BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	PCB No. 00-211
	)	
v.	)	(Enforcement-Air)
	)	
	)	
TOYAL AMERICA, Inc. formerly known as ALCAN-TOYAL AMERICA, INC., a foreign corporation,	)	
	)	
Respondent.	)	

NOTICE OF ELECTRONIC FILING

PLEASE TAKE NOTICE that on the 20th day of February, 2009, the Complainant filed its Closing Argument and Post-Hearing Brief, a true and correct copy of which is attached and herewith served upon you.

PEOPLE OF THE STATE OF ILLINOIS, *by* LISA MADIGAN
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COMPLAINANT'S CLOSING ARGUMENT AND POST-HEARING BRIEF

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

I. INTRODUCTION

On December 10th and 11th, 2008, hearing was held to determine liability and the appropriate penalty for the violations alleged by the State in Count I and II of the Complaint filed in this matter[1]. Counts I and II relate to the alleged failure to control volatile organic material emissions ("VOM") at Toyal America Inc.'s ("Toyal's") facility, located at 17401 South Broadway, Lockport, Will County, Illinois ("facility or site"), in violation of Section 9(a) of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/9(a) (2006), and 35 Ill. Adm. Code 218.986.

[1]Counts III-VII, relating to alleged hazardous waste storage and handling violations, were resolved through a Stipulation and Proposal for Settlement accepted by the Board on August 9, 2001.

II. SUMMARY OF THE RELIEF SOUGHT BY COMPLAINANT

Complainant seeks a finding of liability on Counts I and II of the Complaint, and assessment of a civil penalty in the amount of $716,440.00. Complainant also requests that the Board order Respondent to cease and desist from future violations of the Act and Board regulations.

III. THE EVIDENCE ESTABLISHES THE VIOLATIONS ALLEGED IN COUNTS I AND II OF THE COMPLAINT

A. Toyal Violated Section 9(a) of the Act and 35 Ill. Adm. Code 218.986 (Count II)

1. The Regulation Applies to Toyal's Facility

Part 218 of the Board Air Pollution Regulations, 35 Ill. Adm. Code, Part 218, establishes VOM emission standards and limitations for the Chicago area, which includes Will County, Illinois, where Toyal's facility is located[2]. On January 6, 1994, the Board adopted amendments to the Part 218 regulations, as required by Section 182(b)(2) of the federal Clean Air Act[3]. The amendments were required because the area had been designated as a severe ozone non-attainment area. The Board's Order required compliance with the amended regulations no later than March 15, 1995[4].

Subpart TT of the Part 218 regulations applies to "other emission units", which include the aluminum flake and paste operations at Toyal's facility. The VOM control requirements of

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[2]35 Ill. Adm. Code 218.103

[3]R93-14, Opinion and Order of the Board (January 6, 1994)

[4]Id., p.5

Subpart TT are applicable to Toyal's emission units because these units had the potential to emit in excess of 25 tons per year of VOM[5]. Toyal admits that it was subject to the requirements of 35 Ill. Adm. Code 218.986(a), Subpart TT, as of March 15, 1995[6]. Toyal also admitted that, as of April 18, 2001, emission units in its A-Unit, B-Unit, C-Unit, D-Unit, Aluminum Flake Process, FX Flake Process, and Sigma Mixer Process were subject to 81% VOM control in accordance with 35 Ill. Adm. Code 218.986(a), but were not in compliance[7].

2. Toyal Operated in Violation of 35 Ill. Adm. Code 218.986(a)

The evidence proves that Toyal operated in violation of the Part 218 regulations for more than eight years. Part 218, Subpart TT, Section 218.986(a), provides, in pertinent part, as follows:

> *Section 218.986* *Control Requirements*
>
> *Every owner or operator of an emission unit subject to this Subpart shall comply with the requirements of subsection (a), (b), (c), (d), or (e) below.*
>
> *a) Emission capture and control equipment which achieves an overall reduction in uncontrolled VOM emissions of at least 81 percent from each emission unit, or (Board Note: For the purpose of this provision, an emission unit is any part or activity at a source of a type that by itself is subject to control requirements in other Subparts of this Part or 40 CFR 60, incorporated by reference in Section 218.112, e.g., a coating line, a printing line, a process unit, a wastewater system, or other equipment, or is otherwise any part or activity at a source.)*
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> * * *

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[5]See: 35 Ill. Adm. Code 218.280(b). Toyal admits that its emission units had the potential to emit in excess of 25 tons per year VOM from March 15, 1995 through April 30, 2003. Complainant's Exhibit 17, Admitted Fact No. 11.

[6]Complainant's Exhibit 17, Admitted Fact No. 13

[7]Complainant's Exhibit 17, Admitted Facts No.'s 34-53.

Toyal was subject the VOM control regulations of Subpart TT from March 15, 1995 through April 30, 2003, because throughout that period its emission sources had the potential to emit in excess of 25 tons of VOM per year[8]. Toyal opted to reach compliance with Subpart TT by controlling VOM emissions by 81% pursuant to 35 Ill. Adm. Code 218.986(a)[9].

Toyal's facility contains a large number of VOM emission units which require 81% VOM control[10]. On March 6, 1996, Toyal submitted a Clean Air Act Permit Program Permit ("CAAPP") application to Illinois EPA. In its application, Toyal admitted that its emission units were not in compliance with 35 Ill. Adm. Code 218.986(a)[11]. At hearing, Toyal's Vice President of Operations also admitted that there was no question that Toyal was required to control emissions pursuant to the regulation as of March 15, 1995[12]. However, as admitted in its CAAPP application, at the time Toyal was not in compliance.

Toyal's first attempts at controlling excess VOM emissions was through the 1998 installation of a Recuperative Catalytic Oxidizer ("RCO") control device, which began operation on December 1, 1998[13]. However, at that time, many of Toyal's VOM emission units were not

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[8]Complainant' s Exhibit 17, Admitted Fact No. 11

[9]Complainant's Exhibit 17, Admitted Fact No. 18

[10]Toyal's consultant testified that there were "well over 200 VOM emission units" at Toyal's facility. Tr., 12/11/08, p. 69

[11]Complainant's Exhibit 17, Admitted Facts No. 15-16. At hearing, Barry Van Hoose, Toyal's Vice President of Operations, agreed that the 1996 permit application admitted violation of the Subpart TT regulations. Tr., 12/10/08, p. 113.

[12]Tr., 12/10/08, p. 182

[13]Tr., 12/10/08, p. 163

connected to the VOM control device, and Toyal remained out of compliance with the control requirements.

Toyal was still not in compliance on April 18, 2001, when it submitted a construction permit application for a substitute VOM control device[14]. In this application, Toyal identified seven major aluminum flake and past process units that were still not in compliance with 35 Ill. Adm. Code 218.986(a). The seven process units contained 83 separate VOM emission sources[15].

Pursuant to the Part 218 regulations, Toyal was required to demonstrate compliance upon attaining the required VOM emission reduction[16]. Toyal did not demonstrate compliance until April 30, 2003[17].

Based on the evidence, it is indisputable that Toyal failed to control all VOM emissions by 81% as required, and thereby violated 35 Ill. Adm. Code 218.986(a). Toyal also failed to control all VOM emissions from affected emission units subject to 35 Ill. Adm. Code 218.980. By discharging a contaminant into the Air in violation of the Board Air Pollution regulations, Toyal thereby also violated Section 9(a) of the Act, 415 ILCS 5/9(a)(2006). As shown by the facts admitted by Toyal, these violations continued from March 15, 1995 until April 30, 2003.

