ILLINOIS POLLUTION CONTROL BOARD
September 16, 2004

NOVEON, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 91-17
	)	(Permit Appeal - Land)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

RICHARD J. KISSEL, MARK LATHAM, SHEILA H. DEELY, GARDNER, CARTON & DOUGLAS, APPPEARED ON BEHALF OF PETITIONER; and

DEBORAH J. WILLIAMS APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

OPINION AND ORDER OF THE BOARD (by N.J. Melas):

On January 28, 1991, B.F. Goodrich Corporation, now Noveon, Inc. (Noveon), petitioned the Board for review of its National Pollutant Discharge Elimination System (NPDES) permit. The Illinois Environmental Protection Agency (Agency) issued petitioner an NPDES permit on December 28, 1990. Noveon appealed four issues concerning its discharge of ammonia into the Illinois River, including: (a) an effluent limit for ammonia based on Section 304.122(b) of the Board's rules; (b) the Agency's designation of two outfalls; (c) toxicity testing and biomonitoring requirements; and (d) the Agency's interpretation and application of the federal regulations governing discharges from Organic Chemicals, Plastics, and Synthetic Fiber (OCPSF) facilities. Noveon has since withdrawn its appeal of the fourth issue. Nov. Br. at 2.

For the reasons described below, the Board finds that Noveon failed to prove that the conditions of the NPDES permit, as issued, are unnecessary to accomplish the purposes of the Environmental Protection Act (Act) and Board regulations. Accordingly, the Board finds the Agency properly issued the NPDES permit number IL0001892 to Noveon on December 28, 1990.

PROCEDURAL BACKGROUND

On December 28, 1990, the Agency issued a renewal of the NPDES permit number IL0001392 to Noveon's plant located in Henry, Illinois manufacturing facility. On January 24, 1991, Noveon appealed its NPDES permit renewal with the Board. On January 28, 1991, Noveon amended the petition for appeal, adding one additional basis for appeal; the Agency's interpretation and application of the federal regulations governing discharges from OCPSF facilities. The Agency filed an answer and the administrative record on September 19, 1991.

Hearing Officer Richard T. Sikes held a hearing on November 19, 1991 in the Marshall County Courthouse and continued to December 16, 1991. On December 16, 1991, counsel for both parties requested to suspend the hearing and indicated that a proposal for settlement would be filed soon. At hearing, Noveon called three witnesses: Mr. Ken Willings of Noveon, and Agency employees Mr. Richard Pinneo and Mr. Tim Kluge.

Noveon petitioned the Board for a variance in 1992. This appeal was stayed while Noveon filed a variance petition with the Board to provide Noveon additional time to explore treatment options and methods for coming into compliance. The Board granted Noveon's petition to voluntarily withdraw that petition for variance on June 20, 2002. *See* PCB 92-167 (June 20, 2002). The Agency has not issued any subsequent permits pending resolution of this appeal. Noveon petitioned the Board for an adjusted standard on May 20, 2002. *See* AS 02-5.

Hearing officer Brad Halloran held hearings on both Noveon's petition for an adjusted standard and this permit appeal on February 17 and 18, 2004 at the Marshall County Courthouse. At the continued hearing, Noveon called Mr. Houston Flippin in lieu of Dr. Patterson and the Agency called Mr. Richard Pinneo and Mr. Bob Mosher. The hearing record closed on March 26, 2004, and the Board received public comments from approximately six members of the public during the comment period.

PRELIMINARY MATTER

Noveon moves the Board to overturn a ruling by hearing officer Halloran denying Noveon's request to admit testimony by Mr. Flippin in both this permit appeal and the related adjusted standard (AS 02-5). Mr. Flippin is Noveon's expert on the same matters as Dr. Patterson. In determining that the current Board procedural rules apply to the hearing proceedings, Hearing Officer Halloran allowed Mr. Flippin to read a redacted version of his testimony in AS 02-5 into the record of this permit appeal. Section 105.214 of the Board's procedural rules, effective since January 1, 2001, provides that permit appeal hearings "will be based exclusively on the record before the Agency at the time the permit or decision was issued . . . ." Noveon renews its argument that relevant testimony was excluded from the redacted version and the Board should overrule the hearing officer's order and allow the complete version of Mr. Flippin's testimony into the record. Noveon contends that the hearing officer should have applied the Board's procedural rule in effect in 1991, which read in pertinent part:

> If any party desires to introduce evidence before the Board with respect to any disputed issue of fact, the Board shall conduct a *de novo* hearing and receive evidence with respect to such issue of fact. 35 Ill. Adm. Code 105.102(b)(8).

Noveon contends that at the time of the initial round of hearings in this case, there was no question that the Board's review of an Agency decision on a permit appeal was *de novo*. Nov. Br. at 9; citing IBP, Inc. v. PCB, 204 Ill. App. 3d 797, 563 N.E.2d 72 (3rd Dist. 1990); Dean Foods Co. v. PCB, 143 Ill. App. 3d 322, 492 N.E.2d 1344 (2nd Dist. 1986). Noveon argues that the *de novo* standard continues to apply to the present appeal. Nov. Br. at 11.

The Agency opposes Noveon's motion, contending that portions of the testimony are not relevant and other portions were based on information not available at the time Noveon's NPDES permit was issued. Ag. Br. at 6. The Agency urges the Board to affirm the hearing officer's ruling, yet contends the irrelevant evidence that Noveon seeks to enter would not alter the Board's determination in any way. Ag. Br. at 8.

The Board affirms Hearing Officer Halloran's ruling that the Board's review is limited to the record available to the Agency at the time Noveon's NPDES permit was issued. *See* 105.112(a); 415 ILCS 5/40 (e)(3) (2002). The Board finds the Hearing Officer properly allowed the parties to supplement the record with portions of Mr. Flippin's testimony as substitute for Dr. Patterson, who was unavailable for the more recent round of hearings. *See* 35 Ill. Adm. Code 105.214(a). The Board further finds the Hearing Officer properly excluded other portions of Mr. Flippin's testimony regarding information not available at the time the Agency issued Noveon's permit.

