BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

EMERALD PERFORMANCE MATERIALS, L.L.C. (as purchaser of 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
Drinker Biddle Garner Carton
191 N. Wacker Drive
Suite 3700
Chicago, Illinois 60606-1698

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 sent by Overnight Mail with postage thereon fully paid and deposited into the possession of the United Parcel Service the **MOTION FOR WAIVER OF REQUIREMENTS, MOTION TO TEMPORARILY SEAL RESPONDENT'S POST-HEARING BRIEF AS TRADE SECRET** and **POST-HEARING BRIEF** 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,

Sally Carter

Sally Carter
Assistant Counsel

Dated: July 24, 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

EMERALD PERFORMANCE MATERIALS, L.L.C. (as purchaser of NOVEON, INC.).	)	
Petitioner,	)	
v.	)	**PCB 2004-102 (CAAPP Permit Appeal)**
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

MOTION TO TEMPORARILY SEAL RESPONDENT'S POST-HEARING BRIEF AS TRADE SECRET

The Respondent, Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"), by and through its attorneys and pursuant to 35 Ill. Adm. Code 101.500, hereby moves the Illinois Pollution Control Board ("Board") to Temporarily Seal Respondent's Post-Hearing Brief as Trade Secret until Petitioner has been afforded the opportunity to review Respondent's Post-Hearing Brief to confirm that statements within such document do not jeopardize Petitioner's prior trade secret claims pending before the Illinois EPA. In support of this Motion, Respondent states as follows:

1. 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. For purposes of this appeal, and particularly, for the Post-Hearing Brief, the issue before the Board is Petitioner's challenge to the Agency's decision that the facility's condensers in the mercapto-benzothiazole crude ("MBT-C") process are not entitled to the exemption provided by 35 Ill. Adm. Code 214.382 and thus, are subject to the 2,000 ppm SO_2 limit in 35 Ill. Adm. Code 214.301 (hereinafter referred to as the "SO_2 issue").

2. During CAAPP permitting of the source, Petitioner submitted a number of documents to the Agency, many of which included claims of trade secret by Emerald. At all times and consistent with the mandate of 35 Ill. Adm. Code 130, the Illinois EPA has protected those documents previously claimed trade secret by Petitioner. In order to continue the protection afforded to material previously claimed as trade secret by Petitioner to the Illinois EPA, the Agency filed a Public Version (i.e., Volume I), and a Trade Secret Version, (i.e., Volume II) of the Administrative Record with the Board on April 27, 2007. *See,* 35 Ill. Adm. Code 130.

3. While the Respondent has diligently protected such documents, the Respondent had no choice but to extensively rely upon certain documents claimed as trade secret by Petitioner in its Post-Hearing Brief given that the Illinois EPA relied upon these documents in its ultimate permitting decision. Consequently, the Respondent's brief cites to a variety of documents contained within the Trade Secret Version of the Administrative Record and, moreover, provides a lengthy discussion of Petitioner's MBT-C process that had previously been claimed trade secret in countless documents submitted by the Petitioner to the Agency.

4. What is not clear to the Agency is whether such statements in its brief would impair Petitioner's prior trade secret claims particularly, due to recent statements by Petitioner to the Board. Most recently, in Petitioner's Motion to Designate Transcript as Non-Trade Secret, the Petitioner asserted it had reviewed the transcript from the February 5, 2008, hearing and the exhibits admitted into evidence concluding only one exhibit (i.e., Exhibit 3) contained trade secret information. *Motion to Designate Transcript as Non-Trade Secret,* April 14, 2008.

5. In light of Petitioner's prior claims to the Agency and, more recently, Petitioner's willingness to designate much of the same material as non-trade secret before the Board, it is not clear to the Agency how to reconcile these apparent inconsistencies in Petitioner's statements. To avoid the inadvertent disclosure of materials and/or information claimed trade secret by Petitioner to the Agency, the safest course of action is to provide Petitioner the opportunity to review Respondent's Post-Hearing Brief before making it public. Consequently, the Illinois EPA requests that the Board temporarily seal Respondent's Post-Hearing Brief as trade secret until Petitioner has the opportunity to review the filing to confirm statements contained within such document do not jeopardize Petitioner's prior trade secret claims to the Agency. In the event, Petitioner concludes that certain statements within Respondent Post-Hearing Brief could impair its trade secret claims pending before the Agency, the Agency would propose submitting a Public (i.e., redacted) Version of Respondent's Post-Hearing Brief and a Trade Secret Version of Respondent's Post-Hearing Brief to the Board.

WHEREFORE, for the reasons set forth above, the Respondent, Illinois Environmental Protection Agency, respectfully requests that the Board Temporarily Seal Respondent's Post-Hearing Brief as Trade Secret.

Respectfully submitted,

Sally A. Carter
Assistant Counsel

Dated: July 23, 2008
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217)782-5544

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

EMERALD PERFORMANCE MATERIALS, L.L.C. (as purchaser of NOVEON, INC.).	)	
Petitioner,	)	
v.	)	**PCB 2004-102**
	)	**(CAAPP Permit Appeal)**
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

MOTION FOR WAIVER OF REQUIREMENTS

The Respondent, Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"), by and through its attorneys and pursuant to 35 Ill. Adm. Code 101.500, hereby moves the Illinois Pollution Control Board ("Board") to waive certain requirements, namely that the Respondent's Post-Hearing Brief not exceed fifty (50) pages as set forth in 35 Ill. Adm. Code 101.302. In support of this Motion, Respondent states as follows:

1. 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. However, the issue for purposes of this appeal, and particularly, for this Post-Hearing Brief, is Petitioner's challenge to the Agency's decision that the facility's condensers in the mercapto-benzothiazole crude ("MBT-C") process are not entitled to the exemption provided by 35 Ill. Adm. Code 214.382 and thus, are subject to the 2,000 ppm SO_2 limit in 35 Ill. Adm. Code 214.301 (hereinafter referred to as the "SO_2 issue").

2. Admittedly, Respondent's Post-Hearing Brief, together with its accompanying exhibits, is sixty-six (66) pages in length. Nonetheless, it is fairly

proportional in its response given both the complexity and, in some instances, the potential significance of the issues raised by the Petitioner in its appeal. While one principle issue remains for this appeal, the number of off-shooting arguments and miscellaneous issues raised by Petitioner was considerably greater. First, the Petitioner contends that the Illinois EPA's review of the applicable regulatory language in conjunction with its consideration of the Administrative Record subjected the source to the 2,000 ppm SO_2 standard and in so doing, the Agency improperly reversed course on twenty-five years of state operating permitting history exempting the source from this standard. [*Petitioner's Post-Hearing Memorandum at 3-4, 10-18*]. In support of such argument, Petitioner argued that the Illinois EPA subjectively engaged in an inappropriate rulemaking by incorporating additional requirements into 35 Ill. Adm. Code 214.382. [*Petitioner's Post-Hearing Memorandum at 2-18*]. Second, due to the lack of any regulatory amendments to 35 Ill. Adm. Code 214.301 and 214.382, or the lack of changed circumstances at the source, Emerald insists that the Illinois EPA should be estopped from subjecting it to 35 Ill. Adm. Code 214.301. *Petitioner's Post-Hearing Memorandum at* 15-18. Finally, in a related argument, the Hearing Officer purportedly erred in denying Petitioner's Motion to Supplement the Record for the CAAPP permit with documents contained in state operating permit files from 1972 through 1993. *Petitioner's Post-Hearing Memorandum at* 19-26.

3. In all instances, the Illinois EPA sought to provide a detailed overview of its permitting decision, together with relevant supporting facts from the Administrative Record. At the same time, Respondent diligently attempted to restrict the length of Respondent's Post-Hearing Brief and, in furtherance of these efforts, where possible, the

Illinois EPA sought to minimize its responses to trivial or collateral matters. Despite these efforts, Respondent has found it impossible to abide by the fifty-page limit and fully set forth the numerous complex matters that must be discussed by the Respondent to provide a through analysis of the applicable law and facts in support of the Respondent's position. In addition, as the Petitioner's Post-Hearing Brief is dispositive to the outcome of the case, a thorough review of the applicable law and facts is warranted by the Illinois EPA in this case.

4. Concurrently with this Motion, Respondent is submitting Respondent's Post-Hearing Brief to the Board for filing that is in excess of fifty pages in length.

WHEREFORE, for the reasons set forth above, the Respondent, Illinois Environmental Protection Agency, respectfully requests that the Board provide approval for the Respondent's Post-Hearing Brief for filing in excess of fifty pages.

Respectfully submitted,

Sally A. Carter

Sally A. Carter
Assistant Counsel

Dated: July 23, 2008
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217)782-5544

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of July 2008, I did send the following instruments, **MOTION FOR WAIVER OF REQUIREMENTS, MOTION TO TEMPORARILY SEAL RESPONDENT'S POST-HEARING BRIEF AS TRADE SECRET** and **POST-HEARING BRIEF** by Overnight Mail with postage thereon fully paid and deposited into the possession of the United Parcel Service, 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 24th day of July 2008, I did send, a true and correct copy of the same foregoing instruments, by Overnight Mail with postage thereon fully paid and deposited into the possession of the United Parcel Service, to:

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

Roy M. Harsch
Steven J. Murawski
Drinker Biddle Gardner Carton
191 N. Wacker Drive
Suite 3700
Chicago, Illinois 60606-1698

Sally A. Carter

Sally Carter
Assistant Counsel

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

EMERALD PERFORMANCE MATERIALS, L.L.C. (as purchaser of NOVEON, INC.).	)	
Petitioner,	)	
v.	)	**PCB 2004-102**
	)	**(CAAPP Permit Appeal)**
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

POST-HEARING BRIEF

The Respondent, Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"), by and through its attorneys files with the Illinois Pollution Control Board ("Board") this Post-Hearing Brief in this cause, stating as follows:

I.

Introduction

The Petition for Review ("Petition") involves a Clean Air Act Permit Program ("CAAPP") permit issued by the Illinois EPA on November 24, 2003 to Noveon, Inc. for the operation of an organic chemical manufacturing plant located in rural Henry, Marshall County, Illinois.[1]

Relevant Case History

[1] In May 2006, Sun Capital purchased the polymer chemical side of the manufacturing plant including the mercapto-benzothiazole crude ("MBT-C") process in Henry, Illinois and renamed the facility Emerald Performance Materials, L.L.C. [*Transcript at 12-13*]. On February 7, 2008, the Board granted Noveon Inc.'s Agreed Motion to Change Petitioner's Name to Emerald Performance Materials, L.L.C. For purposes of Respondent's Post-Hearing Brief, all references to this source shall be to "Petitioner" or "Emerald" regardless of the actual source name at that time.

