs across its expanded operations. However, unlike these three competitors, Packaging was unable to take advantage of an adjusted standard. Furthermore, Illinois EPA continues to refuse to issue Packaging a permit, as Illinois EPA has not acted on Packaging's initial CAAPP permit application that it submitted in 2002, or its subsequent FESOP application submitted in 2004, that would limit it to less-than-major source threshold. Likewise, even those facilities that were out of compliance and were not part of the three printers that initially worked with Illinois EPA, have since obtained operating permits even prior to settling with Complainant.

For example, in *People v. Aargus Plastics,* PCB 04-09 (Slip. Op. July 20, 2006), Argus obtained compliance simply by moving its facility. As testified by Mr. Trzupek at the hearing, a review of its permits showed that they had 17 uncontrolled presses at their facility in Des Plaines, Illinois facility (significantly more than one uncontrolled press at the Packaging facility). (6/30 Tr., 59:19-60:21). They were granted a new permit that allowed them to take advantage of the new 100 ton per year major source threshold and the new permit did not provide for any emissions control (i.e., the permit did not require the installation of an RTO). However, the State's enforcement action was settled on the basis that they had moved their facility to a new location in Wheeling, Illinois and as a result, they were now in compliance. (6/30 Tr., 59:19-60:21).

Here, it has been more than seven years since its initial CAAPP application submittal and Illinois EPA's CAAPP completeness determination, and Packaging is now in substantive compliance with all the applicable regulations in the Act and Board regulation but for its operating permit (i.e., it has submitted CAAPP, FESOP, SERs, ERMs letter requesting amount of ATUs to be purchased, provided all requested information to Illinois EPA, and completed a successful stack test for the RTO in June 2004 (see Respondent's Exhibit 28)). Even Mr. Trzupek acknowledged that not acting on a permit for a period of seven years is in his experience, is "a remarkably long time frame." (6/30 Tr., 48:22-24). It is rather perplexing as to why Illinois EPA has not acted on Packaging's permit for an extended period of time which has caused Packaging undue burdens that have not been placed on its competitors and other regulated entities subject to the Flexographic regulations.

In failing to issue Packaging an operating permit, Illinois EPA has frustrated Packaging's ability to fully comply with the regulations and, in fact, the very same allegations made by Complainant could have been remedied at a much earlier point in time, or would have been rendered non-existent. For example, Complainant's allegations regarding Packaging's failure to participate in the ERMs program could have been remedied much sooner. However, Illinois EPA never notified Packaging or followed up on an internal email dated June 16, 2003, in which Ms. Yasmine Keppner requested confirmation as to whether someone from Illinois EPA had followed up with Packaging concerning the details for setting up an account to settle the outstanding ATUs. (Respondent's Exhibit 25).

In fact, it was Packaging's Environmental Manager, Timothy Piper, who brought up this issue up in 2005 because, in reviewing the records of this matter, it was unclear whether this had been addressed prior to his employment with Packaging. (6/30 Tr., 62:14-64). The reason why Packaging had not purchased the required ATUs is because it was waiting to hear from Illinois

EPA since it is rather unusual to participate in the ERMs program without a CAAPP permit. (6/30 Tr., 64:5-7). Packaging has sent Illinois EPA a letter indicating that it would purchase the ATUs requesting confirmation as to exact number of ATUs that it believes it is required to purchase, so that it could satisfy this requirement. However, it has not heard back from Illinois EPA. (See Respondent's Exhibit 50). Consequently, but for Illinois EPA's lack of diligence, Packaging would have complied with this requirement much sooner. Again, as previously discussed, this was not a requirement imposed on other sources. (See *People v. Aargus Plastics,* PCB 04-09 (July 17, 2006)(approved by the Board Slip. Op. July 20, 2006); *People v. Bag Makers,* PCB 05-192 (April 29, 2006)(approved by the Board Slip. Op. January 5, 2006); and *People v. Golden Bag,* PCB 06-144 (March 10, 2006)(approved by the Board Slip. Op. September 3, 2009).

In addition to the above, Illinois EPA's refusal to issue Packaging's operating permit has caused Packaging to continue with the burden of maintaining daily records, which is a requirement of its Construction Permit 03030016, but would not be a requirement once its FESOP is issued by the Illinois EPA. (Respondent's Exhibit 34). In fact, Packaging requested that this requirement be removed because it was not an underlying rule in the Illinois Administrative Code. *Id.*

Recently, Illinois EPA finally took some action with respect to Packaging's FESOP application by requesting additional information (a majority of which it already had based on Packaging's previous CAAPP and FESOP submittals) just prior to the hearing in this matter. (Respondent's Exhibit 48 and 6/30 Tr., 48:24-49:6). Packaging promptly replied with the requested information and still awaits further action or response by Illinois EPA. (Respondent's Exhibit 49 and 50).

Based on the above, Packaging has unquestionably been treated differently than its counterparts and Illinois EPA's actions have been unnecessarily detrimental to Packaging.

E. Packaging Always Maintained Records For Its Operations, but Just Not in The Form Illinois EPA Would Have Preferred.

Packaging has always maintained records of its ink usage and the VOM and HAP content associated with its operations vis-a-vis MSDS sheets and its daily production records (i.e., job tickets) that track the output of sold products to customers in terms of production runs for each of its presses (i.e., either in the form of pounds or footage or bags on the production equipment). (6/29 Tr., 195:21-196:11 and 197:10-198:2). Moreover, the information obtained would be transferred from a small paper form that is filled out on the floor (i.e., area near the actual printing operations), and then would be inputted into an Access database. (6/29 Tr., 166:9-11). Most recently, Packaging provided Complainant with a CD-ROM with some of this information that it had viewed during one of its inspections. (Respondent's Exhibit 50 and 51).

Packaging admits that the form in which it has maintained its records was not in the manner that Illinois EPA would have preferred, but with the assistance of Mr. Trzupek, Packaging was able to modify its past recordkeeping system to produce results to Illinois EPA's satisfaction. (6/29 Tr., 242:6-244:3). Certainly, the complete absence of any records is distinguishable from this case, where ample records were kept which contained the necessary data. Hence, the information was available. Consequently, for the Complainant to state that Packaging has not maintained records is an inaccurate statement. Mr. Trzupek testified at the hearing that Packaging had records of the inks utilized on each of its presses in the form of MSDS sheets and the amount of ink used on each press which was available through Packaging's "job tickets." (6/30 Tr., 27:2-18).

While Complainant argues that Packaging was unable to produce records at the Illinois EPA inspection in 2001, Mr. Joseph Imburgia clarified at the hearing that neither Dominic or he

were there at the time. (6/29 Tr., 195:5-13). Even Illinois EPA's inspection report indicated that Mr. Dan Imburgia was present at that time. (Respondent's Exhibit 9). Unfortunately, Mr. Dan Imburgia, who was responsible for sales, administration and front office, and who was present at the time of the Illinois EPA inspection, couldn't provide the information because he had no involvement with those aspects of the business. (6/29 Tr., 195:5-13). Consequently, it is logical that the person in charge of sales would have difficulty in producing records on the sport for which he had no involvement. When Illinois EPA inspected the facility in 2004, Mr. Trzupek had already begun (but was still in the process of) converting Packaging's recordkeeping to a system that would be more acceptable to Illinois EPA. (6/30 Tr., 26:23-27:1). Clearly, it would take time to convert years of records and hundreds of job tickets into a new recordkeeping system and, thus, Complainant's aspersions that Packaging maintained no records is disingenuous at best.

