BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Noveon, Inc.	)	
	)	
v.	)	PCB 91-17
	)	(Permit Appeal)
Illinois Environmental Protection Agency	)	
	)	

NOTICE OF FILING

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PLEASE TAKE NOTICE that on Wednesday, **June 20, 2004**, we filed the attached **POST-HEARING REPLY MEMORANDUM OF NOVEON, INC.** with the Illinois Pollution Control Board, a copy of which is herewith served upon you.

Respectfully submitted,

NOVEON, INC.

By: _____
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THIS FILING IS SUBMITTED ON RECYCLED PAPER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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v.	)	PCB 91-17
	)	(Permit Appeal)
Illinois Environmental	)	
Protection Agency	)	

POST-HEARING REPLY MEMORANDUM OF NOVEON, INC.

Noveon, Inc., by its attorneys Gardner Carton & Douglas LLP, submits this Post-Hearing Reply Memorandum in its NPDES Permit Appeal. Noveon has met its burden of proof that no ammonia limit is required by Board regulations for the NPDES permit, because Noveon's untreated wasteload can be calculated on a population equivalent basis comparable for that used for municipal wastewater treatment plants, and that calculation yields a population equivalent less than 50,000. In addition, Illinois EPA is estopped from changing its application of Section 304.122 in a manner that requires imposition of an effluent limit in Noveon's permit. Further, Noveon has shown that Illinois EPA made a clear error when it applied the Board's regulation prohibiting dilution of effluent to mandate separation of what is physically one outfall into two outfalls. Finally, Noveon has demonstrated that further toxicity testing would not yield any useful information.

I. Illinois EPA Has Accepted Admission of Mr. Flippin's Testimony to Avoid an Appeal of this Issue

In its opening memorandum, Noveon appealed the Hearing Officer's ruling that the written testimony of Houston Flippin was admissible only in a form redacted by the Illinois EPA. Noveon's appeal was based on the rules in effect when Noveon commenced this appeal, which provided for *de novo* review by the Board. The Hearing Officer determined, however, that existing Board rules promulgated after the first round of hearings in 1991 prohibited admission

of certain portions of Mr. Flippin's testimony, because the information in that testimony was not before the Illinois EPA at the time it made its permit decision. The Illinois EPA argues, however, that Mr. Flippin's testimony is admissible only in a form redacted by the Agency.

Illinois EPA does not dispute or even address the change in the Board's rules and the applicability of the rules at the time this permit appeal was filed and the first hearings proceeded. Instead, Illinois EPA purports to make "equitable" arguments, which it claims were the basis for the Hearing Officer's ruling. Illinois EPA first claims that it was confused as to which proceeding, this permit appeal or the pending adjusted standard proceeding, Mr. Flippin's testimony was intended to be presented. The claimed confusion derives from the fact that a notice of filing and motion to substitute testimony, which were submitted to the Board after Mr. Flippin's initial testimony was filed before the Board, referenced only the adjusted standard proceeding. Second, Illinois EPA claims that the hearing officer took into account other equitable factors in making his ruling.

After presenting these contrived arguments, the Illinois EPA nevertheless states that it would prefer to allow additional evidence rather than allow a "manufactured" basis for appeal. Noveon urges the Board to accept Illinois EPA's concession and avoid having to decide what now appears to be a non-issue in light of Illinois EPA's position. Should the Board wish to decide this matter, however, Noveon believes it is Illinois EPA's claimed confusion concerning the proceeding in which Mr. Flippin's testimony was to be used that is manufactured, for both the adjusted standard and permit appeal proceedings are clearly listed on the face of Mr. Flippin's testimony. In addition, counsel for Noveon and Illinois EPA conferred prior to the hearing, so that the purpose of Mr. Flippin's testimony and the motion to substitute was further clarified. *See* 2004 Tr. 10. Furthermore, Mr. Flippin's substituted testimony was a shorter

version of what had previously been filed as his written testimony, not a new version with additional evidence, so no prejudice could be said to result from the later motion to substitute testimony.