B. Toyal Caused, Threatened, or Allowed Air Pollution (Count I)

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[14]The proposed replacement device was a Regenerative Thermal Oxidizer

[15]Complainant's Exhibit 17, Admitted Facts No. 34-53. The reported emission 'sources' are emission 'units' for the purpose of 35 Ill. Adm Code 218.986(a).

[16]35 Ill. Adm. Code 218.991(a)

[17]Complainant's Exhibit 17, Admitted Fact No. 57

In Count I, Complainant alleges that, by failing to control VOM emissions according to the standards applicable to its industry, Toyal caused, allowed or threatened air pollution, in violation of Section 9(a) of the Act[18]. In this case, Toyal caused or allowed or threatened air pollution by failing to control VOM emissions in an ozone non-attainment area[19].

Pursuant to Section 182(b)(2) of the federal Clean Air Act ("CAA"), the Board developed regulations requiring "major" VOM sources to control emissions using reasonably available control technology ("RACT")[20]. In the Board Order adopting these standards, the Board noted that Illinois EPA had identified 88 sources in the Chicago non-attainment area which qualified as 'other [VOM] emission sources' that would be considered 'major' VOM sources under the new regulations[21]. Of these 88 sources, 45 had *actual* VOM emissions greater than 10 tons per year, and the basis for achieving RACT was determined on the basis of these 45 sources[22]. Toyal reported *actual* VOM emissions of 33 tons in 1990 and 28 tons in 1992[23]. In its 1996 CAAPP Permit application, Toyal reported VOM emissions in excess of 80 tons per year[24]. Clearly, the

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[18]Complaint, Count I, par. 18

[19]At the time the regulations were promulgated, Will County was classified as 'severe non-attainment' for ozone. R93-14 (January 6, 1994). Will County was still classified as an ozone non-attainment area as of the date of hearing. Tr., 12/11/08, p. 18.

[20]R93-14 (January 6, 1994 Order, slip op. at 1)

[21]Id., slip op. at 4.

[22]Id.

[23]Complainant's Exhibit 17, Admitted Fact No. 9

[24]Complainant's Exhibit 17, Admitted Fact No. 19. This disclosure was made for the purpose of a CAAPP fee determination and likely only represents a possible range of VOM emissions.

1994 amendments to the Part 218 regulations pertaining to 'other emission sources' were directed specifically to companies such as Toyal.

The Act prohibits causing, threatening or allowing emission of contaminants "...so as to cause or tend to cause air pollution in Illinois, *either alone or in combination with contaminants from other sources...*"(emphasis supplied)[25]. Because Toyal had actual emissions in excess of 25 tons prior to the amendments to the regulations, Toyal's emission units were possibly one of the 45 VOM sources for which the 81% control regulations were developed.

An ozone non-attainment area, by its very nature, is more susceptible to adverse impacts from excess VOM emissions due to existing ambient conditions. Additional uncontrolled VOM emissions, such as Toyal's, threatened the existing non-attainment area as a whole by threatening to worsen air quality. Toyal's failure to control VOM emissions as required, while continuing to operate in a severe ozone non-attainment area, ' tended to cause' air pollution. By failing to control VOM emissions at its facility as required by 35 Ill. Adm. Code 218.986(a), Toyal, alone and in combination with other VOM sources, caused, or tended to cause air pollution from March 15, 1995 to April 30, 2003, and thereby violated Section 9(a) of the Act, 415 ILCS 5/9(a) (2006), as alleged in Count I.

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

In making its orders, the Board is directed to consider matters of record concerning the reasonableness of the alleged pollution, including those factors identified in Section 33(c) of the

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[25]415 ILCS 5/9(a) (2006). Note that the term 'contaminant' is defined in 415 ILCS 5/3.165 (2006) to include "...any solid, liquid or gaseous matter...". VOM is a 'contaminant' under the Act.

Act, 415 ILCS 5/33(c) (2006). The Board is also authorized by the Act to consider any matters of record concerning the mitigation or aggravation of penalty, including those matters specified in Section 42(h).

A. Section 33(c) Factors

Section 33(c) of the Act, 415 ILCS 5/33(c) (2006), provides, as follows:

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

1. The evidence demonstrates that Toyal's excess VOM emissions interfered with protection of the health and general welfare of the people

During the documented period of noncompliance, Toyal failed to control 81% of VOM from its emission sources, in violation of the Board's emission standards for major VOM sources, i.e. sources that have the potential to emit ("PTE") 25 tons of VOM per year.

Section 110 of the CAA required states to develop regulations and control strategies to address air pollution within their jurisdictions, for approval by the United States Environmental

Protection Agency ("USEPA"). To be approved, the regulations needed to meet Federal requirements, and could not adversely impact attainment of the National Ambient Air Quality Standards ("NAAQS").

As part of its aluminum manufacturing operation, Toyal was operating equipment that emitted VOM without providing the environmental protections that the Board intended. VOM is an air contaminant that can result in ozone formation, causing a threat to human health. The Board adopted the amended Part 218 regulations to improve ozone air quality in the greater Chicago area, by expanding the existing requirement that major sources of VOM "utilize reasonably available control technology ("RACT") to all sources in the Chicago ozone nonattainment area which emit or have a potential to emit 25 tons per year VOM."[26]

Toyal operated a manufacturing plant that was located in a severe ozone nonattainment area that was classified as "severe." As required by Section 182 of the CAA, sources in ozone nonattainment areas classified as severe must have RACT if they have the potential to emit 25 tons of VOM annually. However, Toyal did not comply with the RACT control requirements, and consequently allowed its VOM emissions to exceed the 81% control requirement each year for eight years.

These emissions adversely affected the ozone non-attainment area and air quality in Will County. The greater the increase in excess emissions to the atmosphere in this area, the greater potential threat is posed to the NAAQS. Toyal's increased VOM emissions must be considered in conjunction with the cumulative effects of increased emissions elsewhere in the non-

[26]R93-14 (January 6, 1994 Order, slip op. at 1)

attainment area. The cumulative impacts on air quality could be severe if each source in the non-attainment area violated these Board emission standards for VOM.

Toyal's noncompliance for eight years impeded federal and state efforts to reduce the sources of VOM levels, and thereby seriously interfered with the "*protection* of the of the health, general welfare and physical property of the people." 415 ILCS 5/33(c)(i) (2006) (emphasis added).

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

The Complainant does not dispute that Toyal's aluminum paste and flake manufacturing facility has social and economic value since a business entity which employs people and supplies products on the open market has a certain degree of social and economic. However, a facility that operates in violation of regulations is a social and economic detriment.

The Board has previously found that a pollution source typically possesses a "social and economic value" that is to be weighed against its actual or potential environmental impact. *People v. Waste Hauling Landfill, Inc., and Waste Hauling, Inc.*, PCB No. 95-91 (May 21, 1998). Toyal's failure to reduce its VOM emissions in an area of severe non-attainment for ozone for an extended period of time was a detriment to the site and surrounding area, which therefore, would diminish the social and economic value of the source.

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

Operation of Toyal's facility is suitable for the site and surrounding area provided it is operated in compliance with the Act and Board Air Pollution Regulations. However, over a period of eight years, Toyal failed to demonstrate that its control equipment was reducing VOM

emissions by at least 81% as required by Section 218.986(a) of the Board Air Pollution Regulations.[23] By failing to comply with these requirements, Respondent's facility contributed VOM to an area that is non-attainment of the NAAQS for ozone. Thus, during the time Respondent was out of compliance, its facility was not suitable to the area.

