ILLINOIS POLLUTION CONTROL BOARD
November 15, 2001

PEOPLE OF THE STATE OF ILLINOIS, Complainant, v. PANHANDLE EASTERN PIPE LINE COMPANY, Respondent.	))))))))))	 PCB 99-191 (Enforcement - Air)

SALLY A. CARTER, ASSISTANT ATTORNEY GENERAL, OFFICE OF THE ATTORNEY GENERAL, AND ROBB H. LAYMAN, SPECIAL ASSISTANT ATTORNEY GENERAL, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, APPEARED ON BEHALF OF COMPLAINANT; and

ERIC E. BOYD AND SUSANNAH A. SMETANA, SEYFARTH SHAW, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by C.A. Manning):

This enforcement action concerns air emissions from a natural gas compressor station in Glenarm, Sangamon County, Illinois. The Illinois Attorney General, on behalf of the People of the State of Illinois (People) and at the request of the Illinois Environmental Protection Agency (Agency), filed a complaint against Panhandle Eastern Pipe Line Company (Panhandle), a natural gas pipeline transmission company. The People allege that Panhandle, at its Glenarm compressor station (Glenarm Station), violated requirements of the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (2000)) to limit air emissions. Those requirements include the Prevention of Significant Deterioration (PSD) program, which is designed to protect air quality from diminishing in areas with relatively clean air.

At Glenarm Station, Panhandle uses compressor engines to recompress natural gas, ensuring that the gas will continue to move along the pipeline. By burning fuel, these compressor engines emit nitrogen oxides (NOx) into the air. NOx is a pollutant under the federal Clean Air Act (42 U.S.C. § 7401 *et seq.*). In 1988, Panhandle retired 12 of the 15 compressor engines at Glenarm Station and added four new compressor engines, leaving the station with a total of seven compressor engines. For this change in compressor engines, Panhandle received a construction permit from the Agency in 1988.

The construction permit and each of Panhandle's subsequent operating permits limited NOx emissions from the four new compressor engines to 461.3 tons per year (TPY). As stated on each permit, the 461.3 TPY limit on NOx emissions was designed to avoid the applicability of the PSD regulations by ensuring that the construction change in 1988 would not increase NOx

emissions by 40 TPY or more. An increase of 40 TPY or more would be considered a "major modification" under PSD, which would subject Panhandle to more stringent and expensive requirements, including analyzing the construction project's impact on air quality and installing the best available control technology (BACT) on the four new compressor engines to limit their NOx emissions. Because these types of permits are designed to avoid "major" modification status, they are referred to as "minor source" permits or "PSD avoidance" permits. Panhandle never appealed the 461.3 TPY NOx condition in these permits. Panhandle admits that the four new engines have consistently emitted NOx in excess of the 461.3 TPY limit and were continuing to do so, at least through 1998—the last full year before the People brought this enforcement action. The main issue that the Board faces in this enforcement proceeding is to determine the legal implications of these uncontested facts.

The People allege that Panhandle's NOx emissions in excess of 461.3 TPY have resulted in violations of the Act. The People assert that Panhandle is subject to PSD requirements, with which Panhandle admits it has not complied. The People also allege that Panhandle violated its permit by emitting NOx in excess of the 461.3 TPY limit. The People seek a total civil penalty of $2,218,759 against Panhandle for the violations, as well as costs and attorney fees of $128,902.25. Panhandle asserts that it is not subject to PSD and that no violations took place, raising five affirmative defenses. Panhandle also argues that if the Board imposes any civil penalty, the total amount should be no more than $160,000, and that costs and attorney fees are inappropriate in this case.

For the reasons provided in this opinion, the Board (1) finds that Panhandle violated the Act and orders Panhandle to cease and desist from further violations; (2) imposes a total civil penalty on Panhandle of $850,000; and (3) awards the People costs and attorney fees of $115,750.25 because Panhandle repeatedly and, since 1996, knowingly violated the Act.

PSD is a critical program created by the federal Clean Air Act to keep our air safe to breathe. In Illinois, the Act makes it a violation of State law to violate PSD requirements. The Act also prohibits violations of air permit conditions. Panhandle sought to avoid the extra costs of complying with PSD's stringent requirements by applying for a minor source permit. Under the law, Panhandle could receive a minor source permit for its construction project without meeting any PSD requirements. To avoid the applicability of PSD, a minor source permit limits the company's net emissions increase from the construction project below the 40 TPY threshold. To determine the net increase, the Agency considers any decrease in the company's emissions that will take place as part of the project (*e.g.*, from taking existing engines out of operation at the same time). The Agency received Panhandle's application for a minor source permit and in turn issued a minor source permit to Panhandle. Panhandle could have appealed the issued permit but failed to do so, *i.e.*, Panhandle accepted the minor source permit, including the condition limiting NOx emissions from the four new engines to 461.3 TPY.

Panhandle then effectively ignored the NOx emission limit in the permit, while nevertheless enjoying the benefit of the permit—avoiding the extra compliance costs associated with PSD. Since 1989, Panhandle has repeatedly exceeded the emission limit in its permit, often by hundreds of tons of NOx per year. In doing so, Panhandle violated both its permit and the federal Clean Air Act's PSD requirements. Panhandle therefore violated the Act. In committing

these major violations, Panhandle failed to take even the most basic steps incumbent upon any company doing business in Illinois to determine whether it is complying with its permit.

In this opinion, the Board first provides this case's procedural history. The Board then sets forth its findings of fact. Lastly, the Board discusses the alleged violations, the appropriate remedy, and the People's request for costs and attorney fees.

PROCEDURAL HISTORY

On June 29, 1999, the People filed a two-count complaint against Panhandle for alleged violations at Glenarm Station. Specifically, count I of the complaint alleges that Panhandle violated the PSD requirements of Section 165 of the federal Clean Air Act (42 U.S.C. § 7475) and regulations thereunder (40 C.F.R. §§ 52.21(i) and (j)), thereby violating Sections 9.1(d)(1) and 9.1(d)(2) of the Act (415 ILCS 5/9.1(d)(1), (2) (2000)). Count II of the complaint alleges that Panhandle violated its permit limit on NOx emissions, thereby violating Section 9(b) of the Act (415 ILCS 5/9(b) (2000)). Panhandle filed an answer on July 27, 1999, raising five affirmative defenses.[1]

The Board's then Chief Hearing Officer John C. Knittle held a hearing for seven days over September and November 2000, resulting in just under 1,500 pages of hearing transcript. In addition, at the parties' request, the hearing officer incorporated portions of the hearing transcript from an earlier Board proceeding involving Panhandle's appeal of an Agency permit decision. *See* Panhandle Eastern Pipe Line Co. v. IEPA, PCB 98-102 (Jan. 21, 1999), *aff'd sub nom* Panhandle Eastern Pipe Line Co. v. PCB and IEPA, 314 Ill. App. 3d 296, 734 N.E.2d 18 (4th Dist. 2000).[2]

The parties jointly offered 24 hearing exhibits, all of which were admitted. The People presented seven witnesses. The People offered 42 exhibits, 41 of which were admitted. The hearing officer excluded from evidence the People's Exhibit 5, a letter from the United States Environmental Protection Agency (USEPA) to the Agency. The Board affirmed the hearing officer's ruling (*see* People v. Panhandle Eastern Pipe Line Co., PCB 99-191, slip op. at 6 (Feb. 1, 2001)) and later denied the People's March 12, 2001 motion to reconsider (*see* Panhandle, PCB 99-191, slip op. at 3 (Oct. 18, 2001)). Panhandle presented nine witnesses. Panhandle offered 43 exhibits, all of which were admitted. Consistent with its offer at hearing, Panhandle, on December 12, 2000, filed its parent corporation's annual reports from 1987 through 1996, all of which were marked as hearing officer exhibits and admitted.[3]

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[1] The complaint is cited as "Comp. at _." The answer is cited as "Ans. at _."

[2] The September and November 2000 hearing transcript is cited as "Tr. at _." The incorporated hearing transcript is cited as "Incorp. Tr. at _."

[3] The stipulated hearing exhibits are cited as "Stip. Exh. at _." The People's hearing exhibits are cited as "People Exh. _." Panhandle's hearing exhibits are cited as "Pan. Exh. _." The hearing officer exhibits are cited as "H.O. Exh. at _."

By order of December 22, 2000, the hearing officer granted the parties' request to exceed the 50-page limit on their initial post-hearing briefs. The People filed a 138-page brief on January 19, 2001. Panhandle filed a 91-page response brief on February 15, 2001, a portion of which the People moved to strike on February 28, 2001. The Board denied the People's motion to strike. *See* Panhandle, PCB 99-191, slip op. at 4 (Oct. 18, 2001). The People filed a 65-page reply brief on March 5, 2001, along with a motion to waive the page-limit requirement for the reply brief. The Board granted the People's motion to waive.[4] *See id.*

FINDINGS OF FACT

Background

Panhandle was formed in 1929. Since 1987, Panhandle has been a wholly-owned subsidiary of several different corporations. In 1987, Panhandle was owned by Panhandle Eastern Corporation, a publicly owned holding company traded on the New York Stock Exchange. Panhandle Eastern Corporation changed its name to PanEnergy Corp. in the mid-90's. At that point, PanEnergy Corp. was among the United States' five largest transporters of natural gas and producers of natural gas liquids. PanEnergy Corp. had 37,000 miles of natural gas pipeline and provided 12% of the natural gas consumed in the United States. In 1997, PanEnergy Corp. was merged into Duke Energy Corporation. In 1999, Duke Energy Corporation sold Panhandle to CMS Energy Corporation, which is the current parent corporation of Panhandle. Tr. at 668-69; H.O. Exh. 1-10.

Panhandle operates an interstate natural gas pipeline that transports natural gas to customers in Illinois and other Midwestern states. Panhandle's natural gas pipeline extends from gas fields in Kansas, Texas, and Oklahoma to the Midwest. Tr. at 29, 605, 827; H.O. Exh. 10. Due to the great distances that the natural gas is transported, the gas must be recompressed. Tr. at 682-84. Panhandle uses compressor stations at locations along the pipeline system to ensure that the gas continues to move through the system and is delivered to customers at serviceable pressures. *Id.* Panhandle has five compressor stations in Illinois. Tr. at 744. One of those compressor stations, Glenarm Station, is in Glenarm, Sangamon County. Glenarm Station is in a rural, lightly populated area and has operated for over 60 years. Tr. at 28, 605-06. The compressor engines at Glenarm Station emit NOx into the air when they burn fuel (natural gas). Tr. at 627, 686; Ans. at 3.

Air Permitting

In 1987, Glenarm Station had 15 compressor engines (engines 1101-1115). Tr. at 32-33, 608-13. In September 1987, Panhandle filed with the Agency an application for a construction permit to replace 12 engines (engines 1101-1112), which were 41 to 56 years old, with four new engines (engines 1116-1119).[5] Panhandle sought to avoid PSD applicability by offsetting new

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[4] The People's first brief is cited as "People Br. at _." Panhandle's response brief is cited as "Pan. Br. at _." The People's reply brief is cited as "Reply Br. at _."

[5] The parties and the Board refer to these four engines as "new" because they were new to Glenarm Station. Panhandle purchased engines 1116 and 1117, which had been used at a

NOx emissions from adding engines 1116-1119 with the decreased NOx emissions from retiring engines 1101-1112. Tr. at 544, 553, 606-07, 612-13, 627, 660, 675-76, 803; Pan. Exh. 1, 2. Engines 1116 and 1117 were not equipped with emission controls for NOx. Tr. at 620. Engines 1118 and 1119 had been equipped with an early version of "Clean Burn" emission control technology before arriving at Glenarm Station. "Clean Burn" is the name for this pre-combustion chamber technology made by Cooper-Bessemer Corporation. Tr. at 684-87. Panhandle undertook the construction project to modernize its operations—add more efficient engines and remove older engines that required more maintenance. Tr. at 613, 651-52; Pan. Exh. 2, 3. The construction project at Glenarm Station cost Panhandle approximately $15 to $20 million. Tr. at 639.

During the permit application process, Panhandle provided the Agency with data from 1987 on how much fuel engines 1101-1112 used and how many hours they operated. Based on this data, the Agency calculated that the 12 engines emitted NOx at a rate of 421.4 TPY. Tr. at 100-01, 555-56, 565-66; Pan. Exh. 4; Stip. Exh. 6. To arrive at the 421.4 TPY figure, the Agency relied on a fuel-based emission factor[6] (3,400 pounds/million cubic feet) in USEPA's September 1985 edition of AP-42, "Compilation of Air Pollutant Emission Factors for Stationary Sources." Tr. at 30-31, 51, 101, 564-66, 594-95, 1104-05; Pan. Exh. 29; Stip. Exh. 6.

