**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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| PEOPLE OF THE STATE OF ILLINOIS<br><br>Complainant,<br><br>v.<br><br>TOYAL AMERICA, INC. , formerly known as ALCAN-TOYO AMERICA, INC., a foreign corporation,<br><br>Respondent. | ) | PCB 2000-211<br>(Enforcement) |



**NOTICE OF FILING**

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Please take notice that on Friday April 10, 2009 we filed Respondent's Closing Argument and Post-Hearing Brief and Motion to File An Expanded Post-Hearing Brief Instanter, a copy of which is herewith served upon you.

Respectfully submitted,

**TOYAL AMERICA, INC.**

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**THIS FILING IS SUBMITTED ON RECYCLED PAPER**

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**RESPONDENT'S CLOSING ARGUMENT AND POST-HEARING BRIEF**

NOW COMES Respondent, TOYAL AMERICA, INC. ("Toyal"), by and through its attorneys, Drinker Biddle & Reath LLP, and hereby presents its Closing Argument and Post-Hearing Brief.

## I. INTRODUCTION

This case is unlike other most enforcement actions, and its unusual facts clearly do not support the assessment of a substantial penalty against Toyal. Here, there were unique circumstances which greatly impeded the ability of Toyal to demonstrate compliance with 35 Ill. Adm. Code Part 218 ("Subpart TT rules") regarding volatile organic matter ("VOM") emissions until Toyal had worked through many extremely challenging technical and operational issues. While Toyal does not contest that it did not demonstrate compliance with Subpart TT until April 2003, Toyal did operate a control device from 1998 until the present. Further, because Toyal did in fact demonstrate full compliance years ago, the only issue before the Board is what is the appropriate civil penalty to be assessed against Toyal for the non-compliance period. While the Complainant contends that Toyal's behavior merits a substantial penalty, the evidence before the Board shows quite the opposite.

As the evidence introduced at the December 10th and 11th hearing in this matter attests, and as set forth in detail herein, only a modest penalty, if any, should be assessed. Toyal was diligent in trying to achieve compliance with the Subpart TT rules, as is evidenced by the fact that it hired, relied upon, and executed the advice of reputable expert consultants, which efforts did result in proving compliance in 2003. Toyal consistently kept the Illinois Environmental Protection Agency ("Illinois EPA") apprised of what it was doing to achieve compliance and, significantly, Illinois EPA even granted Toyal several extensions during the noncompliance period to complete modifications to its pollution control system and other compliance efforts. Since finally resolving its compliance challenges (which were met by utilizing a "Permanent Total Enclosure" ("PTE") strategy, as discussed further herein), Toyal has consistently been in compliance with all of the Subpart TT rules and has not received any notice of violation ("NOV") since the 1998 NOV which precipitated the matter at hand. Finally, Toyal has replaced its original permitted pollution control device with a new and more efficient one that has resulted in lower actual emissions.

Based on the above, Toyal believes that a substantial penalty should not be imposed in this matter, as such unwarranted punishment would be simply punitive, and not promote enforcement of the Illinois Environmental Protection Act (the "Act"). 415 ILCS 5/1 *et seq.* Toyal also does not believe that an economic benefit component to a penalty should be assessed because its non-compliance resulted in a negative cost to Toyal, in that it lost the opportunity to obtain savings that would have inured to it had earlier compliance been achieved. Such lost opportunity for savings more than offsets any theoretical gains from noncompliance. In addition, Toyal contends that its expenditure for significant pollution control equipment, specifically, $1 million spent in good faith for a vacuum chiller unit in furtherance of its emissions control

efforts, should also be offset against any theoretical economic benefit that inured to Toyal for its noncompliance, notwithstanding the fact that the particular unit was not utilized as part of Toyal's eventual compliance strategy.

As set forth in Complainant's Closing Argument and Post-Hearing Brief ("Complainant's Brief"), Complainant's demand for a significant penalty disregards and dismisses the fact that Toyal's operations are complex and unique. Incredibly, Complainant portrays Toyal's several years' worth of expensive and time-consuming (and eventually successful) efforts towards achieving compliance as evidence of Toyal's complete disregard of and contempt for its obligations under the Act. This is completely inaccurate and unfair. Toyal's significant efforts towards compliance during these years resulted in continual improvements to and better understanding of its facility, as well as incremental reduction in its emissions, even as Toyal progressed towards eventually showing full compliance. Indeed, the facts relevant to Toyal's efforts to work with the Illinois EPA show that even the agency did not fully understand the complexities of the rules, as they applied to Toyal. Consequently, Toyal's period of non-compliance was not due to its disregard for the rules but, rather, because of the unique circumstances inherent in its manufacturing operations that complicated its ability to demonstrate compliance.

Therefore, Toyal respectfully requests that the Board consider all the relevant factors and the unique circumstances applicable to Toyal's situation in determining the appropriateness of a civil penalty, if any. Assessment of only a modest penalty in this unusual case is appropriate and consistent with the goals of the Act, as explained fully herein.

## II. SUMMARY OF FACTS

### A. Toyal's Business, Operations and Challenges

Toyal is in the business of manufacturing aluminum atomized powder and aluminum paste and flakes. (Tr., 12/10/08, p.140:20-21). Toyal manufactures over 400 hundred different products in various batch processes (Tr., 12/11/08, p.70:6-11), and it has approximately 129 different VOM emission sources at its facility. (Tr., 12/11/08, p. 4:23-5:9). Toyal's customers include the automotive industry, the rocket industry (where the powders are used as rocket propellant fuel for the solid boosters found on missiles), the military, and the refractory brick industry. (Tr., 12/10/08, 140:20-141:17). The paste operations make up the largest component of Toyal's business, and the automotive industry is its main customer. (Tr., 12/10/08, p.141:4-17). The aluminum pigments that are manufactured at the Toyal facility are used by automotive industry clients to provide the metallic coating on some cars. (Id.).

There are certain unavoidable risks inherently involved with Toyal's manufacturing operations, including fires and explosions, despite the best practices with which Toyal conducts its operations.[1] Unfortunately, during the period from 1999 through 2001, there were nine fires at the Toyal facility. (See Resp. Exhibit 7, p. 7). The various causes of the fire were related to static discharges, lack of complete aluminum oxidation during the milling process, mechanical action, moisture contamination, and impact sparking. (See Resp. Exhibit 7, p. 9). As a result of these fires, Toyal understandably was under pressure from its insurance companies to reduce the number of fires. Consequently, this period of time was challenging for Toyal because it was

[1] Specifically, Toyal's aluminum atomized powder operations are highly explosive due to the dust that is formed during the manufacturing process. (Tr., 12/10/08, p. 132). It only takes a small amount of energy (between two and four millijoules) to ignite dust formed during the manufacturing process and cause an explosion. (Tr., 12/10/08, p. 133:5-10).

dealing with the health and safety issues described above, while at the same time it was striving to demonstrate compliance with the Subpart TT regulations. (Tr., 12/10/08, p.152:21-24). In fact, Toyal invested close to $1 million for fire suppression systems and alarm systems for the plant. (Tr., 12/10/08, p.153:3-8). Additionally, it made changes to its safety and environmental management systems while also training its employees to prevent and minimize the incidents and damage from any potential fires and explosions. (Tr., 12/10/08, p.153:3-22).

Toyal's improved safety measures were largely successful and, after 2001, internal operational improvements at Toyal reduced the number of incidents. However, there was one fire in December 2003 (Resp. Exhibit 7, p. 7-8), and then an additional fire in the Catalytic Recuperative Oxidizer ("CRO") in December 2006. (Tr., 12/10/08, p. 148:17-24). The most recent explosion occurred on August 26, 2008. (Tr., 12/10/08, p. 149:4-10).[2]

Toyal is a small plant in relation to other similar plants. Consequently, when fires and/or explosions occur at its facility, it must immediately divert all of its resources (including management, engineering, technical, production, safety, health and environmental personnel) to investigate the accident. (Tr., 12/10/08, p. 154:19-155:9). As a result, many things must occur simultaneously as part of the accident follow-up, which is taxing on the very small professional staff at the facility. For example, insurance companies and OSHA spend substantial time at the facility investigating the incident, which demands considerable facility resources. (Tr., 12/10/08, p. 155:10-14). In addition, there is an appreciable amount of outside testing which is conducted.

[2] Toyal immediately shut down its paste and flake operations as required by its permit until it was able to obtain a provisional variance. (Tr., 12/10/08, p. 150:17-151:3). Toyal obtained the provisional variance from the Illinois EPA on December 21, 2006 and was compliant with all the terms of the provisional variance. (Tr., 12/10/08, p. 151:5-7).

(Tr., 12/10/08, p. 155:20-156:3). Consequently, when fire and/or explosions occur, they are very time-consuming, resource-intensive and expensive. (Tr., 12/10/08, p. 155:10-14).

### B. Toyal's VOM Pre-1998 Compliance History and Efforts

Toyal first learned of the Subpart TT rules approximately around February 27, 1995, which was about two weeks prior to the time when the rules were to take effect. (Tr., 12/10/08, p. 178:19-23). During this time period, Toyal was also completing a Clean Air Act Title V permit application ("CAAPP"). (Tr., 12/10/08, p. 179:6-12). However, it was not until it completed its Title V analysis that Toyal was able to determine with certainty that it was subject to the Subpart TT rules. (Tr., 12/10/08, p. 180:11-14). Toyal disclosed its noncompliance when it timely submitted its CAAPP application (which contained an action plan and compliance schedule) in February 1996. (Tr., 12/10/08, p. 179:21-180:15). Toyal did not receive any feedback from the Illinois EPA regarding its compliance schedule. (Tr., 12/10/08, p. 179:21-180:15).

Montgomery Watson, a nationally-recognized consulting firm with which Toyal had prior successful experience, assisted Toyal with the CAAPP application. (Tr., 12/10/08, p. 158:10-14). Toyal became dissatisfied with Montgomery Watson's responsiveness as the compliance work progressed and, thus, ceased working with Montgomery Watson. (Tr., 12/10/08, p. 158:17-159:5).

Approximately in January 1997, Toyal selected and retained Woodward-Clyde as its consultant based on Toyal's previous experience with Woodward-Clyde, and its reputation in the industry (Resp. Exhibit 7, p. 2 and Tr., 12/10/08, p. 159:17-23). Woodward-Clyde assisted Toyal with: (1) selecting the proper equipment; and (2) designing and overseeing the installation of the overall system to bring Toyal into compliance. (Id.). After investigation of Toyal's systems, Woodward-Clyde recommended the installation of an RCO, capture pick-up points and

ductwork that would be required throughout the system to comply with the Subpart TT rule. (Tr., 12/10/08, p. 160:4-13). With the help of Woodward-Clyde, the design work was completed and a construction permit application submitted, and in June 1998, Toyal received a construction permit from Illinois EPA for installation of an RCO unit, which was installed by November 1998. (Resp. Exhibit 7, p. 3).

On December 1, 1998, Toyal began operating the RCO equipment. (Id.). Based on its implementation of Woodward-Clyde's recommendations, Toyal expected to have a successful RCO stack test and easily achieve compliance. The stack test was scheduled for December 29, 1998. (Resp. Exhibit 5, p. 1). Toyal invited Kevin Mattison of the Illinois EPA to a pre-stack test visit as recommended by Toyal's stack testing company, ARI. (Tr., 12/10/08, p. 160:4-13). However, at this pre-stack test inspection, Mr. Mattison identified a number of concerns regarding the capture and collection system, the fact that not all sources identified were connected, and the need for additional temperature monitoring. (Resp. Exhibit 7, p. 4). Toyal was taken by surprise with the issues identified by Mr. Mattison, as Woodward-Clyde had advised it that the equipment was in compliance. (Tr., 12/10/08, pp. 165:20-166:1). It became apparent that Woodward-Clyde had concentrated on the destruction efficiency of the RCO without adequately considering how Toyal would address and prove the second aspect of the test, which was to demonstrate capture efficiency, because Illinois EPA was not willing to accept Woodward-Clyde's assumptions and calculations on this prong of the test. (Tr., 12/10/08, p. 165:7-19). As a result, Toyal lost confidence in Woodward-Clyde, and decided that it need to shift these responsibilities to another consultant better qualified to help Toyal achieve compliance. (Tr., 12/10/08, p. 166:2-10).