F. Complainant Misstates the Facts Concerning Packaging's Alleged Violations of its Construction Permit Terms.

The Complainant's arguments concerning Packaging's alleged violations of its Construction Permit conveniently leave out some of the most important facts. First, Packaging's alleged exceedances of its VOM emission limitations provided in its construction Permit is an erroneous statement because Packaging never exceeded its annual or monthly emission limits. Second, as previously discussed, Packaging used compliant inks on Presses #1 and #2, and it had records to substantiate such. Third, as stated above, Packaging did maintain records of the ink usage, and the VOM and HAP content of same. However, the burden of having to daily records was a result of Illinois EPA's failure to issue Packaging an operating permit.

Based on the above, Complainant's contention that the duration and gravity of Packaging's noncompliance, and its assertion that Packaging obtained a significant economic benefit that warrants a substantial civil penalty, is completely erroneous, as discussed further

below, and demonstrates that Packaging is being treated differently than other regulated entities cited for the very same allegations alleged in this case.

III. THE PENALTY SOUGHT BY THE COMPLAINANT IS DRASTICALLY EXCESSIVE COMPARED TO OTHER SIMILAR CASES AND, THEREFORE, COMPLAINANT'S PROPOSED PENALTY IS UNSUPPORTED IN THE LAW

There were many other Flexographic facilities that were in non-compliance with the Act and Board regulations with comparable allegations (i.e., construction of sources without a permit, failure to have CAAPP permit, failure to obtain operating permit for new air emission sources, failure to comply with NSR, failure to timely submit annual emission reports, failure to comply with flexographic regulations including recordkeeping etc.,) and, yet, in no other case has there been as assessment of a penalty as large as that proposed by Complainant here. Further, as previously discussed, all of those enforcement cases have settled. (See *People v. Aargus Plastics,* PCB 04-09 (July 17, 2006)(approved by the Board Slip. Op. July 20, 2006); *People v. Bag Makers,* PCB 05-192 (April 29, 2006)(approved by the Board Slip. Op. January 5, 2006); and *People v. Golden Bag,* PCB 06-144 (March 10, 2006)(approved by the Board Slip. Op. September 3, 2009).

In fact, the $861,274 penalty proposed by Complainant is four times greater than the highest penalty (see *Fellowes,* PCB 04-193)[5], and 43 times greater than the lowest penalty ($20,000) that is most comparable to this case (*Golden Bag,* PCB 06-144). Of the cases referenced, the two most comparable cases are *Bag Makers* (PCB 05-192) and *Golden Bag* (PCB 06-144).

[5] While Fellowes Manufacturing may be a family-owned business, it is a large conglomerate with over 1,200 employees throughout the United States and its subsidiaries worldwide. Clearly, Packaging's facility is distinguishable since it has only 100 employees and only two facilities in Chicago, Illinois and Sparta, Michigan. Information concerning Fellowes Manufacturing was obtained on its website. Available at: http://www.fellowes.com/Global/ (last accessed on November 4, 2009).

In *Bag Makers,* the Complainant filed an enforcement action on April 29, 2005 alleging the following: (1) constructing air emission sources without a permit; (2) failure to obtain operating permits for new air emission sources; (3) failure to obtain a CAAPP permit; (4) failure to comply with NSR; (5) failure to timely submit annual emission reports (for calendar years 1996 through 2003); and (6) violating flexographic printing rules and failing to maintain records. The facility was located in Union (McHenry County), Illinois. Bag Makers designs and produces paper and plastic bags. Emission sources at the facility included 15 flexographic printing presses and five silk screen presses. On July 1, 2003, it filed a FESOP for its 15 presses and, later, it obtained a construction permit for its silk screen presses which was to be included in its FESOP. The allegations of non-compliance begin in 1996 and continue until about 2001. However, in 2003, it began construction of its silk screeners without a permit and, thus, began incurring additional violations. It submitted its FESOP application at least six years after it became a major source. The FESOP was issued on May 10, 2005. The parties agreed to a stipulation and the penalty amount was $62,700. The settlement specifically provided that the economic benefit was $700 of avoided air pollution site fees.

The allegations in the Bag Maker's complaint are comparable to those in this matter and occurred for a similar time period. However, unlike the Bag Maker's facility, Packaging has only four presses (two of which utilize water-based inks), and not 15. Unlike Bag Makers, Packaging has yet to receive its operating permit despite submitting its application over seven years ago. Unlike Bag Makers which proceeded to construct five silk screening presses without a permit after receiving the earlier VN, Packaging did request and obtain a construction permit to construct a new Press #6 and the control device that would be utilized for Presses #6 and #5. Unlike Bag Makers, where the economic benefit was only $700, here, the Complainant calculated and determined an economic benefit of $711,274.

More recently, Complainant settled a matter for $20,000 where the allegations again were very similar to this case. *People v. Golden Bag,* PCB 06-144 (September 3, 2009). The State brought an enforcement action on March 10, 2006 which included the following: (1) failure to obtain a construction permit; (2) operating a major source without Clean Air Act Permit Program ("CAAPP") permit; (3) failure to comply with New Source Review ("NSR"); (4) failure to submit annual emissions reports; (5) failure to demonstrate compliance with flexographic printing operations standards; and (6) failure to certify compliance. Golden Bag commenced operations beginning in 1999 and did not submit its request for an operating permit until January 2004 (5 years later). Additionally, Respondent was unable to produce any emission records for the 1999 calendar year (it produced the emission reports for the other years was missing) and failed to comply with the annual emissions reporting requirements until June 2006. Here, the Complainant indicated that it was reasonably diligent to come back into compliance with the Act and Board regulations. *Id.* at 7. The Golden Bag facility includes 10 plastic extruders and five flexographic printing presses. (See Complaint *People v. Golden Bag* PCB 06-144 at 2 (March 10, 2006). The economic benefit assessed in this case was $3,200 (which was included in the $20,000 penalty) in avoided operating permit fees from 1999 through 2009. *Id.*

Interestingly, Complainant does not cite to any of these Board-approved settlements in support of its proposed penalty. The record is devoid of any factor including bad-faith that could potentially distinguish this case from the others and, evidently based on the number of facilities that were out of compliance, it is apparent that Packaging's noncompliance was not unique. Packaging has taken compliance very seriously from the time it first learned of its non-compliance. Based on the above, Packaging strongly disagrees with the penalty and, specifically, the $711,274 economic benefit that Complainant seeks to impose in this case, which is 1,000 times greater than that assessed in *Bag Makers* and 222 times greater than the economic

benefit assessed in the most recent settlement, *Golden Bag.* Consequently, it is up to the Board to ensure that the law is applied consistently amongst the regulated entities.

IV. ANALYSIS OF THE 33(C) FACTORS DEMONSTRATES THAT THE BOARD SHOULD NOT ASSESS A SIGNIFICANT CIVIL PENALTY AGAINST RESPONDENT

The Complainant correctly states that Section 33(c) of the Illinois Environmental Protection Act (the "Act") requires that the Board conduct an analysis in making its orders and determinations concerning the reasonableness of the alleged pollution. 415 ILCS 5/33(c)(2007). However, Packaging disagrees with the Complainant's analysis and, thus, respectfully requests that the Board adopt Packaging's analysis as provided below.

A. Packaging's Operations Did Not Constitute An Interference with the Protection of Health, General Welfare and Physical Property

Packaging disagrees with the Complainant's assertion that "its excess VOM emissions interfered with the protection of the health and general welfare" of the Complainant for several reasons. First, the Complainant has failed to present adequate evidence that Packaging's VOM emissions interfered with protection of the health and general welfare of the Complainant especially in light of the fact that the Chicago Nonattainment area came into compliance with the 1-hour ozone standard during Packaging's noncompliance period. Second, once Packaging shut down Press #4, it was in substantive compliance with all emissions limitations that would apply to its facility based on the fact that Press #1 and Press #2 were compliant with the VOM limitations because only water-based inks were used on those presses; and, Press #5 was not emitting VOM emissions in quantities in excess of the applicable regulations based on Mr. Trzupek's investigations of the destruction and capture efficiency of the recirculating oven/dryer.

