BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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| NOVEON, INC. f/k/a BF GOODRICH CORPORATION, (Henry Facility), | ) | |
| Petitioner, | ) | PCB 91-17 (NPDES Permit Appeal) |
| v. | ) | |
| ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, | ) | |
| Respondent. | ) | |

NOTICE

TO: Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph Street, Suite 11-500
Chicago, Illinois 60601

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
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Sheila Deely
Mark Latham
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GARDNER, CARTON & DOUGLAS
191 North Wacker Drive, Suite 3700
Chicago, Illinois 60606

PLEASE TAKE NOTICE that I have today filed with the Office of the Pollution Control Board the RESPONDENT'S POST-HEARING MEMORANDUM on behalf of the Illinois Environmental Protection Agency, a copy of which is herewith served upon you.

Date: May 26, 2004

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By: Deborah J. Williams

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THIS FILING IS SUBMITTED ON RECYCLED PAPER

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**RESPONDENT'S POST-HEARING MEMORANDUM**

NOW COMES the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA" or "Agency"), by one of its attorneys, Deborah J. Williams, and pursuant to the Hearing Officer's order of March 18, 2004, submits its Post-Hearing Memorandum in the above-captioned permit appeal and states as follows:

## I. PROCEDURAL HISTORY

On December 28, 1990, the Illinois EPA issued a renewal of the National Pollutant Discharge Elimination System ("NPDES") permit number IL0001392 to Petitioner's Henry, Illinois manufacturing facility. At that time, the facility was owned and operated by BF Goodrich. Currently, the permitted treatment works is owned and operated by Noveon, Inc. and hereinafter Petitioner will be referred to as Noveon.

On January 24, 1991, Petitioner filed an appeal with the Pollution Control Board ("Board") pursuant to Section 40(a) of the Environmental Protection Act ("Act") of the issuance of Noveon's renewal permit. 415 ILCS 5/40(a). An Amended Petition adding one additional basis for appeal was submitted on January 28, 1991 and received by the Board on February 4,

1991. The Agency submitted its Answer and Record in this matter on September 19, 1991. Discovery was conducted consisting of Petitioner deposing two Illinois EPA witnesses (Richard Pinneo and Tim Kluge) and propounding written interrogatories on the Illinois EPA which were answered on October 29, 1991.

A hearing was scheduled by Hearing Officer Richard T. Sikes and held on November 19, 1991 in the Marshall County Courthouse. Due to the unavailability of a witness for Noveon, Dr. James Patterson, the hearing was continued to December 16, 1991. 1991 Hearing Transcript at 10.[1] Counsel for both parties appeared at the December 16, 1991 hearing and requested that the hearing be suspended. 1991 Tr. at 165. The parties indicated that documents outlining a proposed settlement and requesting further action from the Board would be filed.

In the intervening decade, Petitioner filed a Petition for Variance in 1992 and a motion to voluntarily withdraw that Petition was granted by the Board on June 20, 2002. *See*, PCB Docket 92-167. An Adjusted Standard Petition was filed just prior to Petitioner's motion to withdraw its Variance Petition on May 22, 2002. As the parties were unable to reach settlement, the Hearing Officer in both matters scheduled and held the remainder of the Permit Appeal hearing on February 17, 2004. The Permit Appeal hearing was followed by approximately two days of hearings on Noveon's Adjusted Standard Petition in docket AS 02-05.

At the November 19, 1991 hearing, the Petitioner called three witnesses: Ken Willings of Noveon and Illinois EPA employees Richard Pinneo and Tim Kluge. The Agency began its case by a direct examination of Tim Kluge. At the February 17, 2004 hearing, Petitioner called Houston Flippin in lieu of Dr. Patterson and the Agency called Richard Pinneo and Bob Mosher.

[1]References to the Hearing Transcripts from the 1991 and 2004 hearings in this matter will be abbreviated as either "1991 Tr. at __" or "2004 Tr. at __."

With regard to the testimony of Houston Flippin, Petitioner submitted pre-filed testimony from Mr. Flippin on Friday, February 6, 2004 to the Board (and via email to the Agency) in dockets PCB 91-17 and AS 02-05 titled "Petition of Noveon, Inc. AS02-05 for an Adjusted Standard NPDES Adjusted from 35 ILL. ADM. Code Standard 304.122." On Monday, February 9, 2004, with three business days remaining before the hearing, Petitioner submitted a Motion to Withdraw and Substitute Expert Written Testimony of T. Houston Flippin. The Notice of Filing and Motion to Withdraw and Substitute this revised testimony only referred to AS 02-05 (and not PCB 91-17) but on its first page the substituted testimony was titled ""Petition of Noveon, Inc. For An Adjusted Standard NPDES Adjusted From 35 ILL. ADM. Code Standard 304.122, B 02-05 [*sic*] and Noveon, Inc. v. Illinois Environmental Protection Agency, PCB 91-17."[2] At the February 17, 2004 hearing, the Hearing Officer sustained an objection by the Agency to submittal of identical testimony in both proceedings and allowed Mr. Flippin to read a redacted version of the pre-filed testimony into the permit appeal record in addition to being subject to direct examination, cross-examination, and redirect examination. 2004 Tr. at 18. The Hearing Record in this matter closed on March 26, 2004. Public comments were received from approximately six members of the public during the comment period.

## II. BACKGROUND ON PETITIONER'S FACILITY AND STATEMENT OF FACTS

Noveon's Henry, Illinois Plant is located on 1550 County Road, 850 N. in northwestern Marshall County. This facility was owned and operated by BF Goodrich until 1993. At that time, part of the facility was divested to form The Geon Company and is now known as PolyOne. The PolyOne portion of the former BF Goodrich facility manufactures poly-vinyl chloride resins

[2]According to the Board's website, the Motion to Withdraw and Substitute was not actually filed in PCB 91-17, but it was filed in AS 02-05.

and compounds. 1991 Tr. at 28. The resins are used primarily by the medical industry for blood bags and other medical equipment while the compounds are used in the construction industry for house siding and vertical blinds. 1991 Tr. at 29. In 2001, the remainder of the Henry facility was sold by BF Goodrich and is now known as Noveon. Noveon's portion of the former BF Goodrich facility produces specialty polymers and chemicals used either as rubber accelerators in the tire curing process or production of anti-oxidant additives to prevent degradation of polyethelene for the rubber, lubricant, and plastic industries. 1991 Tr. at 30.

Noveon operates the wastewater treatment facilities for both PolyOne's and Noveon's productions processes and stormwater, cooling tower, boiler blowdown and well water treatment discharges. 2004 Tr. at 39, 41. Effluent monitoring is currently conducted after all wastestreams from both plants are combined. Treatment begins with pre-treatment of Noveon's Cure-Rite 18 wastestream. Noveon's process water is then sent to one of two tanks for equalization (the Polymer Chemical (PC) Tank or a separate equalization tank for the Cure-Rite 18 wastestream) while PolyOne's wastewater receives equalization in the Polyvinyl Chloride (PVC) Tank. This is followed by primary treatment (pH adjustment and addition of coagulant and polymer to remove solids) and primary clarification. Solids are then sent to a collection tank and are dewatered in a filter press and sent to a landfill. Primary clarification is followed by activated sludge treatment in four biotreators to degrade the organic matter. Finally, the wastewater is sent to a secondary clarifier followed by tertiary treatment that consists of polishing by a traveling bridge sand filter. Petitioner's Post-Hearing Brief at 3-4.[3] The discharge from the City of Henry's publicly owned treatment works ("POTW") combines with Noveon's effluent and is discharged through

[3]Reference to Petitioner's Post-Hearing Brief in this matter will be cited at "Pet. Br. at __."