### C. Toyal's 1999-2001 Compliance Efforts

Subsequent to Toyal's unfortunate surprise with respect to rejection of its consultant's recommendations by Illinois EPA, Toyal was required to rethink how it was going to go about demonstrating compliance with the Subpart TT rules. (Tr., 12/10/08, p. 166:2-10). Toyal wrote a letter to Mr. Mattison dated December 30, 1998, in which it cancelled the scheduled December 1998 stack test and requested an extension until February 28, 1999,[3] based upon the concerns Mr. Mattison identified in the pre-stack test inspection. (Resp. Exhibit 5). Subsequently, Toyal had several conversations with the Illinois EPA in January and February 1999 regarding its follow-up efforts to address those issues.[4] It should be noted that, despite not having conducted a stack test, Toyal continued to operate the RCO control device beginning in December 1998 (Tr., 12/10/08 p.29:14-22), and thus achieved actual reductions to its emissions, despite not being ready to prove compliance under the VOM regulations.

Dealing with the fire incidents and aftermath related to the safety concerns at the facility, in addition to diligently pursuing its compliance efforts, was a challenge for Toyal. From 1999 through 2001, Toyal added a continuous emission monitoring system ("CEM") unit on the RCO, as well as adding additional hoods, conducting additional testing, investigating alternative methods of destruction (specifically the issue of whether it would need to change the RCO to a recuperative thermal oxidizer ("RTO") or modified RTO), investing in a centralized vacuum system, and changing its internal management organization to better address the issues and safety concerns. (Resp. Exhibit 7 pp. 5 and 10).

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[3] There is a typo in the original document which indicates February 29, 1998. However, the correct date should read February 28, 1999.

[4] There is a typo in the original document which shows the dates for 19 through 21 as 1990. However, the correct date should read as 1999.

After Toyal ceased to work with Woodward-Clyde, it began working with Chemstress Engineering ("Chemstress") to address the unresolved issues identified by Mr. Mattison. (Tr., 12/11/08, p. 20:8-15). Chemstress was on site performing process engineering for the paste B unit expansion project which consisted of the installation of a new set of ball mills to replace the older ball mills. Specifically, this project involved removing the six old mills, and replacing them with four mills and two mills, respectively, of two different sizes, and then making those into individual units along with screens and tanks. (Tr., 12/11/08, p. 29:9-18). (Tr., 12/10/08, p. 118:20-119:1).[5]

> With respect to demonstrating compliance of the capture system, Chemstress was involved in the ongoing work in trying to identify source points and engineer solutions to those. (Id.). Additionally, Chemstress recommended the use of a vacuum chiller system to replace the numerous vacuum pumps throughout the plant (these are all emission sources as identified through the permit process) with a centralized vacuum and condenser system that would act as a control device to aid in controlling some of the fugitive emission points. (Tr., 12/10/08 p. 214:3-13). Toyal sought the necessary internal approvals and purchased the vacuum chiller unit which cost Toyal approximately $1 million dollars.

(Tr., 12/10/08, p. 166:24-167:2).

Although Toyal was not able to demonstrate compliance with the work completed by its early consultants, the work done by each had a benefit, in that Toyal was able to learn a little more about the challenges that existed at its facility and what it would need to address in order to demonstrate compliance with Subpart TT.

During the 2000-2001 time frame, Toyal underwent various management changes at its plant, including hiring Ray Malmgren as the engineering manager in July 2000. (Tr., 12/11/08,

[5] Complainant contends that despite its non-compliance, Toyal continued to upgrade its production equipment at its facility. (Resp. Brief, p. 19). In actuality, however, this modification project resulted in only a small amount of capacity increase. (Tr., 12/10/08, p. 118:20-119:1).

p. 4:12-18). Mr. Malmgren hired Steve Anderson of Admiral Consulting to assist with the compliance and permitting issues. On April 18, 2001, Toyal applied for a construction permit that included several projects such as the paste B unit expansion, installation of an RTO at its facility to replace the RCO, the vacuum chiller unit that was recommended by Chemstress, and various other projects related to improved capture. (Resp. Exhibit 22 and Tr., 12/11/08, p. 192:10-17). Toyal also worked with ARI consultants to come up with a testing plan to generate additional data regarding the emissions from various emissions points that had to be captured. Specifically, ARI's function was to assist Toyal with implementing a data acquisition system to gather better data from the RCO operation and secondly, to determine what it would take to make the RCO compliant with the Subpart TT rules (i.e., be able to complete a compliance test and successfully demonstrate compliance). (Tr., 12/11/08, p.36:12-19). Unfortunately, in evaluating the system, ARI was unable to put forth a program that Toyal felt would satisfy its compliance obligations. Thus, Toyal again began to look for yet another consultant to assist with its compliance obligations, and retained Clean Air Engineering.

### D. Deciding On Permanent Total Enclosure As the Solution to Toyal's Compliance Issues

During the 2001-2002 time period, Toyal finally was able to work with two consultants, Clean Air Engineering and Admiral Consulting, that understood what it would take for Toyal to demonstrate compliance with the capture efficiency portion of the Subpart TT rules. (Tr., 12/11/08, p.37:9-17). Clean Air Engineering was retained as the stack testing consultant and Admiral Consulting was retained as the engineering consultant. Clean Air and Admiral Consulting devised a compliance plan using the principle of Permanent Total Enclosure, or "PTE". (Tr., 12/11/08, p.37:19-22). This required that over 120 pieces of equipment in Toyal's manufacturing process be enclosed in such a manner that qualifies under the definition of PTE

and connected to the control device. (Tr., 12/11/08, p.38:10-17). Additionally, in order to understand what was going on in the RCO device, Toyal installed a second flame ionization detector to monitor the inlet of the RCO that would allow it to track the loading coming into the unit. (Tr., 12/11/08, p.41:4-15). At the same time, it installed flow monitoring instrumentation that allowed it to totalize the level of VOMs going into the unit. (Tr., 12/11/08, p.41:8-15). As a result of the above, Toyal and its team of its consultants determined that it could capture all emissions and continue with its efforts to operate the existing RCO unit without the need to install an RTO. (Tr., 12/11/08, p.41:16-22). Moreover, it determined that the vacuum chiller unit, which had been recommended by Chemstress and already purchased and delivered, would not be necessary to demonstrate compliance with the Subpart TT rules. (Tr., 12/11/08, p.42:14-43:7).

During the 2002-2003, Toyal conducted most of the work to enable it to successfully demonstrate compliance with the Subpart TT rule through the concept of PTE. This required a considerable amount of time and effort as Toyal had to ensure that enclosure, capture and collection systems for the 129 sources were configured and balanced with a specific flow rate to meet PTE requirement. (Tr., 12/11/08, p.45:14-19). Toyal also invested much time in designing the necessary enclosure, capture, and duct work of its tank farm system with the rest of the source point connections and vacuum pumps. (Tr., 12/11/08, p.48:1-8). In addition, Toyal had to connect its air stripping solvent system to the RCO which required designing connection points in the solvent distillation system that would be connected to the RCO. (Tr., 12/11/08, p.46:6-14). Toyal completed all this work and invited Kevin Mattison to a pre-test inspection in 2003. Mr. Mattison recommended a few modifications which Toyal completed prior to its stack test. The stack test, which was performed in July 2003, successfully demonstrated compliance

with both the capture and destruction efficiency requirements of the Subpart TT rules. Illinois EPA accepted the stack test results and issued a Federally Enforceable State Operating Permit ("FESOP") in November 2003. (Resp. Exhibit 18).

## III. ARGUMENT

Toyal does not dispute that it was not in compliance with the Subpart TT rules from 1995 through 1998, or that it did not demonstrate compliance until April 2003. But, even though it took several years for Toyal to demonstrate complete compliance, its efforts over the years in trying to understand its own systems and how it could achieve compliance, did result in improvements in controlling its emissions along the way. While Complainant scathingly denounces Toyal's delay in compliance and demands a substantial penalty, the evidence before the Board shows that Toyal's delayed compliance was not due to willful lack of due diligence or contempt for the rules, but, instead, to the complex and technical issues which it faced.

Tellingly, Complainant did not present any evidence or witnesses at the hearing or elsewhere in the record to refute the mitigating evidence presented by Toyal regarding the uniqueness of its operations, and the understandable reasons for Toyal's delay in demonstrating compliance with Subpart TT rules. As explained below, this is not a case where the Subpart TT rules were written for a specific type of facility but, rather, the rules were meant to apply to many different types of facilities. Consequently, an easy cookie-cutter approach to compliance could not be used for all facilities, especially for Toyal, where there were several unique factors which complicated its ability to demonstrate compliance.

Complainant's proposed civil penalty is inappropriate because its analysis of the Section 33(c) and 42(h) factors fails to accurately assess all the relevant facts in this matter and would not aid in enforcement of the Act Specifically, Complainant's analysis of the relevant factors

fails to take into account many mitigating factors that should weigh significantly in the Board's assessment of whether a penalty is appropriate in this case; among other issues:

- Toyal has been compliant with the Subpart TT rules for well over five years;
- Toyal has operated a control device since 1998;
- Toyal employs over 89 people at its facility and, thus, has a positive social value;
- Toyal's compliance efforts were frustrated by the overall complexity of its operations, and delays caused by the fires and explosions; and
- Toyal spent years and considerable sums on consultants in its diligent pursuit of full compliance.

Finally, Toyal did not experience an economic benefit because of its noncompliance. On the contrary, Toyal experienced an economic loss because it spent over $1 million dollars in purchasing a vacuum skid condenser that was intended to be used to achieve compliance, as recommended by its then-consultant, Chemstress Engineering. However, it was later discovered that the vacuum skid condenser was not needed for compliance. In addition to the above, Toyal experienced a further loss of over $1 million due to its inability to efficiently reclaim its spent solvent. Complainant's economic benefit analysis is inappropriate because it fails to consider Toyal's true cost of coming into compliance. Thus, as presented below, Mr. McClure's economic benefit analysis is the more appropriate analysis because it captures Toyal's true cost of coming into compliance consistent with generally-accepted financial principles and relevant U.S. EPA guidance.

## A. TOYAL WAS DILLIGENT IN ITS EFFORTS TO COME INTO COMPLIANCE, IN LIGHT OF THE UNIQUE CIRCUMSTANCES INHERENT IN ITS BUSINESS OPERATIONS THAT COMPLICATED ITS COMPLIANCE SCHEDULE

Toyal's delay in demonstrating compliance was a result of several unique factors, many of which were beyond Toyal's control and took considerable time, expense and effort to overcome. The factual overview presented above regarding the operational issues and compliance history of the Toyal facility, while lengthy, is important background information that is necessary to fully understand the constraints and challenges that Toyal strove to overcome during the period of non-compliance, for the purpose of determining an appropriate penalty, if any. To the extent possible, Respondent will refrain from repeating the above-mentioned facts in offering its justification as to the appropriateness of a modest, if any, penalty in this case.

As discussed below, the first mitigating factor was the complexity of Toyal's manufacturing operations, which include a substantial number of sources and batch processes. The second factor is that although Toyal worked with competent environmental consultants who were experienced with industrial air permitting issues, these consultants did not fully understand Toyal's unique issues, and Toyal went through a number of different consultants before hitting upon a winning team and compliance strategy for its complex facility. The third factor relates to the inherent dangers associated with Toyal's manufacturing operations, which are important to this case mostly because the Complainant misunderstands and oversimplifies the challenges that Toyal faced in achieving compliance in light of these issues. Finally, the involvement of Illinois EPA in working with Toyal in furtherance of its struggle to achieve compliance, and Illinois EPA's continued acquiescence and assistance offered to Toyal, refutes Complainant's contention that Toyal was dragged kicking and screaming into compliance after years and years of ignoring

its compliance obligations. These reasons, and others discussed further below, all weigh in favor of leniency in the Board's penalty determination in this matter.

### 1. Toyal's Manufacturing Operations are Complex and Unique

The sheer complexity of Toyal's manufacturing operations is probably the most important reason why Toyal's compliance with Subpart TT required an unusually large amount of time to achieve total compliance. Among other factors, the facility is unique in the large number of emission units and its batch processing operations which complicated its compliance activities. (Tr., 12/11/08, p. 66:20-70:5).

As Mr. Steve Anderson of Admiral Consulting testified at the hearing:

> "It took me a while to figure out what the processes were, how they worked, how they could interconnect between each other. It was a very complicated process and it was going to be very complicated to show compliance with the regulations."

(Tr., 12/11/08, p. 67:14-18).

Specifically, there are well over 200 VOM sources at the Toyal facility (Tr., 12/11/08, p. 68:21-69:1). However, only 129 of those sources were actually tied into the control device. (Tr., 12/11/08, p. 69:2-3). Additionally, Toyal's facility is a batch processing operation. (Tr., 12/11/08, p. 69:2-3). As a result, there were approximately seven to nine batch operations, of which all or none might be operating at the same time. (Tr., 12/11/08, p. 69:23-70:5). This was an enormous challenge in determining how Toyal would approach the compliance testing. (Tr., 12/11/08, p. 69:18-21).