FACTS

The Facility

The Noveon Henry Plant is located on the West Branch of the Illinois River north of the City of Henry, at 1550 County Road, 850 N. in Northwestern Marshall County. Nov. Br. at 2; Agency Br. at 3. Until 1993, the facility was owned and operated by B.F. Goodrich. Agency Br. at 3. When the NPDES permit was issued, the Henry Plant had two manufacturing units: (1) a specialty chemicals manufacturing unit, which began manufacturing rubber chemicals in 1958; and (2) a PVC resins unit that began operating in 1965. The resins unit, divested in 1993, is now known as PolyOne Corporation, and the specialty chemicals unit, sold in February 2001, became Noveon, Inc. *Id*. At the specialty chemicals unit, Noveon produces two general kinds of products: (1) rubber accelerators that are used in the vulcanizing process of the tire-curing process for the tire industry; and (2) plastic and rubber anti-oxidants, which are additives used to prevent the degradation of the material from light and heat in products such as rubber baby bottle nipples. Nov. Br. at 3. The Henry Plant is classified as industrial. Ag. R. at 208.

Wastewater Treatment

Noveon operates the wastewater treatment facilities for both Noveon and PolyOne. Ag. Memo. at 3. The facility treats discharges from production processes, the cooling tower, boiler blowdown, and well water treatment, as well as stormwater. Agency Br. at 4. The combined process and non-process water discharged per day from the two facilities is approximately 800,000 gallons. R at 3.

Noveon treats wastewater in several steps. The first step involves equalization of all influent wastewaters. Nov. Memo at 3. All wastewaters from Noveon, excluding those from rubber accelerator (Cure-Rite 18 or C-18) manufacturing, discharge directly into equalization tank (PC Tank). *Id*. at 4. The wastewater from C-18 manufacturing is pretreated prior to discharge into a separate equalization tank (C18 Tank). Similarly, all wastewaters from PolyOne production areas, except for waste stream from 213 manufacturing, discharge into an

equalization tank (PVC Tank). *Id*. Wastewater from 213 manufacturing is pretreated prior to discharge into the same equalization tank. The PolyOne equalization tank also receives backwash water from sand filter, filtrate from sludge dewatering, and, potentially primary sludge from primary clarifier. *Id*.; 2004 Tr. at 36, 37. The wastewater from all equalization tanks is combined in a pH adjustment tank prior to primary treatment. In addition to these wastestreams, the non-process wastewater, including non-contact cooling water, stormwater, water from the boilerhouse demineralizer and water treatment works is discharged to a holding tank. The non-process water is then either sent to primary treatment or pumped directly to sand filter to remove solids prior to discharge through the outfall. Nov. Memo at 4.

Primary treatment involves the removal of settleable solids from the combined pH adjusted wastewater. The combined wastewater is sent to primary clarifier after adding coagulant and polymer. The solids removed during primary treatment are dewatered and sent to a landfill. The wastewater from the primary clarifier is pumped to the four aeration basins for secondary activated sludge treatment, which involves the removal organic compounds. The effluent from the secondary clarifier is sent through a sand filter prior to discharge through the outfall. This final treatment step is termed as tertiary treatment. Nov. Memo at 4.

Discharge from the City of Henry's publicly owned treatment works combines with Noveon's effluent and is discharged through Noveon's outfall into the Illinois River. Noveon's outfall (Outfall 001) is located on at mile 198 and 199 on the Illinois River. Agency Br. at 5. According to Noveon, the major source of ammonia in its wastewater comes from the destruction of amine compounds during the activated sludge treatment. 1991 Tr. at 33; Pet. Br. at 5; Agency Br. at 5.

Noveon states that before the Agency issued the 1990 NPDES permit, Noveon completed two major expansions: (1) the start-up of the Recirculating Fluid Bed Coal Fired Boiler; and (2) a Rubber Accelerator expansion (the Cure-Rite 18 process). Pet. Br. at 2. The parties agree that Noveon's discharge of ammonia nitrogen to the Illinois River exceeds 100 pounds per day. 1991 Tr. at 68; Agency Br. at 5.

Ammonia Discharge

Noveon's application for the 1984 NPDES permit indicated that the facility's discharge of ammonia nitrogen was approximately 34 milligrams per liter (mg/L). Noveon's renewal application, dated August 30, 1989, indicated that the facility discharged approximately 80 to 120 mg/L. R. at 1. That figure translates into a daily maximum value of 1,933 pounds of ammonia and a concentration of 230 mg/L. 1990 Tr., Pet. Exh. 6, V-1. In a memo regarding ammonia-nitrogen treatment alternatives at the Henry Plant, Mr. Houston Flippin estimated the average ammonia effluent value at 909 lbs/day, derived from wastestream data gathered in 1995 and effluent data gathered in 1999 through 2000.[1]

[1] This information came from Exhibit C of the redacted version of Mr. Houston Flippin's written testimony filed with the Board on February 6, 2004.

After reviewing B.F. Goodrich's 1989 renewal application, Mr. Bob Mosher and Mr. Toby Frevert, both from the Agency and Mr. Kenneth Fenner from the U.S. Environmental Protection Agency stated that Section 304.122(b) must be incorporated into the issued permit. R. at 23, 208, and 50. Mr. Rick Pinneo of the Agency reviewed Noveon's 1990 permit.

Outfalls

Prior to September 10, 1974, Noveon, then B.F. Goodrich, had an NPDES permit which identified three outfalls, 001 process and cooling water, 002 boiler blowdown and water treatment backwash, and 003 storm water runoff. R. at 1. Noveon altered the discharges, and on December 29, 1981, B.F. Goodrich submitted an NPDES renewal application identifying only one outfall, number 001. 1991 Tr., Pet. Exh. 3. The 1981 application also indicated that water treatment, demineralizer waste, stormwater and all blowdowns were being directed to primary treatment. *Id*. A subsequent renewal application, received on August 31, 1989, showed that water treatment, demineralizer waste, stormwater and all blowdowns were directed either into the wastewater treatment process or to a sandfilter before being discharged. 1991 Tr., Pet. Exh. 6; Ag. Memo at 5.

RELEVANT STATUTORY BACKGROUND

Section 301.354 defines population equivalent as:

> "Population Equivalent" is a term used to evaluate the impact of industrial or other waste on a treatment works or stream. One population equivalent is 100 (380 l) of sewage per day, containing 0.17 pounds (77 g) of BOD_5 (five day biochemical oxygen demand) and 0.20 pounds (91 g) of suspended solids. The impact on a treatment works is evaluated as the equivalent of the three highest parameters. Impact on a stream is the higher of the BOD_5 and suspended solids parameters.

