ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	**Docket No. CAA 03-2004-0286**
	)	
NOVA Chemicals Corporation d/b/a	)	
NOVA Chemicals Beaver Valley Plant,	)	
Respondent	)	
	)	

INITIAL DECISION

In this proceeding under the Clean Air Act, 42 U.S.C. § 7413, the United States Environmental Protection Agency alleges that Nova Chemicals Corporation failed to obtain a written plan approval permit from the Pennsylvania Department of Environmental Protection before commencing construction of a stationary air contamination source, as required pursuant to Pennsylvania's state implementation plan under 35 PA. STAT. ANN. § 4006.1 and 25 PA. CODE § 127.11.

Nova Chemicals Corporation ("NOVA") contends that it received *verbal* approval from the Pennsylvania Department of Environmental Protection ("DEP") to perform certain, limited, construction activities before the plan approval permit was issued. It also contends that in any event the whole project was exempt from an obligation to file a plan approval because of the operational flexibility provisions of its operating permit. NOVA maintains that those provisions exempt one from seeking a revised plan approval permit where only *de minimis* emission increases will result from the change and also because the emissions trading and exemptions provisions under operational flexibility allow the changes it made, without any permit revisions.

For the reasons that follow, the Court finds that NOVA did violate the cited provision of the Pennsylvania implementation of the Clean Air Act ("CAA") and that, procedurally, it was not eligible for the application of any operational flexibility provisions but that, under the totality of the circumstances, only a minimal penalty is warranted.

I. Findings of Fact

Respondent NOVA operates its Beaver Valley polystyrene polymer plant in Monaca, Pennsylvania. One of its products, a packaging plastic, is sold under the trademark name

"ARCEL®." Tr. 338-343. Regarding emissions, NOVA had an existing Title V permit.[1] In order to meet market demand for the product, NOVA planned its ARCEL® Phase 2 expansion project in the D2 area of its facility. To that end, in May of 2003, NOVA initiated contact with DEP regarding the ARCEL® expansion. Although NOVA discussed potential compliance options regarding its expansion project with DEP, including whether the project would qualify under its existing permit's operational flexibility provisions, such as emissions trading and *de minimis* emission increases, DEP felt more comfortable with, and expressed a preference for, NOVA to proceed under the "plan approval" route for its project and NOVA agreed to this approach for approval of its project. It was NOVA's understanding, however, that approval of its expansion, under plan approval route, would be processed in a timely manner, so that the planned increase in its ARCEL® production capacity would not miss the expected demand for the product. Operating under this expectation, NOVA filed its plan approval on August 29, 2003 and submitted a revision to that plan on October 27, 2003, with the belief that the plan approval would be issued in early November 2003.

When delays in the expected time for the processing of the plan approval developed, NOVA was able to arrange a meeting with DEP in the hope of accelerating the time for approval of its plan. That meeting, which occurred on October 23, 2003, was significant in that NOVA did not meet merely with regional DEP officials. Rather, the Secretary for the Pennsylvania DEP, Kathleen McGinty, met with NOVA officials to discuss the matter. Mr. Ronald Schwartz, who at that time was the DEP Program Manager of the Air Quality Program in the Pittsburgh Regional Office, also attended the October 23rd meeting, as did other DEP personnel.

Thereafter, on January 27, 2004, the United States Environmental Protection Agency ("EPA" or Complainant), acting on a tip that NOVA was performing construction activities without a permit, conducted an unannounced inspection of NOVA's facility. EPA's Jerome Curtin, an environmental engineer and James Hagedorn, an environmental scientist, were the inspectors. NOVA's Andrea Davison, their senior environmental air speciality engineer, accompanied the EPA officials during their inspection.[2] No DEP representative was present for this inspection.[3] When the inspectors viewed the D2 area they observed construction activities

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[1]A "Title V permit" is an operating permit. Such a permit brings together all the state and federal air quality requirements into one document. Tr. 315-316. It is distinguished from a "plan approval permit" in that the plan approval authorizes new construction or modifications to an existing facility. Tr. 316.

[2]Ms. Jane Kelley, NOVA's environmental team leader for the ARCEL® project at its Beaver Valley facility, was not present during the inspection as she was recuperating from surgery. However, she did participate via telephone.

[3]Although this will be discussed in more detail later, this in itself is unusual and inferentially instructive about what transpired here. Hagedorn stated that EPA *always* tells the state people that they will be conducting an inspection. Yet, no DEP representative showed up on the date of the unannounced inspection. It can be inferred that with DEP very much aware of

taking place. The activities in that area included two large excavations, a newly poured concrete pad and its associated wooden framing, earth-moving equipment, and workers operating jackhammers and others performing construction tasks in an open pit. Upon viewing this, Hagedorn expressed his concern over construction activities being performed prior to the permit approval. Curtin's view was more succinct; in his view, no construction can take place prior to the issuance of the plan approval and it was his view that "construction" begins "when shovel hits dirt." Tr. 52.

It is noteworthy that, by EPA's own admission, when the construction activity concern was first raised by EPA during its inspection, Davison immediately advised that NOVA had oral agreements with DEP regarding the activity viewed by the inspectors. At that time Davison also specifically invoked the name of Secretary McGinty and DEP's Schwartz, in connection with the claimed oral agreements. Tr. 50, 66, 68. Thus, the assertion of an oral agreement with DEP was immediately made by NOVA. While more will be said about this later, the significance of the immediacy of the assertion is that it shows that the assertion of an oral agreement was not a concoction invented some time after the inspection had occurred.[4] It points to, at least on NOVA's part, a good faith belief that the activities in question were being performed with DEP's blessing.[5] Tr. 124.

Despite the importance placed by the parties on the activity observed, as opposed to the parties' views of the legal significance of that activity undertaken, there is no genuine controversy about *what* had been done at the site at the time of the inspection. Thus, the photographic evidence reflects what both parties ultimately acknowledged: at the time of the inspection NOVA in fact had made some excavations in the D2 area, created two pits, laid some rebar, poured a concrete pad and footers and was breaking up some old concrete with jackhammers. Curtin acknowledged that no equipment related to the source itself for the

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the issues, both from its earlier meeting with NOVA and because of its awareness that a DEP employee had called EPA to complain about NOVA's activity, it determined that it was best to lay low and not attend the EPA inspection.

[4]EPA tried to prove that NOVA knew its construction activities were forbidden by DEP through the notes taken by EPA inspector Curtin during the meeting between NOVA and EPA, which occurred subsequent to the inspection. Those notes purport to reflect that NOVA's Kelley stated that it could "remove [the] old [but] not put in [the] new" and that Kelley when shown photograph 8, called that "new stuff." Tr. 265-267. The Court places little stock in this, given the live testimony of Kelley and the inherent vagueness of the phrases themselves.

[5]This finding is not disturbed by the assertion of EPA's Curtin that Davison had told him in the conference preceding the inspection that no ground breaking had occurred. Davison did not testify and it may be that she was alluding to NOVA's belief that the activity it had performed was considered to be allowable preconstruction activity. In any event, it was Curtin himself who admitted that Davison raised the claim that DEP had given oral approval to the activity observed *immediately* upon EPA's expression of concern during the inspection.

expansion project had been delivered at the time of the January 2004 inspection. Thus, no cooling tower nor reactor or oxidizer had been installed and, as far as the record is concerned, those objects were not even at the site at the time of the inspection. Tr. 91-92. NOVA received its plan approval approximately one week after the January 27, 2004 inspection. Subsequently, the ARCEL® reactor was in fact located in the structure where the concrete pad had been laid.

EPA witness Dave Campbell, the Chief for the air protection division's permits branch for the Philadelphia Region, stated that a plan approval is required prior to starting construction and that later the approval is converted into an operating permit. Tr. 290. Campbell stated that the model permit application has no provision allowing for an oral approval of a permit application. Tr. 291. EPA Ex. 10.[6] When asked about the rationale for the inclusion of building supports, foundations, and other support functions within definition of "construction," as set forth in 25 PA. CODE § 121.1[7], Campbell expressed that those items are an integral part of the air contamination source as the source could not function without them and because they are permanent in nature. Tr. 322-324. Unlike EPA's Curtin, Campbell asserted that not all activity before issuance of a plan approval is prohibited. Instead, he expressed that all non-permanent activity, such as tree cutting, or limited grading, is allowed as those actions are limited and do not reflect significant expenditures. In contrast, relatively permanent actions, such as laying a foundation, represent significant costs. If such actions were allowed prior to a plan approval, a company then could point to those expenditures in an attempt to dissuade regulators who want to undo such permanent actions. In short, EPA does not want to have itself, or states implementing the CAA, to be in the posture of dealing with a company asserting that because a foundation or building has already been installed, the regulating authority's request for an additional or different air pollution control device would no longer be feasible.[8] Tr. 324-327.

NOVA witness David Ocamb, its styrenics team leader, attended the October 23, 2003 meeting with DEP. Ocamb testified that the purpose of the meeting was to accelerate issuance of the plan approval, and that it was prompted by DEP's failure to meet their earlier

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[6]Court refers to those exhibits as "EPA Ex.," followed by the same exhibit number used by EP EPA marked their exhibits with the prefix "CX" followed by the exhibit number. For clarity, the A.

[7] Construction is defined there as: "[t]o physically initiate assemblage, installation, erection or fabrication of an air contamination source or an air pollution control device, including building supports and foundations and other support functions."

[8]Although EPA also tried to augment its contention regarding construction activity by pointing to the after-the-fact memo, dated March 26, 2004, EPA Ex. 8, from DEP Secretary McGinty setting forth that state's policy regarding construction activity vis-a-vis plan approvals, the Court regards this document for what it is – an attempt to atone for the state's tacit approval of NOVA's pre-plan approval construction activities. The memo and the memorandum it cites, which was issued on February 24, 2004, only serve to set the course for *future* issues concerning construction, but it is of no value in the resolution of this matter.

commitment for a timely issuance of that approval. Tr. 346-348. The prompt approval had been agreed to by DEP in meetings with NOVA in June and July of 2003. It was at those meetings that NOVA raised other routes that it believed would allow it to go forward with its expansion project without needing a plan approval, routes that included emission trading and operational flexibility, although ultimately NOVA acceded to DEP's preference that it obtain a plan approval. Tr. 374-375. According to Ocamb, DEP had promised that the plan approval would be completed in early November.[9] Tr. 351.

Regarding the October 23rd meeting, Ocamb related that NOVA started with a presentation about its project but that, about half-way through it, Secretary McGinty stopped it and informed NOVA that she could help them. Tr. 354. Ocamb added that the Secretary informed that it was within her authority to allow some preparatory activities that were not directly related to the air contaminant source. The Secretary's approval included the footer or pad and demolition work.[10] Ocamb did concede that the Secretary would likely not understand all the details of permitting and that is a reason why staffers, such as Mr. Schwartz, would accompany her to the meeting. Tr. 366. However, Ocamb stood by his statement that the Secretary gave approval for the limited activities that were identified at the meeting, telling the NOVA people "that's set" but that they would need to work with Schwartz to figure out the details. Tr. 367. Thus he characterized Schwartz's role as fine tuning. Tr. 368. On cross-examination by EPA, Ocamb denied that the DEP Secretary gave permission to proceed but with a warning that it could not control what EPA or a third party might do about such construction activity. Tr. 366.

NOVA's Jane Kelley, who at the time of the inspection was the environmental superintendent at the Beaver Valley site, and now is the "responsible care leader" at that location, testified that she was the lead environmental person for the ARCEL® expansion project. She noted that while the project would increase production of the ARCEL® by seven-fold, volatile organic chemicals ("VOCs") would drop by nearly 70%. Regarding the ARCEL® reactor, Kelley made the point that the reactor does not actually sit on the foundation pad that was observed during the EPA inspection. Rather, it is suspended from the second floor within the building that houses it. Tr. 415- 418. In making that point, Kelley was attempting to distinguish the building and the concrete pad in it from the ARCEL® reactor which was eventually housed, albeit suspended, within it. Tr. 418. As part of its effort to show that NOVA was attempting to act aboveboard, Kelley noted that it hired David Pezze, a former DEP employee, to make sure that it complied with the plan approval process. Kelley also stated that NOVA was of the view that, except for a minor modification regarding the oxidizer, the ARCEL® expansion project could

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[9]This was based on reports from NOVA's Jane Kelley to Mr. Ocamb. As the overseer of the project, Kelley reported to Ocamb. Tr. 350.

