

To: Jackson, Ryan[jackson.ryan@epa.gov]
From: Douglas, Patrice
Sent: Thur 11/9/2017 11:11:27 PM
Subject: Whiskey - Fugitive Emissions
[NOV.PDF](#)
[Response to NOV.PDF](#)
[October 23, 2000 Letter.PDF](#)
[6.21.17 Letter to Administrator Pruitt.pdf](#)
[Chronology redraft.docx](#)
[Talking Points.PDF](#)

Ryan,

Thanks for calling me back last week, and we look forward to working with you and the EPA to resolve this matter.

My client, MGPI, has been working with EPA Region 5 and the IDEM (Indiana Department of Environmental Management) to resolve this, but to no avail. IDEM is deferring to EPA Region 5.

I have included in this email the following documents: (1) NOV, (2) MGPI's response, (3) chronological order of events, (4) letter from Congressman Messer, (5) EPA letter, dated October 23, 2000 specifically addressing this question and (6) Talking Points Advocacy Sheet.

Bottom line, Region 5 has determined that the "fugitive emissions" resulting from the natural aging process of whiskey in barrels must be captured. Never before has this been regulated, and the EPA has relied continuously on its October 23, 2000 interpretation to say that these fugitive emissions are not regulated until recently. EPA Region 5's new interpretation is contrary to, and in direct conflict with other EPA regions and states and with EPA's prior interpretation. MGPI's facility is currently located in an area of attainment and the company invested heavily in improvements that reduced VOCs and NOx after acquiring the facility in 2011.

We seek your help and advice on how to proceed. We suggest that a conference call be scheduled to review this matter.

Thanks again, and it is great to work with you.

Patrice

Patrice Douglas Of Counsel
Spencer Fane LLP

9400 N. Broadway Ext, Suite 600 | Oklahoma City,
OK 73114
☎ 405.753.5920
pdouglas@spencerfane.com | spencerfane.com

Luke Messer
6th District, Indiana

Republican Policy Committee
Chairman

Committee on Financial Services

Committee on Education
and the Workforce

Deputy Whip



Congress of the United States
House of Representatives
Washington, DC 20515

Washington Office:

1230 Longworth House Office Building
Washington, DC 20515
(202) 225-3021

District Offices:

2 Public Square
Shelbyville, IN 46176
(317) 421-0704
(855) 341-8196

107 West Charles Street
Muncie, IN 47305
(765) 747-5566

50 North 5th Street, 2nd Floor
Richmond, IN 47374
(765) 962-2883

June 21, 2017

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
Mail Code 1101A
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Pruitt:

I write to inform you that the Environmental Protection Agency's (EPA's) Region V is overstepping its authority and acting contrary to long-standing EPA policy. Region V has issued a notice of violation to MGPI of Indiana, LLC (MGPI) for constructing and planning to construct a total of ten new whiskey aging warehouses at its distillery in Lawrenceburg. This action will not only cost jobs, but is also legally unjustifiable: Region V failed to provide "fair notice" of the alleged violation because its position is contrary to decades of EPA guidance, which fully supports MGPI's position. Region V's argument is also in violation of EPA's regional consistency regulations, and further depends on an invalid "indefinite" stay issued under a statutory provision that is explicitly limited to only 90 days. No formal lawsuit has yet been filed. I recommend your intervention before Region V files such a suit, which will only make these issues more difficult to resolve.

I. Region V insists on unproven control technology not required anywhere in the country.

MGPI's new whiskey aging warehouses are part of a broader strategy that has been simultaneously good for the environment and the economy: MGPI converted a coal-fired boiler to natural gas, purchased new energy-efficient equipment, and installed state-of-the-art emissions control technology. This activity has doubled the number of jobs MGPI provides to the region, to over 100. All the while, air pollution in the Lawrenceburg area has *decreased* significantly, with the area recently coming into "attainment" for ozone standards.

Despite these improvements, Region V is not satisfied with the measures that MGPI has implemented, and has asserted that MGPI must go further and control the "angels' share" emissions during the whiskey aging process. As whiskey ages, a small amount of the product naturally and unavoidably evaporates out of the barrels and into the air. The EPA has, for decades, taken the view that these are "fugitive emissions", generally not subject to regulation; the EPA first announced this position as long ago as 1978. State environmental regulators in Kentucky, Ohio, Maryland, Tennessee, and Indiana itself agree. There is good reason for this: studies, including those by EPA, have shown that barrel environment is critical in whiskey aging, and even minor changes in air conditions could interfere with this environment and ruin the

aging process. Despite this, Region V is demanding that MGPI install costly and unproven emissions control technology, which may ruin the quality of MGPI's whiskey.

II. Region V did not provide “fair notice” of the policy MGPI has allegedly violated.

Beyond being economically harmful, Region V's action also rests on dubious legal grounds. Under the “fair notice” doctrine, agencies like the EPA have an obligation to tell the regulated community the “rules of the game” in advance of bringing an enforcement proceeding for allegedly violating them. Yet as of the date of the alleged violation, EPA's statements of position to the regulated community consistently reiterated that angels' share emissions were fugitive. Indeed, EPA headquarters publicly announced this position in a 2000 letter to Senator Bob Smith (R, NH), then Chairman of the Committee on Environment & Public Works. The EPA's Region IV, which contains the whiskey distilleries in Kentucky and Tennessee, shares this view. One study could not find “*any facility in the nation*” that is mandated to control emissions from whiskey aging operations.¹ Even California does not regulate these emissions from its own distilleries, recognizing that control technology would interfere with the whiskey aging process.

Companies like MGPI are entitled to rely in good faith on consistently articulated EPA policies such as this. I have serious concerns about Region V attempting to hold MGPI liable for failing to anticipate that Region V would take a position contrary to the rest of the agency, and state regulators. As the late Justice Scalia put it for a unanimous Supreme Court decision: “It is hard to imagine a more violent breach of [the requirement of reasoned decision-making] than applying a rule of primary conduct ... which is in fact different than the rule or standard formally announced.”² Notably, courts have previously determined that the EPA failed to provide fair notice of an alleged violation when the positions of regional offices and headquarters conflicted.³

III. Region V's stance flaunts EPA's regional consistency guidelines, putting future economic growth in Indiana at risk.

Region V's position not only calls into question basic principles of due process, but also violates the EPA's own regulations meant to assure fair and uniform application of the Clean Air Act. The EPA has promulgated “regional consistency” guidelines that require actions taken under the Act to be consistent with both headquarters policy and the activities of other regions.⁴ As

¹ San Joaquin Valley Unified Air Pollution Control Dist., Appendix K: Reasonable Available Control Technology Analysis (RACT) for Wine Fermentation, Wine Storage Tanks, and Brandy Aging at 12-13 (Apr. 30, 2007) (emphasis added), available at https://www.valleyair.org/Air_Quality_Plans/docs/AO_Ozone_2007_Adopted/28%20Appendix%20K%20April%202007.pdf.

² *Allentown Mack Sales and Service Inc. v. NLRB*, 522 U.S. 359, 374 (1998).

³ See *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1332 (D.C. Cir. 1995).

⁴ See 40 C.F.R. § 56.1 *et seq.*

discussed, Region V's position conflicts with policy at every level—state, other EPA regional offices, and EPA headquarters—and cannot stand under these guidelines.

Far from an abstract legal violation, Region V's policy is already beginning to have negative effects on economic growth in Indiana, which the guidelines are designed to prevent. MGPI wishes to further expand its business, and requires additional aging warehouses. MGPI has identified available warehouse space across the river in Kentucky, under the jurisdiction of EPA's Region IV. Because Region IV (like every EPA regional office other than Region V) adheres to the agency's longstanding position with regard to fugitive whiskey emissions, MGPI can age its whiskey there without having to navigate inconsistent regulatory interpretation and enforcement. Unless the position taken by a staff lawyer in Region V is reversed, MGPI will be forced to locate this and perhaps future expansions in Kentucky rather than Indiana. The regional consistency guidelines are meant to avoid just this type of situation where inconsistent regional positions cause economic development to be redirected from one state to another.