4. The evidence proves that compliance was technically practicable and economically reasonable

The evidence clearly shows that it was technically practical and economically reasonable for Toyal to comply with the Act and Board Air Pollution Regulations by reducing its VOM emissions by at least 81%.

In the Board's January 6, 1994 Order adopting the amendments to 35 Ill. Adm. Code 218, Subparts AA, PP, QQ, RR and TT, and concluding that RACT for a 25-ton PTE source was 81% control at each emission unit, the Board also expressly concluded that "these requirements are technically feasible and economically reasonable.[24] Also, the Board should take note that when Toyal replaced its VOM control system in 2005, it was able to arrange for permitting, construction, and operation of the new control device within one year[25]. Thus, the evidence shows that it was both technically feasible and economically reasonable to require Toyal to implement the proper control equipment at its facility to come into compliance with the Act upon the date the regulations came into effect.

5. After eight years of violation, Toyal came into compliance

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[23] On April 17, 1995, Respondent submitted an application to Illinois EPA for a CAAPP permit for the Regenerative Catalytic Oxidizer ("RCO"). Under its CAAPP permit, Toyal was required to submit compliance certification that demonstrated the RCO was reducing VOM emissions by at least 81%.

[24] R93-14 (January 6, 1994 Order, slip op. at 4)

[25] Tr. 12/10/08, pp. 112-112

The Complainant acknowledges that Toyal is presently in compliance with its VOM control requirements. However, Toyal achieved compliance after continuously violating the Act for eight years. Toyal initially proposed to Illinois EPA in 1996 that it would apply for a construction permit for control equipment to meet the 81% control requirements by February 1998 and demonstrate compliance by November 1998.[26] However, after numerous requests for extensions of time, Toyal finally demonstrated compliance on April 30, 2003.

In addition, Toyal's efforts to implement measures to reduce its VOM emissions by 81% should not be deemed a mitigating factor if compliance is achieved only after enforcement proceedings are initiated. *ESG Watts, Inc. v. IPCB*, 282 Ill. App. 3d 43, 53-53 (4th Dist. 1996) ("Evidence...presented regarding petitioner's failure to comply with many regulations until after enforcement proceedings were initiated, of the hardship imposed upon the Agency in collecting monies due and the necessity of deadlines to ensure the smooth operation of the Agency. The Board's decision that a stiff penalty was warranted to deter future violations was neither arbitrary nor capricious."). Respondent first demonstrated compliance with the control requirements of 35 Ill. Adm. Code 218.986(a) on April 30, 2003, three (3) years after this case was filed.[27]

6. Conclusion

A review of the evidence shows that a significant civil penalty is both appropriate and necessary to aid in enforcement of the Act.

V. AFTER CONSIDERATION OF THE 42(h) FACTORS, THE BOARD SHOULD ASSESS A CIVIL PENALTY OF $716,440.00

A. Statutory Maximum Civil Penalties

[26]Complainant's Exhibit 17, Admitted Fact No. 18
[27] Complainant's Exhibit 17, Admitted Fact No.57

The evidence at hearing demonstrates that the Respondent has violated the Act and Board Air Pollution Regulations. Section 42(a) of the Act permits the Board to impose penalties against those who violate any provision of the Act or regulation adopted by the Board, 415 ILCS 5/42(a) (2006). The Board may impose a maximum penalty of $50,000.00 for each violation of the Act, and an additional $10,000.00 penalty for each day the violation continues, 415 ILCS 5/42(a) (2006). In our case, the State has proved at least two violations of the Act, i.e. Section 9(a): Regulatory Violation (35 Ill. Adm. Code 218.986); and 9(a): Air Pollution.

Respondent violated Section 9(a) of the Act, 415 ILCS 5/9(a) (2006), by failing to capture and control at least 81% of its VOM emissions as required by Section 218.986(a) of the Board Air Pollution Regulations. Respondent admits that it exceeded this 81% VOM emission limit from 1995 to 2003.[28] This represents a period of 2,986 days. Therefore, statutory daily penalties for Count II alone would amount to $29,860,000.00. With an additional $50,000.00 per violation, and the total statutory violations for Count I, the total penalty recoverable rises to $59,820,000.00. Complainant requests at a minimum that the Board impose a total civil penalty of $714,000[29] on Respondent for the violations.

B. Section 42(h) Factors

Section 42(h) of the Act, 415 ILCS 5/42(h) (2006), authorizes the Board to consider the impact of any matter of record in determining an appropriate civil penalty.

Section 42(h) provides:

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[28] Complainant's Exhibit 17, Admitted Facts No. 15-16, 21, 26-28, 35, 38, 41, 44, 47, 50, 52, 55 and 57

[29] This amount reflects a total benefit of $314,000 that Respondent received from delaying compliance, and $400,000 for gravity, duration, lack of diligence, and deterrence.

(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 respondent in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;

(3) any economic benefits accrued by the respondent because of delay in compliance with requirements, ... ;

(4) the amount of monetary penalty which will serve to deter further violations by the respondent and to otherwise aid in enhancing voluntary compliance with this Act by the respondent and other persons similarly subject to the Act;

(5) the number, proximity in time, and gravity of previously adjudicated violations of this Act by the respondent;

(6) whether the respondent voluntarily self-disclosed, in accordance with subsection (i) of this Section, the non-compliance to the Agency; and

(7) whether the respondent has agreed to undertake a "supplemental environmental project,"...

1. Duration and Gravity

A civil penalty imposed under the Act must "bear some relationship to the seriousness of the infraction or conduct" of the polluter. *Southern Illinois Asphalt Company v. Pollution Control Board*, 60 Ill. 2d 104, 326 N.E. 2d 406, 412 (1975); *Trilla Steel Drum Corp. v. Pollution Control Board*, 180 Ill. App. 3d 1010, 1013 (1989) (penalty should be "commensurate with the seriousness of the infraction"). The Act "authorizes the Board to assess civil penalties for violations regardless of whether these violations resulted in actual pollution." *ESG Watts*, 282 Ill.

App. 3d at 51. Accordingly, the Board should consider both the seriousness and duration of the VOM emissions violations committed by Toyal.

Toyal failed to control its affected VOM emissions as required under Subpart TT of the Part 218 regulations for more than eight years. The violations began on the date the regulations became effective, March 15, 1995. Although it was aware of this effective date, Toyal admits failing to comply with Subpart TT, Part 218 standards every year after March 15, 1995, up to April 30, 2003.

The extended period of violation should weigh heavily against Toyal. *See*, *People of the State of Illinois v. Panhandle Eastern Pipe Line Company*, PCB 99-191 (November 15, 2001, slip op. at 29) (long period of violations was an aggravating factor for purpose of penalty); *United States v. Marine Shale Processors*, 81 F3d 1329 (5th Cir. 1996) ($2,500,000 penalty for twenty-nine unpermitted minor sources occurred over approximately eleven-year period).

Toyal's violations were also significant because they occurred in an ozone non-attainment area and should be considered in conjunction with the cumulative effects of increased emissions elsewhere in the non-attainment area.

The greater the increase in excess emissions to the atmosphere, the greater potential threat is posed to the NAAQS. *See, People of the State of Illinois v. Blue Ridge Construction Corp.*, PCB 02-115, 2004 WL 2347631, *15 (October 7, 2004) ("Because of asbestos' harmful nature and because it risked contamination of air, soil and water, the Board finds that the duration and gravity of these violations must be considered an aggravating factor in determining the amount of a civil penalty.").