[10]Although Ocamb had no specific recollection of DEP approval of excavation work, this does not undercut his testimony, as these would be lesser included activities in connection with the approval to proceed with the footers and pad, excavation being a necessary part of such actions.

have proceeded under the operational flexibility provisions, but that it agreed to take the plan approval route per DEP's preference. Tr. 424-426. As with witness Ocamb, Kelley stated that under the arrangement, in return for NOVA's agreeing to use the plan approval process, instead of insisting on using the operational flexibility option, DEP would proceed promptly with the approval of the project. In fact, Kelley stated that the application specifically requested an "expedited review." Tr. 428- 430, and EPA Ex. 11, August 29, 2003 letter from NOVA, requesting expedited review.

As NOVA expected that, under this arrangement, the plan approval would be issued by the end of November, it became "extremely concerned" upon subsequently learning from DEP that the approval would not come until late December, at the earliest. Given that NOVA had been working with DEP for six months on the matter, it was, to say the least, perplexed that DEP was not holding up its end of the understanding. There is no question that NOVA was intent upon getting the project up and running by its target date so that it would not lose the anticipated market for its product. That keen interest, coupled with DEP's delay in processing its plan approval, led to the October 23, 2003 meeting with Secretary McGinty. Kelley stated that the purpose of the meeting was to obtain DEP's approval of some preconstruction activities. She noted, without contradiction, that other DEP officials were present for the meeting in addition to the Secretary and Schwartz. Tr. 433 - 434. Kelley testified that NOVA identified that some excavation and pouring of concrete needed to be done in order to meet its production schedule.[11]

Although Kelley had a different recollection from that of Ocamb about the point in time when the Secretary expressed that there was no need for the presentation to continue, they agreed that the Secretary told NOVA that it could proceed with the construction work it identified. Kelley stated that the Secretary stated that she was there to help NOVA. Tr. 490. The Secretary then instructed Schwartz to discuss the details with NOVA for getting those activities done, instructions which included reviewing "the requirements and [contacting NOVA] with any limitations or boundaries around the scope of work that [it] could conduct. Tr. 439. In fact, Kelley asserted that such a conversation with Schwartz did ensue, by telephone, and that he reiterated to her at that time that NOVA could do the excavation, foundation and preconstruction work that had been identified at the meeting but that, under no circumstances could NOVA do any installation work related to the source itself.[12] Tr. 440- 441. Kelley testified that no work

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[11]Later in her testimony Kelley reiterated that NOVA specifically mentioned excavating and pouring concrete to the Secretary. Tr. 464-465.

[12]Although viewed skeptically by EPA, Kelley supported her testimony with a "sticky note" upon which she had scribbled Schwartz admonition that NOVA could not install the oxidizer or the source itself until after the plan approval was issued. The Court had no reason to conclude that this was a fabrication. Had Kelley wanted to invent such a note, a memorandum for the file would have been more likely, and a more persuasive route for one to take. In any event, the Court relied upon her testimony and her demeanor while delivering it and determined that she was truthful.

was done until after Schwartz's call and that it took some time after that call for NOVA to figure out how it would proceed. Tr. 443. Significantly, Kelley stated that she asked Schwartz to put in writing the activities which were acceptable for NOVA to perform but that he would not do that, expressing to her that he "was not comfortable doing that." Tr. 446 -447. Thus, Kelley was left to interpret Schwartz's December 8, 2003 letter to NOVA, with its reference to progress reports on the phase 2 installation as signaling DEP's approval of the actions it planned to undertake prior to the plan approval's issuance. Tr. 446. R. Ex. 5.

NOVA also called Joseph Pezze, an environmental consultant, who described himself as an "environmental professional." Before entering the private sphere, he was employed by DEP as their regional air quality manager in that state's southwest region. He was hired by NOVA to help them with the operational flexibility provisions, as well as with the preparation of its plan approval application. Tr. 545-546. Pezze stated that he was familiar with the plan approval process from his experience at DEP and that he was also familiar with exemptions from that process. Drawing upon his time at DEP, he related that when a facility would telephone for advice as to whether a plan approval was needed, and it was clear to DEP that no plan was necessary, it would so advise the caller orally. However, if the answer was not clear, DEP would advise the facility to submit a Request for Determination ("RFD").

Pezze concluded that NOVA could use the operational flexibility provisions of its Title V permit and stated that these options were discussed during a May 9, 2003 meeting between DEP and NOVA. Tr. 548. He stated that NOVA considered both emissions trading and the *de minimis* provision as within the operational flexibility provisions of its Title V permit. However, he was also aware that DEP was divided over whether NOVA could utilize operational flexibility for its project and that it preferred the plan approval approach. Tr. 548-550. Referring to 25 PA. CODE § 127.14, which lists exemptions for which no plan approval is needed, he noted that where there is uncertainty on the issue, one seeks a RFD. For the emissions trading provision of its Title V permit, Pezze stated that Section 127.448 allows such trading if there is an enforceable emissions cap for the facility.[13] Pezze identified the Reasonably Available Control Technology ("RACT") cap for NOVA's D2 process, adding that there are RACT caps for other sources at NOVA's facility as well as a plant-wide applicability. Under its permit VOCs may not exceed 186 tons in any 12 month period. In practice, however, NOVA's Phase 2 VOCs were 110 to 120 tons per year, amounts which would decrease to about 55 tons per year after phase 2 was completed. Tr. 558-559. As with other NOVA witnesses, Pezze expressed that the operational flexibility *de minimis* provision allows *additional*, but *de minimis*, increases in emissions. Obviously a reduction in emissions, as in the case of NOVA's VOC emissions, satisfies that requirement. For nitrous oxide, ("NOx"), and carbon monoxide ("CO"), he expressed that those increases, one ton for NOx and 0.84 of a ton, for CO, would qualify as *de minimis* increases, according to 25 PA. CODE § 127.449 and NOVA's Title V permit. Tr. 563-565. While he acknowledged that DEP has had internal conflict over the correct interpretation of the *de minimis*

[13]Pezze also stated that the cap could be based on a Reasonably Available Control Technology ("RACT") permit or on a Title V permit and that a company could seek a plant-wide applicability limit. Tr. 557.

provision, he asserted that DEP verbally told him that the limitations refer to tons per year. Thus he viewed the 1 ton / 5 ton limitation for NOx as an increase of up to 1 ton per year and 5 tons during the term of the permit, and does not mean that the limit for any year is 2/10ths of a ton. Tr. 567-568. Pezze also asserted that the provision does *not* state that such exemptions from the plan approval must be in writing. Tr. 569.

DEP's Ronald Schwartz was also called by the Respondent. Schwartz stated that at the time of the October 23, 2003 meeting between NOVA and DEP, he was the program manager of the air quality program in the Pittsburgh Regional Office. Tr. 599. Schwartz agreed that the purpose of that meeting was to discuss NOVA's Beaver Valley ARCEL® project. Tr. 602. Further, he agreed that NOVA brought up at that meeting its desire to perform certain work activities prior to issuance of the written plan approval. Tr. 602. However, Schwartz's recollection of the meeting differed from that of NOVA's Kelley and Ocamb in some critical aspects. He maintained that there "wasn't a lot of detailed discussion . . . about the specific construction activities" and believed it was left that "we could discuss those details after the meeting to determine what could or could not be constructed prior to receipt of the permit." Tr. 603 He also had a different recollection as to the Secretary's expression of expansion activities that NOVA could pursue in advance of the permit's issuance. While he admitted that there was some discussion of the topic, he asserted that they informed NOVA that, by proceeding, they would be doing so at their own risk. Schwartz expanded on that, pointing out that while DEP can oftentimes use enforcement discretion, there were other parties that may not exercise the same discretion, such as EPA or third parties. Tr. 604-605. Emphasizing this, Schwartz stated that he recalled using the term "enforcement discretion, and he maintained that the Secretary stated that by proceeding before receipt of the plan approval, NOVA would be doing so at its own risk." Tr. 605, 608-609. He also asserted that the Secretary advised NOVA to follow up with him, particularly, to find out what could or could not be built or constructed without plan approval, adding that if it was unrelated to the air contamination source, obviously, construction could proceed with those actions. Tr. 605 - 606. Regarding the alleged follow-up telephone call that he had during November 2003 with NOVA's Kelley, while he admitted that there was a subsequent call about the project, he could not "remember the details of that phone conversation, although he added that his "task was to try to work with NOVA to identify line items in the contract that did not require a plan approval to proceed." Tr. 607.

It is interesting to note that when asked by EPA counsel if NOVA had informed him that it was "going to build a building that is going to contain our air contamination source, would you have said: Okay. Go ahead and do that pending plan approval?" Schwartz was equivocal, stating: "I would want to know more about the building structure. The regulations talk about the air contamination source footers and foundations. I would want to know if that was part of the building or not." Tr. 612. The Court also finds it noteworthy that when it asked Schwartz if he recalled Secretary McGinty effectively stating that she had heard enough and that what NOVA wanted to do was not a problem for DEP, Schwartz's memory was hazy as to the details of that significant part of the meeting. Tr. 613 - 614.

NOVA's last witness, Chester Kos, is a professional engineer and a NOVA employee.

He was the ARCEL® project's engineer and he also attended the October 23, 2003 meeting. Tr. 615 - 618. As with the others, he confirmed that there was discussion during the meeting about work activities that NOVA wanted to start prior to receipt of the plan approval. In fact, it was he who described at the meeting the specific work activities that NOVA wanted to perform so that it could meet its goal. Tr. 619. He expressed that because of its timing late in the year, with the beginning of winter, NOVA needed to start construction. The identified areas of work were those involving early construction engineering, for which it already had other documents allowing it to proceed with that work. Primarily these involved the cooling tower and the required excavation and foundations. Tr. 620**.** Kos affirmed that the Secretary said that NOVA could proceed with the work that was described at the meeting, which NOVA considered to be the "site preparation work." Tr. 634 -635. Kos added that the Secretary also viewed the work NOVA wanted to do as site preparation work. Tr. 623. Further, Kos asserted that the "risk" referred to by Schwartz was a "design risk." More specifically, he defined it as the risk that public comments could prompt DEP to require some changes, such as adding a different piece of equipment. Tr. 623-624. Following the meeting with DEP, Kos conferred with other NOVA employees to see if they had the same interpretation of DEP's position. Kos expressed that NOVA employees Bringle and Kelley confirmed to him that it did mean that NOVA could proceed with the construction regarding the building extension and its concrete pad at its base. Tr. 625-626.

II. The Parties Contentions Regarding the Construction Events

A. EPA's Perspective

EPA asserts that the activity it observed during the January 27, 2004 inspection was construction activity which required a construction permit. It notes that under 25 PA. CODE § 121.1, "construction" means "to physically initiate assemblage, installation, erection or fabrication of an air contamination source or an air pollution control device, including building supports and foundations and other support facilities." EPA's Post-Hearing Brief ("EPA Br.") at 14. It also observes that under Section 110 of the CAA, 42 U.S.C. § 7410, "no major emitting facility may be constructed without being subject to the preconstruction permit requirements" and that the phrase "begin actual construction" is defined to mean "[i]n general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change." *Id.* (citing 40 C.F.R. §§ 51.165(a)(1)(xv), 51.166(b)(11), and 52.21(b)(11)). EPA contends that a "bright line" test has been established for construction requirements, as it has "interpreted 'physical on-site construction' to refer to placement, assembly, or installation of materials, equipment, or facilities that will make up part of the ultimate structure of the source." *Id*. EPA Ex. 8.

To put it plainly, EPA asserts that it, and DEP, have always interpreted these provisions as barring the initiation of "any type of construction related to an air contamination source or air pollution device, including the laying of a foundation or building supports until a plan approval

has been issued."[14] EPA Br. at 15. Referring to the contention that DEP had given the go-ahead to the Respondent's activity, EPA suggests that such approval was unlikely to have been made as DEP "could not allow a major source, like Respondent, . . . to build supports and foundations and other support functions without a plan approval from the Department without risking federal oversight and sanctions." *Id*. at 17.

Accordingly, EPA contends that as the Respondent's ARCEL® reactor is an "emissions unit" and consequently an air contamination source, and as the activity observed was more than nonspecific site preparation work, engineering or maintenance work, but instead was the completion of the concrete pad for the reactor, liability has been established. *Id*. at 19-20.