Noveon's outfall to the Illinois River. Noveon's Outfall 001 is located on the Illinois River between river mile 198 and 199. The stormwater and utility waters are discharged to holding ponds where they are either pumped into the wastewater treatment process or sent to a sand filter prior to discharge to the Illinois River. Pet. Br. at 4. According to Petitioner, the major source of ammonia in its wastewater is generated from the destruction of amine compounds in the secondary treatment activated sludge portion of the wastewater treatment process. 1991 Tr. at 33, Pet. Br. at 5. Petitioner has also identified that "[i]n the period prior to the issuance of the 1990 NPDES Permit, two major expansions took place: the start-up of the Recirculating Fluid Bed Coal Fired Boiler and a Rubber Accelerator expansion (the Cure-Rite 18 process)." Pet. Br. at 2. There is no dispute in the Record that Noveon's discharge of ammonia nitrogen to the Illinois River clearly exceeds 100 pounds per day ("lbs/day"). 1991 Tr. at 68.

Noveon provides some discussion in its Post-Hearing brief of evidence presented in the Record regarding additional topics including: whether Noveon's plant is designed to achieve nitrification; why Noveon's plant does not achieve nitrification in practice; whether Noveon would trigger the threshold applicability of 50,000 population equivalents ("P.E.") of 35 Ill. Adm. Code 304.122(a) if that provision was found to apply to Noveon's facility; and the results of evaluations of alternatives to achieve nitrification at Noveon's facility. Pet. Br. at 5-7. The Illinois EPA disputes some of the characterizations of this evidence as presented by Noveon in its Brief and the conclusions reached from these characterizations. However, information related to whether Noveon's treatment works is able to achieve compliance with 35 Ill. Adm. Code 304.122(b); whether Noveon would meet the threshold of applicability of 35 Ill. Adm. Code 304.122(a) if that section was applicable and whether Noveon's plant was designed to meet

standards applicable only to POTWs is not relevant to the Board's determination in this Permit Appeal proceeding. Since these facts will be discussed extensively in the parties Post-Hearing Briefs in the Adjusted Standard proceeding (AS02-05) the Agency will not burden the Board with further discussion of them in this forum.

## III. STANDARD OF REVIEW AND HEARING OFFICER RULINGS

Petitioner spends several pages of its Post-Hearing Brief arguing that the Board must overturn rulings of Hearing Officer Halloran in this matter and proceed to make its determination under a standard of review applicable and under Board procedural rules that were in effect at the time the permit was issued. Although the Illinois EPA believes the Board's ultimate determination in this matter will not be altered by its holding in response to this argument, the Respondent will address these issues briefly below.

### A. Hearing Officer Halloran's refusal to admit Mr. Flippin's substituted testimony should be upheld.

At the February 17, 2004 hearing in this matter, Hearing Officer Halloran was forced to rule on numerous objections from both parties. Among those rulings, he determined that rather than allow identical pre-filed testimony to be entered from Houston Flippin in both PCB 91-17 and AS 02-05, he would allow Mr. Flippin to read a redacted version of his AS02-05 testimony into the Record of PCB 91-17 followed by direct examination from counsel for Petitioner. Noveon argues that "unquestionably" relevant testimony was not included in the redacted version and the Board should overrule Hearing Officer Halloran and allow the unredacted version to be admitted. Pet. Br. at 8-9. The Agency objected to both the relevance of portions of the testimony and the fact portions of it were based on data not available at the time the permit was issued.

2004 Tr. at 9-11, 15-16.

Hearing Officer Halloran determined that he would apply 35 Ill. Adm. Code 105.214 of the Board's procedural rules to this proceeding in his determination that 2004 rather than 1991 procedural rules should govern. That provision requires that permit appeal hearings "will be based exclusively on the record before the Agency at the time the permit or decision was issued..." Noveon argues instead that Hearing Officer Halloran should have relied on former procedural rule 35 Ill. Adm. Code 105.102(b)(8) that was in effect in 1991.

Noveon's Post-Hearing Brief fails to discuss other equitable factors that likely played a role in Hearing Officer Halloran's determination not to admit Mr. Flippin's substituted pre-filed testimony. These factors include prejudice to the Agency and the Hearing Officer by the late filing of the substitute testimony only three business days prior to the start of the hearing and confusion on the face of the filing regarding into which proceeding the testimony was intended to be entered. 2004 Tr. at 11-12. Additionally, the Hearing Officer was aware that Mr. Flippin was available to be questioned by both parties about all information relevant to the proceeding. Hearing Officer Halloran also expressed concern that these issues could and should have been addressed prior to the date of hearing. 2004 Tr. at 17. Officer Halloran was aware that counsel for Illinois EPA had repeatedly expressed concern at pre-hearing status conferences over having sufficient time to review pre-filed testimony in the Permit Appeal proceeding to be sure the Petitioner was not permitted to blur the lines and confuse the standards of review and relevant evidence in the Permit Appeal and Adjusted Standard proceedings. The Hearing Officer's Order was a reasonable one (under either the 1991 or 2004 procedural rules) that took into account a variety of factors that weighed against allowing Mr. Flippin's pre-filed testimony for AS 02-05 to

be entered in total in this proceeding. Admission of pre-filed testimony is discretionary on the part of the Hearing Officer and Officer Halloran's reasonable use of his discretion in this matter should be upheld by the Board.

The Illinois EPA objection was intended to assist the Board in only allowing in the evidence relevant to its determination under each proceeding's standard of review. The Agency determined that preparing redacted testimony would assist the Board, rather than requiring it to wade through relevant and non-relevant information. The Hearing Officer's ruling was appropriate and should be sustained by the Board. On the other hand, the Agency does not believe that the Board's determination would be altered in any way by the admission of this irrelevant evidence. Faced with the unpleasant choice of alternatives, the Agency would prefer the Board allow additional evidence to be admitted into the Record over providing Petitioner a manufactured basis for appeal that would only serve to delay further the effectiveness of its 1990 NPDES permit.

## B. Standard of Review and Burden of Proof

Noveon claims that it had proceeded under the assumption that the Board's standard of review in this matter would be *de novo* because that was the standard of review at the time the permit was issued. Pet. Br. at 8. The Illinois EPA believes this argument misinterprets the meanings of prior and current Board rulings regarding the standard of review in NPDES permit appeals. Among other things, Noveon seems to argue that the Board's procedural rules are in conflict with the Act. Noveon argues that under the Act there is no requirement for applicant permit appeals that the evidence be based "exclusively on the Record before the Agency" as is required by Section 40(e) of the Act for third-party permit appeals. On this basis Noveon argues

that the Board's procedural rules are inconsistent with the Act. The Illinois EPA believes the Board's procedural rules that took effect on January 1, 2001 were duly adopted and are not an inconsistent interpretation of the Act.