Toyal's violations should be considered to have a high degree of gravity.

2. The Evidence Shows a Serious Lack of Due Diligence over Eight Years of Noncompliance

The evidence shows that Toyal demonstrated an absence of diligence in complying with the Act, and that it never sought relief from the applicable provisions of the Act. The evidence also shows that Toyal placed very little value on environmental compliance during the relevant period. Toyal's lack of diligence must be considered as a serious aggravating factor in the Board's consideration of civil penalty.

Lack of Diligence in Identifying Violations

Toyal claims that it first learned of the control requirements of the Subpart TT regulations in early 1995. Specifically, Toyal Vice President Barry Van Hoose testified that they learned of the regulations on or about February 27, 1995, which left them insufficient time to control emissions[30]. If this claim is taken as true, it proves a serious absence of diligence in identifying the major environmental regulations applicable to its facility.

Well before the March 15, 1995 compliance deadline date for 35 Ill. Adm. Code 218.986, Toyal had been in correspondence with Illinois EPA regarding applicability of the Subpart TT regulations. As admitted by Toyal, in early 1992 Illinois EPA requested information specific to Subpart TT. Toyal provided the information in May, 1992[31]. Clearly, by that date, Toyal had notice that their VOM emissions were potentially subject to the Subpart TT regulations. The amended regulations were promulgated on January 6, 1994. Toyal then had fourteen months to learn of the applicability of the 81% VOM control requirement, and to install controls before the VOM emissions limitations of 35 Ill. Adm. Code 218.986 became effective on March 15, 1995.

[30]Tr., 12/10/08, p.178

[31]Complainant's Exhibit 17, Admitted Facts 6, 7, 8

Contrary to Respondent's assertions, Toyal clearly had sufficient time to install controls by the compliance date. Moreover, Toyal's current control device, a Catalytic Recuperative Oxidizer ("CRO"), was permitted, constructed, and began operation within one year[32]. However, if Toyal believed that it did not have sufficient time to attain compliance, Toyal surely had time within fourteen-month period to seek regulatory relief, either through variance or adjusted standard. But at no time did Toyal ever seek regulatory relief[33].

There was no question that Toyal's facility was covered by the new regulations: it had reported actual VOM emissions of 28 and 33 tons to the Agency for the years 1990 and 1991[34]. Furthermore, as a major VOM source in an ozone non-attainment area, Toyal had an affirmative duty to apprise itself of the air pollution regulations applicable to its facility. If, in fact, it did not learn of the control requirements of the 35 Ill. Adm. Code 218.986 until late February, 1995, Toyal demonstrated a serious lack of diligence.

Lack of Diligence In Installation of RCO

When Toyal submitted its CAAPP application on March 5, 1996, it admitted noncompliance with the Subpart TT regulations, and stated that it would install VOM control equipment and demonstrate compliance by November, 1998[35]. In fact, it did not demonstrate compliance until 2003.

Toyal did not start its formal capital approval process for control equipment until February 27, 1997, almost twenty three months after the VOM control compliance date in 35 Ill.

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[32]Tr., 12/10/08, pp. 111-112
[33]Tr., 12/10/08, pp.130-131
[34]Complainant's Exhibit 17, Admitted Fact 9
[35]Complainant's Exhibit 17, Admitted Facts 17 &18

Adm Code 218.986[36]. Toyal did not submit a construction permit application for a VOM control device until late May, 2008[37]. Construction began in September and the RCO unit began operation on December 1, 2008[38]. As of that date, Toyal had operated out of compliance with the regulations for 45 months. Toyal's snail-paced efforts toward compliance during this period indicate a complete lack of diligence in attempting to comply with the regulations.

Lack of Diligence in Completing VOM Control

The installation of the RCO did not result in compliance with the 81% control requirements of Subpart TT. Toyal cancelled the stack test which had been scheduled for February 29, 1999 to demonstrate compliance[39]. Toyal's lack of action in addressing the VOM control problem thereafter (i.e. from the end of 1998 through April, 2003) is astonishing. Toyal continued to operate in violation for more than fifty months after cancelling the 1999 stack test, instead of quickly and effectively addressing the VOM control problem[40].

Toyal's supposed compliance 'efforts' at this point were confused and misdirected. In early 2001, Toyal applied for and obtained a construction permit for a new VOM control device, a Regenerative Thermal Oxidizer ("RTO"), which was intended to replace the RCO[41]. However, Toyal did not install the RTO within the time frame required by the Construction Permit, and, on February 19, 2002, requested an extension of the RTO construction permit from Illinois EPA[42].

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[36]Id., Admitted Fact No. 20. Tr., 12/10/08, p. 184

[37]Complainant's Exhibit 17, Admitted Fact No. 22.

[38]Tr., 12/10/08, p. 163

[39]Complainant's Exhibit 17, Admitted Fact No. 25

[40]Toyal never ceased operations to prevent continued violations. Tr., 12/10/08, p.130. Also, as previously noted, Toyal never sought regulatory relief from the Board.

[41]The RTO Permit Application was submitted on April 18, 2001 and the Permit granted on May 30, 2001. See: Respondent's Exhibit 17; Complainant's Exhibit 17, Admitted Fact No. 31.

[42]Tr., 12/11/08, pp. 94-95. Illinois EPA granted the extension on March 8, 2002.

Toyal did not meet the permit deadline. In fact, despite applying for and obtaining a permit for the RTO as a replacement VOM control device, and despite obtaining an extension for installation of the RTO, Toyal never even purchased an RTO to install[43]. Instead, Toyal requested an additional extension, which was granted on November 18, 2002[44]. When it requested this second extension, Toyal advised Illinois EPA that it had abandoned the RTO proposal, and stated it would control using a 'modified RCO'[45]. Eventually, Toyal hooked up all emission sources and controlled the VOM emissions at their facility using the same RCO that had been in operation since 1998. Compliance was demonstrated on April 30, 2003, about 52 months after the RCO was originally installed, and more than eight years after Toyal was required to control all VOM emission sources by at least 81%.

Toyal's lax efforts toward obtaining compliance with 35 Ill. Adm. Code 218.986 were likely due to misplaced priorities. Between 2000 and 2003, Toyal continued to upgrade production equipment at its facility. During this period they performed an expansion of 'B unit' production costing $5,000,000.00 to $6,000,000.00[46]. This expenditure should be compared with the delayed 'Phase II' VOM compliance expenditures which only amounted to $470,887.00.

During this same period, Toyal also expended time and resources on engineering work performed to obtain a Federally Enforceable State Operating Permit ("FESOP"). Toyal did not *need* to obtain a FESOP: it had already sought a CAAPP permit, and was operating under the authority of its earlier state operating permits. More importantly, nothing in 35 Ill. Adm. Code

[43]Tr., 12/10/08, p. 193
[44]Respondent's Exhibit 14.
[45]Respondent's Exhibit 13
[46]Tr., 12/11/08, p. 54

218.986 required Toyal to obtain a FESOP: the regulation only requires 81% control of VOM emissions[47]. Therefore all of the work performed by Toyal in seeking a FESOP was voluntary. Toyal should have applied all of its resources to coming into compliance with 35 Ill. Adm. Code 218.986(a) during this period.

The evidence shows that from 1999 through 2003, Toyal made sporadic, half-hearted, and ineffective attempts to comply with VOM control requirements that had been in effect since 1995. At the same time, Toyal committed significant resources to expansion of production capacity and FESOP engineering work. The failure of Toyal to seriously address its responsibilities under 35 Ill. Adm. Code 218.986 during this period indicates a total indifference to the requirements of the Board regulations. The Board should consider this to be a serious aggravating factor for purpose of civil penalty.