Not only did the inspectors, having viewed the concrete pad, believe that it was construction activity, but EPA also asserts that during the subsequent conference to discuss the alleged violations the Respondent made statements which conceded the nature of that activity. EPA points to photographs taken by Inspector Curtin, and accompanying notes made by Inspector Hagedorn, which purport to reflect the comments made by Respondent's Jane Kelley to those photos. It is asserted that those notes record that Kelley agreed that the foundation was for the new reactor and that Kelley expressed her understanding that it could "remove the old [but] not put in [the] new." *Id*. at 20-21. Supporting this construction, EPA notes that Respondent's employee, David Ocamb, conceded that the concrete pad depicted in EPA Ex. 5, photo 8, is a foundation and that Ms. Kelley also admitted this.[15] *Id*. at 21. EPA Ex. 33 at 15.

With the activity involved requiring that there be plan approval, EPA notes that the applicable Pennsylvania regulation requires that one must receive written plan approval before commencing such activity and that the term "plan approval" is defined to mean written approval by the Department of Environmental Resources.[16] *Id*. at 23 (citing 35 PA. STAT. ANN. §§

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[14]EPA also draws an analogy to its guidance for issuance of Prevention of Significant Deterioration, or "PSD," Permits. It points to a December 1978 Memorandum that prohibited all "on-site activities of a permanent nature aimed at completing a PSD source (including but not limited to, installation of building supports and foundations, paving, laying of underground pipe work, construction of permanent storage structures, and activities similar in nature) . . . ." In this regard, it contends that the Respondent's construction activity, observed during the inspection, "was for a foundation for a support structure . . . [for Respondent's ARCEL® reactor]." EPA Br. at 15-16.

[15]In addition, EPA observes that Ms. Kelley's power point presentation reflects that the foundation work for the new reactor began on December 3, 2003, which was well before the January 27, 2004 inspection.

[16]While EPA also cites to 25 PA. CODE § 127.11, which prohibits the construction or modification of an air contamination source "unless the construction, modification, reactivation or installation has been approved by the Department," it is noted that this provision does not express that such approval must be in writing. EPA Br. at 23.

4006.1(a) and 4003). Nor, EPA contends, is there any language suggesting that there can be oral approvals of parts of a construction project after a plan approval application has been submitted. *Id*. at 24. Thus, EPA asserts that the plan approval is really a construction permit, and as such it is distinct from the operating permit.[17]

EPA rejects Respondent's contentions that a written plan approval permit was not required for the construction activity which took place as well as the assertion that verbal approval had been made by DEP. Regarding the claimed verbal approval from Pennsylvania Secretary McGinty to commence the construction activity, EPA accepts that Respondent's Ms. Davison told the inspectors at the time of the inspection that DEP had given verbal approval for that activity, and that she specifically mentioned Secretary McGinty as the source of that approval. EPA also concedes that in fact Secretary McGinty did meet with the Respondent, and notes that Respondent's Mr. Ocamb, Mr. Kos, and Ms. Kelley attended that meeting along with DEP's
Mr. Schwartz. EPA Br. at 28. From EPA's perspective, the purpose of the meeting was to "address Respondent's concerns regarding []DEP's inability to issue the plan approval permit in accordance with Respondent's aggressive construction schedule." *Id.* EPA asserts that the outcome of the meeting was "that employees for Respondent were directed to work with Ronald Schwartz to specifically delineate what could and could not be done prior to plan approval issuance." *Id.* However, EPA agrees that the record is unclear as to "the exact scope of what Secretary McGinty said regarding commencement of work prior to []DEP's issuance of the plan approval permit." *Id*. at 29.

Referring to Ocamb's testimony, while EPA accepts his statement that Secretary McGinty stated at that meeting that it was within her authority "to allow some preparatory activities not related directly to the air contamination source," it contends that Ocamb agreed that the Secretary did not "specifically enumerate what she meant by limited activity." *Id.* EPA also notes that Ocamb's testimony does not claim that the Secretary specifically gave approval to the construction of footers or the foundation. While EPA accepts that Respondent's witness Kelley testified that the Secretary stopped NOVA's presentation before her, it describes her testimony as "murky" as to who actually uttered the words regarding excavation and concrete pouring and it contends that it is not clear that the Secretary or Schwartz knew the activities were part of the construction of the air contamination source. *Id.* at 31. EPA refers to Kelley's testimony to support its contention that the Secretary was leaving the details of the permissible activity up to Schwartz, as Kelley related that the Secretary advised Schwartz "to review the requirements and to contact [NOVA] with any limitations or boundaries around the scope of work that we could conduct." *Id.* (citing Tr. at 439). Although EPA concedes that Schwartz subsequently called Kelley, and according to NOVA, advised that it could do the preconstruction work but could not

[17]EPA acknowledges that six reactor vessels, five tanks, and a catalytic oxidizer, all of which were part of its ARCEL® expansion project, had not been installed at the time of the inspection. Thus, this case essentially involves the compliance implications created by the installation of the concrete foundation pad. EPA considers that pad to be an integral part of the yet to be installed reactor. EPA Br. at 25-26.

install the reactor or oxidizer, it discounts this account because only a "sticky note" supports her claim and even that note lacks the detail asserted in her testimony at the hearing.

EPA dismisses Kelley's claim that Schwartz was reluctant to put his oral assurances in writing and that instead Schwartz sent a "signal" in his December 8, 2003 letter that NOVA could proceed with the identified construction. R. Ex. 5. In this regard EPA notes that Schwartz's letter makes no mention of permission for NOVA to excavate or to pour foundations. EPA Br. at 31-32. Rather, EPA declares that the primary purpose of Schwartz's letter was to confirm that Respondent's Phase I modifications were exempt from plan approval or permit requirements. *Id*. at 32. With respect to witness Chester Kos, the individual who made the presentation before the Secretary, EPA also contends that this witness could not speak with definiteness about Secretary McGinty's statements, stating only that he assumed that they could proceed. In support of this view, EPA notes that Kos asked other NOVA employees if McGinty had in fact okayed the work.

Examining the Complainant's witness' perspective of that meeting, EPA admits that Schwartz's testimony reflects that he recalled that NOVA did "begin to make a presentation to Secretary McGinty regarding the D2 area expansion project." *Id*. at 34. EPA further agrees that Schwartz admitted that there was some discussion "about Respondent proceeding with the expansion work . . . [but it adds that NOVA] would be doing so at their own risk." *Id.* Also, EPA states that Schwartz "requested that Respondent follow up with him to determine what could or could not be constructed without plan approval." *Id.* at 35. Thus, EPA admits that some sort of approval was given, as it states that the Secretary expected NOVA "to work with Mr. Schwartz to clearly delineate the parameters *on what could be done* prior to plan approval permit issuance." *Id*. at 35 (emphasis added).

Seemingly conceding further that the Secretary did give some sort of approval for some work to proceed, EPA alternatively argues that the statute and regulations don't permit oral plan approvals. It making that contention, EPA falls back on the well-established rule of law that erroneous advice from a government employee does not relieve one of liability. Thus, EPA contends that if the regulations are clear, reliance on erroneous advice will not trigger the defense of government estoppel.

B. NOVA's Perspective

NOVA notes that it met with DEP officials in May, June and again in July 2003 to discuss its ARCEL® phase 2 project. Although it believes the Phase 2 project was outside of any plan approval requirements, because it considered the activity to be within the operational flexibility provisions of its Title V permit, NOVA concedes that DEP was less certain that it was exempt and preferred for NOVA to take the safer route of submitting a plan approval.[18] Respondent's

[18]Respondent viewed it as significant that DEP, while preferring that NOVA seek a plan approval, never advised in writing that the operational flexibility provisions were inapplicable. R. Br. at 4.

Post-Hearing Brief ("R. Br.") at 4. NOVA agreed to take the plan approval route, filing its initial plan approval on August 29, 2003. At that time it advised DEP that, to meet expected demand for its product, it would need to begin construction by November 2003.[19] With that date in mind NOVA anticipated providing its "revised final application" in early October. NOVA contends that in not assigning the plan to a DEP engineer promptly, waiting until October 23, 2003 to make the assignment, DEP allowed the plan approval process to languish for six weeks. When the engineer assigned to the plan approval advised NOVA that no plan approval would be issued until December, at the earliest, the news caused consternation within NOVA, as the delay would threaten delay of the project's schedule. This development prompted the October 23, 2003 meeting between DEP and NOVA, at which a DEP Air Quality Program Manager, Ronald Schwartz, attended along with the Secretary for DEP, Kathleen McGinty.

By NOVA's recounting of that meeting, it explained to the DEP attendees the work NOVA needed to complete before winter, if it was to meet its construction schedule. NOVA identified the excavation and foundation work it needed to complete and, it contends, Secretary McGinty "stated that DEP authorized NOVA to proceed with certain preconstruction and site preparation activities even as NOVA's plan approval application pending." R. Br. at 6-7. NOVA concedes that the Secretary told Mr. Schwartz to "delineate specifically which activities NOVA could pursue prior to issuance of [the] written plan approval." From there, NOVA agrees that the parties have differing versions of the ensuing arrangement. While NOVA's Ms. Kelley stated that there was discussion that any work NOVA did before issuance of the plan approval would be at "NOVA's risk," according to her that risk referred to the risk of additional costs it would face if the plan approval ultimately required changes to construction work it had done in advance of the approval. In contrast, DEP's Schwartz stated that the "risk" involved potential "citizen's suits" or an enforcement action by EPA. *Id*. at 7.

According to NOVA, Schwartz made a subsequent call to Ms. Kelley on November 5, 2003, advising that it could perform "the excavation, foundation and preconstruction work . . . discussed during the October 23, 2003 meeting, but [no] work on the source or control equipment itself" or the ARCEL® reactor and the oxidizer until the written plan approval had been issued. *Id*. at 7 -8.

NOVA concedes that it did excavation work, site preparation activity, which included removal of idled equipment, and that it poured concrete footers and a slab for the building extension which would house the ARCEL® reactor. NOVA makes two points about this activity. First, there was nothing unique about its actions in that the footer and slab which were installed for a building extension could have served a number of other purposes. NOVA's point is that while it admits that the extension *was* built to house the reactor, the extension was *not* so specialized that it could be used *only* for the reactor. Second, NOVA makes the point that it never constructed any air contamination source, such as the reactor, nor any air pollution control device, such as the oxidizer, until *after* DEP issued its written plan approval.

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[19]NOVA asserts that when discussing the operational flexibility and plan approval approaches, DEP represented that the plan approval would be issued by November 2003. R. Br. at 5.

NOVA points out that when EPA inspectors Jerome Curtin and James Hagedorn conducted their inspection on January 27, 2004, the inspection was prompted by a call from DEP employee Brian Hammer, who alleged that NOVA was performing construction at its facility without a permit. It notes that while the EPA inspectors saw the excavation and concrete work, they did not note the presence of either the reactor or the oxidizer.[20] NOVA further notes that eight days after the inspection the plan approval was issued, approving the Phase 2 project, and it observes that EPA had no problems at all with the plan or project.

NOVA's contention that the work at issue did not constitute construction of an air contamination source.

NOVA contends that the Pennsylvania Air Pollution Control Act requires a plan approval for the construction of a stationary "air contamination source." Observing that this term is defined as "any place, facility or equipment, stationary or mobile, at from or by reason of which there is emitted into the outdoor atmosphere any air contaminant" and that "construction" refers to the physical assembly or erection *of an air contamination source or an air pollution control device*, it makes the obvious point that the construction in issue did not, literally, involve either of these. 35 PA. STAT. ANN. § 4006.1. NOVA then submits that "[i]f work is being performed on a structure that is *unrelated* to an air contamination source or air pollution control device, then, plan approval is not required prior to commencing construction." R. Br. at 10 (emphasis added). NOVA then makes a distinct point, asserting that excavation, and site preparation work such as pouring concrete footers and slabs, is "site preparation work" for which EPA has long admitted that the permit requirement does not apply. *Id.* However, NOVA's support for this contention falls short, as the EPA Memorandum it relies upon only allows "certain limited activities . . . such as planning ordering of equipment and material, site-clearing, grading and on-site storage of equipment and materials." R. Ex. 2. Accordingly, the memorandum does not allow for foundations or slabs to be constructed prior to a plan approval. NOVA's answer to this is the footers and slab were ordinary and "not peculiar to the ARCEL® reactor." R. Br. at 11. On that reasoning, it contends that unless such concrete work is uniquely suited for the air contamination source or device, it should be considered activity for which no pre-construction permit is needed. Absent such uniquely suited concrete work, NOVA submits that the regulations only apply when the construction work at issue involves the air contamination source itself. *Id*. Yet, NOVA then agrees that to make the determination between permissible and non-permissible activity, the work in question "must bear some nexus to the air contamination source or air pollution control device." To satisfy this "nexus," NOVA contends that "excavation and other construction-type work must be directly related to or specific to the 'air contamination source' or 'air pollution control device' . . . [for] a plan approval [requirement] prior to commencement of such

[20]While NOVA notes that EPA inspector Hagedorn's report refers to the activity he observed as a violation, paradoxically he stated that it is not his role to determine if such activity is a violation. Further, NOVA points out if the matter was obviously a violation, it is odd that the inspector did not inquire as to when these activities occurred. R. Br. at 9.

activities."[21] *Id*. at 12.