Additionally, Noveon tries to argue that the prior holdings of the Appellate Courts regarding the standard of review in NPDES permit appeals are still good law for appeals by applicants. The Illinois EPA disagrees and argues that this caselaw has been overturned by subsequent cases and amendments to the Board's procedural rules. There is no merit to Noveon's claim that the standard of review is different for NPDES appeals by the applicant from those by third parties. As the Board has recently stated:

> The Board has consistently held that in permit appeals, its review is limited to the record that was before IEPA at the time the permitting decision was made. *See* Community Landfill Company v. IEPA (April 5, 2001), PCB 01-48, PCB 01-49 (consolidated); Panhandle Easter Pip Line Co. v. IEPA (January 21, 1999), PCB 98-102; and West Suburban Recycling and Energy Center, L.P. v. IEPA (October 17, 1996), PCB 95-199, PCB 95-125 (consolidated); Alton Packaging Corp. v. PCB, 162 Ill.App.3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987)(court affirmed Board, holding that scope of Board's review in permit appeal is limited to record before permitting agency). *Moreover, Section 40 of the Act (415 ILCS 4/40(2000)) does not differentiate between the scope of review in permit appeals brought by permit holders and those brought by third parties.*

Prairie Rivers Network v. IEPA and Black Beauty Coal Co., PCB 01-112 (August 9, 2001) slip. op. at 8 (emphasis added). In addition to finding that the standard of review is the same for permit holder and third part NPDES appeals, the Board has also held that the standard for NPDES appeals is the same for other "routine" permit appeals. See, City of East Moline v. IEPA, PCB 86-218 (September 8, 1988) slip. op. at 2.

The Illinois EPA agrees with Noveon that the burden of proof is on the Petitioner in an NPDES permit appeal under Section 40(a)(1) of the Act. Pet. Br. at 9. The Illinois EPA is

confident that the Board will find that Noveon has failed to meet its burden in this case.

## IV. ISSUES ON APPEAL OF NOVEON'S NPDES PERMIT

Noveon's initial filings in this matter appealed several Special Conditions in the 1990 NPDES permit which will be explained in more detail below. At this stage there are three remaining issues on appeal for the Board's determination: applicability of ammonia nitrogen effluent limits, toxicity testing requirements and separation of outfalls for sampling purposes. An issue was raised in the initial pleadings regarding establishment of a mixing zone for copper that has thus far not been addressed further in the pleadings or at hearing and the Respondent assumes that matter has been resolved. Petitioner also challenged the Agency's interpretation of the federal Organic Chemicals, Plastics, and Synthetic Fiber regulations in Noveon's permit. *See* 40 CFR § 414.90 *et seq*. That issue was addressed at the 1991 hearing, in Pre-Hearing Memoranda in this matter and in testimony of both parties at the 2004 hearing. Only in its Post-Hearing Brief has Noveon conceded that Illinois EPA properly interpreted those federal requirements and agreed to withdraw its appeal of those permit conditions.

### A. Applicability of 35 Ill. Adm. Code 304.122(b) to Petitioner's facility

At the core of this dispute for both parties is the applicability to the Petitioner of the Board's effluent limitations for large ammonia nitrogen dischargers to the Illinois River contained in 35 Ill. Adm. Code 304.122. Noveon has specifically appealed Special Condition 4 of its NPDES permit which requires monitoring and reporting of Petitioner's ammonia discharge. Special Condition 4 provides that if monitoring demonstrates a 30-day average ammonia loading in Noveon's effluent greater than 100 lbs/day, Petitioner is required to comply with a 30-day average ammonia concentration of 3 milligrams per liter ("mg/L"). If the daily maximum

loading of ammonia exceeds 200 lbs/day, Petitioner is limited to a daily maximum concentration of 6 mg/L. This Special Condition is based on the effluent limitations contained in 35 Ill. Adm. Code 304.122 which provides:

a) No effluent from any source which discharges to the Illinois River, the Des Plaines River downstream of its confluence with the Chicago River System or the Calumet River System, and whose untreated waste load is 50,000 or more population equivalents shall contain more than 2.5 mg/L of total ammonia nitrogen as N during the months of April through October, or 4 mg/L at other times.

b) Sources discharging to any of the above waters and whose untreated waste load cannot be computed on a population equivalent basis comparable to that used for municipal waste treatment plants and whose total ammonia nitrogen as N discharge exceeds 45.4 kg/day (100 pounds per day) shall not discharge an effluent of more than 3.0 mg/L of total ammonia nitrogen as N.

c) In addition to the effluent standards set forth in subsections (a) and (b) of this Section, all sources are subject to Section 304.105.

The Illinois EPA placed Special Condition 4 in Noveon's permit based on subsection (b) of 304.122 which applies to dischargers whose "untreated waste load cannot be computed on a population equivalent basis comparable to that used for municipal waste treatment plants."

Noveon claims "Illinois EPA's application of the rule ignores its plain meaning and relies on a misinterpretation that has no basis in the language of the rule, the Board's opinion promulgating the rule, or any Illinois guidance document." Pet. Br. at 11. Illinois EPA, on the other hand, has consistently maintained that "the only logical reading of this provision is that 304.122(b) was adopted specifically to cover dischargers like Noveon with industrial waste streams for whom calculations of traditional P.E. values produce figures that give no meaningful information about the magnitude or nature of the discharger's final effluent to the Illinois River." 2004 Tr. at 101. The Illinois EPA believes the Record demonstrates that its interpretation is

consistent with the Board's regulatory history of this provision, has been interpreted consistently over time by the Board and to read the language as Noveon does would render Section 304.122(b) utterly meaningless.

Petitioner supported the appeal of this Condition with two alternative arguments. First, the Illinois EPA had not imposed this condition on the Petitioner's facility previously and should somehow be estopped by law from doing so. Second, Petitioner argues that this section is not applicable because its wasteload "can be computed on a population equivalent basis" and therefore subsection (a) should apply. Under subsection (a), Petitioner also claims no effluent limit would attach based on the allegation that Noveon's influent has a population equivalent ("P.E.") of less than 50,000.

Finally, Noveon also seems to suggest that the technical basis for 304.122 has proven faulty and the Board should not attempt to apply the rule. Pet. Br. at 23. While this argument is beyond the scope of this Permit Appeal, the Agency presented expert testimony from Bob Mosher that the Board opened 304.122 twice since the adoption of subsections (a) through (c) and the Board never sought to update or alter the effluent ammonia standard at that time. 2004 Tr. at 107. If the rulemaking is out of date or the basis for it had been over-turned as Noveon implies, the Board presumably would have addressed those concerns at that time.

### 1. Response to argument that Illinois EPA should be estopped from applying an ammonia effluent limit to Noveon's discharge

Petitioner claims that because Noveon's discharge always contained ammonia and permits issued prior to 1990 did not contain an effluent limit for ammonia, that Illinois EPA should be estopped from including this limitation in Noveon's 1990 NPDES permit. Not only

does Noveon present no evidence of a change in interpretation of the regulation at issue by the Agency, but it fails to present or even attempt to distinguish all precedent setting caselaw in this area. A failure to include this provision in Noveon's prior permits is not a basis for an estoppel allegation against the State.

