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VIA ELECTRONIC MAIL
PatM@village.gurnee.il.us
Patrick Muetz
Village Administrator
Gurnee Village Hall
325 North O'Plaine Road
Gurnee, Illinois 60031

Re: Home Rule Regulation of Ethylene Oxide

Dear Mr. Muetz:

This letter responds to the request by the Village to evaluate whether the Village of Gurnee under its home rule authority can ban or regulate the emissions of ethylene oxide ("EtO") from point sources within its borders. For the reasons as set forth herein, it is my opinion, current Federal and State regulations pertaining to the use and emission of ethylene oxide prevents the Village of Gurnee from enacting ordinances which would ban the use of ethylene oxide within Village boundaries.

The Village of Gurnee ("Village") derives its home-rule powers from the Illinois Constitution of 1970, Article VII, Section 6. The constitution permits municipalities to exercise any power and perform any function pertaining to its government and affairs, except as limited by that section. (Ill. Const. 1970, art. VII, Section 6(a).) Home-rule in Illinois originates from the idea that local problems and issues are usually best addressed at the local level of government. *See* Schillerstrom Homes, Inc. v. City of Naperville, 198 Ill.2d 281, 289–90, 260 Ill.Dec. 835, 762 N.E.2d 494 (2001). Section 6(i) provides that home-rule units may perform concurrently with the State any power or function of a home-rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive. (Ill. Const. 1970, art. VII, Section 6(i).) Illinois courts have consistently recognized these broad powers Scadron v. City of Des Plaines, 153 Ill.2d 164, 174, 180 Ill.Dec. 77, 606 N.E.2d 1154 (1992); City of Evanston v. Create, Inc., 85 Ill.2d 101, 107, 51 Ill.Dec. 688, 421 N.E.2d 196 (1981) (section 6(a) is intentionally imprecise to allow great flexibility in the exercise of home rule power); accord ILCS Ann., 1970 Const., art.

welfare, etc., unless the Illinois General Assembly specifically limits them from doing so. See Ill. Const.1970, art. VII, § 6(h) ("The General Assembly may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit. If the legislature chooses not to act, a local ordinance and a state statute may operate concurrently under article VII, section 6(i). Scadron, 153 Ill.2d at 186, 180 Ill.Dec. 77, 606 N.E.2d 1154(1992); accord City of Chicago v. Roman, 184 Ill.2d 504, 519-20, 235 Ill.Dec. 468, 705 N.E.2d 81 (1998); Village of Bolingbrook v. Citizens Utilities Co. of Illinois, 158 Ill.2d 133, 142, 198 Ill.Dec. 389, 632 N.E.2d 1000 (1994).

The Illinois Supreme Court has traditionally employed a three-part test in reviewing the constitutionality of an exercise of home rule power. Schillerstrom Homes, Inc. v. City of Naperville, 198 Ill.2d 281, 762 N.E.2d 494 (2001). First, the municipal exercise of power must fall within Section 6(a), Article VII which means the exercise must pertain to the municipality's government and affairs. Second, the General Assembly must not have specifically preempted the power or function that the municipality seeks to exercise. Third, if the municipality's exercise of power falls within Section 6(a) and is not specifically preempted by the General Assembly, then it is up to the courts to determine the proper relationship between the local ordinance and the relevant state statute. Schillerstrom Homes, 260 Ill.Dec. 835, 762 N.E.2d at 498-99 (citing County of Cook v. John Sexton Contractors Co., 75 Ill.2d 494, 27 Ill.Dec. 489, 389 N.E.2d 553, 557 (1979), superseded by statute on other grounds as recognized in Village of Carpentersville v. Pollution Control Bd., 135 Ill.2d 463, 142 Ill.Dec. 848, 553 N.E.2d 362, 367 (1990)).