Beyond that claim, NOVA contends that, factually, Secretary McGinty and Mr. Schwartz allowed it to proceed with the project work as long as it did not deal "directly with the reactor or oxidizer." *Id*. NOVA believes if one pours a footer or a foundation, the plan approval requirement only becomes activated if those actions "directly support an air contamination source or control device." *Id*. at 11. The key word, for NOVA, is "directly." Under its view, a footer or foundation for a building "that is not specific to or directly related to the air contamination source or control device should not require prior plan approval." *Id*. at 13. In fact, NOVA asserts that DEP's Schwartz subscribes to this interpretation that such work requires the permit only if it relates to "footers and foundations for an air contamination source itself and not for a non-specific building." *Id.* at 13. NOVA thus contends that as long as the building for the footer and foundation could serve some other "general" purpose, as opposed to being suitable only for an air contamination source or control device, no permit should be required for that construction work. NOVA asserts that in this case, neither footer nor slab were designed to directly support the ARCEL® reactor and the building itself could serve as "general storage or other purposes." *Id*. Lastly, NOVA also looks to Mr. Schwartz's December 8, 2003 letter, requesting an update on the Phase 2 activities. Why, NOVA posits, would Mr. Schwartz be asking about progress when no permit had been issued, unless DEP had in fact authorized the work which is in dispute. R's Br. at 16 (citing R. Ex. 5, letter from Schwartz to NOVA). The Court agrees that it makes no sense for Schwartz to request a "progress report on Phase II installation" if DEP had advised NOVA that no construction work could be performed. *Id*.

NOVA's alternative contention that in any event it was denied fair notice of EPA's interpretation of "construction of an air contamination source."

NOVA asserts that it is obvious that as the regulating source, DEP, was itself uncertain whether operational flexibility applied to the project and subsequently had uncertainty as to the applicability of a plan approval for the work in issue. However, it then focuses on the plan

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[21]NOVA asserts that the nexus has never been clearly established by either DEP or EPA and that this uncertainty led it to seek guidance, and subsequently approval from DEP for the actions it undertook. R. Br. at 12. In fact, NOVA contends that DEP guidance already applies when "directly related to or specific to the air contamination source or pollution control device" nexus because DEP has distinguished nonspecific source activities from specific activities. *Id*. at 11. NOVA reads EPA Ex. 8, at page 36, as supporting its view because it refers to "nonspecific source activities like site preparation work and the construction of support facilities" as not needing DEP approval because they are "not designed and constructed to meet certain air quality performance levels, like emission limitations . . . ." However, the same document refers to "specific source activities like laying a foundation or building supports for the air contamination source or air pollution control device." Apparently, NOVA reads this as being limited to a foundation or building support which is *specifically, and only, built for* an air contamination source or pollution device, and not merely for a foundation or building extension which *could* be used for other purposes.

approval aspect, maintaining again that DEP approved the limited work and that the problems only developed when another DEP employee took the issue to EPA. It contends that this conflicting advice amounts to a failure to provide fair notice of NOVA's compliance obligations. Pointing to the Environmental Appeals Board's decision *In re Morton L. Friedman & Schmitt Constr. Co.*, CAA Appeal No. 02-07, Docket No. CAA 09-99-004, 2004 WL 418018 (EAB Feb. 18, 2004) ("*Friedman*"), NOVA argues that the factors identified in *Friedman* all support its contention that it did not receive fair notice. It maintains that the first of these factors, the plain language of the regulations, presents a "facially ambiguous" requirement because the "construction" relates to an "air contamination source or an air pollution control device" with the former defined as "any place, facility or equipment, stationary or mobile, at, from or by reason of which there is emitted into the outdoor atmosphere any air contaminant." R. Br. at 24 - 25 (citing 35 PA. STAT. ANN. § 4003). NOVA maintains that the regulations do not inform it as to what is encompassed by the words "construction of an air contamination source," at least when one is inquiring about construction other than construction of the source itself. *Id.* Thus, it argues that where one is dealing with ancillary construction, and not construction pertaining to the air contamination source itself, the regulations are totally unclear. *Id*. at 25-26.[22] It further contends that EPA's broader interpretation of the regulations produces "absurd results" because that view, "detaching the reference to supports and foundations from the term 'air contamination source,'" would mean that plan approvals would be required for *all* building projects. *Id*. at 26.

NOVA also presents an interpretation of the regulation defining "construction" which views the word "building" in the phrase "including *building* supports and foundations" as a verb. The effect of this interpretation would be to limit the scope of the regulation to building supports for the air contamination source itself, and thereby excluding construction of "non-source buildings." *Id*. at 26-27. Thus, NOVA urges that, given the variety of interpretations, the regulation is "facially ambiguous."[23] Its "fair notice" analysis continues that when one examines the factor "other public statements by the agency," the only such statements are those that DEP made to NOVA when it met with the DEP Secretary in October 2003 and Mr. Schwartz's confirmation of DEP's authorization after that meeting for construction work which did not directly involve the ARCEL® reactor. Thus, it contends that this analysis supports NOVA's lack of fair notice claim. NOVA also maintains that the factor concerning whether an agency has engaged in "pre-enforcement efforts to bring about compliance" works in its favor too, as not only did EPA and DEP give no advance notice that it could not proceed as planned but the latter

[22]NOVA believes that the testimony of Mr. Schwartz can be viewed as endorsing its position that construction is limited to supports for the air contamination source itself. R. Br. at 26.

[23]In this regard, NOVA asserts that both DEP and EPA have "struggled" with interpreting these regulations. It views the NOVA memorandum of March 26, 2004, EPA Ex. 8, issued after the EPA inspection as "too little, too late" and that EPA's issuances, (EPA Ex. 8 and R. Ex. 2), also demonstrate agency disagreement in interpreting these regulations. R. Br. at 27.

"actively encouraged or at least abetted NOVA's activities."[24] *Id*. at 28.

In examining the factor of "whether there is significant difference in opinion within the agency as to the proper interpretation of the regulation," NOVA asserts "[t]here is broad disagreement [between the agencies] as to what activities NOVA could perform without written plan approval." R. Br. at 30. Again, NOVA returns to its central contention that DEP approved the work in question to support this argument. It also points to the "internal DEP memorandum provid[ing] that a party may 'survey or clear the construction site, or . . . build structures, which support the operation of an air contamination source or air pollution control device without a written plan approval from [DEP]." *Id*. at 30 (citing EPA Ex. 8). NOVA also finds confusion between EPA inspector Curtin's understanding of "when shovel hits dirt" test to trigger the construction permit requirement, and EPA's own guidance permitting excavation and similar site preparation activities before one must obtain the pre-construction permit. *Id*. at 30 (citing R. Ex. 2). NOVA notes that even EPA's Notice of Violation refers to prohibiting "physical equipment installation . . . before the Company receives written approval," language it believes is consistent with the contention that the ban deals only with the installation of the air pollution equipment itself. *Id*. at 31 (citing EPA Ex. 6). Lastly, NOVA contends that the fair notice criterion concerning whether a regulated party inquired about the regulation's meaning also works in its favor, as it called for the DEP meeting and thereafter followed that agency's advice.

Respondent contends that EPA's fundamental argument, that NOVA's activity constituted the construction of an air contamination source, is flawed. It contends that while Inspectors Curtin and Hagedorn believed that the excavation work and concrete pad they observed at the facility required plan approval, they acknowledged they did not have the expertise to definitively reach that conclusion or whether it could be deemed exempt as "site preparation" activity. In support of its contention that the activity was the latter, NOVA refers to the testimony of its project engineer, Mr. Kos, who testified that the concrete pad was not a foundation for the ARCEL® reactor itself, but rather that it was for "the building extension, a non-specific structure with potential non-source uses."[25] Respondent's Post-Hearing Reply Brief ("R. Reply") at 2. Thus, NOVA, contending that its evidence shows that the ARCEL® reactor "was not supported directly by the pad and had no direct relationship to it," asserts that EPA, having failed to present credible evidence to rebut NOVA's testimony regarding the nature and purpose of the pad, failed in meeting its burden of proof on this issue. *Id*.

Apart from its argument that EPA failed to show the nature and purpose of the foundation pad, NOVA contends that, in any event, DEP gave oral approval for it to go ahead with the excavation and concrete work and that this approval constituted an exemption from the plan approval requirements. Examining the critical October 23, 2003 meeting with DEP, NOVA notes

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[24]This contention is another reference to NOVA's central factual contention that DEP authorized it to perform the work at issue.

[25]However, NOVA admits that in fact the ARCEL® reactor was later installed in the building extension.

that each of its witnesses, Ocamb, Kelley, and Kos, testified that Secretary McGinty gave the go ahead for NOVA's excavation and concrete work. R. Reply at 3. NOVA asserts that EPA could only produce Schwartz to counter this testimony and even at that Schwartz "did not actually deny that Secretary McGinty gave NOVA permission to proceed." *Id.* Noting that Schwartz agreed with Kelley that the Secretary directed Schwartz to meet with NOVA as to the details of the work to be done, NOVA observes that, had Secretary McGinty not approved NOVA's intended work, it would have been senseless for her to direct that Schwartz have a follow-up conversation with NOVA. *Id.*

Addressing NOVA's "Fair Notice" defense, EPA first looks to NOVA's reliance upon the EAB's decision in *Friedman*, EPA contends that none of the factors identified in that case apply here to support a fair notice defense. Speaking to each of the factors, EPA first asserts that the "plain language" of the regulation does not assist the Respondent because Pennsylvania's federally enforceable SIP plainly requires a written plan approval before one may construct or modify any stationary air contamination source or install any air pollution control equipment on such source. EPA's Post-Hearing Reply Brief ("EPA Reply") at 3 - 4. It notes that "construction" means "to physically initiate assemblage, installation, erection or fabrication of an air contamination source or an air pollution control device, including *building supports and foundations and other support functions.*" *Id.* at 4 (emphasis added). Thus it maintains that the clarity of this definition precludes a claim that the term "construction" is ambiguous. EPA contends that this memorandum distinguishes between "nonspecific source activities like site preparation work for nonspecific source activities as opposed to specific source activities, like those commenced by the Respondent, involving foundation and building supports for an air contamination source." *Id*. at 5 (citing EPA Ex. 8 at EPA 036). EPA also notes that courts will defer to an agency's interpretation of its own regulations, unless such interpretation is clearly wrong.

Further, EPA asserts that the public statements that it and DEP have made also support the conclusion that it has been made clear that one must have plan approval prior to starting construction of an air contamination source. While citing to a July 1, 1978 Memorandum[26] from the Director of the Division of Stationary Source Enforcement, EPA concedes that this is not part of the record. Inferentially, EPA seems to be asking that the court take official notice of this memorandum for the purpose of showing that the Respondent had notice of the agency's plan approval permit requirements. In contrast, EPA's March 28, 1986 memorandum from the Director, Stationary Source Compliance Division, is part of the record, and it too prohibits all

[26]EPA takes the same position with regard to a December 18, 1978 memorandum, another document, which was not entered as an exhibit but which, as a public document, supports its contention that the Respondent had notice of the Agency's interpretation. The memorandum like the July 1, 1978 statement, states that the installation of building supports and foundations and similar activities are prohibited until the permit for the PSD source has been issued. Reference to a March 18, 1989 statement, issued by Pennsylvania's Environmental Quality Board ("EQB"), was intended to clarify that construction of a new source still required a permit even if it was characterized as a relocation. EPA Reply at 8 - 9.

"on-site activities of a permanent nature aimed at completing a PSD source . . . including . . . building supports and foundations . . . ." *Id*. at 8. Examining the factor in *Friedman* for pre-enforcement efforts, EPA, contends that the Respondent also had notice through four meetings with DEP that it had to apply for and receive written plan approval before it began construction.