As further explained by Mr. Anderson at the hearing:

> "So one of my main concerns initially was if you're going to demonstrate compliance, you have to be at maximum capacity, how are you going to tell if you are at maximum capacity, what products are you going to be doing, can you have all nine

operations going on at the same time, you know. What is exactly going to be needed to demonstrate compliance."

(Tr., 12/11/08, p. 70:11-17).

One of the biggest challenges that Toyal had to deal with was that there was little process data available, due to the unique nature of its operations. (Tr., 12/11/08, p. 71:15-18). While Toyal had some historical data regarding certain pieces of equipment, it didn't know what product was being made while the test was being run because that information had not been recorded. (Tr., 12/11/08, p. 71:22-72:2). Thus, Toyal couldn't determine if the equipment was being run at maximum, normal, or some other capacity. (Id.).

Additionally, Toyal had some historical data which showed the VOM concentration rate, but information regarding the flow rates had not been recorded. (Tr., 12/11/08, p. 71:18-21). Toyal went through the plant and identified each process, what was being emitted, the flow rates, and the emission points. (Tr., 12/11/08, p. 73:9-11). In order for Toyal to complete the work outlined in its May 2001 construction permit, it had to determine the above because up until that point, the submitted CAAPP permit was based on engineering estimates, and Illinois EPA wanted actual data. Related to the above, Toyal also experienced challenges in determining what the fugitive emissions were from its sources for which capture was not feasible. This was something that Steve Anderson in all of his years of experience had never seen, and to his knowledge, neither had Illinois EPA. (Tr., 12/11/08, p. 81:9-13). Specifically, Toyal had to devise an emission factor that the facility was going to produce itself because no emission factors existed from the U.S. EPA or other published sources. (Tr., 12/11/08, p. 81:17-19). This, of course, took time, as Toyal not only had to determine the emission factor but also had to get Illinois EPA's approval. (Tr., 12/11/08, p. 81-82). However, Toyal's efforts towards quantifying the controlled and uncontrolled emissions were important because at the conclusion of this

process, Toyal determined that it could obtain a FESOP instead of a CAAPP, because its actual emissions were below 25 tons per year of VOM.[6] (Tr., 12/11/08, p. 74:14-23).

As Toyal obtained more information regarding its facility, Steve Anderson advised Toyal that in order for it to demonstrate compliance with the Subpart TT rules, it would have to put in permanent total enclosures ("PTE"), or it would have to seek relief from the regulations. (Tr., 12/11/08, p. 90:3-10). Specifically, the PTE concept would satisfy the capture efficiency part of the control requirements of Subpart TT rules. (Tr., 12/11/08, p. 85:15-19). Once it understood what would be required, Toyal opted for permanent total enclosure, although it was advised that it would be very costly and would be a very complicated process. (Tr., 12/11/08, p. 87:20-12). For example, this included designing and installing PTEs to capture emissions from numerous sources, including the screeners and the tank farm, which were originally not proposed for control. (Tr., 12/11/08, p. 86:10-88:8).

As noted above, in addition to the engineering challenges of demonstrating compliance and designing and installing PTE for all of its sources, Toyal was also involved in the aftermath of investigating the cause of the fires at its facility, and responding to insurance companies and OSHA regarding the fire incidents. As a result, Toyal had to request several extensions from Illinois EPA. (Resp. Exhibits 9 and 10).

Toyal contacted Eric Jones of Illinois EPA and requested extensions to complete the work set forth in its 2001 construction permit. (Tr., 12/11/08, p. 94:14-20). Toyal requested two extensions, on February 26, 2002 (Resp. Exhibit 9) and August 19, 2002 (Resp. Exhibit 12)

[6] With respect to completing the permit application, a FESOP and a CAAPP application basically involve the same amount of work. In fact, the application is similar and the same forms are used. Contrary to Complainant's implications, Toyal lost no time in reaching compliance by switching from pursuit of a CAAPP to a FESOP along the way, as all of the underlying work needed to support the application was the same.

respectively. Illinois EPA granted these extensions with some conditions. (Resp. Exhibits 11 and 17). Toyal demonstrated compliance and Illinois EPA issued its FESOP application on November 25, 2003. (Tr., 12/11/08, p. 100:10-23 and Resp. Exhibit 18).

One of the most important things to be understood is that Toyal lacked any reference or model to rely upon for the obstacles that it encountered in demonstrating compliance. For example, Toyal's competitors, Siberline and Eckhard, were located in areas that did not require VOM emission controls. (Tr., 12/11/08, p. 88:17-89:1).[7] Consequently, they were not subject to the VOM rules. Furthermore, in Illinois the Subpart TT rules involved a lot of different sources. (Tr., 12/11/08, p. 67:2-5). None of these sources involved a facility like Toyal. Therefore, what may have worked for other sources would not apply to a unique facility such as Toyal.

In sum, although Toyal may have taken some years to demonstrate compliance through a stack test to satisfy the Subpart TT rules, it had legitimate reasons for the time it took to reach full compliance, most of which were a function of the extreme complexity of its operations and the difficulty of effectively controlling the facility's emissions.

### 2. Toyal Hired Competent Consultants But Unfortunately, They Did Not Fully Understand Toyal's Operations and What It Would take to Demonstrate Compliance with Subpart TT

Although Toyal hired competent engineering consultants, many of which were nationally-recognized firms, and with which Toyal had had prior successful experiences on other issues, it took several tries to find consultants who were able to understand Toyal's unique operational challenges and devise an effective compliance plan. As explained in detail above,

[7] Admiral Consulting was able to obtain information through a Freedom of Information Act request information regarding one other facility that received a similar violation notice.. It was located in an non-attainment area for VOM. However, by the time that Admiral Consulting received the information, the facility appeared to have closed down. Additionally, it did not appear that they had any of the control requirements as applied to Toyal here in Illinois. (Tr., 12/11/08, p. 89:2-15).

Toyal began with Montgomery Watson, which assisted Toyal with its CAAPP application and proposed compliance plan. (Tr., 12/10/08, p. 179:21-180:15; Tr., 12/10/08, p. 158:10-14). Montgomery Watson's responsiveness was unsatisfactory (Tr., 12/10/08, p. 158:17-159:5), and so Toyal moved on to Woodward-Clyde in January 1997 to design and implement a compliance plan. (Tr., 12/10/08, p. 159:17-23). Based on Woodward-Clyde's investigations, Toyal followed its recommendations, obtained the necessary construction permits, and installed the RCO and associated capture points and ductwork. (Tr., 12/10/08, p. 160:4-13). Although the RCO began operating in early December 1998, the planned stack test scheduled for later that month never occurred, as the pre-stack test inspection by Illinois EPA revealed a number of concerns. (Resp. Exhibit 7, p. 4). Because Woodward-Clyde had apparently failed to adequately consider how Toyal would demonstrate capture efficiency of the system, and did not give Toyal confidence that it could bring Toyal into compliance, Toyal had to replace Woodward-Clyde as well. (Tr., 12/10/08, p. 166:2-10).

While Toyal continued to operate the RCO, Toyal was required to rethink how it was going to go about demonstrating compliance with the Subpart TT rules, and continued to search for a consultant that would be able to meet this challenge. Toyal first used Chemstress (Tr., 12/11/08, p. 20:8-15) to identify source points and engineer capture solutions in response to Mr. Mattison's comments because they were on site and already had knowledge about Toyal's various processes. (Tr., 12/10/08, p. 118:20-119:1). Chemstress recommended the use of a vacuum chiller system to replace the numerous vacuum pumps throughout the plant with a centralized vacuum and condenser system (Tr., 12/10/08 p. 214:3-13), which cost Toyal approximately $1 million dollars. (Tr., 12/10/08, p. 166:24-167:2).

During the 2001-2002 time period, Toyal finally was able to retain two consultants, Clean Air Engineering and Admiral Consulting, that understood what it would take for Toyal to demonstrate compliance. (Tr., 12/11/08, p.37:9-17). Based upon the initial work of ARI and the ongoing input from Clean Air Engineering, Admiral Consulting devised a compliance plan using the principle of PTE, which required that over 120 pieces of equipment in Toyal's manufacturing process either be totally enclosed or enclosed in such a manner that qualifies under the definition of PTE and connected to the control device. (Tr., 12/11/08, p.38:10-17). After Toyal modified its emission sources to utilize PTE, Illinois EPA accepted the capture and control system and issued a FESOP to Toyal in November 2003. (Resp. Exhibit 18).

Although Toyal was not able to demonstrate compliance following the installation of the RCO in 1999, the work done by each of its early consultants was beneficial, in that Toyal was able to improve its understanding of its own facility and what it would need to address in order to demonstrate compliance with Subpart TT. Each experience with the above-named consultants were rungs on the ladder up to achieve full compliance, and were hardly wasted effort, as Complainant wishes the Board to believe. Even more offensive in the face of Toyal's extensive (and expensive) efforts at compliance, Complainant contends that Toyal "placed very little value" on environmental compliance (Complainant's Brief, at 16), and characterizes Toyal's efforts as "sporadic, half-hearted and ineffective." (Id., at 20). Aside from Complainant's overwrought hyperbole in its brief, however, Complainant offered no witnesses at the hearing, nor any other evidence, to disprove Toyal's copious evidence of continuous good-faith efforts to overcome its considerable challenges and move to full compliance in a reasonable manner.

### 3. There Are Inherent Dangers in Toyal's Manufacturing Operations That Significantly Complicated Toyal's Compliance Efforts

The third factor relates to the inherent dangers of fires and explosions in Toyal's manufacturing operations. Fires in its paste operation have always been a major concern for Toyal because, historically, that is where a majority of the fires have taken place. (Tr., 12/11/08, p. 48:14-16). As noted above, during the time period from 1996 to 2001, despite its best efforts, Toyal experienced nine fires at its facility. (Resp. Exhibit 7). This time period coincided with the time frame in which Toyal was in the process of trying to demonstrate compliance with the Subpart TT rules. Obviously, when fires and/or explosions occur at its facility, the priority of the plant must be to determine the root causes of the accidents while the information is fresh. (Tr., 12/10/08, p. 154:19-155:9). Consequently, Toyal was obligated to continue with its efforts in determining how to demonstrate compliance, while also simultaneously dealing with the aftermath of the nine fires. As previously noted, Toyal is a small plant in relation to other similar plants. Thus, when fires and/or explosions occur at its facility, it must immediately divert all of its resources (including management, engineering, technical, production, safety, health and environmental personnel) to investigate the accident. (Tr., 12/10/08, p. 154:19-155:9).

Because of the inherent dangers, there is an added level of complexity to the projects undertaken at the Toyal facility because it requires that Toyal be very careful in the design of any of the process equipment or connections to its process equipment. (Tr., 12/11/08, p. 48:21-49:3). When projects are undertaken, Toyal must review the proposed work with the plant and production personnel to evaluate the proposed changes and determine whether any changes or modifications would create safety problems. (Tr., 12/11/08, p. 48:21-49:3).

Although Complainant tries to argue that Toyal's efforts were half-hearted and lax, it clearly shows a lack of understanding or appreciation for the technical constraints and challenges

that were placed on Toyal in trying to achieve compliance with the Subpart TT rules. For example, Complainant asked Mr. Van Hoose whether Toyal could have simply installed a flare to address the VOM emissions from the air stripping of the solvent. (Tr., 12/10/08 p. 124:1-5). Complainant's implication that there was such an easy solution to Toyal's compliance challenges completely ignores the inherent dangers in Toyal's manufacturing process, and the fire and explosion incidents that occurred at the facility. As Mr. Van Hoose testified, given the record of fire incidents at the facility, use of a flare would have posed a serious concern to Toyal's operations. (Tr., 12/10/08, p. 132:7-133:18). Furthermore, Complainant fails to recognize that Illinois EPA was well-aware of the difficulties faced by Toyal. Moreover, Toyal acted in good faith throughout the process of non-compliance by keeping the Illinois EPA apprised of its activities and even seeking guidance from Illinois EPA as is discussed below.

### 4. Illinois EPA Was Aware of the Complications That Toyal Faced in Demonstrating Compliance

Complainant's arguments fail to consider that Illinois EPA was aware of the complications that Toyal faced in demonstrating compliance. Again, Toyal does not dispute that it was not in compliance with the Subpart TT rules. However, Toyal did not disregard its obligations under the Subpart TT rules during the noncompliance period. On the contrary, as is explained above, Toyal took its obligations quite seriously as it worked to understand the requirements of Subpart TT rules and how its facility could meet its obligations. In fact, that is why Toyal communicated with the Illinois EPA on many occasions during the time period of noncompliance and even thereafter. The record before the Board shows that Toyal consistently kept Illinois EPA apprised of its compliance activities while also seeking guidance and the necessary approvals from Illinois EPA. In fact, the level of interaction between Toyal, its consultants, and Illinois EPA was unusual, if not unprecedented. Mr. Steve Anderson testified at

the hearing, that it was the highest level of involvement he had ever had with Illinois EPA. (Tr., 12/11/08, p. 82:21-24). Toyal communicated with Illinois EPA in written and oral discussions as well as in-person meetings beginning at least since its CAAPP submittal application.

