

ILLINOIS POLLUTION CONTROL BOARD
February 4, 2008

NOVEON, INC.,)	
)	
Petitioner,)	
)	
v.)	
)	PCB 04-102
ILLINOIS ENVIRONMENTAL)	(CAAPP Permit Appeal)
PROTECTION AGENCY,)	
)	
Respondent.)	
)	

HEARING OFFICER ORDER

Procedural Nature of Case

On January 24, 2008, petitioner Noveon, Inc., (Noveon) filed a motion to supplement the record on appeal (Motion). On January 29, 2008, the respondent Illinois Environmental Protection Agency (Agency) filed its response in opposition (Response). Hearing in the above-captioned matter is scheduled for February 5, 2008.¹

For the reasons set forth below, the petitioner's motion to supplement the record on appeal is denied.

Petitioner Noveon's Motion To Supplement the Record

The petitioner's motion seeks to supplement the record with certain documents attached thereto as un-paginated Exhibit A, amounting to a little less than an inch of documents of various types. The first page of Exhibit A is an October 3, 2007 letter from

¹On January 30, 2008, Noveon filed two motions that must be addressed by the Board rather than the hearing officer; the Board's next scheduled meeting is February 7, 2008. These motions are an agreed motion to change petitioner's name from "Noveon" to "Emerald Performance Materials, LLC", as well as an agreed motion to voluntarily dismiss certain claims. The agreed motion to voluntarily dismiss certain claims asks that petitioner's objections 1, 2, 5, and 6 be dismissed from the Board's review of this appeal, leaving only objections 3 and 4 remaining. Those two issues involve whether the facility's condensers in the MBT-C process are subject to 35 Ill. Adm. Code 214.301 by virtue of the exemption found in 35 Ill. Adm. Code 214.382, and whether the facility's existing processes are designed to remove sulfur compounds from the flue gases of petrochemical processes, hereinafter referred to as the SO₂ issues.

the Agency's attorney to the petitioner's attorney, stating that the information was provided in response to the request

for information contained within the "Illinois Environmental Protection Agency file for the Accelerator Crude Process, Application Number 72110935. . . . While the Illinois EPA is voluntarily disclosing this information, the Illinois EPA does not waive its argument that the Administrative Record currently on file [in this docket] comports with all applicable procedural rules (Motion, Exh. A).

The documents are dated at various times between the years 1972 and 1993. Petitioner explains that these documents pertain to the issuance of a renewal of a state operating permit for air operating permit No. 72110935 for petitioner's facility (Motion at 3-4).

Petitioner alleges the Agency relied upon the documents in making its November 23, 2003 determination as to petitioner's March 7, 1996 application for its Clean Air Act Permit Program (CAAPP) permit at issue here but that the documents were not included in the Agency's compilation of the record on appeal. Among others, the documents include two internal memoranda authored in 1993 that predate the filing of the CAAPP application of March 7, 1996. The attachments referenced in the memoranda, however, were not included in the record that was filed by the Agency (Motion at 3-4.) It appears that each of the 1993 memoranda that petitioner refers to addresses an earlier state operating permit application and was merely an attachment to a memorandum generated in 2001 from the permitting analyst assigned to review the 1996 CAAPP application (Response at 5).

Petitioner argues that the Exhibit A is relevant and must be included in the record on appeal. Petitioner further argues that the Agency's decision in this CAAPP permit is contrary to previous decisions by the Agency. Noveon states that the Agency 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 SO₂ emission limitation did not apply (Motion at 2).

Petitioner cites the Board's decision in Jack Pease, d/b/a Glacier Extraction v. Illinois Environmental Protection Agency, PCB 95-118 (July 20, 1995), in support of its motion. In Pease, the Board granted the petitioner's motion to supplement the record on appeal where the Board found that all of the additional documents, involving letters to and from elected officials and citizens, pre-dated the Agency's final denial letter, and the documents therefore, were in the Agency's files and reasonably could have been relied upon. *Id.* at 2.