IV. Region V improperly relies on an invalid stay to manufacture a violation.

Region V's enforcement case is all the more questionable because it relies on a stay that has long since expired. In 2008, President Bush's EPA issued a rule clarifying that fugitive emissions—such as MGPI's angels' share emissions—should generally not be counted when determining whether a new construction project can proceed. In 2009, President Obama's EPA stayed that rule pursuant to the Clean Air Act, which authorizes EPA to stay rules pending reconsideration, but *only* “for a period not to exceed three months.”⁵ That three month stay has turned into an indefinite one: the 2008 rule is still on hold, nine years after it was supposed to take effect. The EPA has not even proposed potential revisions to the 2008 rule. Courts have held this tactic invalid, under both the Administrative Procedure Act and the Clean Air Act.

V. Action is required.

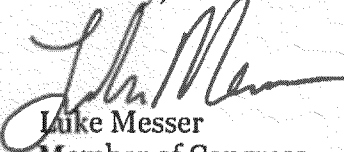
As you can see, Region V's action is an example of regional overreach, with significant adverse policy, economic, and legal consequences if allowed to continue.

I hope that you will take action to ensure that Region V does not continue this conduct. To date, Region V has only issued a notice of violation. The matter has not yet come to formal litigation, meaning there is an opportunity for Region V to reconsider its decision before the adverse consequences are fully felt. As Administrator, you have made clear your commitment to ending regulatory overreach, including by EPA regions. Asking Region V to reconsider its pending notice of violation would further this agenda, and help rein in a regional office that is pursuing minimal environmental advantage at the cost of concrete economic growth in the American heartland.

⁵ 42 U.S.C. § 7607(d)(7)(B).

EPA Administrator Scott Pruitt
June 21, 2017
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Sincerely,



Luke Messer
Member of Congress

cc: Justin Schwab
Deputy General Counsel
U.S. Environmental Protection Agency

Chronology of Events – MGPI Indiana

- December 2011 - MGPI of Indiana was acquired by MGP Ingredients
- December 2011 – MGPI immediately switched from coal to natural gas in boiler
Reduction in NOx emission – 500 tons per year
- 2012-13 - MGPI replaced paddle screen
Reduction in VOC – 440 tons per year
- 2015- MGPI installed ICM dryer (old dryers used only 5-6 days per year)
Reduction in VOC – 400 tons per year
- 2015-16 MGPI renovated 8 structures for barrel expansion program
- May 2016 Unscheduled visit from EPA Region 5 and Indiana Dept. of Environmental Management, no stated agenda. No NOV or citations issued.
- August 2016 MGPI submitted Clean Air Act permit application for construction of warehouses
- December 2016 IDEM issued Notice of Deficiency – agreeing emissions were “fugitive” but claims non-attainment permit required
- December 2016 EPA Region 5 issued NOV
- January 2017 MGPI responded to EPA Region 5 – showing past practices of EPA and other Regions recognize air emission controls are not feasible on whiskey aging warehouses. EPA Region 5
Rejected analysis.
- February 2017 IDEM asked MGPI to withdraw application until EPA Region 5 issues resolved, MGPI withdrew application
- April 2017 EPA published final rule re-designating Lawrenceburg Lawrenceburg Township as attainment zone

Feb.-Nov. 2017 MGPI has initiated repeated discussions with EPA Region 5 and with IDEM. No progress.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DEC 21 2016

REPLY TO THE ATTENTION OF:

Randy Graves
Environmental, Health and Safety Manager
MGPI of Indiana, LLC
7 Ridge Avenue
Lawrenceburg, Indiana 47025

Re: Notice and Finding of Violation
MGPI of Indiana, LLC
Dearborn, Indiana

Dear Mr. Graves:

The U.S. Environmental Protection Agency is issuing the enclosed Notice of Violation and Finding of Violation (NOV/FOV) to MGPI of Indiana, LLC (MGPI) under Section 113(a)(1) and (a)(3) of the Clean Air Act (CAA or Act), 42 U.S.C. § 7413(a)(1) and (a)(3). EPA has determined that you have violated and are continuing to violate the Act's Non-Attainment New Source Review requirements under Part D of the Act, 42 U.S.C. §§ 7501 *et seq.* and the Indiana State Implementation Plan (SIP) at your Lawrenceburg, Indiana facility.

Section 113(a) of the Act gives us several enforcement options. These options include issuing an administrative compliance order, issuing an administrative penalty order and bringing a judicial civil or criminal action.

We are offering MGPI an opportunity to confer with us about the violations alleged in the NOV/FOV. The conference will give you an opportunity to present information on the specific findings of violation, any efforts you have taken to comply and the steps you will take to prevent future violations. In addition, in order to make the conference more productive, we encourage you to submit to us information responsive to the NOV/FOV prior to the conference date.

Please plan for your facility's technical and management personnel to attend the conference to discuss compliance measures and commitments. You may have an attorney represent you at this conference. EPA is also including a Small Business Resources Information Sheet for your reference.

The EPA contact in this matter is Marie St. Peter, Environmental Engineer. You may call her at (312) 886-4746 to request a conference. You should make the request within 10 calendar days following receipt of this letter. We should hold any conference within 30 calendar days following receipt of this letter.

Sincerely,



Edward Nam
Director
Air and Radiation Division

cc: Phil Perry, Chief
Compliance and Air Enforcement, IDEM

Chief Environmental Compliance Officer
MGP Ingredients, Inc.
Atchison, Kansas

enclosures: Notice of Violation and Finding of Violation EPA-5-17-IN-03
Small Business Resources Information Sheet

Sections 2-1 and 2-3 of Chapter 326 of the Indiana Administrative Code (326 IAC 2-1, 2-3) as SIP revisions replacing APC 19. 59 *Fed. Reg.* 51108 (effective December 6, 1994). 40 C.F.R. § 52.800(c)(94). Included in the NNSR SIP revisions were changes to the definitions previously codified at 325 IAC 1-1; the definitions now applicable to NNSR in Indiana appear at 326 IAC 2-3-1. All citations to the NNSR regulations herein refer to the provisions of the Indiana SIP as applicable at the time of the project.

4. 326 IAC 2-3-2(a) provides that NNSR regulations “appl[y] to new major stationary sources or major modifications constructed in an area designated, as of the date of submittal of a complete application, as nonattainment in 326 IAC 1-4, for a pollutant for which the stationary source or modification is major.”
5. 326 IAC 2-3-3(a)(7) provides that construction of a major modification shall only begin after the applicant “obtain[s] the necessary preconstruction approvals . . . [and meets all the permit requirements] specified in 326 IAC 2-5.1 or 326 IAC 2-7, as applicable.”
6. The Indiana SIP and NNSR regulations define “major modification” as “any physical change in, or change in the method of operation of, a major stationary source that would result in a significant emissions increase and a significant net emissions increase of a regulated NSR pollutant from the major stationary source.” 326 IAC 2-3-1(y). *See also* 40 C.F.R. § 51.165(a)(1)(v)(A)(1) and (A)(2).
7. The Indiana SIP and NNSR regulations define “regulated NSR pollutant” as, among other things, “any pollutant that is a constituent or precursor of a general pollutant.” 326 IAC 2-3-1(mm)(3). *See also* 40 C.F.R. § 51.165(a)(1)(xxxvii)(C).
8. The Indiana SIP and NNSR regulations further define that for the purposes of NNSR, that “regulated NSR pollutant” includes “nitrogen oxides or any VOC.” 326 IAC 2-3-1(mm). 40 C.F.R. § 51.165(a)(1)(xxxvii)(C)(I).
9. The Indiana SIP and NNSR regulations define “major stationary source” as, any stationary source of air pollutants that emits or has the potential to emit one hundred (100) tons per year of any regulated NSR pollutant. 326 IAC 2-3-1(z)(1). 40 C.F.R. § 51.165(a)(1)(iv)(A)(I).
10. The Indiana SIP and NNSR regulations define “significant,” in relation to ozone, “in reference to a net emissions increase . . . a rate of emissions that would equal or exceed . . . the following [rate]: . . . ozone . . . 40 tons per year of volatile organic compounds (VOC) or oxides of nitrogen.” 326 IAC 2-3-1(pp). 40 C.F.R. § 51.165(a)(1)(x)(A).
11. The Indiana SIP and NNSR regulations define “significant emissions increase” for VOCs as “an increase in emissions that is significant as defined [in the applicable subsection] for that pollutant.” 326 IAC 2-3-1(qq). 40 C.F.R. § 51.165(a)(1)(xxvii).
12. The Indiana SIP and NNSR regulations define “fugitive emissions” as “those emissions that could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.” 326 IAC 2-3-1(u). 40 C.F.R. § 51.165(a)(1)(ix).