Section 304.122 of the Board's effluent standards for ammonia nitrogen 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.

Section 304.102 of the Board's general effluent regulations concerning dilution provides:

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.

Section 309.103(a) of the Board's regulations requiring effluent toxicity monitoring in NPDES permits provides in pertinent part:

In addition to the above application forms, the Agency may require, pursuant to Section 39 of the Act, the installation, use, maintenance and reporting of results from monitoring equipment and methods, including biological monitoring. The Agency may require, pursuant to Section 39 of the Act, effluent toxicity testing to show compliance with 35 Ill. Adm. Code 302.621 and 302.630. If this toxicity testing shows the effluent to be toxic, the Agency may require pursuant to Section 39 of the Act further testing and identification of the toxicant(s) pursuant to 35 Ill. Adm. Code 302.210(a).

BURDEN OF PROOF

Section 40(a)(1) of the Act and Section 105.112(a) places the burden of proof on the petitioner in permit appeals. 415 ILCS 5/40(a)(1) (2002); Browning-Ferris Industries of Illinois, Inc. v. PCB, 179 Ill. App. 3d 598, 534 N.E. 2d 616, (2nd Dist. 1989). As the petitioner, Noveon bears the burden of proving that the permit, as issued, would violate the Act or Board regulations.

Section 39(a) of the Act provides, in part, that: "in granting permits the Agency may impose such conditions as may be necessary to accomplish the purposes of this Act, and are not inconsistent with the regulations promulgated by the Board thereunder." 415 ILCS 5/39(a) (2002). Thus, when appealing conditions imposed in a permit, the petitioner must prove that the conditions in the Agency-issued permit are not necessary to accomplish the purposes of the Act and Board regulations, and therefore, must be deleted from the permit. City of Rock Island v. IEPA, PCB 00-73, slip op. at 2 (July 13, 2000); citing Browning-Ferris, 179 Ill. App. 3d 598; Jersey Sanitation Corp. v. IEPA, PCB 00-82 (June 21, 2001); *aff'd* IEPA v. Jersey Sanitation Corp. and PCB, 336 Ill. App. 3d 582; 784 N.E.2d 867 (4th Dist. 2003).

STANDARD OF REVIEW

Related to the burden of proof issue is the standard of review. Noveon argues the standard of review in this proceeding should be *de novo* because that was the standard of review at the time the permit was issued. Noveon argues that under the Act there is no requirement in permit appeals by applicants 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.

The Agency contends that recent Board holdings and amendments to the Board's procedural rules limit the Board's standard of review to the record that was before the Agency at the time the permitting decision was made. Agency Br. at 9; citing Prairie Rivers Network v. IEPA and Black Beauty Coal Co., PCB 01-112 (Aug. 9, 2001).

As discussed above, the appropriate standard of review in a permit appeal proceeding is limiting the Board's review to the record before the Agency when it made the decision. 415 ILCS 5/40(e)(3) (2002); 35 Ill. Adm. Code 105.212(b). In Prairie Rivers Network, a third-party NPDES permit appeal, the Board held that "Section 40 of the Act (415 ILCS 5/40 (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, slip op. at 10; *aff'd* 335 Ill. App. 3d 391; 781 N.E.2d 372 (4th Dist. 2002). The Board has consistently held in other kinds of permit appeals that its review is limited to the record that was before Agency at the time the permitting decision was made. *See* Community Landfill Company v. IEPA, PCB 01-48, PCB 01-49 (consolidated) (Apr. 5, 2001); Panhandle Eastern Pipe Line Company v. IEPA, PCB 98-102 (Jan. 21, 1999); and West Suburban Recycling and Energy Center, L.P. v. IEPA, PCB 95-199, PCB 95-125 (consolidated) (Oct. 17, 1996); Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 516 N.E.2d 275 (5th Dist. 1987) (court affirmed Board, holding that scope of Board's review in permit appeal is limited to record before permitting agency). Alton Packaging, 162 Ill. App. 3d at 738, 516 N.E.2d at 280.

DISCUSSION

The Agency issued Noveon an NPDES permit in 1990 that contained twelve special conditions. Noveon contests the inclusion of four of those conditions in this appeal; Special Conditions 4, 5, 6, and 7. The remaining issues on appeal for the Board's determination are the following: the applicability of ammonia nitrogen effluent limits (condition 4), the separation of outfalls for sampling purposes and use of best degree of treatment (conditions 5 and 7), and toxicity testing requirements (condition 6). In the following pages the Board will discuss each of the parties' arguments regarding these issues and provide reasons why the Board denies Noveon's appeal of conditions 4, 5, 6, and 7 of its 1991 NPDES permit.

Condition 4: Applicability of Ammonia Nitrogen Limits

The parties dispute which section of the Board's effluent limitations for large ammonia nitrogen dischargers, found at Section 304.122 of the Board's rules, applies to Noveon's Henry Plant. *See* 35 Ill. Adm. Code 304.122. The Agency based Special Condition 4 of Noveon's NPDES permit on subsection (b) of Section 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." The Special Condition 4 provides that if monitoring demonstrates a 30-day average ammonia loading in Noveon's effluent greater than 100 lbs/day, Noveon's effluent cannot exceed a 30-day average ammonia concentration of 3 milligrams per liter (mg/L). If the daily maximum loading of ammonia exceeds 200 lbs/day, Noveon must meet a daily maximum concentration of 6 mg/L. R. at 9.

Noveon contests the inclusion of condition 4 in its NPDES permit. Noveon argues that the Henry Plant is exempt from subsection (b) and does not trigger the threshold of subsection (a). The Agency maintains that Noveon is clearly subject to the effluent limitations in subsection (b), and that subsection (b) was added to the Board's effluent limit specifically to regulate dischargers like Noveon.