To simply give a bit of an overview to the permit application submittal and the permit review, Emerald submitted a CAAPP application to the Illinois EPA's Division of Air Pollution Control ("DAPC")/Permit Section on March 7, 1996. [*Trade Secret Version of Record at 1-2115*]. This application lacked requisite details to determine compliance with certain regulatory requirements at issue in this proceeding. Consequently, the Agency subsequently notified the source in a February 22, 2001, letter that the Illinois EPA was reevaluating Emerald's compliance with the applicable SO_2 regulations. [*See, Public Version of Record at 1469-1471*]. As a result of Petitioner's response to this letter, and the Illinois EPA's review of the pertinent regulations, the Agency determined that Emerald was not in compliance with the SO_2 regulations. Following the February Request for Additional Information, the Illinois EPA sent Petitioner a second Request for Additional Information on May 16, 2001, requesting the submittal of a compliance plan given the Illinois EPA's determination that the condensers on the MBT-C process did not qualify for the exemption in 35 Ill. Adm. Code 214.382 and thus, were subject to the requirements of 35 Ill. Adm. Code 214.301. [*See, Public Version of Record at 1459-1460*; *see also, Transcript at 113-116*].

As will be elaborated upon in the body of this brief, the Illinois EPA's decision not only centered on a detailed review of the workings of the MBT-C process in light of the applicable regulatory language as well as a consideration of the percent of total sulfur compounds recovered by the condensers; the Agency's conclusion was also based upon its institutional knowledge (i.e., the intent of the original rulemaking for 35 Ill. Adm. Code 214.382, particularly in light of the differences at sulfur recovery units at petroleum

refineries, the units meant to be covered by the rulemaking, verses the condensers on the MBT- C process); information from regulators in other states; and USEPA guidance.

The Petitioner expressed its disagreement with the Illinois EPA over the applicability of the exemption in various meetings and in letters dated June 14, 2001 and October 17, 2003. [*See, Trade Secret Version of Record at 2116-2118; see also, Public Version of Record at 1238-1252 ¶7, 1276-1277, 1420; see also, Transcript at 40-41, 119-120*]. While Petitioner disagreed with the Agency's conclusion that 35 Ill. Adm. Code 214.301 was applicable to the MBT-C process at the source, the USEPA did not comment on this applicable requirement during its 45-day review period. Rather, any concerns expressed by the USEPA over the proposed CAAPP permit were limited to the future applicability of the Miscellaneous Organic National Emission Standard for Hazardous Air Pollutants ("NESHAP") ("MON") and, in the context of the New Source Performance Standards ("NSPS"), various proposed applicability determinations made by the Illinois EPA. [*Public Version of Record at 1842-1843, 1850-1851; see also, Transcript at 126-127*]. Acting in accordance with its authority under the CAAPP provisions of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/39.5 (2002), the Illinois EPA deliberately considered the applicable regulations and the Administrative Record when it issued a CAAPP permit to Emerald on November 24, 2003 subjecting the MBT-C process to 35 Ill. Adm. Code 214.301.

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. While the initial petition challenged a number of conditions, on January 30, 2008, Petitioner filed an Agreed Motion to Voluntarily Dismiss Certain Claims; said motion

was granted by the Board on February 7, 2008. The sole issue for purposes of this appeal, and particularly, for this Post-Hearing Brief, is Petitioner's challenge to the Agency's decision that the facility's condensers in the MBT-C process[2] are not entitled to the exemption provided by 35 Ill. Adm. Code 214.382 and thus, the process is subject to the 2,000 ppm SO_2 limit in 35 Ill. Adm. Code 214.301 (hereinafter referred to as the "SO_2 issue").

Given that other information relied upon by the Illinois EPA was not relevant to the SO_2 issue but involved other noncontested sections of the CAAPP permit or other sections of the CAAPP permit that would ultimately be withdrawn, 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 SO_2 issue. The Illinois EPA filed its Motion for Leave and submitted its Administrative Record to the Board on April 27, 2007. Petitioner had no objection to the Motion for Leave. [*See, Hearing Officer Order, dated July 26, 2007*].

The Administrative Record included a Public Version (i.e., Volume I), and a Trade Secret Version, (i.e., Volume II) of the record that generally included Emerald's CAAPP 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 DAPC/Permit Section in the issuance of the CAAPP permit relevant to the SO_2 issue. Documentation contained within the Administrative Record was arranged chronologically, beginning with the submittal of the CAAPP application on

[2] As discussed in Petitioner's case-in-chief, Emerald produces, in addition to other products, accelerators to speed the time required to cure tires. Sodium mercapto-benzothiazole (MBT) is the intermediate employed to make the accelerators; the first step in the production of sodium MBT is the MBT-crude process at issue in this appeal. [*Transcript at 14-15*; *see also, Petitioner's Post-Hearing Memorandum at 5*].

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 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).

On January 24, 2008, Petitioner filed a Motion to Supplement the Record in this cause, arguing that the Illinois EPA was required to supplement the Administrative Record for the subject CAAPP application with material not specifically relied upon by the Agency and, in fact, was information derived from prior state operating permit application submittals.

In its January 29, 2008 response, the Illinois EPA explained that the record for the CAAPP permit appropriately began with the submittal of the CAAPP application in March 1996 and ran through the date of the CAAPP permit's issuance in November 2003; the Agency's inclusion of two memoranda in the record that pre-dated the submittal of the CAAPP application in 1996 were appropriate given they were physically attached to a 2001 memorandum included within the CAAPP permit file; and for purposes of Petitioner's estoppel claim that the Illinois EPA held a contrary permitting decision for approximately twenty years with regard to the applicability of 35 Ill. Adm. Code 214.301 to the source, the Illinois EPA conceded the point. Hearing Officer Halloran concurred with the Illinois EPA in his February 4, 2008, Hearing Officer Order denying Petitioner's Motion to Supplement the Administrative Record.

A hearing was scheduled by Hearing Officer Halloran and held on February 5, 2008 in Marshall County, Illinois. At the hearing, the Petitioner called three witnesses, David Giffin of Emerald, Michael Corn of AquAeTer, Inc., and Bernard Evans of Environmental Resources Management. During its case-in-chief, the Illinois EPA presented the testimony of Agency permitting engineer, Dan Punzak. During the hearing, the Hearing Officer sustained Agency objections to Petitioner's repeated efforts to introduce documentation relevant to previously-issued state operating permits from 1972 through 1993 that pre-dated the March 1996 submittal of the CAAPP application to the Illinois EPA. Public comments were to be filed with the Board on or before June 12, 2008. No member of the public commented by this deadline.

II.

Argument

The opening salvo in Petitioner's challenge to the Illinois EPA's permit decision is a highly-charged and caustic denunciation of the assigned permitting engineer's, Mr. Dan Punzak, review of the applicable regulatory language in conjunction with his review of the Administrative Record in this proceeding, particularly, Petitioner's CAAPP application. The Petition presents a derisive view of Mr. Punzak's role in the Agency's CAAPP decision to subject the source to the applicable SO_2 standard and in so doing, reversing course on twenty-five[3] years of state operating permitting history exempting the

[3] Emerald's contention that over a span of *twenty-five* years, the Illinois EPA consistently approved state operating permits for the source's MBT-C process exempt from the 2,000 ppm SO_2 standard is not supported by evidence before the Board. [*Petitioner's Post-Hearing Memorandum at 2, 4, 15, 26*]. Rather, evidence indicates that the Illinois EPA held a contrary permitting decision for approximately *twenty* years. Elsewhere in its brief, Petitioner references documents indicating that the initial permit approving the exemption from the 2,000 ppm SO_2 standard was issued in 1975 and subsequently renewed until 1993. [*Petitioner's Post-Hearing Memorandum at 3, 4, 6, 16, 19; see also, Petitioner's Exhibit 1 (Affidavit of Dan Punzak stating*

source from this standard. [*Petitioner's Post-Hearing Memorandum at 3-4, 10-18*]. Interestingly, the gist of Petitioner's argument is not directed against the Illinois EPA but generally focuses its attention on the "personal viewpoint" of Mr. Punzak. [*Id.*]. Petitioner would have the Board believe that Mr. Punzak single-handedly convinced the Agency to disregard twenty years of state operating permitting history to subjectively interject extra features into 35 Ill. Adm. Code 214.382 and based upon such inappropriate rulemaking, the Illinois EPA arbitrarily subjected the MBT-C process to the 2,000 ppm SO_2 standard. [*Petitioner's Post-Hearing Memorandum at 2-18*].

Based on the foregoing and the lack of any regulatory changes to 35 Ill. Adm. Code 214.301 and 214.382, or the lack of any changes to the source's factual circumstances, Emerald insists that the Illinois EPA should be estopped from subjecting the source to 35 Ill. Adm. Code 214.301. [*Petitioner's Post-Hearing Memorandum at 15-18*]. Finally, in a related argument, the Hearing Officer purportedly erred in denying Petitioner's Motion to Supplement the Record with documents contained in state operating permit files from 1972 through 1993. [*Petitioner's Post-Hearing Memorandum at 19-26*]. In Petitioner's last argument, allegations of wrong-doing do not end with the assigned permitting engineer, as state officials from the Illinois EPA's Freedom of Information Act ("FOIA") section are accused, in essence, of deceit by withholding critical information from Petitioner. [*Petitioner's Post-Hearing Memorandum at 20*]. Aside from wonderful hyperbole, the Petitioner's arguments do not

---

that "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.")]. For purposes of simplicity before the Board, all references shall be to a twenty-year period as admitted by the Illinois EPA in Petitioner's Exhibit 1.

contain evidence showing that if the CAAPP permit had been issued as requested by Emerald, the permit would have complied with the Act and the Board regulations.

A. Applicable Standard of Review and Burden of Proof

The Illinois EPA is required to issue CAAPP permits consistent with the Clean Air Act, the Illinois Environmental Protection Act and all implementing regulations. 415 ILCS 5/39.5(3)(a). While recognizing the Illinois EPA's obligation to issue CAAPP permits consistent with these statutory and regulatory dictates, the burden of proof rests with the Petitioner in an appeal of a CAAPP permit before the Board. 415 ILCS 5/40.2(a)(2006). *Accord., Color Communications, Inc., v. Illinois Environmental Protection Agency,* (July 18, 1996), PCB 96-125 (the appropriate standard of review in CAAPP permit appeals filed pursuant to Section 40.2 of the Act is the same as that routinely applied by the Board in Section 40 permit appeals). In such matters:

> the permit applicant bears the burden of proving that the application as submitted to the Agency will not violate the Act or the Board regulations. (*Browning-Ferris Industries of Illinois, Inc. v. Pollution Control Board,* 179 Ill. App. 3d 598, 534 N.E. 2d 616, (2nd Dist. 1989); *John Sexton Contractors Co. v. Illinois,* (February 23, 1989), PCB 88-139.)

