

ILLINOIS POLLUTION CONTROL BOARD
October 15, 2009

EMERALD PERFORMANCE MATERIALS,)
L.L.C. (as purchaser of NOVEON, INC.),)
)
Petitioner,)
)
v.) PCB 04-102
) (CAAPP Permit Appeal)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

ROY M. HARSCH AND LAWRENCE W. FALBE, DRINKER BIDDLE & REATH LLP,
APPEARED ON BEHALF OF PETITIONER, AND

ROBB H. LAYMAN AND SALLY A. CARTER APPEARED ON BEHALF OF
RESPONDENT.

OPINION AND ORDER OF THE BOARD (by S.D. Lin):

This case involves a petition for review of a permit issued November 24, 2003, by the Illinois Environmental Protection Agency (IEPA or Agency) under the Clean Air Act Permit Program (CAAPP). The permit was issued for a petrochemical manufacturing plant, which received its first air permit in 1975, located at 1550 County Road, 1450N in Henry, Illinois (Henry plant). At the time of permit issuance, the Henry plant's owner was Noveon, Inc.; as of May 2006, the owner was Emerald Performance Materials, LLC. Emerald, as current owner, challenges a condition contained in the CAAPP permit stating the applicability to the Henry plant of the 2,000 parts per million (ppm) emission limit for sulfur dioxide (SO₂) set out in 35 Ill. Adm. Code 214.301.

The Agency issued the CAAPP permit under Section 39.5 of the Illinois Environmental Protection Act (Act), and the Board heard this appeal under the authority of Section 40.2 of the Act. 415 ILCS 5.39.5 and 40.2 (2008).¹ The Board held a hearing on this matter on February 5, 2008.² The hearing made clear that there is no real factual dispute here, but rather a question of application of law to agreed facts. Following hearing and prior to briefing, the Board granted the parties' request to dismiss four of the six issues originally presented in this appeal. Emerald Performance Materials, LLC (as purchaser of Noveon, Inc. v. IEPA, PCB 04-102 (Feb. 7,

¹ As the provisions of the Act have not materially changed since 2005, the Board will cite to the 2008 edition of the Illinois Compiled Statutes (ILCS).

² The transcript of the February 5, 2008 will be cited as "Tr."

2008).³ The parties narrowed the disputed issues to: whether certain of the plant's condensers are subject to 35 Ill. Adm. Code 214.301 or whether instead they are covered by the "SO₂ exception" found in 35 Ill. Adm. Code 214.382, on the grounds that they are existing processes "designed to remove sulfur compounds from the flue gases of petrochemical processes" within the meaning of 35 Ill. Adm. Code 214.382. Emerald believes that the SO₂ exception is applicable. The Agency believes that the exception does not presently apply to Emerald, while acknowledging that Emerald's permits issued between 1975 and 1993 stated that the SO₂ exception applied to the Henry plant.

For the reasons stated below, the Board finds that Emerald's condensers qualify for the SO₂ exception in 35 Ill. Adm. Code 214.382. The Board accordingly finds that the Agency improperly included the condition concerning applicability of 35 Ill. Adm. Code 214.301, and remands the permit for re-issuance of the permit consistent with the Board's findings in this opinion and order.

FACTS

The Facility

Emerald's facility (Facility) is a petrochemical manufacturing plant located at 1550 County Road, 1450 N in Henry, Illinois (Facility ID No. 123803AAD). The Facility currently 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. Tr. at 14. The Facility houses storage tanks for raw material, intermediates and finished products and operates a wastewater treatment facility and a small process fluid heater for process heat.

The Henry plant received its first air permit in 1975. Until the November 24, 2003 issuance of the CAAPP permit Emerald appeals here, Emerald's permits have recognized the facility as eligible for the SO₂ exception found in 35 Ill. Adm. Code 214.382. At issue in this proceeding is a product and process of the polymer chemicals portion of the Henry plant. That product is called sodium mercaptobenzothiazole (MBT), one of the plant's primary products since 1972. Tr. at 14. Sodium MBT is the intermediate the plant uses to make accelerators used in the process of tire manufacture. Tr. at 15. Mr. David Giffin is now Health and Safety Environmental Manager of the Henry Plant, but began working at the plant in 1967 as an associate engineer in the plant's polymer chemicals area. Tr. at 9-10. Mr. Giffin explained that

³ In the same order, the Board granted the agreed motion to change petitioner's name from Noveon, Inc. to Emerald. Consistent with the naming convention used by the parties in their briefs, to avoid confusion, all references in this opinion and order to Emerald/Noveon will be to "petitioner" or "Emerald", regardless of the actual name of the company at the time of the facts being related. *See, e.g.* Pet. Post-Hearing Memo. at 1, n.1, and IEPA Post-Hearing Br. at 1, n.1. The Henry plant's original owner was B. F. Goodrich. Successor owners of the polymer chemicals portion of the plant included AEA Investors, Noveon, Luberzol, Sun Capitol, and finally Emerald. Tr. at 12-13.

The accelerators that we make are what we call the salt and pepper chemicals that go into the master batch of rubber. And most of the rubber goes into the manufacturing of tires. If you didn't put the accelerator into the master batch, a small amount of it, it would take a long time for the rubber to cure. And so when you make a tire, if you didn't have that accelerator in the rubber, it would take maybe a couple hours to cure rather than maybe 30 minutes. So, basically, what it boils down to that everybody's tires here are less expensive because they use accelerators in the product.

* * *

And so for tires . . . by adding the antioxidant into the rubber batch, it will extend the life of the tire because the tire is subject to heat and other forces to break down the rubber. The antioxidant prevents that breakdown, and it make the tire last longer. And, again, it gets back to giving you more miles to the tires that you purchase. Tr. at 14-15.

At the time of hearing, Emerald's Henry plant was the sole manufacturer of sodium MBT for accelerators in the United States, having outlived a number of domestic competitors who were not able to compete with Asian producers. Tr. at 21. Moreover, Emerald is the sole supplier to the North American market; Mr. Giffin explained that "the tire company will purchase it from us [at Emerald], or they will bring it in from Asia." Tr. at 23.