EPA also contends that the final two factors identified in *Friedman*, whether the agency was itself conflicted over the regulation's interpretation, and whether a regulated party, confused about the agency's interpretation, sought clarification as to the regulation's meaning, also support its position. Regarding the former factor, EPA distinguishes the circumstances in NOVA from those in *Rollins Envtl. Servs., Inc. v. EPA*, 937 F.2d 649 (D.C. Cir.1991) ("*Rollins*") because there were conflicting interpretations within the agency regarding the interpretation of the TSCA regulation at issue. In contrast, EPA contends that, as the regulation itself is clear and there was no conflict between EPA and DEP, and because there was no conflict within either agency, *Rollins* is inapplicable. *Id.* at 11. EPA also cites to *Sierra Pacific Power Company v. U.S.*, 647 F. 2d 60 (9th Cir. 1991) for the principle that violations of preconstruction permit requirements occurs when construction commences and that construction "includes foundations and other support functions for a facility's air contamination source." *Id*. at 12. As to the latter, and last, *Rollins* factor, EPA simply is at odds with NOVA's view of the facts. EPA contends that NOVA's meetings with PADEP were not to clear up confusion about the regulatory requirements but rather they were prompted by NOVA's "tight construction schedule."[27] *Id*. at 13.

In conclusion, while EPA concedes that the Respondent is correct that "the line delineating permissible excavation and construction-related work must bear some nexus to the air contamination source or the air pollution control device," it asserts that the nexus is clear. EPA Reply at 15. This is so, EPA maintains, because the foundation was for the new VOC source, the ARCEL® reactor, and because the law is clear that activity, such as building foundations and other supports, is within the scope of the construction of an air contamination source." Thus, EPA contends that although hypothetically the foundation could have been used for a non-air contamination purpose, it is the reality of the foundation's actual purpose which controls. *Id.* at 15-16.

There is no need for an extended discussion of *Friedman*. NOVA's contention that it lacked notice is unpersuasive, as the definition of "construction" clearly covers the activity in issue. In addition, the fact that NOVA sought a meeting with DEP to determine what could be done to speed the permit approval process and to explore what activities it could undertake prior to the approval, demonstrates that it knew that the regulations presented obstacles to the work it wanted to commence in advance of the permit's issuance. The events which transpired in the meeting with DEP and DEP's actions are separate matters, which do not bear on the notice issue. However, as explained *infra*, they do bear upon the determination of an appropriate penalty.

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[27]EPA views Respondent's Post-hearing Brief as acknowledging this by its statement that NOVA's engineer, Mr. Kos, met with DEP representatives to identify the work it needed to do to meet its construction schedule. EPA Reply at 14 (citing R. Br. at 6).

III. The Court's Determinations Regarding the Construction Activity

Based on the testimony and record evidence, the Court finds the following. As part of its plan to expand its ARCEL® production capacity, NOVA began communications with DEP in June 2003, in order to receive DEP's approval for its plan. The initial meetings raised the issue of whether a plan approval was necessary, on the basis that the planned expansion qualified under the operational flexibility provisions of NOVA's existing Title V permit. The issue of the availability of the operational flexibility option was not resolved between DEP and NOVA and NOVA ultimately acceded to the expressed preference of DEP that NOVA utilize the plan approval method for its planned expansion. Thereafter, NOVA did not pursue assertions that operational flexibility options were available, concentrating instead on the submission of a plan approval to DEP. However, as part of that concession, there was an understanding between DEP and NOVA that DEP would handle the plan approval in an expeditious manner and DEP understood that NOVA anticipated approval of its plan by November 2003.

Subsequently NOVA learned that the anticipated November plan approval date would not be met and that the approval would not be issued until late December or in January 2004. NOVA, believing that the delay would harm its competitive position in the projected demand for its product, sought relief from this obstacle and to that end was able to arrange a meeting with the Secretary of DEP, Kathleen McGinty, which took place on October 23, 2003. The Secretary, DEP's Ronald Schwartz and other DEP officials met with NOVA at NOVA's facility for the specific purpose of addressing this issue. At that meeting NOVA requested approval for it to perform certain, limited, construction activity in advance of the issuance of the approval of its plan from DEP. The activities identified at the meeting included excavation in the D2 area, installation of rebar, a footer and concrete pad, along with associated wooden framing, demolition of some old concrete pourings, and other construction activities related to the tasks identified, as subsequently identified in the photographic evidence of record which was taken by EPA during its January 27, 2004 inspection of the NOVA facility. Per the testimony of Ocamb, Kelley and Kos, Secretary McGinty, after hearing some portion of NOVA's presentation of the project and the problem which had arisen, stopped the meeting and announced that she could help NOVA and she approved the identified tasks, with the understanding that no construction could begin with regard to the emission sources themselves: i.e. the reactor or oxidizer and that NOVA was to communicate with Schwartz regarding the particulars of the approved work. NOVA was also advised that the DEP approval was subject to the "design risk" that the ultimate plan approval could require changes in the project's design which could necessitate changes to the work that it was allowing in advance of the plan approval.

DEP was aware, at the time of approving the limited work that NOVA sought to undertake in advance of the plan approval issuance, that such approval was not strictly in compliance with the applicable CAA provisions but it wanted to accommodate NOVA's pressing need to complete its project according to its schedule. The fact that such a meeting convened with the highest ranking state official regarding the environment, Secretary McGinty, was itself a highly unusual event. Had DEP in fact flatly opposed the requested construction, Mr. Schwartz would have testified to that effect. It is also likely that DEP opposition, had it existed, would have been

expressed in a letter to NOVA following that meeting, not in a letter issued *only after* the EPA inspection had taken place.

Even Schwartz's testimony, offering the only potential basis to undercut that presented by Ocamb, Kelley and Kos, ultimately points to NOVA's version of the events at the October meeting. Schwartz, it will be recalled, admitted that NOVA raised the issue of its desire to perform certain work activities prior to issuance of the plan approval. The Court accepts the version offered by NOVA's employees that the risk it was assuming related to the possibility that it might have to alter construction performed before the permit was issued, if DEP made determinations, upon review of the plan, that required such changes. In fact, accepting Schwartz's recollection would imply that DEP actively engaged in an arrangement of deception with NOVA. That is because Schwartz's version referred to DEP's "enforcement discretion" while allegedly advising NOVA that it would have no control over what others might do, such as EPA discovering the activity on its own or, as happened, by the disgruntled DEP employee reporting it to EPA. It would be inconsistent with its obligations for enforcement of the CAA for DEP, as Schwartz claimed, to be able to exercise "enforcement discretion" while simultaneously claiming that EPA or others might object. That is because "enforcement discretion" does not extend to permitting one to do that which is not permitted. Schwartz's version was further undercut by his testimony regarding the post-meeting conversation with NOVA, as his memory was surprisingly vague of that significant conversation. Although he admitted that the task in that conversation was to try to work with NOVA to identify what it could do without the plan approval, the post-meeting conversation could not have been merely a reiteration of his earlier claim that NOVA was told it could proceed with activity completely unrelated to the air contamination source. That is the case because such activity, completely unrelated to the air contamination source, would never have been the subject of a meeting in the first place.

Another indication that DEP was cautiously assenting to NOVA's requested activity, is Schwartz's unwillingness to put the DEP's approval in writing. DEP wanted to cooperate, but it did not want "fingerprints," in the form of a letter, if a problem arose. All of this is further supported by the agreement in the record that NOVA's Davison *immediately* raised NOVA's claim that DEP had orally approved the construction activity witnessed by EPA during the January 2004 inspection. The fact that the defense was raised without delay, points to the conclusion, as does much of the other evidence in the case, that DEP had given the go-ahead to NOVA's limited construction activities. The foregoing also provides a basis for understanding the curious absence of DEP at NOVA's facility in January 2004 when EPA arrived for its surprise inspection.[28] Finally, when EPA counsel served Schwartz the soft-pitch down the middle about the advice he would give if one advised that it was about to build a building to house an air contamination source, Schwartz did not deliver a home run or, for that matter, a single, as he took the pitch, his bat resting on his shoulder, by offering only that he would want more information. Under EPA's theory, and indeed according to DEP's own letter of penance following the EPA inspection, only one answer should have been forthcoming from that question: "no such activity

[28]As reflected in EPA Ex. 1, DEP's Charlton and Hammer were notified of the unannounced inspection but no one from DEP attended the January 27th EPA inspection.

is permitted until the plan approval has been issued."

Having found, based on the testimony at hearing, that DEP did assent to NOVA's request to allow certain limited construction activities prior to the issuance of the plan approval does not equate with a determination that no violation occurred. EPA has pointed out that the definition of construction as per the Pennsylvania Code, 25 PA. CODE § 121.1, expressly includes building supports and foundations and other support activities. So too the CAA expressly includes the same actions as prohibited until the permit has been issued. 42 U.S.C. § 7410. As explained by EPA's witness Campbell, EPA expressed a rational basis for its policy that no construction activity of a permanent nature take place until a plan approval is issued. Campbell expressed the reasonable concern that if such activities were allowed to go forward, the regulating authority would be under some pressure not to order that permanent work be undone. While Campbell did not adopt Curtin's "when shovel hits dirt" test as the measure of proscribed activity, he did explain that activities such as laying concrete, being expensive and time consuming to redo, are the kinds of activity that should await issuance of the plan approval. While others might decide to draw the line differently for allowable pre-plan approval activity, it is not for a court to second guess such determinations. As long as the choice is a reasonable, rationale option, among many, it is within the Agency's discretion to make such a reasoned determination.

The Court also rejects NOVA's contention that the foundation and the building *could have* been used for other purposes and were not uniquely suited for its ARCEL® reactor, for the sophistry that it is. The facts overtake the possibility of the theoretical uses for the construction, as the pad and footers, and ultimately the building which was constructed after the permit was issued, were for one purpose and one purpose only: to house the ARCEL® reactor.

IV. ALTERNATIVE DEFENSES: the parties' contentions regarding the applicability of the operational flexibility provisions of NOVA's Title V permit

NOVA notes the uncontested fact that Pennsylvania's Title V regulations allow some activity without a plan approval or a permit revision under that Title's operational flexibility provisions. Such plan-exempt changes involve subjects such as *de minimis* emission increases, emissions trading and the "exemption" provisions. NOVA does not agree with EPA's position that one cannot embark on the plan approval process and still invoke the operational flexibility provisions for the same activity and it contends that EPA cannot cite any authority for the claim that they are mutually exclusive. R. Br. at 15. On the theory that one can simultaneously apply for a permit while having the activity itself be exempt from the permit requirements, NOVA asserts that its project is exempt under the *de minimis*, trading and exemption provisions for operational flexibility.

To begin, NOVA looks to the Pennsylvania Air Pollution Control Act provision exempting written plan approval where "the construction, assembly, installation or modification is specifically authorized by the rules or regulations." 35 PA. STAT. ANN. § 4006.1(a). It notes that Pennsylvania regulations have articulated that no plan approval is required where the state determines that the sources, classes of sources, or physical changes to such sources are of "minor

significance." *Id.* at 15-16 (citing 35 PA. STAT. ANN. § 4006.1(a) and 25 PA. CODE §§ 127.14(a)(8), (9)).

NOVA's argument then shifts from asserting generally that the "activities could have been exempted from plan approval" to its claim that "DEP granted NOVA an exemption from plan approval." *Id*. at 16. It then blurs those arguments with the claim that DEP allowed it to proceed with the preconstruction and site preparation activities, which form the basis for the Complaint.[29] Thus, instead of a claim that the whole project could be exempt from a plan approval, NOVA seems to suggest that only the activities cited in the Complaint fall within the operational flexibility provisions. Consequently, NOVA appears to be contending that one may parse the activity in question in determining if it is of "minor significance." *Id*. at 16-18.

NOVA also contends that exemptions from plan approval may be issued orally. Pointing to the testimony of Joseph Pezze, a long-time former DEP employee who was one of DEP's Regional Air Quality Managers, NOVA asserts that granting exemptions orally has been a common DEP practice. Pezze testified that DEP supervisors would receive telephone inquiries about the need for a plan approval for certain activities and that such inquiries commonly were handled with an oral response. In cases of uncertainty, DEP would require a written request for a determination or "RFD" from the caller. R. Br. at 17 (citing Tr. at 543-544). Although NOVA correctly observes that nothing in 25 PA. CODE § 127.14(a) requires that plan exemptions must be in writing, it overlooks that the section *does require* that the applicant must *request* approval *in writing* from DEP in advance of making physical changes.[30] *Id.* at 18.