13. 326 IAC 2-3-3(a)(2) provides that “prior to the issuance of a construction permit to a source subject to this rule, the applicant shall . . . apply emission limitation devices or techniques to the proposed construction or modification such that the LAER for the applicable pollutant will be achieved.” 40 C.F.R. § 51.165(a)(2)(i).
14. The Indiana SIP and NNSR regulations define “LAER” as “for any source, the more stringent rate of emissions based on the most stringent emissions limitation of the following:
 - I. Contained in the implementation plan of any state for the class or category of stationary source unless the owner or operator of the proposed stationary source demonstrates that the limitations are not achievable.
 - II. Achieved in practice by the class or category of stationary source. This limitation, when applied to a modification, means the LAER for the new or modified emissions unit within the stationary source. In no event shall the application of the LAER allow a proposed new or modified stationary source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance.” 326 IAC 2-3-1(x); *See also* 40 C.F.R. § 51.165(a)(1)(xiii).

Title V

15. Section 502(a) of the Act, 42 U.S.C. § 7661a(a), provides that no person may operate a major source without a Title V permit after the effective date of any permit program approved or promulgated under Title V of the Act. EPA first promulgated regulations governing state operating permit programs on July 21, 1992. *See* 57 Fed. Reg. 32295; 40 C.F.R. Part 70. EPA promulgated regulations governing the federal operating permit program on July 1, 1996. *See* 61 Fed. Reg. 34228; 40 C.F.R. Part 70.
16. On December 4, 2001, EPA granted full approval of Indiana’s Title V Clean Air Act Permit Program, effective November 30, 2001. *See* 66 Fed. Reg. 62969.
17. On March 16, 2015, EPA approved Indiana’s Title V construction permit rule, replacing Indiana’s previous construction permit rules codified at 326 IAC 2-1 with 326 IAC 2-7-10.5. *See* 80 Fed. Reg. 13493.
18. Section 503 of the Act, 42 U.S.C. § 7661b, sets forth the requirement to submit a timely, accurate, and complete application for a permit, including information required to be submitted with the application.
19. Section 504(a) of the Act, 42 U.S.C. § 7661c(a), requires that each Title V permit include enforceable emission limitations and standards, a schedule of compliance, and other conditions necessary to assure compliance with applicable requirements, including those contained in a state SIP. 42 U.S.C. § 7661c(a).
20. 40 C.F.R. § 70.1(b) provides that: “All sources subject to these regulations shall have a permit to operate that assures compliance by the source with all applicable requirements.” *See* 326 IAC 2-7-2.

21. 40 C.F.R. § 70.2 defines “applicable requirement” to include, “(1) Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act, including revisions to that plan promulgated in part 52 of this chapter...” *See* 326 IAC 2-7-1(6).
22. 40 C.F.R. § 70.7(b) provides that no source subject to 40 C.F.R. Part 70 requirements may operate without a permit as specified in the Act. *See also* IAC 2-7-2.
23. 40 C.F.R. § 70.5(a) and (c) require timely and complete permit applications for Title V permits with required information that must be submitted and 40 C.F.R. § 70.6 specifies required permit content. *See also* 326 IAC 2-7-2.
24. 40 C.F.R. § 70.5(b) provides that: “Any applicant who fails to submit any relevant facts or who has submitted incorrect information in a permit application shall, upon becoming aware of such failure or incorrect submittal, promptly submit such supplementary facts or corrected information. In addition, an applicant shall provide additional information as necessary to address any requirements that become applicable to the source after the date it filed for a complete application but prior to release of a draft permit.” *See also* 326 IAC 2-7-2.
25. 326 IAC 2-7-10.5(a) requires that an owner or operator of a source with a Title V permit (Title V source) proposing to construct a new emissions unit must submit a request for a modification approval in accordance with 326 IAC 2-7-10.5.
26. 326 IAC 2-7-10.5(g) requires the owner or operator of a Title V source planning to complete a modification that, among other things, increases potential VOC emissions by 25 tons per year or more must have their approval request processed according to 327 IAC 2-7-10.5(h).
27. 327 IAC 2-7-10.5(h)(2) prohibits the construction of any applicable modification until the administrator has issued a modification approval, except as provided in 326 IAC 2-13.
28. 327 IAC 2-7-10.5(h)(4) provides that a modification approval may only be issued if, among other things, the conditions of the modification approval provide for compliance with all applicable requirements, which includes but is not limited to, the NNSR regulations.

Factual Background

29. MGPI is a wholly owned subsidiary of MGP Ingredients, Inc. a Kansas corporation with a place of business in Lawrenceburg, Indiana.
30. MGPI is a “person” as that term is defined in Section 302(e) of the Act, 42 U.S.C. § 7602(e).

31. MGPI is the owner and operator of a distillery located at 7 Ridge Avenue, Lawrenceburg, Indiana (Lawrenceburg Distillery or the Facility).
32. The Lawrenceburg Distillery is located in Dearborn County, Indiana. Dearborn County is located in an area which has been classified as nonattainment for the 2008 Ozone National Ambient Air Quality Standards (NAAQS) from July 20, 2012 to the present. 77 Fed. Reg. 30087.
33. The Lawrenceburg Distillery operates under Title V operating permit no. 029-32119-00005, which the Indiana Department of Environmental Management (IDEM) issued to MGPI on June 6, 2014.
34. The Lawrenceburg Distillery is a "major stationary source," as defined at 326 IAC 2-3-1(z)(1) and 40 C.F.R. § 51.165(a)(1)(xiii), because it has a potential to emit more than 100 tons per year of VOCs.
35. The Lawrenceburg Distillery produces barrel-aged alcohol which requires the aging of alcohol in barrels stored in aging warehouses, herein referred to in its entirety as the alcohol aging process.
36. The alcohol aging process results in VOC emissions.
37. MGPI does not control emissions resulting from the alcohol aging process.
38. On May 17, 2016, EPA conducted a CAA inspection (the inspection) at the Facility.
39. During the inspection, MGPI personnel informed EPA that MGPI had constructed several new aging warehouses in 2015 (2015 aging warehouses) at the Lawrenceburg Distillery to increase the capacity of its alcohol aging process.
40. During the inspection, EPA noticed that additional aging warehouses (2016 aging warehouses) were being constructed.
41. On September 6, 2016, IDEM received an air permit application (2016 permit application) from MGPI proposing the construction of ten new aging warehouses (new aging warehouses) to increase the capacity of its alcohol aging process by 503,600 barrels.
42. MGPI's 2016 permit application is for a significant source modification to operating permit 029-32119-00005 and does not propose, among other things, the implementation of LAER, emissions offsets, or the performance of an air quality analysis and modeling, as required by the NNSR regulations and 326 IAC 2-3.
43. MGPI's 2016 permit application includes the following table, which describes the installation dates of the proposed new aging warehouses, their capacities, and their vent IDs:

Unit ID	Description	Installation Date	Maximum Capacity (barrels)	Stack/Vent ID
EU-770	Warehouse IC	2015	7,600	707
EU-771	Warehouse K	2015	14,000	706
EU-772	Warehouse O	2015	47,000	709
EU-773	Warehouse P	2016	65,000	710
EU-774	Warehouse Q	2016	46,000	711
EU-775	Warehouse F	2016	60,000	712
EU-776	Warehouse H	2017	60,000	713
EU-777	Warehouse V	2017	60,000	714
EU-778	Warehouse 3XProfab	2018	108,000	715
EU-779	Warehouse 1XProfab	2019	36,000	716