The following is a brief overview of the Emerald production process⁴ at issue here. This discussion is intended to render later discussion of hearing testimony more meaningful; additional detail will be provided later in the synopsis of testimony. Emerald's process has remained unchanged since the 1970's, except for addition of the sodium hydrosulfide (NaSH) system added within the last 3 1/2 years. Emerald maintains the workings of its process as a trade secret, including during the permit process before the Agency and the appeal process before the Board.⁵

The first part of the process of creating the finished accelerators is the MBT crude (or MBT-C) creation process. The MBT-C reactor and its condensers was one of the Henry facility's original processes, built in 1958 or 1959. Tr. at 54. The process utilizes three

⁴ The process as described verbally in the record is also portrayed in the record as a schematic. See TSR 141, also admitted at hearing as petitioner's exhibit 3 and marked as a trade secret by the hearing officer.

⁵ There were two records compiled by IEPA for the permit appeal; one was composed of documents for which Petitioner claimed trade secret protection, and the other was an unprotected "public" record. The Board has maintained the trade secret protection of the materials filed as trade secret, and here notes that there have been no requests to review the protected materials. Citations to the Trade Secret Record will be to "TSR", and citations to the public record will be to "R." The schematic for the process described above is found in the record at TSR 141 and Pet. Exh. 3 (also protected as trade secret).

chemicals: aniline, sulfur, and carbon disulfide (CS₂). Tr. at 16. The chemicals are charged to three high pressure reactors. The reactor is heated to about 500 degrees Fahrenheit, using dotherm as the heating medium. The reactor reaches temperature, creating pressure in excess of 1,000 pounds per square inch gauge (psig). There is a condenser on each of the reactors which Emerald classifies as its “sulfur reducing device”. Tr. at 18.

The “support system” to the sulfur reducing device is a high pressure control valve, an additional steam condenser, and a tank that controls the level that is in the condenser. Once the reaction begins, it generates hydrogen sulfide (H₂S) and vaporizes some of the CS₂ in the reactor. The condenser returns the CS₂ to the reaction. The high pressure valve controls it and releases the H₂S into blowdown tanks. Tr. at 18. The system reduces the pressure from 1,000 psig to about 50 psig in the blowdown tank. The contents are transferred to the flare, which further reduces pressure before it is converted to SO₂. Tr. at 19.

Finished molten product is then transferred from the reactor to the “MBT crude blowdown tanks”, which transfers the product into later portions of the process that convert it into a water soluble organic material. Tr. at 15-17.

Gases generated during the reaction and blowdown enter the MBT blowdown tanks, which are vented on a controlled basis to a flare system incorporating a vaporizer. Vapor is converted from H₂S and some residual CS₂ into SO₂. Tr. at 17-18.

In 2006, Emerald installed and began to operate its NaSH system.⁶ Instead of sending gases to the flare, Emerald propels it to the NaSH system, which recovers the CS₂ that remains after the reaction through a column system. Emerald returns that CS₂ to the process, recharging it back into the reactors at a later time. Tr. at 19.

The H₂S gas that goes with the CS₂ continues on through the NaSH system. The H₂S is purified, and then reacted in the NaSH distillation column. Emerald combines the H₂S and a caustic solution to form a liquid with a NaSH concentration of 45-47%. Tr. at 20. Following the distillation column, there is a NaSH scrubber. Emerald states that after gases are scrubbed in it, the system emits less than 50 ppm of H₂S. *Id.* at 21.

⁶ As to the reason for its installation of the NaSH system, in its opening brief, Emerald explains that:

While the installation of the NaSH unit brings the Facility into compliance with the applicable air regulations even without the application of the SO₂ exception, Petitioner has never abandoned its legal position that it is entitled to the SO₂ exception, and has valid reasons for continuing this appeal. (Testimony of D. Giffin, [Tr. at] 41:24-42:2; 46:13-47:7). Among other reasons, Petitioner has voluntarily complied with the SO₂ limitation so that, if its appeal is successful, it will be able to market SO₂ reduction credits. Petitioner also intends to seek modification of its construction permit for the NaSH system so that it can utilize its flare as its NESHAP [National Emission Standards for Hazardous Air Pollutants; *see* 415 ILCS 5/9.1(2008)] control device for periods when the NaSH system is inoperable. (*Id.*) Pet. Opening Brief at 6, n.4.

Emerald stores the NaSH in a storage tank, and ships the liquid product via truck to various customers for the product. One customer set include tanneries, which use Emerald's high quality NaSH product to tan leather. Another customer set is the ore mining industry, which uses NaSH to recover metals from ores. Tr. at 20.

REGULATORY AND LEGAL BACKGROUND

Applicable Rules

35 Ill. Adm. Code 214.301 provides in its entirety that

Except as further provided by this Part, no person shall cause or allow the emission of sulfur dioxide into the atmosphere from any process emission source to exceed 2,000 ppm.

35 Ill. Adm. Code 214.382(a) provides in its entirety that

Section 214.301 shall not apply to existing processes designed to remove sulfur compounds from the flue gases of petroleum and petrochemical processes.

Legal Framework

Under the Act (415 ILCS 5 (2008)), IEPA is the permitting authority. The Agency has general permitting authority under Section 39(a), and specific CAAPP permitting authority under Section 39.5. *See* 415 ILCS 5/39(a) and 39.5(3) (2008). The Act requires IEPA to issue a permit if the permit applicant proves that the requested permit will not cause a violation of the Act or the Board's regulations. *Id.* If IEPA denies a requested permit, the applicant may appeal IEPA's decision to the Board within 35 days; permits issued by the Agency under Section 39(a) are appealable to the Board under Section 40(a)(1) of the Act, while permits issued under Section 39.5(3) are appealable under Section 40.2. *See* 415 ILCS 5/40(a)(1) (2008) and implementing procedural regulations at 35 Ill. Adm. Code 105.Subpart B and 415 ILCS 5/40.2(a) and implementing procedural rules at 35 Ill. Adm. Code 105.Subpart C.

"[T]he Board is not required to apply the manifest-weight test to its review of the Agency's decision denying a permit." *See Peoria Disposal Co. v. Illinois Environmental Protection Agency*, PCB 08-25, slip. op. at 23 (January 10, 2008), *affd. sub nom Peoria Disposal Company v. Illinois Pollution Control Board and Illinois Environmental Protection Agency*, No. 3-08-0030 (Third Dist. Jan. 20, 2009) (Rule 23 order) (hereinafter *Peoria Disposal*, PCB 08-25) quoting from *IEPA v. PCB*, 115 Ill. 2d 65, 70, 503 N.E.2d 343, 345 (1986). The petitioner has the burden of proof on appeal. *See* 415 ILCS 5/40(a)(1) (2008); 35 Ill. Adm. Code 105.112.