Color Communications at 4. The Board further explained "[i]n most permit appeals, a petitioner must show that the condition imposed by the Agency is arbitrary and not necessary to accomplish the purposes of the Act. Stated alternatively, a petitioner must establish that its permit, absent the condition, will not result in any future violation of the Act and the condition is, therefore, arbitrary and unnecessary." *Land & Lakes Company v. Illinois EPA,* (November 8, 1990), PCB 90-118, at p. 4; *see also, Illinois EPA v. Pollution Control Board,* 455 N.E.2d 188, 194 (1983). ("If the Agency has granted the permit with conditions to which the petitioner objects, the petitioner must prove that the

conditions are not necessary to accomplish the purposes of the Act and therefore were imposed unreasonably."). "[T]he primary focus must remain on the adequacy of the permit application and the information submitted by the applicant to the Agency." *John Sexton Contractors Company v. Illinois EPA,* PCB 88-139, slip op. at 5 (February 23, 1989).

More recently, the Board has reaffirmed this standard in a National Pollutant Discharge Elimination System ("NPDES") permit appeal stating that the "Board's standard of review is whether the record establishes that the issuance of the permit will not violate the Act or Board rules." *Des Plaines River Watershed Alliance, Livable Communities Alliance, Prairie Rivers Network, and Sierra Club v. Illinois EPA and Village of New Lenox,* PCB 04-88, slip op. 2 (July 12, 2007). "In the case of a permit issued with conditions, the Board must determine that as a matter of law the application as submitted to the IEPA demonstrates that no violation of the Act or Board rules will occur if the requested permit is issued." *Id.,* slip op. 14-15 (April 19, 2007), *citing Jersey Sanitation v. IEPA,* PCB 00-82 (June 21, 2002) *aff'd IEPA v. Jersey Sanitation and PCB,* 336 Ill. App. 3d 582, 784 N.E. 2d 867 (4th Dist. 2003).

Nor may a petitioner fulfill this requirement by merely challenging the propriety of the Illinois EPA's decision without establishing the merits of its requested permit. *See, John Sexton Contractors Company v. Illinois EPA,* PCB 88-139, slip op. at 6-7 (February 23, 1989). In *Sexton,* the applicant provided limited support for its proposed plan to manage leachate but rather restricted its challenge to the special conditions included in the permit. The Board explained:

> To prevail, the applicant must prove how the application as submitted was environmentally sound. Whether the Board affirms or rejects challenged

> conditions is primarily dependent on the facts that the applicant made available to the Agency when the Agency made its permit decision. Reiteration of the desired conclusion offers no factual support for an independent evaluation. Therefore, conclusory arguments do not prove that the Agency erred on the threshold issue: did the facts available to the Agency support a conclusion that no violation of the Act and Board regulations would have occurred had the permit issued as requested? A permit applicant cannot prevail by simply limiting its arguments to the impropriety of the Agency-imposed conditions without showing the propriety of its own requested conditions. *Cf. Browning-Ferris Industries of Illinois, Inc. v. EPA,* No. 2-88-0548, slip op. at 6-7 & 13-14 (2nd Dist. Feb. 3, 1989).

Id. at 5. In affirming the permit, the Board concluded that the petitioner failed to establish its proposed plan was adequate based on the information before the Illinois EPA at the time of the permitting decision. *Id.* at page 7. The record was "largely devoid" of information that would support the adequacy of the plan proposed by the applicant. *Id.* at page 14.

Similarly, as will be elaborated upon in the following discussion, the record is "largely devoid" of material supporting Petitioner's claim that 35 Ill. Adm. Code 214.382 is applicable to the condensers on the MBT-C process. In fact, the record is replete with evidence that if the CAAPP permit had been issued as requested by Emerald, the permit would have violated the Act and Board regulations. The information that the Illinois EPA drew upon in concluding that facility's condensers in the MBT-C process were, in fact, subject to 35 Ill. Adm. Code 214.301 was based in large part upon the information submitted by Emerald in its CAAPP application. [*See, Trade Secret Version of Record at 1-2115*]. As such, the Illinois EPA is confident that Emerald has not met its burden in this matter.

B. The Condensers in the MBT-C Process Are Reflux Condensers Utilized to Recover CS_2 for Additional Use as a Raw Material in the Process

i. The MBT-C Process

Admittedly, the following discussion of Petitioner's MBT-C process is detailed and lengthy in nature. Nonetheless, it is fairly proportional in its explanation given the complexity of the reaction, and particularly, the steps that the relevant reactants, product and byproducts (waste material) follow during the ultimate production of MBT-C. Moreover, given the potential significance of the issues raised by Petitioner in its appeal, a thorough discussion of the MBT-C process in light of the pertinent regulations, 35 Ill. Adm. Code 214.301 and 214.382, and the supporting testimony provided by Respondent's expert witness is vital to the Board's understanding of these issues. In issuing Petitioner's CAAPP permit consistent with the Clean Air Act, the Act, all applicable regulations and chemical engineering principles, the Agency not only took into account the Administrative Record, its institutional knowledge, information from regulators in other states, USEPA guidance, but also relied upon the work of Illinois EPA chemical permitting engineer, Mr. Dan Punzak.[4]

---

[4] Mr. Dan Punzak has a bachelors of science degree, major in chemical engineering, from Carnegie Mellon University. [*Transcript at 91*]. He is a licensed professional engineer and, in the context of applicable regulations and USEPA guidance, drafts and issues CAAPP permits for major sources in Illinois. [*Transcript at 93-95*]. Mr. Punzak has approximately thirty years of experience in the field of air permitting, most recently serving in the CAAPP permit unit since its inception in the mid-1990s. [*Transcript at 92-93*]. Given his educational background and extensive permitting experience, Mr. Punzak is routinely assigned complex CAAPP applications typified by chemical process plants such as refineries, organic chemical plants, printing and coating plants, etc. [*Transcript at 93*]. While Petitioner would have the Board believe that Mr. Punzak single-handedly convinced the Agency to disregard twenty years of state operating permitting history, "[a] decision of the Agency to grant or deny a permit is indeed the decision of the Agency" and does not merely reflect the thoughts of isolated Agency personnel. *West Suburban Recycling & Energy Center, L.P. v. Illinois EPA* (October 17, 1996), PCB 95-119 and 95-125, at p. 6.

Petitioner's witnesses are not trained chemical engineers. Rather, Mr. Dave Giffin holds an undergraduate degree in zoology and a master's degree in engineering administration; Mr. Michael Corn has a bachelor's degree in nuclear engineering and a master's degree in environmental and water resources engineering; and Mr. Bernard Evans holds a bachelor's degree in engineering and a master's degree in environmental engineering. [*Transcript at 58-59, 66, 76-77, 80*]. Both Mr. Corn's and Mr. Evans' experience with 35 Ill. Adm. Code 214.301 and 35 Ill.

As explained by Mr. Punzak, the MBT-C process is a petrochemical process, that generally reacts molten sulfur (S), aniline (AN), and carbon disulfide (CS_2) under high pressure (1000 psig) and high temperatures (500°F) to produce MBT-C that is subsequently transferred to another reaction to aid in the production of sodium mercapto-benzothiozole (NaMBT).[5] [*Trade Secret Version of Record at 138-140, 173 & 195; see also, Transcript at 24, 52, 56, 72, 96-99, 130, 165*]. After this general overview of the MBT-C process, Mr. Punzak's testimony focused on a detailed, but crucial discussion of the MBT-C process,[6] classified as a process emission unit by the Petitioner. For the Board's ease of reference, the MBT-C process is delineated in further detail on page 141 in the Trade Secret Version of the Administrative Record. [*Transcript at 98*].

The sulfur, aniline and carbon disulfide enter the MBT-C reactor as liquids and together, under elevated temperature and pressure react to form mercapto-benzothiozole-

---

Adm. Code 214.382 is limited to their respective permitting work at the Henry plant. [*Transcript at 77, 88*].

[5] The above discussion will explain the MBT-C process prior to the installation of the hydrosulfide recovery system ("NaSH system") in approximately 2006. [*Transcript at 19*]. Emerald installed the NaSH system to alter the route of CS_2 and hydrogen sulfide (H_2S) from the blow down tank to a process designed to remove sulfur compounds from those flue gases. [*Transcript at 105*]. The NaSH system separates CS_2 from the H_2S thereby allowing the recovery of any remaining CS_2 for additional MBT-C production in the reactors. [*Transcript at 19-21*]. Meanwhile, the H_2S is purified, reacted in the distillation column and combined with a caustic solution to form sodium hydrosulfide that is shipped to various NaSH customers. [*Id.*]. Any remaining H_2S is sent to the scrubber prior to being discharged to the atmosphere. [*Id.*; *see also, Petitioner's Post-Hearing Memorandum at 6, fn.4*]. Given that the NaSH system was installed in 2006, for purposes of 35 Ill. Adm. Code 214.382, the NaSH system is a *new* process, not entitled to the exemption for an *existing* process designed to remove sulfur compounds from the flue gases of petroleum and petrochemical process. [*Transcript at 60-62*].

[6] The MBT-C reactor process may consist of two concurrent reactions; the first occurring in EU 711-001 made up of MBT-C Reactor No. 1, Condenser CU 711-0001 and MBT-C Blow Down Tank No.1 and the second reaction taking place in EU711-0002 embracing MBT-C Reactor No.2, Condenser CU711-0002 and MBT-C Blow Down Tank No.2. [*See, Trade Secret Version of Record at 141; see also, Transcript at 52, 96 & 98*].

crude that is subsequently transferred to the MBT-C blow down tank. [*Transcript at 52, 56, 98-99*]. In the process, the sulfur, aniline and carbon disulfide also produce two vapors, hydrogen sulfide and carbon disulfide; the MBT-C reactor does not release the vapor, sulfur dioxide (SO_2) in the process. [*Transcript at 52,* 99]. The vapors, H_2S and CS_2, are later sent to a high temperature condenser that maintains an inlet gas temperature of 500 °F. [*See, Trade Secret Version of Record at 173 & 195; see also, Transcript at 99*].

The following discussion tracks each vapor, H_2S and CS_2, through the MBT-C process beginning with the appearance of CS_2 in the condensers. The condensers target a lower temperature to condense the vapor, CS_2, into a liquid and in so doing, allow the recovery of CS_2 before sending it back to the reactor for additional use as a *raw material* in the MBT-C process. [*Transcript at 52, 56, 57, 99-100, 111*]. Not surprising then, the outlet gas temperature of the condensers is typically at a lower temperature, approximately 300 °F, than the condensers' inlet gas temperature of 500 °F. [*See, Trade Secret Version of Record at 173 & 195; see also, Transcript at 99-100*].