Illinois EPA's additional claims concerning the Hearing Officer's "equitable" considerations for his ruling were not and could not have been a basis for the Hearing Officer's ruling. 2004 Tr. 17. "Equitable" factors cannot play a role in the hearing officer's rulings, which must be decided by Board rules. The Hearing Officer's ruling was that those portions of Mr. Flippin's testimony that were redacted by the Agency were not relevant and not permissible under the rules because the information was not before the Agency at the time it made its permitting decision. The Hearing Officer did not decide that the testimony would "blur the lines and confuse the standard of review," Resp. Mem. 7, or base his rulings on equitable factors or purported prejudice to the Agency. Rather, the admissibility of Mr. Flippin's testimony was assessed based on existing rules governing Board permit appeals.

With respect to the scope of review, and how the Illinois Environmental Protection Act ("Act") and existing Board rules direct the Board to proceed, Noveon argued that the Act does not limit the Board's review in the case of permit appeals by the permittee to the record. Though the Board's existing rules do purport to so limit review, Noveon argued that, because the rules as they existed when Noveon pursued this appeal allowed *de novo* review, Mr. Flippin's testimony should be admissible in the unique circumstances of this case. Illinois EPA ignores the past Board regulations and instead argues that the Act does in fact limit review in this case to the record, claiming that Section 40 of the Act does not differentiate between the scope of review in permit appeals brought by permit holders and those brought by third parties. The Agency's claim here completely ignores the statute, which does in fact differentiate between permit holders

and third parties. The scope of the Board's review is narrower in third-party appeals, limited to information in the record. *See* Section 40(a) and 40(e) of the Act, differentiating between third-party permit appeals and NPDES permittee appeals.[1] The Board's rules concerning the information that is admissible in first party and third party permit appeals must be construed accordingly.

Those portions of Mr. Flippin's testimony that are relevant to this proceeding and were redacted from his testimony were discussed in Noveon's opening Post-Hearing Memorandum in the adjusted standard proceeding in Section II and IV(A) and (B) of the Argument. Should the Board overturn the Hearing Officer, and apply the rules that governed this case when it commenced and which established a *de novo* hearing, Noveon incorporates those pages of the adjusted standard brief by reference.

Finally, Noveon must clarify the burden of proof applicable to it in this proceeding. While Illinois EPA is correct that Noveon has the burden of proof in this proceeding, under the Act questions of law, such as the interpretation of a regulation, are always reviewed *de novo.* *Branson v. Department of Revenue,* 168 Ill.2d 247, 254, 659 N.E.2d 961 (1995).

II. Applicability of Rule 304.122(a) and (b)

A. Equitable Estoppel Is Appropriate In This Case

It was a long-standing interpretation of Illinois EPA that no ammonia limitation was required for Noveon's discharge, and this interpretation was reflected in the Illinois EPA's issuance of NPDES permits for a long span of years without an ammonia effluent limitation. *See*

[1]Sections (b), (c), (d) and (e) state that the Board's review is based "exclusively on the record compiled in the Agency proceedings," *see, e.g,* 415 ILCS 40(b), (c), (d) and (e) (applicable to third-party NPDES permit appeals), but there is no such limitation in Section (a), governing permit appeals by the applicant.

Petitioner's Exhibit 2 (1978 Permit), Exhibit 4 (1985 Permit), and Exhibit 5 (1986 Permit). In its opening Post-Hearing Memorandum, Noveon noted that an ammonia limit had been placed in Noveon's draft 1977 Permit, but it had been removed from the permit and was not an issued limitation in the final NPDES Permit. Noveon invested substantial capital and located product lines at the Henry, Illinois facility after a thorough review of regulatory requirements and in reliance on the absence of an ammonia limit. 1991 Tr. 70-72. Noveon argues that as a result of Illinois EPA's past actions and in accordance with fundamental fairness, Illinois EPA should be estopped from changing its interpretation of the inapplicability of Section 304.122(b) and imposing an ammonia limitation.

Illinois EPA now purports to have had a consistent interpretation of Section 304.122(b) all along, which it claims made the regulation applicable to Noveon. Illinois EPA states that it has "consistently maintained that 304.122(b) was adopted to specifically cover dischargers like Noveon." Resp. Mem. at 11. Further, Illinois EPA claims that Noveon needs documentary evidence of a change in agency position, and presumably that it does not exist. The record contains direct evidence that it was the Illinois EPA's position that Section 304.122 did not apply to the Noveon discharge. In 1977, the Illinois EPA issued a draft permit for the Noveon discharge, and included the effluent limitation it believed was required under Section 304.122. 1991 Tr. 138. Then, the Illinois EPA issued a permit without the ammonia limitation. There is only one inference from this documented agency action—the Illinois EPA concluded that Section 304.122 was not applicable to Noveon's discharge. To conclude or infer otherwise would mean that the permit issued in 1978 was issued in violation of the Illinois Environmental Protection Act, because, then, as now, the Illinois EPA cannot issue a permit unless the permit requires the permittee to comply with all applicable regulations. Illinois EPA does not cite any