The Board's review of permit appeals is generally limited to information before IEPA during IEPA's statutory review period, and is not based on information developed by the permit applicant or IEPA after IEPA's decision. *Alton Packaging*, 162 Ill. App. 3d at 738, 516 N.E.2d at 280; *Panhandle*, PCB 98-102, slip op. at 2; *American Waste Processing v. IEPA*, PCB 91-38, slip op. at 2 (Oct. 1, 1992). However, it is the proceeding before the Board that affords the petitioner the opportunity to challenge the information relied upon by, and the reasons given by,

IEPA for denying the permit. Alton Packaging, 162 Ill. App. 3d at 738, 516 N.E.2d at 280, citing IEPA v. PCB, 115 Ill. 2d 65, 70, 503 N.E.2d 343, 345 (1986).

On appeal of the IEPA's denial of a permit, the question before the Board is "whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violation of the Act would occur if the permit was granted." Panhandle Eastern Pipe Line Co. v. IEPA, PCB 98-102, slip op. at 10 (Jan. 21, 1999), *aff'd sub nom Panhandle Eastern Pipe Line Co. v. PCB and IEPA*, 314 Ill. App. 3d 296, 734 N.E.2d 18 (4th Dist. 2000), quoting Centralia Environmental Services, Inc. v. IEPA, PCB 89-170, slip op. at 9 (Oct. 25, 1990); *see also* Browning-Ferris Industries of Illinois, Inc. v. PCB, 179 Ill. App. 3d 598, 601-602, 534 N.E.2d 616, 619 (2d Dist. 1989); Joliet Sand & Gravel Co. v. PCB, 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, 958 (3d Dist. 1987), citing IEPA v. PCB, 118 Ill. App. 3d 772, 455 N.E.2d 188 (1st Dist. 1983). IEPA's denial letter frames the issues on appeal. *See* Centralia, PCB 89-170, slip op. at 8; Pulitzer Community Newspapers, Inc. v. IEPA, PCB 90-142, slip op. at 6 (Dec. 20, 1990).

Permits issued under both Sections 39(a) and 39.5 may each contain conditions. *See* 415 ILCS 5/39(a) and 39.5(7) (2008). The applicant may appeal conditions of permits issued under either section. The courts have held that

To prevail on its claim, petitioner must show the IEPA's imposed modification "were not necessary to accomplish the purposes of the Act, or, stated alternatively, [the petitioner] had to establish that its plan would not result in any future violation of the Act and the modifications, therefore were arbitrary and unnecessary." Browning-Ferris [v. PCB], 179 Ill. App. 3d [598] at 603, 534 N.E. 2d [616] at 620 [2d Dist. [1989]]. IEPA v. Jersey Sanitation Corp., 336 Ill. App. 3d 582, 784 N. E. 2d 867 (4th Dist. 2003).

In this particular case, due to the nature of the condition at issue, the question on review can be framed as whether the permit should have specified as a condition that the SO₂ exception in 35 Ill. Adm. Code 214.382 applies to the Henry plant's MBT-C process, or whether it in fact correctly specified that the general 2,000 pm SO₂ limit applies to the MBT-C process.

PROCEDURAL HISTORY AND PRELIMINARY PROCEDURAL MATTERS

IEPA Permit Process

As previously stated, Emerald received its first permit in 1975. In March, 1996, Emerald timely applied for a CAAPP permit (sometimes referred to as a Title V permit) for its facility. TSR 1-2115. IEPA issued a draft CAAPP permit on September 17, 2003. Among other written comments petitioner made to IEPA on the draft, petitioner claimed applicability of the SO₂ exception. But, the draft did not recognize applicability of the SO₂ exception of 35 Ill. Adm. Code. 214.382. *Id.*, and R. at 1253-1267, but esp. 1260.

The Agency's November 23, 2003 final permit became effective upon issuance. R. 1980-2070. While IEPA did modify some conditions in response to Emerald's comments, IEPA did

not make all modifications Emerald requested. Pursuant to the parties' negotiations, the sole issue remaining for resolution by the Board concerns the applicability of the SO₂ exception of 35 Ill. Adm. Code. 214.382. *See, supra*, n.3 at 2.

Various conditions in the final November 23, 2003 CAAPP permit (R. 001144- 001237) embody the concept. *See* CAAPP permit conditions 4.0 (R. 1154-1157), 7.1.2 (R. 001166-001167), 7.1.3(d) (R. 001167), 7.1.4 (R001167-68), and 7.1.13 (R001170-001171). Perhaps the most straightforward articulation is contained in Condition 7.1.3 "Applicability Provision and Applicable Regulations". Subsection (d) of Condition 7.1.3 states in its entirety:

Each affected MBT-C reactor/blow down tank system is subject to 35 IAC 214.301. This rule requires that emissions of sulfur dioxide into the atmosphere from any Process emission source shall not exceed 2,000 ppm. R. 001167

Board Appeal Process

Petitioner filed its appeal with the Board on December 24, 2003. The parties conducted negotiations and participated in status conferences with the hearing officer in 2004 through 2007. With Emerald's agreement, IEPA filed a partial record on April 27, 2007. Hearing, originally scheduled for two dates at the end of 2007, was ultimately scheduled and held February 5, 2008 solely on the issue of the applicability of the SO₂ exception. Emerald filed a motion to supplement the record on January 24, 2008 over IEPA's January 29, 2008 opposition. The hearing officer denied the motion in a February 4, 2008 order. Emerald Performance Materials, LLC (as purchaser of Noveon, Inc.) v. IEPA, PCB 04-102 (h.o. order Feb. 4, 2008).

The Board Hearing

Board Hearing Officer Bradley P. Halloran presided at the February 5, 2008 hearing, held in the Council Chambers at the Municipal Building in Henry, Marshall County. The hearing officer announced that the hearing would be closed to the public, at the parties' request, due to the fact that portions of the record under discussion concerned trade secret material. Tr. at 4. But, the hearing officer also announced that a sign-up sheet was posted outside the door, and that if any members of the public wished to comment, they could do so at an appropriate point. Tr. at 5. A member of the public who "just wanted to listen" stopped by early in the hearing, but declined to make a statement either at that point or later. Tr. at 22. At the close of hearing, the hearing officer noted that no other members of the public had presented themselves at hearing, or asked to speak. Tr. at 172-173.