In examining "the proper relationship" between an ordinance and a statute, the Illinois Supreme Court has held that " '[w]hether a particular problem is of statewide rather than local dimension must be decided * * * with regard for the nature and extent of the problem, the units of government which have the most vital interest in its solution, and the role traditionally played by local and statewide authorities in dealing with it.' " City of Chicago v. StubHub, Inc., 2011 IL 111127, ¶ 24 (quoting Kalodimos v. Village of Morton Grove, 103 Ill.2d 483, 501, 83 Ill.Dec. 308, 470 N.E.2d 266 (1984)); *see also* Scadron v. City of Des Plaines, 153 Ill.2d 164, 176, 180 Ill.Dec. 77, 606 N.E.2d 1154 (1992)). Thus, when environmental matters are involved, courts must apply the third prong of the test with an eye toward state primacy. John Sexton Contractors, 27 Ill.Dec. 489, 389 N.E.2d at 559-60; *see also* City of Wheaton v. Sandberg, 215 Ill.App.3d 220, 158 Ill.Dec. 584, 574 N.E.2d 697, 701 (1991) (distinguishing environmental cases from other types of cases with respect to home-rule power). The federal courts have taken the same approach. *See* Village of DePue v Viacom International, Inc., 632 F.Supp.2d 854 (C.D. Ill. 2009) (Where the court found that the environmental regulations of the Village of DePue's established by local ordinance were in conflict with the Illinois Environmental Protection Agency's (IEPA) actions and conflicted with Illinois's uniform standard of environmental protection. The court ultimately held that the local ordinance was unenforceable as an invalid exercise of home-rule authority.) In determining whether an issue is one "pertaining to [home-rule units'] government

and affairs" or is instead a matter of regional or statewide concern, the courts will look to: (1) the nature and extent of the problem that governments are trying to solve; (2) which units of government have the most vital interest in solving it; and (3) the roles traditionally played by local and state authorities in addressing that problem.

While the Illinois Constitution is the source of broad home-rule power that allows home rule municipalities to govern locally in the areas of public health and safety, the state constitution also expressly directs the state to provide a uniform policy for environmental protection. Article XI of the Illinois Constitution provides that it is the public policy of the State and the duty of each person to provide and maintain a healthful environment for the benefit of future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy. The Illinois Supreme Court has interpreted this provision to mean, [T]he General Assembly [will] provide leadership and uniform standards with regard to pollution control.... John Sexton Contractors, 27 Ill.Dec. 489, 389 N.E.2d at 559.

The powers of different levels of government often conflict regarding environmental protection. In general, the state's Environmental Protection Act and regulations under it are the final authority for resolving such conflicts, even involving home-rule units. The Environmental Protection Act was enacted in part because of the Illinois General Assembly's findings that, "because environmental damage does not respect political boundaries, it is necessary to establish a unified state-wide program for environmental protection," and that "[a]ir...pollution and other environmental problems are closely interrelated and must be dealt with as a unified whole in order to safe-guard the environment." 415 ILCS 5/2(a)(ii), (iii).

The Environmental Protection Act is a comprehensive pollution control statute that created a structure and process for adopting and enforcing environmental regulations in Illinois. Three government agencies play vital roles under the Act's structure. They were two executive agencies, the Illinois Institute of Environmental Quality (whose name and structure the General Assembly later changed to the Department of Energy and Natural Resources (DENR)) and the Illinois Environmental Protection Agency, and one independent board, the Illinois Pollution Control Board (Board). Each agency has a distinct function in the rule making process. The IEPA is the primary regulatory language formulation entity in Illinois for two reasons. First, sections 4(j) and (1) of the Act designate the IEPA as the lead agency for the State regarding various federal environmental protection laws (the Bureau of Air is responsible to ensure clean, safe air for Illinois' citizens and the environment. The Bureau of Air monitors and evaluates ambient air quality, develops plans to attain new and existing national ambient air quality standards, runs an air permitting program, regularly inspects sources of pollution, and enforces applicable requirements). The second and more important factor is the significant weight of the IEPA's resources. No other entity in Illinois has the magnitude of resources devoted to the evaluation and control of environmental problems. While the IEPA is primarily responsible for formulating regulatory language, section 5 of the Act delegates primary promulgation authority

