

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

NOVEON, INC. )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 ILLINOIS ENVIRONMENTAL )  
 PROTECTION AGENCY, )  
 )  
 Respondent )

PCB 04-102  
(Permit Appeal – Air)

**RECEIVED**  
CLERK'S OFFICE  
JAN 24 2008  
STATE OF ILLINOIS  
Pollution Control Board

**NOTICE OF FILING**

TO: Bradley P. Halloran  
Hearing Officer  
Illinois Pollution Control Board  
James R. Thompson Center, Suite 11-500  
100 W. Randolph Street  
Chicago, IL 60601

Sally A. Carter  
Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
P.O. Box 19276  
Springfield, IL 62794-9276  
[Sally.Carter@illinois.gov](mailto:Sally.Carter@illinois.gov)

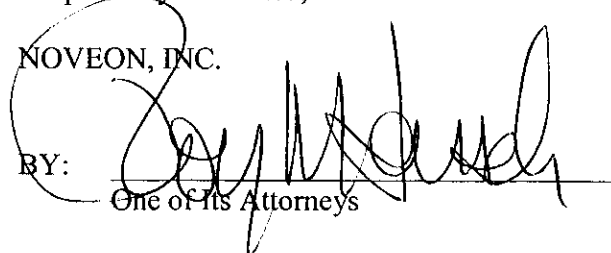
**PLEASE TAKE NOTICE** that on **Thursday, January 24, 2008**, we filed the attached **Notice of Filing and Motion to Supplement The Record** with the Hearing Officer, a copy of which is herewith served upon you.

Respectfully submitted,

NOVEON, INC.

BY:

One of its Attorneys



Roy M. Harsch, Esq. ARDC #1141481  
DRINKER BIDDLE GARDNER CARTON, LLP  
191 N. Wacker Drive – Suite 3700  
Chicago, IL 60606  
312-569-1441

**THIS FILING IS BEING SUBMITTED ON RECYCLED PAPER**

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED  
CLERK'S OFFICE

JAN 24 2008

Noveon, Inc. )  
)  
Petitioner, )  
)  
v. )  
)  
Illinois Environmental Protection Agency, )  
)  
Respondent. )

PCB 04-102

(Permit Appeal - Air)

STATE OF ILLINOIS  
Pollution Control Board

**PETITIONER NOVEON'S MOTION TO SUPPLEMENT THE RECORD**

Petitioner, Noveon, Inc. ("Petitioner"), hereby moves to supplement the record before the Illinois Pollution Control Board ("Board") with certain documents that the Illinois Environmental Protection Agency ("IEPA") relied upon in making its determination as to Petitioner's application for its Clean Air Act Permit Program ("CAAPP") permit, but which documents were not included in the IEPA's compilation of the record. In support of its Motion, Petitioner states as follows:

1. On March 7, 1996, IEPA received a timely application for a CAAPP permit (Application No. 96030152) for Petitioner's facility located at 1550 County Road, 1450 N, Henry, Illinois, Facility ID No. 123803AAD ("Facility"). The Facility manufactures organic chemicals, specifically antioxidants and accelerators to be used in the manufacture of rubber and plastics, coatings used in the electronics industry and personal care products used for personal hygiene such as hair conditioners.

2. On September 17, 2003, the IEPA issued a draft CAAPP permit to the Facility and opened the 30-day public comment period soliciting comments about that permit. During the public comment period, Petitioner submitted detailed comments to the IEPA regarding certain draft permit conditions (“Comment Letter”). On November 24, 2003, the IEPA issued a final CAAPP permit that became effective upon issuance. While the IEPA modified some conditions of the final CAAPP permit in response to Petitioner’s Comment Letter, it did not modify the final CAAPP permit to respond to all of Petitioner’s significant comments. Petitioner filed the instant permit appeal, claiming that IEPA’s failure to modify the final CAAPP permit, as requested, is inconsistent with the Illinois Environmental Protection Act and the corresponding regulations.

3. While there are several issues involved in the permit appeal, for the purposes of this Motion, the relevant issue is the exemption concerning regulation of SO<sub>2</sub> emissions that the IEPA had historically applied to the Facility. This exemption applied because the Facility’s processes are of the type excluded from the general SO<sub>2</sub> emission limitation of 2000 ppm since the Board promulgated the original rules as *Rule 204(f)* and updated those rules since then as 35 IAC §§ 214.301 and 214.382. Furthermore, the IEPA has historically been aware of the Facility’s ability to remove sulfur compounds from the flue gases of its petrochemical processes so that the general 2000 ppm SO<sub>2</sub> emission limitation clearly did not apply. In fact, the IEPA has approved the Facility’s position on numerous occasions informally, after inquiry, and formally, in past permits.<sup>1</sup>