The hearing officer admitted as Hearing Officer Exhibit A (HO Exh. A) pages 1276 through 1452 of Volume I of the public copy of the IEPA record, filed April 27, 2007. These pages had not previously been filed by the Agency.

Petitioner Emerald presented three witnesses at hearing:

David Giffin, the health, safety and environmental manager at the Henry Facility. Mr. Giffin, who had been employed at the Facility for almost 38 years, was the engineer assigned to the process at issue in this case. Tr. 9-89.

Michael R. Corn, P.E. who was president of AquAeTer, Emerald's environmental consulting firm. Mr. Corn had 33 years of experience as an environmental consultant and first became involved with the Henry Facility in 1988. He and his firm were retained by Emerald to assist the company in the preparation of its first CAAPP or Title V air permit in the mid-1990s. Tr. at 65-78, and 161-166.

Bernard O. Evans, who has been employed by Environmental Resources Management (ERM) since 1988 and has been working with the Henry Facility since 2003. Mr. Evans had been consulting with industry on air matters for 30 years. He has been working with the owners of the Henry plant since 1998. Tr. at 79-90 and 166-170.

Petitioner also presented three exhibits: the January 29, 2008 affidavit of IEPA's Dan Punzak attesting to the applicability of the SO₂ exception in IEPA permits for the Henry Facility from at least 1975-1993 (Pet. Exh. 1); a letter dated September 6, 2001, from Bonnie Sawyer of IEPA to Roy Harsch, responding to Emerald's Freedom of Information Act (FOIA) request (Pet. Exh. 2); and Emerald's Process Schematic (Pet. Exh. 3, marked as a trade secret, previously submitted as TSR 141).

Petitioner also made an offer of proof, designated as Petitioner's Exhibit A by the hearing officer when he denied the materials' admission at hearing. Tr. 32-33. These materials were those attached as Exhibit A to Emerald's motion to supplement the record on January 24, 2008. Noting, among other things, IEPA's January 29, 2008 response in opposition, the hearing officer denied the motion in a February 4, 2008 order. Emerald Performance Materials, LLC (as purchaser of Noveon, Inc. v. IEPA, PCB 04-102 (ho order Feb. 4, 2008).

The Agency presented one witness in support of its determination that the Henry facility is no longer eligible for the SO₂ exception:

Dan Punzak, P.E., an IEPA employee since 1978. Other than a one-year stint as an air inspector, Mr. Punzak has worked in the air permitting area, working with both construction and operating permits. Mr. Punzak is currently working with CAAPP permits in the fields of chemical processes, printing, refineries, and that type of operation. Mr. Punzak may have inspected the Henry Facility once in 1979 or 1980, but his primary acquaintance with the Facility and its permits began in 1993. Tr. 91-160.

The Agency presented no hearing exhibits.

While the parties had initially intended to have the entire hearing transcript designated as a trade secret, on April 23, 2008 the hearing officer granted Emerald's April 14, 2009 motion to have the transcript handled as a public document, while still giving trade secret protection to the process schematic (Pet. Exh. 3). In his May 14, 2008 hearing report, the hearing officer established a post-hearing briefing schedule.

Pursuant to the schedule as extended by June 11, 2008 hearing officer order, the petitioner filed its post-hearing memorandum on June 27, 2008 (Pet. Br.). The Agency filed its 66-page post-hearing brief on July 25, 2008 (IEPA Br.), accompanied by a motion for waiver of

page limit requirements (Mot. Waiver) and motion to temporarily seal its brief as trade secret (Mot. Seal). Petitioner filed its reply brief on August 18, 2008 (Pet. Reply).

Post-hearing Motions

Agency Motions re Briefing

The Board first turns to the Agency's motions regarding its brief. As to length, IEPA correctly relates that the Board's rules provide that briefs are not to exceed 50 pages without prior approval under 35 Ill. Adm. Code 101.302(k). The Agency comments that the 66 page length of its brief is "proportional" to the "complexity and potential significance" of the issues. Mot. Waiver at 2. Emerald has not responded to the motion, except to note the "super-size" of the IEPA's brief in its reply brief. Pet. Reply at 1. Under 35 Ill. Adm. Code 101.500(d), the Board deems Emerald to have waived objection, and grants the Agency's motion.

The Board next turns to the Agency's motion to temporarily seal its brief as a trade secret. The motion is premised upon the Agency's uncertainty as to what the petitioner does and does not currently claim as trade secret. To avoid any inadvertent disclosure, the Agency moved the Board to temporarily consider the entire brief a trade secret until the petitioner had an opportunity to review it. The Agency suggested that in the event Emerald concluded that any particular statements could impair its trade secret claims pending before the Agency, the Agency would provide trade secret and redacted public copies of the brief. Emerald has not responded to the motion in its reply brief. Pet. Reply at 1.

Under 35 Ill. Adm. Code 101.500(d), the Board deems Emerald to have waived objection to the material included in the IEPA brief, and denies the Agency motion to seal as unnecessary. In so ruling, the Board notes that the IEPA brief has been provided trade secret protection during the pendency of the motion to seal, and the Board will continue to provide the brief such protection until the time for appeal of this opinion and order has expired.

The Board commends IEPA on its willingness to provide Emerald's process all due trade secret protection, and Emerald on its diligence in protecting its trade secrets. But, in this context, the Board notes that the January 3, 2008 hearing notice did not indicate that the February 5, 2008 hearing would be closed due to trade secret issues. As the existence of trade secret issues was known early on in this proceeding, the better practice would have been for the parties to make their desire for a closed hearing known far enough in advance to have allowed the hearing notice to include that information as well as information regarding notice of opportunities for comment. Doing so would have minimized inconvenience to members of the public while still protecting trade secret material.

Emerald Motion for Admission of Petitioner's Exhibit A

In the closing pages of its opening brief (Pet Br. at 19-27), petitioner requests the Board to overrule the hearing officer's order of February 4, 2008 and hearing ruling denying admission of the documents with which Emerald has sought to supplement the record since April 27, 2007.

The hearing officer's written order provided in pertinent part that

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.⁷ Emerald Performance Materials, LLC (as purchaser of Noveon, Inc. v. IEPA, PCB 04-102, slip op. at 4-5 (ho order Feb. 4, 2008) (footnote 2 indicated after "reply" in original reproduced in footnote 7 below).