Toyal's written and oral communications with Illinois EPA regarding its compliance complications began after Illinois EPA's pre-stack inspection in December 1998. Toyal sent a letter to Illinois EPA dated December 23, 1998, in which it requested an extension to address concerns noted by Kevin Mattison at his pre-stack test inspection. (Resp. Exhibit 5). During the 2002 time period, Toyal sent a letter dated February 19, 2002 to Eric Jones requesting an extension due to an explosion and fire at the facility that delayed the construction of some pertinent equipment which was required to determine control and efficiency of the operation to secure the permit. (Resp. Exhibit 9 and Tr., 12/10/08, p. 218:8-219:1). Following receipt of the letter, Toyal had several discussions with Eric Jones regarding the request. (Tr., 12/10/08, p. 219:2-4). Mr. Jones requested additional information regarding what Toyal had done and what it was doing in installing the pollution control equipment relative to securing the permit. (Tr., 12/10/08, p. 219:11-20). Toyal provided the requested information as set forth in its letter dated February 26, 2002 to Don Sutton copying Mr. Jones. (Resp. Exhibit 10 and Tr., 12/10/08, p. 219:7-24). Thereafter, Illinois EPA granted Toyal's request as provided in the March 8, 2002 revised construction permit. (Resp. Exhibit 11).

Following the revision of the construction permit, Toyal requested an additional extension on August 19, 2002 because the remaining part of the expansion was behind schedule and, in order for Toyal to obtain the permit, it needed to have all the units in operation. (Tr., 12/10/08, p. 221:3-16). Once again, Toyal followed up with Eric Jones of the Illinois EPA and explained its reasons for requesting an additional extension. (Tr., 12/10/08, p. 221:20-22). Per

these discussions, Toyal submitted a request to modify its permit in a letter dated August 19, 2002, to Mr. Sutton, with a copy to Eric Jones. (Tr., 12/10/08, p. 222:2-6 and Exhibit 12). Illinois EPA requested additional information which Toyal provided and, thereafter, Illinois EPA granted Toyal's August 19, 2002 request and, again, issued a revised construction permit dated November 18, 2002. (Tr., 12/10/08, p. 222:15-24 and Resp. Exhibit 14).

In addition to the requests for extensions, Toyal also communicated with Illinois EPA regarding particular incidents and/or other requests. For example, Toyal had to report each outage of the RCO those to the Illinois EPA. (Tr., 12/10/08, p. 112:18-19). Further, as Toyal proceeded to implement additional capture and control and other refinements, the original engineering estimates that were used in the Title V application described previously and in the May 30, 2001 construction permit application changed and were replaced by actual engineering data. (Tr., 12/10/08, p. 217:12-17). Toyal had discussions with Eric Jones regarding those changes. (Tr., 12/10/08, p. 218:5-12). When Toyal attempted to determine and gather specific data regarding fugitive emissions from the sources that were not feasible to capture and control, Steve Anderson engaged in discussions with Eric Jones and Kevin Mattision regarding the concept of applying emission factors that the facility itself was going to produce, given that there were no emission factors available from U.S. EPA or other sources. (Tr., 12/11/08, p. 81:5-82:20). These factors were ultimately used in the FESOP application and were accepted by the Illinois EPA.

In addition to its oral and written communications, Toyal had several meetings with Illinois EPA in which it actively sought the advice of the Illinois EPA. Beginning with the installation of its RCO in December 1990, Toyal invited Mr. Kevin Mattison to a pre-stack test inspection. Subsequently, Toyal had a meeting with Illinois EPA and the Attorney General's

Office on November 1, 2000, in which it presented proposed plans to apply for a construction permit that included the B-unit expansion project, the modifications it needed to show compliance, and other related activities, all in one application. (Tr., 12/11/08, p. 75:18-19). Illinois EPA gave its approval thereafter and Toyal submitted its permit application in January 2001. (Tr., 12/11/08, p. 76:15-16). Toyal followed up with Eric Jones, the Illinois EPA permit engineer, on several occasions during the 90-day review period, to confirm the status of its application and determine whether Illinois EPA had any questions. (Tr., 12/11/08, p. 76:16-23). Mr. Harish Desai and Eric Jones of the Illinois EPA conducted a site visit in May 2001 and, thereafter, Illinois EPA issued the permit on May 30, 2001. (Tr., 12/11/08, p. 77:5-11 and Resp. Exhibit 17). Toyal also invited Kevin Mattison and Anju Mathia of Illinois EPA for a pre-stack test inspection when it had completed all the work in connection with its FESOP application in 2003. (Tr., 12/10/08, p. 224:2-18).

Based on the above, it is evident that Toyal exercised good faith and cooperation as Toyal consistently kept Illinois EPA apprised of the challenges that it encountered, and also sought guidance and the necessary approvals from Illinois EPA regarding Toyal's compliance activities with Subpart TT rules. The fact that Illinois EPA had knowledge as to the challenges and circumstances faced by Toyal, and that it granted the extension requests as set forth above, provide context for Toyal's delayed compliance with Subpart TT.

Further, it is important that as time passed, Illinois EPA became more familiar with the regulators and became better acquainted with what was really going on at the facilities. (Tr., 12/11/08, p. 65:11-24). As stated aptly by Steve Anderson at the hearing, "It was a learning process for everybody involved." (Tr., 12/11/08, p. 65:24-66:1). As previously discussed, the generic Subpart TT rules were not written specifically for a facility such as Toyal's. Rather, the

generic Subpart TT rules were meant to apply to many different sources and, therefore, it is understandable that there would be unknowns and questions as to how the rules would apply to specific sources. That is exactly what happened in this matter. However, in Toyal's case, there were many questions and many unknowns that Toyal had to work through in order to achieve compliance with the Subpart TT rules.

### B. THE CIVIL PENALTY IMPOSED SHOULD REFLECT TOYAL'S GOOD FAITH EFFORTS AND THE UNIQUE CIRCUMSTANCES AFFECTING TOYAL'S ABILITY TO DEMONSTRATE COMPLIANCE

A substantial penalty should not be imposed in this matter because Toyal was diligent in its efforts to bring its operations into conformity with the Subpart TT rules, and its delayed compliance was due to the unique circumstances as set forth above. Illinois courts have often stated that the primary purpose of the civil penalties is to aid in enforcement of the Act. *ESG Watts, Inc., v. Illinois Pollution Control Board,* 668 N.E.2d 1015, 1021, 282 Ill. App. 3d 43, 52 (4th Dist. 1996). The imposition of the statutory maximum penalty is clearly not appropriate, and even Complainant has not made such a request.

However, Complainant's demanded penalty is still greatly excessive in light of the circumstances in this matter, after taking considering the factors provided in Section 33(c) and 42(h) Act. 415 ILCS 5/33(c), 42(h)(2007). There is nothing in the record which indicates that Toyal was dilatory or recalcitrant; on the contrary, the record shows that Toyal was sincerely trying to come into compliance. It is long-established policy of the Board not to penalize those who are honestly trying to comply. *Southern Illinois Asphalt Company, v. Illinois Pollution Control Board,* 60 Ill.2d 204, 216, 326 N.E.2d 406, 412-413 (1975) (citing *Employees of Holmes v. Merland, Inc.,* PCB 71-39 Slip Op. *5 (September 16, 1971)). Moreover, as explained below, Toyal did not enjoy an economic benefit from its noncompliance period when taking into account all of the expenditures it incurred specifically, including the expenses of the vacuum

chiller unit which cost Toyal $1 million, and the lost savings as a result of its inability to use the solvent recovery system.

### 1. Complainant's Requested Civil Penalty is Excessive and Inappropriate Due To Lack of Evidence of Willful Noncompliance

To assess a civil penalty in the amount of $716,440.00 and, moreover, the added $400,000 to deter future violations, as demanded by Complainant, would be completely inappropriate in this matter. The record before the Board shows that Toyal was diligent in its compliance efforts despite all the complexities and challenges it faced. Further, Toyal continuously engaged the Illinois EPA as to what it was doing, and sought assistance and the necessary approvals as it worked to demonstrate compliance. This is not like other enforcement actions when the alleged violator failed to show good faith and completely disregarded its obligations in attempt to skirt the regulations. *See People v. Jersey Sanitation Corporation,* PCB 97-2 Slip. Op *8 (June 16, 2005). In *Jersey Sanitation,* the Board noted that on only one occasion upon which the Illinois EPA inspected the Site were there no violations. Further, the Board noted that the respondent, Jersey Sanitation, failed to act in good faith and that it did not show that its failure to comply with regulations was simply inadvertent. *Id.* at *9.

Here, Toyal was, in good faith, trying to comply with the Subpart TT rules, and it had legitimate reasons for its delay in demonstrating full compliance. Tellingly, Complainant has presented no evidence to the contrary. Toyal consistently operated a control device at its facility since December 1998 to the present. Further, it is evident that Toyal's delayed compliance in understanding and implementing the necessary modifications at its facility to conform to the Subpart TT rules was successful, because it has never received any notice of violation or other enforcement action since the filing of the complaint in this matter on May 31, 2000. (Tr., 12/10/08, p. 173:4-10). Consequently, there is no need to deter future violations because there

have been none, and more importantly, no evidence of willful noncompliance or any implication otherwise that Toyal will not continue to be in compliance. To the contrary, to impose a substantial penalty in this matter would deter future facilities subject to these rules from making the good faith efforts demonstrated by Toyal as it strove to achieve full compliance.

**2. Complainant's Requested Civil Penalty Would Be Detrimental to Toyal's Already Ailing Business Operations**

A substantial penalty such as that requested by Complainant would have a detrimental effect on Toyal's business and its employees. Toyal operates as a stand-alone company. As testified to by Mr. Van Hoose at the hearing:

> Q. Mr. Van Hoose, you stated that you're a stand alone company,
> although owned eventually by Toyo in Japan, correct?
>
> A. Correct.
>
> Q. Where do you get your financing from?
>
> A. We finance our own.
>
> Q. Okay. When you need to make a large capital expenditure, where do you get the money from?
>
> A. Banks.

(Tr., 5/10/08 p. 174:16-175:1).

Unfortunately, the economy has had a negative impact on Toyal's business. As of the time of the hearing, in December 2008, Toyal's business was already suffering in this economic turmoil as testified to by Mr. Van Hoose.

> Q: Since you sell to ---your product is used in the automotive industry, is the recent widely publicized woes of the auto industry having an impact on your operation?
>
> A: Absolutely.
>
> Q: Would you describe that impact?

A: Yes. Let me explain, first, that we've had to reduce our manpower. We've had to lay off both salary and hourly employees. We've dropped our employment from 109 at the beginning of the year down to 89 people. We're hoping to remain there. For example, December, as the year went on, the auto industry has gotten worse and worse. A lot of companies have -- or plants of the automotive companies have shut down and they've also canceled their orders to their customers who are our customers. And in these are paint plants. And they have since cancelled their orders.

As an example, this month we are going to run our paste units at about 20 percent capacity and 10 percent of that capacity is just orders that were left over from November that were postponed. So we only have a small number of orders for this month. We're going to actually shut down our plant on the 19th and reopen on the 2nd of January. Normally, we operate between the holidays and just be off on the holidays.

As far as the – addition, on the financial side, our company has been extremely impacted by the economy. We're going to lose over $3 million this year.

(Tr., 12/10/08, p. 143:11-144:17).

In these challenging economic times, companies such as Toyal that provide good jobs and benefit the community, need a helping hand from the government, not the punitive hand that the Complainant wishes to extend to Toyal, especially under the circumstances where Toyal has been in compliance and has expended a significant amount of resources to meet and exceed its compliance obligations. While Complainant refuses to acknowledge that Toyal's current financial position is an appropriate factor to be considered in the penalty analysis, such information is clearly relevant, as determined by the Board's Hearing Officer. (Tr., 12/10/08, p.145:1-146:10).

On the other hand, to the extent that Complainant seeks to insert the issue of the financial status of Toyal's Japanese parent company, Toyo Aluminum KK and/or its parent, Nippon Light Metals Group, into the penalty calculation debate (See Complainant's Brief, at 21), this is

improper and should be ignored by the Board. Complainant has presented absolutely no evidence that Toyal's parent corporation(s) have integrated financial relationships. Nor has it set forth any legal authority as to why the parent corporation should be responsible for a stand-alone company under such circumstances. In *Charter Hall Homeowner's Association v. Overland Transportation System, Inc.*, PCB 98-91 *10 (Slip. Op. May 6, 1999), the complainant similarly attempted to argue that the proposed penalty was warranted based on the gross profits of the respondent's parent company. However, the Board rejected that argument because the complainant failed to prove that the parent corporation was responsible for the violations or demonstrate that this information was relevant to the penalty to be imposed on the respondent.

