

RECEIVED
CLERK'S OFFICE

OCT 20 2004

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STATE OF ILLINOIS
Pollution Control Board

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

NOTICE OF FILING

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

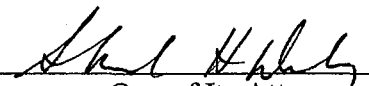
Deborah Williams
Assistant Counsel
Division of Legal Counsel
Illinois Environmental Protection
Agency
1021 N. Grand Avenue East
Springfield, IL 62794-9276

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

PLEASE TAKE NOTICE that on **Wednesday, October 20, 2004**, we filed the attached **Motion for Reconsideration and Oral Argument** with the Illinois Pollution Control Board, a copy of which is herewith served upon you.

Respectfully submitted,

NOVEON, INC.

By: 
One of Its Attorneys

Richard J. Kissel
Mark Latham
Sheila H. Deely
GARDNER CARTON & DOUGLAS LLP
191 N. Wacker Drive – Suite 3700
Chicago, IL 60606
312-569-1000

THIS FILING IS SUBMITTED ON RECYCLED PAPER

RECEIVED
CLERK'S OFFICE

OCT 20 2004

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

MOTION FOR RECONSIDERATION AND ORAL ARGUMENT

Noveon, Inc. ("Noveon"), by its attorneys Gardner Carton & Douglas LLP, respectfully submits this Motion for Reconsideration of the September 16, 2004 Opinion and Order of the Illinois Pollution Control Board ("Board") regarding Noveon's NPDES Permit Appeal. The Board's decision addressed three permit limitations and conditions appealed by Noveon, on all of which the Board ruled against Noveon. The Board's rules governing motions for reconsideration allow the Board to consider factors such as new evidence, a change in the law, or any other factor if a motion is timely filed with 35 days after the date of the Board's Opinion and Order. Il. Adm. Code 101.520, and 101.902. Noveon submits this motion because the Opinion rejecting Noveon's permit appeal did not properly interpret or apply the law in this proceeding and accepted factual errors raised by the Illinois EPA.

To assist the Board in understanding the extensive record and Noveon's positions in the Permit Appeal, Noveon respectfully moves for oral argument on the merits of the issues raised in this motion. *See* 35 Il. Adm. Code 700. The wastewater produced as a result of Noveon's production process is unique, and Noveon's Permit Appeal involves complicated questions of fact and law. Further, the Board stated in its Opinion that it has not previously issued an interpretation of Section 304.122(b) of the Board's rules, by which Illinois EPA seeks to impose an ammonia limitation.

Finally, Noveon requests that the Board issue contemporaneous rulings on this motion and Noveon's pending Petition for an Adjusted Standard, PCB AS 02-5, so that Noveon understands the outcome of the adjusted standard proceeding before deciding what steps it needs to take to ensure compliance with all laws and requirements.

I. Burden of Proof and Standard of Review.

As an initial matter, the burden of proof imposed upon Noveon in the Permit Appeal was inconsistent with that set forth in the Illinois Environmental Protection Act ("Act"). The Board's decision cites the Act to conclude that Noveon had to prove that a permit condition would *violate* either the Act or Board regulations. This is inaccurate, imposes a heavier burden on Noveon, and is different from the statutory requirement, which under the Act requires Noveon to show that Illinois EPA's decision is against the manifest weight of the evidence. *See* 415 ILCS 5/40(a) and 41(a). Section 39(b) of the Act requires Illinois EPA to show that the permit's "terms and conditions are required to accomplish the purposes and provisions of the Act." 415 ILCS 5/39(b). Noveon has met its burden of proving that, where Illinois EPA made the required determination, Illinois EPA's determination was against the manifest weight of the evidence.

Noveon has shown that, as a matter of law, Illinois EPA's decisions with respect to imposition of an ammonia limitation, the need for toxicity testing, and separation of the outfalls are not necessary to accomplish the purposes and provisions of the Act. With respect to ammonia, Illinois EPA's imposition of effluent limitations that are not derived from water quality criteria must be authorized by and consistent with properly promulgated regulations. Illinois EPA's contorted reading of the Illinois regulation governing ammonia in effluent discharges to certain waterways is manifestly contrary to that regulation. The ammonia limitation is not necessary to accomplish the purposes of the Act or Board regulations and must

be overturned. In addition, because an ammonia limitation is not necessary or authorized, neither is toxicity testing necessary to accomplish the purposes of the Act, and Illinois EPA is on record in concurrence with this position. Finally, as discussed in more detail later in Section III, with respect to separation of the outfalls, Noveon has also met the burden of proof to show that Illinois EPA's conclusion that separation was necessary to accomplish the purpose of the Act is against the manifest weight of the evidence.