Prior to Petitioner's installation of the NaSH system, Petitioner estimated that 75% to 83% of the CS_2 was recovered by the condensers. [*See, Trade Secret Version of Record at 173 & 195; see also, Public Version of the Record at 1471; see also, Transcript at 100-101*]. Elsewhere in the record, Petitioner estimated that the condensers recovered 70% of the CS_2. [*Trade Secret Version of the Record at 2120; see also, Transcript at 26*]. Central to the Agency's ultimate conclusion, the condensers do not remove CS_2 from the MBT-C process, rather CS_2 is recovered for additional use as a raw material in the process and the remainder of the CS_2 is vented to a blow down tank

ultimately expelling to the flare. [*See, Trade Secret Version of the Record at 2120 ("the condenser operates to conserve the loss of carbon disulfide during the reaction."); see also Public Version of Record at 1235-1237; see also, Transcript at 18 ("the condenser returns the carbon disulfide"), 52, 56, 57, 101-102, 104, 111, 113-114, 128-129*].

Completing the reaction for the second vapor that is released from the MBT-C reactor with CS_2, H_2S is more aptly characterized as a byproduct or waste-material with no value in the production of MBT-C. [*Transcript at 99, 119*]. Given that H_2S is not necessary to facilitate MBT-C production, it is not surprising then that the condensers do not recover H_2S but merely vent H_2S to the blow down tank. [*Transcript at 26, 57, 101-102*]. Due to CS_2 condensing at a higher temperature than H_2S, CS_2 is recycled back to the reaction by the ambient temperature condensers while H_2S, once vented to the blow down tank, escapes to the flare. [*See, Trade Secret Version of Record at 2120, ¶2b; see also, Public Version of Record at 1545; see also, Transcript at 101-102, 119*]. SO_2 is not released from the condensers during this process. [*Transcript at 102*].

In the flare, approximately 99% of the vapors, CS_2 and H_2S, are converted into SO_2 and by means of the flare, SO_2 is subsequently emitted into the atmosphere. [*See, Trade Secret Version of Record at 139 & 207; see also, Transcript at 52, 104*]. While the flare would appear to be removing sulfur compounds in the form of CS_2 and H_2S, the flare merely acts to convert sulfur compounds from CS_2 and H_2S, to another form, SO_2.

ii. The Applicable Regulatory Text, 35 Ill. Adm. Code 214.382, Is Clear On Its Face

While the Illinois Administrative Code specifies that the 2000 ppm SO_2 limit does not apply to "existing processes *designed* to remove sulfur compounds from the flue gases of petroleum and petrochemical processes," Petitioners' interpretation of the scope

and meaning of this regulatory language is misplaced. 35 Ill. Adm. Code 214.382(a)(emphasis added). In lieu of this unambiguously expressed ground, Petitioner repeatedly overlooks the requirement in 35 Ill. Adm. Code 214.382 that the "existing process [be] *designed* to remove sulfur compounds" preferring instead to focus on the condensers' purported removal (i.e., recovery) of sulfur compounds regardless of whether the condensers were, in fact, *designed* for such purpose. [*Petitioner's Post-Hearing Memorandum at 9, 11*]. Consistent with such argument, Petitioner would have the Board consider any process that recycled any sulfur compound, regardless of percent removal, as a process *designed* to remove sulfur compounds. [*Petitioner's Post-Hearing Memorandum at 10-11*].

When analyzing the applicability of an exemption to a statute, the analysis is generally "two-tiered." *Nokomis Quarry Co. v. Department of Revenue,* 692 N.E. 2d 855, 858, 295 Ill. App. 3d 264, 268. (Ill. App. 5 Dist. 1998). First, the statute must be construed; second, the applicability of the statutory exemption must be determined. *Id.*

> The objective in construing the . . . statute is to determine and give effect to the legislature's intent. *Thomas M. Madden & Co.,* 272 Ill. App. 3d at 215, 209 Ill. Dec. at 292, 651 N.E. 2d at 220. The court should consider not only the statute's language but also its purposes. *Canteen Corp. v. Department of Revenue,* 123 Ill. 2d 95, 104, 121 Ill. Dec. 267, 271, 525 N.E.2d 73, 77 (1988).

Id. at page 859, 269; *see also, M.I.G. Investments, Inc. v. Environmental Protection Agency,* 122 Ill. 2d 392, 523 N.E. 2d 1, 119 Ill. Dec. 533 (1988). Given that the applicable regulatory texts, i.e., 35 Ill. Adm. Code 214.301 and 214.382, are not ambiguous, effect must be given to these expressed terms. *Envirite Corporation v. Illinois EPA,* 158 Ill. 2d 210, 632 N.E. 2d 1035 (1994); [*see also, Petitioner's Post-Hearing Memorandum at* 2 (recognizing that the "regulation at issue is plainly-worded

and unambiguous.")]. "The law is well settled that the plain language of a statute should be given the common meaning of the language." *Saline County Landfill, Inc. v. Illinois EPA, County of Saline,* PCB 04-117, (May 6, 2004), slip op. at 14, *citing Pioneer Processing, Inc. v. Illinois EPA,* 111 Ill. App. 3d 414, 444 N.E. 2d 211 (4th Dist. 1952).

While 35 Ill. Adm. Code 214.301 generally subjects a source such as Petitioner's to a 2000 ppm SO_2 limitation, an exemption to the SO_2 standard exists in 35 Ill. Adm. Code 214.382 for "existing processes *designed* to remove sulfur compounds from the flue gases of petroleum and petrochemical processes." While Petitioner initially suggests that the exemption requires two elements be met, (ie., the facility must possess a 'process' that is 'designed to remove sulfur compounds'), Petitioner later cites testimony of its witness, Mr. Corn, stating that the source need only meet two requirements in order to qualify for the exemption (ie., must be a petrochemical process and it must remove sulfur). [*Petitioner's Post-Hearing Memorandum at 2 and 9, citing Testimony of M. Corn. 72:7-11*]. A closer review of the applicable language indicates that neither interpretation by Petitioner concerning the scope and meaning of the regulatory language in 35 Ill. Adm. Code 214.382 is accurate. For the exception to apply, the source must arguably meet four basic elements: 1) be an existing process; 2) be designed to remove sulfur compounds; 3 & 4) those sulfur compounds must be derived from flue gases originating from a petroleum and petrochemical process. While, the Illinois EPA agrees that the MBT-C process is an existing process and that sulfur compounds stem from the flue gases of a petroleum and petrochemical process, Petitioner has not only failed to demonstrate that the condensers on the MBT-C process were *designed* to remove sulfur

compounds but has generally glossed over the requirement all-together. [*Petitioner's Post-Hearing Memorandum at 9, 11*].

Given the use of the phrase "designed to remove sulfur compounds" in 35 Ill. Adm. Code 214.382, the Illinois EPA sought to give effect to this phrase in combination with the remaining elements of the exemption as set forth above. *Accord., Central Illinois Public Service Company v. Pollution Control Board,* 165 Ill. App. 3d 354, 362, 518 N. E. 2d 1354, 1359 (4th Dist. 1988), *citing Niven v. Siqueira* (1985), 109 Ill. 2d 357, 94 Ill. Dec. 60, 487 N.E. 2d 937 ("Rule of construction that all words of an enactment should, if possible, be given some effect"). Unfortunately, the term "design" has not been defined by the applicable regulations and thus, some degree of subjectivity is necessarily associated with this term. Given the lack of a regulatory definition, a logical place to begin is with the plain and ordinary meaning for the term "design," i.e., "devise for a specific function or end." *Webster's Ninth New Collegiate Dictionary* 343 (1st ed. 1989). In addition, to eliminate some of the inherent subjectivity associated with an undefined term, the Illinois EPA not only considered the term "design" in the context of 35 Ill. Adm. Code 214.382 but deliberated upon "design" in the context of the inner-workings of the MBT-C process as explained above.

First, the evidence indicates that the specific function of the condensers is not to remove sulfur compounds from the flue gases of petrochemical processes but rather to recover CS_2 for additional use in the MBT-C process. [*See, Trade Secret Version of Record at 2120; see also, Public Version of Record at 1235-1237; see also, Transcript at 18, 56, 57, 102, 104, 111, 113-114, 128-129*]. Meanwhile, any non-recovered CS_2 and the waste material, H_2S, is merely vented through the condensers to the blow down tank

and ultimately released to the atmosphere as SO_2 by means of the flare. [*See, Trade Secret Version of Record at 2120; see also, Public Version of Record at 1235-1237; see also, Transcript at 52, 57, 102*]. Nor can it be said that the flare removes sulfur compounds given that sulfur compounds are not removed by the flare but are merely converted from the vapors, CS_2 and H_2S, to the vapor, SO_2. [*See, Transcript at 104*].

One would naturally contemplate that a process *designed* to remove sulfur compounds would minimize emissions to the greatest extent possible and that emissions of sulfur compounds from such process would not be significant. However, the evidence before the Illinois EPA and now the Board clearly evinces a contrary conclusion (i.e., that the condensers were never designed to remove sulfur compounds). Prior to the installation of the NaSH unit, potential flaring emissions of SO_2 from the MBT-C process while the condensers were operating were significant, 4922 tons per year (tpy), while typical flaring emissions of SO_2 were also considerable, 3691 tpy and 1123.79 lbs/hour. [*See, Trade Secret Version of Record at 203; Public Version of the Record at 1543; see also, Transcript at 105*]. If truth be told, the Petitioner, too, felt there were "a lot of emissions of sulfur dioxide" from the MBT-C process prior to the installation of the NaSH unit. [*Transcript at 44*].

Based on such significant emissions, it is not surprising that the Petitioner determined a mere 23% of *total sulfur compounds* were *recovered* from the condensers, an appreciable difference from the estimated 70-83 % of *carbon disulfide recovered* from the same condensers. [*See, Trade Secret Version of Record at 173 & 195, 2117, 2120; see also, Transcript at 103-104, 113*]. This difference is generally attributed to the failure of the condensers to recover those sulfur compounds existing as H_2S, and more

particularly, due to the relative amount of H_2S vapors converted into SO_2 emissions as compared to the amount of CS_2 vapors converted into SO_2 emissions (i.e., H_2S emissions accounted for approximately two-thirds of the SO_2 being emitted from the flare while CS_2 emissions made up only one-third of SO_2 emissions from the flare). [*See, Trade Secret Version of Record at 2120, ¶2 – c; see also, Public Version of Record at 1545; see also, Transcript at 103-104*].