Here, Complainant has not set forth any evidence in the record before the Board that shows that Nippon Light Metals was responsible for the violations or even had daily involvement in affairs at Toyal. In fact, the evidence in the record shows that Toyal operates as an independent entity that seeks financing on its own from banks. (Tr., 5/10/08 p. 174:16-175:1). Notwithstanding those issues, Complainant does not even offer any competent information regarding the actual financial health of any of these companies, but seeks only to prejudice the Board against Toyal by citing to data on total global sales of Nippon Light Metals Group, which by itself has no intrinsic bearing on the financial strength of a company. Complainant's transparent attempt to leverage such irrelevant financial information to support an inflated penalty is improper, and should not be condoned by the Board.

### 3. The Act Requires That the Board Consider the Factors Provided in Section 33(c) to Determine Whether a Penalty Should Be Assessed in this Matter

Before determining any penalty for violations under the Act, the Board must consider the factors set forth in Section 33(c) of the Act. *People v. State Oil Company,* PCB 97-103, Slip.

Op. at *11 (March 20, 2003). While the Board sometimes applies the Section 33(c) factors to each and every alleged violation, the Board does not do so in every case. Rather, the Board may apply the Section 33(c) factors to the totality of the alleged violations. *People v. Waste Hauling Landfill, Inc.*, PCB 95-91, *20 (May 21, 1998). Section 33(c) of the Act provides that:

> In making its determination, 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;
>
> (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)(2007).

Additionally, as stated by the Illinois Supreme Court in discussing the Section 33(c) factors, "The Board is not limited, however, to the consideration of the specified areas, but, it is required to consider all facts and circumstances bearing upon the reasonableness of the conduct." *Southern Illinois Asphalt Company v. Pollution Control Board,* 60 Ill.2d 204, 208, 326 N.E.2d 406, 408 (1975). Based on the above, Toyal respectfully requests that the Board consider all the facts and circumstances presented in this case, including the evidence in the record that shows that Toyal acted in a reasonable manner based on the unique challenges it faced in demonstrating the capture efficiency requirements of the Subpart TT rules. Finally, while it is true that the severity of the penalty should bear some relationship to the seriousness of the infraction or conduct, the Board should also consider good faith or lack therof to the issue of whether a

penalty should be imposed. *Modine Manufacturing v. Illinois Pollution Control Board,* 193 Ill. App.3d 643, 649, 549 N.E.2d 1379,1383 (2d Dist. 1990) (citing *Archer Daniels Midland v. Pollution Control Board,* 149 Ill. App. 3d 301,305, 491 N.E.2d 580 (1986)).

**4. Complainant Misconstrues the Character and Degree of Injury to, or Interference with the Protection of the Health, General Welfare and Physical Property of the People**

Complainant's arguments that Toyal's eight years of alleged noncompliance impeded federal and state efforts to reduce the sources of VOM levels, and thereby seriously interfered with the "protection of the health, general welfare and physical property of the people" mischaracterizes the facts in this matter. (Resp. Br., p.10). To state that "Toyal was operating equipment that emitted VOM without providing the environmental protections that the Board intended" further mischaracterizes several important facts in this matter. First, Toyal operated a control device since December 1998. Second, as explained at the hearing, it was very important for Toyal to continue to operate because such was essential to its ability to demonstrate compliance. As Mr. Dennis Debrodt testified at the hearing:

> "Actually, having the plant operating was essential in being able to size the equipment and understand what was going on with the equipment. You know, we needed to do the testing of the flow and the loading to understand whether or not our sizing was adequate or not. So from my standpoint, having the plant operating was very important."

(Tr., 12/11/08, p. 57:23-58:17).

Furthermore, this case differs from other cases where there was testimony from Illinois EPA inspectors and inspection reports that there was serious impacts to the physical property and surrounding areas due to the respondent's noncompliance, which would continue into the future. *See People v. Waste Hauling Landfill,* PCB 95-91 Slip. Op. *21 (May 21, 1998). Unlike the respondent in *Waste Hauling Landfill,* whose activities resulted in a landfill that greatly exceeded

the dimensions allowed in its permit, continual leachate problems, and issues related to the disposal of hazardous waste into an unpermitted waste facility, here, Complainant has not evaluated the level of emissions or whether such would have an impact even after Toyal demonstrated compliance with the capture and efficiency requirements of the Subpart TT rules. The completely unsupported conclusion that Toyal's emissions caused great harm to the environment is an insufficient basis upon which to base a substantial penalty demand.

Moreover, this case differs markedly from *People v. Panhandle* PCB 99-191, Slip. Op. *21 (November 15, 2001), where the respondent was in violation of NOx rules for over ten years, and continued to be in violation as of the time when the Board provided its decision. While Toyal admittedly was in violation of the Subpart TT rules for a period of time, it did operate a control device since 1998, has since 2003 demonstrated full compliance, and has had continual compliance with the applicable regulations.

**5. Toyal's Business Has a Positive Social and Economic Value**

Toyal's facility employed 89 employees as of the time of the hearing (48 hourly union and 41 salary) (Tr., 12/10/08, p. 139:21-140:3). Therefore, Toyal has a positive social and/or economic value. Further, while it is true that the Board has found that a pollution source typically possesses a "social and economic value" that is to be weighed against its actual or potential environmental impact, in this case, Toyal's operations would still be considered a positive social and economic value. *People v. Waste Hauling Landfill,* PCB 95-91 Slip. Op. at *21 (May 21, 1998). Moreover, in these trying economic times, it is important that companies remain viable and, imposing penalties such as requested by Complainant for the type of infraction in this case, (especially one that has long since been cured) should not be a reason for jeopardizing a company's continuing viability.

Complainant cites to *Waste Hauling Landfill* in support of its assertions; however, this case clearly is distinguishable on several grounds. First, unlike the respondent in *Waste Hauling Landfill,* who consistently failed to make the technical improvements necessary to control the overheight, overfill, and hazardous waste disposal, and further, did not submit proper closure, post-closure plans, or meet financial assurance obligations, Toyal continuously strove to remedy its noncompliance issues by working with its team of consultants and implementing their recommendations. Second, the Board stated in *Waste Hauling Landfill* that "the overheight and overfill continue to be problems today and this diminishes the social and economic value of the landfill." *Id.* at *21. Here, neither the Complainant nor the record before the Board show that Toyal's noncompliance continued to be a problem after April 2003, let alone continuing to today. On the contrary, Toyal has been in compliance for years. Consequently, the Board should weigh this factor in favor of Toyal.

**6. Toyal's Facility is Suitable to the Area in Which it is Located**

Toyal's facility is suitable for the area where it is located and Complainant has not substantiated its claim otherwise. This factor requires that the Board look at the location of the source and determine its suitability to the area, including the question of priority of location. *Waste Hauling Landfill,* at * 21.

In an exceptionally-strained argument, Complainant contends that Toyal's facility is not suitable for the area, simply because it was not in compliance with applicable air regulations for a period of time. (Complainant's Brief, at 10-11). Simply being out of compliance, however, does not somehow render a facility "unsuitable" for its location as contemplated by the Section 33(c) factors. Complainant either misunderstands, or deliberately misapplies, the point of this test, considering that in practically any enforcement action, a facility likely is (or has been) out of compliance, and Complaint's interpretation of this factor would essentially render it a nullity, as

a facility would always be unsuitable for its location when noncompliant, under Complainant's argument. Complainant's position, therefore, is illogical and simply invalid.

The Toyal facility is located in the Des Plaines Valley Area. (Tr., 12/10/08, p. 229:9-11). The Toyal facility was originally used a long time ago as a manufactured gas plant. (Tr., 12/10/08, p. 230:2-6). To the east of the Toyal facility is the Des Plaines River. To the north is property owned by the Water Reclamation District of Greater Chicago and a wetlands area. To the west is an Illinois Department of Transportation facility and Stateville Penitentiary property. Directly to the south is a publicly owned treatment works operated by the Village of Crest Hill. (Tr., 12/10/08, p. 229:7-22). Based on the above, the Toyal facility is suitable to its location. Therefore, the Board should weigh this factor in favor of Toyal.

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

While Complainant insists that compliance was technically practicable and economically reasonable, its argument is clearly flawed. (Complainant's Brief, at 11). While the 'technology' may have been available, and even in place at a certain point, the successful application of that technology to the Toyal facility was anything but standard. In fact, most of the work done at the facility to show compliance with the Subpart TT rules had to be custom designed and fitted for the facility. As testified to by Mr. Dennis Debrodt at the hearing:

> Q: You responded that fume hoods and vacuum systems, obviously, were available in the 1990s. Would a standard fume hood qualify, in your opinion, as a permanent total enclosure?
>
> A: Well, every -- you know, all the source points, each one had to be looked at individually and to ensure that we could pass that criteria. So, you know there are all kinds of standards hoods, but they all had to be custom fit to the specific equipment they're connected to. So it's not as

simple as a standard hood for the criteria. They kind of all had to be done together.

Q: You didn't hear it yesterday, Mr. Malmgren testified about the modifications that were necessary on the screener hoods and qualified those as a permanent total enclosure. You're familiar with those?

A: That's correct.

Q: Would you call those a standard fume hood as the way they presently exist?

A: No. Those are actually very specially designed for that piece of equipment because the –because there's a lot of the space constraints and there's process piping going through the middle of the hood to get the product to the screener. So, those are very custom designed.

(Tr., 12/11/08, p. 59:13-60:14).

Moreover, Complainant fails to recognize that the application of the available technology to the Toyal facility presented many challenges in light of certain unique factors pertinent to its operations. Consequently, prior to even completing the design and construction there was a significant amount of due diligence that had to be completed regarding its large number of small emission sources. Unlike in *Panhandle,* where the Board noted that the respondent could have easily verified its compliance status because all it needed to calculate such was its own records along with the standard emission factor (both of which were readily available), Toyal did not have the necessary information readily available. *People v. Panhandle,* at *21. In fact, that is one of the main reasons for the delay in compliance.

Hearing testimony clearly established that Toyal's prospective compliance with Subpart TT required that it use emission factors to determine what the fugitive emissions were from its sources that were not feasible to be enclosed or captured. (Tr., 12/11/08, p. 81:5-8). Unlike the respondent in *Panhandle,* Toyal had to develop its own emission factors because there was no

such thing available from U.S. EPA or other published source. (Tr., 12/11/08, p. 81:17-19). This was one of the unique features of the facility according to Steve Anderson, who testified that such was "part of the uniqueness of this plant. I've never had to do this with another plant. We had to up front get okays from the Agency on the concept. They had not, as far as I know, seen this from other facilities." (Tr., 12/11/08, p. 81:9-13).

Again, as previously stated, it is important to understand that Toyal was the only facility of its kind in Illinois that was subject to the Subpart TT rules. Consequently, Toyal did not have a model or example to guide its compliance activities. Thus, when Toyal had to develop its own program, it required a lot of time and effort, and also required obtaining the approval of Illinois EPA.

While Complainant asserts that "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," it surprisingly ignores the very reasons why Toyal could do so. (Resp. Br., p. 11). After all, by 2005 Toyal had already worked with several consultants to understand its operations, the Subpart TT rules, and it had gone through some positive and not so positive experiences in attempting to comply with the Subpart TT rules which resulted in many learned lessons. Consequently, by the time Toyal sought to replace its VOM control system in 2005, it had a better understanding of what it needed to accomplish, what it would take, and how it was going to complete such; this was all as a result of its diligence and the efforts it undertook in the years prior to 2005.

Most telling is that Complainant does not comprehend that the replacement of the RCO with the CRO did not require any change to the large number of sources, PTE and capture and collection system, nor any of the other extensive work it undertook to demonstrate compliance

with the capture efficiency requirements of Subpart TT. Complainant's attempt to equate these two issues is fundamentally flawed: installation of a control device was one piece of the Subpart TT compliance requirements, but the more difficult component was demonstrating compliance with the capture efficiency component to the Subpart TT rules. (Tr., 12/10/08, p. 134:9-19). Therefore, the more appropriate comparison would be to assess the time period it initially took Toyal to install its RCO in 1998 (less than a year), which was similar to the time it took Toyal to install the CRO in 2005. (Comp. Exhibit 7, p.3).

Consequently, for the Complainant to suggest that "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" (Resp. Br., p. 11) is nonsensical because it compares apples to oranges, and also fails to consider the technical challenges that Toyal encountered. Based on the above, Toyal respectfully requests that Board weigh this factor in its favor.