Petitioner's arguments. Emerald characterizes the documents as ones "that related to IEPA's many internal discussions over the years as to whether the Facility was in fact entitled to the SO₂ exception." Pet. Br. at 19. These include internal memoranda between various members of the Agency's legal staff concerning the issue, which apparently arose in the context of earlier permit applications in 1973, 1975, 1978, and 1983. *Id.*

Emerald also noted that these internal IEPA documents had not been produced in response to FOIA requests. Pet. Br. at 20. Emerald's contention is that,

⁷ *See* Emerald Performance Materials, LLC (as purchaser of Noveon, Inc. v. IEPA, PCB 04-102, slip op. n. 2 at 4-5 (ho order Feb. 4, 2008), which provides in its entirety:

The hearing officer notes that a recent Board decision underscores that the relevance to 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.## (sic) [2] (January 10, 2008) (affirming Agency permit denial where Agency had retreated from its previous historical interpretation of statutory exemption).*

while some of the documents from the Facility's operating permit file relevant to the SO₂ exception were included in the Record, the IEPA . . . apparently picked and chose among a group of relevant documents when preparing the record it submitted. Pet. Br. at 21.

Emerald argues that the "entire record" referred to in the CAAPP permit rules at 35 Ill. Adm. Code 105.302(f) includes "everything existing in the IEPA's files that pre-dates the final decision on the permit. *Id.*, citing Jack Pease, d/b/a Glacier Lake Extraction v. IEPA, PCB 95-118 (May 18, 1995).

IEPA's Arguments. The Agency begins its response by noting that

In light of the [IEPA's] concession that the Agency held a contrary permitting position for approximately twenty years concerning the applicability of 35 Ill. Adm. Code 214.382 to this source, the inclusion of twenty years of permitting history does not further substantiate Petitioner's estoppel claim.

* * *

Moreover, upon receipt of an operating permit application, the [IEPA's] review is based upon the material contained within the application which necessarily contains the most up-to-date information about the source. . . . so long as the information is complete and accurate, there is no need for the Agency to review dated operating permit records that could not only be in excess of thirty years old but may not reflect existing source status.

* * *

The [IEPA's] recent departure from its earlier decisions, which serves as the pretext for Petitioner's arguments, 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 [IEPA]). IEPA Br. at 52-54.

IEPA observes that it did include two 1993 memoranda in the record that pre-dated Emerald's March 7, 1996 submission of the CAAPP permit at issue here. But, states IEPA, these were included because they were physically attached to a 2001 memorandum concerning the instant application. Under these circumstances, IEPA argues, they were required attachments under the CAAPP rules at 35 Ill. Adm. Code 105.302(f). IEPA notes that Jack Pease, cited by petitioner, also concerned a situation where the documents were physically located in the file. IEPA Br. at 59-60.

The Agency further argues that FOIA has its own set of exceptions, and that neither the Act nor Board rules compel release of FOIA-exempt material. IEPA Br. at 57-58.

The Board's Ruling. The Board finds that Emerald has produced no convincing evidence or argument that the hearing officer's ruling was in error. It is, of course, true that the purpose of

the CAAPP permit is to bring into one unitary document all of the operating conditions that currently apply to a source, to avoid the need to reference a fistful of permits to determine compliance. *See, e.g.* Mr. Evans testimony quoted *infra* at 14. But, at the same time, the Board has no reason to disbelieve the Agency's statement that it did not rely on the reasoning of its earlier permit application analyses to make its 2003 CAAPP permit decision. And, as the Agency correctly states, any permit must stand or fall on whether it is reasoned and supported by applicable law and regulations.

HEARING TESTIMONY

As previously stated, the SO₂ exception of 35 Ill. Adm. Code states:

Section 214.301 shall not apply to existing processes designed to remove sulfur compounds from the flue gases of petroleum and petrochemical processes.

Emerald, the Agency, and their witnesses agree that Emerald's MBT-C is an existing process, and that sulfur compounds stem from the flue gases of a petroleum and petrochemical process. The parties also agree that the 2,000 ppm SO₂ limits of Section 214.301 would apply to Emerald but for the applicability of the challenged exception.

The hearing testimony diverges concerning the issue of whether, within the meaning of the SO₂ rule and its exception, the Facility is actually "designed to remove sulfur compounds", given the capture efficiency of Emerald's process.

Each of Emerald's witnesses, Messrs. Giffin, Corn, and Evans, confirmed his belief that the SO₂ exception properly applied to the facility. Tr. 25-26, 70, and 86-87, respectively.

Giffin Testimony

Mr. Giffin described the MBTC-system. *See supra*, p. 4. He explained that it is a petrochemical process, as the aniline comes from a petrochemical source. *See e.g.*, Tr. at 24. The condensers condense the sulfur compound CS₂ during the reaction phase, returning it to the reactor as a liquid. Some 70% of the CS₂ is recovered, while H₂S passes through the condenser. Tr. at 26. Mr. Giffin stated that the condensers were originally designed to remove the sulfur compound CS₂ from the stacked gases. Tr. at 26-27. Mr. Giffin stated that the MBT reactors can be run without the condensers. Tr. at 27-28. This does not affect the quality of the product, but does result in generation of more sulfur dioxide because the CS₂ is not being put back into the reactor. Tr. at 54-55. More CS₂ is being used in the process. The purpose of the condenser is to separate H₂S from CS₂, so that the CS₂ can be recovered while the H₂S can be vented to the MBT-C blowdown tank. Mr. Giffin presumes the condenser was installed to reduce raw material usage and to control emissions. Tr. at 56-58. Mr. Giffin agrees that the condensers qualify as reflux condensers, since condensed material returns directly to the process from which it is generated. Tr. at 60.

With an eye to submission of a CAAPP application, in March of 1996, Mr. Giffin began working in 1994 with an environmental consulting firm AquAeTer, whose principal owner was

and is Michael Corn. Tr. at 28-29. As part of that process, with the advice and assistance of legal counsel, in February 1996 Emerald submitted a FOIA application to IEPA. Emerald sought the IEPA permitting files for the Henry plant to better understand “the posture of the IEPA concerning our processes and to understand if we were interpreting the regulations correctly. Tr. at 30.