evidence of a "consistent" interpretation. Instead, it cites its own opening statement in this case, presented to the Board in 2004, in support of its claim. Resp. Mem. at 11. An opening statement in an administrative hearing is not evidence of a consistent position. It is evidence only of a litigation position. Illinois EPA's actions must be taken as evidence of its position. Its consistent action in not applying an ammonia effluent limitation in any NPDES permit is all the evidence that is necessary to conclude that Illinois EPA had a documented, definitive, and specific position on the non-applicability of Section 304.122(b), and it is not the same position that Illinois EPA now urges the Board to adopt.

Illinois EPA also claims that a misrepresentation is required for estoppel to be found. To the extent that Illinois EPA believed Section 304.122(b) applied prior to the 1990 Permit, as Illinois EPA evidently claims it did, this failure to include the limit in Noveon's permit, and its affirmative act in removing a limit from the 1978 final Permit, followed years later by placing the limit in the permit again, constitutes that misrepresentation.

Equitable estoppel is ultimately about fundamental fairness, and under what circumstances it is fair to hold an agency to a long-standing position upon which a regulated party has relied. Noveon meets the test here. Noveon relied for a number of years and through issuance of several NPDES permits on the affirmative representations of the Illinois EPA that Section 304.122(b) did not apply. The Illinois EPA had a demonstrated long-standing interpretation, which is quite opposite to what it claims to have been its real position. Noveon reasonably relied upon that applied interpretation by incurring substantial expense to bring a product line to Henry and providing a benefit to the community in the form of jobs and revenue. Noveon constructed that process and relied on the regulatory limits in place, including the absence of an ammonia limit, in its regulatory review and its decision to install the new process

at the Henry Plant. 1991 Tr. 76, 118-19. It would be fundamentally unfair to penalize Noveon because the agency belatedly decided that an ammonia limit was warranted.

To the extent Illinois EPA admits that it changed its position, Illinois EPA claims this took place because the ammonia effluent levels rose between 1984 and 1990, and this fact excuses its change in position. But this change is a consequence of the decisions Noveon made in reliance on Illinois EPA's position, that is, Noveon added to its facilities because Noveon relied on the Illinois EPA's documented position that Section 304.122 did not apply to its discharge. In addition, ammonia effluent levels are simply not relevant to the determination of whether Section 304.122(a) or (b) applies. It is the untreated waste load that is relevant for purposes of determining calculation of population equivalents, not the effluent, and the calculation is based on flow, BOD and TSS, not ammonia. *See* 35 Il. Adm. Code 301.345.

Because ammonia effluent levels are not relevant to the determination of whether Section 304.122(a) or (b) applies, this case is therefore like *Central Illinois Public Service Co. v. Pollution Control Board*, 165 Ill. App. 3d 354, 518 N.E.2d 1354 (4th Dist. 1988). In *Central Illinois Public Service Co.*, the Illinois EPA changed its interpretation of the regulations governing emissions of sulfur dioxide. Like Noveon, the plaintiff claimed that the rule did not support Illinois EPA's imposition of an emission limit. The court held Illinois EPA was bound by its prior policy reflected in past permits to issue a new permit without an added condition. *Id.* at 379-81, 518 N.E.2d at 1359-61.

Further, the amines in Noveon's untreated wastewater, which degrade to form ammonia during the wastewater treatment process, were always present in its untreated waste load. While there was some increase in the ammonia effluent levels, the increase was due primarily to the construction of a new wastewater treatment facility. Because Noveon was experiencing

difficulty treating BOD, the new treatment facility was constructed to provide more biodegradation than the old treatment facility. The bacteria responsible for degradation of amines[2] are the same bacteria responsible for BOD removal. With these treatment facility upgrades, degradation of amines occurred in the wastewater treatment system rather than in the environment. 1991 Tr. 105-06, 118. The levels of ammonia in Noveon's untreated wasteload, prior to the degradation that occurred in the wastewater treatment system, were comparable both before and after the 1990 permit proceeding. Even prior to the changes to the wastewater treatment facility, however, all of those levels were above the effluent limits of Section 304.122(a) and (b), which do not apply to the Noveon-Henry Plant due to regulatory exclusion.