Even if the Complainant disagrees that the recirculating oven constitutes a "control device," this argument still stands because the Complainant has not presented any evidence to counter that the recirculating oven does in fact limit the amount of VOM emissions emitted from

Press #5. Furthermore, once Packaging installed the RTO on Press #5, it lowered emissions more than what was required by law. Additionally, the Complainant's allegations that DuPage County was designated as severe non-attainment for ozone during the entire time period is not true. In fact, DuPage County was designated as severe non-attainment for only a portion of the time when the violations occurred. Consequently, Packaging's facility was not a threat to the National Ambient Air Quality Standards ("NAAQS") as presented by Complainant.

B. Packaging's Business Has a Positive Social and Economic Value

Packaging is a small-family owned business that was started by Mr. Dominic Imburgia and his current partner about 34 years ago. (6/29 Tr., 182:21-183:5 and 186:17-22). Packaging now has two facilities, one in Sparta, Michigan and the other in Carol Stream, Illinois. Packaging's facility in Carol Stream had 100 employees as of the time of the hearing (Tr., 6/29 Tr., 188:12-15). Therefore, Packaging has a positive social and/or economic value. Further, while it is true that the Board has found that a pollution source typically possesses a "social and economic value" that is to be weighed against its actual or potential environmental impact, in this case, Packaging's operations would still be considered a positive social and economic value. *Complainant v. Waste Hauling Landfill,* PCB 95-91 Slip. Op. at *21 (May 21, 1998). Moreover, in these trying economic times, it is important that companies, especially family-owned businesses, remain viable, and penalties such as requested by the Complainant in this case should not jeopardize a company's continuing viability.

The Complainant cites to *Waste Hauling Landfill* in support of its assertions; however, this case clearly is distinguishable on several grounds. First, unlike the respondent in *Waste Hauling Landfill,* which consistently failed to make the technical improvements necessary to control the overheight, overfill, and hazardous waste disposal issues it confronted and, further, did not submit proper closure, post-closure plans, or meet financial assurance obligations,

Packaging immediately worked towards remediating its noncompliance once discovered. Even the Complainant acknowledges in its Post-Hearing brief that Packaging began to take concrete steps towards achieving compliance with the Act and Board regulations. (Complainant's Brief, at 26). Second, the Board stated in *Waste Hauling Landfill* that "the overheight and overfill continue to be problems today and this diminishes the social and economic value of the landfill." *Id.* at *21. Here, neither the Complainant nor the record before the Board show that Packaging's noncompliance continues to be a problem. Notwithstanding, the above Packaging continues to operate without its permit because of Illinois EPA's refusal to issue the requisite permit and not because of inaction on Packaging's part.

Additionally, Complainant has previously stipulated that there is a social and economic benefit to the facility as was provided in the *Golden Bag*, *Bag Makers,* and *Aargus* settlement agreements. (See *Golden Bag,* *5 (August 21, 2009), *Bag Makers,* *6 (November 16, 2005), *Aargus* *7 (May 31, 2005). Consequently, the Board should weigh this factor in favor of Packaging.

C. Packaging's Facility Is Suitable To the Area in Which it is Located

Packaging's facility is suitable for the area where it is located and Complainant has not substantiated its claim otherwise. This factor requires that the Board look at the location of the source and determine its suitability to the area, including the question of priority of location. *Waste Hauling Landfill,* at * 21. The Packaging facility is located at 246 Kehoe Boulevard in Carol Stream, DuPage County, Illinois in an industrial/commercial area. A simple Google satellite image of the facility and surrounding area confirms same.

In an exceptionally strained argument, the Complainant contends that Packaging's facility is not suitable for the area because it was not in compliance with the applicable air regulations for a period of time. (Complainant's Brief, at 19). Simply being out of compliance,

however, does not somehow render a facility "unsuitable" for its location as contemplated by the Section 33(c) factors. The Complainant either misunderstands, or deliberately misapplies, the point of this test, considering that in practically any enforcement action, a facility likely is (or has been) out of compliance. Complaint's novel interpretation of this factor would essentially render it a nullity, as a facility would always be unsuitable for its location when noncompliant, under Complainant's argument. The Complainant's position, therefore, is illogical and simply invalid. Furthermore, in *Golden Bag, Bag Makers, and Aargus* Complainant agreed that the facilities were suitable for the area in which it occurred so; consequently, there is no reason why the same conclusion should not apply to the Packaging facility which is also located in the general Chicagoland area. Based on the above, the Packaging facility is suitable to its location. Therefore, the Board should weigh this factor in favor of Packaging.

D. Complainant's Argument That Compliance Was Technically Practicable and Economically Reasonable is Flawed

Packaging disagrees with the Complainant's assertions that its actions taken after Illinois EPA's October 2001 inspection demonstrate that it was technically practicable and economically reasonable for it to comply with the Flexographic regulations. Specifically, the evidence cited by the Complainant in support of this assertion is flawed for several reasons. First, applying for and obtaining construction and operating permits from the Illinois EPA is not a simple, low-cost measure that is not burdensome for many subject sources. Most telling is the fact that Packaging has been involved in this matter since 2001 (almost eight years) and, yet, even after submitting a CAAPP application in 2002, decommissioning Press #4 in December of 2002, installing an RTO in 2003, receiving an Illinois EPA CAAPP completeness determination dated July 2002 (See Respondent's Exhibit 14), and submitting a FESOP in 2004 and then a revised FESOP application in 2006, submitting its SERs, and submitting various other information, it has yet to

receive its operating permit, despite the fact that it is now in substantive compliance with the regulations, and has been for some time.

Even Mr. Trzupek, an expert with over 25 years of experience, stated at the hearing that the permitting process is complex: "But the rules are very complicated, the permit forms are very complicated, that's why consultants like me exist. And they [Packaging] were, like a lot of people, frustrated and not understanding and they wanted to turn it over to an expert..." (6/30 Tr., 7:24-8:5). Additionally, Mr. Trzupek stated in his testimony that the level of effort and costs associated with obtaining a CAAPP application requires a great amount of time and financial resources because "There's a great deal of information that needs to be gathered, detailed information about the facility and the way it operates and details of equipment and costs. Depending on the facility, several thousands to several tens of thousands of dollars to prepare it." (6/30 Tr., 10:13-23). Further, even the Board acknowledged in the adjusted standard proceedings for Vonco, Bema, and Formel that when the Flexographic regulations were adopted, it was primarily presented with evidence concerning the methods that larger printing operations could use to achieve compliance with the rules, specifically since the emissions from large flexographic printing operations would have a greater impact on air quality than the smaller job-shop printers like Formel, Vonco, and Bema. The Board concluded that it was not technically or economically feasible for these smaller facilities to install the necessary add-on control technology unless, as previously discussed, the facilities expanded their businesses and, thus, could spread the cost of the add-on control technology across its operations. (See Respondent's Exhibit 5, 6, and 7). This was exactly the case with Packaging, as it was one of these smaller facilities and, without the expansion of its business, compliance would have been technically and economically infeasible.

Additionally, the Illinois EPA's attempts to conduct "outreach to the entire regulated community" (emphasis added) were unsuccessful numerous instances other than Packaging. In fact, other flexographic printers were also cited for not having permits and/or not complying with the rule subsequent to its promulgation. Thus, the process of becoming aware of the new regulations and then achieving compliance was not as simple as the Complainant would like the Board to believe.[6] Based on the above, the Board should weigh this factor in favor of Packaging.