to the Board. Under that section: (1) The Board shall determine, define and implement the environmental control standards applicable in the State of Illinois and may adopt rules and regulations in accordance with Title VII of the Act; and (2) The Board shall have authority to act for the State in regard to the adoption of standards for submission to the United States under any federal law respecting environmental protection. Such standards shall be adopted in accordance with Title VII of the Act. The Environmental Protection Act provides further evidence of the recognition of air pollution as a matter of vital statewide concern.

In evaluating the three-part test outlined in Kalodimos and undertaking the "vital interest" analysis, historically, local governments have not enacted regulations related to emission standards for hazardous air pollutants such as EtO or maximum achievable control technology standards. Commercial facilities are a major source of EtO emissions across the State of Illinois and the nation. Federal air regulations have been delegated to the State of Illinois. This is a typical approach throughout the country, where state agencies, like IEPA effectively manage environmental issues in their states. To address air quality problems, stationary sources are subject to permits and emissions limitations. The primary purpose of the operating permit is to set forth the emissions limitations and operating parameters allowable pursuant to the Clean Air Act. Thus the permits generally address ambient and hazardous pollutants. In the case of EtO facilities, the Illinois General Assembly has recently revised those standards and have existing rules for industries that emit ethylene oxide. In fact, Illinois recently passed one of the nation's strictest limits on ethylene oxide emissions from commercial facilities. In addition, the United States Environmental Protection Agency (USEPA) is likewise reviewing and updating Clean Air Act regulations for facilities that emit EtO.

As part of the analysis in evaluating the ability of municipalities to regulate air pollution, various doctrines of preemption must be considered in light of these applicable state and/or federal regulations. The doctrine that a law may cover a subject so comprehensively as to block regulation by lower levels of government, is called implied preemption. This type of preemption focuses more on the purpose of regulation and includes both conflict preemption and field preemption as subcategories. Conflict preemption occurs when a local law conflicts with a state law, especially where it becomes impossible for an entity to comply with both local and state requirements. A further derivative of conflict preemption is obstacle preemption, which occurs where local law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the General Assembly. Field preemption, occurs when state law so thoroughly occupies a legislative field that there are no matters remaining for the local government to regulate. Thus, if a critical examination of the statute reveals an intent by the legislature to preempt the subject into, it is no longer within the government and affairs of the home-rule unit. Additionally, if the review of state statute reveals an intent to preempt only pro tanto or where the state scheme of regulation is not comprehensive, home-rule units may be able to legislate concurrently with the State in those areas not covered by state statue.

Under this framework, whether a municipality can enact concurrent EtO regulations was discussed in a memorandum prepared by the Northwestern Environmental Advocacy Clinic ("Northwestern Memorandum") dated March 8, 2019. The Northwestern Memorandum emphasizes that some Illinois cases have found that to restrict the concurrent exercise of home rule power, the General Assembly must enact a law specifically stating that home rule power is limited, and if it does not expressly do so, a municipal ordinance and a state statute may operate concurrently as provided in article VII, section 6(i). (citing Palm v 2800 Lake Shore Drive Condo. Ass'n, 988 N.E.2nd 75, 81 (Ill.2013) and Village of Bolingbrook v Citizens Utils. Co of Illinois, 632 N.E.2d 1000,1002 (Ill.1994)). In other words, there is no implied preemption of home rule powers and if the legislature intends to limit or deny the exercise of home rule powers, the statute must contain an express preemption statement to that effect. But, as the Illinois Supreme Court noted in Palm, that is not always the case. In environmental regulation cases involving interference with a vital state interest, the Illinois Supreme Court has intervened to compensate for legislative inaction or the oversight of not expressly stating home rule authority is limited, and preempted the exercise of home rule authority based on the specific language in the Illinois Constitution establishing the state's supremacy in that field.