II. An Ammonia Limit Is Not Necessary to Accomplish the Purposes of the Act.

A. Estoppel in Application of Ammonia Limitation.

Throughout this proceeding, Noveon argued that 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. These prior permits are in the record, and they constitute affirmative acts that, to the extent Illinois EPA now claims a consistent position on the application of Section 304.122(b), are misrepresentations.

The Opinion states that the Agency has consistently interpreted Section 304.122(b) to apply to facilities such as Noveon, and concludes that Noveon has not proven the affirmative act constituting a misrepresentation to the contrary, which is required for estoppel. This position entirely ignores the Agency's affirmative action in 1977, when it issued a draft permit with an ammonia limitation and subsequently removed that limitation from the permit, as well as the Agency's action in issuing numerous prior permits that contained no ammonia limitation. The Board's conclusion 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. The

Opinion and Order does not address that, though Noveon's discharge has always exceeded the ammonia limitation of Section 304.122(b), the Agency did not ever include a limit for ammonia based on Section 304.122(b) in these prior permits. *See* Petitioner's Exhibit 2 (1978 Permit), Exhibit 4 (1985 Permit), and Exhibit 5 (1986 Permit). 1991 Tr. 70-72.

The Opinion also asserts that it is not the interpretation of Section 304.122(a) and (b) by the Agency that is important for purposes of estoppel, but rather that of the Board. The Board states that it has not previously issued an interpretation. The Board does not address that its interpretation is quite clearly derived directly from the interpretation of Rick Pinneo of Illinois EPA, who testified that it was he who came up with factors such as COD/BOD ratios and other "things" to support his interpretation. These factors are not reflected anywhere in a Board regulation or opinion, nor are they derived from any Illinois EPA guidance. They are made up to fit the circumstances of this case and are therefore arbitrary, capricious and unreasonable. They are not necessary to accomplish the purposes and provisions of the Act. To the extent the Board is deferring to the Agency and citing Mr. Pinneo's interpretation, it is the Agency's consistency that is still at issue with respect to estoppel. Further, the Board's original opinions adopting Section 304.122(a) and (b) were interpretive, and are contrary to Illinois EPA's new interpretation of these provisions as applicable to Noveon.

The Opinion states that Illinois EPA was justified in changing its position because ammonia levels from Noveon increased. But this increase 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.

Noveon presented unrefuted evidence that it invested substantial capital and located new product lines at the Henry, Illinois facility after a thorough review of regulatory requirements and in reliance on the absence of an ammonia limit. The Opinion states that Noveon did not present any evidence regarding reliance on the Illinois EPA's actions. Noveon in fact presented extensive testimony from Ken Willings that Noveon relied on the absence of an ammonia limitation in any of its prior NPDES permits and based on that reliance expanded the Henry Plant by bringing new product lines to the facility and designing and upgrading the wastewater treatment plant to ensure continued compliance with the terms and conditions historically imposed by the Illinois EPA in prior NPDES permits, none of which required compliance with Section 304.122(b). 1991 Tr. 71-72, 76-80, 105-06, 118-19. The Opinion failed to consider this unrefuted evidence.

B. Applicability of Section 304.122(a) and (b), Ammonia Effluent Limitations.

In the Opinion's discussion of the factual background of this matter, the Board stated that Bob Mosher and Toby Frevert of Illinois EPA and Kenneth Fenner of U.S. EPA concluded that the ammonia limitations in Section 304.122(b) must be incorporated into the permit. This statement appeared to bolster the conclusion that Section 304.122(b) was applicable to Noveon's discharge, notwithstanding that it was contrary to the clear language of the regulation.

The record shows that only Toby Frevert reached this unexplained conclusion. Mr. Frevert's conclusion was reached in a cursory memorandum without any apparent examination of the regulation and contrary to its plain meaning. Toby Frevert's memorandum stated that Section 304.122(b) applies to Noveon because it is "industrial." In fact, the factors considered

by the 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. Bob Mosher relied on Mr. Frevert’s conclusion and did not make his own independent assessment.