Noveon's Arguments

Noveon appeals Special Condition 4 for three reasons. First, it argues that because the Agency hadn't imposed this condition in the past, it should be estopped from doing so now. Second, Noveon contends that subsection (a) rather than (b) should apply. Subsection (a) applies, Noveon contends, because its wasteload can be computed on a population equivalent (P.E.) basis, and equals less than 50,000. Third, Noveon argues that the Agency shouldn't impose condition 4 because its discharge does not violate the Illinois River water quality standard for ammonia nitrogen.

The Agency is Estopped from Imposing Special Condition 4. Noveon contends that ammonia has always been a component of Noveon's wastewater and that the Agency has been aware of the presence of ammonia in Noveon's discharge since the 1970s, when Section 304.122 was promulgated. Noveon asserts that the Agency did not issue an NPDES permit containing an ammonia limit until the 1990 permit. Pet. Br. at 12.

Noveon asserts that the Cure-Rite 18 accelerator expansion and associated upgrades to the wastewater treatment system in 1986-187 increased organic amines and consequently increased levels of ammonia in Noveon's discharge. Noveon contends that throughout the upgrade, Noveon relied on the existing discharge limits in its NPDES permit. Pet. Br. at 13-14.

Prior to the 1990 permit, Noveon states it also upgraded its wastewater treatment facility. Again, Noveon asserts ammonia was not a consideration because its NPDES permit did not contain an ammonia limit. Pet. Br. at 14. Noveon argues it would be inequitable to allow the Agency to apply a regulation with which Noveon contends it cannot comply. Noveon argues "[i]f the meaning of a regulation is debatable, and circumstances have not changed, an administrative agency is bound by a long-standing interpretation of the regulation." Pet. Br. at 15; citing Central Illinois Public Service Co. (CIPS) v. PCB, 165 Ill. App. 3d 354, 518 N.E.2d 1354 (4th Dist. 1988). For these reasons, Noveon contends the Agency is estopped from imposing Special Condition 4 in the 1990 permit.

Subsection (a) Rather Than (b) Applies. Noveon argues that by its plain language, subsection (b) only applies to sources whose untreated waste load cannot be computed on a P.E. basis comparable to that used for municipal waste treatment plant. Thus, Noveon reasons that subsection (b) applies to discharge sources only if data does not exist to express an untreated waste load in terms of P.E. Noveon argues that because a P.E. can be calculated, subsection (b) does not apply. Pet. Br. at 17.

Noveon contends that under subsection (a), only dischargers with a P.E. of greater than 50,000 are subject to the seasonal ammonia nitrogen limit of no more than 2.5 mg/L during the months of April through October or 4 mg/L at other times. Noveon asserts that the P.E. for the Henry Plant is less than 50,000, and therefore, its NPDES permit should not contain an ammonia effluent limit. Pet. at 19. Finally, Noveon contends the Agency had this information when it drafted the 1990 permit. Pet. Br. at 16; citing Pet. Exh. 16 at 12, 13; Pet. Exh. 19; 2004 Tr. 53-55.

Noveon's Discharge Does Not Adversely Impact Illinois River Water Quality. Noveon argues that its discharge does not adversely affect the Illinois River water quality because data shows the water quality in the Illinois River has improved dramatically since the ammonia standard was adopted, notwithstanding Noveon's discharge. Pet. Br. at 22.

The Agency's Response

Estoppel. The Agency argues that a failure to include an ammonia nitrogen limit in Noveon's prior permit does not estop the Agency from including such a limit in the 1990 permit. The Agency points out that the principles of estoppel do not usually apply to public bodies. Ag. Br. at 13; citing Hickey v. Illinois Central Railroad Co., 35 Ill. 2d 427, 220 N.E.2d 415 (1966). The Agency contends that Hickey establishes that "the mere inaction of governmental officers is not sufficient to work an estoppel" and that "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." Ag. Br. at 13; citing Hickey, 35 Ill. 2d at 447. According to the Agency, under the well-established principles of estoppel, Noveon cannot prove the elements.

In response to Noveon's claim that the Agency is bound by its prior interpretation that Section 304.122 did not apply to Noveon, the Agency asserts that Noveon has not shown that the Agency has changed its interpretation. The Agency further notes that even a change by the Agency of its interpretation of a regulation is not basis for estoppel if it is not a deliberate misrepresentation. Ag. Br. at 14; citing White & Brewer Trucking, Inc. v. IEPA, PCB 96-250, slip op. at 10 (Mar. 20 1997).

Subsection (b) Applies. The Agency asserts that a plain reading of Section 304.122 shows that Noveon is subject to the effluent limits found in subsection (b). The Agency argues 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." Agency Br. at 11; citing 2004 Tr. at 101. The Agency contends that in such cases, it is more appropriate to look at the actual loading to the receiving stream. Ag. Br. at 19. The Agency's expert, Mr. Pinneo, states that "in all cases you should be able to calculate a P.E. value of a waste stream," but that in deciding whether to apply Section 304.122(a) or (b), the key factor is whether the untreated waste load can be computed on a P.E. basis comparable to that of a municipal waste treatment plant. Agency Br. at 21; citing 2004 Tr. at 140-141.

According to the Agency, when calculated, the actual P.E. value of Noveon's facility does not correspond to the "enormous ammonia loading" that the Henry Plant is discharging into the Illinois River. Agency Br. at 20. Further, the Agency argues that its interpretation of Section 304.122 is consistent with the Board's past application of this provision. The Agency notes that in general, when the Board has granted relief from Section 304.122 to industrial dischargers in the past, it granted relief from Section 304.122(b) without questioning whether subsection (a) should apply instead, suggesting that subsection (b) applies to industrial dischargers like Noveon. Ag. Br. at 18-19.

Noveon's Wastestream is Not Comparable to a Municipal Wastestream. The Agency contends the record shows that Noveon's wastestream differs from a municipal wastestream in two significant ways: (1) the degradability of the waste; and (2) the presence of inhibitory compounds in the wastestream. The degradability of waste is demonstrated by the ratio of biological oxygen demand (BOD) to chemical oxygen demand (COD). The Agency states the record shows that while the COD to BOD ratio of normal municipal waste ranges from one and a quarter to two and a half to one, Noveon's COD to BOD ratio is approximately six to one, which means Noveon's waste is not as degradable as municipal waste. Agency Br. at 23-24; citing 2004 Tr. at 141. The Agency asserts that the record further shows that inhibitory compounds make the BOD levels appear even lower because those compounds inhibit the BOD test itself. As a result, the calculated BOD value may not properly reflect actual levels in Noveon's wastestream because the BOD values, and P.E. calculations derived from those values, are artificially low. Agency Br. at 24.