The Court notes that NOVA's Title V State Operating Permit, a 134 page document, devotes only one of those pages to Operational Flexibility. R. Ex. 1 at 22. Using incorporation by reference, the Title V permit simply refers to the Pennsylvania Code provisions dealing with that subject, citing 25 PA. CODE CH. 127, and, as applicable here, Sections 127.14 (exemptions), 127.448 (emissions trading) and 127.449 (de minimis emission increases). It is also worth noting that the second page of the permit informs that "[n]othing in this permit relieves the permittee from its obligations to comply with all applicable Federal, State and Local laws and regulations." R. Ex.1 at 2.

Applicability of the *de minimis* provision

To put it plainly, EPA contends that NOVA's facility does not meet the limits either for

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[29]Here, NOVA repeats its essential claim that on October 23, 2003 Secretary McGinty okayed the activities which form the basis for the Complaint and that Mr. Schwartz clarified the details of the DEP Secretary's general permission to proceed. R. Br. at 16.

[30]In the case of changes which do not add new equipment, the applicant must wait seven days after DEP receives such notice before it may make changes and where, as here, new equipment is added, the applicant must wait 15 days *after receipt* by DEP of the requested approval.

NOx or for VOCs. While it concedes that the Respondent's VOCs would decrease from 245 tons per year to 40 tons, once the catalytic oxidizer associated with the ARCEL® reactor expansion is installed, it still contends that the *de minimis* emissions provision does not apply because one cannot take credit for reductions from the catalytic oxidizer and apply them against increases from the ARCEL® reactor. Thus, EPA contends that the *de minimis* threshold cannot be met by offsetting emission increases or decreases at the same source. Although EPA's Campbell agreed that *de minimis* increases, up to 1 ton from a single source and five tons at the facility, are allowed for NOx and VOCs, he stated that the VOCs did not qualify for the *de minimis* provision because the ARCEL® reactor's emissions, at 40 tons of VOCs per year, is more than 1 ton per year and more than 5 tons during the five year term of the permit. Similarly, he opined that the NOx from the catalytic oxidizer exceeds the 1 ton per year/5 tons over the five year permit limit. EPA asserts that this means that the NOx and VOCs each have a 1 ton limit from a single source and a 5 ton limit at the facility. On that basis, it contends that NOVA does not qualify for the *de minimis* provision.

Although EPA acknowledges that NOVA's ARCEL® expansion project reduces its VOCs, a reduction attributable to the installation of an oxidizer, it notes that the facility's NOx emissions increase. Thus it was EPA's witness Campbell's assertion that neither NOVA's NOx emissions nor its VOCs fit within the *de minimis* provision. As to the VOCs, Campbell asserted that, even after the expansion, NOVA's VOCs would be 40 tons per year, an amount that exceeds the annual one (1) ton allowed from a single source and exceeds the five (5) tons of total VOCs allowed during the full term of the permit. As to the NOx, Campbell stated that it exceeded the *de minimis* threshold because it too only allows one (1) ton of NOx emission from a single source per year and because only 5 tons of NOx may be emitted from the whole facility during the entire five year term of the permit.

NOVA, looking to Section 127.449 of the Pennsylvania Code, contends that its permit allows it to make changes and install sources without any plan approval or permit revision if there is only a *de minimis* increase. NOVA's contention regarding an exemption from a plan approval, on the ground that it meets the *de minimis* increase exemption, is based in part upon the reduction in its VOC emissions, from the permitted level of 186 tons per year,[31] to its Phase 2 projected result of less than 55 tons. While it admits that its NOx emissions will go up by about one ton per year, it takes note that such an increase is within the *de minimis* emission threshold increase for NOx, while the CO emissions, at 0.84 tons per year, are well below the 4 tons per year allowed under that *de minimis* emissions increase threshold. Again referring to its plan approval submission as its method of "notifying" DEP that it was within the *de minimis* threshold, NOVA asserts that its plan submission showed its emissions meet the tons per year cap for the D2 area. NOVA considers that its admission that the plan approval application makes no express reference to the "*de minimis* emissions increase provision" to be "of no moment" because the underlying

[31]The actual level is about 115 tons per year.

information was submitted to the DEP.[32] The real focus, and determinative consideration, NOVA maintains, should be upon the fact that its plan application met the *de minimis* emissions provision of the operational flexibility provisions of its Title V permit and Section 127.449(d).

As the parties agree that NOx is 1 (one) ton "from a single source during the term of the permit and 5 tons of NOx at the facility during the term of the permit" and that the same limits apply for VOCs,[33] the critical difference is the proper interpretation for these emissions. NOVA focuses on the language in Section 127.449(d), which provides that "the maximum *de minimis* emission rate increases" are "measured in tons/year," while EPA focuses on the subsections within Section 127.449(d), namely, 127.449(d)(2) and (d)(5), because they express the 1 ton single source limit and the 5 ton facility limit as a maximum *de minimis* emission rate increase "*during the term of the permit*." Thus NOVA's position is that emission increases are measured in tons/year, and not simply by the cumulative tons emitted over the term of the permit. Measuring the emissions increase on a yearly basis, NOVA witness Joseph Pezze stated that the NOx increase from the ARCEL® phase 2 project would be one (1) ton. NOVA asserts that the DEP regulations, its own Title V permit, and the testimony of Mr. Pezze, all support its interpretation that the thresholds are measured in tons *per year*.

The Court's determination regarding Operational Flexibility and the *de minimis* provision

25 PA. CODE § 127.3, entitled, "Operational flexibility," lists regulations which implement section 502 of the CAA, 42 U.S.C. 7661a, ("Permit Programs"). As pertinent here, the "Permit Programs" section of the CAA requires the Administrator to establish "the minimum elements of a permit program," which program is then administered by each air pollution control agency. As noted, among the permit program regulations to be promulgated, one is to create provisions

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[32]NOVA points to *In re International Paper Co.*, 2000 WL 341014 (EPA ALJ, Jan. 19, 2000) ("*International Paper*"), a decision issued by this Court, to support its position that a submittal may satisfy a notification obligation even though the submittal does not reference the section imposing the notice obligation. NOVA describes that case as holding that a "PSD progress report satisfied an NSPS initial notice requirement. R. Br. at 22. NOVA has confused penalty issues with the fact of violation. In fact, in *International Paper* the Respondent did submit notice of its startup date, arguing that missing information from that notice was sufficiently referenced in it. This Court noted that the "regulation creates no alternative means for conveying the [missing] information, such as by cross-reference, [and consequently] a violation was established." *Id.* That reasoning applies directly to this matter. As discussed *infra*, NOVA did not comply with the notice requirements for any of the operational flexibility provisions under the Pennsylvania Code.

[33]Although NOVA expresses that its CO emissions also fall within the *de minimis* provision, EPA does not challenge that class of emission. As regarding the *de minimis* issue, the only question at hand is whether the emissions increases for NOx falls within that provision. The VOCs are not at issue because those emissions *decrease* as a result of NOVA's ARCEL® project.

allowing changes within a permitted activity without the need to obtain a revised permit. Such changes without a revised permit are allowed as long as they do not modify any provisions of Subchapter I ("Programs and Activities") of Chapter 85 *and* they do not exceed the emissions allowable under the permit. 42 U.S.C. § 7661a(b)(10). However, even if these two conditions are met, a facility must still notify the Administrator *and* the permitting authority within seven (7) days written notice in advance of such proposed changes.

Among the numerous regulations listed in Section 127.3 implementing this "Operational Flexibility," three have been asserted by NOVA as applicable in this proceeding: Section 127.488, involving emissions trading; Section 127.449, involving *de minimis* emission increases; and Section 127.14, involving minor changes not requiring a revised plan. As noted, these provisions apply to NOVA because its Title V permit incorporates them.

25 PA. CODE § 127.449 provides that the DEP may allow, as part of the operating permit, *de minimis* emission increases from a new or existing source. To be eligible, the *de minimis* increase must not increase a pollutant regulated under Section 112 of the Clean Air Act,[34] or subject the facility to the permit requirements of Subchapters D and E,[35] or violate an applicable requirement of the Pennsylvania Air Pollution Control Act, that Act's regulations or the CAA.

The provision spelling out the maximum *de minimis* emission rate increases is far from clear, because while it states that such maximum *de minimis* increases are measured in *tons/year*, the limitations listed for identified pollutants are measured in tons *during the term of the permit.* Thus, NOx from a single source is limited to 1 ton and 5 tons from the facility during the term of the permit. VOCs are expressed with the same limitations as NOx, while CO applies a 4 ton limit from a single source and 20 tons from the facility *during the term of the permit*. The section also provides that *de minimis* emission threshold levels cannot be met by offsetting emission increases or decreases at the same source. 25 PA. CODE § 127.449 (h).

Although the NOx and VOC references in Section 127.449(d)(2) and (5) speak of maximum emission rate increases of one (1) ton from a single source and five (5) tons during the term of the permit, the controlling introductory language for those subparts expressly provides that "the maximum *de minimis* emission rate <u>increases</u>, *as measured in tons/year* . . . are one or more of the following . . . . 25 PA. CODE § 127.449(d). Thus, only the introductory language found in Section 127.449(d) sets forth the *measure* to be applied for such *de minimis* <u>increases</u> and that measure is in tons/year. While that is sufficient to support this construction, the Court also notes that the notice required when a facility seeks to apply the *de minimis* provisions, provides in Section 127.449(c) that the notice is to list the emissions <u>increase</u> <u>rates</u> *in tons/year*. EPA's interpretation ignores that the focus is upon emission <u>increases</u> where they are considered to be *de minimis.* There would be no *de minimis* <u>increase</u> concept under the construction offered

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[34]Except as authorized under 42 U.S.C. § 7412(d)(4) and (5).

[35]Those subchapters relate to the prevention of significant deterioration of air quality and new source review.

by EPA in this case because its interpretation looks only to whether the emission is greater than one ton per year and greater than 5 tons over the term of the permit. In contrast, the provision is intended to allow *de minimis* increases of NOx and VOCs. Accordingly, the Court finds that NOVA's construction is correct. As the only record evidence regarding the NOx emission is that there would be a one ton increase per year, the increase fits within, although at the upper limit of, the provision.

However, this does not mean that NOVA prevails on the issue because to avail itself of the *de minimis* provisions of Section 127.449, it had to "provide the Department with 7 days prior written notice of any *de minimis* emission increase." 25 PA. CODE § 127.449(c). NOVA's contention that it provided this notice by virtue of its plan approval application is without merit. Even if one could assert that within a plan approval application, which application is an entirely different route for regulatory approval of CAA emissions matters, one could include an independent request seeking avoidance of a plan approval because the *de minimis* increase provisions apply, nowhere in that plan approval did NOVA make such a request and thereby alert DEP that it was also seeking operational flexibility relief under Section 127.3(a)(2). Instead, NOVA would have the Court recognize a *sub silentio* notice, hidden within its plan approval application. Such a construction is obviously at odds with the fundamental purpose of the notice provision because it fails to provide DEP *with notice* that the permittee is seeking to avail itself of that operational flexibility provision. DEP can hardly be expected to disapprove or condition the *de minimis* emission increase when Respondent has not told DEP that it is seeking to apply that provision. Accordingly, because NOVA, failing to provide the required notice, never properly availed itself of the *de minimis* provisions, its contention regarding its applicability to this proceeding is rejected.

Applicability of the Emissions Trading Provision.