In its CAAPP application, Emerald listed the SO₂ exception of 35 Ill. Adm. Code 214.382 as the rule applicable to its flare, consistent with its prior permits. Tr. 30-31, 34. Put another way, Emerald did not submit a compliance plan that would allow it to otherwise achieve compliance with the 2,000 ppm SO₂ limit of Section 214.301. *Id.*

IEPA’s Dan Punzak began his review of the Title V application in January 2001, which resulted in a meeting between Mr. Punzak and Mr. Giffin, along with some others on January 18, 2001. Tr. at 37. On March 21, 2001, Mr. Giffin received his first formal communication from IEPA regarding concerns about application of the exception to the Facility’s MBT crude reactor and condenser, to which the petitioner responded. Tr. at 38-39 and TSR. at 2120-2121; 1459-1460. On May 16, 2003, the IEPA’s Don Sutton requested additional information, to which Mr. Giffin responded on June 14, 2001. Tr. at 40. The exchange resulted in a meeting in July 2001 during which Mr. Punzak presented Emerald with his observations concerning other manufacturers of the same materials in West Virginia and Louisiana, but with different control systems. Mr. Giffin stated that the company would investigate certain add-on controls, but did not concede that the SO₂ exception did not apply. Tr. at 41.

Around that time, Noveon became the company owner, and additional financial issues presented themselves, including an ammonia problem in the Henry plant’s wastewater discharge. Mr. Giffin stated the plant began investigating sulfur recovery using a claus unit, and that included doing design work and cost estimates. Mr. Giffin determined that there “was no financial return on sulfur recovery”, and found that any recovered sulfur would probably end up in a landfill. Tr. at 42. But, prior to the issuance of the Title V permit, the company did communicate to the IEPA a willingness to install an additional sulfur recovery system. Mr. Giffin stated that the company wanted to work on a schedule that would allow a Board ruling on the current control flare control device’s compliance with the federal Miscellaneous Organic NESHAP (MON). Tr. at 43. (MON is addressed in greater detail below). Mr. Giffin expressed appreciation for the “patience of the air people on this because it was a very, very, fragile time for us.” Tr. at 44.

Mr. Giffin ultimately determined that use of a claus process would pose a problem for its batch operation, given that the sulfur recovery is a continuous process. The final cost estimate Mr. Giffin received was in excess of \$5 million, up from the original estimate of \$3.5 million. Tr. at 45. The Henry plant, then purchased by Luberzol, evaluated a NaSH system. Mr. Giffin determined that the NaSH system required an initial investment of about \$10 million, but operations would just about break even, with revenue generated by the product about equaling material cost going in. Mr. Giffin stated that the company also considered that if it reduced the SO₂ emissions from its flare, it might qualify for emission credits that would help pay for the initial investment. Tr. at 46. Mr. Giffin stated that the SO₂ credit was the primary driving force

behind this appeal. Tr. at 47.

Mr. Giffin stated that installation of the NaSH unit began in 2006. Tr. at 60. The company is still in the “shake down” process with the system, which is not without its problems. At the time of hearing, the system was averaging about 85% “up time” over the prior six months, with some months better. Tr. at 62-63. The NaSH system is a unique, “one of a kind system”. Operational issues include tar-like material that accompanies gas venting, which can cause some lines to plug. Cold conditions also affect operations. If the NaSH plugs, the vapor stream is diverted from the blowdown tanks to the NaSH, and diverted back to the flare. The NaSH is one way in which Emerald can comply with the MON, but it is also evaluating use of the flare as a back-up compliance mode. Tr. at 63-65.

Corn Testimony

As previously stated, Michael Corn is the president and primary owner of the environmental consulting firm AquAeTer. Tr. at 65-66. As Emerald’s environmental consultant Mr. Corn reviewed the Facility for its first CAAPP permit in the mid-1990’s. Tr. at 67, 77. Mr. Corn testified that he believed the SO₂ exception of Section 214.382 rule properly applied because the Facility “had to be a petrochemical process, and it had to remove sulfur. From our review, both of those conditions were met”. Tr. at 72.

Mr. Corn was called back as a rebuttal witness on re-direct examination, following testimony by IEPA’s Mr. Punzak. Mr. Corn testified concerning Emerald’s condenser and process. Tr. at 161-165.

Evans Testimony

As previously stated, Bernard O. Evans of Environmental Resource Management, has been an Emerald consultant since 1998, but had no hand in the 1996-2003 Title V or CAAPP permit application process. Tr. at 81. However, he has been working with the Henry plant since 2003 in relationship to the current control flare control device’s compliance with the federal Miscellaneous Organic NESHAP (MON); the MBT-C process is one of the miscellaneous chemical processing units (MPCUs) affected by the MON. Tr. at 82-83. Mr. Evans believes the current unassisted flare complies with the MON. He also believes that the NaSH system complies with the MON. Mr. Evans stated that there are several ways to comply with the MON, including use of a control device that reduces HAPS by 98%, or use of a recovery device that reduces HAPS by 95 %. Mr. Evans believes that if petitioner prevails in this appeal, he can formulate a MON compliance program based on the use of either the NaSH system when it is operational or not plugged, or the use of the flare testified to by Mr. Giffin. If the 2,000 ppm SO₂ limits of Section 214.301 were applied to the facility, and the SO₂ exception of Section 214.382 was not, the flare could not be used. Tr. at 85.

Mr. Evans reviewed the facility concerning the applicability of the exception during the process of preparing the permit application for the NaSH system. Mr. Evans reads the Section 201.382(a) exception as requiring a petrochemical operation, and a system that designed to reduce sulfur in relationship to the way the process operates. Mr. Evans believes that it makes

no difference if the reduction system is characterized as a reflux condenser, a control device, a process device, or anything else, because

The rule does not describe that it requires any sort of device other than a recovery device. It doesn't prescribe any level of recovery. As the rule is written, the system would comply with that particular requirement. And I would disagree with the interpretation it does not. Tr. at 86-87.

After Mr. Punzak's testimony, Emerald called Mr. Evans to the witness stand again, to testify concerning CAAPP permits. Based on his experience as a consultant and drafter of Title V guidance documents along with USEPA, Mr. Evans stated that:

The whole purpose of the Title V CAAPP permit is to bring together all those conditions [that exist in operating permits] into a single document that was more easily understood by the inspector from the federal government or the state agency in relationship to how do you review compliance of a facility. So the whole purpose is to bring those operating conditions into a single document [requiring review of prior operating and construction permit files]. Tr. at 168.

On re-cross, Mr. Evans agreed that Title V permits typically lists as "T1" conditions those contained in construction permits that incorporate conditions concerning items discussed in Title I of the CAA, including PSD and New Source Performance. Tr. at 170.