Actual P.E. Values are Irrelevant. The Agency contends that the dispute over the actual P.E. value is secondary to the issue of whether subsection (b) applies. Agency Br. at 25.

The Agency concedes that a P.E. value can be calculated, but that the calculation is irrelevant because it would not result in a meaningful value. Agency Br. at 25.

Noveon's Reply

Noveon reiterates that estoppel bars the Agency from including an ammonia limit in Noveon's NPDES permit. Noveon claims that the Agency did make a misrepresentation on which Noveon relied. According to Noveon, that the Agency believed Section 304.122(b) applied prior to the 1990 permit but did not include the limit until the 1990 permit constitutes misrepresentation. Noveon claims that inclusion of an ammonia limit in the 1990 permit is fundamentally unfair. Noveon concedes that ammonia levels in its discharge rose between 1984 and 1990, but that the levels only increased because Noveon relied on the Agency's prior decisions that Section 304.122 did not apply to its discharge. Pet. Reply at 7.

In response to the Agency's claim that estoppel is even more disfavored where environmental protection is involved, Noveon states that the record does not show that Noveon's discharge has any negative impact on the Illinois River water quality. Noveon claims that the Illinois River meets the dissolved oxygen water quality standard and is even very close to the dissolved oxygen saturation level. Pet. Reply at 9.

In deciding which section of 304.122 to apply, Noveon states that when the language of a regulation is clear, no further inquiry is required and the Board must adhere to the plain meaning of a regulation. Pet. Reply at 9; citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Noveon claims that subsection (a) simply did not limit its applicability to municipal wastestreams and subsection (b) to industrial wastestreams.

Noveon contends the Agency's argument that Noveon's wastestream is not comparable to a municipal wastestream fails because some municipalities provide wastewater treatment primarily to industry. Further, Noveon asserts that many municipalities have COD and BOD ratios much higher than the averages cited by the Agency. Pet. Reply at 11. Noveon concludes that subsection (a) applies because a P.E. can be calculated for Noveon's wastestream and because that value is less than 50,000 P.E., no ammonia limit should apply to the Henry Plant's discharge. Pet. Reply at 13.

Board Analysis

The Board finds that estoppel does not apply here and the Agency properly included the ammonia nitrogen limits of Section 304.122(b) in Noveon's Henry Plant NPDES permit.

Estoppel. In a permit appeal where the petitioner alleged that the Agency was estopped from requiring a change in the petitioner's NPDES permit, the appellate court has stated:

> Principles of estoppel do not usually apply to public bodies (Hickey v. Illinois Central R.R. Co., 35 Ill. 2d 427, 447, 220 N.E.2d 415 (1966)), and estoppel is found against such bodies only in rare and unusual circumstances. County of Cook v. Patka, 85 Ill. App. 3d 5, 12, 405 N.E.2d 1376 (1980). Before estoppel

> may be used against a public body it must be shown that an affirmative legislative act induced substantial reliance. Village of Orland Park v. First Federal Savings & Loan Ass'n, 135 Ill. App. 3d 520, 528, 481 N.E.2d 946; Watcha v. PCB, 8 Ill. App. 3d 436, 289 N.E.2d 484 (1972). The party claiming estoppel must have relied upon the acts of the other and have had no way of knowing the true facts. Hickey, 35 Ill. 2d at 447. Dean Foods Co. v. PCB, 143 Ill. App. 3d 322, 492 N.E.2d 1344 (2nd Dist. 1986).

In Dean Foods, the appellate court refused to apply estoppel because the petitioner had failed to prove that it relied to its detriment on a final Agency action. The court found no evidence in the record to support Dean's contention that it spent over $250,000 to improve its treatment system in reliance on the Agency's designation of a post-mixture sampling point. The court continued that an even more compelling reason for not applying estoppel in that case was that the issue involved protection of the environment. The court stated "an estoppel may not be invoked where it would operate to defeat the effectiveness of a policy adopted to protect the public." Dean Foods, 143 Ill. App. 3d at 338; citing Tri-County Landfill Co. v. PCB, 41 Ill. App. 3d 249, 255, 353 N.E.2d 316 (1976). The court indicated an exception may exist where there are rare and unusual circumstances, but that Dean had not shown such circumstances. Dean Foods, 143 Ill. App. 3d at 339.

Here, Noveon claims that because the Agency did not include an ammonia limit in Noveon's previous NPDES permits, the Agency is estopped from imposing an ammonia limit in the 1990 permit. Noveon claims it relied to its detriment on the fact that its prior permits contained no limit.

In response, the Agency claims that Noveon has not proven that estoppel applies here. The Agency claims that Board precedent, Illinois caselaw, and public policy support the argument that estoppel does not apply. Further, even if the Agency had changed its interpretation of Section 304.122, which it asserts it did not, nothing outside of compelling circumstances or a deliberate misrepresentation prohibits the Agency from doing so.

The Board finds that estoppel does not apply. First, the Board finds the Agency took no affirmative action on which Noveon relied. Inaction alone does not constitute a sufficient misrepresentation to establish an estoppel; the governmental body must have taken some affirmative act. Here, the Agency's lack of including an ammonia standard in Noveon's previous NPDES permits does not constitute an affirmative act.

Second, the Board finds the Agency has not changed its interpretation of Section 304.122, nor made any misrepresentation regarding that section. The regulatory history of the ammonia nitrogen effluent limit as well as the Agency record in this matter show that the Agency has consistently considered Section 304.122(b) to apply to facilities such as Noveon. In a past NPDES permit appeal, the Board has considered the Agency's alleged change in interpretation of an effluent limit involving the term "population equivalent." Village of Fox River Grove, Illinois, v. IEPA, PCB 97-156 (Dec. 18, 1997). The Board found that the Agency properly decreased the facility's effluent limits for two parameters in the petitioner's NPDES permit and found no need to discuss the Agency's prior interpretations of the applicable

regulation. *Id*. at 18. In affirming the Board on appeal, the Appellate Court relied on the Board's interpretation of its own regulations, finding the Board's interpretation raised no question of inconsistency. Village of Fox River Grove, Illinois v. PCB and IEPA, 299 Ill. App. 3d 869, 702 N.E.2d 656 (2nd Dist. 1998). Like in Fox River Grove, the Board has not yet interpreted the applicability of Section 304.122(a) and (b), so there is no question of inconsistency with its own past interpretation.