---

<sup>1</sup> As set forth in detail in Petitioner’s Petition for CAAPP Permit Appeal, the IEPA is attempting (without any apparent or clear technical, legal or policy basis), through the CAAPP permitting process, to withdraw its historical recognition and acceptance of Petitioner’s sulfur removal process design. Since at least 1975, the Facility has operated its processes designed to remove

4. As required under the Act and applicable Board regulations, IEPA prepared the Record on Appeal and submitted the Record to the Board on April 26, 2007. Pursuant to an agreement with Petitioner, the IEPA filed only those documents that were relevant to this issue regarding the applicability of the exemption to Petitioner's facility. Petitioner is in the process of preparing an appropriate motion to either strike or withdraw the other issues which were raised in its Petition.

5. Upon receipt of the Record, Petitioner reviewed the documents that were included in the Record and found two internal Memoranda that predate the filing of the CAAP Application on March 7, 1996 which pertain to the issue of whether Petitioner is entitled to the exemption. These documents are a Memorandum with the subject of Request for Legal Interpretation of Rule 214 Subpart K from Don Sutton and Dan Punzak to Robert Sharpe, dated April 13, 1993 (Record 001477-001479) and a Memorandum with the subject of Legal Interpretation of Rule 214 Subpart K, from Rachel Doctors to Kathleen Bassi, dated May 13, 1993 (Record 001474-00176). These internal IEPA documents are clearly relevant to the issue on appeal and were included in the record by the IEPA as part of the basis for IEPA's permitting analysis and decision. These documents pertain to the issuance of a renewal of the state operating permit NO. 72110935 for the facility ( See Record 001477 ). Furthermore, these

---

sulfur compounds from the flue gases of petrochemical processes pursuant to Operating Permits issued by the IEPA. This operational configuration has historically relied upon in exempting the Facility from the general SO<sub>2</sub> emission limitation of 2000 ppm found at 35 IAC § 214.301. In the present appeal, Petitioner contends that the Facility remains exempt from the general SO<sub>2</sub> emission limit of 2000 ppm in 35 IAC § 214.301 pursuant to 35 IAC § 214.382(a) because its existing processes qualify as systems designed to remove sulfur compounds from the flue gases of petrochemical processes. Therefore, the IEPA's new position and the related CAAPP permit conditions cannot be justified. *See generally*, Petition, at 7-8.

documents clearly state that the IEPA had questioned the application of the exemption as part of the application for an operating permit in 1973, subsequent issuance in 1975 and subsequent issuance of operating permit renewals in 1975, 1978, 1983 (See Record 001474). Finally the Request for Legal Interpretation of Rule 214 Subpart K, from Don Sutton and Dan Punzak to Robert Sharpe, dated April 13, 1993, states that: "Attached are copies of former analysis notes and some responses from BFG to inquiries." (See Record at 001477). These referenced attachments are not included in the Record that was filed by IEPA.

6. Clearly, these earlier internal IEPA documents contained in the operating permit file relate to the issue of whether the Facility, in the opinion of IEPA personnel, qualified for the SO<sub>2</sub> emission exemption.

7. Petitioner was not aware of the existence of these two Memoranda nor the apparent concern regarding the application of the exemption prior to the filing of its CAAP application. As will be established by testimony at hearing, these documents were not produced by IEPA in response to a Freedom of Information Act ("FOIA") request submitted to review the operating permit files in advance of the preparation of the CAAP application. Nor were they produced by IEPA in response to a FOIA request submitted to review the operating permit files as they pertain to the exemption issue which was submitted during the pendency of the CAAP application when it became apparent that IEPA did not then believe the exemption applied.

8. Upon review of the record, Petitioner began discussions with the Attorney for the IEPA regarding the previous IEPA internal documents from the operating permit files that had not been included in the Record as filed. In lieu of formal discovery pursuant to agreement of Council, Ms. Carter sent a letter dated October 3, 2007, voluntarily providing a number of documents from the operating permit files pertaining to the process. This letter and its enclosures

are found at Exhibit A to this Motion. Petitioner requests that Attachment A be included in the Record as a supplement to that which was filed by the IEPA. These documents are clearly relevant to the issue at hand, were referenced in documents included in the Record by IEPA and may in fact have been actual attachments to one such document. Thus, while some of the documents from the operating permit file relevant to the SO<sub>2</sub> emission exemption were included in the Record, the IEPA, in preparing the Record, apparently picked and chose among a group of relevant documents when preparing the Record it submitted.