E. Any Subsequent Compliance

Upon learning of its non-compliance, Packaging immediately took steps towards compliance even before receiving any VN, (6/29 Tr., 185:14-23), even Complainant is compelled to acknowledge to some degree. (Complainant's Brief, at 24 and 26). Packaging has been in substantive compliance with the Flexographic rules since it decommissioned Press #4 in December of 2002 and submitted the required documentation, including a CAAPP permit, ERMS, and SERs. Furthermore, Packaging has connected Press #5 to the RTO which is also used to control emissions from Press #6. Consequently, any differences in opinion regarding whether Press #5 was compliant with the Flexographic VOM emission rules has also been addressed. The record is replete with examples of all the actions it took as outlined in the proceeding sections above. The only outstanding issue is that Packaging has not received its operating permit because Illinois EPA refuses to issue its permit. However, Packaging has complied with all of Illinois EPA's demands and request for information.

[6] It is important to note that the original three entities that requested an adjusted standard represented a limited subset of the flexographic printing universe: smaller converters that print on high-slip plastic films. This subset could not comply through the use of compliant inks (they don't work on this type of substrate), nor were they large enough to be able to afford control devices. Printers who printed on other substrates, such as cardboard, could use compliant inks. Larger converters could afford control devices, due to the economy of scale. Packaging met exactly the profile of the subset of flexographic printers who needed relief from the flexographic printing rules, because the rule did not consider their position in the larger flexographic printing universe. (See Respondent's Exhibits 5, 6, and 7).

In *Blue Ridge*, the Board noted that the Respondent had "implemented measures to properly contain, remove, and dispose of all regulated asbestos-containing waste and refuse." *Complainant v. Blue Ridge,* PCB 02-115, Slip. Op. *13 (October 7, 2004). Thus, the Board weighed this factor against assessing a civil penalty. *Id.* Similarly, Packaging has taken affirmative steps towards remediating the allegations in the complaint. Based on the above, the Board should weigh this factor in favor of Packaging.

V. APPLYING THE 42(H) FACTORS TO THE FACTS IN THIS MATTER DEMONSTRATES THAT THE COMPLAINANT'S PROPOSED ANALYSIS IS INAPPROPRIATE AND GROSSLY OVERSTATED

In addition to the factors addressed above, the Board must consider the factors listed in 42(h) of the Act. 415 ILCS 5/42(h)(2007). The Board has wide discretion under 42(h) of the Act to consider any factor in aggravation or mitigation of the penalty. *ESG Watts, Inc. v. Illinois Pollution Control Board,* 282 Ill. App.3d 43, 51, 668 N.E.2d 1015, 1020 (4th Dist. 1996). In determining the amount of a civil penalty, the Board is authorized under the Act to consider a number of matters in either mitigation or aggravation of penalty, including those specified in Section 42(h) of the Act, 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 because of delay in compliance with requirements;

(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.

415 ILCS 5/42(h)(2007).

A. Duration and Gravity

The Complainant's statements concerning this factor are misplaced. Packaging acknowledged that Press #4 was non-compliant with the Flexographic regulations from the time the regulations became effective to when it decommissioned Press #4 in December of 2002. However, the remaining three presses were all in substantive compliance with the regulations. Further, it is self-apparent that PPI did not adversely impact ambient air quality in the time frame referenced since the Chicago Nonattainment Area came into compliance with the 1 hour ozone standard. Moreover, in reviewing the cases concerning the other enforcement actions that were in violation of the Flexographic regulations, Packaging's violations were similar but yet were rather minimal based on the fact that all but one of its four presses were in substantive compliance with the regulations. (See *Aargus,* (facility had 18 flexographic presses); *Bag Makers,* (facility had 15 flexographic presses), and *Golden Bag,* (facility had 10 plastic extruders and five flexographic presses)).

The Complainant's assertions that Mr. Dominic Imburgia's sworn testimony is somehow not credible finds no support in the record. (Complainant's Brief, at 24). In fact, the hearing officer's report dated July 15, 2009 indicated that the credibility of the witnesses who testified at the hearing was not an issue based on his legal judgment, experience, and observations at the hearing. While Complainant attempts to support its assertion that Packaging had to have known of the regulations because it was complying with the hazardous material regulations during the 1990s, this argument lacks logic. If Packaging was complying with the hazardous materials

regulations, it would likely have also complied with any other applicable regulations of which it was aware.

In addition, Complainant's statements regarding the competitive nature of the flexographic industry are unsubstantiated and have no bearing on the duration or gravity components of the penalty calculation. Even if it did, the fact that so many other facilities were out of compliance (most of which were located in the Chicagoland area) and, yet, the Chicago Nonattainment Area came into compliance with the 1-hour ozone standard, belies Complainant's arguments concerning the duration and gravity as applied here.

To the extent the Board decides to weigh the duration of Packaging's non-compliance as a factor against Packaging, it should also consider that it was only one of Packaging's presses that was not controlled per the Flexographic regulations.

B. Lack of Due Diligence

Packaging has expended a considerable amount of resources and time (i.e., the VN was issued over approximately 8 years ago) (see Respondent's Exhibit 9) to understand what it needed to do to come into compliance, and it has taken all the necessary actions towards full compliance. In fact, during Mr. Trzupek's testimony at the hearing, he spoke about his recollection of Packaging's attitude during their initial meeting shortly after the Illinois EPA's inspection. "...Dominic's first statement to me was what do I need to do, we're going to do whatever we need to do, tell me what I need to do. And that was the attitude I found when I initially came in." (6/30 Tr., 8:6-10). As discussed fully herein, Packaging has done all it needed to do to remedy its past noncompliance and to conform to its current obligations under the Flexographic regulations. Even Complainant acknowledges that Packaging took concrete steps to achieve compliance with the Act and Board regulations. (Complainant's Brief, at 26).

Complainant's statements that Packaging did not expend the time and cost to demonstrate compliance for Press #5, and that Packaging knew that a formal test would be required, misconstrues the evidence and the facts presented at the hearing because Mr. Trzeupek's statements were qualified (i.e., formal stack test only made sense if Packaging was going to continue to use the recirculating oven as its control device for Press #5 and comply with the requirement to conduct a formal stack test). (Complainant's Brief, at 26). Mr. Trzupek conducted a very thorough engineering analysis using approved U.S. EPA methods as previously discussed.

From the time that Press #4 was shut down to the time when Packaging made the decision that it would connect Press #5 to the RTO was less than 12 months. (6/30 Tr., 11:2-9). Packaging also went above and beyond its duties in installing an RTO with a larger capacity, which it was done in hope of reaching resolving their compliance issues with Complainant, despite the fact that Press #5 could have demonstrated formal compliance with the Flexographic regulations even without the RTO. (6/30 Tr., 21:6-15).

Additionally, Complainant's attempt to allege that Packaging was unable to produce records at the time of the Illinois EPA 2004 inspection is an overly broad statement of the facts and, once again, mischaracterizes the actual circumstances. As explained above, Packaging has always had records of its ink use, and VOM and HAP content; these records simply were not organized in the manner in which Illinois EPA would have preferred. However, Mr. Trzupek has assisted Packaging in converting its records to a form which is acceptable to Illinois EPA. Unsurprisingly, converting years of records into a different format takes time but most importantly, the information was available and is not the case that Packaging failed to maintain any records at all, as Complainant's brief implies.

With respect to the Complainant's allegations regarding VOM exceedances, it was previously explained that this burden is a condition in Packaging's construction permit and would not be a requirement of any operating permit. Most importantly, Complainant fails to state the although the VOM usage at the facility was above the permit limit on a few occasions, Packaging never exceeded its annual or monthly emission limits. Moreover, as is common in the industry, Packaging subsequently requested a modification to change the solvent ink use limits at its facility. (Respondent's Exhibit 42 and 6/30 Tr., 44:14-23). Based on the above, there is ample support that Packaging was quite diligent in remedying any noncompliance and, consequently, the Board should weigh this factor in favor of Packaging.