In the seminal case of Hickey v. Illinois Central Railroad Company, 35 Ill.2d 427, 220 N.E.2d 415 (1966), the Illinois Supreme Court held that it is elementary that principles of estoppel do not apply to public bodies under usual circumstances. The reluctance of courts to hold governmental bodies estopped to assert their claims is particularly apparent when the governmental unit is the State. There are sound reasons for the policy, including the possibility that the application of estoppel doctrine may impair the functioning of the State in the discharge of its government functions, and that valuable public interests may be jeopardized or lost by the negligence, mistakes, or inattention of public officials. Hickey, 35 Ill.2d at 447-448, 220 N.E.2d at 425-426. *See also*, Good Samaritan Hospital v. Shalala, 508 U.S. 402, 113 S.Ct. 2151 (1993).

Of course, the court also recognized that such an immunity is not absolute, but that only in compelling circumstances estoppel be available when the State is acting in a governmental capacity. The mere inaction of governmental officers is not sufficient to work an estoppel. Hickey, 35 Ill.2d at 448, 220 N.E.2d at 426. Further, the party claiming the estoppel must have relied upon the acts or representations of the other and have had no knowledge or convenient means of knowing the true facts. Hickey, 35 Ill.2d at 447, 220 N.E.2d at 415. As this Board has noted, prior Illinois EPA actions, if in error, are properly remedied by correcting the error, not perpetuating it. State Bank of Whittington v. Illinois EPA, PCB 92-152 (June 3, 1993) slip. op at 14.

In the case of Panhandle Eastern Co. v. Illinois EPA, PCB 98-102 (January 21, 1999), the Board engaged in a detailed discussion of the availability of estoppel against the Agency.[4] The Board identified the appropriate test that "a party seeking to estop the government must show that the government made a misrepresentation with knowledge that the misrepresentation was untrue." Id. at slip op. at 19 (citing Medical Disposal Services v. IEPA, 286 Ill. App. 3d 562, 570, 677 N.E. 2d 428, 433 (1st Dist. 1997)(even when letter from Illinois EPA stated prior contrary interpretation of regulations, Illinois EPA was not estopped from changing its interpretation); City of Mendota v. PCB, 161 Ill. App. 3d 203, 209, 514 N.E.2d 218, 222 (3rd Dist 1987); People v. Chemetco, PCB 96-76, slip.op. at 11; and White & Brewer Trucking, Inc. v. Illinois EPA, PCB 96-250 (March 20, 1997), slip op. at 10.). The Board has also noted that a change by the Illinois EPA in its interpretation of a regulation does not give rise to estoppel since it is not deliberate misrepresentation. White & Brewer Trucking, PCB 96-250, slip. op. at 10.

Even if Noveon were able to demonstrate that Illinois EPA had previously interpreted 304.122 as being inapplicable to its facility, the elements required to prevail on a claim of estoppel would not be met. There has been no evidence presented of an affirmative misrepresentation by any Illinois EPA employee to any representative of the Petitioners and certainly no evidence that a misrepresenation was made with the knowledge that the

[4]The Third District Appellate Court has articulated a six part estoppel test: 1) Words or conduct by the party against whom the estoppel is alleged constituting either a misrepresentation or concealment of material facts; 2) knowledge on the part of the party against whom the estoppel is alleged that representations made were untrue; 3) the party claiming the benefit of an estoppel must not have known the representations to be false either at the time they were made or at the time they were acted upon; 4) the party estopped must either intend or expect that his conduct or representations will be acted upon by the party asserting the estoppel; 5) the party seeking the benefit of the estoppel must have relied on or acted upon the representations; and 6) the party claiming the benefit of the estoppel must be in a position of prejudice if the party against whom the estoppel is alleged is permitted to deny the truth of the representations made. City of Mendota v. Pollution Control Board, 161 Ill. App.3d 203, 209, 514 N.E.2d 218, 222, 112 Ill. Dec. 752, 756 (1987); Stewart v. O'Bryan, 50 Ill. App.3d 108, 110, 8 Ill. Dec. 633, 634-35, 365 N.E.2d 1019, 1020-21 (1977).

misrepresentation was untrue. The fact that no permit limit was previously included does not amount to such a misrepresentation. Noveon cites to no evidence in the Record for the statement "it was determined by Illinois EPA as inapplicable when questioned by Noveon in 1974." Pet. Br. at 15-16. Not only does the Illinois EPA find no evidence in the Record to support this statement, in a good faith effort to evaluate Noveon's arguments prior to hearing, the Agency conducted an exhaustive review of documents in Noveon's files and elsewhere to discover why a permit condition was included in a draft 1977 permit and then removed from the final permit. 2004 Tr. at 138-139. No documentation could be found to explain this occurrence, so Noveon can not claim there was an affirmative representation from the Agency that the provision did not apply.

Noveon also can not demonstrate reasonable reliance in this case. As the Board stated in Panhandle, "It is the responsibility of companies doing business in Illinois to determine whether they are complying with Illinois environmental laws. Panhandle's reliance on Agency permit renewals and inspections as the *sole* means by which Panhandle determined its compliance was unreasonable." Panhandle, slip op. at 20. Noveon claims that it "relied on the absence of a permit limit for ammonia" to increase levels of ammonia in its discharge. Pet. Br. at 13-14. If true, this is regrettable, but it was not reasonable reliance as that concept has been defined by the Board and the courts.

The Agency provided detailed testimony for its reasons for including the effluent limit in Noveon's 1990 permit and none of this testimony supports a claim of a misrepresentation by the Agency that was known to be untrue. There is no evidence in the Record that the Agency changed its interpretation of 304.122, only that it determined for the first time to place that

provision in Noveon's permit.[5] Permit writer Rick Pinneo describes in detail the process that led to the imposition of this limit in Noveon's permit. 2004 Tr. at 137-138. In his 1984 permit review, Mr. Pinneo found that the ammonia levels were relatively low (around 34 mg/L) and similar to the values reported on earlier applications. Mr. Pinneo then included only those same limitations in this permit that had been placed in earlier versions of Noveon's permit. 2004 Tr. at 137. In 1989, that changed significantly when the levels went up to a daily maximum of 230 mg/L. 2004 Tr. at 138.

Q. What did this jump in ammonia levels cause you to do differently?
A. It made me consider restricting ammonia discharges in the permit.
Q. And what regulation did you look to to do that?
A. The effluent limitation contained in 35 Ill. Adm. Code Section 304.122(b).

2004 Tr. at 138. Mr. Pinneo also testified regarding a memo from Toby Frevert of the Standards Section determining that 304.122(b) should be applied in this case. 2004 Tr. at 138, Agency Permit Appeal Record ("Rec.") at 208.

The only caselaw cited by Noveon to support its estoppel argument is Central Illinois Public Service. Co. v. Pollution Control Board, 165 Ill. App. 3d 354, 518 N.E. 2d 1354 (4th Dist. 1988). While not an estoppel case, it is cited for the proposition that "Administrative Agencies are bound by their long-standing policies and customs of which affected parties had prior knowledge." Pet. Br. at 15. This precedent is distinguishable because no evidence was presented of a long-standing interpretation of Section 304.122(a) or (b) that is contrary to that taken today, only that this provision had previously been omitted from Noveon's permit. In addition, unlike Noveon, the Petitioner in CIPS was able to demonstrate that it had not increased its emissions during the time period at issue. In this case, Noveon admits that its ammonia discharges to the

[5]In fact, Mr. Pinneo testified that when an ammonia limitation was placed in Noveon's 1977 Draft NPDES permit,

Illinois River had increased significantly between issuance of the 1984 and 1990 NPDES permits. Pet. Br. at 13-14.