Based on the applicable language of 35 Ill. Adm. Code 214.382 and the mechanics of the MBT-C process, including each condenser's total sulfur removal efficiency of a mere 23%, the Illinois EPA concluded that the two condensers, CU711-0001 and CU711-0002, in the MBT-C reactor process were aptly characterized as reflux or process condensers, a device designed to *recover* raw materials – here CS_2 – and return them back to the production process rather than a control device, one that is *designed* to eliminate, prevent or *remove* air contaminants.[7] [*See, Public Version of Record at 1144-1234, Unit Specific Conditions 4.0, 7.1.2, 7.1.3, & 7.1.13, 1235-1237, 1459-1461, 1469-1471, 1473; see also, Trade Secret Version of Record at 2120; see also, Transcript at 56, 57, 60, 102, 104, 106, 111, 113-116, 128-129*]. Petitioner seizes upon these distinctions familiar to the Illinois EPA between a reflux or process condenser verses a control device that necessarily built-in a consideration of the condensers' sulfur removal efficiency as if this recognition was tantamount to an unauthorized rulemaking by the Agency.

---

[7] Mr. Punzak explained the difference between a reflux condenser and a control device as follows:

> Based on various types of guidance that the U.S. EPA has provided to us in regard to organic or petrochemical processes, that reflux condensers are referred to as a process condenser. They are designed just to operate the process, often to save raw materials and not for the purposes of reducing emissions. . . .

[*Transcript at 106-107*].

[*Petitioner's Post-Hearing Brief at 3-4, 9-14*]. While the regulation admittedly does not delineate the "level of sulfur reduction that must be achieved. . . does not specify how the process must be designed, how they relate to the rest of the system, or how they actually function" and does not employ the terms "pollution control device," "reflux condenser" or "process condenser," the Illinois EPA's understanding of the system merely assisted the Agency in interpreting the phrase "designed to remove sulfur compounds" in the context of the applicable exemption.[8] [*Petitioner's Post-Hearing Brief at 2, 9, 12-14*].

Contrary to Petitioner's insinuations, this does not imply that the Illinois EPA was intent on reading additional elements into the exception but to merely conduct a "simple, straightforward, fact-based determination as to whether the processes . . . are so designed." [*Id.*]. By so doing, the Illinois EPA reflected upon the information contained within the Administrative Record, particularly that the condensers recovered one sulfur compound, CS_2, for additional use in the production of MBT-C, the condensers neglected to remove any of the second sulfur compound, H_2S, and thus, only removed a minimal amount of total sulfur compounds from the system. The operation of the condensers in conjunction with their percent removal efficiency supported the Agency's conclusion that

[8] In addition, Petitioner suggests that the Agency sought to write into the regulation Mr. Punzak's belief "that if the *sulfur* was returned to the system during the process at any point, rather than somehow completely removed from the production process, this also disqualified the process from the SO_2 exception, no matter how much *sulfur* was removed from the flue gas." [*Petitioner's Post-Hearing Brief at 11, citing Testimony of D. Punzak, 160:3-15 (emphasis added)*]. As an initial point of clarification, Mr. Punzak's testimony provides at best tenuous support for such an argument. A closer reading of the transcript indicated Mr. Punzak's statement that even if all the CS_2 returned to the system this would not qualify the source for the SO_2 exemption given that the condensers failed to control any sulfur existing as H_2S. [*Transcript at 160*]. Regardless of the lack of support for certain portions of Petitioner's argument, the Illinois EPA considered whether the sulfur compounds were removed from the system. Such review was consistent with 35 Ill. Adm. Code 214.382 and its application to "existing process designed to *remove sulfur compounds* from the flue gases." Nothing in the regulation suggests that the exemption applies to a process designed to merely *recover* sulfur compounds from the flue gases for further use in the production process.

the condensers were most appropriately characterized as reflux or process rather than control devices.

When the meaning behind these terms is read in conjunction with 35 Ill. Adm. Code 214.382, it merely reinforces the appropriate reading to be ascribed to the text of the exception. Again, the relevant exception provides that the 2000 ppm SO_2 limit does not apply to "existing processes *designed* to *remove* sulfur compounds from the flue gases of petroleum and petrochemical processes." 35 Ill. Adm. Code 214.382 (emphasis added). Reflux or process condensers do not meet this standard as they are merely devices *designed to recover* raw materials. Meanwhile, so long as it meets the other elements of 35 Ill. Adm. Code 214.382, an existing control device qualifies for the exception; consistent with the requirements of 35 Ill. Adm. Code 214.382, a control device is *designed* to eliminate, prevent or *remove* air contaminants, here SO_2. *Accord., Dean Foods Co. v. Illinois Pollution Control Board,* 143 Ill. App. 3d 322, 334, 97 Ill. Dec. 471, 492 N.E. 2d 1344 (1986) (court to give effect to language in regulation when clear on its face).

In fact, Petitioner's CAAPP application characterizes these two condensers in the same manner as the Agency, stating in response to the following question: "Is this a reflux condenser, i.e., does condensed material return directly to the process from which it was generated? Yes. Condensed material returns to reactor vessel." [*See, Trade Secret Version of Record at 173 & 195; see also, Transcript at 60, 102-103, 112*]. Petitioner also admitted that CS_2 is generally recycled back to the reactor while H_2S is allowed to pass through to the flare stack, stating:

> Note: . . . Due to normal venting of the condenser, some CS_2 is lost during reaction. *All of the excess CS_2 is emitted to the flare along with the H_2S either*

during reaction or blowdown. There is no CS_2 in the reactor at the end of the process.

Paragraph 2 – b: . . .Approximately 65#/hr of CS_2 is condensed and *recycled back to the reactor resulting in a recovery rate* of 70%. On the basis of total sulfur removal only, the total sulfur efficiency of the condensers is 23%. . .

* * *

Paragraph 2 – d: The condenser operates to *conserve the loss of carbon disulfide during the reaction. . .*

[*See, Trade Secret Version of Record at 2120 (emphasis added); see also, Transcript at 56, 113-114*].

As evidenced by these statements, Petitioner has repeatedly expressed its belief that these condensers recover a raw material, CS_2, for reuse in the reactor to produce a final or intermediate product and thus, meet the definition of a reflux or process condenser. [*See, Transcript at 18 ("The condenser returns the carbon disulfide"); 57 ("its purpose is to recover CS_2 and also to separate the H_2S from the CS_2")*]. Consistent with this information submitted by the Petitioner in its application, the Illinois EPA concluded that the condensers serve as a material recovery device and are not designed to remove sulfur compounds from the flue gas of a petrochemical process. [*See, Public Version of Record at Public Version of Record at 1144-1234, Unit Specific Conditions 4.0, 7.1.2, 7.1.3, & 7.1.13, 1235-1237, 1461, 1545; see also, Transcript at 56, 57, 104, 113-114, 128-129*].

Despite these statements made by Petitioner during the permitting of the source, Petitioner relies upon Mr. Giffin's direct testimony that the condensers were originally designed to recover CS_2 from the vapors. [*Petitioner's Post-Hearing Memorandum at 5,*

citing Testimony of D. Giffin, 15:13-16:6; 24:4-8].[9] In fact, a review of the previously-cited portions of Mr. Giffin's testimony reveal that he did not state (or otherwise imply) that "[s]ince 1972, the facility has operated processes designed to remove sulfur compounds from the flue gases of petrochemical processes as part of its manufacture of a substance known as crude sodium MBT." [*Petitioner's Post-Hearing Memorandum at 5*]. Rather, under cross examination, Mr. Giffin acknowledged that he could only presume the source's rationale for installing the condensers in 1957 or 1958, stating as follows:

> Q: Is it fair to say that the condenser was designed to recover CS_2 for purposes of reducing the amount of virgin CS_2 used in the process?
>
> A: I wasn't back in that time when it was installed. So I don't know exactly the reason why the condenser was installed. I *presume* it was to reduce raw material usage.
>
> Q: Have you ever - - -
>
> A: And also to control any emissions.

[*Transcript at 57-58 (emphasis added)*]. When questioned further on whether he had reviewed any design specifications for the condensers, Mr. Giffin admitted that he had not nor was he aware of the existence of any such design specifications. [*Transcript at 58; see also, Transcript at 79 & 165 (Mr. Corn admitted that he did not review any specific design specifications for the MBT-C process)*].

Indeed, Petitioner does not present a rational interpretation of 35 Ill. Adm. Code 214.382 but, rather, simply asserts that the exemption does not require a specific type of

---

[9] Nor does Mr. Giffin's testimony support Petitioner's statement that "since prior to 1960 (which also predated the Illinois air emission regulations), the Facility has operated processes designed to remove sulfur compounds from the flue gases of petrochemical processes." [*Petitioner's Post-Hearing Brief at 8, citing Testimony of D. Giffin, 54:5-10*]. Rather such testimony merely states that the condensers were part of the original MBT-C process probably dating back to 1958 or 1959. [*Transcript at 54*].

control equipment; the process need only have "some sort of a sulfur-reducing device" that removes sulfur compounds from the flue gases to qualify for the exemption.[10] [*Transcript at 25-26; see also Transcript at 72-74 & 86-87 (to meet the exemption it merely had to remove sulfur with no requirement on the percent removal); see also, Petitioner's Post-Hearing Memorandum at 8-15*]. Admittedly, 35 Ill. Adm. Code 214.382 does not require a specific category of control, but contrary to Petitioner's assertions, there is a connection between a process *designed* to remove sulfur compounds and the percent removal achieved by a process purportedly designed to remove such compounds. It can hardly be stated that a process was designed to remove sulfur compounds when it admittedly recovers no more than 20 to 25 percent of sulfur compounds. Following Petitioner's argument to its logical end, Petitioner would have the Board conclude that a sulfur-reducing device recovering as little as 1% of sulfur compounds should be entitled to an exemption from the 2000 ppm standard. Accepting Petitioner's reasoning would effectively negate the 2000 ppm standard altogether given any existing device recovering any minute amount of sulfur compounds would eliminate such requirement.

In light of the foregoing, it is difficult to envision how Petitioner could possibly have met its burden, particularly given that in the environmental context, the party asserting "the benefit of exemption from a statute [generally] bears the burden of proof."

---

[10] Petitioner's expert went onto assert that "[m]ost environmental regulations do not specify the type of control equipment you put on to reduce emissions, just that you reduce emissions." [*Petitioner's Post-Hearing Memorandum at 14, citing Testimony of M. Corn, 73:5-74:15*]. This argument is not only disingenuous but of little consequence, where the language at issue does not merely require the installation of additional emission control technology but so long as the process qualified as a preexisting process designed to remove sulfur compounds, a particular source would be entitled to a complete exemption from the applicable requirements.