3. Economic Benefit

a. An Appropriate Civil Penalty Must Include Recovery of All Economic Benefit from Toyal's Violation of 35 Ill. Adm. Code 218.986(a)

The Act requires that absent the narrowest of circumstances a civil penalty must recover all economic benefit accruing to a respondent as a result of the violation. Specifically, Section 42 of the Act, 415 ILCS 5/42(2006) provides, in pertinent part:

* * *

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

* * *

[47]Tr., 12/11/08, p. 117

Toyal is owned by Toyo Aluminum KK, which also owns Toyal Europe SASU. Toyo Aluminum KK is in turn owned by Nippon Light Metals Group, which consists of 115 subsidiaries and 51 affiliates[48]. Nippon Light Metals Group reported 2007 sales of $5,236,408,000.00 in its annual report for that year[49]. As part of a large international company with sales in the billions of dollars, it is neither arbitrary nor unreasonable to recover all of the economic benefit accruing to Toyal over the eight-year period of violation.

b. The Economic Benefit Derived from the Violations was at Least $316,440.00

Mr. Gary Styzens testified on behalf of the State on the issue of Toyal's accrued economic benefit from the violations alleged in this case. Mr. Styzens is employed by Illinois EPA ("Agency") with the title Economic Benefit Analyst and Manager, and is based in Springfield, Illinois. Mr. Styzens' educational background includes extensive undergraduate course work in business and accounting and a Masters Degree in Business Administration. He is also a Certified Internal Auditor[50].

Mr. Styzens has extensive experience in estimating the economic benefit of noncompliance in an environmental context. He has provided expert testimony on behalf of the Agency in three Board matters, and in one case tried in Circuit Court[51]. He also has assisted the Agency in developing economic benefit for settlement discussions in other cases[52]. Aside from

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[48]Complainant's Exhibit 17, Admitted Facts Nos. 2-3. See also, testimony of Barry Van Hoose, Tr., 12/11/08, p.11.

[49]Id., Complainant's Exhibit 17, Admitted Fact No. 4

[50]A copy of Mr. Styzens resume is included with his written opinion as Complainant's Exhibit 20.

[51]Tr., 12/10/08, p. 41

[52]Id., pp. 66-67

his normal salary, he did not receive any additional compensation for his testimony at hearing[53].

Mr. Styzens' testimony outlined the methodology that he employed to arrive at his estimate of economic benefit. The premise of Mr. Styzen's analysis derived from the concept of the time value of money, which included an evaluation of on-time and delayed compliance. The focus of this analysis dealt with Toyal's failure to timely install a Regenerative Catalytic Oxidizer ("RCO"), which was eventually to become the means by which the company achieved compliance with the Subpart TT regulations[54].

Mr. Styzens prepared a report, which describes and memorializes his calculations and opinions[55]. Based on information provided by Toyal, he found that the overall compliance expenditures had been made in two phases, which he refers to in his report as "Phase I" and "Phase II". Phase I represented expenditures which were completed in 1998, and totaled $781,129.00[56]. Phase 2 expenditures totaled $470,887.00 and were made between 2001 and 2003[57]. As reported by Toyal, the total costs for their control system amounted to $1,252,016.00.

As described by Mr. Styzens, economic benefit accrues from both avoided costs and delayed costs. Delayed costs include compliance expenditures delayed past the date of required compliance, but eventually made[58]. As delayed costs, Mr. Styzens considered the interest benefit from delay in installation of the RCO. Avoided costs include expenditures never made,

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[53]Id., pp. 32-33

[54]Id., pp. 48-49. Mr. Styzens developed his opinion in accordance with the same method which formed the basis of his testimony in *People v. Panhandle Eastern Pipeline Company*, PCB 99-191.

[55]Complainant's Exhibit 20

[56]Complainant's Exhibit 20, p.5

[57]Id., p.9

[58]Id., p. 46

such as additional utility costs, maintenance of equipment not actually purchased, etc.[59] Mr. Styzens' report analyzes the effect of both in determining the amount of economic benefit by Toyal.

Calculation of the economic benefit from delayed expenditures requires choice of an appropriate interest rate, which reflects the investment value of delayed and avoided expenditures to the violator . In this case, Mr. Styzens used Toyal's interest rate from an industrial revenue bonds to calculate benefit during the period when Toyal was out of compliance. Use of the bond rate provides an accurate depiction of how Toyal would have funded its compliance capital expenditures. Also, this conservative assumption runs to Toyal's benefit, as the bond rate was significantly below the bank prime interest rate during the period, and resulted in a lower estimate of economic benefit[60]. To calculate interest on 'unpaid penalty' (i.e. economic benefit derived from violations, but which had not yet been recovered through civil penalty) which accrued after Toyal reached compliance, Mr. Styzens used the published bank prime interest rate[61].

Mr. Styzens also made certain adjustments to cost information provided by Toyal. First, the capital expenditure costs reported by Toyal were adjusted to estimated 1995 costs prior to calculating interest to account for possible inflation [62]. In addition, Mr. Styzens made further adjustments to reflect tax benefits and depreciation. For example, the interest benefit from delayed capital expenditures for 'Phase I' during the period from March 15, 1995 through

[59]Id., pp. 46-47

[60]Plaintiff's Exhibit 20, p.1; Tr., 12/10/08, p.49

[61]Id, p. 50. Use of the bank prime rate is inherently reasonable. It would be unreasonable to assume that a company would be able to access industrial revenue bond money to finance an unpaid civil penalty.

[62]See, e.g.: Complainant's Exhibit 20, pp. 5 & 9

December 31, 1998 totaled $139,105.00. Mr. Styzens credited Toyal for possible depreciation and tax benefits that reduced this expense by $105,463.00, and only applied $33,642.00 in calculating the total economic benefit of Toyal's noncompliance. Similarly, Toyal's benefit from delayed 'Phase II' expenditures was reduced by $101,326.00[63].

The required date for full compliance with the VOM control regulations was March 15, 1995. Toyal began operating the RCO control device at the end of December, 1998, after spending $781,129.00[64]. Mr. Styzens stopped calculating interest for these expenditures as of that date. However, the Phase I project did not result in compliance with the VOM control requirements. Toyal needed to spend an additional $470,887.00 between 2001 and 2003 to comply with 35 Ill. Adm. Code 218.986(a)[65]. The last of these expenditures was made on February 28, 2003, and Mr. Styzens 'stopped the interest clock' on that date, even though Toyal did not demonstrate compliance until several months later. Thus, the dates used in the delayed cost estimates are also reasonable and highly conservative[66].

Mr. Styzens used Toyal's own operating cost information in calculating the "avoided costs" during the period of noncompliance[67]. He also added a small amount to reflect avoided additional labor and maintenance costs, which Toyal had not included, claiming that the RCO

[63]Complainant's Exhibit 20, p.9

[64]Reduced to $764,115 to account for possible inflation. Complainant's Exhibit 20, p.5

[65]Reduced to $452,887.00 by Mr. Styzens to account for possible inflation.

[66] Arguably, the State could have calculated interest on the entire $1,252,016.00 expense from March 15, 1995 to April 30, 2003. All of these expenditures should have been made between January 6, 1994 (when the regulation became applicable to Toyal) and March 15, 1995 (when they were required to have VOM control in place). By 'stopping the clock' on partial expenditures which eventually resulted in compliance, the State's economic benefit estimate reduces the economic benefit calculation substantially, and is therefore highly conservative.