The Punzak Testimony

As previously stated, Dan Punzak, P.E. has worked for the Agency since 1978, primarily in the air permit area, except for some 18 months during which he was employed as a field inspector. Tr. at 92. Mr. Punzak currently works with CAAPP permits for chemical plants, refineries, coding, printing, and similar operations. Tr. at 93.

Mr. Punzak explained that the CAAPP permit is a broad permit that encompasses an entire site and includes all processes that occur there. There is a general section that addresses general requirements, while there is typically another section addressing each process. The CAAPP permit describes applicable rules and any monitoring, record keeping, reporting, and conditions that came from construction permits. Tr. at 93-94. (Mr. Punzak does not work with CAAPP construction permits, which are handled by another group within the Agency). Tr. at 93-94.

Mr. Punzak described the MBT crude (or MBT-C) process. Tr. 96-100. He stated that IEPA characterized it as a batch process, and a petrochemical process. Mr. Punzak estimated that, prior to the installation of the NaSH unit, that 70-80 % of the CS₂ was recycled to the reactor by the condensers, with the balance continuing through the process as a vapor to the blowdown tank, and ultimately to the flare. H₂S travels through the process as a vapor which passes on through to the blowdown tank and to the flare. Tr. at 101. In other words, no H₂S is removed. Tr. at 102.

Mr. Punzak classifies the two condensers as “reflux condensers”, designed to recycle some of the raw material to the condenser. Emerald so characterized them in one portion of the CAAPP application. Tr. at 102-103. Emerald estimated that the MBT-C condensers remove 23 % of the total sulfur compounds recovered. The condenser does not remove sulfur compounds from the flue gases, but recycles one of the materials to the reactor. The flare converts 99% of CS₂ and H₂S to SO₂, but is not designed to remove sulfur compounds from flue gases. Tr. at 104.

The NaSH system takes vapors in the blowdown tank and sends them to control devices to reduce emissions. Prior to installation of the NaSH unit, actual flaring SO₂ emissions were in the range of 3,000 - 4,000 tpy, with a potential to emit of 4,922 tons (rarely emitted). Tr. at 105.

Mr. Punzak testified that in a 2001 memo he questioned whether a “reflux condenser” could properly be characterized as a control device. Based on various USEPA guidance documents, Mr. Punzak concluded that reflux condensers are “process condensers”, and not “control devices”. Tr. at 106, 115-117. This is because reflux condensers

are designed just to operate the process, often to save raw materials and not for the purpose of reducing emissions. That’s just an incidental, something that’s incidental. Tr. at 106-107.

Mr. Punzak went on to describe that petroleum refineries too have SO₂ emissions, mainly resulting from the burning of fuel contaminated with H₂S. Refineries seek to remove H₂S from the fuel before burning, and convert it to sulfur in a complex, multi-step process involving combustion and use of catalysts which result in elemental sulfur. Roughly 98% of H₂S is converted to sulfur in modern systems, while 90-95% was recovered “when they adopted these rules”. Tr. at 108. By contrast, Mr. Punzak explained that Emerald’s condensers have a “total sulfur efficiency” of 23%, target only CS₂, and are designed to conserve the loss of the raw material CS₂ during the reaction and “recycle” rather than “remove” it. The low 23% capture efficiency, in combination with USEPA guidance regarding failure of “reflux condensers” to qualify as “control devices,” lead Mr. Punzak to conclude that the Henry plant should not qualify for the Section 214.382(a) exception. Tr. at 113-114.

Mr. Punzak discussed various USEPA guidance documents, including the one called Control of Volatile Organic Compound [VOC] Emissions⁸ from Batch Processes, Tr. 115-118 and R. at 2136-2510. He noted that reflux condensers are not considered to be control devices, although some secondary condensers function primarily as control devices. Mr. Punzak stated that Emeralds MBT-C process had no secondary condensers on its “batch organic chemical process”, and so IEPA requested the company to provide a compliance plan. Tr. at 119. In response, Emerald questioned use of guidance documents for pollutants other than sulfur. But, Mr. Punzak stated that CS₂ is a VOC or VOM, so that use of the documents concerning VOM control equipment was appropriate. Tr. at 120. Mr. Punzak also testified that in the MON published by USEPA in the *Federal Register*, that process condensers include “reflux

⁸ As Mr. Punzak stated, in Illinois VOC is referred to as “volatile organic material” (VOM). Tr. at 117.

condensers”. Tr. at 121 and R. 1841. And, because a “process condenser” is not a “control condenser”,

if it’s a reflux or process condenser, it should, in effect, be given zero percent efficiency in terms of control equipment that it’s designed for the purpose of recycling material

Mr. Punzak stated that he consulted state regulators in West Virginia, Louisiana, and South Carolina regarding similar MBT-C processes, and determined that systems in their states had higher control efficiencies than Emerald’s MBT-C process. Tr. at 123-126. Mr. Punzak noted that USEPA had commented on the draft CAAPP permit for Emerald, finding the “MON would be applicable in the process.” Tr. at 127, R. at 1842-1843. But, Mr. Punzak also stated that USEPA had not commented on the issue on appeal here: applicability of Section 214.301 vs. Section 214.382. Tr. at 127.

Mr. Punzak stated that his analysis notes in the permit also explain that reflux condensers are process condensers which are not to be considered control equipment. Tr. 128-129, R. at 1235-1237.

On cross-examination, Mr. Punzak agreed that CS₂ is recycled and sent back to the reactor was not emitted into the atmosphere. Tr. at 131-132. He acknowledged that the USEPA guidance documents had been prepared well after Board adoption of the rules at issue, as were many of the USEPA rules generating the guidance. Tr. at 139-140. Mr. Punzak read aloud a portion of a 2001 memo he had prepared which was part of the permit record, remarking:

If we can show that they [Emerald] have made changes, we may be able to use the PSD [Prevention of Significant Deterioration] rules to require control and not have to get into the semantics of whether the condenser is a control—recovery device. Tr. at 145, quoting R. at 1543.

Mr. Punzak agreed that PSD was not an issue. *Id.* Mr. Punzak answered questions about the differences in the systems regulated by Louisiana. Tr. at 155. As to the MON, Mr. Punzak agreed that the NaSH unit complies with the MON, and the CAAPP permit allowed Emerald to use the flare when the NaSH system is unavailable due to plugging or other problems. Tr. at 156-157.

