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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,

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.

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[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).

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

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-137-6928-00011 for Joseph E. Seagram & Sons, Inc.*, 2004 OEA 58 (03-A-J-3003), at 64 (Ind. Office of Envtl. 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

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[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/AQ_Ozone_2007_Adopted/28%20Appendix%20K%20April%202007.pdf.

[6] *Available at*: http://www.in.gov/oea/decisions/2004oea58.pdf

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. Kovzan*, No. 11-2017, 2012 WL 4819011, at *5 (D. Kan.

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[7] *Available at* https://www3.epa.gov/ttnchie1/ap42/ch09/bgdocs/b9s12-3.pdf

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).

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[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*

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.

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[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).

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.

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[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.

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
Senior of Counsel

Of Counsel

Tony Sullivan
Barnes & Thornburg LLP
11 S. Meridian St.
Indianapolis, IN 46204
Ex. 6
Tony.Sullivan@btlaw.com

Attachment