In February 1988, the Agency issued Panhandle a minor source permit for the construction project. Stip. Exh. 1. The permit included an emission limit of 461.3 TPY of NOx applicable to the four new engines. *Id.* The permit stated that the 461.3 TPY limit was based on (1) standard emission factors; (2) fuel use from the most recent one year period (*i.e.*, a credit for decreased emissions of 421.4 TPY, calculated using the 1987 data for engines 1101-1112); and (3) an allowed emissions increase from the modification of 39.9 TPY. The permit also stated that the NOx emission limit was necessary to avoid the applicability of PSD. Stip. Exh. 1, 6.

The Agency set the 461.3 TPY emission limit to ensure that the four replacement engines would not result in a net increase in NOx emissions of 40 TPY or more over the 1987 emissions. The limit was designed to prevent the construction project from being a "major modification" under PSD rules, thus allowing Panhandle to avoid PSD requirements. Tr. at 48; Stip. Exh. 1, 6. The construction permit also required Panhandle to keep records on the hours of operation and the fuel use for each of the four new engines. Tr. at 86; Stip. Exh. 1.

The Agency set forth all of these requirements in the construction permit's three special conditions:

Tenneco Chemical Company facility in Texas, and brought engines 1118 and 1119 to Glenarm Station from another Panhandle facility, Hugoton Station in Kansas. Tr. at 617, 619-20, 685-86.

[6] An "emission factor" is the "relationship between the amount of pollution produced and the amount of raw material processed. For example, an emission factor for a blast furnace making iron would be the number of pounds of particulates per ton of raw materials." USEPA, Terms of Environment (last modified May 13, 1998) http://www.epa.gov/OCEPAterms/eterms.html.

1. This permit is issued based upon the replacement of ten Cooper Compressors and two Clark Compressors with four new Cooper Compressors. The overall increase in NOx emissions from the replacement will not exceed 39.9 tons per year. This condition is necessary to avoid applicability of 40 CFR 52.21, Rules for Prevention of Significant Deterioration (PSD).

2. NOx emissions from the four new compressors shall not exceed 461.3 tons per year. This limit is based upon [emission] rates calculated from standard emission factors, the gas usage from the most recent one year period and the allowed increase of 39.9 tons per year.

3. a. The permittee shall keep records of the hours of operation and the gas usage of each of the new compressor engines.

   b. These records shall be kept for two years and be available to Agency inspectors upon request. Stip. Exh. 1.

Panhandle completed the construction project in 1988, leaving Glenarm Station with a total of seven compressor engines (1113-1119), which are the same engines there today. Tr. at 683, 1094. Panhandle applied for an operating permit for the four new engines in July 1988. Pan. Exh. 5. The Agency issued an operating permit to Panhandle in August 1988. The Agency issued Panhandle renewed operating permits in September 1989, June 1990, and July 1991. The most recent permit included an expiration date of June 26, 1996. Each of the operating permits had the same three special conditions (above) as were in the construction permit. Tr. at 102-03, 580, 584-90; Stip. Exh. 2-5. Panhandle did not appeal the Agency's 1988 construction permit decision. Nor did Panhandle appeal any of the four subsequent Agency decisions to issue operating permits for the four engines.

None of the permits specified a limit on hours of operation or fuel use. Tr. at 147, 575; Stip. Exh. 1-5. Imposing an annual emissions limit in a permit, coupled with recordkeeping requirements, was consistent with the Agency's practice for restricting emissions below PSD levels. Tr. at 102, 138-43; Incorp. Tr. at 361-62. Panhandle kept records of the hours of operation and the fuel use for the four new engines. Pan. Exh. 7-13. The amount of NOx that a compressor engine emits in a year can be calculated using a standard emission factor and data on the engine's hours of operation or the engine's fuel use. Tr. at 29-30, 86-89, 140-41, 151-52, 485-87, 509-10, 560, 693, 746-47.

Annual Emission Reports and Inspections

Panhandle submitted to the Agency annual emission reports, which showed total NOx emissions annually from Glenarm Station. Before the annual emission report filed in May 1995, these reports did not provide information on emissions from each engine individually or information on the total emissions from engines 1116-1119 collectively. To prepare the annual reports, Panhandle staff calculated the emissions from each of the seven engines using a standard

emission factor and hours of operation data. Tr. at 58, 91-93, 145-46, 691-97, 784-85, 790-94; Pan. Exh. 14; Stip. Exh. 9-16.

Panhandle employees in Houston, Texas responsible for calculating and reporting emissions knew of the amounts of NOx being emitted from the Glenarm Station engines. The evidence in the record, however, does not demonstrate that any of those persons knew of the 461.3 TPY permit limit before the Agency notified Panhandle in 1996 of excess emissions. Panhandle employees who operated Glenarm Station knew of the permit limit. The evidence in the record, however, does not demonstrate that any of those persons knew how much NOx was being emitted before the Agency notified Panhandle in 1996 of excess emissions. The only Panhandle corporate officer to testify about NOx emissions was Mr. John Alholm, a vice president of engineering who retired in January 1993. Mr. Alholm oversaw the 1988 Glenarm Station construction project. While he was with Panhandle, he apparently had no knowledge that the NOx emissions exceeded a permit limit. Tr. at 602-04, 616-22, 635-36, 656, 659, 671, 691-99, 702, 704, 707-11, 747-48, 768-70, 791, 798-99, 1215; Pan. Exh. 14, 21; Pan. Br. at 2-3.

The Agency inspected Glenarm Station annually. The Agency's inspection reports found no violations regarding the four new engines until 1996. During or after the inspections, Panhandle provided its records of fuel use and hours of operations to the Agency. Beginning at least with 1991 operations, the hours of operation data was provided for each of the seven compressor engines individually, while total fuel use data was provided for all seven engines collectively. Before its 1996 inspection, the Agency did not use this data or the data in the annual emission reports to assess whether NOx emissions from engines 1116-1119 might be exceeding the permit limit. Tr. at 31, 35-42, 49, 58, 64-66, 75-77, 84-91, 94-95, 482-84, 492-520, 528-31; Pan. Exh. 7-12; Stip. Exh. 7.

On August 19, 1996, the Agency inspected Glenarm Station. Tr. at 42-43; Stip. Exh. 17. Because Panhandle had filed a permit application under Title V of the federal Clean Air Act Amendments of 1990, the Agency's 1996 inspection of Glenarm Station was more comprehensive than its prior inspections. The inspection included review of an annual emission report and the Title V permit application.[7] Tr. at 43-44, 56-58, 90-92; Stip. Exh. 7, 17. Panhandle's data on 1995 operations provided both fuel use and hours of operation for each of the seven engines individually. To calculate 1995 NOx emissions from engines 1116-1119, the Agency used the data from Panhandle on fuel use for the four engines, and a standard fuel-based emission factor from USEPA's 1995 edition of AP-42. Tr. at 29-30, 49-51, 54-56; Pan. Exh. 13. This calculation showed 1995 NOx emissions from the four engines exceeded the 461.3 TPY limit. Tr. at 49-52, 54-58; Stip. Exh. 17 at 0020, 0034.

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[7] Title V of the federal Clean Air Act Amendments of 1990 (42 U.S.C. §§ 7661-7661f) ushered in the Clean Air Act Permit Program (CAAPP). A CAAPP permit is designed to be a comprehensive statement of all air pollution obligations that apply to a facility. In Illinois, the General Assembly added the CAAPP to the Act at Section 39.5 (415 ILCS 5/39.5 (2000)). The Agency has codified the CAAPP permit application process (35 Ill. Adm. Code 270) and the Board has codified the procedures to appeal the Agency's CAAPP permit determinations (35 Ill. Adm. Code 105.300-105.304).

The Agency contacted Panhandle later in 1996 to express concern about NOx emissions exceeding the permit limit. Tr. at 703-04, 706. After that, Panhandle in 1996 recognized that it was exceeding the 461.3 TPY permit limit and expressed concern to the Agency over how the Agency calculated the limit. Tr. at 712-14; Pan. Exh. 6.

Panhandle admits that NOx emissions from engines 1116-1119 at Glenarm Station exceeded the 461.3 TPY limit from 1989 through 1998. Ans. at 14. Using a fuel-based emission factor from USEPA's 1985 edition of AP-42 (which the Agency used to set the permit limit of 461.3 TPY), Panhandle calculated the following NOx emissions from engines 1116-1119 in TPY:

1989	686.26
1990	703.11
1991	747.70
1992	659.99
1993	706.55
1994	800.28
1995	1014.93
1996	1173.69
1997	911.57
1998	550.59

Pan. Exh. 28, App. B, PAN01706.

Violation Notice and Subsequent Events

On March 20, 1997, the Agency issued a violation notice to Panhandle based on its determination that the four new engines at Glenarm Station had violated the permitted annual NOx emission limit of 461.3 TPY. Tr. at 59; Stip. Exh. 20. In April 1997, representatives of the Agency and Panhandle met to discuss the violation notice. Tr. at 125, 719-24. In May 1997, Panhandle responded to the violation notice by submitting to the Agency a compliance commitment agreement (CCA), along with a construction permit application. Tr. at 63; Incorp. Tr. at 331; Stip. Exh. 22. Panhandle implemented an "environmental dispatch" program at Glenarm Station, under which Panhandle reduced emissions from engines 1116-1119 by running the older engines (1113-1115) first. Tr. at 727-29, 735; Stip. Exh. 22. The Agency rejected the CCA in June 1997, and issued a notice of intent to pursue legal action in November 1997. Stip. Exh. 23, 24.

In the May 1997 construction permit application, Panhandle sought to increase the PSD avoidance limit of 461.3 TPY in its minor source permit, and to install "Clean Burn" emissions controls on engines 1116 and 1117, the two engines out of the four new engines that had no emission controls. Stip. Exh. 22. In June 1997, the Agency responded to the construction permit application by issuing a notice that the application was incomplete. The Agency's notice stated that the application failed to demonstrate Panhandle's compliance with PSD requirements. Tr. at 108-09, 729-730; Incorp. Tr. at 333; People Exh. 2. Panhandle submitted additional information,

and twice proposed revised PSD avoidance limits. Based on recalculating annual NOx emissions from retired engines 1101-1112 using data from 1985 and 1986, Panhandle requested to increase its PSD avoidance limit from 461.3 TPY to 560.94 TPY, then later sought to increase the NOx limit to 729.08 TPY. Incorp. Tr. at 303, 305-16, 725; People Exh. 3. In December 1997, the Agency denied Panhandle's permit application because Panhandle failed to demonstrate that it would not violate PSD. Tr. at 732; Incorp. Tr. at 316.

In January 1998, Panhandle filed with the Board a petition to review the Agency's decision denying the permit application. The Board affirmed the Agency's decision in January 1999, and Panhandle appealed the Board's decision. Tr. at 732. The Fourth District Appellate Court affirmed the Board's decision in June 2000. *See* Panhandle, PCB 98-102, *aff'd sub nom* Panhandle, 314 Ill. App. 3d 296, 734 N.E.2d 18.

In August 1999, Panhandle submitted a PSD permit application to the Agency. In its application, Panhandle proposed to add "Clean Burn" emission control to engines 1116 and 1117 and to enhance the emission controls already on engines 1118 and 1119. Tr. at 732-34. The Agency has not taken final action on Panhandle's PSD permit application. Tr. at 734.

DISCUSSION

Below the Board first discusses the violations that the People have alleged. The Board then discusses each of the five alleged affirmative defenses that Panhandle has raised. After ruling on whether Panhandle has violated the Act, the Board, if necessary, will turn to the appropriate remedy and the People's request for costs and attorney fees.

Alleged Violations

The People allege that Panhandle violated three sections of the Act—Sections 9.1(d)(1), 9.1(d)(2), and 9(b). Sections 9.1(d)(1) and 9.1(d)(2) prohibit persons from violating PSD requirements under the federal Clean Air Act. Section 9(b) prohibits persons from operating in violation of their air permit conditions.