44. MGPI's 2016 permit application states that the 2015 aging warehouses and 2016 aging warehouses began operating in 2015 and 2016, respectively.
45. MGPI's 2016 permit application states that the construction of all ten new aging warehouses is one project.
46. MGPI's 2016 permit application states that the increase in potential total emissions from the new aging warehouses is 1737.42 tons of VOCs.
47. The VOCs released during the alcohol aging process are not fugitive, as they can reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.
48. MGPI did not apply for an NNSR permit prior to beginning construction of the new aging warehouses, and has still not applied for an NNSR permit.
49. MGPI's 2016 permit application states that the construction of the 2015 and 2016 whiskey warehouses resulted in the following potential emissions:

Unit ID	Description	Installation Date	Maximum Capacity (barrels)	VOC Emission Factor (lbs /barrel/year)	VOC Emissions (tons/year)
EU-770	Warehouse IC	2015	7,600	6.9	26.22
EU-771	Warehouse K	2015	14,000	6.9	48.3
EU-772	Warehouse O	2015	47,000	6.9	162.15
EU-773	Warehouse P	2016	65,000	6.9	224.25
EU-774	Warehouse Q	2016	46,000	6.9	158.7
EU-775	Warehouse F	2016	60,000	6.9	207

50. MGPI did not submit to IDEM a request for approval of its modification prior to commencing construction of the new aging warehouses, as required pursuant to 326 IAC 2-7-10.5(h)(2).

Violations

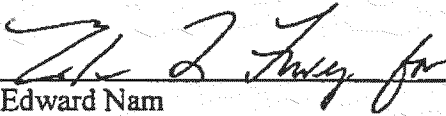
51. The construction of the new aging warehouses referred to in paragraphs 39-48, above, constitutes a "major modification" under the NNSR regulations and 326 IAC 2-3 of the Indiana SIP, because the emissions resulting from the new aging warehouses are not fugitive and will result in a significant emissions increase and a significant net emissions increase.
52. For the modification referred to in Paragraphs 39-48, above, MGPI failed to obtain a NNSR permit as required by the NNSR regulations and 326 IAC 2-3 of the Indiana SIP.
53. MGPI is in violation of NNSR requirements, Part D of the Act, 42 U.S.C. § 7502, and 326 IAC 2-3 of the Indiana SIP for construction of a major modification to an existing major source at its Lawrenceburg Distillery without applying for or obtaining an NNSR permit, and for operating the modified facilities without installing appropriate emission control equipment in accordance with a LAER analysis.
54. For the construction referred to in Paragraphs 49-50, above, MGPI is in violation of 326 IAC 2-7-10.5(h)(2) for failing to obtain approval of its modification prior to commencing construction.

Environmental Impact of Violations

55. These violations have caused or can cause excess emissions of VOCs, which are precursors to ozone. Breathing ozone contributes to a variety of health problems including chest pain, coughing, throat irritation, and congestion. Ground-level ozone can reduce lung function and inflame lung tissue. Repeated exposure may permanently scar lung tissue.

Date

12/21/16



Edward Nam

Director

Air and Radiation Division

U.S. EPA Small Business Resources Information Sheet

The United States Environmental Protection Agency provides an array of resources, including workshops, training sessions, hotlines, websites and guides, to help small businesses understand and comply with federal and state environmental laws. In addition to helping small businesses understand their environmental obligations and improve compliance, these resources will also help such businesses find cost-effective ways to comply through pollution prevention techniques and innovative technologies.

EPA's Small Business Websites

Small Business Environmental Homepage - www.smallbiz-enviroweb.org

Small Business Gateway - www.epa.gov/smallbusiness

EPA's Small Business Ombudsman - www.epa.gov/sbo or 1-800-368-5888

EPA's Compliance Assistance Homepage

[www.epa.gov/compliance/assistance/
business.html](http://www.epa.gov/compliance/assistance/business.html)

This page is a gateway to industry and statute-specific environmental resources, from extensive web-based information to hotlines and compliance assistance specialists.

EPA's Compliance Assistance Centers www.assistancecenters.net

EPA's Compliance Assistance Centers provide information targeted to industries with many small businesses. They were developed in partnership with industry, universities and other federal and state agencies.

Agriculture

www.epa.gov/agriculture/

Automotive Recycling

www.ecarcenter.org

Automotive Service and Repair

www.ccar-greenlink.org or 1-888-GRN-LINK

Chemical Manufacturing

www.chemalliance.org

Construction

www.cicacenter.org or 1-734-995-4911

Education

www.campuserc.org

Food Processing

www.fpeac.org

Healthcare

www.hercenter.org

Local Government

www.lgean.org

Metal Finishing

www.nmfrc.org

Paints and Coatings

www.paintcenter.org

Printed Wiring Board Manufacturing

www.pwbrc.org

Printing

www.pncac.org

Ports

www.portcompliance.org

U.S. Border Compliance and Import/Export Issues

www.bordercenter.org

Hotlines, Helplines and Clearinghouses

www.epa.gov/epahome/hotline.htm

EPA sponsors many free hotlines and clearinghouses that provide convenient assistance regarding environmental requirements. Some examples are:

Antimicrobial Information Hotline

info-antimicrobial@epa.gov or
1-703-308-6411

Clean Air Technology Center (CATC) Info-line

www.epa.gov/ttn/catc or 1-919-541-0800

Emergency Planning and Community Right-To-Know Act

[www.epa.gov/superfund/resources/
infocenter/epcra.htm](http://www.epa.gov/superfund/resources/infocenter/epcra.htm) or 1-800-424-9346

EPA Imported Vehicles and Engines Public Helpline

www.epa.gov/otaq/imports or
734-214-4100

National Pesticide Information Center

www.npic.orst.edu/ or 1-800-858-7378

National Response Center Hotline -

to report oil and hazardous substance spills
www.nrc.uscg.mil or 1-800-424-8802

Pollution Prevention Information Clearinghouse (PPIC)

www.epa.gov/opptintr/ppic or
1-202-566-0799

Safe Drinking Water Hotline

[www.epa.gov/safewater/hotline/index.
html](http://www.epa.gov/safewater/hotline/index.html) or 1-800-426-4791

Stratospheric Ozone Protection Hotline

www.epa.gov/ozone or 1-800-296-1996

U. S. EPA Small Business Resources

Toxic Substances Control Act (TSCA) Hotline

tsca-hotline@epa.gov or 1-202-554-1404

Wetlands Information Helpline

www.epa.gov/owow/wetlands/wetline.html or 1-800-832-7828

State and Tribal Web-Based Resources

State Resource Locators

www.envcap.org/statetools

The Locators provide state-specific contacts, regulations and resources covering the major environmental laws.

State Small Business Environmental Assistance Programs (SBEAPs)

www.smallbiz-enviroweb.org

State SBEAPs help small businesses and assistance providers understand environmental requirements and sustainable business practices through workshops, trainings and site visits. The website is a central point for sharing resources between EPA and states.

EPA's Tribal Compliance Assistance Center

www.epa.gov/tribalcompliance/index.html

The Center provides material to Tribes on environmental stewardship and regulations that might apply to tribal government operations.

EPA's Tribal Portal

www.epa.gov/tribalportal/

The Portal helps users locate tribal-related information within EPA and other federal agencies.

EPA Compliance Incentives

EPA provides incentives for environmental compliance. By participating in compliance assistance programs or voluntarily disclosing and promptly correcting violations before an enforcement action has been initiated, businesses may be eligible for penalty waivers or reductions. EPA has two such policies that may apply to small businesses:

EPA's Small Business Compliance Policy

www.epa.gov/compliance/incentives/smallbusiness/index.html

This Policy offers small businesses special incentives to come into compliance voluntarily.