In conclusion, the courts have also held that estoppel is even more disfavored when "what is involved is the protection of the environment and the people who inhabit it. ... Progress in controlling pollution should not be barred by methods of the past." Dean Foods Co. v. Pollution Control Board, 143 Ill. App.3d 322, 338, 492 N.E. 2d 1344, 1356, 97 Ill. Dec. 471, 483 (2nd Dist. 1986). Based on all of these factors, Petitioner's argument that the Agency should be estopped from applying the applicable effluent limits to its facility should not be entertained by the Board.

### 2. Regulatory Interpretation of 35 Ill. Adm. Code 304.122 requires placing an ammonia effluent limit in Petitioner's NPDES permit

This long-standing dispute between the parties requires the Board to make a finding on the intent and meaning of its ammonia effluent limitations contained in 35 Ill. Adm. Code 304.122(a) and (b). Petitioner claims that a "plain reading" of these provisions concludes that Noveon's facility is exempt from subsection (b) and does not trigger the threshold of subsection (a), while the Illinois EPA maintains that such a reading results in a finding that Noveon is subject to the effluent limitations in subsection (b).

#### a. History and application of 304.122(a) and (b)

When first adopted by the Board, the provisions at issue in this proceeding were codified as Rule 406. On January 6, 1972, the Board adopted the language currently contained in subsection (a) of 304.122 in the combined dockets of R70-8, R71-14 and R71-20. It required that no effluents from dischargers to specified waterbodies, including the Illinois River, "whose untreated waste load is 50,000 or more population equivalents shall contain more than 2.5 mg/L

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that limit was based on subsection (b) of Section 304.122 and not subsection (a). 2004 Tr. at 139.

of total ammonia nitrogen as N during the months of April through October, or 4 mg/L at other times, after December 31, 1977." 35 Ill. Adm. Code 304.122(a)(adopted as PCB Rule 406). In 1973, the Board adopted the language (proposed upon its own motion) currently found in 304.122(b) which requires dischargers to the same specified waterways "whose untreated waste load cannot be computed on a population equivalent basis comparable to that used for municipal waste treatment plants and whose total ammonia nitrogen as N discharge exceeds 45.4 kg/day (100 pounds per day) shall not discharge an effluent of more than 3.0 mg/L of total ammonia nitrogen as N." 35 Ill. Adm. Code 304.122(b). *See* R 72-4 (June 28, 1973) and Opinion of the Board dated November 8, 1973. Even though it was adopted after the language in the current 304.122(a), this provision had an effective date of December 31, 1974. One explanation given by the Board for including the additional language is found in another rulemaking opinion's discussion of the addition of the current 304.122(b) to Rule 406: "This amendment did nothing more than provide an additional clarification of the definition of a source subject to the effluent limitations of Rule 406; for either case, the threshold applicability of the rule is established by a discharge of 100 pounds per day of ammonia nitrogen, however calculated." In the Matter of: Proposed Final Amendment to Chapter 3, Water Pollution Regulations; Rule 402.1, An Exception to Rule 402 for Certain Ammonia Nitrogen Sources, R77-6 (March 30, 1978), slip. op. at 5.

In looking for guidance on the Board's interpretation of these provisions it is helpful to look at Board cases where site-specific relief has been granted from 304.122(a) or (b). It can be concluded generally that when the Board has granted relief from 304.122 to industrial dischargers, it has granted this relief from subsection 304.122(b) without questioning whether

subsection (a) should be applied instead.[6] In 35 Ill. Adm. Code 304.213, the Board granted a site-specific effluent standard for PDV Midwest Refining, LLC. Relief was granted from 304.122(b) and that facility is required to meet a monthly average effluent limit of 9.4 mg/L and a daily maximum of 26.0 mg/L. In 35 Ill. Adm. Code 304.214, similar relief from 304.122(b) is granted to Mobil Oil Refinery with the requirement that the facility meet monthly average effluent limits of 9.0 mg/L and daily maximum limitations of 23.0 mg/L. On the other hand, in R87-21, the Board refused to grant site-specific relief from 304.122(a) for the Peoria Sanitary District. See, R87-21 (October 6, 1988). While the Board has never directly explained these provisions or ruled on the precise meaning of "comparable to that used for municipal waste treatment plants," Noveon points to no prior Board opinions that support its interpretation of 304.122. In multiple cases, the Board has granted some type of relief from the provision at issue to other industrial dischargers and never questioned that 304.122(b) was the appropriate section to apply.

Noveon argues that subsection (a) applies because a P.E. value **can** be calculated for its facility, while the Illinois EPA maintains that provision must be read in totality to apply when the "untreated wasteload can not be computed on a P.E. basis comparable to that used for municipal waste treatment plants." The Illinois EPA argues that when, as with Noveon, the influent P.E. values do not result in a meaningful value that can be used (as it is for POTWs) to estimate the ammonia loading to the receiving stream; it is more appropriate to look to the actual loading to the receiving stream. Where these facilities have a loading greater than 100 lbs/day, the Board intended an effluent limit to apply to these large ammonia discharges to the Illinois River.

[6]35 Ill. Adm. Code 304.201 provides relief from 304.122 to the Metropolitan Water Reclamation District of Greater Chicago without specifying which subsection is applicable.

Noveon's position is supported by testimony from Houston Flippin that "in his professional opinion" 304.122(b) did not apply to Noveon. 2004 Tr. at 51. However, Mr. Flippin's testimony clearly indicated that he had no prior experience with any other clients subject to 304.122(a) or (b), nor had he attended the Board hearings or read the opinions adopting these provisions. 2004 Tr. at 72-73. In fact, Mr. Flippin was unable to name or even describe a facility that would be subject to Section 304.122(b) under Petitioner's interpretation. Petitioner is asking this Board to find that it adopted a provision in a separate rulemaking one year after adoption of 304.122(a) with no facilities in mind that it would apply to. The Agency's interpretation is the only logical reading of the plain language of this provision. This section is intended to cover facilities for whom a P.E. value does not accurately reflect the ammonia loading to the Illinois River. Noveon is the archetypical example of the type of facility this provision was intended to cover. While there is a factual dispute in the Record regarding the actual P.E. value of Noveon's facility, there can be no dispute that when calculated that value does not correspond to the enormous ammonia loading Petitioner's facility is discharging to the Illinois River.

When asked what type of hypothetical facility this regulation would apply to, Mr. Flippin responded that "an industry that did not contain BOD and suspended solids would be one that could conceivably fit 304.122(b)." Mr. Flippin also testified that the regulation could apply to facilities where there was "no data available." 2004 Tr. at 50. It is inconceivable that a facility would be discharging over 100 lbs/day of ammonia into the Illinois River, but would have no data available to calculate a P.E. value or contain no BOD or suspended solids in its

wastestream.[7] According to Mr. Flippin, "In my opinion the word 'comparable' merely questions whether the data exists to express an untreated waste load in population equivalents like one does when either designing or evaluating a municipal wastewater treatment plant. The data for the Noveon-Henry plant do exist and such calculations can be made and have been made." 2004 Tr. 51. As Mr. Pinneo testified on behalf of the Agency, "that's where I believe that we differ in that I believe that you can always calculate a PE, and so why would the Board write a rule saying if you can't when it always can." 2004 Tr. at 147.