Alleged PSD Violations—Sections 9.1(d)(1) and 9.1(d)(2) of the Act

Section 9.1(d)(1) of the Act provides that "[n]o person shall . . . violate any provisions of Section[] . . . 165 . . . of the Clean Air Act, as now or hereafter amended, or federal regulations adopted pursuant thereto;" *i.e.*, the federal PSD statutory and regulatory requirements.[8] 415 ILCS 5/9.1(d)(1) (2000). Section 9.1(d)(2) of the Act provides:

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[8] Section 165 of the federal Clean Air Act provides that "[n]o major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part [42 U.S.C. § 7470 *et seq*.] applies unless—(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part; * * * (4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility * * * ." 42 U.S.C. § 7475(a)(1), (4).

> No person shall *** [c]onstruct, install, modify or operate any equipment, building, facility, source or installation which is subject to regulation under Section[] . . . 165 . . . of the Clean Air Act, as now or hereafter amended, except in compliance with the requirements of such Section[] and federal regulations adopted pursuant thereto, and no such action shall be undertaken without a permit granted by the Agency or in violation of any conditions imposed by such permit. *** 415 ILCS 5/9.1(d)(2) (2000).

Whether Panhandle is subject to PSD is therefore central to the alleged violations of Sections 9.1(d)(1) and 9.1(d)(2) of the Act. The federal Clean Air Act established the PSD program to prevent significant deterioration of air quality in areas with air quality that meets or exceeds the National Ambient Air Quality Standards (*i.e.*, "attainment areas"). *See* 42 U.S.C. §§ 7470-7492. Under Section 165 of the Clean Air Act (42 U.S.C. § 7475), USEPA promulgated regulations at 42 C.F.R. § 52.21 to implement the PSD program. The Agency administers the federal PSD program under a delegation agreement with USEPA. *See* 46 Fed. Reg. 9580, 9582, 9584 (Jan. 29, 1981).

The federal PSD program protects against the degradation of air quality in attainment areas by imposing various requirements on new and modified major stationary sources of regulated pollutants. Generally, PSD requirements are imposed upon projects that constitute the construction of a new "major stationary source" or a "major modification" of an existing major stationary source.

A "major modification" is:

> any physical change in or change in the method of operation of a major stationary source that would result in a *significant net emissions increase* of any pollutant subject to regulation under the [federal Clean Air Act]. 40 C.F.R. § 52.21(b)(2)(i) (emphasis added).

A "net emissions increase" is the sum of (1) any increase in actual emissions from the physical change or change in the method of operation and (2) any other increases and decreases in actual emissions that are contemporaneous with the increase from the change. 40 C.F.R. § 52.21(b)(3)(i). The pollutant at issue in this case is NOx. A net emissions increase for NOx is "significant" if it equals or exceeds 40 TPY. 40 C.F.R. § 52.21(b)(23)(i). Therefore, a major source that undertakes a major modification (*i.e.*, a change resulting in a net emissions increase in NOx of 40 TPY or more) is subject to PSD.

If a modification is "major," a PSD permit must be obtained before construction begins. 40 C.F.R. § 52.21(i).[9] Before a PSD permit can be issued, the PSD rules require, among other

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[9] Section 52.21(i) provides in part: "(i) Review of major stationary sources and major modifications—Source applicability and exemptions. (1) No stationary source or modification to which the requirements of paragraphs (j) through (r) of this section apply shall begin actual

things, an emissions source to demonstrate that it will use BACT to control its emissions. 40 C.F.R. § 52.21(j).[10] BACT means:

> an emissions limitation . . . based on the maximum degree of reduction for each pollutant . . . which would be emitted from any proposed major stationary source or major modification which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant. 40 C.F.R. § 52.21(b)(12).

The Agency issued a construction permit to Panhandle in 1988 to take out of operation 12 compressor engines (engines 1101-1112) of the 15 existing engines at Glenarm Station, and to replace those 12 engines with four new compressor engines (engines 1116-1119). The construction permit contained an emission limit for NOx that applied only to the four new compressor engines being added. This NOx limit of 461.3 TPY was designed to ensure that Panhandle's construction project would not be a major modification—that is, the construction project would not result in a net emissions increase of 40 TPY or more of NOx.

The Agency's calculated PSD avoidance limit of 461.3 TPY had two components. First, because Panhandle was taking 12 engines out of operation, those engines would no longer emit NOx. Panhandle therefore received a credit for decreasing those emissions. Panhandle provided data on the engines' fuel use and hours of operation for 1987. With this data, the Agency calculated that the 12 engines emitted 421.4 tons of NOx in 1987. Panhandle's emissions baseline credit (the amount of the decreased emissions) therefore was 421.4 TPY.

Second, the Agency took the 421.4 TPY figure and added a less than "significant" increase in emissions of 39.9 TPY, *i.e.*, NOx emissions after the change could be no greater than 39.9 TPY more than emissions before the change. These two figures (421.4 TPY and 39.9 TPY) added up to the NOx permit limit of 461.3 TPY. Accordingly, the permit limit, applicable only to the four new engines, was designed to ensure that the "net emissions increase" from the 1988

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construction without a permit which states that the stationary source or modification would meet those requirements." 40 C.F.R. § 52.21(i)(1).

[10] Section 52.21(j) provides in part: "Control technology review. (1) A major stationary source or major modification shall meet each applicable emissions limitation under the State Implementation Plan and each applicable emissions standard and standard of performance under 40 CFR parts 60 and 61. *** (3) A major modification shall apply best available control technology for each pollutant subject to regulation under the [federal Clean Air Act] for which it would result in a significant net emissions increase at the source. This requirement applies to each proposed emissions unit at which a net emissions increase in the pollutant would occur as a result of a physical change or change in the method of operation in the unit." 40 C.F.R. § 52.21(j)(1), (3).

construction changes would not be "significant" (*i.e.*, would be less than 40 TPY) and thus that the project would not be a major modification subject to PSD. The Agency subsequently issued four operating permits to Panhandle, each of which had the 461.3 TPY limit on NOx emissions.

In March 1997, Panhandle received a violation notice from the Agency based on NOx emissions exceeding the 461.3 TPY limit, which ultimately led to this enforcement action. After receiving the violation notice, Panhandle applied with the Agency to increase the PSD avoidance limit, *i.e.*, retain a minor source permit but with a less stringent NOx emission limit. Panhandle argued that the Agency erred in 1988 when it calculated the 421.4 TPY baseline for the construction permit. The Agency denied Panhandle's application. The Board affirmed the Agency's denial and, in turn, the Fourth District Appellate Court affirmed the Board's decision. *See* Panhandle, PCB 98-102, *aff'd sub nom* Panhandle, 314 Ill. App. 3d 296, 734 N.E.2d 18.

The People allege that Panhandle emitted NOx from engines 1116-1119 in excess of the 461.3 TPY permit limit, which resulted in a major modification subject to PSD, *i.e.*, a net emissions increase of 40 TPY or more of NOx. The People assert that, despite Panhandle's NOx emissions, Panhandle failed to demonstrate BACT, failed to obtain a PSD permit before constructing or operating engines 1116-1119, and failed to install BACT. The People allege that, by these failures, Panhandle violated PSD requirements at Section 165 of the federal Clean Air Act (42 U.S.C. § 7475) and 40 C.F.R. §§ 52.21(i) and (j), and therefore violated Sections 9.1(d)(1) and 9.1(d)(2) of the Act. Comp. at 7-9.

As noted, under the federal Clean Air Act, major modifications cannot be built in attainment areas without a PSD permit and BACT. *See* 42 U.S.C. § 7475(a); 40 C.F.R. §§ 52.21(i), (j). Panhandle concedes that its NOx emissions from the four new engines have consistently exceeded the PSD avoidance limit of 461.3 TPY limit and, as of the start of this enforcement action, had continued to do so. Panhandle also concedes that it has neither obtained a PSD permit nor implemented emission controls on the four engines that constitute BACT. The parties do not dispute that Glenarm Station is a major stationary source for NOx or that the facility is in an attainment area. Ans. at 9-10 (engines 1101-1115 emitted more than 250 TPY of NOx); *see also* 40 C.F.R. § 52.21(b)(1)(i) (definition of "major stationary source"). The parties, however, *do* dispute whether Panhandle's 1988 replacement of the 12 compressor engines with the four new engines was a "major modification" subject to PSD. Panhandle argues that its exceedences of the 461.3 TPY NOx limit did not trigger PSD requirements, and that the engines are a minor source.

The "source obligation" regulation of PSD, at 40 C.F.R. § 52.21(r)(4), provides:

> At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then the requirements [of] paragraphs (j) through (s) of this section shall apply to the source or modification as though construction had not yet commenced on the source or modification. 40 C.F.R. § 52.21(r)(4).

At the time it promulgated the PSD rules, USEPA discussed the enforcement options available to the administering agency when a source exceeds the limit of its PSD avoidance permit, including the applicability of 40 C.F.R. § 52.21(r)(4):

> One option is simply to enforce . . . the limitations in the permit . . . with the result that the source retains its minor status. This is appropriate where, *despite the permit violations, it appears that the source intends to adhere to the emissions limitations in the future*. However, [USEPA] retains the right to *enforce the PSD . . . violation as well*.
>
> The second option is to invoke the "source obligation" regulations, e.g., 40 CFR 52.21(r)(4), and treat the source as major by requiring it to obtain a PSD . . . permit. This course is appropriate where the source, through a change in business plans, or a *belated realization that its original plans cannot accommodate the design or operational limitations in that permit, and so exceeds them*. *** [USEPA] treats the source "as though construction had not yet commenced" for PSD . . . permitting purposes. 54 Fed. Reg. 27274, 27280 (June 28, 1989) (emphasis added).

In Panhandle's appeal of the Agency's decision denying it a modified minor source permit with an increased PSD avoidance limit, the Board found the facts of Panhandle's case analogous to the second option that USEPA describes and concluded that PSD had been triggered. *See* Panhandle, PCB 98-102, slip op. at 15, *aff'd sub nom* Panhandle, 314 Ill. App. 3d 296, 734 N.E.2d 18.[11] However, as the Board stated in that proceeding, because its decision was made in a permit appeal, it was not binding or *res judicata* in any subsequent enforcement action. *See* Panhandle, PCB 98-102, slip op. at 7-8 (May 20, 1999).

Based on the record before it in this enforcement proceeding, the Board again finds that the second scenario described in USEPA guidance better characterizes the facts of this case. The condition in Panhandle's minor source permit limiting NOx emissions to 461.3 TPY was designed to ensure that Panhandle would avoid PSD by limiting the net emissions increase of NOx from the 1988 construction project to 39.9 TPY. The permit stated that this was its purpose. By meeting this PSD avoidance limit in the permit, Panhandle's increase in NOx emissions would not constitute a major modification under PSD because it would be less than the 40 TPY threshold.

The first enforcement option described by USEPA provides that an agency may enforce against the exceedences of the minor source permit, without enforcing PSD, if the source intends to adhere to the original permit limit. This option does not apply here. Panhandle did not exceed the PSD avoidance limit in its minor source permit once or twice and then demonstrate a ready ability to comply with the limit. On the contrary, Panhandle continuously exceeded the PSD

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[11] The Board also held that the Agency lacked the authority to reconsider its 1988 permit decision. The Fourth District Appellate Court affirmed the Board's decision on this ground and others, making it unnecessary for the court to reach the issue of PSD applicability. *See* Panhandle, 314 Ill. App. 3d at 306, 734 N.E.2d at 25.

avoidance limit for many years and finally sought, not to comply with the limit, but to greatly increase it. Even under the first enforcement option, however, the administering agency retains the right to enforce the PSD violation as well. Of course, the Act prohibits both the violation of PSD and the violation of a minor source permit, and the People allege both types of violations here.

The court in United States v. Louisiana-Pacific Corp., 682 F. Supp. 1122 (D. Colo. 1987) rejected an emission source's similar arguments about whether PSD is triggered:

> [Defendant] fails to account satisfactorily for a source which obtains permits under another regulatory scheme limiting emissions to 250 TPY or less [the trigger for being considered a "major stationary source" under PSD] and then *fails to stay within those limitations*. Clearly if Congress intended that a new source with the potential to emit 250 TPY should be subject to PSD new source review, it most certainly intended that a new source which actually emits more than 250 TPY should be subject to the PSD program.
> ***
> [Defendant] contends that [USEPA's] recourse would be to enforce the "federally enforceable" limitations in the [minor source] permits [without enforcing PSD]. Under such a scenario, however, [USEPA] would be deprived of the benefit of the remedies Congress created for a violation of PSD. Additionally, [defendant's] contention ignores the obvious answer that if Congress had intended for such a state of affairs to exist, it would never have enacted the PSD program. Louisiana-Pacific, 682 F. Supp. at 1133 (emphasis added).