EPA's Audit Policy

www.epa.gov/compliance/incentives/auditing/auditpolicy.html

The Policy provides incentives to all businesses that voluntarily discover, promptly disclose and expeditiously correct their noncompliance.

Commenting on Federal Enforcement Actions and Compliance Activities

The Small Business Regulatory Enforcement Fairness Act (SBREFA) established a SBREFA Ombudsman and 10 Regional Fairness Boards to receive comments from small businesses about federal agency enforcement actions. If you believe that you fall within the Small Business Administration's definition of a small business (based on your North American Industry Classification System designation, number of employees or annual receipts, as defined at 13 C.F.R. 121.201; in most cases, this means a business with 500 or fewer employees), and wish to comment on federal enforcement and compliance activities, call the SBREFA Ombudsman's toll-free number at 1-888-REG-FAIR (1-888-734-3247), or go to their website at www.sba.gov/ombudsman.

Every small business that is the subject of an enforcement or compliance action is entitled to comment on the Agency's actions without fear of retaliation. EPA employees are prohibited from using enforcement or any other means of retaliation against any member of the regulated community in response to comments made under SBREFA.

Your Duty to Comply

If you receive compliance assistance or submit a comment to the SBREFA Ombudsman or Regional Fairness Boards, you still have the duty to comply with the law, including providing timely responses to EPA information requests, administrative or civil complaints, other enforcement actions or communications. The assistance information and comment processes do not give you any new rights or defenses in any enforcement action. These processes also do not affect EPA's obligation to protect public health or the environment under any of the environmental statutes it enforces, including the right to take emergency remedial or emergency response actions when appropriate. Those decisions will be based on the facts in each situation. The SBREFA Ombudsman and Fairness Boards do not participate in resolving EPA's enforcement actions. Also, remember that to preserve your rights, you need to comply with all rules governing the enforcement process.

EPA is disseminating this information to you without making a determination that your business or organization is a small business as defined by Section 222 of the Small Business Regulatory Enforcement Fairness Act or related provisions.

CERTIFICATE OF MAILING

I, Kathy Jones, certify that I sent a Notice of Violation, No. EPA-5-17-IN-03, by

Certified Mail, Return Receipt Requested, to:

Randy Graves, EHS Manager
MGPI of Indiana, LLC
7 Ridge Avenue
Lawrenceburg, Indiana 47025

7014 2870 0001 9578 8926

Steve Glaser, Vice President of Production and Engineering
MGP Ingredients, Inc.
P.O. Box 130
Atchison, Kansas 66002

7014 2870 0001 9578 8933

I also certify that I sent copies of the Notice of Violation by e-mail to:

Phil Perry, Chief
Air Compliance Branch
Indiana Department of Environmental Management
pperry@idem.in.gov

On the 22 day of December 2016.



Kathy Jones
Program Technician
AECAB, PAS

CERTIFIED MAIL RECEIPT NUMBER: _____

OCT 23 00 (MON) 16:59

SEN MITCH MCCONNELL

TBL: 2022242499

P. 002

10/23/00 MON 16:18 FAX 202 224 2622
10/23/2000 10:08 FAX 802 801 1580

SENATE CHIEF OF STAFF
U.S. SEN. MITCH MCCONNELL

0003



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 23 2000

OFFICE OF
AIR AND RADIATION

The Honorable Robert C. Smith
Chairman, Committee on Environment
& Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter is in response to your question as to whether the Environmental Protection Agency (EPA) has identified reasonably available control technology (RACT) for ethanol emissions from alcohol beverage aging warehouses. One control technology which has been suggested in this regard is carbon adsorption which conceivably could be applied to the warehouse ventilation exhaust to capture ethanol fumes. However, in order to capture the warehouse fumes it may be necessary to modify the air flowing through the warehouse which could affect temperature, humidity and ventilation in the warehouse. The industry has raised questions about whether these changes would adversely affect the product quality.

Due to this unresolved issue, EPA has not, at this time, declared that such add-on control devices are RACT for alcohol beverage aging warehouses. Nor has EPA currently identified any other available technology which it considers to be RACT for alcohol beverage aging warehouses. Therefore, EPA is not requiring states to control these sources in order to meet ozone control state implementation plan requirements.

I appreciate this opportunity to be of service and trust that this information will be helpful to you.

Sincerely,

John C. Beale
Deputy Assistant Administrator
for Air and Radiation

cc: The Honorable Max Baucus

Internet Address (EPA) = <http://www.epa.gov>

Recycled/Recyclable = Printed with Vegetable Oil Based Inks on Recycled Paper (Minimum 50% Postconsumer)

Exhibit J

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BEIJING BRUSSELS DUBAI JOHANNESBURG LONDON
LOS ANGELES NEW YORK SAN FRANCISCO SEOUL
SHANGHAI SILICON VALLEY WASHINGTON

Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 6000

By Electronic and U.S. Mail

May 26, 2017

Susan M. Tennenbaum
Associate Regional Counsel
U.S. EPA - Region 5
77 West Jackson Blvd., C-14J
Chicago, IL 60604

Re: MGPI of Indiana, LLC Notice and Finding of Violation

Dear Susan:

As you know, I was recently brought on board by MGP Ingredients (MGP) to explore the possibility of finding a mutually acceptable settlement to your December 21, 2016 Notice and Finding of Violation issued to MGPI of Indiana, LLC (MGPI). My co-counsel Tony Sullivan and I were surprised and very disappointed with your May 12 email, which we interpreted as meaning that EPA Region V did not want to meet with us unless we agreed in advance to propose a program of controls on whiskey aging warehouses.

In what follows, we explain why Region V cannot via notice of violation unilaterally change EPA's long-stated policy that the so-called "angels' share" that leaks out of the barrels during whiskey aging are fugitive emissions that are not subject to control.

The Fair Notice Doctrine Precludes Enforcement Prior to an Announcement by EPA Headquarters of a Change in Position. Under the fair notice doctrine, which is described in more detail below, any federal agency, including EPA, has an obligation to tell the regulated community the "rules of the game" in advance of bringing an enforcement proceeding for allegedly violating them. As outlined below, as of the date of the purported "violation," *all* of EPA's notices and statements of position to the regulated community, including the RACT/BACT/LAER clearinghouse, continued the Agency's long-standing policy as stated in the 2000 Letter from the Deputy Assistant Administrator for Air and Radiation (copy attached) that the "angels' share" that leaks out of wooden barrels naturally during whiskey aging are fugitive emissions that are not subject to control without unacceptable effects on product quality.

There has been no announcement to the regulated community of any change in this long-standing position by EPA Headquarters, nor has there been an opportunity for notice and comment on the recent efforts by Gallo to control emissions from a brandy aging warehouse in California. In fact, even the San Joaquin Valley Air Pollution Control District, which promulgated the rule governing the Gallo facility, expressly acknowledged that it "understands that the nature of whiskey aging operations differs from wine and brandy aging. Specifically, the ambient conditions, such as storage temperature and humidity, as well as seasonal variations, are important factors in the whiskey aging process. All aging processes[] depend[] upon the interaction of product in oak barrels, whiskey aging operations strive for a particular blend of temperature, humidity, and ventilation, leading to different types of warehouse. Therefore,

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whiskey aging is not considered or included in this rule development process.” Final Draft Staff Report at 3 (Sept. 17, 2009) (citing EPA’s AP-42 factors).¹

At a minimum, before changing its position, EPA would have an obligation to determine, and to make available for public comment and criticism, whether there has been an adverse effect on product quality in the Gallo experiment or whether the results, even if successful, can be projected to the quite different process of traditional natural aging of Bourbon whiskey, which we are advised is very different than brandy. Indeed, EPA recognizes the difference between brandy and whiskey warehouses, as it has an AP-42 emission factor for brandy and wine aging separate from the factor used for whiskey aging. Compare EPA Office of Air Quality Planning & Standards, Emission Factor Documentation for AP-42, Section 9.12.2 Standards of Performance for New Stationary Sources (Oct. 1995) (standards for wine and brandy) *with*, Section 9.12.3 Standards of Performance for New Stationary Sources (Mar. 1997) (standards for other distilled spirits). We do understand that certain Region V staff apparently disagree with all the Agency’s prior conclusions, and also with those of their colleagues in other regions, but bringing an enforcement case based on isolated opinions alone, rather than what the Agency has officially told the regulated community consistently in the past is simply impermissible. As the late Justice Scalia put it for an unanimous Supreme Court,