NOVA maintains that the emissions trading provisions are available for "whatever physical . . . [or operational changes] the facility wants, provided that the emissions are capped and that the facility does not exceed [its] cap." R. Br. at 18 (citing 25 PA. CODE § 127.448(a)).[36] In this regard NOVA notes that its Title V permit incorporates Section 127.448 and, as such,

[36]This section provides: "The owner or operator of a facility with a Federally enforceable emissions cap may trade increases and decreases in emissions between sources with Federally enforceable emissions caps at the permitted facility, when the applicable SIP and this article provide for the emissions trades without requiring a permit revision and when the owner or operator of the facility provides 7 days written notice to the Department prior to the proposed change." 25 PA. CODE § 127.448(a).

allows emissions trading within the facility's operations as long as the emissions are capped and the changes do not exceed that cap. While acknowledging that the ARCEL® reactor for the Phase 2 project will *increase* certain emissions, NOVA asserts that, because the catalytic oxidizer for its Phase 2 will result in an overall decrease in emissions, its VOC emissions will be reduced by about half of that emitted before the project. Accordingly, it contends that increases in emissions from the new reactor will be offset by decreases in VOC emissions in the D2 area. Thus, NOVA is asserting that the concept of trading emissions looks to the total output and does not concern itself with the individual emission components. Consequently, under its view, even though a particular type of emission increases, as long as another emission type has an offsetting decrease, trading does not concern itself with *what* types of emissions are being released into the atmosphere, but only with the total amount of pollutants being emitted from the area. As with the previous discussion about *de minimis* increases, NOVA then makes the further assumption that the notice requirement was met, effectively, when it filed its plan approval application. Thus it contends that when one files for a plan approval, such filing can also serve as the notice that one is seeking the emissions trading exemption, even when one's plan approval application makes no mention of its dual purpose.[37]

Because NOVA contends that emission offsets can be measured by examining the whole facility, it asserts that EPA is wrong in claiming that Section 127.449(h) does not permit VOC emission decreases from *other* sources within the D2 area of its facility to be applied as offsets to emission increases from its new ARCEL® reactor. Restated, NOVA believes that facility-wide offsets may be considered and that EPA is incorrect that offsets can not arise from the *different* sources at the same facility. R. Reply at 5. It argues that had the intent of the regulation been to prohibit offsets from different sources as well as the same source, the broader term "facility" would have been employed. Thus, while NOVA agrees that Section 127.449(h) does not allow offsets from the *same source*, the provision does not prohibit offsetting decreases from *different sources* at the same facility. *Id*. NOVA's permit has an emissions cap on VOC emissions from the facility's D2 area of 186 tons/year and actual VOC emissions of about 120 tons/year. It asserts that because of its Phase 2 changes, overall emissions at the facility will decrease. In terms of VOCs, the changes brought about by Phase 2, by installing the catalytic converter, will reduce those VOCs to about 55 tons per year. While NOVA concedes that the new ARCEL® reactor will increase NOx emissions, it contends that the decreases in the VOCs can be used as credits against those increases.[38]

NOVA also asserts that EPA is incorrect in asserting that before it could avail itself of

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[37]NOVA interprets the record as supporting its claim that DEP agreed in meetings with NOVA that NOVA could proceed with the project under the operational flexibility provisions. R. Br. at 20 (citing Tr. 514). However, the Court notes that NOVA's Kelley acknowledged that DEP had internal disagreements on this issue. Tr. 514 - 515.

[38]Thus, in the Court's view, one issue is whether a decrease in one type of emission, in this case VOCs, can be used to offset the increases in another type of emission, in this case, NOx.

emissions trading, as a new source, NOVA would first need a new RACT analysis, because requiring it would defeat "the whole point of emissions trading and the RACT cap." R. Reply at 4. Rather, it contends that, as long as the cap is not exceeded, such an analysis is not required. Accordingly, NOVA takes the position that the regulation allows it to use emission reductions from other sources at the D2 portion of its facility as offsets to the emissions increase from the ARCEL® reactor, which in this case allows it to utilize VOC emission decreases from other sources at the D2 portion of the facility in order to offset emission increases from its new ARCEL® reactor. *Id*. at 5-6.

For its part, EPA concedes that NOVA's Title V permit includes a RACT cap for VOC emissions in the D2 area. EPA also agrees that "Section 127.448 allows [a facility] to change the locations and amount of emissions from particular sources within a facility as long as all of those sources in the aggregate do not violate the facility's emission's cap."[39] Although EPA acknowledges that NOVA at least potentially could have been exempt from plan approval because its permit includes a RACT cap for VOC emissions in the D2 area, it rejects NOVA's claim that the seven day notice requirement for this exemption to apply was met by virtue of its filing for a plan approval. EPA Br. at 40. Further, EPA contends that approval under this exemption is not automatic and therefore the only way one could determine if the exemption applies is by the regulated party filing for such an exemption, which would trigger a RACT analysis to determine if it applied or not. *Id*. at 40- 41. Thus, EPA, through its witness Campbell, asserted that 25 PA. CODE § 127.449(h), prohibits one from claiming offsetting emissions at the same source. Campbell expressed that one "cannot take credit for emission reductions elsewhere at the facility or at other times at the same source to offset any increases you expect from that source. In other words, in this situation, while the catalytic oxidizer reduces [VOCs] across the entire facility, those reductions . . . cannot offset the emission increases at the new ARCEL® reactors." Tr. 309.

The Court's Determination Regarding the Applicability of Emissions Trading.

The "Emissions Trading" provision (25 PA. CODE § 127.448) applies to facilities with federally enforceable emissions caps. It provides that such a facility may trade "increases and decreases in emissions *between sources . . . at the permitted facility*" as long as the State Implementation Plan ("SIP") and Section 127.448 allow such trading without requiring a revised permit. 25 PA. CODE § 127.448(a). Thus, before one determines the applicability of Section 127.448, one must first look to the permit itself to see if it already provides for emissions trading, trade increases and decreases in emissions between sources at the permitted facility. 25 PA. CODE § 127.448(a). As noted, NOVA's permit does provide for such emissions trading.

One need not delve far into emissions trading without realizing that it is a complex area of the CAA. It is clear that the parties inadequately briefed this issue. Although neither side

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[39]EPA claims that this provision does not necessarily apply when a facility adds a *new* source. It contends, without citing any authority, that even if the addition of the new source produces resulting emissions that remain under the cap, that new source is still subject to a new RACT analysis, which was never made in this case.

made the assertion, it appears that, as a starting point, trading relates to the same type of emissions and therefore a reduction in VOCs does not operate to allow one to increase NOx output. Emission Offset Interpretive Ruling, 44 Fed. Reg. 3274, 3274-3276 (Jan. 16, 1979).

In any event, as with its failure to provide notice under the *de minimis* provision, NOVA's failure to comply with the notice provision of this section operates to bar any claim that the emissions trading provisions apply. To avail itself of this emissions trading, the facility must give the DEP seven (7) days written notice of its intent to use emissions trading. The seven day notice is particularly precise in this regard, providing that the notice "shall also state how the increases and decreases will comply with the terms and conditions of the permit." 25 PA. CODE § 127.488(d)(2). Even accepting, *arguendo*, NOVA's claim that its permit application also acted to notice DEP of its emissions trading claim, NOVA has not identified where it complied with this notice detail. Accordingly, this claim must also fail.

The Exemption Provisions of 25 PA. CODE § 127.14

NOVA contends that exemptions from plan approvals may be granted orally and that the testimony of former DEP Regional Air Quality Manager Joseph Pezze regarding this practice supports this contention. NOVA notes that Section 127.14 exemption provisions do not specify that DEP's determinations must be in writing. NOVA asserts that two of these listed exemptions apply to its facility: sources and classes of sources determined by DEP to be of "minor significance," and physical changes to sources determined by DEP to be of minor significance. 25 PA. CODE §§ 127.14(a)(8) and (a)(9). These provisions were incorporated into NOVA's Title V permit. NOVA contends that the activities in issue, consisting of digging some holes and pouring some concrete,[40] fit within these exempted actions and that DEP granted the exemption, during the meeting it had with DEP Secretary McGinty on October 23, 2003.

EPA expressly acknowledges that this provision allows DEP to exempt sources or classes of sources determined to be of minor significance, and implicitly acknowledges that physical changes to sources which are of minor significance are exempt from a plan approval. However, it contends that, pursuant to that provision, DEP has published a list of 44 such exemptions, and that as the actions NOVA took are not on that list, they are prohibited without a plan approval. EPA Br. at 43- 44.

Although EPA concedes that there are numerous exemptions from plan approval requirements, noting, as one example, sources considered to be of minor significance, it notes that the Respondent concedes it does not come within any of these exempted sources. Further, EPA states that DEP already determined, after meetings with NOVA during May, June and July 2003, that the regulatory options were not available for NOVA and consequently it was directed to use the plan approval process. *Id*. at 43-44. Alternatively, EPA states that even if the regulatory

[40]More specifically, NOVA asserts that the activities DEP allowed it do "consisted of some excavation, the removal of an old storm sewer, and the pouring of a footer and a concrete slab for a building addition." R. Br. at 17.

options were applicable, this would only impact the penalty, not liability.

Campbell asserted that none of the exemptions listed at Section 127.14(a) of the Pennsylvania Code applied to NOVA. This view included exemption 8, which allows for other sources determined by DEP to be of "minor significance" because neither the ARCEL® reactors nor the catalytic converters are among the 44 listed exemptions.[41] Tr. 310-311. EPA Ex. 34.

The Court's Determination Regarding the Applicability of the Exemption Provisions

This section lists certain emission sources for which no plan approval is required. For example, mobile emission sources, and space heaters which provide heat by direct transfer, do not require plan approval. 25 PA. CODE §§ 127.14(a)(5) and (a)(6). In this instance, NOVA has pointed to exemptions 8 and 9 under Section 127.14. Collectively these address changes deemed to be of "minor significance" by DEP. The problem with NOVA's assertion is that, consistent with the deficiencies identified for its claim of applicability of the emissions trading and *de minimis* provisions, the regulation spells out, with detail, the steps a facility must follow when seeking exemption under the "minor significance" provisions. One seeking this approach must "request approval in writing" from DEP. 25 PA. CODE § 127.14(c). The Court determines that no such request can be deemed to have been made unless an applicant expressly informs DEP that it is seeking an exemption under these provisions. While the time that must elapse before one may proceed with the identified physical varies, depending upon whether new equipment is being added or not, in both instances the key is that DEP is notified of the intended change. As noted, although NOVA is correct that the regulation regarding plan approval exemptions involving sources or physical changes which are of "minor significance" does not provide that the DEP's *determinations* must be in writing, the regulation does provide that the *applicant's* request for approval of such an asserted exemption must be in writing.[42] Accordingly, as with the determinations regarding *de minimis* increases and emissions trading, and based on the same reasoning, the Court finds that NOVA also failed to provide the required notice for the exemption provisions. Thus, none of the operational flexibility options were properly pursued in this case and consequently NOVA cannot avail itself of their theoretical application.[43]

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[41]Campbell did not believe that the last of the listed exemptions, number 44, applied to NOVA either because it never sought a Request for Determination under that exemption. For the same reason, he believed that failure to seek an RFD for changes of minor significance did not apply. Tr. 312. In addition, he asserted that the ARCEL® Phase 2 was not minor change and, in any event, the DEP regulations do not authorize oral approvals. Tr. 314-315.

[42]Where the asserted exemption does not involve new equipment, the applicant is to request approval *in writing* to DEP and thereafter may proceed with the activity within 7 days of DEP's receipt of such application. If the exemption does entail adding new equipment, one may proceed within 15 days of DEP's receipt of the application.

[43]It should also be noted that although NOVA has claimed that it was effectively filing for operational flexibility while formally filing for the plan approval route, Kelley's own

Determination of the Appropriate Penalty

The Parties' Perspectives

EPA asserts that, when considered in the context of the penalty it could have sought, one which could have exceeded $300,000, the $60,060 it proposed is reasonable. It believes that it is appropriate to view the violation as a failure to receive an operating permit.[44] Regarding NOVA's contention that a 30% downward adjustment is appropriate for its "good faith" efforts to comply, EPA states that the factors which can justify reductions on this basis are not present here. This view is based on the theory that NOVA did not initiate reporting of its own violation and did not acknowledge such violation when DEP appeared at the facility to conduct the inspection. EPA also asserts that NOVA made no extraordinary efforts to come into compliance upon discovery of the violation.[45] Nor, EPA maintains, did NOVA display any "unusual cooperation during the pre-filing investigation." EPA Reply at 17 - 18.

Although NOVA still maintains that liability has not been established, it asserts that, in any event, the penalty sought by EPA is excessive. In this regard it submits that the $60,600 proposed penalty rests on "unsupported assumptions" and is not in conformance with the Agency's penalty policy. Addressing the components of the penalty total, NOVA believes that the $12,000 ascribed to the duration of the violation is incorrect because EPA incorrectly assumed that the violation began on the date NOVA met with the DEP Secretary, October 23, 2003, and that the violation did not end until it received the plan approval on February 4, 2004. While those dates fall within the penalty policy duration category of 4 to 6 months and a $12,000 penalty, NOVA asserts that EPA's record evidence of the duration of the violation only begins with the January 27, 2004 date of inspection. If that is the correct starting date, the policy provides for a $5,000 penalty, the figure corresponding to violations up to one month's duration. R. Br. at 33-34.

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testimony refutes this claim. She testified that while NOVA *considered* going ahead with the operational flexibility approach, despite DEP's expressed preference that they use the plan approval, NOVA ultimately decided *not* to use the operational flexibility route. Tr. 427- 429.