C. Economic Benefit

Because economic benefit is at the center of this litigation, it is discussed further below in its own section.

D. Deterrence of Future Violations and Aid in Enhancing Compliance with the Act

Packaging agrees that deterrence of further violations is an important objective for the Board in establishing an appropriate civil penalty. However, based on the actions taken by Packaging and the significant amounts it has expended thus far, a significant penalty would not serve the purpose of deterring future violations or aid in enhancing compliance with the Act. Interestingly, numerous cases have already been before the Board concerning the very same allegations in this matter involving other flexographic entities. The penalty proposed by the Complainant here does not coincide with those cases and the facts presented at the hearing. (See *People v. Aargus Plastics,* PCB 04-09 (July 17, 2006)(settlement of $125,000 approved by the Board Slip. Op. July 20, 2006); *People v. Bag Makers,* PCB 05-192 (April 29, 2006)(settlement of $62,700 approved by the Board Slip. Op. January 5, 2006); and *People v. Golden Bag,* PCB

06-144 (March 10, 2006)(settlement of $20,000 approved by the Board Slip. Op. September 3, 2009)).

Based on the caselaw and the adjusted standards that were granted to Formal, Bema, and Vonco cited herein, a significant penalty is not warranted in this case. Here, Packaging, like most of the other sources subject to the rules was noncompliant with the new rules at the time of promulgation. However, as soon as it learned of its non-compliance it took affirmative steps to come into compliance, and it kept Illinois EPA apprised of its actions and even had meetings and subsequent conversations as was discussed during Mr. Trzupek's testimony. (See Generally Mr. Trzupek's testimony at 6/30 Tr., 4:9-113:14). Clearly, the record shows that Packaging attempted to work with the Illinois EPA in remedying its noncompliance. However, in comparing the results of the last eight years that Packaging has been dealing with Illinois EPA and its attempts to settle this matter, there is nothing else that Packaging could have done differently than what its counterparts did; yet, it appears that most of the other Flexographic facilities were able to settle and remedy their noncompliance. Here, it appears that Complainant has become so wedded to the economic benefit analysis prepared by Mr. Styzen that it has refused to settle the case, or even modify its penalty demand based on the information presented at the hearing, which shows that Complainant's experts mistakenly relied on information that was not specific to Packaging. As discussed further below, Mr. Styzen's analysis is incorrect and, as a result, Packaging would not submit to a penalty that was based on inaccurate information and inconsistent with other Flexographic cases.

For example, in *Golden Bag*, it operated its flexographic printing operations from 1999 until the present (settlement agreement is dated August 21, 2009) without its operating permit – essentially for 10 years – and it failed to comply with the emission and record keeping requirements from 1999 until June 2006 (over the course of seven years). Complainant

stipulated that Golden Bag demonstrated reasonable efforts to comply. Despite the above allegations, the Complainant concluded that a $20,000 penalty would serve to deter future violations and aid in future voluntary compliance with the Act. See *Golden Bag,* (Slip. Op. September 3, 2009).

Additionally, in *Bag Makers,* the source operated fifteen flexographic printing presses without the required construction permits, it operated emission sources without the required permits for a period of at least eight years, and it failed to adhere to the reporting and recordkeeping requirements, and it constructed sources without demonstrating compliance with the NSR regulations. Here Complainant stipulated that Bag Makers was diligent in responding to Section 31 of the Act. Thus, Complainant concluded that a penalty in the amount of $62,700 would serve to deter further violations and aid in voluntary compliance with the Act. *Bag Makers,* PCB 05-192 (Slip. Op. January 5, 2006).

Based on prior settlements and the exorbitant amount of money that Packaging has already expended to date, and all of the aforementioned actions taken by Packaging to comply with the regulations for which it was cited, there appears to be no rational justification or precedent for imposing a significant penalty upon Packaging for purposes of deterring future violations or voluntary compliance with the Act.

E. Previously Adjudicated Violations of the Act

Here, Complainant has not presented any evidence of previously adjudicated violations. Consequently, this factor could only serve to mitigate any penalty imposed on Packaging. See *People v. State Oil,* PCB 97-103 at *14 (Slip. Op. March 20, 2003).

F. Voluntary Self-Disclosure

Packaging did not self-disclose its non-compliance. However, it did take steps to affirmatively comply with the applicable regulations and kept Illinois EPA apprised of its

actions. Thus, Packaging requests that this factor neither weigh in mitigation or aggravation of a penalty.

G. Supplemental Environmental Project

This factor is not applicable to the present case.

VI. COMPLAINANT'S ECONOMIC BENEFIT ANALYSIS IS SEVERELY FLAWED AND INCONSISTENT WITH THE FACTS OF THIS CASE.

Packaging strenuously disagrees with the economic benefit analysis presented by the Complainant, which it proved at the hearing was based on inaccurate assumptions and information. Section 42(h) of the Act was substantially amended by P.A. 93-575, effective January 1, 2004. The amendments established that a violator's economic benefit from delayed compliance is to be the minimum penalty amount. See *People v. Blue Ridge Construction Group,* fn. 1. Section 42(h)(3) now reads, "any economic benefits accrued by the respondent because of delay in compliance with requirements, in which case the economic benefits shall be determined by the lowest cost alternative for achieving compliance." 415 ILCS 5/42(h)(3)(2007). If the plain language of 42(h) of the Act were to be applied, then the lowest cost alternative for compliance would be $0 as Packaging did not incur any expenses in shutting down its Press #4 and shifting production to Press #5.

Neither the Act nor any official Illinois EPA guidance provides any instruction on determining how to calculate economic benefit. However, U.S. EPA does provide guidance in determining how to calculate economic benefit. One of the most important considerations in determining an appropriate economic benefit is the concept discussed by both respective experts at the hearing known as "leveling the playing field," which is further discussed below. Applying the previously-cited cases to the concept of "leveling the playing field," indicates that a significant penalty is inappropriate, especially in light of the cases concerning similar allegations that have settled before the Board, as noted in *Golden Bag* and in *Bag Makers*.

At the hearing, Packaging presented its expert witness, Mr. Christopher McClure of Navigant Consulting, who conducted an independent economic benefit analysis, and Illinois EPA presented Mr. Gary Styzens of Illinois EPA. Mr. McClure is a Certified Public Accountant, Certified Fraud Examiner, and is Certified in Financial Forensics. (Respondent's Exhibit 4 and 4(a)). Based on the testimony at the hearing and the evidence in the record, Packaging disagrees with Mr. Styzen's economic benefit calculation because it fails to capture Packaging's true cost of non-compliance, given that it is based on flawed information. As explained below, only Mr. McClure's analysis is consistent with the facts in this case and, therefore, the Board should defer to Mr. McClure's analysis and disregard Complainant's expert testimonies of Mr. Styzen and Mr. Bloomberg.

A. Mr. Styzen's Analysis Does Not Reflect Packaging's True Cost of Noncompliance

Mr. Styzen's economic benefit analysis does not reflect the true cost of Packaging's noncompliance. Specifically, Packaging objects to the cost inputs, the capital expenditures, and the annual operating costs utilized in Mr. Styzen's analysis. (6/30 Tr., 143:5-9). The evidence in the record shows that: 1) the inputs that were utilized were not reflective of the actual costs that Packaging may have enjoyed as a result of its noncompliance and Mr. Styzen mistakenly believed that these amounts were actual and appropriate inputs for his calculation; 2) despite being an internal auditor, Mr. Styzen did not conduct any independent audit to confirm that the data provided to him by Mr. Bloomberg was in fact accurate nor did Mr. Bloomberg conduct any follow up to determine if it was appropriate to use the costs that he had provided to Mr. Styzen and; 3) at the hearing it became apparent that Respondent's experts had not confirmed the accuracy of the costs inputs in determining the economic benefit penalty to be imposed upon Packaging and, yet, Complainant did not produce any evidence at the hearing or in its brief to remedy the discrepancies brought to light at the hearing. Additionally, Packaging disagrees with

the respective compliance period as discussed further below.[7] As a result of the above, Mr. Styzen's faulty analysis appears to be a substantially inflated penalty that inaccurately portrays what, if any, economic benefit Packaging may have enjoyed. Consequently, his analysis should be disregarded because it is based on inaccurate and unverified information.