“It is hard to imagine a more violent breach of [the requirement of reasoned decision-making] than applying a rule of primary conduct ... which is in fact different than the rule or standard formally announced.”²

We are bringing this to your attention first in the hopes that you will be persuaded to drop the Notice and Finding of Violation (NFV) and advise your colleagues to work through normal channels of consultation—including with the regulated community—to try to change the agency’s position if you believe a policy change is appropriate. It is also noteworthy that at the time of the alleged violations, the area was actually in compliance with the NAAQS for ozone, as EPA later acknowledged by re-designating it as attainment. 82 Fed. Reg. 16,940 (Apr. 7, 2017). That fact alone would justify an exercise of prosecutorial discretion not to bring a case seeking to impose LAER. However, if you are determined to proceed with the NFV even though EPA Headquarters has not notified the regulated community that it is reconsidering or changing its long-standing position, we will of course be forced to elevate the issue with the political leadership of the agency, including OAR, OAQPS, OECA, OGC, the Department of Justice, and if necessary, in court.

¹ Available at https://www.valleyair.org/Board_meetings/gb/agenda_minutes/Agenda/2009/September/Agenda_Item_9_Sep_17_2009.pdf

² *Allentown Mack Sales and Service Inc. v. NLRB*, 522 U.S. 359, 374 (1998).

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I. The Fair Notice Doctrine

“It is a cardinal rule of administrative law” that a regulated entity must be given fair notice of “what conduct is prohibited or required of it.” *Wisconsin Res. Prot. Council v. Flambeau Min. Co.*, 727 F.3d 700, 707 (7th Cir. 2013) (quotation marks omitted). “In the absence of notice . . . an agency may not deprive a party of property by imposing civil or criminal liability.” *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995).

An agency has “has fairly notified a petitioner” if “by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, *with ascertainable certainty*, the standards with which the agency expects parties to conform.” *Flambeau*, 727 F.3d at 708 (quotation marks omitted) (emphasis added). Importantly, an agency’s position can be entirely permissible, but nevertheless fall afoul of the fair notice requirement if the agency has not provided adequate notice. *Gen. Elec.*, 53 F.3d at 1325 (“We conclude that EPA’s interpretation of those regulations is permissible, but because the regulations did not provide GE with fair warning of the agency’s interpretation, we vacate the finding of liability and set aside the fine.”). The consistency of an agency’s public proclamations on an issue is crucial to providing notice of what is required. *See United States v. Lachman*, 387 F.3d 42, 57 (1st Cir. 2004) (“When the agency itself issues contradictory or misleading public interpretations of a regulation, there may be sufficient confusion for a regulated party to justifiably claim a deprivation of fair notice.”); *United States v. S. Ind. Gas & Elec. Co. (SIGECO)*, 245 F. Supp. 2d 994, 1021 (S.D. Ind. 2003) (“Confusion within the enforcing agency as to the proper interpretation of a regulation is relevant evidence that suggests lack of fair notice.”).

MGPI lacked fair notice that its construction of new whiskey aging warehouses was a “major modification” requiring a permit for at least two reasons. First, even though EPA Region V alleges in its Notice and Finding of Violation that emissions from whiskey aging operations are not fugitive, EPA headquarters and other regional offices have consistently taken the exact opposite view for decades, making the instant enforcement action an abrupt shift in policy. Second, MGPI lacked notice that fugitive emissions would be considered in the major modification determination because of the uncertainty surrounding the legal status of EPA’s fugitive emissions rules and the Indiana SIP.

II. Even If Whiskey Aging Emissions Are Properly Considered Not Fugitive, EPA Failed to Provide Requisite Notice of That Regulatory Status.

Fugitive emissions are those which “could not *reasonably* pass through a stack, chimney, vent, or other functionally equivalent opening.” *See* 40 C.F.R. §§ 51.301, 52.21(b)(20) (emphasis added); *see also* 45 Fed. Reg. 52,676, 52,692-93 (Aug. 7, 1980) (fugitive emissions are those which would not “ordinarily be collected and discharged through stacks or other functionally equivalent openings”).

EPA headquarters, other EPA regions, and state permitting officials exercising their authority under the Clean Air Act have long concluded, and repeatedly informed the regulated community, that emissions from whiskey aging operations cannot be reasonably collected

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because the collection process would ruin the whiskey being aged. MGPI maintains that this conclusion is correct, and such emissions are indeed fugitive.

Perhaps most significantly, a search of EPA's RACT/BACT/LAER Clearinghouse shows that there are no control methods listed for alcohol aging operations. EPA has described the clearinghouse as being able to "help permit applicants and reviewers make pollution prevention and control technology decisions for stationary air pollution sources." EPA, Permit Data Base.³ EPA is required by statute to maintain the Clearinghouse to "make information regarding emission control technology available to the States and to the general public." 42 U.S.C. § 7408(h). Permitting authorities are required to provide LAER information to EPA for inclusion in the Clearinghouse. 42 U.S.C. § 7503(d). Given that LAER information must be on the Clearinghouse, and EPA is statutorily required to maintain it as a repository of data relating to permitting, it is quite significant that no such controls are listed in the Clearinghouse.

The absence of any RACT/BACT/LEAR Clearinghouse controls for alcohol aging operations is also consistent with permitting decisions relating to whiskey aging facilities. For example, in 2012 Kentucky permitted a Louisville whiskey warehouse, characterizing the emissions as fugitive in nature. Louisville Metro Air Pollution Control Dist., Title V Statement of Basis, at 11 (2012).⁴ See also San Joaquin Valley Unified Air Pollution Control Dist., Appendix K: Reasonable Available Control Technology Analysis (RACT) for Wine Fermentation, Wine Storage Tanks, and Brandy Aging at 12-13 (Apr. 30, 2007) (District could not "find *any facility in the nation* that are (sic) mandated to control" emissions from whiskey aging (emphasis added)).⁵ Likewise, the Indiana Office of Environmental Adjudication has concluded that whiskey aging emissions are fugitive in nature. See *In Re: Objection to the Issuance of Part 70 General Operating Permit No. T-137-6928-000111 for Joseph E. Seagram & Sons, Inc.*, 2004 OEA 58 (03-A-J-3003), at 64 (Ind. Office of Env'tl. Adjud., Aug. 4, 2004).⁶

EPA has long agreed with this view in various sources beyond the Clearinghouse. In an October 23, 2000 letter to the Chair of the Senate Committee on Environment & Public Works, the Deputy Assistant Administrator for Air and Radiation said plainly that EPA has not identified "*any . . . technology which it considers to be [reasonably available control technology] for alcohol beverage aging warehouses*" in part because of concerns that such technology would "adversely affect the product quality." Letter from John C. Beale, Deputy Assistant

³ <https://www.epa.gov/catc/ractbactlaer-clearinghouse-rblc-basic-information>.

⁴ Available at

https://louisvilleky.gov/sites/default/files/air_pollution_control_district/documents/permits/titlev/20120601basis136_97_tv_r1_plant244.pdf

⁵ Available at

https://www.valleyair.org/Air_Quality_Plans/docs/AO_Ozone_2007_Adopted/28%20Appendix%20K%20April%202007.pdf.

⁶ Available at: <http://www.in.gov/oea/decisions/2004oea58.pdf>

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Administrator for Air and Radiation, U.S. EPA, to the Hon. Robert C. Smith, Chairman, Senate Comm. on Env't & Pub. Works (Oct. 23, 2000) (the "2000 Letter") (emphasis added) (attached).