Panhandle also asserts that it did not know it was violating the 461.3 TPY NOx limit until the Agency notified Panhandle after the 1996 inspection. It is well-settled, however, that knowledge is irrelevant to whether a violation occurred. The Act is "*malum prohibitum*, no proof of guilty knowledge or *mens rea* is necessary to a finding of guilt." Meadowlark Farms, Inc. v. PCB, 17 Ill. App. 3d 851, 861, 308 N.E.2d 829, 836 (5th Dist. 1974); *see also* Freeman Coal Mining Co. v. PCB, 21 Ill. App. 3d 157, 163, 313 N.E.2d 616, 621 (5th Dist. 1974). Accordingly, whether Panhandle knew it was violating the Act has no bearing on whether Panhandle violated the Act.

The Board finds that Panhandle's emissions exceeded its PSD avoidance limit for years. These exceedences demonstrate that the changes Panhandle made in 1988 increased its emissions by 40 tons or more per year, and therefore that Panhandle made a major modification in 1988. As Panhandle concedes, it did not comply with PSD. Panhandle constructed and operated a major modification without obtaining a PSD permit and without demonstrating or implementing BACT, in violation of PSD requirements under the federal Clean Air Act. The Board therefore finds that Panhandle, absent any affirmative defenses (discussed below), violated Sections 9.1(d)(1) and 9.1(d)(2) of the Act.

Alleged Permit Condition Violation—Section 9(b) of the Act

The People allege that Panhandle violated Section 9(b) of the Act. Section 9(b) provides that "[n]o person shall *** operate any equipment [or] facility . . . capable of causing or contributing to air pollution . . . without a permit granted by the Agency, or in violation of any conditions imposed by such permit." 415 ILCS 5/9(b) (2000). The People allege that Panhandle violated the minor source permit condition limiting NOx emissions to 461.3 TPY and therefore violated Section 9(b). Comp. at 10-11. Panhandle admits that "the NOx emissions from compressor engines 1116-1119 at its Glenarm Station exceeded the 461.3 [TPY] NOx limit beginning with the first full year [1989] the engines operated and continuing every year since." Pan. Br. at 1.

NOx emissions from the four new engines at Glenarm Station consistently exceeded the 461.3 TPY NOx permit limit. Panhandle's own calculations show exceedences each year from 1989 through 1998. These calculations reveal that the smallest amount of emissions, taking place in 1998, exceeded the limit by 89.29 tons, while the largest amount of emissions, taking place in 1996, exceeded the limit by 712.39 tons. The Board finds it appropriate that, for these calculations, Panhandle used the same USEPA fuel-based emission factor that the Agency used to calculate the permit limit of 461.3 TPY. However, using a variety of different emission factors also revealed year after year of exceedences of the permitted NOx emission limit. *See*, *e.g.*, People Exh. 3 at 0090; Pan. Exh. 28, App. A, PAN01694, App. B, PAN01706; Stip. Exh. 22 at 0182. The Board finds that Panhandle violated the 461.3 TPY NOx permit limit and therefore, absent any affirmative defenses (discussed below), violated Section 9(b) of the Act.

Alleged Affirmative Defenses

Panhandle raises five alleged affirmative defenses to the violations alleged by the People. The first and second alleged affirmative defenses relate to the 461.3 TPY NOx limit itself. The third, fourth, and fifth alleged affirmative defenses relate to the Agency inspecting Glenarm Station, renewing Panhandle's operating permit, and reviewing Panhandle's annual emission reports. In the alternative, Panhandle states that if the Board finds that the alleged affirmative defenses do not preclude enforcement, then the evidence entered to support each defense should mitigate against a civil penalty. Pan. Br. at 3.

First Alleged Affirmative Defense: Denial of Due Process

Panhandle claims that the Agency denied it due process by issuing the minor source permit without first giving Panhandle, and the public, notice and an opportunity to comment on the 461.3 TPY limit. Panhandle argues that the emissions baseline credit that the Agency calculated in 1988 was too small. Again, based on 1987 fuel use data for the 12 retired engines, the Agency calculated a credit of 421.4 TPY, reflecting the decrease in NOx emissions by taking the 12 engines out of operation. Panhandle argues that 1985 and 1986 were more representative of how the 12 engines normally operated. Panhandle claims that 1987 was not representative because warmer weather in 1986 and 1987 limited natural gas use in 1987. Panhandle asserts that if, in 1988, a draft permit had been issued and subject to notice and comment, "then the problems with the 461.3 TPY NOx limit . . . would have been discovered." Pan. Br. at 18-19. Panhandle argues that the permit limit is therefore invalid and unenforceable.

Special condition No. 1 of Panhandle's 1988 construction permit stated that the "overall increase in NOx emissions from the replacement [of compressor engines] will not exceed 39.9 tons per year" and that this "condition is necessary to avoid applicability of 40 CFR 52.21, Rules for Prevention of Significant Deterioration (PSD)." Stip. Exh. 1. Special condition No. 2 of the construction permit states that the 461.3 TPY "limit is based upon [emission] rates calculated from standard emission factors, the gas usage from the most recent one year period and the allowed increase of 39.9 tons per year." *Id*. Thus, the minor source permit itself clearly stated (1) that the NOx limit was 461.3 TPY; (2) that the limit was designed to avoid PSD; and (3) that the limit was based on 1987 fuel use data for the retired engines.

Panhandle intended to avoid PSD by offsetting the new NOx emissions (from adding engines 1116-1119) with the simultaneous emissions decrease (from taking engines 1101-1112 out of operation). Panhandle knew that the Agency would have to determine the amount of the emissions decrease to perform this netting calculation. During the permit application process, Panhandle provided the Agency with fuel use data on the 12 engines being retired. However, Panhandle provided data not from 1985 and 1986, but rather from 1987. Pan. Exh. 1-4. As the permit applicant, Panhandle could have provided data from 1985 and 1986 for the Agency to consider. Panhandle should not be surprised that the Agency used the only data that Panhandle provided to calculate past emissions from the 12 engines.

Moreover, Panhandle's past NOx emissions exceeded not only its actual permit limit of 461.3 TPY, but also the higher PSD avoidance limit that Panhandle sought in 1997. As noted, after the Agency issued the violation notice in 1997, Panhandle applied to increase its minor source permit limit by using a baseline credit based on 1985 and 1986 NOx emissions from the 12 retired engines. In 1997, Panhandle first asked for an increase of the NOx limit to 560.94 TPY, then changed its application and sought an increase to 729.08 TPY. Despite Panhandle's concerns over how the Agency arrived at the NOx limit in 1988, Panhandle's actual NOx emissions repeatedly exceeded even Panhandle's later-proposed limits. Nor does Panhandle explain why its review of a "draft" of the 1988 permit would have been any more strenuous than its review of the issued construction permit, or the four subsequent operating permits.

More importantly, however, for over 30 years, the Act has given permit applicants like Panhandle the right to appeal Agency permit decisions. Specifically, Section 40(a)(1) of the Act (415 ILCS 5/40(a)(1) (2000)) affords a permit applicant the opportunity to appeal an Agency permit decision to the Board within 35 days after the Agency's decision. Panhandle failed to do so. By failing to do so, the permit became final and binding. Panhandle cannot now, in an enforcement proceeding over ten years later, raise challenges to the validity of the permit's emission limit based on alleged deficiencies in the permit application process. To hold otherwise would render the 35-day appeal period of Section 40(a)(1) meaningless. *See* Panhandle, 314 Ill. App. 3d at 304, 734 N.E.2d at 24 (having an unlimited time to revise permit decisions "would render meaningless the review provisions of the Act").

Panhandle's reliance on Village of Sauget v. PCB, 207 Ill. App. 3d 974, 566 N.E.2d 724 (5th Dist. 1990) for its due process claim is therefore misplaced. In that case, the permit applicant that raised a due process challenge, unlike Panhandle, timely appealed the Agency's

permit decision to the Board and, in turn, timely appealed the Board's decision to the Appellate Court. The Board denies Panhandle's first alleged affirmative defense.

The Board's decision is consistent with Hawaiian Electric Co. v. USEPA, 723 F.2d 1440 (9th Cir. 1984). The Fourth District Appellate Court relied upon Hawaiian Electric when it affirmed the Board in the Panhandle case involving the Agency's denial of Panhandle's request for a revised minor source permit. In Hawaiian Electric, Hawaiian Electric requested that USEPA modify Hawaiian Electric's PSD permit after the time period for Hawaiian Electric to appeal the original PSD permit had expired. Hawaiian Electric, 723 F.2d at 1441-42, 1445. The court noted that the legislative intent to "avoid excessive bureaucratic contention" by requiring USEPA to make permit decisions within a prescribed time period would be frustrated if past determinations could be routinely challenged *de novo*. *Id*. at 1446. The court stated:

> [Hawaiian Electric] argues that it is challenging the premises under which the permit was originally granted and that therefore the application of the major modification definition in particular and PSD review in general is incorrect. The policy of finality, which is critical to the administration of a complex technocratic program, dictates that [Hawaiian Electric's] argument must fail. Finality is a particularly important value in air pollution control because of the simultaneous existence of substantial risk and substantial technical uncertainty. *Id*. at 1445.

Second Alleged Affirmative Defense: Permitted Emission Limit is Practicably Unenforceable

Panhandle asserts that the annual NOx limit of 461.3 TPY is "illegal and unenforceable because the permit did not contain practicably enforceable conditions . . . such as restrictions on hours of operation or fuel usage . . . ." Pan. Br. at 19. This collateral attack by Panhandle on a final and valid permit fails as a bar to enforcement for the reasons, articulated above, that Panhandle's first alleged affirmative defense must fail. Moreover, contrary to Panhandle's assertions, nowhere did the Louisiana-Pacific court hold that minor source permit limits on actual emissions are unenforceable. In fact, the court acknowledged that such limits *are* enforceable. *See* Louisiana-Pacific, 682 F. Supp. at 1133 (referring to minor source permit limits on actual emissions as "federally enforceable").

Even Panhandle concedes that compliance with an annual emission limit *can* be verified—a "way to determine compliance with an annual emissions cap is to run calculations using data on fuel use or hours of operation and an emission factor." Pan. Br. at 20. This information was readily available to Panhandle and this record is replete with such calculations. The minor source permit required Panhandle to keep records of the hours of operation and the fuel use for each of the four new compressor engines.

Not restricting the new engines' operating hours or fuel use in Panhandle's permit does not render the annual emission limit unenforceable. Panhandle could have readily monitored its compliance with the NOx limit by estimating annual emissions, based on fuel use, hours of operation, and a standard emission factor. Even if, as Panhandle asserts, the "Glenarm Station personnel were not familiar with the manner in which NOx emissions could be calculated" (Pan.

Br. at 20), this is no defense. Moreover, Panhandle concedes that its "employees in Houston responsible for calculating and reporting emissions to the Agency knew what the NOx emissions were . . . ." Pan. Br. at 2. To prepare the annual emission reports, Panhandle staff calculated the emissions from each of the four engines. Panhandle admits that "[s]omeone who could calculate emissions should have known of the emissions limit." *Id*. at 3.

Finally, Panhandle argues that, because it was retiring 12 "older, dirtier" engines and replacing them with four more efficient engines, it believed in "good faith" that its 1988 construction project would decrease NOx emissions, not result in a significant net emissions increase in NOx emissions. Pan. Br. 2, 19. As discussed above, however, the Act is *malum prohibitum*—whether Panhandle believed it would not violate its permit is irrelevant to whether Panhandle violated its permit. The Board denies Panhandle's second alleged affirmative defense.

Third Alleged Affirmative Defense: Waiver or Estoppel

Panhandle claims that it reasonably and detrimentally relied on the Agency's alleged misrepresentations that Panhandle was in compliance with the NOx emission limit in the PSD avoidance permit. Pan. Br. at 22. Panhandle argues that it relied on the following:

1. The Agency's annual inspections before 1996 found either "no violation" or a violation unrelated to the four new engines, even with records of fuel use and hours of operation provided;

2. The Agency's renewals of the minor source operating permit, the standard for issuance of which being that the permit applicant had submitted proof to the Agency that the emission units at issue would not cause a violation of the Act; and

3. The Agency's failure to take any enforcement action upon receiving annual emission reports from Panhandle. Pan. Br. at 24.

Panhandle states that the Agency, in carrying out these functions, has waived its right to enforce against Panhandle or should now be estopped from pursuing this enforcement action.