Finally, Illinois EPA says that estoppel is even more disfavored where protection of the environment is involved. The record is absolutely clear that there is no water quality problem at all from Noveon's discharge, nor has there been any documented impact in the aquatic community around the Noveon outfall or downstream. This simplistic argument by Illinois EPA is unsupported by testimony from Illinois EPA's own witness on water quality, Mr. Bob Mosher, or any evidence at all. Mr. Mosher conceded that water quality in the Illinois River has improved during the period of Noveon's discharge. *See* Testimony of Bob Mosher, 2004 Tr. 117-18. In its Post-Hearing Memorandum, Illinois EPA claims that "if Noveon were required to comply with this regulation, as other large dischargers of ammonia to the Illinois River have been done [sic], the water quality in the Illinois River would continue to improve and have additional benefits to aquatic life." This is pure speculation. By what standards Illinois EPA is making this claim or how it would propose to measure such a claim is unknown, for the Illinois

[2] Illinois EPA refers to the source of ammonia as the "destruction of amine compounds," but this is not accurate. The amine compounds are not destructed, they are transformed by hydrolysis to ammonia.

River meets the water quality standard for dissolved oxygen and in fact is very close to the maximum oxygen level that the water can hold (dissolved oxygen at or near saturation). It cannot meet the standard even more, and there is simply no evidence to support the Agency's statement.

B. The Board Must Make a Finding Only on the Plain Meaning of Section 304.122

Noveon argued that where, as here, the language of a regulation is clear, no further inquiry is required or allowed, and the Board must adhere to a regulation's plain meaning. This is a basic precept of statutory construction. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Illinois EPA wants the Board to make a finding on the "intent and meaning" of Section 304.122, ignoring the regulation's plain language, and imposing an array of factors on the applicability of Section 304.122(b). These factors are intended to compare an alleged "typical" municipal wastestream with that of the industrial discharger, and include the BOD/COD ratio and the "degradability" of the wastestream. Further, Illinois EPA claims its interpretation is based on a memorandum by Toby Frevert, which states that Section 304.122(b) applies to Noveon because it is "industrial." In fact, the factors considered by Illinois EPA and the intended application of Section 304.122(b) to "industrial" sources, to the exclusion of Section 304.122(a), were nowhere mentioned in the Board's regulation or its opinion when the regulations were passed. The Illinois EPA's argument is simply to urge the Board to ignore the plain meaning of Section 304.122.

Illinois EPA is simply wrong on what the Board's authority and responsibility is here. The Board regulations were written with specific language, and did not limit the applicability of Section 304.122(a) to municipal wastestreams and Section 304.122(b) to "industrial"

wastestreams. The whole purpose of a population equivalent is to provide a basis for comparison of industrial wastestreams to municipal wastestreams. Illinois EPA just does not like the basis of comparison, or P.E., directed by the Board.

It is wrong for Illinois EPA to claim that the Board has authority or to ask the Board to make a finding concerning the "intent and meaning" of a regulation that is unsupported by and contrary to the plain language of 304.122(a) and (b). It is a fundamental requirement of due process that the plain language of a regulation must give fair warning to the regulated community of how it will be applied. *See Granite City Division of National Steel Co. v. Illinois Pollution Control Board,* 155 Ill.2d 149, 613 N.E.2d 719 (1993). "Where the language of a regulation is clear and certain, an administrative agency's interpretation of the regulation which runs counter to the regulation's plain language is entitled to little, if any, weight in determining the effect to be accorded the regulation." *Central Illinois Public Service Co. v. Pollution Control Board,* 165 Ill. App. 3d 354, 518 N.E.2d 1354 (4th Dist. 1988). Section 304.122(b) requires an ammonia limit for sources "whose untreated waste load cannot be computed on a population equivalent basis comparable to that used for municipal waste treatment plants." 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.

What Illinois EPA really wants is a rulemaking. And Illinois EPA's strained argument as to the factors relevant to comparability of wastestreams makes the case for Noveon, for Illinois EPA has drafted an entirely new rule to impose an ammonia limit on Noveon. It is wishful thinking that there is a "typical" municipal wastestream to which Noveon's wastestream can be compared. *See* Resp. Mem. at 23. Some municipalities provide wastewater treatment primarily

to industry, and there are many municipalities with COD to BOD ratios much higher than those given by Mr. Pinneo. But COD is not a parameter to calculate PE in the regulations.