This letter reflects EPA's longstanding position, and the position it states has been repeatedly reiterated, and never retracted, by the Agency.

As long ago as 1978, EPA concluded that "control of emissions from whiskey warehousing has not been demonstrated at this time." EPA, Emission Standards and Engr'g Div., Chemical and Petroleum Branch, Office of Air Quality Planning and Standards, Cost and Engineering Study - Control of Volatile Organic Emissions From Whiskey Warehousing at 1-4 (Apr. 1978).

In 1987, EPA rejected "proposed control technologies" for storing nonindustrial distilled beverage alcohol because they "could contaminate beverage alcohol, resulting in a product with little or no market value." Standards of Performance for New Stationary Sources: Volatile Organic Liquids Storage Vessels, Final Rule, 52 Fed. Reg. 11,420, 11,434 (Apr. 8, 1987).

In 1994, Region 4 explained that "EPA does not consider windows and screen panels [in whiskey aging warehouses] to fall within" the definition of "functionally equivalent opening" for purposes of fugitive emissions analysis. Letter From Jewell A. Harper, Chief Air Enforcement Branch, Region IV, to John W. Walton, Director of the Div. of Air Pollution Control, Tenn. Dep't of the Envmt. (August 19, 1994).

In 1997, EPA's AP-42 emission factors remarked that "Add-on air pollution control devices for whisky aging warehouses are not used because of the anticipated adverse impact that such systems would have on product quality". EPA Office of Air Quality Planning & Standards, Emission Factor Documentation for AP-42, Section 9.12.3 at 2-12 Standards of Performance for New Stationary Sources (Mar. 1997).⁷ EPA is required by statute to update these emission factors once every three years, 42 U.S.C. § 7430, but EPA has not since 1997 updated these factors, demonstrating that this remains the Agency's view.

We also note that a 2015 decision from the 6th Circuit described a permit for a whiskey warehouse in Louisville, Kentucky, noting that "[t]he permit does not cap fugitive ethanol emissions, *i.e.*, those from Diageo's storage warehouses." *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 688 (6th Cir. 2015).

MGPI was entitled to, and did, rely in good faith on this consistently articulated policy, as did its sophisticated environmental consultants. *See, e.g., Beaver Plant Operations, Inc. v. Herman*, 223 F.3d 25, 31 (1st Cir. 2000) (considering testimony of "experts regarding industry practice"); *Martin v. Am. Cyanamid Co.*, 5 F.3d 140, 146 (6th Cir. 1993) (fair notice determination "is made with reference to what an employer familiar with the industry could reasonably be expected to know"); *SEC v. Kouzan*, No. 11-2017, 2012 WL 4819011, at *5 (D. Kan.

⁷ Available at <https://www3.epa.gov/ttnchie1/ap42/ch09/bgdocs/b9s12-3.pdf>

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Oct. 10, 2012) (“industry practice may be considered in ruling on fair notice defense”). Region V cannot, consistent with due process, hold MGPI liable for failing to anticipate that Region V would take a position contrary to the rest of the agency.⁸

As the D.C. Circuit has held, “it is unlikely” that an agency has provided “adequate notice when different divisions of the enforcing agency disagree.” *GE*, 53 F.3d at 1332 (holding that EPA failed to give fair notice in part because at least one, and possibly two, regional offices had guidance agreeing with the regulated entity’s position); *Rollins Envtl. Servs. Inc. v. EPA*, 937 F.2d 649, 653 (D.C. Cir. 1991) (concluding that a penalty could not be imposed in light of the fact that EPA had written a report acknowledging “significant disagreement among various headquarters and regional offices” as to whether conduct that served as predicate to violation was actually illegal).

Region V’s NFV is especially impermissible given EPA’s regional consistency guidelines that are designed to “[a]ssure fair and uniform application” of the Clean Air Act, 40 C.F.R. § 56.3, evidencing “EPA’s firm commitment to national uniformity in the application of its permitting rules,” *Nat’l Envtl. Dev. Assoc.’s Clean Air Project v. EPA*, 752 F.3d 999, 1010 (D.C. Cir. 2014). This inconsistent position is particularly problematic under EPA’s regional consistency guidelines. See 40 C.F.R. § 56.5(a) (regional officials must assure that “actions taken under the [Clean Air Act]” are “as consistent as reasonably possible with the activities of other Regional Offices”).

III. EPA Has Not Provided Fair Notice That Fugitive Emissions Are Counted in Major Modification Determinations

EPA has also failed to provide fair notice that MGPI’s fugitive emissions—VOC emissions from its new aging warehouses—would be considered in the major modification determination. The stay purporting to allow EPA to consider these emissions was invalidly promulgated, and also inconsistent with Indiana’s State Implementation Plan (SIP).

⁸ The existence of a 1996 letter in which Region V concluded that VOC emissions from whiskey aging operations were not fugitive does not somehow cure the fair notice problem. See Letter from Cheryl Newton, Chief, Permits and Grants Section, Region V, to Paul Dubenetzsky, Permit Branch, Office of Air Mgmt., Indiana Dep’t of Envtl. Mgmt. (Apr. 16, 1996). Region V’s letter was issued four years *before* the 2000 Letter’s authoritative statement that no workable control technology exists, *before* the 1997 AP-42 factors, and *before* the statements by state regulators cited above.

Notably, this letter has been criticized as lacking any supporting analysis. See *In Re: Objection to the Issuance of Part 70 General Operating Permit No. T-137-6928-000111 for Joseph E. Seagram & Sons, Inc.*, 2004 OEA 58 (03-A-J-3003), at 64 (Ind. Office of Envtl. Adjud., Aug. 4, 2004) (specifically criticizing the letter as being devoid of “supporting evidence” and reaching the opposite conclusion). Moreover, Region V’s letter itself acknowledged recognizing “a letter from another USEPA region that appears to be inconsistent with [its] position.” See Letter from Cheryl Newton, *supra*

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On December 19, 2008, EPA promulgated the “Fugitive Emissions Rule.” 73 Fed. Reg. 77,882 (Dec. 19, 2008). The Rule clarified that fugitive emissions should generally not be considered when determining whether a physical or operational change at an existing source results in a “major modification” under the CAA’s New Source Review provisions. *See id.* Under the Rule, fugitive emissions from whiskey aging operations would not be taken into consideration when determining whether a major modification of a source has occurred.⁹

On April 24, 2009, EPA granted a petition to “reconsider” the Fugitive Emissions Rule, and administratively stayed that rule pursuant to the CAA, which authorizes EPA to stay rules pending reconsideration “for a period not to exceed three months.” 42 U.S.C. § 7607(d)(7)(B).¹⁰ EPA later extended the stay three times, long beyond three months:

- In December 2009, EPA extended the stay for an additional 3 months. EPA did not take public comment on the extension. 74 Fed. Reg. 65,692 (Dec. 11, 2009).
- In March 2010, EPA extended the stay for another 18 months. EPA provided notice and took comment on whether to extend the stay before issuing the extension. 75 Fed. Reg. 16,012 (Mar. 31, 2010).
- In March 2011, EPA extended the stay indefinitely “until EPA completes its reconsideration of the Fugitive Emissions Rule.” 76 Fed. Reg. 17,548, 17,548 (Mar. 30, 2011). EPA did not take public comment, but instead issued the extension pursuant to the “good cause” exemption. *See* 5 U.S.C. § 553(b). Though EPA did take comment after the rule was promulgated, it did not respond to them.

Though EPA stated that it anticipated it would propose and finalize a replacement rule by October 4, 2012, *see* 76 Fed. Reg. at 17,551, it never even proposed a new rule.

EPA’s decision to indefinitely stay the Fugitive Emissions Rule is void *ab initio* for two separate reasons.

⁹ The Rule did not apply to—and therefore, fugitive emissions are still counted in major modification determinations for—sources in industries that have been designated through rulemaking under § 302(j) of the CAA. *See* 73 Fed. Reg. at 77,882; *see also* 42 U.S.C. § 7602(j). Whiskey aging operations are not among these industries. *See* 40 C.F.R. §§ 70.2, 71.2 (listing 26 industries as well as “[a]ny other stationary source category which . . . is being regulated under section 111 or 112 of the Act”); *id.* Parts 60, 63 (source categories regulated under sections 111 (new source performance standards) and 112 (air toxics) of the Clean Air Act).