[44]EPA, noting that the Penalty Policy does not list a penalty amount for failing to receive a plan approval permit, believes that one should look to the Penalty Policy's prescribed penalty for failing to receive an operating permit. Both the preconstruction permit and the operating permit are important to the CAA's implementation. In such instances of operating permit failures, the Policy lists $15,000 as the deterrence amount.

[45]As an observation only, the Court notes that even if NOVA wanted to make such efforts, it is obvious that, short of tearing up the foundation, there was nothing it could do in this regard.

Second, regarding the factor of "importance to the regulatory scheme," NOVA observes that the policy actually speaks to a "failure to obtain an operating permit" and makes no reference to "pre-construction permitting violations." As EPA's Hagedorn conceded that there was no operating permit infraction involved in this case, NOVA contends that no penalty amount should be attributed to this factor. In addition, in calculating the "size of the violator," since Hagedorn conceded that the policy provides that this should be 50% reduction of the preliminary deterrence amount, the penalty should have been $5,600, not the $27,000 it employed.

NOVA also takes issue with EPA's decision to make no adjustment to the base penalty, even though it admitted that NOVA was cooperative during the events. NOVA contends that it "reported the noncompliance . . . to DEP prior to the noncompliance itself" and that this warrants a 30% reduction in the penalty, which translates into a maximum penalty of $7,840. R. Br. at 35.

Beyond its issues with the application of the elements of the penalty policy, NOVA argues that the circumstances also warrant the Court to deviate from the policy and to apply the statutory criteria under Section 113(e). In particular, it contends that the facts present "compelling mitigating circumstances" such as to warrant a "zero penalty" being imposed. *Id*. at 35 (citing *In re Rollins Environmental Services*, 937 F.2d 649 (D.C. Cir. 1991), affirming administrative law judge decision that, upon consideration of the entirety of the circumstances, no penalty should be imposed). NOVA believes that the facts in its case warrant a similar result because of the "ambiguous regulation as evidenced by differing opinions and advice of the regulatory agencies; no deleterious environmental consequences; and a [respondent] who asked for and abided by the guidance from the regulatory agency." *Id*. at 36. Alternatively, if it assumes that some penalty is appropriate, NOVA argues that given the violation's short duration, the absence of environmental harm and its good faith efforts to comply with the CAA, only a nominal penalty should be imposed. *Id*.

The Court's Penalty Determination

The Court notes that EPA's Hagedorn took the lead in drafting the Notice of Violation ("NOV") and that he was EPA's sole witness on the subject of the agency's penalty calculation. In arriving at his conclusion that the penalty should be $60,600.00, Hagedorn used the stationary penalty policy.[46] Applying it, he determined that the economic benefit was small, amounting to $600.00 (six hundred dollars). When pressed, Hagedorn asserted that the economic benefit was NOVA's not preparing the paperwork for its plan approval, an assertion, the Court observes, which is at odds with the fact that NOVA did file a plan approval. Tr. 162-164, 284.

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[46]The following additional findings about EPA's penalty calculation are noted. EPA determined NOVA's net worth to be $1,411,069,000, based on a February 27, 2003 Dun & Bradstreet report. Under the policy there is a cap on the size of the violator factor which provides that it cannot be more than 50% of the monetary figure ascribed to the gravity factor. Tr. 166-169. EPA made no adjustment under the factor of economic impact of the penalty on the Respondent's business.

EPA's analysis of the duration of the violation also has several interesting aspects to it. In arriving at a figure of $12,000.00 for the duration factor, Hagedorn had to figure out when the challenged construction activity began. An understatement, he admitted that his determination that the duration should be in the "four to six month" category was not exact. Interestingly, the start date for the duration of the violation factor was based on the October 23, 2003 meeting between DEP and NOVA.

> EPA inquired of Hagedorn: "So you used as a start date the meeting with NOVA and PA DEP *regarding the verbal approval*[47] as a start date?" Hagedorn responded: "Right. Right. That's right. Yeah." Tr. 176 (emphasis added).

Apart from what the question reveals concerning EPA's understanding about DEP's approval, that arbitrary start date doesn't even amount to a duration of four months. The plan approval was issued on February 4, 2004. Thus, even by this erroneous measure, a measure which assumed that construction began the day after the meeting between DEP and NOVA, a maximum of 104 days elapsed, which is well short of four months, or 120 days. Further, when the Court pointed out to Mr. Hagedorn that EPA's own photographs from the January 2004 inspection could not possibly reflect four to six months of construction work,[48] he merely demurred that when EPA doesn't know the time span for the construction work it simply lists it as four to six months and leaves it to the respondent to demonstrate a more reasonable time period.[49] Tr. 190 - 192. This approach ignores that the initial burden is on EPA and simply indicating that his practice is to check the four to six months box when the agency does not know the length of time involved, does not meet that burden. As he subsequently admitted, he had no idea if a "shovel hit dirt" on October 23, 2003.[50] Tr. 194.

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[47]EPA's question, which was more than a Freudian slip, implicitly acknowledges that DEP did in fact approve, albeit wrongly, NOVA's request to proceed with the construction activity challenged in this proceeding. Beyond its relevance to the Court's earlier determination as to what transpired at the October 23rd meeting between NOVA and DEP, the complicity of DEP in these events has a significant place in the determination of the appropriate penalty.

[48]When the Court asked Hagedorn to identify the reference in the notice of violation to "physical equipment installation and process changes that cannot be undertaken," he expressed that the concrete pad or foundation fit within those terms. However, he was unaware of any policy statement reaching that view and he conceded that those construction items did not constitute "process changes." Tr. 280-281.

[49]Hagedorn admitted that when EPA conferenced with NOVA on April 28, 2004, regarding the NOV, he did not ask the Respondent about the date construction began. Tr. 196-198.

[50]For example, if the construction actually had begun a month or so less before the plan approval was issued, the penalty figure for that factor under the policy would be $5,000.00, not

For the "seriousness of the violation" factor, Hagedorn expressed that "you can't have people doing construction without having some piece of paper that says it's okay for them to do that, where it's basically stated that the state has had a chance to understand what's going to be done and what effects are going to be before they follow all their given regulations." Tr. 182 However, as the record reflects, this evaluation ignores that in fact there *was* a meeting between NOVA and DEP and it can hardly be argued that the state did not understand what was to transpire. When asked about EPA's consideration of the "other factors as justice may require" aspect, Hagedorn expressed that "[w]ell that's just to give us an ability to take some other - - I guess to take that into consideration with regard to a fine. I mean, you have your penalty policy, and it does have the - - through the matrix I believe it takes that into consideration, but I didn't *add anything additional* because of that." Tr. 183. From this testimony it appears that Hagedorn considered that factor as one which only operates to increase a penalty, an assumption that is plainly incorrect. Accordingly, given the meeting that NOVA had with DEP, it was inappropriate for him to fail to consider it in his penalty calculation and the date selected was simply arbitrary.

Regarding the seriousness of the violation and in particular the subcategory within that, the "[i]mportance to the regulatory scheme," Hagedorn also admitted that the $15,000 figure in the penalty computation, the largest amount that can be imposed for that factor, was derived from a failure to have an operating permit,[51] even though the issue was a failure to have a construction permit. He applied an emissions violation category because the policy does not have a category for failure to have an operating permit. Tr. 204 - 205. Hagedorn conceded that, because there were no emissions involved here, there was no actual or possible harm to the environment and, for the same reason, there was no "sensitivity" to the environment involved. Instead, Hagedorn's emphasis was on the "harm to the program" as opposed to any actual harm to the environment. Tr. 216. While he noted that the permit is to ensure that there is no resulting harm to the environment, this overlooks that NOVA in fact had applied for a permit and consequently it was not seeking to avoid compliance with the CAA.

EPA's Campbell's testimony underscores that the nature of the Respondent's construction activity did not involve the emission equipment itself. Tr. 299 He noted that the plan approval permit "allows NOVA to commence construction on what they're calling phase 2 - - Arcel [sic] phase 2 project, which includes the installation of *six reactor vessels,* I believe, *five tanks,* a *catalytic oxidizer* and numerous other supporting activities, all related to this project *and then authorizes . . . the temporary operation of that equipment*." Tr. 297-301 (emphasis added). This testimony underscores that the focus is, understandably, upon the emission equipment. Accordingly the nature of the construction activity performed is an appropriate consideration in arriving at the penalty to be imposed.

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the $12,000.00 that was applied. Tr. 200-202.

[51]The distinction between an operating permit and the plan approval is that the former refers to permission to activate the new equipment whereas the plan approval relates to the construction permit. Tr. 276.

As reflected above, EPA's penalty calculation was seriously flawed. Consequently, the Court finds that the penalty policy, as applied, did not yield an appropriate penalty. Accordingly, the Court departs from that policy and applies the statutory criteria in assessing the penalty for this case. First, it should be noted that there is no suggestion that NOVA was attempting to hide its construction activities. Beginning back in May 2003, when NOVA began communicating with DEP about its ARCEL® expansion project, and continuously thereafter, NOVA acted completely aboveboard. Further, there was full cooperation from NOVA when EPA made its unannounced inspection on January 27, 2004.[52] Yet Hagedorn admitted that the despite the penalty policy's provision for a downward adjustment, albeit one limited to 30% of the gravity component under the policy, where a respondent is cooperative, he decided not to make any adjustment in this case, while simultaneously agreeing that NOVA was cooperative. Tr. 245 - 246. Hagedorn also conceded that the details of this factor are oriented toward operation violations, not permitting violations and that it was difficult to apply that policy directly to the circumstances presented by this case. Still, he believed that the policy provided a "framework" for determining the penalty. Tr. 248-249, 262-263. Hagedorn also agreed that no allowance was made under the "prompt reporting" consideration, even though he acknowledged that DEP was certainly aware of NOVA's intentions prior to their engaging in any construction activity. Tr. 256- 257. In fact, Hagedorn conceded that, although typically when computing a proposed penalty several penalty calculations will be made as the process continues, in *this* case he made only one calculation; that is, his first calculation also turned out to be his last. Tr. 278.

The statutory penalty assessment criteria for the CAA, as set forth at 42 U.S.C. § 7413(e), provide that the court shall take into consideration *in addition to such other factors as justice may require*: "the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test period), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation." Based on the foregoing discussion, and with emphasis upon NOVA's forthright effort to comply with the CAA beginning with its early discussions of its ARCEL® expansion project with DEP in May 2003, the subsequent approval by DEP, allowing NOVA to proceed with identified limited construction activities in advance of issuance of the plan approval, the fact that the construction activity did not involve the sources (i.e. cooling tower, reactor, or oxidizer) and that construction involving those sources did not commence until *after* the plan approval was issued by DEP, that NOVA was highly cooperative when EPA made its unannounced inspection on January 27, 2004, that the economic benefit, as acknowledged by EPA, was minuscule, that ultimately the plan was approved without the need for any alterations, that NOVA had no prior history of CAA violations, and that upon the Court's full consideration of the remaining statutory criteria, the

[52]Although the EPA inspectors had to wait for nearly 30 minutes before starting their inspection, they arrived before the facility's normal startup time. Tr. 75-78. In addition, EPA has not contended that NOVA was anything other than cooperative throughout this matter. Tr. 110-111, 122. The Court finds that to have been the case: NOVA was fully cooperative with EPA.

Court determines that a civil penalty of $3,000.00 (three thousand dollars) is appropriate and hereby imposed.

ORDER

A civil penalty in the amount of $3,000.00 (three thousand dollars) is imposed. Payment of the full amount of the civil penalty assessed shall be made within 30 (thirty) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c). Payment shall be submitted by a certified check or cashier's check made payable to the Treasurer, United States of America and mailed to:

United States Environmental Protection Agency,
Regional Hearing Clerk Region III
P.O. Box 360515
Pittsburgh, PA 15251

A transmittal letter identifying the subject case and EPA docket number, plus the Respondent's name and address, must accompany the check. Failure of the Respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalty.

Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order 45 (forty-five) days after its service upon the parties and without further proceedings unless: (1) a party moves to re-open the hearing with 20 (twenty) days after service of the Initial Decision pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the EAB is taken from it by a party to this decision within 30 (thirty) days after the Initial Decision is served upon the parties pursuant to 40 C.F.R. § 22.30(a); or (3) the EAB elects, upon its own initiative, to review the Initial Decision pursuant to 40 C.F.R. § 22.30(b).

So ordered.

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William B. Moran
United States Administrative Law Judge

Decided: March 8, 2006