When Mr. Pinneo was asked if he agreed with Mr. Flippin's "expert" opinion that subsection (a) applied to Noveon's facility, he stated that the basis for his disagreement with Mr. Flippin's conclusion was:

> Well, I believe that in all cases you should be able to calculate a PE value of a waste stream and that the issue of whether a waste stream is comparable or not I think is the key factor in which the rule should apply. The facility has a particular type of waste stream that just is not comparable to a municipal waste stream and to calculate a PE value which, like I said, I think you can calculate a PE value for any wastestream, is just totally meaningless.

2004 Tr. at 140-141.

Noveon relies on portions of the Permit Appeal Record that support its argument and attempts to ignore those portions that do not. Noveon points to a memorandum from Jim Kammueller of the Peoria Regional Office asking for an interpretation from Headquarters staff regarding whether Noveon's facility should not have an ammonia effluent limit under 304.122(a). Rec. at 207.[8] In response, Toby Frevert's memo clearly states the consistent

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[7]Of course, even if there were no BOD or TSS in a facility's discharge a P.E. could be calculated for those parameters. It would be zero. In addition, even if somehow an influent had no BOD or TSS, flow could still be measured to calculate the flow P.E. value.

[8]Noveon wants to rely on Mr. Kammueller's suggestion that 304.122(a) applies to Noveon's facility, but not his conclusion that Noveon had a P.E. value greater than 50,000.

application of this provision to Noveon's facility that it is subsection (b) that applies to Noveon's facility, not subsection (a). Rec. at 208. This memo is criticized by Noveon, because Mr. Frevert relies on the term "industrial" to indicate which provision applies when that term is not present in the regulatory provision itself. While an oversimplification, the very brief memo correctly identifies that this provision was adopted to apply primarily to industrial facilities unless those facilities can be compared to municipalities when using P.E. values to determine the impact the facility will have on the receiving stream. As Mr. Pinneo testified regarding his understanding of the use of the term "industrial" in that memorandum: "he was making a determination of that and previous history with the use of 304.122(b). And that there are no municipalities that are regulated under 304.122(b), and believed that industrial facilities are the only – I believe, that industrial facilities are the only ones that are regulated under 304.122(b)." 2004 Tr. at 155. The Illinois EPA presented its clear position in these proceedings that 304.122(b) "applies to industrial facilities if they have over 100 pounds [of ammonia per day in their effluent], and you cannot compute a meaningful population equivalent." 2004 Tr. at 156.

Petitioner correctly states the Agency's consistent position on this issue in its initial filing when it states "However, the Agency contends that because BF Goodrich's effluent is dissimilar to domestic waste, even though a P.E. can be calculated for the discharge, P.E. calculations are meaningless and Section 304.122(b) should apply." Petition at 3-4. Petitioner offers no support in fact, law or history for its contention that since a P.E. value **can** be calculated for the waste, then 304.122(a) must apply. Illinois EPA maintains that Noveon's wastestream is exactly the type of discharge the Board had in mind when it adopted a separate section for wastestreams not comparable to municipal waste treatment plants. 1991 Tr. at 152.

The core of Noveon's legal argument is a grammatical one. Petitioner claims that "Section 304.122(b)'s phrase 'comparable to that used for municipal waste treatment plants' defines 'computed on a population equivalent basis.' It cannot be read any other way." Pet. Br. at p. 18. It seems clear that Section 304.122(b) certainly **can** be read another way. Whether or not grammatical experts would support the manner in which this provision was drafted, common sense and logic must have some role in the plain reading of this language which clearly asks the permit writer to compare the nature of the wastestream of the facility at issue to a municipal plant. Noveon has not been able to identify a single real or hypothetical facility that would be covered by the Board's regulation as it has interpreted it. The Board would not have taken on its own motion to amend former Rule 406 to add the language currently found in 304.122(b) with no facilities in mind that this amendment would apply to.

**b. Noveon's wastestream is not "comparable" to a municipal wastestream**

The Record in this proceeding provides a clear explanation of the factual bases underlying the Illinois EPA's conclusion that Noveon's wastestream was not comparable to a municipal wastestream and that any P.E. value obtained for Noveon was meaningless. Noveon admits that its influent does not contain appreciable amounts of ammonia relative to its effluent, because the ammonia is generated in the treatment process itself. When asked about the value of using P.E. calculations obtained regarding Noveon's facility, Mr. Pinneo testified as follows:

Q. Can you give us some examples of why you feel a PE would be meaningless for this facility?

A. Well, the COD [chemical oxygen demand] to BOD ratio of normal municipal waste ranges from one and a quarter to 2 and a half to one. That would be the ...COD and BOD for municipal waste. BF Goodrich's or Noveon's COD to BOD ratio is more in tune to around six to one. That's an indication that the wastewater is certainly not similar at all to municipal waste and that particular indicator would mean the waste is not as

degradable as municipal waste.

2004 Tr. at 141.

The evidence in the record demonstrates that the degradability of the waste as demonstrated by the BOD to COD ratio and the inhibitory compounds present in the wastestream are two very important factors in this determination. 2004 Tr. at 141-142. Higher COD waste requires more oxygen to get a comparable removal rate. 2004 Tr. at 141. In addition, the inhibitory compounds actually make the BOD values appear lower because it "causes inhibition to the BOD test itself." 2004 Tr. at 142. Therefore, when the BOD value of Noveon's wastestream is calculated it may not be reflective of the magnitude of the loading when compared to municipal wastestream because the BOD values (and resulting P.E. calculations derived from those values) are artificially low. 2004 Tr. at 142. Mr. Pinneo also gave some examples in his testimony of industries whose P.E. values for their influents might be comparable to municipal waste in terms of degradability such as meat packing or slaughtering. Even though these industries have very high BOD and suspended solids values, the P.E. values for these facilities would accurately represent the high loading from those values based on the absence of inhibitory compounds and a BOD to COD ratio comparable to municipal waste treatment plants. 2004 Tr. at 151-152. If those industries wanted to argue that 304.122(a) applied to their facility rather than 304.122(b), that argument would have some technical merit. The same argument can not be made for Noveon. In determining the factors to be evaluated in the meaning of the term "comparable", the Illinois EPA has adopted a reasonable interpretation that is consistent with the guidance provided by the Board in its prior opinions in both general applicability and site-specific rulemakings.

### c. Relevance of Noveon's Population Equivalence Calculations

Illinois EPA disagrees strongly with Petitioner's statement that "[u]sing all relevant calculations, the untreated waste load of the Noveon Henry Plant has a population equivalent of less than 50,000." Pet. Br. at 16. This argument will be addressed in AS 02-05, but at the time of the permitting decision, the Illinois EPA made no finding as to whether Noveon's P.E. value was greater than or less than 50,000. The reason Illinois EPA saw no need to calculate a P.E. value for the Petitioner's wasteload was because it was clearly not "comparable" to that of municipal waste treatment plants and a P.E. calculation for Noveon's discharge would not result in a meaningful value. It is not relevant to this matter whether Noveon's influent has a P.E. value less than or greater than 50,000, only whether subsection (b) applies. Since the only logical reading is that subsection (b) applies, the dispute over actual and credible P.E. values is a secondary matter.