9. Under applicable Board regulations for CAAPP permit appeals, the IEPA has the responsibility for preparing the Record, and within 30 days after service of the appeal petition, must file “an answer consisting of **the entire Agency record** of the CAAPP application including the CAAPP permit application, the hearing record, the CAAPP permit denial or issuance letter, and correspondence with the applicant concerning the CAAPP permit application.” (emphasis added). 35 Illinois Adm. Code 105.302(f).

10. Board decisions interpreting the scope of the IEPA’s duty to prepare the Record and what it must contain have held that “the entire record” essentially includes everything existing in the IEPA’s files that pre-dates the final decision on the permit. *See, e.g., Jack Pease, d/b/a Glacier Lake Extraction v. Illinois Environmental Protection Agency*, PCB 95-118, 1995 WL 314505 (May 18, 1995). Thus, the IEPA is not allowed to pick and choose among documents in its file to determine what it would like to include in the Record, and what it would like to exclude. Even if the IEPA might intend to argue before the Board that certain documents may not be relevant to the issue on appeal, in that the IEPA did not “rely” on such documents in making its permit decision, such a position is not grounds for excluding such documents. As the

Board has stated, "To the extent the [Illinois EPA] did not rely on any such documents when it made its determination, it can make those arguments at the hearing." *Id.*

11. The Board has also previously held that petitioners have broad latitude in requesting that the Record be supplemented in cases where the Record prepared by the IEPA is incomplete. For example, in *Joliet Sand and Gravel v. Illinois Environmental Protection Agency*, PCB 86-159, 1987 WL 55908 (February 5, 1987), the Board held that:

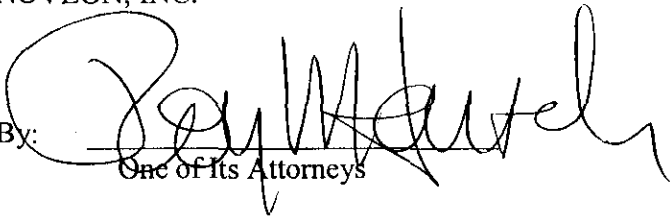
To the extent that the [Illinois EPA] has relied upon information beyond that contained in the application, such information must be included in the permit record filed with the Board; if it is not, the applicant may properly submit such information to the Board during the course of the Board's hearing. Additionally, if there was information in the [Illinois EPA's] possession upon which it reasonably should have relied, the applicant may also submit such information to the Board for the Board's consideration.

12. The specific documents in Exhibit A that Petitioner seeks to add to the Record are all part of the IEPA's operating permit file. As noted above, these documents relate to the internal discussions and analysis of SO<sub>2</sub> emission exemption. While some documents from the operating permit file were included in the Record, most of the documents in Exhibit A were not. The operating permit program for major sources was replaced by the CAAP program. Not only should these documents have been included in the Record simply due to their presence in the IEPA air pollution permit files, *Jack Pease, supra*, but these documents are of the type that IEPA relied on, or should have relied on, in making its permitting decision. *Joliet Sand and Gravel, supra.*

**WHEREFORE**, for the foregoing reasons, Petitioner respectfully petitions the Hearing Officer or, alternatively, the Board, for leave to supplement the Record (or, alternatively, to order the IEPA to do so) to include the documents attached as Exhibit A hereto.

Respectfully submitted,

NOVEON, INC.

By:   
One of Its Attorneys

Dated: January 24, 2008

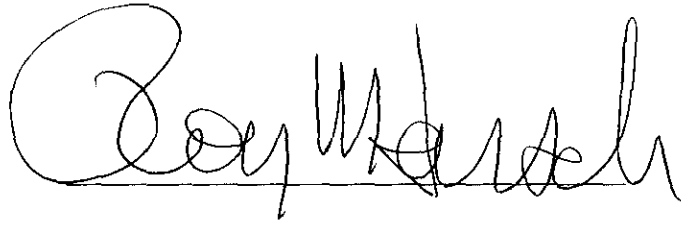
Roy M. Harsch (ARDC # 1141481)  
Lawrence W. Falbe (ARDC# 6224888)  
Drinker Biddle Gardner Carton, LLP  
191 North Wacker Drive - Suite 3700  
Chicago, IL 60606  
312-569-1000

CH01/ 12528179.1



**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing **Notice of Filing and Motion to Supplement The Record** were filed by hand delivery with the Hearing Officer and served upon the parties to whom said Notice is directed by first class mail, postage prepaid, by depositing in the U.S. Mail at 191 North Wacker Drive, Chicago, Illinois on Thursday, January 24, 2008 and by e-mail to Ms. Sally A. Carter. [Sally.Carter@illinois.gov](mailto:Sally.Carter@illinois.gov)

A handwritten signature in black ink, appearing to read "Roy Marsh". The signature is written in a cursive style with a large initial "R" and "M".