

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

NOVEON, INC.)	
)	
Petitioner,)	
)	
v.)	PCB 2004-102
)	(CAAPP Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,)	
)	
Respondent.)	

NOTICE

To:	John Therriault, Assistant Clerk Illinois Pollution Control Board 100 West Randolph Street Suite 11-500 Chicago, Illinois 60601	Roy M. Harsch Steven J. Murawski Gardner Carton & Douglas 191 N. Wacker Drive Suite 3700 Chicago, Illinois 60606-1698
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Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 West Randolph Street
Chicago, Illinois 60601

PLEASE TAKE NOTICE that today I electronically filed with the Office of the Clerk of the Illinois Pollution Control Board the **RESPONSE TO NOVEON'S MOTION TO SUPPLEMENT THE RECORD** and **AFFIDAVIT** of the Respondent, Illinois Environmental Protection Agency, a copy of which is herewith served upon the assigned Hearing Office and the attorney for the Petitioner.

Respectfully submitted by,

_____/s/_____
Sally Carter
Assistant Counsel

Dated: January 29, 2008
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

NOVEON, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 2004-102
)	(Permit Appeal - Air)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

RESPONSE TO NOVEON'S MOTION TO SUPPLEMENT THE RECORD

The Respondent, Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"), by and through its attorneys and pursuant to 35 Ill. Adm. Code 101.500(d), files with the Illinois Pollution Control Board ("Board") this Response to Noveon's ("Noveon") Motion to Supplement the Record in this cause.

1. Acting in accordance with its authority under the Clean Air Act Permit Program ("CAAPP") provisions of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/39.5(2002), the Illinois EPA issued a CAAPP permit to Noveon on November 24, 2003. The permit authorized the operation of an organic chemical manufacturing plant located in rural Henry, Marshall County, Illinois.

2. On December 24, 2003, Petitioner filed a petition before the Board challenging certain permit conditions contained within the CAAPP permit issued by the Illinois EPA. The significant issue for purposes of this appeal, and particularly, for this Response, is Petitioner's challenge that the facility's condensers in the MBT-C process are not subject to 35 Ill. Adm. Code 214.301 by virtue of the exemption found in 35 Ill. Adm. Code 214.382 (hereinafter referred to as the "SO2 issue").

3. On March 29, 2007, the parties participated in a status call with the Hearing Officer, wherein the Petitioner represented it would likely be withdrawing all outstanding issues but the SO₂ issue. *See, Hearing Officer Order*, dated March 29, 2007. To date, Petitioner's counsel has not yet filed a Motion to Voluntarily Dismiss the remaining issues, however, Petitioner's counsel reiterated its intention to drop all contested issues excluding the SO₂ issue in a status call with the Hearing Officer most recently on January 24, 2008. *See also, Motion at page 3, ¶ 4.*

4. Given that other information relied upon by the Illinois EPA was not relevant to the SO₂ issue but involved other non-contested sections of the CAAPP permit or contested sections of the CAAPP permit that will be withdrawn by Noveon, and involved a considerable amount of additional material, the Illinois EPA filed a Motion for Leave to File Partial Administrative Record ("Motion for Leave") to limit the Administrative Record to the SO₂ issue. The Illinois EPA filed its Motion for Leave and submitted its Administrative Record to the Board on April 27, 2007. Petitioner represented it had no objection to the Motion for Leave in a July 26, 2007, status call with the Hearing Officer. *See, Hearing Officer Order, dated July 26, 2007.*

5. The Administrative Record included a Public Version, (ie., Volume I), and a Trade Secret Version, (ie., Volume II) of the Record that generally included Noveon's CAAPP permit application, correspondence received by or exchanged with Petitioner and, except for matters within its institutional knowledge, those documents that were relied upon by the Illinois EPA's Division of Air Pollution Control ("DAPC")/ Permit Section in the issuance of the CAAPP permit, particularly relevant to the SO₂ issue. Documentation contained within the Administrative Record was arranged

chronologically, beginning with the submittal of the CAAPP permit application on March 7, 1996 and running through the date of the CAAPP permit's issuance on November 24, 2003. The inclusion of such material in the Administrative Record fulfilled the express requirements of 35 Ill. Adm. Code 105.302(f) requiring the filing consist of "the CAAPP permit application, the hearing record, the CAAPP permit denial or issuance letter, and correspondence with the applicant concerning CAAPP permit application".