### 8. Toyal Has Subsequently Demonstrated Compliance for Over Five Years

Toyal has been compliant with the Subpart TT rules after it passed the stack test and was issued its FESOP and implemented the necessary modifications to its facility to ensure continuous compliance with the Subpart TT rules. In *Blue Ridge*, the Board noted that the Respondent had "implemented measures to properly contain, remove, and dispose of all regulated asbestos-containing waste and refuse." *People v. Blue Ridge,* PCB 02-115, Slip. Op. *13 (October 7, 2004). Thus, the Board weighed this factor against assessing a civil penalty. *Id.* Similarly, Toyal has been compliant with the Subpart TT rules for well over five years. Furthermore, Toyal has not received any notice of violation from the Illinois EPA in the almost ten years since it first received the NOV in June 1998. (Tr. 5/10/08 p., 173: 4-12).

Moreover, Toyal has been consistent in following the terms of its FESOP as evidenced by its request to the Illinois EPA for a provisional variance as a result of a fire in the CRO on December 8, 2006. (Tr., 12/10/08, p. 226:20-227:1). Toyal was compliant with the terms of the provisional variance it received from Illinois EPA. (Tr., 12/10/08, p. 227:6-11).

Finally, Toyal disagrees with Complainant's position that Toyal's efforts to implement measures to reduce VOM emissions should not be deemed a mitigating factor if compliance is achieved only after enforcement proceedings are initiated. (Resp. Br., p.12). This argument is premised on the need to deter future violations and, therefore, but for the enforcement proceedings, compliance would not have been achieved. Here, Toyal took its compliance obligations very seriously. Further, Toyal began working towards compliance immediately as soon as it learned of its noncompliance, which was years prior to any enforcement proceedings. It is undisputed that Toyal submitted a compliance schedule in its Title V application, which occurred four years prior to the filing of this complaint. This is truly a case unlike many other enforcement actions, because Toyal was diligent but, unfortunately, a combination of several factors (i.e., fires, working with consultants who didn't understand the Subpart TT rules as they applied to the Toyal facility, implementation of measures to better understand how facility could demonstrate compliance with Subpart TT, creation of an emission standard, one-by-one analysis of 200 emission sources, customization of hoods amongst other activities) resulted in Toyal's delayed compliance.

Based on all of the above, the Board should weigh this factor in favor of Toyal.

## 9. The Board Must Consider the Factors in Section 42(h) to Determine An Appropriate Penalty.

In addition to the factors addressed above, the Board must consider the factors listed in 42(h).[8] The Board has wide discretion under 42(h) of the Act to consider any factor in aggravation or mitigation of the penalty. *ESG Watts, Inc. v. Illinois Pollution Control Board,* 282 Ill. App.3d 43,51, 668 N.E.2d 1015,1020 (4th Dist. 1996). In determining the amount of a civil penalty, the Board is authorized under the Act to consider a number of matters in either mitigation or aggravation of penalty, including those specified in Section 42(h) of the act but not limited to the following factors:

(1) the duration and gravity of the violation;

(2) the presence or absence of due diligence on the part of the respondent 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, in which case the economic benefits shall be determined by the lowest cost alternative for achieving compliance;

(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," which means an environmentally beneficial project that a respondent agrees to undertake in settlement of an

[8] The amendments direct the Board to use the economic benefit from delayed compliance as the minimum penalty amount.

enforcement action brought under this Act, but which the respondent is not otherwise legally required to perform.

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

**a. Duration and Gravity**

As provided in the analysis of Section 33(c) factors, the duration of Toyal's noncompliance was not due to disregard for rules, but rather because of the challenges that it faced in demonstrating compliance. Moreover, Toyal operated a control device from December 1998 to the present. (Tr., 12/10/08, p.29:14-22). Thus, the gravity of its actions were mitigated by its continuous operation of a VOM control device. Further, this case is distinguishable from *Panhandle*, where the respondent operated a source that had undergone a major modification without the necessary PSD permit and control technology which resulted in exceeding its 461.3 ton per year NOx permit condition for at least ten years and it emitted an unauthorized 33441.67 tons of NOx into the air from 1989 through 1998. *People v. Panhandle,* at *21.

**b. Lack of Due Diligence**

Complainant's assertions and mischaracterizations of the evidence are blatantly inconsistent with all the facts before the Board and, further, shows that Complainant does not understand that Toyal's unique operations simply did not allow for a cookie cutter approach to achieving compliance. Toyal was as diligent as it could be, given the circumstances, and spent years and appreciable sums of money in pursuing compliance (which it eventually achieved). Furthermore, it was responsible and diligent with respect to assuring that the inherent dangers of its business were minimized during this time period. Throughout the noncompliance period, Toyal was active in its efforts in trying to understand its operations and once it understood what it needed to do to demonstrate compliance, it did so. Consequently, this case differs from enforcement actions where the alleged violator failed to perform any work during the

noncompliance period to correct the allegations of noncompliance. See *People v. State Oil, Slip Op.* *16 (March 20, 2003).

This case also differs from other enforcement actions where the respondent relied solely on Illinois EPA inspections and permit renewals to determine its compliance with the limitation in its permit. See *People v. Panhandle,* PCB 99-2001, Slip Op. *21 (November 15, 2001). Here, Toyal disclosed its noncompliance as a result of its own investigations. Furthermore, Toyal immediately hired consultants and submitted a compliance plan and schedule when it disclosed its noncompliance. (Tr., 12/10/08 p., 158:20-159:5). Moreover, it immediately acted in accordance with its compliance plan and schedule as it sought bids to complete the necessary work. (See Resp. Exhibit 3 for implementation schedule) (Tr., 12/10/08, p. 160).

Complainant makes unfounded assertions regarding Toyal's decisions but, yet, it did not present any witnesses or other evidence to contradict that Toyal's delay in compliance was not based on legitimate grounds. Therefore, the Board should weigh this factor in favor of Toyal.

**c. Economic Benefit**

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

**d. Deterrence of Further Violations and Aid in Enhancing Voluntary Compliance with the Act**

This case differs from *Panhandle*, where the Board found that a substantial penalty was needed in order to deter future violations and enhance voluntary compliance by the Respondent and other similarly situated entities. *People v. Panhandle,* PCB 99-191, Slip. Op. *21 (November 15, 2001). Specifically, the Board noted that the penalty amount would serve to ensure that the respondent and other companies like it actually review the permits they accept, and take the steps necessary to monitor their compliance, such as having basic communications

among employees responsible for emissions and those familiar with permit limits. *Id.* The Board further noted that the respondent made no effort to determine its compliance status before the Agency discovered its excess emissions. *Id.* at *21. Moreover, in *Panhandle* the respondent accepted a permit that it could not live with, which allowed it to avoid the compliance costs. *Id.* at *26. Further, the respondent's compliance efforts appeared to have been a result of the "looming of enforcement." *Id.* Finally, even at the time of the hearing, the respondent continued to operate a major modification without the necessary PSD permit. *Id.* at *21.

In contrast, in the present matter, Toyal disclosed its noncompliance to the Illinois EPA when it submitted its CAAPP application along with an action plan and schedule of compliance. Moreover, Toyal expended a significant amount of money in determining how best to come into compliance. The record is replete with examples of all the many steps Toyal took in pursuit of compliance, from when it first learned of its noncompliance to when it actually demonstrated compliance in 2003. Further, more than five years have passed and Toyal has not been in violation of Subpart TT or its permit terms. Consequently, deterrence is not now an issue. Deterrence of similarly situated entities is a non-issue, as none of Toyal's competitors were required to have VOM controls. While it may have taken Toyal a long time to come into compliance, such was due to the amount of work it completed to understand how it best could come into compliance with Subpart TT rules, and not because its lack of diligence. Toyal was diligently, and in good faith, trying to come into compliance throughout the entire noncompliance period, as evidenced by its actions in hiring competent environmental consultants and implementing their recommendations.

Moreover, this extended period of time allowed Toyal to understand what its emissions were and what control device and/or operations would work the best with its facility while

ensuring future compliance with Subpart TT, and ensuring the safety of its facility and employees given the inherent dangers of its operations. In fact, Toyal opted for a FESOP rather than a CAAPP permit, thereby further reducing its emissions and doing more than what was required.[9] Furthermore, Toyal's efforts to come into compliance were not as a result of the enforcement actions by Illinois EPA, unlike in *Panhandle,* where the Board found significant that Panhandle only undertook compliance efforts when faced with looming enforcement. *Id.* at *24. The model behavior shown by Toyal in terms of its due diligence and good faith efforts should be encouraged rather than discouraged.

Moreover, Complainant's arguments that Toyal continued violating the Act for eight years while it spent money on other capital projects that allowed its facility to increase its profit while exceeding VOM emissions, completely misconstrues the facts presented before the Board. Toyal does not deny that it embarked on certain capital projects. For example, the modification to the paste B Unit was performed to replace the older mills with newer mills, and this resulted in only a small amount of capacity increase (Tr., 12/10/08, p. 118:17-1). More importantly, this project was necessary to allow Toyal to be able to install enclosures and capture emissions to demonstrate compliance and, for that reason, Illinois EPA included this project when it issued Toyal's May 2001 construction permit. (Resp. Exhibit 17).

Finally, the other capital projects that Toyal completed during its noncompliance period included the investment of a fire suppression systems and alarm systems for the plant. (Tr., 12/10/08, p.153:3-8). Nowhere does Complainant provide a basis for the implication that

[9] Curiously, Complainant actually criticizes Toyal for switching gears from its initial CAAPP permit application to a FESOP, and characterizes that as unnecessary and wasted effort. Complainant overlooks the fact that applying for a FESOP actually required Toyal to demonstrate and achieve emissions of less than 25 tons per year, which is better for the environment and was anything but a wasted effort.

Toyal's noncompliance was due to a scarcity of funds devoted to Toyal's compliance efforts. The record reflects Toyal's documented expenditures of over a million dollars for just one piece of emission control equipment (the vacuum chiller) after already installing the RCO. Additionally, Toyal also replaced its already the permitted and operating RCO with a CRO in 2005, which improved its emissions control and avoided the problematic shutdowns it experienced with the RCO.

Thus, any suggestion by Complainant that Toyal's compliance program was starved for funds is unsupported and simply wrong. Based on all of the facts as presented in the record before the Board, the Board should weigh this factor in favor of Toyal.

**e. Previously Adjudicated Violations**

Here, Complainant has not presented any evidence of previously adjudicated violations. However, it should be noted that the complaint filed in this matter alleged five claims under the Resource Conservation and Recovery Act ("RCRA") and two claims under the Clean Air Act ("CAA"). However, Complainant and Toyal entered into a partial settlement agreement on June 21, 2001, resolving all of the RCRA claims. Pursuant to the partial settlement agreement, Toyal paid a penalty in the amount of $31,500. Consequently, this factor could only serve to mitigate any penalty imposed on Toyal. See *People v. State Oil,* PCB 97-103 at *14 (Slip. Op. March 20, 2003).

### f. Self-Disclosure

Toyal disclosed its noncompliance at the time of when it submitted its CAAPP application. However, Toyal believes that this factor neither weigh in mitigation or aggravation of a penalty.

### g. Supplemental Environmental Project or Beneficial Economic Project

While not formally proposed to or accepted by Illinois EPA as a supplemental environmental project ("SEP") under Section 42(h)(7) of the Act, Toyal respectfully requests that the Board consider the $674,000 it expended to replace its RCO control device with a CRO as a factor in mitigation of any penalty that may be imposed by the Board.

In 2005, Toyal replaced its RCO with a CRO to more efficiently control its VOM emissions. (Tr., 12/10/08 p.111:12-20). Toyal's RCO operations were compliant with the Subpart TT rules and the FESOP issued by the Illinois EPA. However, the RCO suffered outages from high temperatures. (Tr., 12/10/08, p. 112:17-19). These outages did not result in any noncompliance because Toyal's FESOP permit included a provision allowing for the outages. (Tr., 12/10/08 p.111:12-20 and Resp. Exhibit 18). However, the outages were disruptive and, with each outage, Toyal had to follow the required notification to Illinois EPA and recordkeeping provisions under its FESOP. (Tr., 12/10/08, p. 112:17-19). As testified at the hearing, once Toyal replaced its RCO with the CRO the subsequent stack test showed increased destruction and efficiency, and this resulted in less controlled VOM emissions and less uncontrolled emissions due to the elimination of the periodic RCO high temperature-induced shutdowns. (Tr., 12/10/08, p. 112:9-11). Toyal was under no legal obligation to make this significant expenditure to replace the RCO.