There is one aspect of the relevance of this calculation to Petitioner's argument that the Illinois EPA is willing to concede. Noveon claims subsection (a) applies where P.E. ***can*** be calculated and proceeds to attempt to calculate it to prove that it can be. On the other hand, the Illinois EPA agrees that a P.E. value can be calculated for Noveon because it can be calculated for anything with a flow. 2004 Tr. at 140-141. Its not disputed that P.E. ***can*** be calculated. The dispute is what the appropriate figure is and whether this calculation is relevant.

The Illinois EPA does not agree that Noveon's P.E. is clearly less than 50,000, but the Agency did not perform such a calculation as part of the permitting process. Since the Illinois EPA concedes that a P.E. value for Noveon's treatment plant ***can*** be calculated (as it can for any wastestream), it is not relevant to the Board's determination in this matter what the precise P.E.

value was for Noveon's Henry Plant at the time the 1990 NPDES permit was issued. If the Board were to determine that 304.122(a) was the proper standard to apply to the Petitioner, the NPDES permit would have to be remanded to Illinois EPA to make a final determination of the actual P.E. value for Noveon's facility.

**B. Separation of Outfalls and Best Degree of Treatment**

Petitioner has also appealed Special Conditions 5 and 7 of its 1990 NPDES permit. These conditions outline the separation of Outfall 001 from Outfall 001a and require the separate wastestreams to be monitored prior to mixing them together and discharging them to the Illinois River. Under the 1990 permit, the Illinois EPA required separate sampling of the process wastewater from the stormwater, non-contact cooling water, boiler blowndown, limesoftening and demineralization waste. Noveon claims that since these wastestreams discharge through a single pipe to the Illinois River, the past practice of sampling after all wastestreams have been combined should continue. Noveon also claims that a single sampling point is allowable under Illinois law because the Best Degree of Treatment ("BDT") is being employed as required by 35 Ill. Adm. Code 304.102. The Illinois EPA has held that this separation of Outfalls is necessary based on new information obtained regarding Petitioner's treatment processes and the need to determine whether Petitioner is in compliance with the BDT requirements of 35 Ill. Adm. Code 304.102 for the stormwater/utility pond discharge that by-passes the wastewater treatment processes. That provision prohibits the use of dilution to achieve compliance with numerical effluent limitations or water quality standards and leaves discretion to the Illinois EPA to determine whether segregation of wastestreams is appropriate and whether BDT is being met.

Permit Engineer Rick Pinneo testified on direct examination at the 2004 hearing

regarding his determination to include a condition creating Outfall 001a in Noveon's 1990 permit. He stated that the legal basis for the separation of outfalls was based on "the dilution rule under 35 Ill. Adm. Code Section 304.102, where it specifically prohibits the dilution of a waste stream to meet limitations and it also prescribes in there that the monitoring of an effluent should be done prior to mixture with any other waste stream to prevent an artificially low number and showing compliance with an effluent limitation because of that dilution." 2004 Tr. at 132. The language referred to by Mr. Pinneo in his testimony provides as follows:

> Section 304.102 Dilution
>
> a) Dilution of the effluent from a treatment works or from any wastewater source is not acceptable as a method of treatment of wastes in order to meet the standards set forth in this Part. Rather, it shall be the obligation of any person discharging contaminants of any kind to the waters of the state to provide the best degree of treatment of wastewater consistent with technological feasibility, economic reasonableness and sound engineering judgment. In making determinations as to what kind of treatment is the "best degree of treatment" within the meaning of this paragraph, any person shall consider the following:
>
> 1) What degree of waste reduction can be achieved by process change, improved housekeeping and recovery of individual waste components for reuse; and
>
> 2) Whether individual process wastewater streams should be segregated or combined.
>
> b) In any case, measurement of contaminant concentrations to determine compliance with the effluent standards shall be made at the point immediately following the final treatment process and before mixture with other waters, unless another point is designated by the Agency in an individual permit, after consideration of the elements contained in this section. If necessary the concentrations so measured shall be recomputed to exclude the effect of any dilution that is improper under this Section.

With regard to the reason for addition of this requirement in the 1990 permit, Mr. Pinneo testified as follows:

Q. Can you explain for us, Rick, what changed in the 1990 permit and why?
A. Well, I learned that there was an effluent that was being directed past treatment and discharged into the outfall structure, and I didn't know of that in the past.
Q. How did you become aware of that?
A. I took a plant visit and viewed the discharge and asked what it was and was told that it was boiler water blow down and cooling waters, storm waters, water treatment waste... [objection and ruling striking part of answer] . . . As compared to the 1985 permit there was a diagram that was in that application that did not show that particular waste stream to be discharged around the wastewater treatment plant, thus not being provided any kind of treatment.

2004 Tr. at 133-135.

Petitioner insists in its post-hearing brief that separation of outfalls is not necessary because "[t]he treatment system is one integrated treatment system." Pet. Br. at 24. Noveon correctly explains that much of the stormwater/utility pond water is utilized to facilitate the process wastewater treatment process and thereby receives full treatment. But for the first time, following a site visit by the Permit Engineer prior to issuance of the 1990 permit, the Agency learned that (unlike the representations in earlier flow diagrams) the remaining stormwater/utility pond water was discharged after receiving only minimal treatment by a sand filter. Noveon claims that the Agency's testimony from the 1991 Hearing indicates that BDT is being provided for all parameters other than ammonia and that Mr. Pinneo attempted to change that testimony at the 2004 hearing. Pet. Br. at 25. In fact, Mr. Kluge's testimony stated: "Based on the information we have, it represents the best degree of treatment for parameters other than ammonia." 1991 Tr. at 131. It is clear from the Record in this matter that the Illinois EPA has no data on the nature of the pollutants contained in the stormwater/utility pond wastestream because that wastestream has not previously been sampled.

The Courts have held that where BDT is being provided, dilution may be allowed consistent with 304.102 if the permittee has demonstrated that it is providing BDT prior to the mixing of wastestreams. The Petitioner has not met this burden and the Agency's conclusion that sampling from the stormwater/utility pond wastestream is necessary to demonstrate compliance with the dilution prohibition of 35 Ill. Adm. Code 304.102 was reasonable and should be upheld by the Board. Dean Foods Co. v. Pollution Control Board, 143 Ill. App. 3d 322, 337, 492 N.E. 2d 1344, 1355, 97 Ill. Dec. 471, 482 (2 Dist. 1986)("Dean must show that it is providing BDT because that is a condition precedent for approval of its post-mixture sampling point.").