6. Case law authorities and prior Board rulings make clear that the Record for a permitting decision must include materials generally relied upon the Illinois EPA in its decision. *Joliet Sand and Gravel v. Illinois Environmental Protection Agency*, PCB 86-159, (February 5, 1987) at page 5. In this instance, the existence of prior permitting decisions relating to the MBT-C process and particularly, the treatment of the SO₂ issue, was known to the applicant and was likewise part of the Illinois EPA's institutional knowledge. However, the notion that the Illinois EPA relied upon those earlier permits in reaching its CAAPP permitting decision defies logic. The latter decision contradicted the Illinois EPA's historical interpretation of the SO₂ issue. It did not, however, draw upon those permits, for support or sustenance. The Illinois EPA's recent departure from its earlier decisions, which appears to serve as the pretext for Petitioner's Motion, must stand or fall on whether it is reasoned and supported by applicable law and regulations. *Compare, Alton Packaging Corp. v. PCB*, 516 N.E. 2d 275, 280 (5th Dist. 1987) (review of permitting decisions held to a consideration of material relied upon by the Illinois EPA). And as such, no part of these earlier decisions (ie., operating permits) found their way into the instant CAAPP permit.

7. Petitioner now contends that the Illinois EPA is, in the absence of any

reliance on such material by the Agency, required to supplement the Administrative Record for the subject application with materials from prior permit applications submittals. Consistent with the principle that the Illinois EPA had no authority to act until it received an application from the applicant, (ie., one application – one decision), the Illinois EPA's Record for this appeal from a CAAPP permit began with the submittal of the CAAPP permit application on March 7, 1996 through the date of the permit's issuance on November 24, 2003. *See, Knapp Oil Company, Don's 66 v. Illinois Environmental Protection Agency*, PCB 06-52 (June 21, 2007) (denying motion to supplement record as submitting documents related to "a prior corrective action plan (CAP) submitted to the Agency for approval."). Similar to the Board, the Illinois EPA is a creature of statute with no independent authority to act until an appeal, or in the case of the Agency, an application is pending before it. *See, Reichold Chemicals v. Illinois Pollution Control Board*, 204 Ill. App.3d 674, 677-678, 149 Ill. Dec. 647, 561 N.E.2d 1343, 1345-1346 (3rd Dist. 1990) (administrative agencies possess no inherent authority to act but must be authorized by statute to perform specified act); *accord., Caterpillar Tractor Company v. Illinois EPA*, PCB 79-180, (July 14, 1983) ("Agency has no jurisdiction to issue any subsequent permits once the disputed permit has been appealed to the Board, just as the Board has no authority to modify its Orders once they have been appealed to the courts.").

8. Petitioner seizes upon the Illinois EPA's inclusion of two memorandums in the record from 1993 that pre-dated the application's submittal on March 7, 1996, in an attempt to bolster their argument that the Illinois EPA has selectively inserted documents in the Record. This argument is not substantiated by the

Record. Closer scrutiny of the 1993 memorandums and their placement in the Administrative Record reveals the consistent approach taken by the Illinois EPA. In this regard, each 1993 memorandum addressed an earlier state operating permit application and was merely an attachment to a memorandum generated in 2001 from the assigned permitting analyst. *See, Administrative Record* (the documents were collectively referred to as “Memorandum from Don Sutton to Julie Armitage, dated January 12, 2001, and attachments. [Pages 1473 - 1479]”). The two 1993 memorandums were included in the Record because they were physically attached to a document generated during review of the permit application. If the memorandums had not been instructive to the 2001 memorandum, they would not have been tied to, or otherwise connected with, the CAAPP permit application. The placement of the two 1993 memorandums in the Record are consistent with the Board’s procedural rule that the Illinois EPA’s answer shall consist of the “entire Agency record of the CAAPP application. . . .”. 35 Ill. Adm. Code 105.302(f).

9. The additional documents referenced by Petitioner in its Motion to Supplement, however, were not included in the CAAPP file for Application No. 96030152 but rather were included in the state operating permit file for Application No. 72110935.¹ *See, Motion at page 3-4, ¶5.* As such, these documents were not part of the

¹ The state operating permit file references one application number, 72110935 but, in fact, includes a number of separate permit applications, supporting materials and resulting permits that were issued for the SO₂ process. Self-contained and referencing the same application number (72110935) the file contains a separate administrative record for each permitting decision consistent with 35 Ill. Adm. Code 105.212(b).

Petitioner’s reference to the statement in the April 1993 attachment, particularly, to page 1477, that “[a]ttached are copies of former analysis notes and some responses from BFG to inquiries” were not included in the Record is accurate. *See, Motion at page 4, ¶ 5.* These documents were never attached to the 2001 Memorandum from the assigned permitting analyst. Consequently,

“entire Agency record of the CAAPP application” and were not included in the CAAPP permit record.

10. Although Petitioners place significant emphasis on the Board’s May 18, 1995, Order in *Jack Pease, d/b/a Glacier Extraction v. Illinois Environmental Protection Agency*, PCB 95-118, to support their claim that the “‘entire record’ essentially includes everything existing in the Illinois EPA’s files that pre-dates the final decision on the permit”, the decision did not, in fact, contemplate the matter-at-hand. In *Jack Pease*, the petitioner challenged the Illinois EPA’s denial of a “non-NPDES mine-related pollution control permit” pursuant to Section 40(a) of the Act. *Jack Pease, d/b/a Glacier Extraction v. Illinois Environmental Protection Agency*, PCB 95-118 (July 20, 1995).