[67]As previously noted, the avoided costs include utilities, maintenance and labor expenditures which were never made, resulting in cost savings enjoyed by Toyal because of the noncompliance.

required no additional labor or maintenance. Mr. Styzens testified that because Toyal failed to include additional labor costs for operation and maintenance of the control system, its economic benefit estimate was inaccurate. He stated that allocation of cost for additional labor was a basic financial assumption[68]. Mr. Styzens also pointed to information suggesting that Toyal's VOM control system required a substantial amount of maintenance, indicating that additional operating and maintenance costs should be included[69].

There is substantial evidence in the record demonstrating that the RCO control device did in fact require extra attention and maintenance. Toyal Vice President Barry Van Hoose testified that it was a nuisance, caused outages which had to be reported to Illinois EPA, and required at least some maintenance to restart[70]. Environmental Health and Safety Manger Roy Mahlmgren agreed that the RCO was shutting down frequently, and a replacement control device (the CRO installed in 2005) was installed because of mechanical shutdowns, permit exceedences, and interruptions in production with the RCO[71]. Toyal Engineering Manager Dennis Debrodt testified that they were having trouble keeping the ROC running due to overheating[72]. Clearly, allocating an additional cost for labor and maintenance was appropriate in calculating avoided costs from failure to control VOM emissions.

Mr. Styzens reduced his "avoided cost" calculation by crediting tax benefits to Toyal for the period when no control system was in place at all ('Phase I'). His estimate carries this

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[68]Tr., 12/10/08, p.62

[69]Id., p. 61

[70]Tr., 12/10/08, p.113. Despite this admission Mr. Van Hoose denied that operation of the RCO increased maintenance expenses. Considering that each outage had to be remedied and reported to Illinois EPA, this statement is hardly credible.

[71]Tr., 12/11/08, pp.7-8

[72]Tr., 12/11/08, p.31

avoided cost forward to 2003 using the bank prime rate for a total of $162,911.00[73]. Additional avoided benefits of $19,157.00, after credit for taxes, were attributable for avoided expenditures after 1998 ('Phase II")[74].

Mr. Styzens estimated the total economic benefit to Toyal from violation of 35 Ill. Adm. Code 218.986(a) to be $316,440.00 as of December 31, 2005[75]. This figure is the sum of benefit from delayed Phase I expenditures, delayed Phase II expenditures, avoided operating and maintenance costs from March 15, 1995 through February 23, 2003, and bank prime rate interest from that date until December 15, 2005[76].

c. Toyal's Foregone Benefit Theory must be Rejected

Toyal's economic benefit analysis admits most of the benefit found in the State's estimate. However, Toyal is asking the Board to credit opportunity costs from an unrelated capital project against the acknowledged actual economic benefit, and thereby find that it had no economic benefit whatsoever, despite delaying compliance for eight years. If adopted, Toyal's theory of 'foregone benefit' would reverse Board precedent, and eviscerate the deterrent effect of recovery of economic benefit. Toyal's 'foregone benefit' theory must be rejected.

Toyal Admits Economic Benefit from Delayed Compliance

Toyal retained Navigant Consulting to prepare its economic benefit analysis. Mr. Christopher McClure testified on Toyal's behalf at hearing[77]. Using essentially the same data as

[73]Complainant's Exhibit 20, p.3

[74]Id., p.7

[75]Mr. Styzens prepared this report in early 2006. At hearing he estimated that additional interest on unrecovered economic benefit from December 31, 1995 to the date of hearing would be about $30,000.00. Tr., 12/10/08, p. 58.

[76]Complainant's Exhibit 20, p.2

[77]Mr. McClure is a paid expert with a billing rate of $450.00 per hour. He has worked on this matter since 2004. Mr. McClure could not identify the total amount Toyal has paid to

Complainant's expert Gary Styzens, Mr. McClure estimated the economic benefit from Toyal's delayed capital expenditures at $153,986.00, and the economic benefit from Toyal's avoided costs at $138,385.00[78]. Thus, Toyal's estimate of $292,371.00 is very close to Mr. Styzen's estimate of $316,440.00. The difference is largely due to two factors: Toyal did not add any additional labor cost to its avoided costs, and Mr. McClure used a 'risk free' rate of interest (i.e. the United States Treasury Bond rate).

As argued above and as testified to by Mr. Styzens, some provision for labor cost should included in the avoided costs calculation for two reasons. First, because it is a principle of incremental cost analysis, and second because the facts in this case indicate that difficulties with the control system's operation would necessarily mean that additional labor and maintenance would be required. The Board should find that Mr. Styzens' estimate more accurately reflects the avoided labor cost issue.

With regard to the appropriate interest rate to use, Mr. McClure's choice of the Treasury Bond rate is without any support whatsoever. As testified to by Gary Styzens, the 'risk free' rate is not an appropriate measurement of the time value of Toyal's money. An appropriate interest rate must reflect business risk: the only entity that operates 'risk free', and therefore should borrow 'risk free', is the federal government[79]. Recovery of economic benefit is, *inter alia*, intended to prevent a company from gaining a benefit over its competitors by 'leveling the playing field'[80]. It is logical to assume that hypothetical competitors of Toyal would borrow at business rates. Therefore, using the Treasury Bond rate in these calculations would actually

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Navigant for their work on this case. Tr., 12/11/08, pp.130, 161, 163

[78]Respondent's Exhibit 22, report "page 1 of 15"

[79]Tr., 12/10/08, p.60

[80]Id., p. 42

provide a noncompliant competitor such as Toyal with an *advantage*.

Mr. Styzens used an industrial revenue bond rate actually obtained by Toyal for his calculations related to equipment purchase, and the bank prime rate thereafter. Therefore, the Board should also find that Mr. Styzens' estimate of $316,440.00 for economic benefit from delayed and avoided compliance costs is both conservative and accurate.

Toyal's Solvent Reclamation Project has no Connection to Correcting the Violations

Toyal's claim of 'foregone benefit', which was raised at hearing by Toyal's expert, is based solely on a plant upgrade project which was commenced during the final VOM compliance work. This project was intended to increase the amount of mineral spirit solvent which Toyal could recover from its process[81].

In 2003, Toyal upgraded its pre-existing solvent reclamation process to increase solvent recovery, and therefore save money on a key raw material. Its 'foregone benefit' theory is based solely on its argument that if it had come into compliance earlier, it would have upgraded this recovery system earlier, and therefore increased profitability. Incredibly, Toyal then attempts to subtract the additional profit it *would have made* if it had installed its solvent reclamation project earlier from its admitted economic benefit: money saved by violating the Act for eight years. The Board must summarily reject this attempt as contrary to the policy behind recovery of the economic benefit of noncompliance.

The solvent recovery system at the heart of Toyal's claim had no relationship whatsoever to the violations, i.e. Toyal's failure to control excess VOM emissions at its facility. In fact, Toyal's solvent recovery system already met the requirements of 35 Ill. Adm. Code 218.986(a)

[81]Mineral spirits is a process solvent used at the plant. Tr., 12/11/08, p.30

before any compliance-related VOM control system was installed. In other words, while a large number of Toyal's VOM emission sources were uncontrolled, as of March 5, 1996, Toyal's solvent recovery system was *in compliance.*

On March 5, 1996, Toyal submitted its CAAPP application to Illinois EPA. The application was certified by Mr. Barry Van Hoose, then Toyal's Vice President of Technology[82]. The application listed the compliance status for each emission unit at the facility. For the solvent distillation unit, Toyal certified that the unit was regulated by 35 Ill. Adm. Code 218.986(a) and required 81% VOM control[83]. On the next page, Toyal certified that the solvent distillation unit was *in compliance with all applicable requirements*[84]. Therefore, as of March 5, 1996, the solvent distillation system did not require additional VOM control[85]. Since this emission unit was in compliance, the connection of the solvent distillation system to the RCO in 2003 could not have been done for the purpose of complying with the VOM standard. Obviously, the solvent recovery upgrade was an independent and unrelated plant-efficiency project.