Third, the policy behind the Board's adoption of Section 304.122 is to protect human health and the environment and here, Noveon has not presented any rare and unusual circumstances that would warrant estoppel. Further, if the Board were to hold that the Agency is estopped from including a limit in an NPDES permit if prior permits do not contain such a limit, the Board would greatly encumber the authority given to the Agency to issue permits under the Act. Section 39(b) of the Act provides: "All NPDES permits shall contain those terms and conditions . . . which may be required to accomplish the purposes and provisions of this Act," . . . "and may include, among such conditions, effluent limitations and other requirements established under this Act, Board regulations, the Federal Water Pollution Control Act Amendments of 1972 [Clean Water Act] and regulations pursuant hereto."

The present situation is distinguishable from CIPS, which Noveon cites for the principle that where the meaning of the regulation is debatable an administrative agency is bound by its prior interpretation of the regulation. In CIPS, the appellate court considered whether the Agency properly included a condition limiting sulfur dioxide emissions in a steam generating operating permit that it had decided not to include in the company's prior permits. In 1978, the Board amended the sulfur dioxide emission limit finding it was technically and economically infeasible for large sources. The court held that the Agency's decision to impose the sulfur dioxide limit in CIPS' permit was inconsistent with the Board's interpretation that the particular sulfur dioxide limit did not apply to large emission sources after the 1978 amendment. Unlike in CIPS, the Board has not indicated that the ammonia limit is technically or economically infeasible or would not apply to facilities such as Noveon's.

The Agency included an ammonia limit in Noveon's permit because the concentration of ammonia in Noveon's discharge in 1989 had increased 6.75 times that which the facility discharged in 1984.[2] The Board has found that nothing estops the Agency from imposing an effluent limit in the permit of an applicant who has substantially increased the discharge of a contaminant known to be toxic to aquatic organisms at elevated levels in the State's lakes and streams. Triennial Water Quality Review: Amendments to 35 Ill. Adm. Code 302.202, 302.212, 302.213, 304122, and 304.301 (Ammonia Nitrogen), R94-1(B) (Dec. 19, 1996).

Applicability of Section 304.122(b) to Noveon's Henry Plant. The line of rulemakings establishing the Board's current ammonia nitrogen effluent limit shows that subsection (b) rather than (a) applies to Noveon's Henry Plant. The ammonia effluent limit, applicable to discharges into the Illinois River, the DesPlaines River, the Chicago River System, and the Calumet River System, was adopted January 6, 1972 as "Rule 406." Effluent Criteria; Water Quality Standards;

[2] The Henry Plant discharged approximately 34 mg/L in 1984 and reported a discharge of 230 mg/L in 1989.

Water Quality Standards Revisions for Intrastate Waters, R70-8, R71-14, R71-20 (consolidated) (Jan. 6, 1972). In adopting Rule 406, the Board stated "the evidence is clear that for too long the oxygen demand exerted by ammonia in domestic wastes has been overlooked in the emphasis on reduction of five-day B.O.D." Effluent Criteria, R70-8, slip op. at 6 (Jan 6, 1972). The Board's opinion in 1972 demonstrates that it promulgated the ammonia effluent rule primarily to address the impact of ammonia nitrogen from large sources of domestic wastewater.

What became subsection (b) of Section 304.122, was adopted as an amendment to Rule 406 on June 28, 1973 in R72-4. Subsection (b) prescribes ammonia effluent limits for any discharge to the same 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 exceeds 45.4 kg/day (100 lb/day). The Board has stated that the amendment clarified the definition of a source subject to the ammonia effluent limitations, establishing that "the threshold for applicability of the rule is established by a discharge of more than 100 pounds per day of ammonia nitrogen, however calculated." Amendment to Chapter 3, Water Pollution Regulations; 402.1, an Exception to Rule 402 for Certain Ammonia Nitrogen Sources, R77-6, slip op. at 8 (June 22, 1978); *see also* R72-4, slip op. at 1 (Nov. 8, 1973). The record of the amending rulemaking clarified that the amendment, which is the language now contained in subsection (b), was meant to regulate industrial discharges that would not have otherwise been subject to the ammonia limits under the original definition of population equivalents. Water Quality Standards Revisions, R72-4 (testimony of Mr. Carl Blomgren, Engineer for the Environmental Protection Agency), Sept. 13, 1972.

Subsection (a) applies to dischargers whose untreated waste load is 50,000 or more P.E. to meet the ammonia limits. Subsection (b) of Section 304.122 applies to dischargers whose untreated waste load cannot be computed on a population equivalent basis comparable to that of municipal waste treatment plants, yet who discharge more than 100 pounds of ammonia per day (lbs/day). Using a daily flow of 50,000 P.E. and the ammonia nitrogen effluent limit of 2.5 mg/L, the ammonia nitrogen loading on the river under subsection (a) would be 104.5 lbs/day. This value is consistent with the Board's explanation in R77-6 that the threshold beyond which either subsection (a) or (b) applies is the discharge of 100 lbs/day of ammonia nitrogen. Accordingly, the Board finds the Agency's argument persuasive.

The Board finds the phrase "comparable to municipal plants" in subsection (b) refers to a comparison of waste stream loading on the river rather than a comparison of the mathematical calculation for untreated waste load, and that this interpretation is reasonable and consistent with the history of the Board's effluent limits for ammonia nitrogen. Prior Board guidance shows that effluent limits were to become applicable based on ammonia loading on the receiving body of water. On the other hand, under Noveon's interpretation, the Henry Plant's discharge would not be subject to ammonia effluent limits even though the plant's ammonia loading on the Illinois River is almost 900 lbs/day, approximately 9 times that of the limit's threshold.