1. Mr. Styzen's Analysis Mistakenly Relies on the $250,000 Cost of the RTO, Which is Irrelevant to the Compliance Cost of Press #4

Mr. Styzen's calculation of delayed costs is fatally flawed because it relies on a $250,000 cost for the RTO that was connected to Press #6 and Press #5, and not associated with the noncompliant press (Press #4). As previously stated, Press #5 was in substantive compliance with the emission control requirements provided in the Flexographic regulations and it could have demonstrated compliance by undergoing the formal stack test. (6/30 Tr., 102:2-9). However, in anticipation of future business growth, and to appease Illinois EPA in order to conclude the ongoing settlement negotiations, Packaging opted for installing an RTO control device that was sized large enough to handle the emissions of the new Press #6, Press #5 (without the recirculating oven), and a potential third press in the future. (6/29 Tr., 208:13-20 and 236:22-237:20).

Applying U.S. EPA guidance would require utilizing the lowest cost approach. Thus, when a company has built a control device allowing for potential future growth, the BEN manual specifically states that one should take steps to allocate those costs to distinguish what is required for compliance, versus a pro-rata accommodation for future growth. (6/30 Tr., 136:6-23 and BEN Manual Page 3-9 in Respondent's Exhibit 4a). (6/30 Tr., 135:23-136:8). However, Mr. Styzen's analysis did not take into consideration the incremental costs associated with

[7] Although Packaging also objects to Mr. Styzen's use of the prime rate because the past cash flows are known, in actuality this does not result in a significant difference. (6/30 Tr., 132:22-134:4). Furthermore, both approaches are supported in the current law. (6/30 Tr., 134:5-13).

Packaging's decision to purchase an RTO that would accommodate for additional capacity. (6/29 Tr., 171:10-19).

In contrast, Mr. McClure's economic benefit analysis, as discussed below, does contemplate the purchase of a used RTO as a way to allocate those costs for Press #4 (this assumes of course that some portions of the RTO capital cost should somehow be attributed to Press #4 compliance costs although Packaging contends this is inappropriate since it was not the method by which Press #4 came into compliance). Consequently, Mr. Styzen should not have relied on the $250,000 that Packaging spent in purchasing the RTO for Presses #5 and #6, which cost is irrelevant to the economic benefit attributable to the noncompliance of Press #4. However, even if the Board disagrees with the compliance status for Press #5, Mr. Styzen's analysis still fails because it did not allocate the costs for the additional capacity of the RTO.

2. Mr. Styzen's Analysis Mistakenly Relies on Costs That Were Utilized in a Different Proceeding Where Packaging Was Not Even a Party And He Failed to Conduct An Audit to Determine the Accuracy of The Information Provided By Mr. Bloomberg

As explained above, Mr. Styzen's analysis of the RTO operating costs are inapplicable because Packaging did not utilize the RTO as its method of compliance for Press #4. However, even if had, his operating costs for the RTO are extremely high and were not specific to the Packaging facility because they were taken from an entirely different proceeding, where a competitor of Packaging (Formel) was seeking an adjusted standard. It is important that since Formel was seeking an adjusted standard, it hadn't installed the RTO, nor did it know with absolute certainty what the actual costs of operation would be for said control device.

As acknowledged by Mr. Styzen, he relied upon Mr. Bloomberg to provide benchmarks and he believed these costs to be actual operating costs for a similar RTO at the Formel facility. (6/29 Tr., 155:9-16). Unfortunately, Mr. Styzen did not conduct any independent analysis of the information provided by Mr. Bloomberg nor did he understand how the $86,000 cost figure

related to the Packaging facility. (6/29 Tr., 155:17-157:15 and 161:6-163:4). Furthermore, the evidence at the hearing shows that Mr. Bloomberg likewise did not verify the information he provided to Mr. Styzen nor did he communicate to Mr. Styzen's that the costs being provided were not actual costs but, rather, were the costs used in the adjusted standard proceeding. (6/29 Tr., 81:18-83:18).

Coincidentally, the costs utilized by Mr. Styzen were the costs associated with Formel, which Mr. Trzupek himself developed as part of the adjusted standard proceedings for Bema, Formel, and Vonco.[8] (Respondent's Exhibit 67 and 6/30 Tr., 55:1-18). Mr. Trzupek testified at the hearing that this information is not applicable to Packaging despite the fact that both facilities installed an RTO because the information in the adjusted standard was based on the U.S. EPA RACT and BACT analysis[9] (which delivers much higher costs than real world costs because it was developed in order to make appropriate comparison of control costs in the context of BACT and RACT). Subsequently, the above U.S. EPA analysis has since been replaced by a program called Air Compliance Advisor. (6/30 Tr., 55:19-57:17). Further, those costs were determined on the basis that the RTO would be controlling three presses and one laminator at Formel. (6/30 Tr., 100:21-101:1).

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[8] It is inaccurate and misleading to assert that Mr. Trzupek developed the operating cost estimates used in the Formel Adjusted Standard case over "several years." U.S. EPA's control cost estimation spreadsheets are very simple to use, and it would have only taken a few hours (at most) to plug in and verify the base data needed for the spreadsheet to perform its calculation. The implication in the Complainant's "several years" statement – that those numbers were the result of a long an detailed study – is simply untrue. Further, in the Formel Adjusted Standard case, Mr. Trzupek presented that data as having been developed using U.S. EPA's control cost spreadsheet, for comparative purposes. It was not presented as actual control cost data, nor could it have been so presented, since Formel did not have a control device at the time. The data, in other words, was speculative, based on a very specific method of estimation, and was presented as such.

[9] As explained by Mr. Trzupek, the RACT requirement was developed by U.S. EPA under the Clean Air Act to regulate sources of VOM in non-attainment areas and it published various guidance documents. (6/30 Tr., 105:16-106:6).

Interestingly, Mr. Styzen testified that in this case, as is true with most cases, the largest component of the annual operating costs is attributable to the utility costs including natural gas and electricity. (6/29 Tr., 119:16-20). In fact, Mr. Styzen specified that in his $86,000 cost figure, probably around $75,000 accounts for the utility costs. *Id.* However, the uncontroverted evidence in the record shows that the RTO installed at the Packaging facility was very efficient, required little maintenance and had minimal operating costs. Thus, the $75,000 figure was not even close to actual RTO operating costs. Even Mr. Trzupek testified at the hearing that the annual operating costs of $86,000 are "completely unreasonable and ridiculously high." Specifically, Mr. Trzupek indicated that the RTO at the Packaging facility operates at a maximum turn down (i.e., the burner is operating with the least amount of natural gas as possible) about 95% of the year, which translates to gas costs of about $5,000 a year. (6/30 Tr., 54:3-15). At the hearing, Mr. Joseph Imburgia testified that the RTO installed at the Packaging facility was deliberately chosen based on its efficiency, requirement of little oversight, and minimal operational costs. (6/29 Tr., 211:1-216:21). In fact, Mr. Joseph Imburgia described the RTO unit as "self-sustaining." (6/29 Tr., 214:21-214:4). Mr. Joseph Imburgia's also indicated in his testimony that the $86,000 figure was not representative of the actual costs for the RTO installed at the Packaging facility and were significantly higher than actual costs:

> Q: Do you believe that your operating costs, in actuality, approach anything close to the figures Mr. Styzen put in his calculation?
>
> A: Is that the $86,000 number?
>
> Q: Yes.
>
> A: No. Not on the same planet.