The regulations do not require companies to maximize profitability through raw material savings; rather, they require regulated entities to control VOM emissions in an ozone non-attainment area. As noted, the solvent reclamation upgrade project was not undertaken for compliance. Also, Mr. Van Hoose admitted at hearing that Toyal could have controlled all VOM emissions by 81% (and thus come into compliance with 35 Ill. Adm. Code 218.986)

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[82]Toyal CAAPP Application (excerpts), Complainant's Exhibit No. 21, p. 30 ("Toyal D2211"). Mr. Van Hoose is now Toyal's Vice President of Operations.

[83]Complainant's Exhibit No. 21, p. 10 ("Toyal 1752")

[84]Id., p.11 ("Toyal 1753")

[85]Mr. Van Hoose also admitted at hearing that the solvent distillation system did not require additional VOM control in 1996. Tr., 12/10/08, p.126.

whether or not a solvent distillation system had ever been installed[86]. Thus, there is no link between Toyal's solvent reclamation upgrade and the delayed VOM compliance expenditures. Toyal is merely trying to confuse the issue in an attempt to avoid recoupment of its economic benefit from the violations.

Moreover, the facts prove that Toyal could have upgraded its solvent reclamation system well before it finally came into compliance with the VOM regulations. The system upgrade involved installing an 'air stripping' system. This operation generated vapors, which needed to be vented to make the upgraded system work properly [87]. The technology was available to Toyal for some time: similar processes had been in place at sister companies in France and Japan for years[88]. Mr. Van Hoose testified that at the French aluminum facility the vapors were simply vented to the air[89]. However, Toyal never even sought a permit to discharge these emissions to the atmosphere at the Lockport facility[90]. Mr. Van Hoose also agreed that, in hindsight, nothing would have prevented Toyal from merely installing a flare to allow for increasing solvent recovery as early as 1995[91]. Clearly, Toyal's additional profit from the solvent recovery upgrade could have been realized even before the Subpart TT amendments took effect.

Most significantly, despite having begun operation of the RCO in 1998, Toyal did not upgrade the solvent recovery system until 2003. Once they did so, they directed the vapors to the RCO...the same control device that had been operating at its facility for five years. Nothing prevented Toyal from connecting the solvent recovery system to RCO for this purpose in 1998.

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[86]Tr., 12/10/08, p. 190
[87]The vapors contained fatty acid residues. Tr., 12/10/08, p. 170
[88]Tr., 12/10/08, p. 121
[89]Tr, 12/10/08, p.122
[90]Tr, 12/10/08, pp. 175-176
[91]Tr., 12/10/08, p. 124

Yet Toyal's estimate attempts to obtain a *credit* against economic benefit from 1998 through 2003.

It was Toyal's business decision to upgrade its solvent recovery system *as it did*, and *when it did.* Prior to installation, Toyal sent the unrecovered product for disposal as waste, which was a 'break even' situation[92]. Afterward, Toyal made more money: Mr. Van Hoose estimated the difference at $1 Million[93]. The facts prove that the solvent reclamation upgrade was nothing but a separate capital project, which proved to be successful for Toyal. However, because the pre-existing solvent reclamation was already in compliance, and because Toyal could have obtained full compliance with 35 Ill. Adm. Code 218.986(a) without even reclaiming solvents, the system upgrade has absolutely no nexus to the VOM compliance efforts, and therefore no relevance to this case. Again, Toyal simply attempts to confuse the issue of its admitted economic benefit from eight years of noncompliance.

The Board has Rejected Similar Attempts to Reduce the Economic Benefit of Noncompliance

Toyal's arguments are identical to those already considered and rejected by the Board in other cases. In *People v. Panhandle Eastern Pipeline Company*, PCB 99-191 (November 15, 2001), the Board rejected the Respondent's attempt to obtain a similar 'credit' against economic benefit recovery. In that case, Respondent Panhandle had failed to control NOx emissions for ten years, and thereby violated the Act[94]. Panhandle argued that because the cost of installing

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[92]Tr., 12/10/08, p. 171. Mr. Van Hoose admitted that the solvent had some value as fuel.

[93]Tr., 12/10/08, p.172. Mr. Van Hoose stated "We probably lost in the neighborhood of about $1 million looking back". Because they had been in a 'break even' situation before, the 'lost $1MM' actually represents profit they would have made if they had chosen to upgrade the recovery system in 1995.

[94] The period of noncompliance was 1988-1998. Board Order in PCB 99-191 (November 15, 2001), slip op at 35-36.

controls ten years after the fact was much higher than the cost had been on the required date of compliance, the increased costs totally eliminated any economic benefit derived from the noncompliance[95]. The Board rejected this attempt to obtain a 'credit' in its entirety. The Board found that such an argument conflicted with the purpose of Section 42(h)(4) of the Act: deterring violations. The Board noted that applying such a credit:

> "....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 its 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[96].

Toyal's 'foregone benefit' argument is, if anything, *more* tenuous than that rejected by the Board in *Panhandle*. At least in that case, the Respondent's 'credit for higher cost' argument related to the NOx control device. In our case, Toyal is seeking a credit for 'lost profits' from a plant system with *no relation* to compliance with the applicable regulations. Obviously, Toyal looked retroactively to modifications at its facility in an attempt to find *some* argument to *totally avoid* recovery of economic benefit. Encouraging such conduct by companies who have been caught in violation would totally eliminate the deterrent effect of the recovery of the economic benefit of noncompliance, and be contrary to the purpose of civil penalties. In this case, the Board must again reject such an obvious attempt to avoid responsibility. Toyal's 'foregone benefit' argument must be denied as contrary to the purposes of the Act.

4. Deterrence

Deterrence is an important objective for the Board in establishing an appropriate civil

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[95]Id., slip op. at 32
[96]Id.

penalty, even where a violator has already achieved compliance. See: *ESG Watts, Inc. v. Pollution Control Board,* 283 Ill. App. 3d 43, 51 (4th Dist. 1996) (Respondent's compliance came only after initiation of enforcement, and associated hardships imposed on Illinois EPA warranted a "stiff" penalty to assure deterrence). Although Toyal did make half-hearted efforts to comply with the Act, it did not cease operations after recognizing a violation, but in fact, continued to operate for eight years.

Courts have found that the Act's provisions for civil penalties is to "provide a method to aid enforcement of the Act". *Southern Asphalt Co. v. PCB*, 60 Ill. 2d 204, 207, 326 N.E.2d 406, 408 (1975). In *People of the State of Illinois v. State Oil Company*, PCB 97-103, 2003 WL 1785038 (March 20, 2003), the Board found that imposing a civil penalty on State Oil, who continued to operate for another eight months after receipt of a violation notice, served the purpose of having a "prospective deterrent effect on current and future Act violators." *State Oil Company*, 2003 WL 1785038, *13 ("Levying a civil penalty against State Oil and the Anests in this case aids in the enforcement of the Act because it informs violators that they may not delay efforts to comply with the Act while pursuing sale of the offending property.").