Illinois EPA states that "[t]he core of Noveon's legal argument is a grammatical one." On that point, Illinois EPA is correct. Isn't that the case with all arguments involving the application of a statute or regulation? Illinois EPA's argument is not derived from the grammar used in Board regulations or based on principles of statutory or regulatory construction; it instead represents a wish list for a regulation that simply does not exist. Illinois EPA's position is concisely stated in one sentence from its brief:

> 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.

Resp. Mem. 19. Illinois has made two mistakes, however, that directly diverge from the plain meaning of the Board's regulations. The point Illinois EPA has missed is that the population equivalent of a facility has nothing to do with ammonia. Nowhere does the regulation state that to be comparable, a wastestream has to have ammonia comparable to a municipal wastestream. By definition in the Board's regulation, "population equivalents" are based on the flow, suspended solids, and BOD of a facility's untreated wasteload. *See* 35 Il. Adm. Code 301.345. And Section 304.122(a) explicitly refers to the untreated wasteload, not the actual loading to the receiving stream. Illinois EPA's attempt to rewrite the regulations is wishful thinking to suit its position, and nothing more.

Even if Section 304.122 considered ammonia in the determination of whether an ammonia effluent limitation is required, it is clear that the population equivalents are what is important, and Mr. Flippin showed that a population equivalent of 50,000 people discharges

more TKN and NH3-N than Noveon is requesting. Pet. Ex. 16 at 13. Illinois EPA cites a Board opinion subsequent to adoption of the rule that seems to state that discharge of 100 pounds per day of ammonia nitrogen triggers the ammonia effluent limitation of Section 304.122. *See* Resp. Mem. 18, citing *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). Illinois EPA has entirely omitted the sentence previous to the quoted sentence, which states:

> Rule 406 was amended on June 28, 1973 by adding the provision that sources discharging to any of the waters listed in 406 *and having an untreated waste load which could not be computed on a population equivalent basis* and discharging ammonia nitrogen in excess of 100 pounds per day, could not discharge an effluent containing more than 3.0 mg/L . . . .

Id. at 5 (emphasis added). Illinois EPA's failure to include this sentence in its quotation uses this Board opinion in a misleading manner, and the opinion notably fails to mention any factors concerning the comparability of industrial wastestreams to municipal wastestreams.

Illinois EPA's other arguments are self-contradictory. Illinois EPA claims that "Mr. Flippin was unable to name or even describe a facility that would be subject to Section 304.122(b) under Petitioner's interpretation." Several sentences later, however, Illinois EPA acknowledges Mr. Flippin's example of exactly the type of facility to which Section 304.122(b) could apply: that is, one for which a population equivalent could not be calculated. Resp. Mem. 20, 21. Mr. Flippin[3] gave an example of such a facility as one where no data were available to calculate a P.E. value or whose wastestream contained no BOD or suspended solids. Illinois

[3] Illinois EPA claims that Flippin's testimony is not credible because he did not attend the Board hearings or read the opinions adopting them. If this is the criteria, the only credible expert on the meaning of this provision is counsel for Noveon, who was on the Board at the time of the hearing and the Board's designated hearing officer in the Chapter 3 Water Regulations. Illinois EPA's witnesses were not present either, and are therefore not credible.

EPA claims that it is inconceivable that a facility would discharge ammonia but would have no data available to calculate a P.E. value or contain no BOD. Illinois EPA also states that even where a facility's wastestream did not contain these parameters, a P.E. could still be calculated, and the P.E. would be zero. Noveon believes that the three parameters specified in the Board's rule, flow, BOD, and suspended solids, are required to calculate a P.E. comparable to that used for municipal wastewater treatment plants, and the Noveon wastestream specifically meets the requirements for comparison. Further, Noveon can conceive of many industries where the facility would use ammonia, but not necessarily have a BOD, such as mining and metals.

Illinois EPA itself cites Board cases which granted relief from Section 304.122(b) as evidence of its own position that Section 304.122(b) applies to Noveon. Those cases, however, do little to support the Illinois EPA's position. The applicability of 304.122(b) was not discussed, disputed, or decided in those cases, and it is equally plausible to assume that those cases represent the instances described by Mr. Flippin in which Section 304.122(b) applies, where a "population equivalent comparable to that used for municipal wastewater treatment plants" could not be calculated.