Sierra Club v. Morgan, et al., 2007 U.S. Dist. LEXIS 82760 (W.D. Wis. 2007), *citing United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 856 (S.D. Ohio 2003); *United States v. E. Ky. Power Coop., Inc.*, 498 F. Supp. 2d 976, 995 (E.D. KY, 2007) (party claiming routine maintenance and repair exemption must establish that the work performed meets this exemption). Outside of the environmental context, countless Illinois cases reiterate this very point. In *Guider v. Bauer,* the Northern District of Illinois stated that "General principles of statutory construction further provide that those who claim the benefit of an exception to a statutory prohibition have the burden of proving that their claim comes within the exception." *Guider v. Bauer,* 865 F. Supp. 492, 495 (N.D. Ill. 1994) *citing Mills Music, Inc. v. Snyder,* 469 U.S. 153, 188, n. 20, 105 S.Ct. 638, 657 n. 20, 83 L.Ed. 2d 556 (1985); *United States v. First City National Bank,* 386 U.S. 361, 366, 87 S.Ct. 1088, 1092, 18 L.Ed. 2d 151 (1967). Consistent therewith, exceptions to a "statute are to be strictly construed." *Thoman v. Village of Northbrook,* 499 N.E. 2d 507, 509, 148 Ill. App.3d 356, 358 (Ill. App. 1 Dist. 1986), *appeal denied* 505 N.E. 2d 363, 113 Ill. 2d 585; *see also, People v. Folkers,* 466 N.E. 2d 311, 312, 112 Ill. App. 3d 1007, 1009 (Ill. App. 2 Dist. 1983); *People v. Chas, Levy Circulating Co.,* 161 N.E. 2d 112, 114, 17 Ill. 2d 168, 171 (Ill. 1959) ("Exceptions or provisos found in a statute are to be strictly construed."). Based on the arguments and evidence outlined above, Petitioner has failed to demonstrate that the requested permit would not have resulted in a violation of the Act or implementing regulations. *Joliet Sand & Gravel Company v. Illinois EPA & Illinois Pollution Control Board,* 163 Ill. App. 3d 830, 516 N.E. 2d 955 (3rd Dist. 1987).

C. Additional Support for the Illinois EPA's Conclusion that the Condensers are Subject to 35 Ill. Adm. Code 214.301

i. The Illinois EPA institutional knowledge

While the above discussion evinces that Petitioner's CAAPP permit was issued in accordance with the plain language of the Act and relevant regulations, due to a degree of subjectivity often associated with an undefined regulatory term, i.e., "design", the Illinois EPA also drew upon a number of additional sources to eliminate the inherent subjectivity associated with this term. These sources included the Illinois EPA's institutional knowledge, information from regulators in other states and USEPA guidance to confirm its conclusion that the condensers at the MBT-C process did not meet the criteria required to qualify for the exemption in 35 Ill. Adm. Code 214.382. *Accord., West Suburban Recycling and Energy Center, L.P. v. Illinois EPA,* (October 17, 1996), PCB 95-119 and 95-125 at p. 6 ("the permit reviewer will not conduct the review with blinders" and as such, the Agency is not limited to information contained within the permit application, but may also gather information from either within or outside the Agency").

Based upon the Illinois EPA's institutional knowledge, the Agency understood the original rulemaking, R71-23, to 35 Ill. Adm. Code 214.382, sought to encompass petroleum refineries. Notably:

> Because sulfur recovery units in oil refineries serve as pollution control equipment greatly reducing emissions of noxious sulfur compounds, existing sulfur recovery systems are exempted from meeting the 2,000 ppm limit provided they are equipped with tall stacks.

Illinois Pollution Control Board, R71-23, page 37 (April 13, 1972); [*Transcript at 109-110*]. Similar to the Illinois EPA's interpretation of 35 Ill. Adm. Code 214.382 that an existing *control* device qualifies for the exception, the regulatory history indicated that it intended to cover sulfur recovery devices that served as *pollution control equipment*. The

exception was also generally limited to those processes "greatly reducing emissions" of sulfur compounds consistent with USEPA requirements existing at the time. Part 51, Appendix B, 33 Sulfur Recovery Plants, 36 Fed. Reg. 228, p.22407, November 27, 1971 ("Existing (Sulfur Recovery) plants typically recover 90 to 97 percent of the sulfur."). This, too, is in harmony with the Illinois EPA's conclusion that there is a connection between a process *designed* to remove sulfur compounds and the percent removal achieved by a process designed to remove such compounds.

In light of this understanding, the Illinois EPA reflected upon the operation of petroleum refineries that as a general rule produce the contaminant, SO_2, through the burning of H_2S-contaminated fuel. [*Transcript at 107-109*]. In order to minimize emissions of SO_2, petroleum refineries are typically equipped with sulfur recovery units that scrub contaminated fuel with an amine scrubbant prior to fuel combustion. [*Id.*]. The H_2S is absorbed by the amine and subsequently, combusted in a multi-step process involving various catalysts to convert H_2S into elemental sulfur. [*Id.*]. In such units, the elemental sulfur does not return to the process but is completely removed from the process, generally recovering anywhere from 90% of the H_2S in older units to 98% of the H_2S in newer units. [*Transcript at 108-109*].

A comparison between sulfur recovery units at petroleum refineries and the condensers on the MBT-C reactor process readily revealed the following differences between the former and the latter: a multi-step process versus a single-step process (condensation); distinct and separate from the manufacturing process as opposed to an integral part of the manufacturing process; the removal of elemental sulfur compared to CS_2 recovery for further use as a reactant in the production process; and finally, the

percent conversion and removal of elemental sulfur at upwards of 98% versus the recycling of approximately 20% to 25% of sulfur compounds entering the system. [*Transcript at 106-109*]. In conjunction with the Agency's knowledge of the underpinnings to 35 Ill. Adm. Code 214.382, its understanding of the differences between sulfur recovery units at petroleum refineries and the condensers on the MBT-C reactor process reaffirmed the Illinois EPA's conclusion that the condensers at the MBT-C process did not qualify for the exemption in 35 Ill. Adm. Code 214.382. [*Id.*].

ii. Information from regulators in other states

Additional information that the Illinois EPA drew upon in confirming its conclusion was plainly documented in material related to controls on similar MBT-C processes in West Virginia, Louisiana and South Carolina and Petitioner has articulated no legitimate reason, then or now, for such information to be treated as suspect.[11] [*Public Version of Record at 1421-1452, 1510–1539, 1549, 1552-1553; Transcript at 122-126, 158*]. In West Virginia, the state regulated a process similar to the one being contested in this proceeding; however, a sulfur recovery unit (similar to those at petroleum refineries) acted to control emissions on the MBT-C process in West Virginia. [*Public Version of Record at 1549, 1552-1553; see also, Transcript at 123*]. It is not surprising then that the sulfur recovery device at the MBT-C process in West Virginia realized emission

[11] Petitioner only countered the Illinois EPA's consideration of such information in its Post-Hearing Memorandum by suggesting that the assigned permitting engineer did not conduct his research with an "open mind" but sought data to "confirm his opinion that the condensers used in the Petitioner's process did not remove enough sulfur for his satisfaction." [*Petitioner's Post-Hearing Memorandum at 10, citing R-001553*]. Admittedly, the basis for the Illinois EPA's electronic mail message ("email") to West Virginia requesting such information could have been more articulate, however, this is often one of the unfortunate consequences of email use. Nonetheless, it cannot be disputed that the information gathered from regulators in West Virginia, Louisiana and South Carolina clearly supported the ultimate conclusion reached by the Agency.

reductions analogous to those achieved by sulfur recovery devices at petroleum refineries.[12] [*Public Version of Record at 1552-1553; see also, Transcript at 123*].

In addition to and similar to West Virginia, the Illinois EPA noted that emissions from a comparable MBT-C process in Louisiana vented to a sulfur recovery unit. [*Public Version of Record at 1510-1539, 1549; see also, Transcript at 124*]. Further support for the Illinois EPA's conclusion came from South Carolina where the state regulated a MBT-C process similar to Emerald except that the former controlled sulfur emissions by means of an off-gas scrubber.[13] [*Public Version of Record at 1426, 1549; see also, Transcript at 124-126*]. When these respective technology differentials at the MBT-C processes in West Virginia, Louisiana and South Carolina verses Emerald (i.e., the use of a sulfur recovery unit or an off-gas scrubber versus the mere operation of a condenser) and the respective disparity in achieved emission reductions (i.e., upwards of 98% sulfur removal compared to the recycling of 20-25% of sulfur compounds) were taken into consideration by the Agency, they reinforced the Illinois EPA's conclusion that the condensers at Emerald's MBT-C process were not designed to remove sulfur compounds from the flue gases of petroleum and petrochemical processes. [*Transcript at 126, 158*].[14]

---

[12] Based on information supplied by West Virginia, potential emissions from the MBT-C process in its state were at 3825 tpy of H_2S while actual emissions were significantly lower, 0.8959 tons of H_2S (126 tons of SO_2) in 2000. [*Public Version of Record at 1552; see also, Transcript at 123*]. According to calculations performed by the Illinois EPA, the sulfur recovery device in West Virginia had a removal efficiency of 97 to 98.5%, significantly greater than the 23% removal efficiency realized by Emerald's condensers. [*Public Version of Record at 1553; see also, Transcript at 123*].

[13] An off-gas scrubber typically employs a chemical to absorb H_2S emissions. [*Transcript at 126*]. An example of an off-gas scrubber would be the NaSH system recently installed by Emerald to control sulfur emissions from the MBT-C process. [*Id.*].

[14] Such findings were conveyed to Petitioner in July 2001. [*See, Public Version of Record at 1561; see also, Transcript at 41, 75*]. In response to this meeting, Petitioner acknowledged that this information gave it a better "understanding of what other companies were doing" and, due to

Petitioner, on the other hand, neglects to counter that similar MBT-C processes in other states employed a sulfur recovery unit or an off-gas scrubber designed to physically remove sulfur compounds including H_2S from the flue gases of the MBT-C process rather than a condenser that merely recycled a small percentage of sulfur compounds, only CS_2, back into the MBT-C production process. While Petitioner responded at hearing that the Illinois EPA neglected to review the underlying regulations, particularly whether or not an exemption similar to 35 Ill. Adm. Code 214.382 existed in these states that may have triggered the need to install such control,[15] such review was simply not pertinent to the Illinois EPA's consideration. [*Transcript at 75-76; 140*]. Such information was merely collected to confirm the Agency's understanding that the condensers were not designed to remove sulfur compounds. And no evidence exists that the substance of Petitioner's regulatory argument was raised during communications between Petitioner and the Illinois EPA after the Agency informed Petitioner about the use of devices at similar MBT-C processes in other states.[16] [*Public Version of Record at 1561; see also, Transcript at 75-76*]. Rather, the Illinois EPA learned that this information simply aided Petitioner in its ultimate decision to install the NaSH unit. [*See, footnote 14*]. For these reasons, the information garnered from West Virginia, Louisiana

---

the extent of SO_2 emissions from the MBT-C process, Petitioner agreed to generally evaluate similar add-on control measures. Based upon such evaluation, Petitioner ultimately elected to install the NaSH unit. [*Transcript at 41-47*].