The Agency's Response

The Agency argues that the record for this appeal from a CAAPP permit began with the March 7, 1996 submittal of the application through the date of the permit's issuance on November 24, 2003. The Agency represents that each of the 1993 memoranda addressing an earlier state operating permit application merely attachments to the memorandum generated in 2001 from the assigned CAAPP permitting analyst (Response at 6). The Agency states that the two 1993 memorandums were included in the record because they were physically attached to a document generated during review of the permit application. The Agency further states that if the memoranda had not been instructive to the 2001 memorandum, they would not have been tied to, or otherwise connected with, the CAAPP permit application *Id.* Finally, the Agency argues that the placement of the two 1993 memoranda in the record is consistent with the Board's procedural rule that the Agency's answer shall consist of the entire Agency record of the CAAPP application *Id. See* 35 Ill. Adm. Code 105.302(f). The Agency represents that it did not rely on the pre-dated documents when making its CAAPP permit decision (Response at 4-5).

Finally, the Agency concedes that its decision in the CAAPP permit is contrary to its past decisions regarding SO₂ emission limitations and the applicability of 35 Ill. Adm. Code 214.382 (Response at 9-10).

Discussion

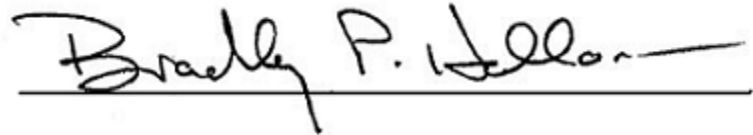
The Board's procedural rules require that "[t]he hearing will be based exclusively on the record before the Agency at the time the permit or decision was issued." 35 Ill. Adm. Code 105.214(a). Here, the additional documents, dated between 1972 and 1993, involve earlier permit applications that obviously pre-date the filing of the 1996 permit application under review. The Agency argues that its decision to include the 2001 memorandum and all accompanying attachments in the record should not subject the Agency's CAAPP permit decision to Board review based on material that not only pre-dates the CAAPP permit application, but only exists in the files from previous state application submittals and permitting decisions. The hearing officer finds that the Agency acted properly when it included in the record the 1993 memoranda attached to the 2001 memorandum. *See* 35 Ill. Adm. Code 105.302(f) The Agency's actions were also proper when it did not include in the record any documents referenced in the 1993 memoranda that were not included in the CAAPP permit file, and the hearing officer will not allow petitioner to add them to the record.

The petitioner's reliance on Pease is misplaced. In Pease, the Board granted the petitioner's motion to supplement the record with letters generated during the pendency before the Agency of the mining permit application that was the subject of the appeal to the Board. Here, the motion to supplement includes documents from previous permit applications that pre-date the CAAPP application, upon which the Agency states it did not rely.²

²The hearing officer notes that a recent Board decision underscores that the relevance to

For all of these reasons, petitioner Noveon's motion to supplement the record is denied.

IT IS SO ORDERED.

A handwritten signature in black ink, reading "Bradley P. Halloran", is written over a solid horizontal line.

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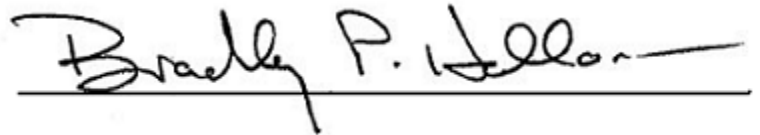
the Board's decision here of the legal opinions contained in the two 1993 Agency memoranda is questionable. *See* Peoria Disposal Company v. Illinois Environmental Protection Agency, PCB 08-25, slip op. at 14, n.## (January 10, 2008) (affirming Agency permit denial where Agency had retreated from its previous historical interpretation of statutory exemption).

CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were mailed, first class, on February 4, 2008, to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on February 4, 2008:

John T. Therriault
Illinois Pollution Control Board
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A handwritten signature in black ink that reads "Bradley P. Halloran". The signature is written in a cursive style and is positioned above a solid horizontal line.

Bradley P. Halloran
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