The question of whether there is or is not a facility to which Section 304.122(b) applies is ultimately not before the Board. The Board must only answer whether Section 304.122(b) applies to Noveon as the Illinois EPA contends or, whether Section 304.122(a) applies to Noveon but does not require an ammonia effluent limit, as Noveon contends, because the P.E. is less than 50,000. To the extent Section 304.122(b) could not apply to a facility as it is written, the remedy is not to create a set of unstated factors and considerations that entirely change the meaning of a regulation and constitute a rulemaking. The remedy is instead to declare that regulation void and unenforceable. *See Spinelli v. Immanuel Lutheran Evangelical*

Congregation, Inc., 118 Ill.2d 389, 402, 515 N.E.2d 1222 (1987), *citing Mayhew v. Nelson,* 346 Ill. 381, 178 N.E.921 (1931).

C. **Noveon's Population Equivalent Is Less than 50,000**

Noveon's expert, Mr. Flippin, provided careful and accurate calculations of its P.E., based on information that was before the Illinois EPA at the time it issued its decision. Pet. Ex. 16 at 12, 13; Pet. Ex. 19; 2004 Tr. 53-55. Illinois EPA disputes the calculation, but provides no alternate calculation, claiming instead that the Board does not have to reach the issue.

Noveon strongly objects to Illinois EPA's attempt to limit the question on review or preserve for itself resolution of any issues on the applicability of Section 304.122. Whether an ammonia limit is properly applied to Noveon based on the provisions of Section 304.122(b) or is precluded by Section 304.122(a), as Noveon argues, is properly before the Board.

Illinois EPA wants to have its cake and eat it too, disputing careful and fully documented calculations but providing no alternative calculations to explain its viewpoint. Noveon provided calculations based on information before Illinois EPA and in the record of this proceeding. Noveon seeks a resolution of this issue, and Illinois EPA should not be permitted to avoid a decision by inartful nonresponsiveness. It is the Board that determines the scope of its review, not Illinois EPA.

D. **Separation of Outfalls**

Noveon appealed Illinois EPA's permit decision separating what is physically one outfall into two apparently on the basis that there is dilution of the wastewater. Illinois regulations prohibit dilution of wastestreams as a method of treatment in order to meet effluent standards, and require Best Degree of Treatment (BDT) of wastestreams before dilution can be allowed. *See* 35 Il. Adm. Code 304.102. Noveon argued that because Illinois EPA admitted that

Noveon's wastestreams receive BDT for all parameters except ammonia, the Board's regulation permits combining the wastestreams prior to discharge and sampling and does not require separation of outfalls for sampling and compliance purposes. Illinois EPA's admission is in the record in testimony by Mr. Tim Kluge, who was a supervisor for the Illinois EPA division responsible for Noveon's 1990 Permit. Mr. Kluge testified as follows:

> Q. Are you familiar, Mr. Kluge, with the wastewater—process wastewater treatment configuration for the BFGoodrich plant at Henry?
> A. Yes.
> Q. Do you know what the term best degree of treatment is? Where it comes from?
> A. It comes from the Board's regulations regarding dilution, which I believe is section 302.102.
> Q. Okay. Are you called upon in your position to interpret that rule and to determine what best degree of treatment is from time to time?
> A. Yes.
> Q. Is the process water treatment system at the BF Goodrich facility the best degree of treatment as far as you're concerned, you being the Agency?
> A. Based on the information that we have, it represents the best degree of treatment for parameters other than ammonia.

1991 Tr. 130-31.

Noveon's effluent is comprised of two wastestreams: process wastewater and stormwater/utilities. Noveon had understood Illinois EPA's objection to be based on alleged dilution of the treated process wastestream. *See, e.g.*, Illinois EPA's cross-examination of Mr. Flippin, 2004 Tr. 96 ("the pond water that has gone through the sand filter, when that waste stream is combined with the remaining process waters, wouldn't you call that dilution of the process wastewater stream?"). In its Post-Hearing Memorandum, Illinois EPA now apparently argues that it is the stormwater/utilities wastestream that is being allegedly improperly diluted by the process wastewater. Further, Illinois EPA has apparently retreated from its position that separation of the outfalls is required and now says that "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." Resp. Mem. 29.