(6/29 Tr., 215:21-216:2).

Complainant's assertions regarding Packaging's failure to produce information regarding the costs associated with the RTO are misplaced. Mr. Styzen's requests for actual operating data

could not be provided because as is the case at most facilities, Packaging did not have gas meters or electric meters dedicated to the control device alone. (6/29 Tr., 210:17-211:7). However, Mr. Joseph Imburgia confirmed that the natural gas burned and electricity used by the RTO represent a only a very small portion of the plant's overall energy use. (6/29 Tr., 212:12-215:20). Additionally, Mr. Trzupek was able to provide a reasonable estimate of those costs at the hearing as discussed above (i.e., $5,000). Based on the above, Mr. Styzen's economic benefit analysis should not have included the $86,000 of costs and has resulted in a proposed penalty that is inappropriate and remarkably high.

Notwithstanding the above, Packaging believes that the evidence at the hearing showed that Complainant has become so wedded to these inapplicable and significantly high costs, that perhaps this is the reason why it has failed to settle this matter previously. Interestingly, Complainant did not attempt to produce any evidence and/or rebuttal at the hearing or in its brief to remedy or explain the discrepancies brought to light at the hearing. However, the record stands clear that the $86,000 annual cost utilized by Mr. Styzen was inapplicable because the RTO was irrelevant, since it was not the method by which Press #4 complied with the Flexographic regulations. However, even if the Board were to find that the RTO operating costs are applicable based on Complainant's allegations that Press #5's was not compliant with the Flexographic regulations, the $86,000 should still be significantly reduced to account for both the excess capacity and the minimal operating costs associated with Packaging's RTO as presented at the hearing. Consequently, the Board should defer to Mr. McClure's analysis as presented below.

B. The Board Should Accept Mr. McClure's Economic Benefit Analysis as Presented at the Hearing Because it Appropriately Captures Packaging's True Cost of Noncompliance

Mr. McClure's economic benefit analysis as presented at the hearing is credible because it accurately estimates Packaging's true cost of "noncompliance." Furthermore, it presents a complete economic analysis of the various alternatives considered by Packaging during its noncompliance, and includes the compliance scenario which it ultimately chose for Press #4. (6/30 Tr., 124:6-125:2). Mr. McClure developed his analysis using the various components provided in the *U.S. EPA BEN User's Manual*, U.S. EPA Office of Regulatory Enforcement and Compliance Assurance (September 1999)(Respondent's Exhibit 4 and 4(a)). He also relied on Mr. Trzupek's expert report, which outlined the various compliance scenarios available to Packaging. (See Respondent's Exhibits 2 and 55).

Notably, Mr. Joseph Imburgia and Mr. Trzupek testified that the scenarios presented in Mr. McClure's analysis were considered prior to the time that decision was made to purchase a new press and RTO. (6/30 Tr., 31:10-36:10 and 6/30 Tr., 13:23-15:12). Contrary to Complainant's assertions, the compliance scenarios presented are not speculative, nor do they go beyond the boundaries of alternatives presented in the Board's regulations.

1. Adjusted Standard

An adjusted standard and/or variance is certainly a legitimate compliance alternative. Evidently this was an acceptable means of compliance for the Illinois EPA as illustrated by the fact that it issued adjusted standards to Bema, Formel and Vonco even after these companies had each been non-compliant with the Flexographic printing rules for three years. (Respondent's Exhibits 5, 6, and 7). Mr. McClure relied on the costs developed by Mr. Trzupek, who represented the entities as a consultant. Consequently, Mr. Trzupek knew with certainty what the costs were for obtaining the adjusted standard. (6/30 Tr., 3-13). Based on Mr. Trzupek's

intimate knowledge, the cost of the adjusted standard in 2007 dollars was approximately about $30,000. (6/30 Tr., 127:2-16). Using basic economic principles and U.S. EPA guidance, Mr. McClure then adjusted the $30,000 to add $3,707 to account for the time value of money, and concluded that the economic benefit would be $33,707. (6/30 Tr., 127:17-19).

2. Installation of RTO for Press #4

The RTO that was purchased by Packaging was larger than what would have been required solely for the control of Press #4. (6/29 Tr., 208:13-20). Contrary to Complainant's statements, Packaging considered purchasing a smaller, refurbished device by a reputable company such as Ship & Shore prior to deciding that it would purchase the larger RTO in anticipation of growing its business. (6/29 Tr., 203:5-204:2 and 208:13-20). Ship & Shore specifically deals in selling "refurbished" equipment that has undergone an inspection and any necessary replacements to insure that the equipment works properly, as opposed to what one would purchase from a "handy-dandy corner used equipment sales lot." (6/30 Tr., 31:24-32:23 and 6/29 Tr., 203:20-204:2). The evidence supports that this alternative would have been a viable option for Packaging.

In calculating the economic benefit for this scenario, Mr. McClure calculated that the initial capital cost would have been about $75,000 based on the Ship & Shore letter dated June 11, 2007, and then it adjusted that amount to include the operating costs (based on conservative estimates) throughout that time period as provided by Mr. Trzupek. (Respondent's Exhibit 43; 6/30 Tr., 128:23-12; and 6/30 Tr., 50:16-53:4). Based on the above information, Mr. McClure concluded that the economic benefit under this scenario yielded a potential economic benefit of $119,020. *Id.*

3. Decommissioning Press #4

The final scenario presented by Mr. McClure was what Packaging actually did, and that was to decommission Press #4, and ultimately move this press to Sparta, Michigan in 2003. The cost associated with this was approximately $15,000 and, using the same methodology of calculating the time value of money, Mr. McClure concluded that the potential economic benefit was $16,853. (6/30 Tr., 130:17-131:15). Mr. Joseph Imburgia testified at the hearing that the $15,000 was reflective of the actual costs incurred for moving the press to Sparta, Michigan. (6/29 Tr., 230:9-232:3).

Complainant's assumption that Packaging could not have sustained its business with only one solvent-based press presumes that it understands Packaging's business better than Packaging itself. As Joseph Imburgia testified, maintaining business is a matter of how many linear feet of film the company can print. (6/29 Tr., 205:3-206:3 and 6/29 Tr., 221:19-223:14). For example, a single press can print 200,000 feet of product in one shift and the company needs to print at 400,000 feet per day in order to sustain its business, then there are two ways of meeting this goal: 1) it can operate two such presses, running one shift per day; or 2) it can operate one such press, operating two shifts per day. Therefore, based on the size and speed of Press #5, Packaging had to simply increase the number of shifts run on that press to sustain its business. *Id.*

Notwithstanding the above, interestingly Complainant acknowledges that Press #5 would be the only solvent-based press at the facility, absent Press #4 and Press #6. (Complainant's Brief, at 34). This would seem to be implicit acknowledgement that Press #1 and Press #2 are indeed water-based presses, despite the Agency's assertion earlier that Packaging did not maintain adequate records to prove that these presses are water-based units. Finally, with respect to Complainant's assertions that Press #6 was a "replacement" for Press #4, Mr. Joseph Imburgia's testimony at the hearing explained that Press #6 was a completely different press and

that Packaging's characterization of "replacement" was for the purpose of demonstrating to Illinois EPA its effort and willingness to come into compliance.