The *Jack Pease* petitioners sought to supplement the Administrative Record with certain documents that were in the permit file for the pending application²; the Agency opposed their inclusion on the basis that the record was specifically limited to the permit application, the correspondence between the applicant and the Agency, and the denial letter from the application file. The Board agreed with the petitioners, finding that:

While the Board’s procedural rule at Section 105.102(a)(4) sets forth the minimum information that the Agency must provide as the “record” in a permit appeal, there is nothing in the rule limiting the record solely to the permit application, the correspondence between the applicant and the Agency, and the denial letter. The rule states that the ‘entire record’ shall be filed with the Board

the referenced documents were only included in the state operating permit file 72110935, not the Tile V file 96030152.

² The request to supplement included: “(1) correspondence from 33 elected officials and citizens to the Agency . . . ; (2) 31 letters from the Agency to the elected and citizens . . . ; (3) information requested by Glacier pursuant to the Freedom of Information Act which was denied by the Agency on ‘investigatory records’ grounds . . . ; (4) September 28, 1994 ‘Complaint Receipt and Report Form’ . . . ; (5) and October 28, 1994 Analytical results of samples taken at Glacier Lake Gravel Pit on September 28, 1994 compiled by the Agency.” *Jack Pease, d/b/a Glacier Extraction v. Illinois Environmental Protection Agency*, PCB 95-118 (May 18, 1995) at fn. 1.

and from our review of the documents, each pre-dates the Agency's final denial letter of February 24, 1995, and the documents therefore, were in the Agency's files, and available to the Agency when making its permitting decision. To the extent the Agency did not rely on any such documents when it made its determination, it can make those arguments at hearing.³

Jack Pease, d/b/a Glacier Extraction v. Illinois Environmental Protection Agency, PCB 95-118 (May 18, 1995) at page 2.

11. As this discussion makes evident, the Board's decision was based on material in the Illinois EPA's permitting files, that merely corresponded to the actual decision pending Board review. This decision did not contemplate the inclusion of materials in the record that pre-dated the application's submittal. Nor does the Board's decision envision that its permit review of a CAAPP permit will be based on information contained within the previous state operating permit files that are each centered on its own distinct application material, correspondence and most importantly, Agency decision. The Board's procedural rules clearly contemplate that a separate record exists for each permitting decision and corresponding application. For CAAPP permit appeals, 35 Ill. Adm. Code 105.302(f) requires the submittal of the "entire Agency record of the CAAPP application", while 35 Ill. Adm. Code 105.212(b) requires a record for "any

³ While in the context of documents in the application file corresponding to the decision pending review, the Board stated that the Illinois EPA could argue it did not rely upon said documents at hearing rather than excluding such documents. *See, Pease, supra*. However, in circumstances more similar to the pending appeal, the Board has, instead, denied the request to supplement the record. For instance, the Board denied the motion to supplement the record in *Knapp Oil Company* finding that the tendered documents were not "correspondence, documents or materials related to the application that is the subject of this appeal," but related to a "prior corrective action plan (CAP) submitted to the Agency for approval." *See, Knapp Oil Company, Don's 66 v. Illinois Environmental Protection Agency, PCB 06-52 (June 21, 2007)*. Meanwhile in *Land and Lakes Company*, the Board denied a motion to supplement the record with information from other permit files for the same applicant but different facilities because "[t]he Board will not put itself in the position of second-guessing the Agency's permit decision based upon information in other permit files in the Agency's possession." *Land and Lakes Company v. Illinois Environmental Protection Agency, PCB 90-118 (November 8, 1990) at page 3.*

permit application or other request that resulted in the Agency's decision" for non-CAAPP permit appeals.

12. Moreover, the Illinois EPA's decision to include the 2001 memorandum and all accompanying attachments in the Record should not subject the Illinois EPA's CAAPP permit decision to Board review based on material that not only clearly pre-dates the CAAPP permit application's submittal but only exists in files from previous application submittals and permitting decisions. If the Board were to allow the Record to be supplemented in such a fashion, the Board would risk interjecting all previous state operating permits for this condenser dating back to the early 1970s. Prior permitting decisions of the Illinois EPA are not before the Board today. *Accord., Panhandle Eastern Pipe Line v. Illinois Environmental Protection Agency*, PCB 98-102 (January 21, 1999) at page 11 (prior permitting decisions of the Illinois EPA were not subject to Board review as the permittee did not appeal these decisions when originally issued by the Agency).⁴