The doctrine of waiver applies when a party intentionally relinquishes a known right or his conduct warrants an inference to relinquish the right. *See* Hartford Accident and Indemnity Co. v. D.F. Bast, Inc., 56 Ill. App. 3d 960, 962, 372 N.E.2d 829, 831 (1st Dist. 1977); People v. Douglas Furniture of California, Inc., PCB 97-133, slip op. at 5 (May 1, 1997). The doctrine of equitable estoppel may be applied when a party reasonably and detrimentally relies on the words or conduct of another. *See* Brown's Furniture, Inc. v. Wagner, 171 Ill. 2d 410, 431, 665 N.E.2d 795, 806 (1996); People v. Chemetco, Inc., PCB 96-76, slip op. at 10 (Feb. 19, 1998); White & Brewer Trucking, Inc. v. IEPA, PCB 96-250, slip op. at 10 (Mar. 20, 1997). However, the doctrine "should not be invoked against a public body except under compelling circumstances, where such invocation would not defeat the operation of public policy." Gorgees v. Daley, 256 Ill. App. 3d 514, 518, 628 N.E.2d 721, 725 (1st Dist. 1993).

As the Illinois Supreme Court explained:

> This court's reluctance to apply the doctrine of estoppel against the State has been motivated by the concern that doing so may impair the functioning of the State in the discharge of its government functions, and that valuable public interests may be jeopardized or lost by the negligence, mistakes or inattention of public officials. Brown's Furniture, 171 Ill. 2d at 431-32, 665 N.E.2d at 806, *citing* Hickey v. Illinois Central Railroad, 35 Ill. 2d 427, 447-48, 220 N.E.2d 415, 426 (1966); *see also* Chemetco, PCB 96-76, slip op. at 11; White & Brewer Trucking, PCB 96-250, slip op. at 10.

Consistent with this reluctance, a party seeking to estop the government must show that the government made a misrepresentation with knowledge that the misrepresentation was untrue. *See* Medical Disposal Services, Inc. v. IEPA, 286 Ill. App. 3d 562, 570, 677 N.E.2d 428, 433 (1st Dist. 1997); City of Mendota v. PCB, 161 Ill App. 3d 203, 209,514 N.E.2d 218, 222 (3d Dist. 1987); Chemetco, PCB 96-76, slip op. at 11; White & Brewer Trucking, PCB 96-250, slip op. at 10.

The Board finds that Panhandle has not demonstrated waiver by the State. None of the Agency's activities constitute the relinquishment of the People's right to bring this enforcement action. Nor do the facts of this case present the "compelling circumstances" necessary for applying the equitable doctrine of estoppel to bar the government from bringing this enforcement action. Hickey, 35 Ill. 2d at 448, 220 N.E.2d at 426.

"[T]he reluctance of courts to hold governmental bodies estopped to assert their claims is particularly apparent when the governmental unit is the State." Hickey, 35 Ill. 2d at 447, 220 N.E.2d at 425. The General Assembly has given the Agency a central role in Illinois' system of environmental law. Under the Act, the Agency's responsibilities include administering the various air pollution control programs. These programs are a vital part of Illinois' effort to "restore, maintain, and enhance the purity of the air of this State in order to protect health, welfare, property, and the quality of life and to assure that no air contaminants are discharged into the atmosphere without being given the degree of treatment or control necessary to prevent pollution." 415 ILCS 5/8 (2000).

Functioning in this critical governmental capacity, the Agency issues permits to, inspects the facilities of, and receives emissions data from companies all over Illinois. *See* 415 ILCS 5/4(d), (g), (l) (2000). However, permit applications are considered by the Agency based on the information that the applying companies provide. Inspection reports finding "no violation" mean only that those particular Agency inspectors did not uncover a problem at a facility on those specific occasions. Thousands of annual emission reports are received by the Agency every year. None of these Agency functions insulate companies from liability for emitting excess pollutants into the air.

Companies cannot simply sit back and wait to see if they will be caught by the Agency. For Illinois' system of environmental programs to be effective, self-policing is required of

industry. Here, when Panhandle became subject to Title V of the federal Clean Air Act Amendments of 1990, the Agency conducted a more comprehensive inspection and found the NOx emission problem. To exonerate Panhandle of liability for the pollutants it has emitted for years in violation of our air pollution control laws because the Agency, acting in good faith, did not discover the company's problems sooner would surely "impair the functioning of the State in the discharge of its governmental functions" and jeopardize "valuable public interests." Hickey, 35 Ill. 2d at 447, 220 N.E.2d at 426.

The Board finds that the Agency's execution of these basic governmental functions do not absolve Panhandle of its statutory obligation to determine, on its own, whether it is complying with its permit. As discussed above, Panhandle could have readily made that determination. *See* Hickey, 35 Ill. 2d at 447, 220 N.E.2d at 425 (1966) (party alleging estoppel must have "no knowledge or convenient means of knowing the true facts"). It is the responsibility of companies doing business in Illinois to determine whether they are complying with Illinois' environmental laws. Panhandle's reliance on Agency permit renewals and inspections as the *sole* means by which Panhandle determined its compliance was unreasonable. *See* Chemetco, Inc., PCB 96-76, slip op. at 10; White & Brewer, PCB 96-250, slip op. at 10. Moreover, Panhandle has made no showing that any Agency personnel made misrepresentations to Panhandle with the knowledge that they were untrue. The Board denies Panhandle's third alleged affirmative defense.

Fourth Alleged Affirmative Defense: Unreasonable Delay by the Agency

Laches. Panhandle claims that the Agency's "inaction over the course of many years" warrant applying the doctrine of *laches* to bar this enforcement action. Pan. Br. at 25. Panhandle claims that the Agency failed to exercise due diligence in the same three contexts for which Panhandle claims waiver and estoppel: (1) annually inspecting Glenarm Station; (2) renewing Panhandle's minor source operating permit; and (3) reviewing annual emission reports from Panhandle. Panhandle asserts that the Agency, over an eight-year period, "failed to discover that operation of engines 1116-1119 caused NOx emissions to exceed the annual NOx limit" resulting in the "undue delay" of this enforcement action. *Id*. at 26. Panhandle argues that the Agency should have discovered the exceedence of the 461.3 TPY limit years before 1996 because Panhandle had supplied the Agency with "all the information necessary to determine whether Panhandle was in violation of its permit." *Id.*

"*Laches* is an equitable doctrine which precludes the assertion of a claim by a litigant whose unreasonable delay in raising that claim has prejudiced the opposing party." Tully v. Illinois, 143 Ill. 2d 425, 432, 574 N.E.2d 659, 662 (1991); *see also* City of Rochelle v. Suski, 206 Ill. App. 3d 497, 501, 564 N.E.2d 933, 936 (2d Dist. 1990). There are two principal elements of *laches*: (1) lack of due diligence by the party asserting the claim; and (2) prejudice to the opposing party as a result of the delay. *See* Van Milligan v. Board of Fire & Police Commissioners, 158 Ill. 2d 84, 89, 630 N.E.2d 830, 833 (1994); Tully, 143 Ill. 2d at 432, 574 N.E.2d at 662; People v. State Oil Co., PCB 97-103, slip op. at 2 (May 18, 2000). As with the equitable doctrine of estoppel, applying *laches* against the government is disfavored and can apply against the State functioning in its governmental capacity only in compelling circumstances. *See* Hickey, 35 Ill. 2d at 447-48, 220 N.E.2d at 425-26.

Panhandle has not demonstrated that the Agency "knowingly slept on [its] rights to the detriment of [Panhandle]." Tully, 143 Ill. 2d at 432, 574 N.E.2d at 662. In addition, as noted, Panhandle admits that its Houston staff knew of the amounts of NOx being emitted from engines 1116-1119 while its Glenarm Station staff knew of the 461.3 TPY permit limit. Pan. Br. at 2. This record does not show that any alleged delay in the Agency's discovery of violations prejudiced Panhandle so as to preclude the People's enforcement action. Panhandle's failure to recognize that its emissions violated its permit was not caused by the time it took the Agency to discover the violations, but rather by the deficient internal communications of Panhandle, which showed a flagrant disregard of its permit obligation.

Had Panhandle diligently monitored its compliance, it could have addressed the exceedences long before the Agency became aware of them. For that matter, if Panhandle had merely reviewed its permit when it received it in 1988, Panhandle could have avoided these violations. The person who oversaw the 1988 construction project for Panhandle, Mr. John Alholm, testified about the importance of the 461.3 TPY limit in the 1988 permit:

> Q. What does a 461.3 ton per year NOx emission limit mean to you?
>
> * * *
>
> A. *** [I]f that is not enough tonnage of NOx emissions from these units that would allow them to operate at a level that they were intended to operate at, that would have been, in effect, a show stopper.
>
> Q. What do you mean by show stopper?
>
> A. We would have gone back to find out how many hours of operation that would have represented. If that was not close to 8,000 hours a year for each one of these units, then that would have been in question as to why not and should we go ahead with the project. Tr. at 632-33.

Accordingly, before it received its 1988 construction permit, Panhandle knew the number of hours that it intended to operate engines 1116-1119. Yet Panhandle could not operate these four engines for more than approximately half of that time and stay under the 461.3 TPY limit. Tr. at 707. With its intended hours of operation and a standard emission factor, Panhandle could have calculated the tons of NOx emissions per year that it believed it needed, and, at a minimum, compared that figure to the 461.3 TPY limit when it received the permit. Somehow Panhandle failed to do that even though the limit was so critical to a $15 to $20 million construction project.

As with the alleged defense of estoppel, the Board finds that Panhandle failed to prove the compelling circumstances required to apply the equitable doctrine of *laches* against the government. The Board denies Panhandle's alleged affirmative defense based on *laches*.

The 180-Day Time Period of Section 31(a)(1) of the Act. Panhandle alleges that the Agency failed to comply with the 180-day time period of Section 31(a) of the Act. Section 31(a)(1) states in part:

> Within 180 days of becoming aware of an alleged violation of the Act or any rule adopted under the Act or of a permit granted by the Agency or condition of the permit, the Agency shall issue and serve, by certified mail, upon the person complained against a written notice informing that person that the Agency has evidence of the alleged violation. 415 ILCS 5/31(a)(1) (2000).

Panhandle alleges that the Agency failed to issue a violation notice to Panhandle within 180 days after becoming aware of Panhandle's exceedence of the 461.3 TPY permit limit. The Agency inspected Glenarm Station on August 19, 1996, and issued the violation notice to Panhandle on March 20, 1997—213 days after the inspection.

Section 31 of the Act provides all respondents in State enforcement actions with notice and opportunity to meet with the Agency before the Agency refers the matter to the Attorney General for enforcement. The Board has held that the 180-day time period of Section 31(a)(1) is not a statute of limitations. *See* People v. John Crane, Inc. PCB 01-76, slip op. at 5 (May 17, 2001). In Crane, the Board also held that "[w]hile the substance of the Section 31 pre-referral process is mandatory, the 180-day time period of Section 31(a)(1) is directory." *Id.* at 6.

Panhandle does not allege that the Agency failed to issue a violation notice or to meet with Panhandle to discuss the violation notice before referring the matter to the Attorney General. In fact, the Agency afforded Panhandle this process. Panhandle alleges only that the Agency did not issue the violation notice within the 180-day time period of Section 31(a)(1). However, even if the Agency did not issue the violation notice within the directory 180-day period, the Board is not thereby divested of jurisdiction to hear this complaint. *See* Crane, PCB 01-76, slip op. at 6. The Board denies Panhandle's alleged affirmative defense based on the 180-day time period of Section 31(a)(1).

Fifth Alleged Affirmative Defense: Statute of Limitations

Panhandle asks the Board to apply the Code of Civil Procedure's five-year limitation on civil actions (735 ILCS 5/13-205 (2000)) to this enforcement action. Panhandle states that the alleged violations "accrued over ten years before" the People filed the complaint. Pan. Br. at 29. As with the third and fourth alleged affirmative defenses, Panhandle again asserts that the Agency failed to diligently assess "the compliance status of the Glenarm Station from 1989 until 1996." *Id.* Panhandle argues that the Agency's "egregious lack of diligence" warrants a departure from the "general rule that the statute of limitations does not apply where the State brings an action involving public rights." *Id.*

Panhandle also argues that this enforcement action is not in pursuit of the "public's right to a clean environment" because it really seeks only civil penalties. Pan. Br. at 30. According to Panhandle, the "installation of emission controls, and not the assessment of civil penalties, will help to ensure a healthful environment." *Id.* at 29. Panhandle filed a PSD permit with the Agency in August 1999 to install emission controls on the two uncontrolled engines (1116 and 1117) and to augment controls on engines 1118 and 1119. Panhandle asserts that the only basis for which the People seek an order from the Board that Panhandle cease and desist from further violations is that the Agency has not yet taken final action on the PSD permit application.

