

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

FEB - 9 2004

STATE OF ILLINOIS  
Pollution Control Board

IN THE MATTER OF: )  
)  
Petition of Noveon, Inc. )  
)  
)  
)  
for an Adjusted Standard from )  
35 Ill. Adm. Code 304.122 )

AS 02-5

NOTICE OF FILING

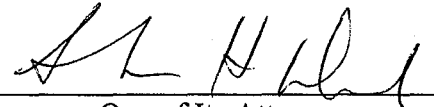
Dorothy M. Gunn, Clerk  
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James R. Thompson Center  
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Chicago, IL 60601

Deborah Williams  
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Bradley P. Halloran  
Hearing Officer  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph Street  
Suite 11-500  
Chicago, IL 60601

**PLEASE TAKE NOTICE** that on **Monday, February 9, 2004**, we filed the attached **MOTION TO FILE REPLY INSTANTER** with the Illinois Pollution Control Board, a copy of which is herewith served upon you.

Respectfully submitted,  
  
NOVEON, INC.

By:   
One of Its Attorneys

Richard J. Kissel  
Mark Latham  
Sheila H. Deely  
GARDNER CARTON & DOUGLAS LLP  
191 N. Wacker Drive - Suite 3700  
Chicago, IL 60606

**THIS FILING IS SUBMITTED ON RECYCLED PAPER**

RECEIVED  
CLERK'S OFFICE

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**MOTION TO FILE REPLY INSTANTER**

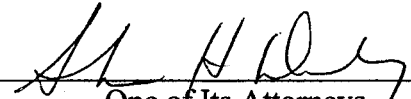
Noveon, Inc. moves to file a reply on its motion to incorporate the transcript from Noveon, Inc. v. Illinois Environmental Protection Agency, PCB 91-17 (NPDES Permit Appeal), into the record for Noveon's pending adjusted standard proceeding. In support thereof, Noveon states as follows:

1. Noveon believes that Illinois EPA's citation of 35 Il. Adm. Code 101.406 is misleading and confusing, as this rule does not apply to or properly describe what Noveon seeks in its motion to incorporate testimony from PCB 91-17 into this proceeding. Noveon would like an opportunity to address the rule cited by Illinois and the rule Noveon believes is properly applied to its motion.
2. Noveon also wants an opportunity to address the other arguments and claimed prejudice to Illinois EPA from incorporation of the transcript.

WHEREFORE, Noveon, Inc. moves the Board to accept its Reply on the motion to incorporate the transcript from its NPDES Permit Appeal, PCB 91-17, into this proceeding as part of the record.

Respectfully submitted,  
NOVEON, INC.

By:

  
One of Its Attorneys

Richard J. Kissel  
Mark Latham  
Sheila H. Deely  
GARDNER CARTON & DOUGLAS LLP  
191 N. Wacker - Suite 3700  
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**REPLY ON MOTION TO INCORPORATE TRANSCRIPT FROM PCB 91-17**

Noveon, Inc., submits this reply on its motion to incorporate the transcript from Noveon, Inc. v. Illinois Environmental Protection Agency, PCB 91-17 (NPDES Permit Appeal), into the record for Noveon's pending adjusted standard proceeding.

1. Noveon believes that the rule cited by Illinois EPA (35 Il. Adm. Code 101.406) concerning consolidation of cases is inapplicable to this case, where Noveon does not seek a consolidation but only incorporation of authenticated, credible and relevant testimony into the adjusted standard proceeding. There will still be a separate hearing on each proceeding, and likely separate briefs where the evidence can be evaluated under the relevant burden of proof. In any case, Section 101.306(b) allows the Board to evaluate incorporated testimony with consideration of the burden of proof.

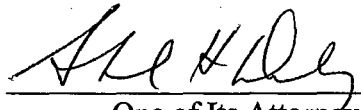
2. As for the burden of proof, Noveon believes that the burden is more stringent in an NPDES Permit Appeal than the adjusted standard proceeding in which Noveon wants testimony incorporated, so no prejudice can be claimed by incorporation of testimony from a proceeding subject to a more rigorous burden of proof into one with a less rigorous burden of proof. The rules of evidence governing these proceedings are in any case the same, so a differing ruling to an objection to evidence would be highly unlikely to result in this case and rather questionable if it did.

3. As for the timeliness of the motion, Illinois EPA has had the transcript from the permit appeal for over ten years in a proceeding clearly inextricably intertwined with the adjusted standard proceeding. Illinois EPA also had an opportunity to depose Ken Willings, the only prior witness who was not employed by Illinois EPA, in discovery in this case, although Illinois EPA did not do so. In any case, as stated in the motion, Mr. Willings has agreed to be present and available for cross-examination if necessary at the Adjusted Standard hearing. As for the other witnesses, they continue to be employed by Illinois EPA.

WHEREFORE, Noveon, Inc. moves the Board to incorporate the transcript from its NPDES Permit Appeal, PCB 91-17, into this proceeding as part of the record.

Respectfully submitted,  
NOVEON, INC.

By:

  
\_\_\_\_\_  
One of Its Attorneys

Richard J. Kissel  
Mark Latham  
Sheila H. Deely  
GARDNER CARTON & DOUGLAS LLP  
191 N. Wacker - Suite 3700  
Chicago, IL 60606

**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing **Notice of Filing** and **MOTION TO FILE**

**REPLY INSTANTER** was filed by hand delivery with the Clerk of the Illinois Pollution

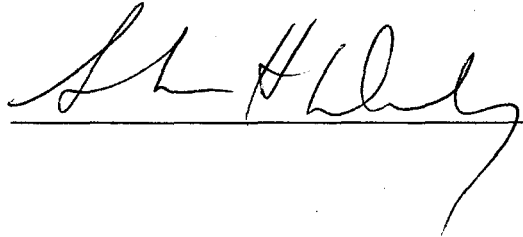
Control Board and served upon the parties to whom said Notice is directed by

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph Street  
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Chicago, IL 60601  
**(personal delivery)**

Deborah Williams  
Assistant Counsel  
Division of Legal Counsel  
Illinois Environmental Protection  
Agency  
1021 N. Grand Avenue East  
Springfield, IL 62794-9276  
**(first class mail and electronic  
delivery)**

Bradley P. Halloran  
Hearing Officer  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph Street  
Suite 11-500  
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**(facsimile)**

on Monday, February 9, 2004.

  
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