[15] Petitioner asserts that its review of the West Virginia and Louisiana regulations found both states possessed a requirement similar to 35 Ill. Adm. Code 214.301, but neither had an exemption comparable to 35 Ill. Adm. Code 214.382. [*Transcript at 75-76*]. Petitioner did not review whether similar regulations existed in South Carolina. [*Transcript at 78*].

[16] While Mr. Corn testified that his knowledge of Louisiana regulations originated from prior work experience, his familiarity with West Virginia's regulations came much later, during witness preparation for this proceeding. [*Transcript at 77-78*].

and South Carolina provided further support towards the Agency's ultimate conclusion that the condensers at the MBT-C process did not qualify for the exemption in 35 Ill. Adm. Code 214.382.

iii. USEPA guidance

Finally, the Illinois EPA also reflected upon federal MON definitions as a type of guidance to merely confirm that its interpretation of various chemical engineering concepts (i.e., reflux condenser, process condenser and a control device) was similar to the USEPA's perception of the same (which also happened to include reflux condensers as a process condenser not a control device). [*Public Version of Record at 1543; see also, Transcript at 116, 158*]; *see also,* 40 CFR §63.2550. In an email message, the Illinois EPA informed Petitioner that the definition of a process condenser in the existing MON or the Pharmaceutical Maximum Achievable Control Technology (MACT) supported the Agency's conclusion that the MBT-C condensers were appropriately identified as reflux or process condensers rather than control devices. Notably:

> Process condenser means a condenser whose *primary purpose is to recover material as an integral part of a process*. The condenser must support a vapor-to-liquid phase change for periods of source equipment operation that are at or above the boiling point or bubble point of substance(s) at the liquid surface. *Examples of process condensers include* distillation condensers, *reflux condensers,* and condensers used in stripping or flashing operations. In a series of condensers all condensers up to and including the first condenser with an exit gas temperature below the boiling or bubble point of the substance(s) at the liquid surface are considered to be process condensers. All condensers in line prior to a vacuum source are included in this definition.

[*Public Version of Record at 1841; see also, Transcript at 121*]. The logical outgrowth of this guidance is that the condensers are rightly identified as reflux or process and not control devices owing to the condensers' primary purpose, the recovery of CS_2 for further use in the MBT-C production process. [*Transcript at 122*]. And reflux or process

condensers do not qualify for the exception in 35 Ill. Adm. Code 214.382 as such devices are merely *designed to recover* raw material rather than *designed to remove* sulfur compounds. 35 Ill. Adm. Code 214.382 (emphasis added).

Moreover, given that the MBT-C process is a batch process and involves a volatile organic compound,[17] the Illinois EPA also kept in mind additional USEPA guidance for *Control of Volatile Organic Compound Emissions from Batch Processes.* [*Public Version of Record at 2135-2510; see also, Trade Secret Version of Record at 173 & 195; see also, Transcript at 97, 116-119, 164*]. In particular, such guidance stated that:

> Note that condensers servicing reactors and distillation columns often function in refluxing material. This *refluxing is an integral part of the process, and these condensers are often not considered to be emission control devices.* Such applications often use secondary condensers, which operate at still lower temperatures and function primarily as control devices.

[*Public Version of Record at 2236 (emphasis added)*]. This passage reiterates the USEPA's view that reflux condensers are generally considered to be a vital part of the production process and thus, not appropriately characterized as emission control. [*Transcript at 118*]. Given the USEPA's guidance that reflux condensers are part of the production process and thus, not control, it should come as no surprise to the Board that the USEPA did not comment on the Illinois EPA's decision that the condensers in the

[17] During CAAPP permitting, Petitioner contested the Illinois EPA's review of guidance pertaining to pollutants beyond sulfur compounds, particularly VOM. However, it was entirely appropriate for the Illinois EPA to take into account guidance applicable to volatile organic material given that CS_2 is a volatile organic material. [*Public Version of Record at 2116-2118; see also, Transcript at 120-121*]. In fact, Petitioner acknowledged in its initial application materials the relationship between the sulfur compound, CS_2, and VOM. [*Trade Secret Version of Record at 173, 195, ¶10, ("Efficiency (VOM reduction): CS_2"); see also, Transcript at 120-121*].

MBT-C process were not entitled to the 35 Ill. Adm. Code 214.382 exemption.[18] [*Public Version of Record at 1842-1843 and 1850-1851; see also, Transcript at 126-127*].

In an apparent effort to dispute statements that the condensers are integral to the MBT-C production process, Petitioner cites to the testimony of Mr. Giffin indicating "that it was perfectly possible to run the MBT reactors without the condensers."[19] [*Petitioner's Post-Hearing Memorandum at 9, fn. 6*]. However, based on Respondent's review of the process even in light of Mr. Giffin's testimony only one plausible

---

[18] As a matter of course, the USEPA routinely reviews draft CAAPP permits prior to issuance by the Illinois EPA. 415 ILCS 5/39.5(9)(b) (2006). [*Transcript at 126*]. In this instance, the USEPA had access to the entire draft CAAPP permit for review and comment but limited comments to the future applicability of the MON and, in the context of the NSPS, various proposed applicability determinations made by the Illinois EPA. [*Public Version of Record at 1842-1843; see also, Transcript at 126-127*]. The USEPA did not provide comment on Conditions 4.0, 7.1.2, 7.1.3, 7.1.4 or 7.1.13. (i.e., the applicability of 35 Ill. Adm. Code 214.301 by virtue of the Illinois EPA's decision that the source was not entitled to the 35 Ill. Adm. Code 214.382 exemption). [*Public Version of Record at 1850-1851; see also, Transcript at 126-127*].

[19] In his direct examination, Mr. Giffin testified that the condensers require liquid water in their shells to properly operate. When the vapors, CS_2 and H_2S, flow through the condenser, the water boils away. [*Transcript at* 27]. The vaporization of the water cools the CS_2 allowing it to return to the MBT-C reactor as a liquid. [*Id.*]. Mr. Giffin admitted running the condensers with various levels of water in their shells, "anywhere from no level all the way to about two thirds level in the condensers." [*Id.*]. Upon further examination from counsel, Mr. Giffin suggested that this occurred on more than one occasion, stating in response to the following question:

> Q: During that work - - during that time period and then at any subsequent time period where the water, for example, wasn't available to the condenser, you were able to continue to operate the MBT crude [reactors]?
>
> A: We were.

[*Transcript at 27-28; see also, Transcript at 54 ("we have had occasions when we had tested it" and "we also had occasions when it ran without water in the storage tank.")*].

Even according to Emerald's strained definition of compliance with 35 Ill. Adm. Code 214.301, the operation of an existing process designed to remove any amount of sulfur compounds from the flue gas, Emerald acknowledges that it has not consistently operated the condensers within its own definition of compliance. [*Transcript at 30-31, (the regulation "allowed the sulfur-reducing device to be classified as compliance" for the "applicable sulfur dioxide emission limitation."); see also, Transcript at 72 (admitting to meet the exemption, the source must operate the condenser); see also, Transcript at 54*].

conclusion may be drawn, the condensers are clearly integral to the process. A closer review of Mr. Giffin's testimony, in totality, particularly his statement that "[t]he process utilizes three chemicals, aniline, sulfur and carbon disulfide" is illuminating in this respect and might explain why Petitioner ignored the statement in its argument. [*Transcript at 16; see also, Transcript at 52*]. As one of three reactants, CS_2 is an integral component to the production of MBT-C and, in fact, is "added in excess to the reaction." [*Transcript at 165-166*]. For purposes of the reaction it is not significant whether CS_2 originates from an outside source of raw materials or is recovered from the process by means of the condensers for reuse in the production of MBT-C.[20] Admittedly, the condensers' recovery of CS_2 minimizes the influx of fresh CS_2 necessary to continue production, however, the condensers do not diminish the significance of the reactant, CS_2, or the absolute need for the reactant, CS_2, in the MBT-C process. Rather, the condensers augment the amount of fresh CS_2 otherwise required for the reaction to continue and thereby, provide a reactant integral to the production of MBT-C.[21] [*Transcript at 52, 56 (concluding the operation of the MBT-C reactor without the condenser only changed the amount of CS_2 consumed); 75 & 165 (confirming CS_2 as a reactant in the process)*]. In light of the foregoing, it is difficult to envision how Petitioner could possibly have met its burden, particularly given that this testimony

[20] In fact, Respondent's expert witness confirmed that the condenser "charge[s] the unit with additional carbon disulfide. Whether that comes from the condenser or from the raw product storage tank, does not make any difference. You use more carbon disulfide from the raw product storage tank, obviously, but it does not make any difference where you get that makeup from." [*Transcript at 75; see also, Transcript at 162 (CS_2 may be provided "from the virgin tank or from the recycle").*].

[21] The operation of the condensers as a process device provides an economic benefit to Petitioner by enabling it to recycle a necessary reactant, CS_2, rather than purchasing more of the same.

supports one inevitable conclusion, the condensers act as reflux or process condensers integral to the production of MBT-C.

D. Petitioner Failed to Establish the Requisite Elements to Make an Estoppel Claim Against the Illinois EPA.

Petitioner argues that because Emerald's prior state operating permits generally exempted the MBT-C condensers from the 2000 ppm SO_2 limit, the Illinois EPA should now be estopped from subjecting the MBT-C condensers to the 2000 ppm SO_2 limit in its CAAPP permit. [*Petitioner's Post-Hearing Memorandum at 15-18*]. Consequently, Emerald urges the Board to conclude that the Illinois EPA waived its right to subject the MBT-C condensers to the 2000 ppm SO_2 limit in Petitioner's CAAPP permit and should be further estopped from future permitting of the MBT-C condensers in such a fashion. However, Emerald fails to present the requisite evidence vital to support such an estoppel claim against the government. At most, Petitioner has demonstrated that the Illinois EPA historically made erroneous state operating permitting decisions. However, prior misguided permitting decisions by government employees do not provide a sufficient basis to justify an estoppel claim against the State.