**C. Toxicity Testing and Environmental Impact of Noveon's Discharge**

Noveon has appealed Special Condition 6 in its NPDES permit which requires acute toxicity tests and other biomonitoring as well as a toxicity reduction and evaluation ("TRE") provision. Petitioner claims the requirement for this testing is "unwarranted and duplicative." Pet. Br. at 26. Prior to the February 2004 hearing, the Illinois EPA explained that in 1990 these conditions were placed in Noveon's permit pursuant to 35 Ill. Adm. Code 309.103(a) in the hopes toxicity tests would be conducted on Noveon's effluent following treatment to reduce the ammonia levels. Prior biomonitoring tests demonstrated the highly toxic nature of the ammonia levels in Noveon's discharge while subsequent tests would be necessary to determine (once ammonia levels are reduced) whether the extremely high levels of ammonia have been masking the toxicity of other compounds in Noveon's discharge. Illinois EPA even went so far in its Pre-Hearing Memorandum to state that "if the Board determines that Noveon is not required to reduce the ammonia levels in its discharge, Petitioner is correct that requiring additional

biomonitoring would be unnecessary." Respondent's Pre-Hearing Memorandum at 9. This conclusion was based on the assumption that if ammonia levels are not reduced, additional biomonitoring of Noveon's current discharge would reconfirm the undisputed results of the testing performed under previous permits that demonstrated the lethality of Noveon's discharge to aquatic life. These conclusions apparently led Noveon to request that the Board order the Agency to reconsider the need for Special Condition 6 in light of its rulings on the applicability of 304.122(b) and its Adjusted Standard Petition in AS 02-05.

However, the Illinois EPA also provided further evidence at the February 2004 hearing of the reasonableness of the toxicity testing conditions placed in Noveon's permit from Bob Mosher. Mr. Mosher has been responsible for reviewing all of the biomonitoring test assessments the Agency has ever done since such testing began in the mid-1980s. 2004 Tr. at 112. Mr. Mosher testified that he does not consider the condition duplicative of prior testing that was performed by Noveon "because effluents can change, processes at the plant can change. Effectiveness of treatment can change. All those things could lead to different results in the whole effluent biomonitoring." 2004 Tr. at 112. In addition, Mr. Mosher stressed that the six month testing schedule and the TRE requirements contained in the appealed permit are very typical for dischargers who have shown whole effluent toxicity in their effluent in the past. 2004 Tr. at 112-113. The Illinois EPA maintains that based on evidence presented by Mr. Mosher regarding biomonitoring conditions generally, Special Condition 6 is reasonable and consistent with the Board's regulations regardless of the Board's determination regarding the applicability of 304.122(b) to Noveon's discharge and it would be unnecessary to further delay applicability of Noveon's permit in this matter to require reconsideration of Special Condition 6 given this

evidence.

Related to the issue of whether Noveon should be required to conduct whole effluent toxicity testing is the environmental impact of Noveon's discharge. Noveon incorrectly states that "[i]t is unquestioned that the water quality in the Illinois River has not been affected by Noveon's discharge." Pet. Br. at 22. Noveon seems to be asking the Board to conclude that Mr. Mosher's testimony demonstrates the truth of this assertion when it quotes from his testimony at the February 17, 2004 hearing in its Post-Hearing Brief. Pet. Br. at 22. In the language quoted by Petitioner, Mr. Mosher's testimony clearly demonstrates that adoption by the Board of 304.122 has resulted in a dramatic improvement in the water quality of the entire Illinois River (both upstream and downstream of Noveon's discharge). Apparently Noveon thinks the obvious implication of this testimony will go unnoticed...that if Noveon were required to comply with this regulation, as other large dischargers of ammonia to the Illinois River have been done, the water quality in the Illinois River would continue to improve and have additional benefits to aquatic life.

Mr. Mosher also provided his expert opinion on the environmental basis and benefit of 304.122 in his testimony:

> I believe that regulation was adopted, of course, many years ago by the Board to solve a problem that existed in the Illinois River and some of its major tributaries and that point source dischargers were contributing high quantities of ammonia to that water body and that was having an adverse effect on aquatic life. And so by establishing a technology-based standard for effluents the Board cured the problem. They cut back on the amount of ammonia that entered the waterway, and that had the good impact of making it fit for aquatic life. And now we enjoy a much healthier fishery and habitat for other forms of aquatic life in the upper Illinois River.

2004 Tr. at 106. To allow a permittee to argue that its compliance with an effluent limit is

unnecessary since other dischargers have succeeded in accomplishing the intent of the effluent limit could lead to a dangerous precedent if accepted by the Board in this matter.

Noveon seems to argue that since that water quality downstream of its discharge on the Illinois River has improved, it is not necessary to impose this condition on the facility. To the contrary, testimony from Bob Mosher demonstrated that it was the Board's adoption of this regulation and the Agency's implementation of the regulation that helped lead to drops in ammonia discharges from the largest dischargers in the State that improved the water quality of the entire Illinois River. Asking Noveon to finally comply with this provision would only further benefit the downstream water quality.

## VI. CONCLUSION AND RELIEF REQUESTED

Based on the arguments outlined above, review of the entire record for the appeal of Noveon's 1990 NPDES permit demonstrates that the Petitioner has failed to meet its burden of proof to demonstrate that based on the information provided in Noveon's permit application and available to the Illinois EPA at the time the determination was made, the requested permit would not have resulted in a violation of the Environmental Protection Act or Pollution Control Board regulations. *Browning-Ferris Industries of Illinois, Inc. v. Pollution Control Board,* 179 Ill.App.3d 598, 601, 128 Ill.Dec. 434, 534 N.E.2d 616, 619 (1989); *Joliet Sand & Gravel Company v. IEPA & IPCB*, 163 Ill.App.3d 830, 516 N.E.2d 955 (3d Dist.1987); *IEPA v. IPCB*, 118 Ill.App.3d 772, 455 N.E.2d 189 (1984); *Oscar Mayer & Co. v. IEPA*, PCB 78-14 (June 8, 1978); *IEPA v. Allaert Rendering, Inc.*, PCB 76-80 (September 6, 1979); and *City of East Moline v. IEPA*, PCB 86-218 (September 8, 1988). The Illinois EPA respectfully requests that the Board uphold the Special Conditions appealed by Noveon in this matter which impose an ammonia

effluent limitation on Noveon's discharge, require separate monitoring of Noveon's process wastwaters from its stormwater/utility pond discharge and require toxicity testing and a toxicity reduction evaluation of Noveon's whole effluent. Noveon has essentially been operating under the same NPDES permit conditions for nearly two decades and the Agency hopes the Board will act quickly to ensure that an updated permit is finally issued and effective for this facility.

By: _____
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Division of Legal Counsel

DATED: May 26, 2004

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THIS FILING IS SUBMITTED
ON RECYCLED PAPER

STATE OF ILLINOIS )
) SS.
COUNTY OF SANGAMON )

PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached Respondent's Post-Hearing Memorandum upon the person to whom it is directed, by placing it in an envelope addressed to:

TO: Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph Street, Suite 11-500
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Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
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Sheila Deely
Mark Latham
Richard Kissel
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191 North Wacker Drive, Suite 3700
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and mailing it by First Class Mail from Springfield, Illinois on May 26, 2004, with sufficient postage affixed.

Cynthia Sims

SUBSCRIBED AND SWORN TO BEFORE ME

this 26th day of May, 2004

Brenda Boehner
Notary Public

OFFICIAL SEAL
BRENDA BOEHNER
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 11-14-2005

**THIS FILING IS SUBMITTED ON RECYCLED PAPER**