Mr. Fenner’s letter, cited in the Opinion, was part of the record, though it was not entered as evidence in the hearing below or even addressed by Illinois EPA and Mr. Fenner did not testify. Further, Mr. Fenner’s statement was also not a conclusion that the ammonia limit indeed applied. It was made in the context of pointing out that Illinois EPA could not issue a schedule for Noveon to comply with the ammonia effluent limitation that Illinois EPA had already included in the permit. He did not say, as noted in the Opinion, that the Illinois EPA must include in the permit the ammonia limitations set forth in Section 304.122(b). It is misleading to state that a conclusion was reached by these three parties when the record manifestly shows it was not. The Opinion also ignores a contradictory memorandum by James Kammueler, an Illinois EPA field inspector at the time, who reached the opposite conclusion. In that memorandum, Mr. Kammueler clearly applied Section 304.122(a) of the Board’s regulations because a population equivalent can be calculated. Because that population equivalent is below 50,000, the NPDES Permit should not contain an ammonia effluent limitation.

The Opinion states that the “line of rulemakings” establishing the Board’s current ammonia effluent limits show that Section 304.122(b) and not (a) applies, and includes its statement in a prior opinion that the applicability of 304.122(b) is triggered by “discharge of more than 100 pounds per day of ammonia, however calculated.” This Opinion’s conclusion is based on a false foundation, as the Board’s purported conclusions in the “line of rulemakings” must encompass an implicit presumption that a population equivalent cannot be calculated,

which is what the regulation requires. Further, the discussion in the Opinion of the estoppel issue notes that the Board did not issue an interpretation of Section 304.122(b), so how can any “line of rulemakings” be interpretive? In any case, the interpretation of a government agency is only important to the extent the regulation is ambiguous. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Village of Fox River Grove v. Pollution Control Board*, 299 Ill. App.3d 869, 702 N.E.2d 656 (2d Dist. 1998). Here there is no such ambiguity. A population equivalent can be calculated. It is below 50,000 and consequently, pursuant to Section 304.122(a), an ammonia limit is not required in the NPDES Permit.

The Opinion also referred to the phrase “comparable to municipal plants” in Section 304.122(a) to conclude that the regulation requires comparability of an industrial facility to a municipal plant not with reference to the calculation of population equivalents, as Noveon argued, but with reference to the characteristics of the wastewater. The quoted portion of the regulation in the Opinion is inaccurate. The regulation reads “whose untreated waste load cannot be computed on a population equivalent basis comparable to that used for municipal waste treatment plants.” The Opinion also ignores the definition of “population equivalents,” which provides that “Population Equivalent is a term used to evaluate the impact of industrial or other waste on a treatment works or stream,” and references only flow, BOD₅ (five day biochemical oxygen demand), and suspended solids. *See* 35 Ill. Adm. Code 301.345.

The Opinion’s analysis of comparability of municipal and industrial wastewaters, using factors such as COD/BOD loadings, ratios and degradability to determine the application of Section 304.122, uses the unique nature of Noveon’s wastewater and the consequent difficulty in treating it as if such a situation was widely anticipated by the Board when the Board wrote and adopted the rules. The approach used in the Opinion reads factors into the regulation that are

simply not there. The Opinion also does not address why Section 304.122(a) is not limited to domestic wastewaters. What the Illinois EPA should do if it wants these factors to be appropriately considered is commence a rulemaking to reconcile its wish list about the applicability of an ammonia limit to the regulation.

The Opinion concludes that “Noveon has not shown that without this condition, it can comply with the Act.” It is not clear what this statement means. The Opinion cannot cite any statutory provision with which Noveon cannot comply. Noveon has proven by unrefuted testimony and evidence that its discharge does not violate water quality standards governing the Illinois River, which meets standards for both dissolved oxygen, the rationale for the Board’s adoption of Section 304.122(a) and (b), and ammonia. *See* Testimony of Bob Mosher, 2004 Tr. 117-18. These provisions are the only ones that are relevant for purposes of the Illinois Environmental Protection Act.

Finally, the Opinion ignores the abandonment of the scientific study that was the basis for the adoption of the ammonia effluent limitation by the study’s authors. An opinion in another case shows that Mr. Butts and Mr. Evans abandoned the conclusions of these earlier studies and claimed that, based on the relative influence of the three primary oxygen demand sinks—carbonaceous BOD, nitrogenous BOD, and sediment oxygen demand—effluent limitations in the ammonia rule were unjustified and severely restrictive. *In the Matter of Site Specific Exception to Effluent Standards for the Greater Peoria Sanitary District and Sewage Disposal District*, R87-21 (Oct. 6, 1988).