¹⁰ EPA initially announced the stay on April 24, 2009. Letter from Lisa Jackson (Apr. 24, 2009), available at <https://www.regulations.gov/document?D=EPA-HQ-OAR-2004-0014-0062>. EPA subsequently realized that it could not institute a stay without publishing notice in the Federal Register, which occurred on September 30, 2009. 74 Fed. Reg. 50,115, 50,115 (Sept. 30, 2009).

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First, EPA lacks authority to stay Clean Air Act rules pending reconsideration for longer than 90 days. 42 U.S.C. § 7607(d)(7)(B) grants EPA authority to issue a three-month stay pending administrative reconsideration, expressly provides that other than that three-month stay period, “[s]uch reconsideration shall not postpone the effectiveness of the rule.” The D.C. Circuit has interpreted this language to mean that “the EPA had no authority to stay the effectiveness of a promulgated standard except for the single, three-month period authorized by section 307(d)(7)(B) of the CAA.” *NRDC v. Reilly*, 976 F.2d 36, 41 (D.C. Cir. 1992). Accordingly, EPA could not and did not validly stay the 2008 rule for more than three months.

Second, EPA violated the Administrative Procedure Act (APA), 5 U.S.C., § 551 *et seq.*, because it failed to take notice and comment on the indefinite stay. Courts have consistently held that suspensions—particularly indefinite suspensions—of validly-promulgated rules are themselves rulemakings that must go through the APA notice and comment process. *See, e.g., NRDC v. Abraham*, 355 F.3d 179, 204-06 (2d Cir. 2004) (60-day delay of an effective date imposed by an incoming administration was a substantive rule that must comply with the APA); *accord Envtl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802 (D.C. Cir. 1983) (indefinite suspension of a rule must go through APA notice and comment procedures); *Ranchers Cattlemen Action Legal Fund v. Dep’t of Agriculture*, 566 F. Supp. 2d 995, 1004-05 (D.S.D. 2008) (rejecting the argument “that a temporary postponement of an effective date is not a rulemaking”).¹¹

Because it did not go through the proper procedures, the indefinite stay of the Rule is void and the parties should be “place[d] . . . in the positions they would have been if the APA had not been violated”—i.e., “EPA’s postponement” of the 2008 rule is invalid and should not be given effect. *NRDC v. EPA*, 683 F.2d 752, 768 (3d Cir. 1982).

Even if EPA could prevail on the argument that the indefinite stay is valid, the uncertainty surrounding the legal status of the Fugitive Emissions Rule means that MGPI lacked notice that emissions from the whiskey warehouses would be counted towards a major modification determination. EPA stayed the Rule by invoking § 307(d)(7)(B) of the CAA, which permits only a 90-day stay, a deadline which has long since passed. It then “indefinitely” stayed the Rule pending reconsideration, but never took any action towards actually revising it. At best for EPA, the status of fugitive emissions was in limbo. At worst, the stay plainly expired by operation of law.

¹¹ “[T]he provision of post-promulgation notice and comment procedures cannot cure the failure” to promulgate the stay validly in the first place. *NRDC v. EPA*, 683 F.2d 752, 768 (3d Cir. 1982). *See also Abraham*, 355 F.3d at 206 n.14 (agreeing with *NRDC*); *N.J. Dep’t of Envtl. Protection v. EPA*, 626 F.2d 1038, 1049 (D.C. Cir. 1980) (“The Administrator now argues that his provision for post hoc comment ‘cures’ his failure to follow section 553’s procedures. We cannot agree.”). Nor can EPA rely on the good cause exemption, as it took notice and comment on the second of the three stays of the Fugitive Emissions Rule, and did not point to any new circumstances to justify disregarding the requirement to take public comment for the third stay extension.

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Susan M. Tennenbaum
May 26, 2017
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Further adding to the uncertainty, Indiana's SIP, which EPA must approve, is inconsistent with the notion that the stay of the Fugitive Emissions Rule is in effect. Subject to exceptions not relevant here, fugitive emissions are not counted for major modification determinations under the SIP. See 326 Ind. Admin. Code § 2-3-2(g). EPA never issued a SIP call to revise the SIP to conform to its indefinite stay. MGPI cannot be faulted for complying with the plain terms of the Indiana SIP.

* * *

I hope this letter helps you understand the merits of our legal position. Tony and I look forward to discussing it with you and moving forward to resolve this case.

Sincerely,

E. Donald Elliott
E. Donald Elliott
Senior of Counsel

Of Counsel

Tony Sullivan
Barnes & Thornburg LLP
11 S. Meridian St.
Indianapolis, IN 46204
317 231-7472
Tony.Sullivan@btlaw.com

Attachment

EPA Region V's Attack on American Whiskey

Jobs are threatened in Indiana. Are Kentucky and Tennessee next?

MGPI's expansion: environmental improvements and more jobs...

- Kansas-based MGPI bought a former Seagram's distillery in 2011 and invested heavily in improvements that are good for both the environment *and* the local economy.
 - Converted a coal-fired boiler to natural gas
 - Purchased new, energy-efficient driers and centrifuges
 - Installed state-of-the-art emissions control equipment
- Meanwhile, MGPI has built or renovated seven structures to age its whiskey in.
- All of this has created new jobs—employment is on track to double by 2018.

...but a few EPA employees who want to regulate “fugitive emissions” that occur naturally as whiskey ages in oak barrels— reversing 17 years of EPA policy

- In part because of MGPI's pollution-control efforts, air pollution in the Lawrenceburg area has *decreased* significantly in 2015 and Lawrenceburg was removed from the EPA's “non-attainment” list in April, 2017.
- Nevertheless, in May of 2016, MGPI received an “unscheduled” visit from Region V and State inspectors.
- MGPI has since been issued job-killing citations for the unavoidable release of Whiskey vapors from their sealed oak barrels during the whiskey aging process.

“Fugitive emission” of whiskey vapors are *not* pollution.

- This is not about factory smokestack pollution, but rather the small amount of alcohol vapors that seep out of sealed barrels as whiskey ages. These “fugitive emissions” were explicitly exempted from regulation for over 17 years during the Clinton, Bush and Obama Administrations and Congress has given the EPA no new authority to regulate them.
- Traditional charred oak barrels allow whiskey to “breathe” as it ages. A few over-reaching EPA employees in Chicago say this creates smog.
- But Lawrenceburg is a town of 5,042 people in a rural county. Lawrenceburg does not have a problem with smog.

A dangerous precedent.

- MGPI's Lawrenceburg facility is the only major whiskey distillery north of the Ohio River. It is in EPA Region V, which wants to enforce fugitive emissions of whiskey vapors notwithstanding long-standing EPA policy in the rest of the country to the contrary. Kentucky and Tennessee whiskey distillers are in EPA Region IV, which are not subject to any EPA enforcement actions for whiskey vapors.
- Kentucky and Tennessee whiskey distillers are alarmed by what is happening and fear they could be next.
- Region V's actions won't apply to imported whiskeys like Scotch or Irish. They will only hurt American Bourbon and Tennessee whiskeys. This will harm American companies and American workers without doing anything meaningful to control real pollution.
- There is no identified means of capturing fugitive emissions without hurting product quality.

The Solution.

- The EPA should require Region V to stop taking a position that is not only contrary to decades' worth of EPA policy, but would also have grave detrimental effect on the industry.
- The EPA should hand the permitting lead back to the State.
- If the EPA insists on making America's Bourbon distillers capture “fugitive emissions” from whiskey barrels, they should at least give the entire industry advance notice and the opportunity to participate in a dialogue regarding the impact of fugitive emissions on the overall environment, as well as evaluate the existing body of research that clearly indicates the impact of any effort to capture fugitive emissions on quality.