In addition, it must be noted that the Northwestern Memorandum was issued prior to the passage of a new Section 9.16 (415 ILCS 5/9.16) added to the Illinois Environmental Protection Act, which was not considered in the Northwestern Memorandum.

On June 21, 2019, a new section 415 ILCS 5/9.16 (hereinafter referred to Section 9.16) became effective which specifically applies to the EtO facility located in Gurnee. This new Section 9.16, provides as follows:

§ 9.16. Nonnegligible ethylene oxide emissions sources.

a) In this Section, "nonnegligible ethylene oxide emissions source" means an ethylene oxide emissions source permitted by the Agency that currently emits more than 150 pounds of ethylene oxide as reported on the source's 2017 Toxic Release Inventory and is located in a county with a population of at least 700,000 based on 2010 census data. "Nonnegligible ethylene oxide emissions source" does not include facilities that are ethylene oxide sterilization sources or hospitals that are licensed under the Hospital Licensing Act or operated under the University of Illinois Hospital Act.
b) Beginning 180 days after the effective date of this amendatory Act of the 101st General Assembly, no nonnegligible ethylene oxide emissions source shall conduct activities that cause ethylene oxide emissions unless the owner or operator of the nonnegligible ethylene oxide emissions source submits for review and approval of the Agency a plan describing how the owner or operator will continuously collect emissions information. The plan must specify locations at the nonnegligible ethylene oxide emissions source from which emissions will be collected and identify equipment used for collection and analysis, including the individual system components.

1) The owner or operator of the nonnegligible ethylene oxide emissions source must provide a notice of acceptance of any conditions added by the Agency to the plan or correct any deficiencies identified by the Agency in the plan within 3 business days after receiving the Agency's conditional acceptance or denial of the plan.
2) Upon the Agency's approval of the plan the owner or operator of the nonnegligible ethylene oxide emissions source shall implement the plan in accordance with its approved terms.

c) Beginning 180 days after the effective date of this amendatory Act of the 101st General Assembly, no nonnegligible ethylene oxide emissions source shall conduct activities that cause ethylene oxide emissions unless the owner or operator of the nonnegligible ethylene oxide emissions source has performed dispersion modeling and the Agency approves the dispersion modeling.

1. Dispersion modeling must:
(A) be conducted using accepted United States Environmental Protection Agency methodologies, including Appendix W to 40 CFR 51, except that no background ambient levels of ethylene oxide shall be used;
(B) use emissions and stack parameter data from any emissions test conducted and 5 years of hourly meteorological data that is representative of the nonnegligible ethylene oxide emissions source's location; and
(C) use a receptor grid that extends to at least one kilometer around the nonnegligible ethylene oxide emissions source and ensures the modeling domain includes the area of maximum impact, with receptor spacing no greater than every 50 meters starting from the building walls of the nonnegligible ethylene oxide emissions source extending out to a distance of at least 1/2 kilometer, then every 100 meters extending out to a distance of at least one kilometer.
2. The owner or operator of the nonnegligible ethylene oxide emissions source shall submit revised results of all modeling if the Agency accepts with conditions or declines to accept the results submitted.

(d) Beginning 180 days after the effective date of this amendatory Act of the 101st General Assembly, no nonnegligible ethylene oxide emissions source shall conduct activities that cause ethylene oxide emissions unless the owner or operator of the nonnegligible ethylene oxide emissions source obtains a permit consistent with the requirements in this Section from the Agency to conduct activities that may result in the emission of ethylene oxide.

(e) The Agency in issuing the applicable permits to a nonnegligible ethylene oxide emissions source shall:

1) impose a site-specific annual cap on ethylene oxide emissions set to protect the public health; and
2) include permit conditions granting the Agency the authority to reopen the permit if the Agency determines that the emissions of ethylene oxide from the permitted nonnegligible ethylene oxide emissions source pose a risk to the public health as defined by the Agency.