On redirect, Mr. Punzak stated that a reflux condenser could be considered a control device if it were a secondary condenser under particular low temperature conditions involving temperature differences. Tr. at 159. On re-cross, Mr. Punzak stated that even if the company were to use a different cooling medium, and even if it recycled 100% of the CS₂, “we [at IEPA] would probably still say that this system was not designed for that.” Tr. at 160.

THE PARTIES’ ARGUMENTS

Emerald’s 27-page opening arguments are that it complies with the terms of the SO₂ exception as written in Section 214.382 (Pet. Br. at 8-15) , and that the Agency should be

estopped from changing its consistent 25-year long determination that the SO₂ exception does in fact apply. Pet. Br. at 15-26.

In its 66-page brief, the Agency sets forth the standard of review and burden of proof (IEPA Br. at 8-10), states that the MBT-C condensers are reflux condensers (IEPA Br. at 8-14), and that Section 214.382 is clear on its face and excludes the MBT-C condensers. IEPA Br. at 14-24. Additionally, IEPA argues that additional support for its contentions is given by its own institutional knowledge (IEPA Br. 25-28), information from other states (IEPA Br. 28-31), and USEPA guidance. IEPA Br. 31-34. IEPA also argues that Emerald has failed to prove its estoppel claim. IEPA Br. 34-52.

In its 29-page response, Emerald argues that the Board should apply a *de novo* standard to interpretation of the SO₂ exception (Pet. Rep. at 1-4), the plain language of the rule shows that it applies to Emerald (Pet. Rep. at 5-9), and IEPA reliance on extrinsic evidence is misplaced. Pet. Rep. at 10-15. While acknowledging that the doctrine of “equitable estoppel” may not “strictly” apply, Emerald urges that the IEPA should be held to its earlier, correct interpretation that the SO₂ exception applies to the Henry plant. Pet. Rep. at 17-24.

DISCUSSION

The Board’s standard of review is clear in permit appeal cases. *See supra* at 5-6. It is long-settled that “[t]he Board is not required to apply the manifest-weight test to its review of the Agency’s decision denying a permit.” IEPA v. PCB, 115 Ill. 2d 65, 70, 503 N.E.2d 343, 345 (1986).

The sole issue here involves interpretation of 35 Ill. Adm. Code 214.382 as it relates to Section 214.301. As Emerald correctly points out, when the question involved is a matter of law involving proper interpretation of a Board rule, the Agency’s interpretation is not binding upon the Board. See Pet. Br. at 17, Pet. Rep. at 3, citing Village of Fox River Grove v. Pollution Control Board, 299 Ill. App. 3d 869, 877-78, 702 N.E.2d 656, 662 (2d Dist. 1998) (citing Envirite Corp. v. Illinois Environmental Protection Agency, 158 Ill. 2d 210, 632 N.E.2d 1035 (1994)); *see also* Peoria Disposal Co. v. Illinois Environmental Protection Agency, PCB 08-25, slip. op. at 31 (January 10, 2008) (“[W]hen the Agency has resolved a legal question such as interpretation of a statutory provision, the Agency's determination is not binding upon the Board.”), *affd. sub nom* Peoria Disposal Company v. Illinois Pollution Control Board and Illinois Environmental Protection Agency, No. 3-08-0030 (Third Dist. Jan. 20, 2009) (Rule 23 order).

Consistent with prior case law, since the Board itself has not previously interpreted Section 214.382(a), any prior interpretations made by the Agency are not binding on the Board. The Board approaches the issue *de novo*.

The Board agrees with the parties that the language of Section 214.382(a) is clear and unambiguous on its face. *See* IEPA Br. at 14-16 and Pet. Rep. at 4. As Emerald argues, it is a well-accepted principle of statutory construction, and IEPA does not argue otherwise, that the initial source for determining regulatory intent is the plain meaning of the language used. The well-settled precedent is that where the language is unambiguous, the plain meaning of the

language controls. See Pet. Rep at 5, n. 3, citing, e.g., Board of Trustees of Southern Illinois University Governing Southern Illinois University, Edwardsville, Illinois Environmental Protection Agency, 2005 WL 2040591, PCB 02-105 (August 4, 2005), at * 11. Additionally, in interpreting its rules, the Board may refer to its adopting opinion and order discussing the hearing record developed in support of the rule and the Board's findings. In this case, that is In the Matter of: [Air] Emission Standards, R71-23 (April 13, 1972). Otherwise, the Board does not examine extrinsic evidence consistent with settled case law in this area.

Emerald argues that, on its face, Section 214.382 imposes only three criteria on a permit applicant that seeks to avail itself of this exception:

- 1) it must be an existing process;
- 2) that is designed to remove sulfur compounds from the flue gases;
- 3) of petroleum and petrochemical processes. Pet. Reply at 5.

The Board agrees with Emerald and its witnesses that the Henry plant's MBT-C process meets all of these requirements. The rule does not enquire into whether the "existing process" uses "reflux" or "process" equipment or "control" equipment, so long as it is designed to remove sulfur compounds from flue gases. The uncontroverted testimony here is that the Emerald process was so designed. The rule does not address capture efficiency percentages, and the Agency has not cited the Board to any evidence in the R71-23 regulatory record that does so. The Board will not rewrite Section 214.382, or import into the record of R71-23, information developed since then by other states or the federal government. The Board notes that while USEPA submitted comments on the CAAPP permit under review here, it commented only that the federal MON would apply to the facility. USEPA did not comment on the issue of applicability of whether the SO₂ exception applies or not.

The Board finds that Emerald's MBT-C process system qualifies for the SO₂ exception in 35 Ill. Adm. Code 214.382. Finding that the plain language of the rule supports the reading sought by Emerald, the Board need not reach any equitable issues such as estoppel. The Board accordingly finds that the Agency improperly included the condition concerning applicability of 35 Ill. Adm. Code 214.301, and remands the CAAPP permit for re-issuance consistent with the Board's findings in this opinion and order.

ORDER

For all of the foregoing reasons, the Board finds that the Agency improperly included in the November 23, 2003 CAAPP permit issued to Emerald for the Henry plant various conditions stating, or premised on, applicability of 35 Ill. Adm. Code 214.301 to Emerald's MBT-C process and condensers. The Board accordingly remands the CAAPP permit for expeditious re-issuance consistent with this opinion and order.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 15, 2009, by a vote of 5-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish extending to the right.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board