On the Permit condition requiring toxicity testing, Illinois EPA conceded that toxicity testing is unnecessary unless the ammonia limitation imposed by Illinois EPA is upheld and no

adjusted standard relief is granted. 1991 Tr. 132-33, 141-43. In addition, Noveon has already performed extensive investigation, and further testing is unwarranted and duplicative.

III. Noveon's Permit Should Not Separate Wastestreams into Different Outfalls

Illinois EPA has also not shown that separation of Noveon's wastestream is authorized by Board regulations, and the Opinion in this regard is contrary to the manifest weight of the evidence. Noveon submitted unrefuted evidence that, for those wastewaters in the stormwater retention pond that are not discharged to the PVC tank for operational purposes, the wastewaters receive treatment by sedimentation and sand filtration before being discharged. This constitutes Best Management Practices (BMPs) and therefore is the best degree of treatment (BDT). 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. Though the Opinion does not explicitly recognize it, these BMPs constitute BDT under the objective regulatory guidance for stormwater discharges.

Dilution is not being used as a treatment method in this case, because all waste streams are being treated to BDT. The Opinion states that the Board regulation governing dilution gives Illinois EPA discretion to determine whether separation of waste streams is appropriate and whether BDT is being met. Opinion at 16. It is the obligation of any person discharging to waters of the state to treat to BDT, and if the party is doing so, any dilution occurring is not improper. The regulation does not provide discretion to Illinois EPA to make a determination on BDT contrary to the law and the evidence. Illinois EPA cannot point to any numerical limitation for which dilution may provide artificially low test results, and the Agency has conceded that all water quality standards are being met.

Noveon made its case, and Illinois EPA did not disprove it. In fact, Illinois EPA originally argued that dilution of the *process* water is taking place, but during the pendency of this case, Illinois EPA changed its theory to claim that improper dilution of the stormwater occurs. *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?"). The Opinion states that Noveon has not demonstrated that all of Noveon's wastestreams receive BDT and therefore any dilution occurring is incidental. Noveon has made this demonstration, and it is unrefuted in the record. Further, Illinois EPA never made a determination that improper dilution of the *stormwater* waste stream is occurring in the first place, because Illinois EPA has always been focused on the dilution of the process wastestream up until briefing in this matter.

The Board should reconsider its decision and make its finding according to the facts in the record and the law. And the remedy for the Board's ultimate decision, that the Illinois EPA did not have sufficient information to determine BDT for the stormwater wastestream, is to remand that question to the Illinois EPA for reconsideration in light of the BMPs in place, and not to affirm the drastic remedy to separate the wastestreams as a condition of the NPDES permit.

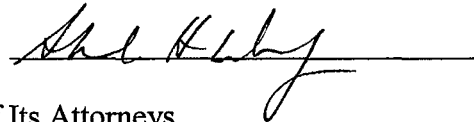
Conclusion

Noveon respectfully requests the Board to reconsider its decisions in the Opinion and Order. The Illinois EPA's reading of Sections 304.122(a) and (b), affirmed by the Board, are contrary to the plain meaning of those provisions and cannot withstand scrutiny. No ammonia effluent limitation is necessary, and there is no dispute that the Illinois River is meeting all water quality standards for ammonia and dissolved oxygen and indeed its quality has improved

throughout the period of Noveon's operation since the 1970s. There is no dispute that in the absence of an ammonia effluent limitation, further costly toxicity testing will also not yield any useful information and should not be required. Finally, although all the facts are before Illinois EPA to allow it to determine BDT on all wastestreams, Noveon is willing to provide any information requested by Illinois EPA with respect to the stormwater wastestream, and separation of the outfalls is not the proper remedy.

Respectfully submitted,
NOVEON, INC.

By:



One of Its Attorneys

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

CH02/ 22344842.1

CERTIFICATE OF SERVICE

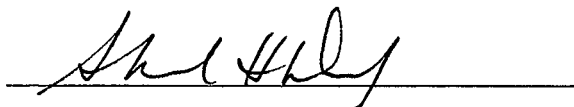
The undersigned certifies that a copy of the foregoing **Notice of Filing and Motion for Reconsideration and Oral Argument** was filed by hand delivery with the Clerk of the Illinois Pollution Control Board and served upon the parties to whom said Notice is directed by

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601
(personal delivery)

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

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

on **Wednesday, October 20, 2004.**



A handwritten signature in cursive script, appearing to read 'Bradley P. Halloran', is written above a horizontal line.