As a result, this project has been very beneficial for the environment in that the controlled emissions have been reduced from 20 tpy of VOM to about 12 tpy. If the Board considers this project as a factor in mitigation of any penalty that it may impose, it will serve as an incentive and encourage the regulated community to do more than what is required under the respective environmental regulations. More importantly, this serves to better the environment for the people of the State of Illinois. Based on the above, Toyal respectfully requests that Board consider this as a factor in mitigation of any penalty to be assessed by the Board.

### C. TOYAL'S NONCOMPLIANCE DID NOT RESULT IN AN ECONOMIC BENEFIT, BUT RATHER A NEGATIVE COST

Toyal did not enjoy an economic benefit because of its noncompliance; rather, it experienced a negative cost as a result of its expenditures for a vacuum chiller unit and its inability to use its current solvent recovery system. Section 42(h) of the Act was substantially amended by P.A. 93-575, effective January 1, 2004. These amendments became effective after Toyal had already demonstrated compliance in 2003. The amendments established that a violator's economic benefit from delayed compliance is to be the minimum penalty amount. See *People v. Blue Ridge Construction Group,* fn. 1. Section 42(h)(3) now reads, "any economic benefits accrued by the respondent because of delay in compliance with requirements, in which case the economic benefits shall be determined by the lowest cost alternative for achieving compliance." 415 ILCS 5/42(h)(3)(2007). Unfortunately, neither the Act nor any Illinois EPA guidance provides any further instruction or guidance to determine how to calculate economic benefit. However, U.S. EPA does provide guidance in determining how to calculate economic benefit, and included in its guidance is the ability to offset certain expenditures from economic benefit.

At the hearing, Toyal presented its expert witness, Mr. Christopher McClure of Navigant Consulting, who conducted an independent economic benefit analysis. Mr. McClure is a Certified Public Accountant, Certified Fraud Examiner, and is Certified in Financial Forensics. (Resp. Exhibit 22(a)). Complainant presented Mr. Gary Styzen of Illinois EPA as its economic benefit analyst expert. Based on Mr. McClure's analysis, the parties derived a very similar calculation regarding delayed and avoided expenditures. (Tr., 12/10/08, p. 93:3-5). However, consistent with U.S. EPA guidance, Mr. McClure's delayed and avoided costs analysis took into account the expenditure of the $1 million Toyal spent in purchasing the vacuum chiller unit. As Toyal proceeded with its compliance activities, it realized that it would not need to use the vacuum chiller unit to come into compliance with the Subpart TT rules. Unfortunately, however, it had already expended the $1.1 million, which it had done in good faith, based upon the recommendations of its consultant. Additionally, during the noncompliance period, Toyal was unable to enjoy the benefits of using its upgraded solvent recovery system and, thus, forego a benefit of $1,096,631. Consequently, as a result, Toyal did not enjoy an economic benefit but, rather, a negative cost during the noncompliance period, which should be factored into the economic benefit analysis in this matter.

### 1. The Board Should Accept Mr. McClure's Economic Benefit Analysis because it Appropriately Captures Toyal's True Cost of Noncompliance

Mr. McClure's economic benefit analysis is appropriate because it captures Toyal's true cost of noncompliance. Specifically, Mr. McClure derived its analysis using the various components provided in the *U.S. EPA BEN User's Manual*, U.S. EPA Office of Regulatory Enforcement and Compliance Assurance (September 1999). (Tr., 12/11/08, p.133:10-18)(see also Resp. Exhibit 22(a)). The first of those components was an analysis of Toyal's benefit from

delaying capital expenditures. (Tr., 12/11/08, p.133:23-134:9). The purpose of calculating delayed capital expenditures is that when a company is supposed to reach compliance by a certain date but doesn't, it avoids or delays those capital expenditures, thereby holding onto its funds for a period of time. (Tr., 12/11/08, p.134:1-9). Thus, the company enjoys an economic benefit in retaining those funds for that period. *Id.*

The second component to Mr. McClure's analysis consisted of the avoided costs which includes the monthly costs associated with operating the system that they would have otherwise operated had they been in compliance and, thus, are completely avoided because they never incurred those monthly charges. (Tr., 12/11/08, p.134:1-9). In order for Mr. McClure to complete an accurate analysis, it obtained from Toyal the capital expenditures information and the delayed costs. (Tr., 12/11/08, p.134:1-9). Toyal provided substantial back up information, invoices, and accounts payable information to support all of its expenditures. Based on Mr. McClure's experience and professional certifications, all of the information provided by Toyal appeared to be true and accurate. (Tr., 12/11/08, p.199:12-16).

Mr. McClure concluded that the delayed capital expenditures were $153,986. Further, Mr. McClure concluded that Toyal's avoided recurring costs were $138,385. However, consistent with the U.S. EPA BEN User's Manual, Mr. McClure modified the above costs to include the foregone benefits related to Toyal's solvent recovery and the expense of the vacuum chiller unit.

### 2. U.S. EPA's BEN Manual Provides Guidance on How to Calculate Economic Benefit and Allows for Legitimate Offsets

U.S. EPA's BEN User's Manual sets forth a methodology for calculating the economic benefits gained from delaying and avoiding required pollution control expenditures. (Resp. Exhibit 22(a)- Ben User Manual p.1-2). It uses standard financial cash flow and net present

value techniques based on modern and generally accepted financial principles. *Id.* at 1-3. Thus, it serves as guidance to a practitioner as to how to calculate an economic benefit penalty. (Tr., 12/11/08, p. 130:19-22). Mr. McClure relied on the BEN Manual to calculate Toyal's economic benefit as provided above. Mr. McClure's reliance on this manual is appropriate given that neither the Act nor Illinois EPA have any other guidance regarding how to calculate economic benefit. Moreover, even Mr. Styzen testified that the BEN manual is used by the Illinois EPA and the Attorney General's Office. (Tr., 12/10/08, p. 67:10-68:2).

In fact, the documents relied upon by Mr. Styzen all point to and provide additional discussion of the U.S. EPA BEN User's Manual. (See Tr., 12/11/08, p.137:23-138:16). Moreover, Complainant has presented no evidence that contradicts the substance of the BEN User's Manual. Finally, even the U.S. EPA has stated that "the BEN is by far the best approach available for calculating economic benefit derived from delayed and avoided costs." U.S. EPA, *Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases,* 64 FR 117 32948, 32949 (June 18, 1999) (See Resp. Exhibit 22(a)(Blank Tab after BEN User Manual)).

The BEN User's Manual provides specific examples of certain compliance scenarios that are relevant in the matter at hand. Specifically, Page 4-3 of the BEN User Model provides that if a violator spends money on a system that does not work, it may offset the economic benefit by the after-tax present value of the unsuccessful expenditure. However, this offset assumes that the violator went to a reputable firm, the firm recommended the system that failed, and the violator's reliance on the recommendation was reasonable.

In addition, page 4-6 the BEN User's Manual also provides that in some instances compliance is "cheaper" than noncompliance because the violator comes into compliance late

and finds that it has been saving money since it installed the new technology. Specifically, it states that this situation may occur because the compliant technology allows the violator to recover materials and/or reduce operation and maintenance costs. Thus, BEN produces a negative result. In addition, the BEN notes that perhaps the violator was unaware of the potential cost savings from compliance.

### 3. Mr. McClure's Economic Benefit Analysis Appropriately Accounted for Toyal's Expense of the Vacuum Chiller Unit

Mr. McClure's economic benefit analysis correctly included the expense Toyal incurred for the vacuum chiller unit at the recommendation of Chemstress Engineering. As cited above, an appropriate economic benefit analysis should include the amount of money that Toyal invested in the centralized vacuum chiller system. Here, the record before the Board shows that Toyal purchased the vacuum chiller unit for approximately $1 million at the recommendation of its consultant, Chemstress Engineering. (Tr., 12/10/08, p. 166:24-167:2). The investment of the vacuum chiller unit was for compliance purposes. Specifically, it was Toyal's understanding that the vacuum chiller system was needed to replace the numerous vacuum pumps throughout the plant (these are all emission sources identified through the permit process) with a centralized vacuum and condenser system that would act as a control device to aid in controlling some fugitive emission point. (Tr., 12/10/08, p.214:3-13).

As explained by Mr. McClure at the hearing, it is appropriate for the Board to consider this expense if it is to capture the true cost of its noncompliance.

> Q. If a company spends money on a capital project, be it pollution control or a pollution control capital project, whether it is used or not used, does the company have that money available thereafter, for other investment purposes?
>
> A. No. Once the dollars are expended, the company be definition loses the economic value of retaining those

> funds. And this type of situation, specifically the Toyal situation is discussed in the BEN user manual presumably because the EPA sees this.

(Tr., 12/11/08, p. 151:18-152:5).

Based on the above, Mr. McClure's analysis appropriately considered the expenditure of the vacuum chiller unit because Toyal lost out on its ability to use the $1 million it spent on this system on reliance of its consultant, Chemstress, for other projects or uses. Further, there is no evidence in the record that shows that Toyal's reliance was unreasonable or that Chemstress was not a reputable company.

#### 4. Mr. McClure's Economic Benefit Appropriately Accounted for Solvent Recovery

Mr. McClure appropriately considered the offset for solvent recovery because, had Toyal been in compliance, it could have realized certain operating efficiencies related to same. The BEN User Manual specifically provides several different references in support of this assertion. First, under the annual recurring cost discussion on Page 3-11, it specifically states that the recurring costs may be negative if compliance increases efficiency. Thus, it clearly indicates that offsetting credits for any number of process improvements must be considered. (Tr., 12/11/08, p.141:18-142:1).

Second, as provided in subsection (a), above, Page 4-6 provides a very specific direction to the practitioner to consider said fact pattern when conducting a BEN analysis. Here, when Navigant Consulting was conducting its BEN analysis, in its discussions with Toyal it discovered that the compliant system had the specific side effect or the specific result of cost savings. (Tr., 12/11/08, p.142:21-143:2). Further, the compliant system allowed the company to recover solvents more reliably, and that improved recovery resulted in a cost savings because Toyal is does not need to purchase as much solvent. (Tr., 12/11/08, p.142:21-143:2).

Moreover, Navigant requested that Toyal provide it with very specific data regarding the recapture and the pricing of the solvents to confirm if the above was correct. (Tr., 12/11/08, p.143:10-19)[10]. Based on Navigant's review of the data, it was very clear that the recapture before and after the installation of the system is very different. (Tr., 12/11/08, p.143:20-22). Navigant concluded that Toyal would have had a potential cost savings of more than a million dollars had they had the system in place at the compliance date. (Tr., 12/11/08, p.143:22-144:4). Hence, Navigant coined the term "foregone benefit" based on potential cost savings that it would have otherwise enjoyed.

Complainant's arguments dismissing Toyal's foregone benefits analysis should be rejected. First, the BEN User's Manual supports consideration of such issues where there are process improvements due to compliance.[11] Second, page 4-6 of the BEN Manual explains that the violator need not be aware of the potential cost savings from compliance in order for this to be considered as a mitigating factor. Third, the Complainant incorrectly argues that the solvent recovery system was unrelated to the compliance at the Toyal facility. In fact, the solvent recovery system was intrinsically related to compliance. As testified to at the hearing by Mr. Van Hoose.

> Q. What is your understanding of what was the last step that was necessary to be completed by Toyal before it could successfully demonstrate compliance with the 81 percent overall control?

[10] All of the supporting data provided by Toyal regarding the foregone benefits associated with the solvent recovery system is provided in Resp. Exhibit 22(a)- under the Foregone Benefits tab.

[11] In fact, the BEN User Manual specifically provides that this situation may occur because the compliant technology allows the violator to recover materials and/or reduce operation and maintenance costs. (Exhibit 22(a)-BEN User Manual Tab).

A. The last step prior to compliance testing was to be able to connect the tank farm into the RCO. In our process, from our filter press we actually remove solvent and that solvent goes out to the tank farm, which is outside.

That needed to be connected – and Dennis can go into that more specifically on how it was done – and then take those vapors and send it to the RCO. Up to that point, it was not connected.
And as a last step beyond that we connected the solvent distillation tank into that same pot that sends it out to the RCO.

Q. And earlier did I understand that it was at that point in time that you were able to use air stripping to remove the contaminants –

A. That's correct.

Q. -- from that solvent?

A. That's correct.

Q. Why did the use of that air stripping system result in the ability for Toyal to continue to reuse that solvent many more times? That's a pretty poor question, but I think you get the idea.

A. Why did it work? The bubbling of the air and the air stripping actually allows the short chain acids to vaporize off, removing that from the solvent. Then we can use the solvent back into the system over and over again.

(Tr., 12/10/08, p. 169:12-19).