Reviewing the provisions of Section 9.16, all the regulations set forth therein apply to the EtO facility operated by Vantage Specialty Chemicals Inc. located in Gurnee. Specifically, subparagraph (a) defines "nonnegligible ethylene oxide emissions source" to mean those

facilities which (i) emitted more than 150 pounds of EtO as reported in 2017; (ii) facilities that were not otherwise classified as a sterilization source or hospital; and (iii) are located in an Illinois county which had a population of at least 700,000 residents based on 2010 census data. Applying this definition to facilities located within the State of Illinois, only 3 out of 102 counties had populations greater than 700,000 people in 2010 (Cook, DuPage and Lake Counties) and only one facility in Lake County, the facility operated by Vantage Specialty Chemicals Inc. is a facility not otherwise classified as a sterilization source or hospital.

Equally important, Section 9.16 sets forth specific regulations pertaining to the emissions of ethylene oxide, including imposing an annual limit for EtO emissions; requiring dispersion modeling from the facility; the reporting of dispersion modeling results to the IEPA; and other requirements. Based on these requirements, the regulations of Section 9.16 represent a comprehensive scheme of regulations which would prevent the Village from adopting additional or alternative regulations on the subject matter covered by Section 9.16. Simply put, the State of Illinois has a vital interest in and has had a traditionally exclusive role in regulating air pollution in this State, including the emissions of ethylene oxide.

Moreover, even assuming, the Village could avail itself of experts to review and evaluate the data which is required for submission to the IEPA under Section 9.16, the Village is not able to enact conflicting regulations as the implantation of home rule standards on ethylene oxide emissions would render the Clean Air Act Permit Program useless, especially given that emissions dispersion depends, inter alia., on atmospheric factors and wind. (*See* O'Connor v. City of Rockford (1972), 52 Ill.2d 360; Carlson v. Village of Worth (1975), 62 Ill.2d 406, and Metropolitan Sanitary District v. City of Des Plaines (1976), 63 Ill.2d 256, all of which were decided in part on the fact that the Environmental Protection Agency had issued permits for the particular operation at issue in those cases and the majority concluded that the local governmental unit could not require compliance with the local ordinance.)

Accordingly, this opinion considers the authority of a home-rule municipality to essentially superimpose the requirements of its own environmental protection ordinance upon the holder of a permit for the operation of an EtO emissions facility issued by the IEPA pursuant to the Environmental Protection Act. While air pollution may initially appear to be a matter of local concern, an analysis of the problem reveals that air pollution is a matter requiring not only statewide, but national standards and controls. As noted above, discharge of EtO emissions presents a state and national problem. As with other pollution which may emanate from a local source and then travel outward to foul an entire area or region, air pollution also extends beyond its source. This was recognized by the Local Government Committee of the 1970 constitutional convention which reported that "Control of air and water pollution, flood plains and sewage treatment are often cited as important examples of areas requiring regional or statewide standards and control" (7 Proceedings 1642). That similar sentiment was expressed during debates on the convention floor (4 Proceedings 3094-95, 3335). We further note that in regard to the General

Assembly's leadership role in the solution of environmental pollution, the General Government Committee wrote: "There are myriad problems which must be overcome in this effort to preserve our environment. Not least among these is the problem of duplication of efforts. It is essential to the cause that the inter and intra governmental efforts complement one another, that there be a coordinated plan of action with uniform standards". (6 Proceedings 700) Such language does not suggest that it was the intent of the constitutional framers that home rule municipalities possess the power to regulate regional, statewide or national environmental problems. Regarding the unit of government which has the most vital interest in solving the problem, courts have consistently found a State's interest will outweigh the interest of a unit of local government.

Therefore, based on the above analysis, it is my opinion that the Village of Gurnee does not have the authority under current law to ban the use and/or emissions of the chemical ethylene oxide at a facility which is located within the boundaries of the Village.

Very truly yours,

KLEIN, THORPE AND JENKINS, LTD.

Dennis Walsh