13. For purposes of Noveon's claim that the Illinois EPA held a contrary permitting position for approximately twenty years with regard to the applicability of 35 Ill. Adm. Code 214.382, the Illinois EPA concedes the point.⁵ *See, attached affidavit of Dan Punzak.* When coupled with the Illinois EPA's admission that it previously

⁴ To open up prior permitting decisions of the Agency suggests that for every CAAPP appeal presently before the Board, the Agency is obligated to include each and every underlying permitting decision in the Administrative Record regardless of whether the Agency explicitly relied upon it or not. Such an approach would be unduly burdensome on the Illinois EPA; it could potentially require the Agency to copy files for countless permitting decisions prior to receipt of the CAAPP permit application in the Administrative Record for the CAAPP permit. Moreover, it would enhance the administrative burden on the Board, particularly the maintenance and storage of countless additional boxes for each pending CAAPP permit appeal.

⁵ The Board may also take official notice of past permits pursuant to 35 Ill. Adm. Code 101.630.

concluded in the applicability of 35 Ill. Adm. Code 214.382 to the source, is readily apparent that supplementing the Record will do little to further substantiate Noveon's apparent estoppel claim. *See, Motion at page 2, ¶3.* The Board has previously declined to supplement the Record based, in part, on the Illinois EPA's decision not to contest representations relevant to Petitioner's claims of estoppel. *See, White & Brewer Trucking, Inc. v. Illinois EPA, PCB 26-250 (March 20, 1997) at page 4* ("Supplementing the record with such documents is especially unwarranted given that the Agency has not contested White & Brewer's claims about those representations."). Apart from the disparate treatment of the SO₂ issue between the earlier state operating permits and the recent CAAPP decision, Petitioner offers no explanation as to why the proffered documents should be incorporated into the Record. Indeed, there is no reason to believe that the historical permitting documents are of any probative value beyond the point already conceded by the Illinois EPA.

WHEREFORE, the Illinois EPA respectfully requests that the Board deny Noveon's Motion to Supplement the Record.

Respectfully submitted by,

/s/
Sally Carter
Assistant Counsel

Dated: January 29, 2008
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of January 2008, I electronically filed the following instrument **RESPONSE TO NOVEON'S MOTION TO SUPPLEMENT THE RECORD** and **AFFIDAVIT** to:

John Therriault, Assistant Clerk
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

I further hereby certify that on the 29th day of January 2008, I did send, a true and correct copy of the same foregoing instrument, by electronic mail and by First Class Mail with postage thereon fully paid and deposited into the possession of the United States Mail, to:

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph Street
Chicago, Illinois 60601
hallorab@ipcb.state.il.us

Roy M. Harsch
Steven J. Murawski
Gardner Carton & Douglas
191 N. Wacker Drive
Suite 3700
Chicago, Illinois 60606-1698
Roy.Harsch@dbr.com

_____/s/_____
Sally Carter
Assistant Counsel

STATE OF ILLINOIS
COUNTY OF SANGAMON

AFFIDAVIT

I, Dan Punzak, being first duly sworn, depose and state that the following statements set forth in this instrument are true and correct, except as to matters therein stated to on information and belief and, as to such matters, the undersigned certifies that he believes the same to be true:

1. I am employed by the Illinois Environmental Protection Agency ("Illinois EPA") as a permit analyst for the Division of Air Pollution Control's ("DAPC") Air Permit Section located at 1021 North Grand Avenue East, Springfield, Illinois. I have been employed by the Illinois EPA since 1978.

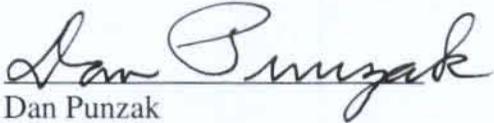
2. As a permit analyst for the Illinois EPA's Clean Air Act Permit Program ("CAAPP") Unit, my primary job responsibility is to conduct reviews of CAAPP permit applications for major sources of air pollution. Among other things, I prepare draft and final versions of CAAPP permits. I am also involved in directing communications with permit applicants and interested persons in the permitting process, and researching, as necessary, available records and documents and other associated work tasks.

3. As part of my responsibilities in the CAAPP Unit, I became the assigned permitting analyst in the Illinois EPA's review of a permit application, CAAPP Application No. 96030152 involving Noveon, Inc. for its operation of its Organic Chemical Manufacturing Plant in Henry, Illinois.

4. Based on my recent review of the permitting file for Operating Permit No. 72110935 for the Accelerator Crude Process, since at least 1975 through 1993, the Illinois EPA issued permits authorizing the source to operate the process exempt from the

requirement in 35 Ill. Adm. Code 214.301 based on the applicability of 35 Ill. Adm. Code 214.382.

Further affiant sayeth not.


Dan Punzak

Subscribed and sworn
To Before Me this 29th Day of January 2008