As a result of above modifications to its solvent recovery system, Toyal was able to enjoy the benefits of not having to buy solvent at the initial cost once it had completed its compliance activities. (Tr., 12/10/08, p. 172:1-8). Based on the above, it is clear that Mr. McClure appropriately considered the foregone benefits associated with the solvent recovery system and, therefore, was able to more accurately determine Toyal's true cost of noncompliance.

### 5. Mr. Styzen's Economic Benefit Analysis is Incomplete Because He Fails to Capture Toyal's True Cost of Noncompliance

Notwithstanding the above arguments, Mr. Styzen's calculations of Toyal's delayed and avoided costs were very comparable to those calculated by Mr. McClure. However, there were certain minor distinctions, none of which are significant, except for the arguments presented below. The key values considered by Mr. McClure included:

- The capital expense for the control device in the amount of $1,252,017
- Non-Compliance Start Date of March 15, 1995
- Non-Compliance End Date April 1, 2003
- Plant Cost Index for Inflation Rate
- Tax Rate
- Discount Rate 5% Estimate of Risk-Free Rate

Mr. Styzen generally agreed with the above values in Mr. McClure's delayed and avoided cost analysis. However, Complainant argues that the discount rate is inappropriate.

#### a. Mr. McClure's Use of the Discount Rate is Appropriate

While the state claims that the risk-free discount rate is inappropriate, it is important to note that Mr. McClure's (5%) is actually higher than the one used by Gary Styzens and would result in a larger penalty (in the absence of the solvent offset). The discount rates used, although employed based on different theories, are so close as to make any difference immaterial. Mr. McClure's inclusion of the risk-free rate is well supported in both case law and relevant economic and legal literature. See *U.S. v. WCI Steel, Inc.*, 72 F.Supp. 2d 810, 830, 1999 U.S. Dist. Lexis 174376 *58 (N.D. Ohio 1999).

### b. Mr. Styzen's Economic Benefit is Inappropriate and It Confuses Economic Benefit Which is a Purely Financial Analysis, with Punitive Considerations

The BEN User's Manual clearly states that economic benefit is "no fault" in nature. See Page 1-2. This is consistent with the Act as it requires the calculation of economic benefit first, and then consideration of the other factors set forth in Section 42(h) in mitigation or aggravation of a penalty to be imposed upon the noncompliant party. It is clear, based on the information provided above, that the expenses associated with the vacuum chiller unit and the foregone benefits are within the parameter of considerations that can be used in determining an appropriate economic benefit analysis as set forth in the BEN User's Manual. Mr. Styzen rejected this as a legitimate consideration, but did not reject the principles or substance of the BEN User's Manual itself. Rather, Mr. Styzen argues that it should only be used by Illinois EPA and the Attorney General's Office for settlement purposes only. Significantly, Mr. Styzen's expert report offers no authority as to why the BEN model should or should not be applied, simply based on the procedural posture of a case. Mr. Styzen's testimony at the hearing was similarly unsupported. (See Tr., 12/10/08 p. 75:9-87:12). Therefore, his rationale for rejecting application of the BEN User's Manual in an enforcement proceeding makes no sense, and is nothing more than *ipse dixit* (i.e., "Because I said so.")

Because Mr. Styzen's analysis did not include the true costs of Toyal's noncompliance, its analysis is flawed and incomplete. Therefore, the Board should look to Mr. McClure's analysis to determine the true cost to Toyal of its noncompliance.

### c. If Accepted by the Board, Mr. Styzen's Analysis Would Negatively Impact Compliance and Good Business Practices

Mr. Styzen's testimony and economic benefit analysis, if accepted by the Board, would have a chilling effect on the willingness of regulated entities to come into compliance.

Regulations are supposed to be applied in a consistent manner. Mr. Styzen has cited no authority as to why an agency such as the Illinois EPA or the Attorney General's office should be able to rely on the BEN model for settlement purposes and not for in under other circumstances. Moreover, the U.S. EPA has recognized that the BEN Model as was discussed above and it has opened this document up for public comment so as to continue to better the model. 64 FR 117, 32948 (June 18, 1999). As provided in the BEN User's Manual, economic benefit is "no fault" in nature and is purely financial.

Throughout his testimony at the hearing, Mr. Styzen cites to a U.S. EPA document titled, "*Leveling the Playing Field*" which discussed the purposes of the economic benefit. (See Tr., 12/10/08 p. 75:9-87:12). Specifically, the document states that penalties serve to "level the playing field" and ensure that noncompliers do not enjoy or gain a competitive advantage over competitors who have invested time and money to achieve compliance. (Resp. Exhibit 28 p. 1). No where in this document does it state that economic benefit is based on good faith efforts, or other punitive considerations. Rather, it specifically distinguished economic benefit from a penalty as provided on page 1, "The civil penalty...impose on a violator has two components: the **economic benefit** being recovered, which ensures that the violator does not profit from his illegal action, and a **dollar penalty** that accounts for the degree of seriousness of the violation." (emphasis added). This is consistent with the U.S. EPA BEN User's Manual and the arguments presented above as to why Mr. McClure's analysis is the most appropriate because it provides the true cost of Toyal's noncompliance.

Moreover, this same document relied upon by Mr. Styzen specifically cites that the BEN Model is used to calculate economic benefit. But, unlike the many examples cited in Mr. Styzen's testimony, an economic benefit analysis should <u>not</u> be based on one person's unfounded

assertions or opinion that a company did not make 'good decisions,' with regard not only to environmental compliance, but to other business practices. (See 12/10/08, p. 97:17-98:14). Mr. Styzen's testimony is further discredited because he contends (again, without any support) that Toyal should have come into compliance quickly and efficiently; yet, Complainant did not present any witnesses or evidence which proves that Toyal could have come into compliance any more quickly and efficiently than it did. Additionally, at the hearing, Mr. Styzen admitted that he does not have the technical expertise to judge the complexity of installing pollution control capture and control equipment. (Tr., 12/10/08 p.101:17-102:12).

Finally, while Mr. Styzen recites the document "Leveling the Playing Field" at length, he fails to acknowledge that Toyal only has two other competitors: Siberline and Eckart, with Toyal being the smallest of the three. Significantly, however, both of the larger facilities are located in attainment areas for VOMs, so they had none of the restrictions and required no VOM controls based on Steve Anderson's review of their permit files. (Tr., 12/11/09 p. 88:22 – 89:22).

### 6. Complainant's Arguments Regarding Economic Benefit Are Flawed and Reveal a Lack of Understanding of the Technical Compliance Issues Involved in This Case

Toyal's position regarding the proposed offsets of the solvent recovery system and the vacuum chiller system is completely different from the argument made by the respondent in the *Panhandle* case. In *Panhandle*, the respondent argued that it did not receive any economic benefit because had it completed the required control technologies on a timely basis, it would have saved a substantial amount of money. *People v. Panhandle,* PCB 99-191, *22 (Slip. Op. November 15, 2001). Specifically, the Federal Energy Regulatory Commission ("FERC") would have allowed the Respondent to set its rates to recover the expenses of the control device plus a reasonable return on an investment and, secondly, the retrofitting of the controls at the time was

more costly than if it had completed such changes at the time of the hearing. *Id.* at 23. The Board rejected this argument because, by avoiding those costs, the Respondent in *Panhandle* was able to use its money for other uses. *Id.* Furthermore, the Board noted that "the costs from retrofitting are self-imposed and exist solely because the violator did not pay to comply on time." Here, Toyal spent $1 million on purchasing the vacuum chiller unit and spent an additional amount on purchasing replacement solvent. Thus, Toyal no longer had this significant amount of money to utilize for other purposes. Consequently, Toyal's request to offset the vacuum chiller unit and the expenses of the solvent recovery system differ significantly from what was presented to the Board in *Panhandle.*

Toyal is not requesting to offset the costs of its RCO device as it agrees with the Board that the deterrent effect of civil penalties would be compromised if the violator would get credit for ignoring its legal obligations. Here, Toyal spent a significant amount of money in trying to come into compliance. It hired several competent professionals who unfortunately did not fully understand the complexity of Toyal's operations and how it would be able to satisfy both the capture and efficiency requirements of Subpart TT rules. Toyal reasonably relied upon the advice of its expert consultant to purchase the vacuum chiller unit. Once Toyal purchased the vacuum skid condenser for $1 million in 2000, it no longer had the $1 million to spend. Complainant's attempts to draw such a parallel between Toyal's request and that in *Panhandle,* mischaracterizes or misunderstands the facts in this case.

With respect to the modifications to Toyal's solvent recovery system, by using the air stripping device Toyal was able to use a system that was better for the environment. Thus while civil penalties should seek to deter violator's, there are also factors in Section 33(c) and 42(h) which seek to mitigate a violator's good behavior as was the case here.

## IV. CONCLUSION

The U.S. EPA BEN User's Manual is a reliable document and it provides ample support that Mr. McClure's economic benefit analysis captures Toyal's true cost of noncompliance. However, the Board has broad discretion in determining which of the factors set forth in Section 33(c) and 42(h) to determine, what should be an appropriate civil penalty, if any. Based on all of the information before the Board, this is truly a case where Respondent was honestly trying to comply with its obligations under Subpart TT. It has expended a substantial amount of time, money, and other available resources to demonstrate compliance but, unfortunately, due to certain unique circumstances, its ability to demonstrate compliance specifically with the capture efficiency portion of the Subpart TT rules for the multitude of its small sources was very challenging. Further, although Toyal did not demonstrate compliance until 2003, it continuously operated a control device since December 1998 and has been compliant since 2003.

Based on all of the above, Toyal respectfully requests that a substantial penalty not be imposed in this matter because such would be inappropriate and would not aid in enforcement of the Act.

Respectfully submitted,

TOYAL AMERICA, INC.

By: _____
One of its Attorneys

Dated: April 10, 2009

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**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**



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| PEOPLE OF THE STATE OF ILLINOIS<br><br>Complainant,<br><br>v.<br><br>TOYAL AMERICA, INC. , formerly known as ALCAN-TOYO AMERICA, INC., a foreign corporation,<br><br>Respondent. | ) | PCB 2000-211<br>(Enforcement) |

**MOTION TO FILE AN EXPANDED POST-HEARING BRIEF INSTANTER**

NOW COMES Respondent, Toyal America, Inc. (hereinafter, "Toyal"), by and through its attorneys, and respectfully requests that the Hearing Officer grant this motion requesting to exceed the page limitation set forth in 35 Ill. Adm. Code Section 101.302(k) in connection with its Closing Argument and Post-Hearing Brief. In support thereof, Toyal states as follows:

1. A hearing was held in this matter on December 10th and 11th, 2008 in which Toyal presented five witnesses to testify regarding the issues alleged in the Complaint.

2. This matter covers an applicable time period of over eight years.

3. There were many unique circumstances in this matter which relate to the question before the Board as to what should be an appropriate penalty in this matter.

4. Pursuant to Section 33(c) and 42(h) of the Illinois Environmental Protection Act, the Board considers the factors set forth therein, in determining the penalty to be imposed in this matter. 415 ILCS 5/33(c),42(h)(2007).

5. Toyal requests that in order for it to present its Closing Argument and Post-Hearing Brief and include all the relevant facts pertaining to the matter and the mitigation of any

penalty to be imposed on the Board, it be allowed to file an expanded brief that exceeds the 50 page limit set forth in Section 101.302(k) of the Board rules.

6. Toyal's expanded brief is a total of 60 pages, and thus, is not excessive.

7. Toyal agrees to give Complainant additional time if it so requires in preparing its reply brief.

8. Toyal does not believe that the parties will be prejudiced by this request.

WHEREFORE, for all the foregoing reasons, Toyal respectfully requests that the Hearing Officer grant this Motion to File an Expanded Brief Instanter in this matter.

Respectfully submitted,

Toyal America, Inc.

By: _____
One of its Attorneys

Dated: April 10, 2009

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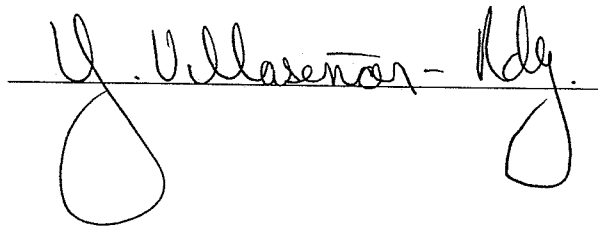
## CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing **Respondent's Closing Argument and Post-Hearing Brief and Motion to File An Expanded Post-Hearing Brief Instanter** were filed by hand delivery with the Hearing Officer and served upon the parties to whom said Notice is directed by first class mail, postage prepaid, by depositing in the U.S. Mail at 191 North Wacker Drive, Chicago, Illinois on Friday, April 10, 2009.



**THIS FILING IS SUBMITTED ON RECYCLED PAPER**