The Board does not find any merit in Panhandle's claims. It is well-settled that no statute of limitations applies to enforcement actions brought by the People pursuant to Section 31 of the Act (415 ILCS 5/31 (2000)), as is the case here. *See*, *e.g.*, Crane, PCB 01-76, slip op. at 5. Moreover, the People are seeking "to protect the public's right to a clean environment." Pielet Bros. Trading, Inc. v. PCB, 110 Ill. App. 3d 752, 758, 442 N.E.2d 1374, 1379 (5th Dist. 1982). Besides the purposes of PSD under the federal Clean Air Act to ensure that air quality in attainment areas does not suffer, the General Assemble found in Section 8 of the Act that:

> pollution of the air of this State constitutes a menace to public health and welfare, creates public nuisances, adds to cleaning costs, accelerates the deterioration of materials, adversely affects agriculture, business, industry, recreation, climate, and visibility, depresses property values, and offends the senses. 415 ILCS 5/8 (2000).

That Panhandle filed a PSD permit application to install emission controls is no assurance of compliance with PSD. Panhandle's proposed control technology and emission rate may not be the best available control technology or BACT. In addition, Panhandle may not make the requisite ambient air quality impact demonstration under PSD. Panhandle also could simply withdraw its PSD application. The People seek a Board order requiring that Panhandle cease and desist from further violating PSD requirements, as well as the 461.3 TPY limit in the permit. Comp. at 9, 11. Moreover, Panhandle cites no authority for its proposition that civil penalties do not further the public's right to a clean environment. The People seek civil penalties for the Environmental Protection Trust Fund. *See* 415 ILCS 5/42(a) (2000). Civil penalties can also serve to deter further violations and enhance voluntary compliance by a respondent and those similarly situated. *See* 415 ILCS 5/42(h)(4) (2000). The Board finds that this enforcement action seeks to further the public's right to a clean environment and is not subject to the Code of Civil Procedure's five-year limitation on actions.

Remedy

Having found that none of the alleged affirmative defenses bar enforcement and that Panhandle violated Sections 9.1(d)(1), 9.1(d)(2), and 9(b) of the Act, the Board turns to the appropriate remedy for these violations. The People request that the Board order Panhandle to cease and desist from further violations and impose a $2,218,759 civil penalty on Panhandle. People Br. at 138. Panhandle argues that the Board should assess no civil penalty. Alternatively, Panhandle argues that because it has not benefited economically from the violations, any civil penalty should be no greater than $160,000. Pan. Br. at 3, 89-90. The maximum possible penalty authorized by the Act easily exceeds $60 million. *See* 415 ILCS 5/42(a) (2000).

Panhandle's minor source permit limit on NOx emissions of 461.3 TPY has special significance. Like any air permit condition, the violation of the NOx limit is a violation of Section 9(b) of the Act, which prohibits the violation of air permit conditions. However, Panhandle's permitted NOx limit was also designed so that Panhandle could avoid PSD and its associated expenses. Compliance with the limit of 461.3 TPY would ensure that Panhandle's

1988 construction project, adding the four new engines, was not a “major modification” under PSD. Any “net emissions increase” in NOx resulting from the modification would not be “significant” because the increase would be less than 40 TPY. By exceeding that limit as it has, Panhandle not only violated a permit condition, it triggered the applicability of PSD. Its 1988 construction project was a “major modification,” which Panhandle built and operated without a PSD permit or BACT, in violation of PSD and thus in violation of Sections 9.1(d)(1) and 9.1(d)(2) of the Act.

In determining an appropriate remedy for these violations, the Board must consider the factors set forth in Section 33(c) of the Act (415 ILCS 5/33(c) (2000)). In determining an appropriate civil penalty component of that remedy, the Board is authorized to consider the factors set forth in Section 42(h) of the Act (415 ILCS 5/42(h) (2000)). Before making its finding on the appropriate remedy, below the Board applies each of the factors of Sections 33(c) and 42(h) to the record in this case, including evidence introduced on the alleged affirmative defenses.

Section 33(c) of the Act

To determine an appropriate remedy, including civil penalty, the Board considers the factors set forth in Section 33(c) of the Act. Section 33(c) provides in part:

> (c) In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved including, but not limited to:
>
> (i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
>
> (ii) the social and economic value of the pollution source;
>
> (iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
>
> (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
>
> (v) any subsequent compliance. 415 ILCS 5/33(c) (2000).

The Board considers each of these factors in turn.

Character and Degree of Injury or Interference. The People state that:

> Despite obtaining a PSD avoidance permit for a purported minor source construction project, Panhandle operated the compressor engines at emission levels that made the project a major modification. By doing so . . . Panhandle prevented the [Agency] from fulfilling its role as the delegated PSD authority in Illinois. People Br. at 53-54.

Panhandle states that the record contains no evidence that the excess NOx emissions "were of a character and degree to interfere with the protection and heath, general welfare or property of the people," and that "Panhandle's NOx emissions in excess of the 461.3 TPY permit limit had minimal impact, if any, on the air quality of Sangamon County." Pan. Br. at 34. Panhandle then explains that the NOx emissions from engines 1116-1119 comprised only a small fraction of the total NOx emissions from Illinois in general and Sangamon County in particular. Panhandle also presented Mr. Bruce Dumdei with the environmental engineering firm of URS Corporation, who testified that emissions from engines 1116-1119 "are not significant compared to the overall emissions from Sangamon County and other sources that contribute to Sangamon County's annual air quality for [NOx]." Tr. at 1170-71.

Panhandle's arguments miss the mark. Regardless of the fact that Panhandle's excess emissions have not resulted in Sangamon County losing its attainment status, Panhandle has built and operated a major modification without providing any of the environmental protections that Congress intended. NOx is a pollutant that can contribute to a violation of the National Ambient Air Quality Standard for nitrogen dioxide, and can result in acid rain and ozone formation, all of which threaten health. That is why NOx was designated a pollutant under the federal Clean Air Act and why there is an extensive, federally-mandated permitting process for major NOx emitters.

Complainants do not have to prove that an air quality standard has been violated or that someone has experienced health problems for the Board to weigh this Section 33(c) factor against a respondent that has unlawfully emitted pollutants into our air. The General Assembly recognized that an effective environmental protection system must prohibit even threats of air pollution. *See* 415 ILCS 5/9(a) (2000) ("No person shall . . . [c]ause or *threaten* or allow the discharge or emission of any contaminant into the environment in any State so as to cause *or tend to cause* air pollution in Illinois . . . .") (emphasis added). Panhandle's NOx emissions exceeded the 461.3 TPY limit each year for at least ten years by very large margins, typically by several hundred tons of NOx each year. For example, NOx emissions from the four engines in 1995 and 1996 were, respectively, 1014.93 tons and 1173.69 tons, more than doubling the limit in the minor source permit.

Nor do Panhandle's violations occur in a vacuum. As Panhandle points out, it is not the only source permitted to emit NOx in Sangamon County. The cumulative effect of multiple violations by Panhandle and other sources could endanger the air quality of Sangamon County. Further, excess NOx emissions from sources across Illinois also can negatively impact ozone levels in the Chicago and East St.Louis ozone nonattainment areas. The General Assembly also recognized that air pollution can result from many sources when it prohibited contaminant emissions causing or tending to cause air pollution "either alone or in combination with contaminants from other sources." *See* 415 ILCS 5/9(a) (2000).

Moreover, the Agency issued, and Panhandle accepted, a PSD avoidance permit, the purpose of which was to allow Panhandle to increase its NOx emissions slightly, without having to undertake the costly and time-consuming PSD review. Therefore, when it applied for a minor source permit, Panhandle would have avoided performing an expensive analysis of the impact of its NOx emissions on ambient air quality. The absence of such evidence in the record now is of no aid to Panhandle. Panhandle's failure to comply with its PSD avoidance permit over the course of at least 10 years defeats the purpose of the PSD program—to protect against the degradation of air quality in attainment areas. Panhandle's noncompliance jeopardizes the Agency's ability to effectively administer the federally-delegated PSD program and thereby seriously interferes with the "*protection* of the health . . . of the people." 415 ILCS 5/33(c)(i) (2000) (emphasis added). The Board weighs this Section 33(c) factor against Panhandle.

Social and Economic Value of Pollution Source. The People do not dispute that Glenarm Station has social and economic value. Panhandle maintains that engines 1116-1119 play an important role in supplying natural gas to users in Illinois and elsewhere. The Board weighs this Section 33(c) factor in favor of Panhandle.

Suitability of Pollution Source. Glenarm Station has operated for more than 60 years. The area of Sangamon County in which Glenarm Station is located is rural and lightly populated. The Board finds that Glenarm Station is suitably located and weighs this Section 33(c) in favor of Panhandle.

Technical Practicability and Economic Reasonableness of Compliance. Panhandle concedes that it was technically practicable and economically reasonable to install emission control technology on the engines when they were installed in 1988. However, Panhandle emphasizes that it is more costly now to add control technology to engines that are fully assembled and operational. Pan. Br. at 39.

The Board finds that, although more complex and expensive now than in 1988, installing emission control technology now is both technically practicable and economically reasonable. Panhandle does not argue otherwise. Additionally, it was technically practicable and economically reasonable for Panhandle to evaluate its compliance with the permit, and determine that it could not comply with the annual NOx emission limit long before the Agency discovered the exceedences.

Finally, Panhandle has reduced NOx emissions from engines 1116-1119 through its environmental dispatch program. Under this program, Panhandle operates other engines before running engines 1116-1119. Panhandle's NOx emissions from engines 1116-1119 decreased in 1998 to 550.59 TPY. Accordingly, in addition to adding emission control technology to the engines, Panhandle can reduce NOx emissions from the four engines through operational changes. The Board finds that this type of operational control is also technically practicable and economically reasonable. The Board weighs this Section 33(c) factor against Panhandle.

Subsequent Compliance. Panhandle has not come into compliance with either the NOx limit of its minor source permit or the PSD program. The Board weighs this Section 33(c) factor against Panhandle.

Civil Penalty and Section 42(h) of the Act

Maximum and Requested Civil Penalties. The maximum civil penalties the Board can assess are established in Section 42(a) of the Act, which provides in part:

> [A]ny person that violates any provision of this Act or any regulation adopted by the Board, or any permit or term or condition thereof . . . shall be liable to a civil penalty of not to exceed $50,000 for the violation and an additional civil penalty of not to exceed $10,000 for each day during which the violation continues . . . . 415 ILCS 5/42(a) (2000).

Panhandle violated Sections 9.1(d)(1) and 9.1(d)(2) by constructing and operating a major modification without complying with PSD requirements, including BACT. Panhandle installed engines 1116-1119, and began operating them, in 1988. Panhandle has yet to comply with PSD, though it applied for a PSD permit in August 1999, after the People filed this complaint.

Panhandle also violated Section 9(b) of the Act by emitting NOx in excess of its permitted 461.3 TPY limit. The calculations in the record show that Panhandle violated this limit each year from 1989 to 1998. Panhandle operated the engines for only part of 1988, and there is no evidence of an exceedence in that year. Panhandle admits that it has emitted NOx from the four engines in amounts greater than the permit limit beginning in 1989 (the first full year that the four engines operated) and continuing through 1998 (the last full year of operation before the People filed this complaint). Ans. at 14.

Panhandles's most recent permit expired on June 26, 1998. However, Section 39.5(4)(b) of the Act provides:

> An owner or operator of a CAAPP [Clean Air Act Permit Program] source shall continue to operate in accordance with the terms and conditions of its applicable State operating permit notwithstanding the expiration of the State operating permit until the source's CAAPP permit has been issued. 415 ILCS 5/39.5(4)(b) (2000).

Panhandle submitted a CAAPP application to the Agency before the August 1996 inspection of Glenarm Station. Under Section 39.5(4)(b) of the Act, Panhandle must still comply with its operating permit, including the 461.3 TPY NOx emission limit. Accordingly, Panhandle remained subject to, and violated, its operating permit, even though it expired.

Pursuant to Section 42(a) of the Act, the Board could impose a $50,000 civil penalty for each violation and a $10,000 civil penalty for each day the violation continues. Section 42(a) was amended July 1, 1990, having previously authorized maximum civil penalties of $10,000

per violation and $1,000 per day of continuing violation. Even if the Board applied the lower maximum penalties under the old law for the violations through the first half of 1990, and the current maximum penalties thereafter, the total possible civil penalty for these violations easily exceeds $60 million.