Illinois EPA has also attempted to retreat from its admission on the record that Noveon provides BDT to its wastestreams. In the 2004 hearings, for the first time, Mr. Pinneo, who worked for Mr. Kluge, claimed that Noveon does not provide BDT, even though he heard that testimony and never disagreed with it until 2004. Like its position on population equivalents, however, Illinois EPA has not come forward with evidence, but instead claims that it simply cannot decide whether Noveon is providing BDT for the wastestreams in the stormwater pond. The implication seems to be that Noveon has withheld something from the Agency. Illinois EPA states that it required separation of the outfalls in the 1990 permit because the stormwater pond water is receiving what Illinois variously describes as "no treatment" or only "minimal treatment" by a sand filter, and Illinois EPA lacks information on the "nature of the pollutants contained in the stormwater/utility pond wastestream because that wastestream has not previously been sampled." Resp. Mem. 28. The fact is that Mr. Pinneo, who "disagreed" with his supervisor on the issue of BDT did so without having made any determination of whether further treatment was available. When asked why he disagreed with Mr. Kluge's conclusion that Noveon was providing BDT for all parameters except ammonia, Mr. Pinneo said the following:

> I'm not sure that there aren't compounds present in the discharge. I'm not sure if there are other pieces of material or waste pollutants that have been removed to the point where I think they could be.

2004 Tr. 161. Does this sound like someone who has made a technical judgment requirement by Section 304.102 as to whether BDT is being employed? We think not—rather the testimony of his former supervisor carries full weight here. It was definitive, determined and conclusive.

The waters in the stormwater pond receive treatment by sedimentation and sand filtration before being discharged. Even if one were to disregard Mr. Kluge's conclusion, Mr. Pinneo is absolutely wrong to state that he could not determine BDT, as the treatment requirements for non-process wastestreams and stormwater have been established by the U.S. EPA. These wastewaters are subject to Best Management Practices (BMPs). In EPA's guidance on this issue, *Considerations in the Design of Treatment Best Management Practices to Improve Water Quality*, EPA 600/R-03/103, September 2002, retention ponds and filtration are both listed as BMPs by themselves in Table 3-2 for stormwater treatment. Noveon has two BMP processes in series. For total nitrogen, TSS, and total phosphorus removal, which are the parameters of concern in the pond, filtration provides the best removal for BMP processes with direct discharges.

The Board should reverse Illinois EPA's separation of the outfalls in the permit. Illinois EPA has not provided a consistent and candid explanation of its actions. Illinois EPA has admitted and there is ample evidence to support the conclusion that Noveon provides BDT for all wastestreams except ammonia, which will be decided in this or the pending adjusted standard proceeding.

E. **Toxicity Testing**

On the Permit condition requiring toxicity testing, Noveon stands by its position in its opening brief. Illinois EPA has not demonstrated the need for or any reasonable rationale for toxicity testing. Noveon has already performed extensive investigation, and further testing is unwarranted and duplicative.

Conclusion

Noveon requests the Board to direct Illinois EPA to rescind the effluent limit for ammonia placed in the permit by Illinois EPA based on Section 304.122(b) of the Board's rules. Illinois EPA's interpretation of Section 304.122(a) and (b) is unsupported by the plain language of the regulation, and Illinois EPA should be estopped from changing its long-standing interpretation evidenced in prior permits that no ammonia effluent limit was required. Noveon also requests the Board to direct Illinois EPA to designate the NPDES permitted outfall in accordance with the physical makeup of Noveon's discharge and the Board's rules as Outfall 001. Finally, Noveon requests rescission of the condition requiring toxicity testing and biomonitoring.

Respectfully submitted,
NOVEON, INC.

By: _____
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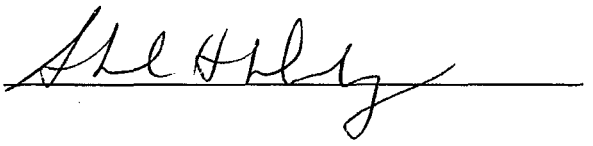
CH02/ 22319527.1

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing **Notice of Filing** and **Post-Hearing Reply Memorandum Of Noveon, Inc.** was filed by hand delivery with the Clerk of the Illinois Pollution Control Board and served upon the parties to whom said Notice is directed by first class mail, postage prepaid, by depositing in the U.S. Mail at 191 N. Wacker Drive, Chicago, Illinois on Wednesday, **June 30, 2004.**



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