> Q: Is press six, in your own mind, a replacement for press four?
>
> A: Absolutely not.
>
> Q: And why not?
>
> A: It's a completely different piece of equipment that allowed us to access a completely different market. It was bought and installed to grow the business. And press five was a newer, faster piece of equipment that had already absorbed all of the work off of press four.
>
> * * *
>
> Q: Do you have any idea why your attorneys back then or even your consultant would have called pres six a replacement press?
>
> A: Well, in discussions it was proposed as what we called a grant, you know, compliance plan where we were showing this very large effort and willing to do anything to comply at that time.
>
> We wanted to say, you know, look we're going overboard, we're doing beyond what would potentially be expected. And that was the concept discussed as far as pushing that idea forward.

(6/29 Tr., 208:3-209:7).

Based on the above, it is clear that Complainant's assertions under this scenario are completely incorrect and, therefore, the Board should defer to Packaging's testimony at the hearing.

C. Complainant's Proposed Penalty Does Not "Level the Playing Field" Because It Treats Packaging Different Than Its Competitors

The Board should defer to Mr. McClure's opinion concerning Complainant's proposed penalty as a being a "gross overestimation of the appropriate penalty." (6/30 Tr., 138:12-14). As explained at the hearing, the concept of leveling the playing field specifically relates to making competition equal amongst companies that choose and do not choose to become compliant. (6/30 Tr., 138:13-17). At the hearing, Mr. McClure opined that the most appropriate of the three

scenarios that presents a closer depiction of Packaging's economic benefit was that of the adjusted standard. (6/30 Tr., 139:9-24).

Mr. McClure based his opinion on the fact that, unlike many other cases, in this case there were clear, identifiable actions taken by Packaging's competitors, which had very similar circumstances and there is information that shows what they did to come into compliance, and how much it cost. (6/30 Tr., 138:18-22). Specifically, as discussed previously, the three companies that sought adjusted standards were very analogous to the circumstances in this case. Moreover, the costs associated with the obtaining approval of the adjusted standard were known with certainty based on the fact that Mr. Trzupek himself served as the consultant in assisting the approval of the adjusted standard. Consequently, although this doesn't happen in many circumstances, we know that, had Packaging known about the regulations at the time these companies sought the adjusted standard, Packaging would have also made the request as it did once, it learned about its non-compliance. As Mr. Trzupek testified, it would have been very likely that Packaging would have obtained the adjusted standard and moved forward to compliance. (6/30 Tr., 139:17-24). However, Illinois EPA declined to support its request.

In addition to using incorrect data inputs, Mr. Styzen's testimony at the hearing exemplifies his lack of understanding of the facts and circumstances surrounding this matter, and betrays his unfamiliarity with Packaging's business. During the hearing, Mr. Styzen could not identify what type of printing Packaging conducts, and who its competitors were – although earlier in his testimony he indicates that economic benefit is determined on a case by case basis, and is about leveling the playing field. (6/29 Tr., 141:3-10). He didn't even know how many printing presses were at issue in this case. (6/29 Tr., 143:16-18). Additionally, Mr. Styzen admitted that he did not know which printing press or presses are out of compliance, and for which the State is maintaining that an RTO is necessary. (6/29 Tr., 143-144:23-4). Moreover,

Mr. Styzen had no total knowledge of the number of printing presses at Formel. (6/29 Tr., 1445-7).

Mr. Styzen's lack of familiarity with these critical pieces of information significantly impacts the accuracy and credibility of his economic benefit analysis. However, Mr. Styzen's unfamiliarity with Packaging's business is not excusable because, as an internal auditor for the Illinois EPA, he should have known better than to simply rely on Mr. Bloomberg's information that was clearly applicable to another facility. Additionally, at the hearing, it was evident that Mr. Bloomberg himself did not audit or check the information he provided to Mr. Styzen. Despite these discovered deficiencies with its expert, Complainant did not attempt to set the record straight at the hearing nor did it do so in its post-hearing brief.

Further, if economic benefit is about leveling the playing field, certain information, such as the number of presses that Packaging operated that were out of compliance in comparison to its competitors, is crucial to a just determination in comparison to Packaging's competitors. Even Mr. Styzen agrees that the purpose of economic benefit is to level the playing field such that "you have to look at what the company is doing, what industry do they operate and how they relate to their competitors in their financial arena so that you can level the financial playing field and try to recover any economic benefit advantages that the company may have accrued by not investing in pollution control equipment." (6/29 Tr., 129:8-15). While Mr. Styzen attempts to make it appear as if Packaging was a company growing aggressively with over 600 customers, Packaging is a family-owned business with only a fraction of that number of customers (about 200 customers) and 100 employees. (6/29 Tr., 188:4-15).

In addition to the above, Mr. Styzen somehow attempts to justify a significant penalty on the basis of the competitive nature of the industry, and that Packaging was 'growing aggressively.' (6/29 Tr., 166:12-167:4). Mr. Styzen's statements are simply not true and are

unsupported in the record. (6/29 Tr., 166:12-167:4). Mr. Styzen admitted that he had no knowledge regarding the competitive nature of the flexographic business industry prior to 2001. (6/29 Tr., 173:24-174:6). Further, Mr. Styzen did not have any first hand knowledge regarding the flexographic printing industry and the little knowledge he obtained was from trade publications. (6/29 Tr., 138:21-140:3). Consequently, Mr. Styzen could not answer any specifics as to the competitive landscape of the flexographic printing business between 1997 and 2003. (6/29 Tr., 172:1-13).

Mr. Styzen's methodology is suspect, as he appears to pick and choose among portions of the BEN guidance as it suits him. When asked whether or not he relies on the U.S. EPA BEN Manual in doing economic benefit analysis, he contradicts himself.

Q: Do you rely on EPA's BEN Manual in doing economic benefit analysis?

A: No.

Q: You don't rely on it for even guidance?

A: Some guidance, yes.

Q: Do you pick and choose the guidance or do you use all of it?

A: I use all of it.

(6/29 Tr., 168:1-9).

Additionally, while Mr. Styzen indicates that he didn't use the BEN manual, he later cites to the guidance concerning "the best evidence of what the violator should have done to prevent the violations is what it eventually did to achieve compliance." (6/29 Tr., 180:1-9).

Yet, Mr. Styzen admitted that he was unaware of any other cases where the Illinois EPA sought an economic benefit penalty from any other flexographic printer. (6/29 Tr., 177:23-178:14). Based on the above, it is evident that Mr. Styzen's analysis is inappropriate because it significantly differs from the actual facts and circumstances specific to the noncompliance at the

Packaging facility. Moreover, Mr. Styzen's penalty calculation is ridiculously high based on the fact that other cases presented in the previously cited Flexographic cases have settled for amounts that had a considerable less economic benefit analysis.

VII. CONCLUSION

The evidence supports that Packaging has exhibited good-faith efforts to comply with the Act and applicable Board regulations. However, Complainant has frustrated its compliance efforts and the settlement negotiations by refusing to issue Packaging an operating permit and failing to settle this matter as it did with all the other enforcement actions concerning the Flexographic regulations. There is clear evidence that the penalty requested by Complainant is severely flawed and does not reflect Packaging's true cost of noncompliance. Based on the exorbitant amount of money that Packaging has expended to date, Packaging does not believe that it has enjoyed an economic benefit or that a substantial penalty should be imposed. However, Packaging respectfully requests, if the Board elects to impose a penalty in this matter, it should be consistent with the facts of this case and similar caselaw as presented herein.

Respectfully Submitted,

PACKAGING PERSONIFIED, INC.,

By: _____
One of its Attorneys

Dated: November 6, 2009

Roy M. Harsch, Esq.
Lawrence W. Falbe, Esq.
Yesenia Villasenor-Rodriguez, Esq.
Drinker Biddle & Reath LLP
191 North Wacker Drive - Suite 3700
Chicago, Illinois 60606
(312) 569-1441 (Direct Dial)
(312) 569-3441 (Facsimile)