Here, where Toyal continued violating the Act for eight years while it spent money on other capital projects that allowed its facility to operate for profit while exceeding VOM emissions, the Board should place a high priority on assessing a penalty that is substantial enough to encourage future compliance by Toyal and the regulated community. *See, ESG Watts Inc. v. PCB*, 282 Ill. App. 3d 43, 52, 668 N.E.2d 1015, 1021 (4th Dist. 1996) ("the deterrent effect of penalties on the violator and potential violators is a legitimate goal for the Board to consider when imposing penalties.").

This deterrence is necessary especially in light of the knowing conduct associated with Respondent's violations. A substantial monetary penalty will serve to prevent corporate management systems that may attempt to mirror Toyal's environmental programs that were in place during the 1990's. Additionally, a high civil penalty will provide an incentive for major source permittees to comply with their VOM control requirements.

As a subsidiary of a larger parent corporation, Toyal has vast financial resources at its disposal.[97] This financial capability enables a company of Toyal's size to absorb the costs associated with environmental liability. A small penalty will not dissuade future noncompliance. Toyal's parent company's financial strengths should therefore be a factor considered by the Board in its determination of penalty that truly serves the goals of deterrence.

Complainant believes that a total civil penalty of $716,440.00 will serve to deter future violations by the Respondent and to otherwise aid in enhancing voluntary compliance with the Act by the Respondent and other persons similarly situated[98].

5. Previously adjudicated violations of the Act

On August 9, 2001, the parties entered a Stipulation and Proposal for settlement on Count III-VII in this case. Complainant had alleged violations of Sections 21(d)(1) and 21(d)(2) of the Act, 415 ILCS 5/21(d)(1) and 5/21(d)(2) (2000). Toyal did not admit the violations, but the parties agreed that the Stipulation could be used as evidence of a previous adjudication of violation.

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[97] Toyal is a subsidiary of Toyal Aluminum KK, which is a subsidiary of Nippon Light Metals. Nippon Light Metals is a large financially-sound company. Toyal admits that Nippon Light Metals reported sales of $5,236,408,000.00 in 2007.

[98] Complainant requests $316,000.00 for recovery of all economic benefit, and an additional $400,000.00 in response to the other penalty factors listed in Section 42(h).

6. Voluntarily Self-Disclose

Respondent did not voluntarily self-disclose throughout its eight-year period of non-compliance.

7. Supplemental Environmental Project

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

VI. REQUESTED PENALTY

A significant civil penalty is necessary to aid in enforcement and accomplish the purposes of the Act. The evidence indicates that Toyal virtually ignored compliance with regulations implemented to protect the public welfare over an eight year period of violation. As shown, Toyal took three years to make its first half-hearted attempts at compliance. After learning that it still was operating in violation of the Subpart TT regulations, it waited five more years to complete the necessary engineering work. During this period, it continued to operate in violation, and even expanded its production. Clearly, environmental compliance was way down on Toyal's list of priorities. The civil penalty assessed by the Board must reflect the gravity and duration of these violations. It must also address the complete lack of diligence by Toyal. Most importantly, it must also deter future violations by Toyal, and by other similarly situated entities.

Recovery of 100% of the economic benefit of noncompliance should be only a first step in calculating the appropriate penalty. Both the Act and the policies behind recovery of economic benefit of noncompliance demand that this be recovered. But recovery of economic benefit alone will not reflect the duration, gravity or lack of diligence in this case. Nor will it serve to deter such ongoing noncompliance, by Toyal or others.

Complainant believes that, in addition to recovery of $316,440.00 for the economic benefit of noncompliance, an additional penalty of $400,000.00 must be assessed in this matter in consideration of the penalty factors, and a means of deterring future violations. This figure is calculated by assessing a penalty of $50,000.00 for each year of violation from March 15, 1995 until April 30, 2003. This additional penalty is fully justifiable, and well within the limits provided for in the Act. In fact, it only recovers daily penalties for five days of violation per year. An additional penalty of $400,000.00, resulting in a total assessed penalty of $716,440.00, is the minimum necessary to reflect Toyal's serious violation over an eight year period, and provide deterrence against future violations by Toyal and others.

VII. ATTORNEY FEES AND COSTS

Although Complainant believes that Toyal's continued violations clearly satisfy the "willful, knowing or repeated violation" standard contained in 415 ILCS 5/42(f) (2006), Complainant does not request the assessment of attorney fees and costs. Complainant asks the Board to take note of this waiver in its assessment of an appropriate civil penalty.

VIII. CONCLUSION

The evidence proves that Toyal is liable for the violations alleged in Counts I and II of the Complaint. Toyal failed to control VOM emissions according to the standards established by the Board for its industry group. As a major VOM source located in an ozone non-attainment area, Toyal's uncontrolled emissions, alone or in combination with other sources, caused, or threatened to cause air pollution. Toyal thereby violated Section 9(a) of the Act, 415 ILCS 5/9(a) (2006), as alleged in Count I. Toyal also failed to control VOM emissions from the numerous sources at its facility by at least 81% , in violation of 35 Ill. Adm. Code 218.986(a),

thereby also violating Section 9(a) of the Act, as alleged in Count II. The violations in Counts I and II continued for more than eight years.

An analysis of the Board's penalty factors suggests the need for substantial penalty to accomplish the purposes of the Act, and aid in enforcement. Complainant believes that three factors in particular are relevant to this case. First, the civil penalty imposed must recover all of the economic benefit accrued by Toyal through its violations. The evidence from hearing shows this benefit to be at least $316,440.00. Because mere recovery of the economic benefit alone would not sufficiently deter violations by Toyal or others, or accurately reflect the absence of diligence shown by Toyal during the period of noncompliance, Complainant believes that a significant additional penalty must also be recovered.

The evidence showed that Toyal failed to make environmental compliance a priority. It did not apprise itself of the major environmental regulations affecting its facility, despite operating in a severe ozone non-attainment area. The necessary compliance expenditures were delayed, and, after an initial attempt at compliance, Toyal failed to complete projects necessary to control emissions for an additional four years. During this period, Toyal continued to expand its production capacity, while ignoring compliance expenditures. The civil penalty imposed by the Board must send an appropriate message to the regulated community. The penalty must be large enough to reflect the extreme duration of the violations in this case, and also large enough to put potential violators on notice that they defer compliance expenditures at great financial risk. Based on the facts of this case, Complainant believes that a total civil penalty of $716,440.00 will accurately reflect the gravity of Toyal's violations, and deter future violations by Toyal and others.

RESPECTFULLY SUBMITTED
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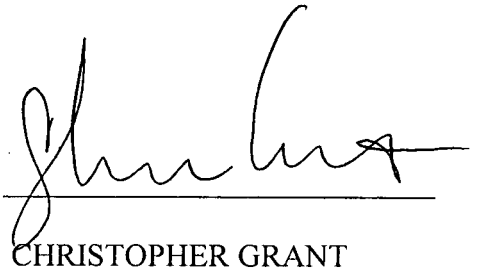
CERTIFICATE OF SERVICE

I, CHRISTOPHER GRANT, an attorney, do certify that I caused to be served this 20th day of February, 2009, the foregoing Closing Argument and Post Hearing Brief and Notice of Electronic Filing upon the persons listed below, by hand delivery, and by placing same in an envelope bearing sufficient postage with the United States Postal Service located at 100 W. Randolph, Chicago, Illinois.



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