The People ask the Board to impose a total civil penalty of $2,218,759 on Panhandle for the violations. People Br. at 138. Of this proposed amount, the People base $1,590,000 on the gravity of the violations, and $628,759 on the economic benefit that Panhandle received from delaying compliance. *Id.* at 52, 82, 84, 104.

Panhandle states that it received no economic benefit from delayed compliance. Panhandle argues that, if the Board imposes any civil penalty, the amount should be much lower than that suggested by the People. Panhandle asserts that the facts of this case warrant a much lower penalty amount attributable to the gravity of the violations, such as $10,000-$20,000 per year. Panhandle maintains that any penalty period should be no more than eight years, 1989 through 1996. According to Panhandle, the Board should not assess a gravity-based penalty for any noncompliance after 1996 because “Panhandle reduced emissions from the four engines through its environmental dispatch program and took other measures to achieve compliance” after learning of the exceedences. Pan. Br. at 89-90. Panhandle therefore suggests that if the Board imposes any civil penalty, it should be no more than $80,000-$160,000 for all violations.

Section 42(h). Section 42(h) of the Act (415 ILCS 5/42(h) (2000)) authorizes the Board to consider the impact of any matter of record in determining an appropriate civil penalty. Section 42(h) provides:

> (h) In determining the appropriate civil penalty to be imposed under subdivision[] (a) . . . of this Section, the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors:
>
> (1) the duration and gravity of the violation;
>
> (2) the presence or absence of due diligence on the part of the violator in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;
>
> (3) any economic benefits accrued by the violator because of delay in compliance with requirements;
>
> (4) the amount of monetary penalty which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance with this Act by the violator and other persons similarly subject to the Act; and

> (5) the number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator. 415 ILCS 5/42(h) (2000).

The Board considers each of these factors in turn.

Duration and Gravity of Violations. Panhandle has been violating PSD requirements since 1988, and continues to operate a major modification without a PSD permit. The PSD program is a very important part of the federal Clean Air Act and Illinois' effort to preserve its air quality. Panhandle has also violated the 461.3 TPY NOx permit condition for at least ten years, emitting an unauthorized 3341.67 tons of the pollutant NOx into the air from 1989 through 1998. The Board finds that these violations have been going on for a very long time and are very serious. The Board weighs this Section 42(h) factor in aggravation of penalty.

Diligence in Attempting to Comply. The Board finds that it was unreasonable for Panhandle to rely *solely* on Agency inspections and permit renewals to determine its compliance with the permitted NOx limit. Panhandle concedes that it simply "assumed that emissions from the four new engines would be less than from the twelve old engines." Pan. Br. at 2. The Act requires more. Companies cannot do business in Illinois and simply assume that they are not violating Illinois' environmental laws.

As discussed, Panhandle could have readily verified its compliance status. The permit requires Panhandle to keep records of the hours of operation and the fuel use of the four new compressor engines. Panhandle kept those records. This information, along with the readily available standard emission factor, was all that Panhandle required to calculate the four engines' NOx emissions and compare them to the permit limit. For the annual emission reports, Panhandle's Houston staff calculated emissions of NOx from each of the engines at Glenarm Station. Panhandle's failure to determine its compliance status before the Agency informed it of the exceedences demonstrates a blatant lack of diligence by Panhandle.

It is true that since receiving the 1997 violation notice, Panhandle has changed its operations to reduce NOx emissions from engines 1116-1119. Through its environmental dispatch program, Panhandle decreased the four engines' NOx emissions from an all-time high of 1173.69 tons in 1996 to 550.59 tons in 1998, though the latter amount is still approximately 90 tons above the permit limit. Panhandle also sought to have the Agency issue a new minor source permit with a higher NOx emission limit for the four engines, and to add emission controls to engines 1116 and 1117. In addition, in August 1999, after the People filed this complaint, Panhandle applied for a PSD permit. This permit application proposes to install "Clean Burn" technology for engines 1116 and 1117, and to upgrade the emission control technology on engines 1118 and 1119.

These operational and administrative efforts since receiving the Agency's notice weigh somewhat in Panhandle's favor. However, they did take place only in the face of looming enforcement and have not resulted in compliance. Panhandle's alarming lack of diligence during the many years before then requires the Board to weigh this Section 42(h) factor in aggravation of penalty.

Economic Benefit Accrued. To assess any economic benefit that Panhandle accrued from delayed compliance, both parties measured (1) the initial capital costs that Panhandle would have incurred to install "Clean Burn" emission control technology on engines 1116 and 1117 and (2) the associated annual operating costs that Panhandle would have incurred. Further, both parties used the weighted average cost of capital (WACC) to calculate this economic benefit. The WACC combines the cost of debt and capital and weighs these costs based on a proportion of a company's debt and equity to determine that company's cost of capital, *i.e.*, its cost of obtaining money. The WACC incorporates the time value of money. Tr. at 166, 178-80, 195, 229-30, 352-55, 357, 919, 926. The WACC has been accepted in federal court to determine economic benefit from violating environmental requirements. *See* United States v. Smithfield Foods, Inc., 191 F.3d 516, 529-31 (4th Cir. 1999). To calculate Panhandle's WACC, both parties used data on Panhandle's former parent company, Panhandle Eastern Corporation, which changed its name to PanEnergy Corp. in the mid-90's. Panhandle, as a wholly-owned subsidiary, was financially managed by its parent corporation. Tr. at 180, 295, 358-60; H.O. Exh. 1-10

The People state that "[b]ecause of the high costs often associated with environmental control expenditures under the PSD program, the incentives for delayed or avoided costs that might be derived by one competitor over the other are more prevalent or likely to occur." People Br. at 83. The People's financial expert, Dr. John Nosari,[12] calculated a WACC for Panhandle. Tr. at 358, 362-88, 390-91; People Exh. 7, 25-27; H.O. Exh. 1, 4, 5, 7, 8. Using Dr. Nosari's WACC calculations, Mr. Gary Styzens of the Agency[13] assessed Panhandle's economic benefit. The People assert that Panhandle's economic benefit from delayed compliance is $628,759. The People derived this figure from an initial capital investment of $285,328 for the emission controls and a total cost of $355,431 to operate and maintain the controls, reduced by $12,000 to reflect partial years of noncompliance (1988 and 1999) for the calculation. These figures were adjusted for inflation and exclude tax benefits. Tr. at 195, 198-216, 229-32, 235, 238, 240-41, 245-50, 293-95, 320, 368-69, 394-95, 1309-33; People Exh. 8-10, 18-20; People Br. at 106-13.

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[12] Dr. Nosari received his Ph.D. in Business Administration from St. Louis University, majoring in accounting and minoring in finance. He is a licensed Certified Public Accountant and holds the professional designation of a Certified Internal Auditor. He has taught for over 20 years in courses that include accounting, finance, and auditing. Dr. Nosari is currently an Associate Professor of Accountancy at the University of Illinois at Springfield. Tr. at 343-51; People Exh. 24.

[13] Mr. Styzens is a Certified Internal Auditor with the Agency. He has approximately 15 years of field experience in auditing, and received a Masters in Business Administration in 1983 from Southern Illinois University. Mr. Styzens joined the Agency in 1991 as an audit supervisor, which is his current position. For the last five years, Mr. Styzens has performed audits relating to economic benefit from noncompliance. Tr. at 155-72; People Exh. 6.

Panhandle's financial expert, Mr. Jasbinder Singh,[14] calculated a different WACC for Panhandle. He assessed Panhandle's economic benefit from delayed compliance to be $454,904 ($150,785 for capital costs plus $304,119 for operating costs).[15] These calculations of Panhandle and the People differ largely because components of the WACC were calculated differently, such as the growth rate of the parent corporation's stock. Panhandle used a growth rate of 2.07%, but the People used a growth rate of 8%. Mr. Singh used average stock prices over various time periods to calculate the growth rate, while Dr. Nosari used certain daily or spot stock prices. Both sides assert that the manner in which the other's expert calculated a growth rate is subject to manipulation. Tr. at 362-64, 375-80, 448-56, 463, 913, 923, 925-26, 932, 962-66, 1037, 1429-31, 1433-35, 1437; People Exh. 7, 26; Pan. Exh. 23; H.O. Exh. 1; People Br. at 92-94; Pan. Br. at 63-64, 76-77.

Using the calculation of either party, the economic benefit that Panhandle accrued was approximately half a million dollars. The Board finds that half a million dollars represents a good approximation of Panhandle's economic benefit from delayed compliance. That the respective experts used different underlying assumptions and still ended up with calculations of economic benefit in the same dollar range only fortifies the Board's finding.

Panhandle maintains, however, that it has received no economic benefit from delayed compliance. Panhandle offers two arguments for this position, each of which is based on the opinions of Mr. Singh. First, Panhandle argues that even if it had incurred the expense of installing the emission controls in 1988, the Federal Energy Regulatory Commission (FERC) would have allowed Panhandle to set its rates to recover that expense plus a reasonable return. Panhandle asserts that the FERC's rate structure would have provided a reasonable rate of return to Panhandle, regardless of whether Panhandle incurred the capital and operating costs of the emission controls. Pan. Br. at 54-57. Therefore, according to Panhandle, "no economic benefit component of a penalty would be necessary to put Panhandle in the same position it would have been in had it installed Clean Burn on engines 1116-1117 in 1988." *Id.* at 55.

The Board rejects this argument. Regardless of whether a company, FERC-regulated or otherwise, can pass its compliance costs along to its customers, avoiding those compliance costs (*i.e.*, having that money for other uses) is an economic benefit. Panhandle has enjoyed that benefit for years. Moreover, with the FERC's restructuring of the natural gas pipeline industry

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[14] Mr. Singh has a Bachelor of Technology degree in Civil Engineering from the Indian Institute of Technology and a Masters of Science degree in Civil Engineering from Carnegie-Mellon University. From 1970-1973, he was in the Ph.D program in regulatory economics at Carnegie-Mellon University. Mr. Singh has provided economic analysis of federal regulations for approximately 23 years and has provided litigation support related to economic benefit from noncompliance for the last 10 years. He has also written five published papers on economic benefit issues. Mr. Singh has a consulting business, Policy Planning & Evaluation, Inc. Tr. at 885-86, 901-03; Pan. Exh. 22.

[15] Despite this calculation, Mr. Singh's opinions about the Federal Energy Regulatory Commission and "retrofitting" costs are the basis for Panhandle's position that it has had no economic benefit from delayed compliance.

in the 80's and 90's, Panhandle faced increased levels of competition. Tr. at 827-38, 849, 854-57, 875-76, 1329, 1342-44, 1387-88. For example, to maintain existing customers and attract new ones, Panhandle charged at rates below what it was allowed to charge. Tr. at 828, 849, 855-56, 875-76. In doing so, Panhandle was not encumbered by these emission control compliance costs, as a compliant competitor so situated would have been. For its own economic benefit, Panhandle had ample incentive to keep its costs down. Tr. at 1329, 1342-44.

Second, Panhandle argues that it has received no economic benefit from delayed compliance because any calculated economic benefit to Panhandle is exceeded by the cost of "retrofitting" the engines with emission controls now. Panhandle asserts that it is more expensive to add the emission controls to these operating engines now than it would have been to install the controls in 1988 during the construction project. Panhandle dismantled and modernized the engines before installing them in 1988. Panhandle argues that the costs of adding "Clean Burn" technology today include not only the costs for updated technology but also the costs to take the engines apart again. Mr. Singh estimated that it would cost $943,948 to install "Clean Burn" control technology on engines 1116 and 1117 today. Tr. at 727, 947, 956, 962-65; Pan. Exh. 23, Tab. 3; Pan. Br. at 62-63.

The Board notes that the Fourth District Appellate Court has affirmed the Board's decision to impose a civil penalty based in part on a violator's economic benefit of delayed compliance. *See* ESG Watts v. PCB, 282 Ill. App. 3d 43, 52-53, 668 N.E.2d 1015, 1021-22 (4th Dist. 1996). In ESG Watts, the Board found that the economic benefit of paying landfill fees late was the interest rate on money the violator could have borrowed to timely pay the fees. *See* ESG Watts, 282 Ill. App. 3d at 49-50, 668 N.E.2d at 1020. The court upheld the Board's finding on economic benefit even though the violator had eventually paid its landfill fees. *See* ESG Watts, 282 Ill. App. 3d at 47, 51, 668 N.E.2d at 1018, 1021. That a violator will still incur costs to come into compliance does not eliminate the economic benefit of delayed compliance, *i.e.*, funds that should be spent on compliance were available for other pursuits.