A review of the record shows that Noveon's discharge at the Henry Plant cannot be computed on a P.E. basis comparable to that of a municipal waste treatment plant. Specifically, Noveon's influent contains compounds that degrade to form ammonia during wastewater treatment, and inhibit the nitrification process. In addition, Noveon's influent has a significantly

higher COD to BOD ratio when compared to municipal wastewater. Thus, a P.E. calculated for Noveon's influent would not reflect the magnitude of loading when compared to municipal waste stream. This is illustrated by the plant's high ammonia loading, of 900 lbs/day, on the Illinois River, while the calculated P.E. is less than 50,000. Accordingly, because Noveon's discharge exceeds the ammonia nitrogen threshold of 100 lbs/day, the Board finds that Subsection (b) applies and that the Agency properly included the ammonia nitrogen limitation based on Section 304.122(b) in condition 4 of Noveon's NPDES permit.

Noveon argues that no ammonia effluent limit apply to the Henry Plant, yet submitted information showing that its daily discharge of ammonia is, on average, 900 lbs/day. Section 304.122 sets forth concentration limits for any source that discharges over 100 lbs/day into the Illinois River, Des Plaines River downstream of its confluence with the Chicago River System, or the Calumet River System. Condition 4 that Noveon appeals limits the ammonia effluent concentration to 3 mg/L if the 30-day average exceeds 100 lbs/day or 6 mg/L if the daily maximum exceeds 200 lbs/day. Noveon has not shown that without this condition, it can comply with the Act.

Conditions 5 and 7: Separation of Outfalls and Best Degree of Treatment

Special Condition 5 of the 1990 permit designates two outfalls at the Henry Plant: Outfall 001 and Outfall 001a. Outfall 001 is limited to process wastewater. Special Condition 7 limits Outfall 001a to stormwater, non-contact cooling water, lime softening and demineralization waste. Both Special Conditions 5 and 7 require sampling for monitoring requirements to occur before mixing with the discharge from Outfall 001a. Ag. R. at 9-10. Noveon contests the designation of two outfalls in these conditions because the outfall at the Henry Plant is physically one and maintains that sampling is appropriate *after* mixing of the wastestreams.

Noveon's Arguments

Noveon argues that there is one physical outfall at the Henry Plant, however, the 1990 permit designated two outfalls for purposes of determining whether Noveon's wastestreams are getting the best degree of treatment (BDT). Noveon contends that the flows that comprise the outfall are part of one integrated wastewater treatment system and all flows receive the BDT. Nov. Br. at 24. Although the Agency contends that Noveon's pond water effluent is being discharged past treatment into the outfall structure, Noveon disagrees. Noveon asserts that the pond discharge includes process wastewater and stormwater runoff and is treated in one of two ways: (1) it is filtered for treatment to remove total suspended solids (TSS), then combined with other treated waste streams prior to discharge; or (2) it becomes part of the wastewater treatment process. Noveon maintains that where BDT is being provided, dilution is not objectionable. Nov. Br. at 24-25; citing In the Matter of: Effluent Criteria; In the Matter of Water Quality Standards; In the Matter of Water Quality Standards Revisions for Intrastate Waters, R70-8, R71-14, R71-20 (Jan. 6, 1972).

Noveon's expert, Mr. Flippin, testified that Noveon's wastewater treatment is defined by the USEPA as the best available technology economically available for the purposes of the

OCPSF sector. For these reasons, Noveon contends Special Conditions 5 and 7, requiring the separation of outfalls and demonstration that BDT is being provided, should be deleted from the permit.

The Agency's Response

The Agency maintains it is necessary to monitor the separate waste streams based on new information obtained regarding Noveon's treatment processes and the need to determine whether Noveon is in compliance with the BDT requirements. The Agency contends that before issuing the 1990 permit, Mr. Pinneo visited the Henry Plant and discovered that an effluent was being directed past treatment (receiving only minimal treatment by sand filter) before discharge into the outfall.

Section 304.102 prohibits the use of dilution to achieve compliance with numerical effluent limitations or water quality standards and gives the Agency the discretion to determine whether segregation of waste streams is appropriate and whether BDT is met. Further, Section 304.102 specifically proscribes that measuring of contaminant concentrations should be done prior to mixture with any other waste stream to prevent an artificially low number because of that dilution. Agency Br. at 27; citing 2004 Tr. at 132. The Agency contends that for these reasons, Special Condition 5 is necessary and appropriate.

The Agency contends that Noveon has not met its burden to show that it is providing BDT prior to the mixing of waste streams. The Agency asserts that the record contains no data on the contaminant levels of Noveon's stormwater/utility pond waste stream. The Agency concludes that sampling from this waste stream is necessary to show compliance with the dilution prohibition of Section 304.102, and therefore, inclusion of Special Condition 7 was reasonable should be upheld by the Board. Agency Br. at 29; citing 35 Ill. Adm. Code 304.102.

Noveon's Reply

In response, Noveon contends that the Agency has not presented a consistent argument for including Special Conditions 5 and 7 in the 1990 permit. Noveon asserts that the Agency first alleged dilution of the process waste stream and then later changed and alleged dilution of the stormwater/utilities waste stream. Noveon also claims the Agency changed its mind on whether Noveon provides BDT for the waste streams in the stormwater pond. Pet. Reply at 16. Noveon seems to argue that because its wastewaters are subject to best management practices, it thus provides BDT for the waste streams at the Henry Plant. Noveon states the record supports that it provides BDT for all waste streams except ammonia and, therefore, the Special Condition 7 should be removed from the 1990 permit.

Board Analysis

Noveon argues that there should be no separation of outfalls because dilution is acceptable when the facility is providing the BDT. Noveon contends that even the Agency has stated that the processed wastewater stream represents the BDT for parameters other than ammonia. 1991 Tr. at 13 (testimony of Mr. Kluge). Conditions 5 and 7 of Noveon's 1990

permit define the separation of Outfall 001 from Outfall 001a and require the separate waste streams to be monitored prior to mixing and discharge into the Illinois River. A determination of whether conditions 5 and 7 are necessary in Noveon's NPDES permit requires a brief review of the Board's and Agency's interpretation and application of the dilution rule.