Panhandle's retrofit argument also conflicts with the purpose of Section 42(h)(4)—deterring violations. Any extra compliance costs from retrofitting are self-imposed and exist solely because the violator did not pay to comply on time. Applying the retrofit argument could encourage companies to put off compliance or at least not be as diligent as they should be in monitoring compliance—any penalty that a company might face if it gets caught in violation could be diminished because the company did *not* spend money to comply when it should have. The deterrent effect of civil penalties is compromised if the violator gets "credit" for ignoring its legal obligations. Panhandle's argument turns one of the primary purposes served by civil penalties on its head and the Board rejects it.

Penalty Amount That Will Deter Further Violations and Aid in Enhancing Voluntary Compliance. The PSD violations have been going on for more than ten years, and the permit exceedences for at least ten years. The violations have undermined the ability of the PSD program to prevent degradation of air quality and resulted in thousands of unpermitted tons of the pollutant NOx being emitted into the air. Until it received notice of the exceedences from the Agency, Panhandle for years exhibited a troubling lack of diligence in determining its compliance status. This lack of diligence stands out given the ease with which Panhandle could

have determined its compliance status. This record does not demonstrate that Panhandle knowingly committed these violations before 1996 when it learned of the excess emissions problem from the Agency. However, even Panhandle suggests that up to $160,000 would be an appropriate penalty amount based solely on the gravity of the violations.

Under this Section 42(h) factor, to arrive at a penalty amount that will have a deterrent effect, the size of the violator is an appropriate consideration. *See* Charter Hall Homeowner's Assoc. v. Overland Transportation System, Inc., PCB 99-81, slip op. at 14 (May 6, 1999). Panhandle is a large corporation. It has operations in many states, including five compressor stations in Illinois. Panhandle spent approximately $15 to $20 million at Glenarm Station for the 1988 construction project alone. Panhandle has also had considerable parent corporations behind it. *See* United States v. Municipal Authority of Union Twp., 150 F.3d 259, 267-69 (3d Cir. 1998) (considering parent corporation's financial information when assessing penalty against subsidiary). For example, PanEnergy Corp.'s net income was $171.6 million in 1993 and $344.4 million in 1996. H.O. Exh. 9 at 37; H.O. Exh. 10 at 37. After PanEnergy Corp., Panhandle was owned by Duke Energy Corporation, a Fortune 500 company. Panhandle's current parent corporation, CMS Energy Corporation, is also a Fortune 500 company. Panhandle has also enjoyed an economic benefit of upwards of a half million dollars from delayed compliance.

Under these circumstances, the Board finds that a civil penalty of $850,000 is required to deter further violations by Panhandle and enhance voluntary compliance by Panhandle and other similarly situated entities. This dollar amount will help to ensure that Panhandle and companies like it actually review the permits they accept, and take the steps necessary to monitor their compliance, such as having basic communications between those employees familiar with engine emissions and those familiar with permit limits.

Previously Adjudicated Violations. The record contains no evidence that Panhandle has previously been adjudicated to have violated the Act. The Board weighs this Section 42(h) factor in mitigation of penalty.

Board Findings on Appropriate Remedy

The Board orders Panhandle to cease and desist from further violations of Sections 9.1(d)(1), 9.1(d)(2), and 9(b) of the Act. For these violations of PSD and permitting requirements, Section 42(a) of the Act authorizes the Board to impose a civil penalty in the tens of millions of dollars. The People seek approximately $2.2 million in civil penalties. Panhandle argues that no civil penalty is warranted, but if the Board awards any civil penalty, it should not exceed $160,000.

Panhandle argues that any penalty assessed against it should be mitigated because the Agency should have discovered the violations sooner, and the Agency's failure to find the violations sooner allowed Panhandle to continue violating the Act. As discussed above, however, the violations could have been avoided *entirely* if Panhandle had simply reviewed its permit in 1988 to see if the annual NOx limit would accommodate Panhandle's planned operations. Instead, Panhandle accepted the 1988 permit and then effectively ignored its

emission limit. Panhandle did not even become aware of its excess NOx emissions until eight years after accepting the minor source permit, and then only because the Agency found the problem.

Panhandle unlawfully emitted 3341.67 tons of NOx into the air over ten years. NOx is a pollutant. When unlawfully emitted into the air, it can result in health problems. Panhandle's violations also interfere with the Agency's ability to see that the PSD program prevents our air quality from deteriorating. PSD is a cornerstone of the federal Clean Air Act. The General Assembly found that PSD "regulate[s] the issuance of preconstruction permits to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources . . . ." 415 ILCS 5/9.1(a) (2000). Companies cannot be allowed to accept minor source permits for the purpose of avoiding the expenses of PSD compliance, and then have little, if any, regard for meeting their permitted emission limits.

While Glenarm Station has social and economic value and is suitably located, Panhandle has had technically practicable and economically reasonable means to comply and is still out of compliance. Panhandle's delays have also given it considerable economic benefit over the years. Though Panhandle has made efforts to comply, these came only with enforcement clouds gathering. Panhandle is a large corporation with multi-state operations. Panhandle could have readily prevented these lengthy and serious violations by exercising minimal due diligence, but it failed to do so. Companies doing business in Illinois must at least take the basic steps necessary to determine whether they are complying with the permits they hold. Neither Panhandle nor any other company can foist that responsibility on the Agency. Panhandle ultimately has only itself to blame for these major violations.

After considering the factors of Sections 33(c) and 42(h) of the Act, the Board orders Panhandle to pay a civil penalty of $850,000. Consistent with Section 42(a) of the Act, the Board orders Panhandle to pay this civil penalty to the Environmental Protection Trust Fund. *See* 415 ILCS 5/42(a) (2000).

Costs and Attorney Fees

The People request $128,902.25 in costs and attorney fees pursuant to Section 42(f) of the Act (415 ILCS 5/42(f)(2000)), which provides in part:

> Without limiting any other authority which may exist for the awarding of attorney's fees and costs, the Board or a court of competent jurisdiction may award costs and reasonable attorney's fees, including the reasonable costs of expert witnesses and consultants, to the State's Attorney or the Attorney General in a case where he has prevailed against a person who has committed a willful, knowing or repeated violation of the Act. 415 ILCS 5/42(f)(2000).

It is undisputed that Panhandle, even after learning of its excess emissions problem from the Agency, has continued to operate the four engines without a PSD permit or BACT and to emit NOx above the 461.3 TPY limit. Panhandle has therefore knowingly violated the Act since it became aware in 1996 that it was exceeding its permit limit. *See* People v. Kershaw, PCB 92-

164, slip. op. at 8 (Apr. 8, 1993) (violations were "knowing" when they continued after respondent was notified of violations). In addition, Panhandle first violated its annual NOx limit in 1989. By exceeding that annual permit limit each year thereafter, Panhandle repeatedly violated Section 9(b) of the Act. Accordingly, under Section 42(f), Panhandle repeatedly and, since 1996, knowingly violated the Act. The Board therefore may award reasonable costs and attorney fees to the People.

Of the People's requested $128,902.25 in fees and costs, $113,298 represents attorney fees and $15,604.25 represents costs. The attorney fees consist of 944.15 hours at $120 per hour. The costs reflect deposition transcript charges for 11 witnesses ($2,329.25) and the fees of an expert witnesses, Dr. Nosari ($13,275). Dr. Nosari's fees represent 189 hours of consulting at $50 per hour and 45 hours of litigation support at $85 per hour. These costs and fees are supported by affidavits. People Br. at 136-37, Att.1; People Reply Br. at 65, Add.

The Board notes that of the 944.15 attorney hours, 109.6 hours were spent on three of the People's motions: (1) the People's December 26, 2000 motion to reverse the hearing officer's ruling to exclude from evidence People's Exhibit 5, a letter from USEPA to the Agency; (2) the People's February 28, 2001 motion to strike portions of Panhandle's response brief; and (3) the People's March 12, 2001 motion for the Board to reconsider its February 1, 2001 order affirming the hearing officer's ruling to exclude the People's Exhibit 5. People Br., Att. 1; People Reply Br., Add. Panhandle opposed and the Board denied each of these motions. *See* Panhandle, PCB 99-199, slip op. at 5 (Oct. 18, 2001).

Panhandle "committed . . . knowing [and] repeated violation[s] of the Act." 415 ILCS 5/42(f) (2000). Panhandle's efforts to comply have not resulted in compliance and have come only when confronted with the prospect of enforcement. Given the rates charged and the complexity of prosecuting this case, the Board finds that the People's costs and attorney fees are reasonable. *See*, *e.g.*, People v. Spirco Environmental, Inc., PCB 97-203, slip op. at 2 (finding rate of $120 per attorney hour to be reasonable). However, the Board will not order Panhandle to pay attorney fees for the People's three unsuccessful motions described above. In so doing, the Board is not finding that the People's motions were frivolous. Rather, the Board is exercising its discretion, under Section 42(f) of the Act, by not requiring Panhandle to pay $13,152 in attorney fees that are attributable solely to motions on which the People did not prevail. The Board therefore orders Panhandle to pay $115,750.25 of the People's costs and attorney fees. Under Section 42(f), Panhandle must pay these costs and fees to the Hazardous Waste Fund. *See* 415 ILCS 5/42(f) (2000).

CONCLUSION

The Board finds that Panhandle violated the requirements of the Act for at least ten years. These requirements include PSD restrictions on pollutant emissions under the federal Clean Air Act, which are designed to ensure that our air quality does not deteriorate. When Panhandle undertook a construction project in 1988, it accepted a NOx emission limit in a minor source permit to avoid the expenses of PSD. With the minor source permit, Panhandle proceeded to do business in Illinois while repeatedly emitting far more NOx than its permit allowed. Panhandle's NOx emissions from the four new engines were dramatically higher than its emissions from the

12 retired engines in the year before the construction project. In short, Panhandle accepted a permit that it could not live with, which allowed it to avoid PSD compliance costs.

Before 1996 when the Agency discovered Panhandle's excess emissions, Panhandle made no effort to determine its compliance status. Doing so would have been easy for Panhandle. Unfortunately, at Panhandle, the left hand did not know what the right hand was doing, and *vice versa*. Panhandle staff who knew how much NOx was being emitted did not know about the permit limit, while staff who knew about the permit limit did not know how much NOx was being emitted. Responsibility for a company's compliance with its air permit must rest with that company.

The Board orders Panhandle to cease and desist from further violations and to pay a civil penalty of $850,000. The Board also awards the People $115,750.25 in costs and attorney fees because Panhandle repeatedly and, since 1996, knowingly violated the Act.

This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

1. The Board finds that Panhandle Eastern Pipe Line Company (Panhandle) violated Sections 9(b), 9.1(d)(1), and 9.1(d)(2) of the Environmental Protection Act (Act) (415 ILCS 5/9(b), 9.1(d)(1), 9.1(d)(2) (2000)).

2. Panhandle must cease and desist from any further violations of Sections 9(b), 9.1(d)(1), and 9.1(d)(2) of the Act.

3. No later than January 15, 2002, which is the 60th day after the date of this order, Panhandle must pay $850,000 in civil penalties and $115,750.25 in costs and attorney fees of the People of the State of Illinois. Panhandle must pay the civil penalty by certified check or money order, payable to the Environmental Protection Trust Fund. Panhandle must pay the costs and attorney fees by certified check or money order, payable to the Hazardous Waste Fund. The case number, case name, and Panhandle's social security number or federal employer identification number must be included on each certified check or money order.

4. Panhandle must send each certified check or money order to:

   Illinois Environmental Protection Agency
   Fiscal Services Division
   1021 North Grand Avenue East
   P.O. Box 19276
   Springfield, Illinois 62794-9276

5. Penalties unpaid within the time prescribed will accrue interest under Section 42(g) of the Act (415 ILCS 5/42(g) (2000)) at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a) (2000)).

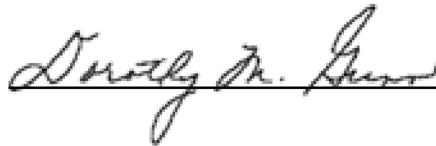
IT IS SO ORDERED.

Board Member R.C. Flemal concurred.

Board Member T.E. Johnson dissented.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2000); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on November 15, 2001, by a vote of 6-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board