The Board generally allows dilution if a petitioner is providing the BDT. Dean Foods, 143 Ill. App. 3d at 329; citing Allied Chemical Corp. v. IEPA, PCB 73-382 (Feb. 28, 1973); Allied Chemical Corp. v. IEPA, PCB 75-69 (May 8, 1975). In Dean Foods, the appellate court held that the dilution rule is ambiguous on its face and, therefore, the court must look beyond the rule itself for guides to its proper interpretation. Dean Foods, 143 Ill. App. 3d at 331. After an analysis of the legislative history of the statute, the court in Dean Foods determined that while the Board maintains that "dilution should not be used as an alternative to treatment of wastes," the Board at least tolerates "minimum dilution after the water has been treated as thoroughly as feasible." *Id*. at 332.

However, the Board finds that Noveon has not demonstrated that it provides the BDT to all of its waste streams. The Agency learned at a site visit that Noveon directs one waste stream past treatment. Further, Noveon did not provide sampling and monitoring information regarding the waste stream containing stormwater, non-contact cooling water, lime softening and demineralization waste. Absent this information, the Board finds it is not unreasonable for the Agency to require the separation of outfalls and associated sampling and monitoring information in Noveon's permit to determine whether Noveon is providing BDT. Section 304.102 provides that the "best degree of treatment of wastewater consistent with the technological feasibility, economic reasonableness and sound engineering judgment" includes consideration of whether the "individual process wastewater streams should be segregated or combined."

Accordingly, the Board finds that requiring a separation of outfalls and testing prior to mixing furthers the Board's regulations regarding BDT and dilution. Therefore, the Board affirms the Agency's inclusion of conditions 5 and 7 in Noveon's 1991 permit.

Condition 6: Toxicity Testing

Noveon's NPDES permit also contains biomonitoring and toxicity testing requirements. Ag. R. at 9. Special Condition 6 requires Noveon to conduct these tests monthly for the first six months and then the Agency will evaluate whether additional testing is necessary. Special Condition 6 also prohibits Noveon's discharge from causing or contributing to acute toxicity to aquatic species in the immediate vicinity of the discharge. Noveon contends that if the Board finds, as Noveon argues, that ammonia limits in Special Condition 4 should *not* apply to the Henry Plant, then Special Condition 6 is unnecessary. Noveon argues that regardless, it should not be subject to toxicity testing because its discharge has no ill effect on the Illinois River water quality.

Noveon's Arguments

Noveon appeals Special Condition 6 of the 1990 permit as unwarranted and duplicative. Noveon contends that it performed these same tests under its prior permit and additional testing

is unnecessary if either the Board finds that the ammonia limit should be removed from the 1990 permit. In the alternative, if the Board grants Noveon's petition for an adjusted standard from the ammonia limits. Pet. Br. at 26. Noveon further contends its discharge has not impaired the Illinois River water quality and will not in the future. For these reasons, Noveon argues that the Agency should remove Special Condition 6 from the 1990 permit. Pet. Br. at 26.

The Agency's Response

The Agency asserts that toxicity tests and other biomonitoring as well as a toxicity reduction and evaluation requirements were included as Special Condition 6 in Noveon's NPDES permit to verify whether extremely high ammonia levels had been masking the toxicity of other compounds in Noveon's waste stream. Agency Br. at 29. Prior to the February 2004 hearing, the Agency conceded that should the Board determine that Noveon does not have to reduce the ammonia levels in its discharge, additional biomonitoring would be unnecessary. Agency Br. at 29. However, at the February 2004 hearing the Agency provided additional evidence that the biomonitoring tests are reasonable and not duplicative. Mr. Mosher testified that effluents, processes, and effectiveness of treatment at the plant can all change. Agency Br. at 30; citing 2004 Tr. at 112. Further, Mr. Mosher emphasized that the testing schedule and toxicity reduction evaluation are typical permit conditions for dischargers that have demonstrated toxicity in their effluent in the past. Ag. Br. at 30.

The Agency maintains that related, is the issue of the impact of Noveon's discharge on the environment. The Agency asserts that Noveon cannot argue that because Illinois River water quality has improved downstream of its discharge, Special Condition 6 is unnecessary. The Agency maintains that it was the adoption of Section 304.122 and subsequent compliance with this regulation by various dischargers that has caused Illinois River water quality to improve. Further, the Agency contends that the inclusion of Special Condition 6 in Noveon's permit would only further benefit the downstream water quality. Agency Br. at 32.

Noveon's Reply

Noveon reiterates that Special Condition 6 is unnecessary because further toxicity testing and biomonitoring is unwarranted and duplicative. Pet. Reply at 17.

Board Analysis

Section 39(a) of the Act allows the Agency to "impose reasonable conditions specifically related to the applicant's past compliance history with this Act as necessary to correct, detect, or prevent noncompliance." 415 ILCS 5/39(a) (2002). More specifically, Section 309.103(a) provides that the Agency may require toxicity testing to determine whether an effluent is toxic. 35 Ill. Adm. Code 309.103(a). If toxic, the Agency can then require more testing and identification of the toxicants. *Id.* Federal regulations direct permitting authorities to require procedures such as toxicity testing in NPDES permits to determine whether there is a reasonable potential for causing or contributing to a violation of the State's effluent toxicity criterion. 40 C.F.R. 122.44(d)(1) (2002).

The Board finds that in meeting the effluent limit set forth in condition 4 of Noveon's permit, the effluent, and perhaps the processes and effectiveness of treatment, may change at the Henry Plant. Further, the record shows that Noveon potentially exceeds the state effluent toxicity criterion. 1991 Tr. at 133. The Board finds that Noveon has failed to demonstrate that condition 6 of Noveon's 1990 permit is unreasonable. Accordingly, the Board affirms the Agency's inclusion of condition 6 in Noveon's 1990 permit.

Conclusion

The Board finds that Noveon has failed to show that the conditions in the NPDES permit as issued by the Agency to Noveon on December 28, 1990, are not necessary to accomplish the purposes of the Act or Board regulations. Therefore, the Board affirms the Agency's issuance of Noveon's NPDES permit number IL0001892.

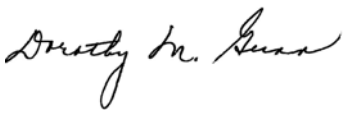
ORDER

The Board affirms the Agency's December 28, 1990 issuance of National Pollutant Discharge Elimination System permit No. IL001892 to Noveon Inc. (then, B.F. Goodrich Corporation).

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2002); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on September 16, 2004, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board