In *Hickey v. Illinois Central Railroad Company*, 35 Ill. 2d 427, 220 N.E. 2d 415 (1966), cert. den. 386 U.S. 934, reh. den. 386 U.S. 1000, the Illinois Supreme Court held that under usual circumstances, principles of estoppel do not apply to public bodies. Courts have generally been reluctant to estop government bodies due to concerns that such a claim may impede government operations and thus, jeopardize public policy. The doctrine "should not be invoked against a public body except under compelling circumstance, where such invocation would not defeat the operation of public policy." *People of the State of Illinois v. Panhandle Eastern Pipe Line Company,* PCB 99-191,

(November 15, 2001), slip op. at 20, citing *Georgees v.* Daley, 256 Ill. App. 3d 143, 147, 628 N.E. 2d 721, 725 (1st Dist. 1993). As further elaborated upon by the Illinois Supreme Court, the court's reluctance to impose estoppel against the state is due to concerns that the doctrine "may impair the functioning of the State in the discharge of its government functions, and that valuable public interests may be jeopardized or lost by the negligence, mistakes or inattention of public officials." *Hickey v. Illinois Central R.R. Co.,* 35 Ill. 2d 427, 447-448, 220 N.E. 2d 415, 426 (1966).

Governmental immunity from claims of estoppel is not unqualified; however, a number of legal standards must be met before an estoppel claim may be made against the government. *Brewer Trucking v. Illinois Environmental Protection Agency,* PCB 96-250, (March 20, 1997), slip op. at 9, *citing Brown's Furniture, Inc. v. Wagner,* 171 Ill. 2d 410, 431, 665 N.E.2d 795, 806 (1996). As recognized by the Illinois Supreme Court, "the party claiming the estoppel must have relied upon the acts or representations of the other and have had no knowledge or convenient means of knowing the true facts." *Hickey,* 35 Ill. 2d at 447, 220 N.E. 2d at 425, *citing Dill v. Widman,* 413 Ill. 448, 455-456, 109 N.E. 2d 765, 769. A party, by statements or conduct, must lead another to do something he would not otherwise have done. *In re Estate of Castro,* 289 Ill. App.3d 1071, 1078, 683 N.E. 2d 1255 (2nd Dist.), *appeal denied,* 174 Ill. 2d 562 (1997). In addition, mere inaction on the part of government officers is not sufficient to justify an estoppel claim against the government. *Hickey*, 35 Ill. 2d at 448, 220 N.E. 2d at 426.

In *Panhandle Eastern Pipe Line v. Illinois Environmental Protection Agency*, the Board elaborated upon the burden that must be met before an estoppel claim may be made against the Illinois EPA:

> Like all parties seeking to rely on estoppel, those seeking to estop the government must demonstrate that their reliance was reasonable and that they incurred some detriment as a result of the reliance. A party seeking to estop the government also must show that the government made a misrepresentation with knowledge that the misrepresentation was untrue. *See Medical Disposal Services, Inc. v. IEPA,* 286 Ill. App. 3d 562, 677 N.E. 2d 428 (1st Dist. 1997). Finally, before estopping the government, the courts require that the governmental body must have taken some affirmative act; the unauthorized or mistaken act of a ministerial officer will not estop the government. "Generally, a public body cannot be estopped by an act of its agent beyond the authority expressly conferred upon that official, or made in derogation of a statutory provision." *Gorgees,* 256 Ill. App. 3d at 147, 628 N.E. 2d at 725; *see also Brown's Furniture,* 171 Ill. 2d at 431, 665 N.E. 2d at 806. ("The State is not estopped by the mistakes made or misinformation given by the Department's [of Revenue] employees with respect to tax liabilities.").

Panhandle Eastern Pipe Line v. Illinois Environmental Protection Agency, PCB 98-102 (January 21, 1999), slip op. at 14 -15.[22] It is well established that the Board has rarely applied the doctrine of estoppel against the State. *People v. Environmental Control and Abatement, Inc.,* 95-170 (January 4, 1996); *see also, City of Herrin v. Illinois Environmental Protection Agency*, PCB 93-195 (March 17, 1994). Where the doctrine has been applied, the Board has found the Illinois EPA affirmatively misled a party and thereafter sought enforcement against that party for acting on the Illinois EPA's recommendation. *People v. Environmental Control and Abatement, Inc.*, 95-170 at 11, *citing In the Matter of Pielet Brother's Trading, Inc.,* 101 PCB 131 (July 13, 1989), and *IEPA v. Jack Wright*, PCB 89-227, (August 30, 1990).

---

[22] According to the Third District Appellate Court, Petitioner must prove, by a preponderance of the evidence, six elements for the doctrine of estoppel to apply: (1) words or conduct by the party against whom the estoppel is alleged constituting either a misrepresentation or concealment of material facts; (2) knowledge on the part of the party against whom the estoppel is alleged that representations made were untrue; (3) lack of knowledge by the party claiming benefit of an estoppel that representations were false either at the time they were made or at the time they were acted upon; (4) the intention or expectation by the party that his conduct or representations will be acted upon by the party asserting the estoppel; (5) reliance by the party seeking the estoppel; and (6) prejudice to the party claiming the benefit of the estoppel if the party against whom the estoppel is alleged is permitted to deny the truth of the representations made. *City of Mendota v. Pollution Control Board*, 161 Ill. App. 3d. 203, 514 N.E. 2d 218, 112 Ill. Dec. 752 (3rd Dist. 1987).

In Emerald's appeal of the Illinois EPA's permitting decision, the Petitioner has visibly framed its arguments in a much different fashion regarding this issue. On the whole, Emerald contends that over a span of twenty years, the Illinois EPA consistently approved state operating permits for the source's MBT-C condensers exempt from 35 Ill. Adm. Code 214.301; the Petitioner relied upon "this exception for decades"; and, subsequently, in 2003, despite the "lack of any change in the regulations or factual circumstances", the Illinois EPA first notified Petitioner of its change in position regarding the applicability of the exemption to the source.[23] [*Petitioner's Post-Hearing Memorandum at 15-18*]. Petitioner concludes by generally suggesting that the Agency's change in position is merely due to a new engineer being assigned to the permitting of this source. [*Petitioner's Post-Hearing Memorandum at 17-18*].

Evidence is noticeably wanting in support of Petitioner's estoppel claim. First, Emerald has failed to establish its reliance was reasonable. As previously discussed, Emerald acknowledged in its CAAPP application that the condensers were reflux condensers designed to recover condensed material for re-use in the reactor vessel. [*See, Trade Secret Version of Record at 173 and 195; see also Transcript at 60, 102-103, 112*]. As such, Emerald knew or readily possessed the means to know that the condensers recovery of a raw material, CS_2, for reuse in the reactor met the definition of a material

[23] Petitioner's statement that the Illinois EPA failed to notify the source of its revised interpretation of 35 Ill. Adm. Code 214.382 until 2003 is not supported by the record. [*Petitioner's Post-Hearing Memorandum at 16*]. In fact, as early as a February 22, 2001, letter from the Illinois EPA to Petitioner, the Agency formally notified the source that the Illinois EPA was reevaluating Emerald's compliance with the applicable SO_2 regulations. [*See, Public Version of Record at 1469-1471*]. Subsequent to the February Request for Additional Information, the Illinois EPA sent Petitioner a second Request for Additional Information on May 16, 2001, notifying the applicant that the condenser on the MBT-C process did not qualify for the exemption in 35 Ill. Adm. Code 214.382 and requested the submittal of a compliance plan. [*See, Public Version of Record at 1459-1460*].

recovery device, not a device designed to remove sulfur compounds from the flue gas of a petrochemical process. *See, Hickey*, 35 Ill. 2d at 447, 220 N.E. 2d at 425 (1966), *citing Dill v. Widman,* 413 Ill. 448, 455-456, 109 N.E. 2d 765, 769 (party asserting a claim of estoppel must "have had no knowledge or convenient means of knowing the true facts"). While in the context of an estoppel claim in an enforcement action involving Panhandle Eastern Pipe Line, the Board found that "[i]t is the responsibility of companies doing business in Illinois to determine whether they are complying with Illinois environmental laws. Panhandle's reliance on Agency permit renewals and inspections as the *sole* means by which Panhandle determined its compliance was unreasonable." *People of the State of Illinois v. Panhandle Eastern Pipe Line Company*, PCB 99-191, (November 15, 2001), slip op. at 20.

An additional element essential to a claim of equitable estoppel is that the party asserting estoppel must have done or omitted some act or altered his position in a manner that he would be injured if the other party is not held to the representation upon which the representation is predicted. *In the Matter of Pielet Brother's Trading, Inc.*, 101 PCB 131, at 6. However, nothing in the *Petitioner's Post-Hearing Memorandum* suggests that Emerald relied to its detriment on prior permitting decisions by the Illinois EPA.[24]

At most, Petitioner made fleeting reference to AEA's decision to purchase the source from BF Goodrich at hearing, in part, based on the source's due diligence review to possibly suggest that it detrimentally relied upon prior state operating permits issued

[24] While Petitioner makes the conclusory statement that the Illinois EPA's interpretation should not be given any deference due to "IEPA's long-standing interpretation, and the obvious reliance of the Petitioner on this exception for decades, and the lack of any change in the regulations or factual circumstances," Emerald fails to articulate how Petitioner altered its position in reliance on the Agency's representation. [*Petitioner's Post-Hearing Memorandum at 18*].

by the Illinois EPA. However, a closer review of the elicited testimony in conjunction with the permit record does not support such claim.[25] [*Transcript at 47-51; see also, Public Version of Record at 1469-1471*]. While AEA Investors purchased the facility in March 2001 and renamed the facility Noveon, no testimony revealed its exact date of purchase in March of that year. [*Transcript at 12, 47-48*]. The Board does not look favorably upon speculative evidence. *Environmental Protection Agency v. Weldon Farmers Grain Co-op,* PCB 72-215, slip op. at 4 (December 12, 1972).[26] Nor is the Board inclined to speculate on matters not in the record before it. *West Suburban Recycling and Energy Center, L.P. v. Illinois Environmental Protection Agency,* PCB 95-119 and 95-125, slip op. at 4 (October 17, 1996); *see also, Herbert Bangert v. City of Quincy,* PCB 74-295 (May 8, 1975).

What is clear is the exact date that the Illinois EPA formally notified the source in writing that it was "reevaluating whether the MBT-C process is in compliance with the applicable SO_2 regulations." [*See, Public Version of Record at 1470*]. This occurred on

---

[25] Prior to its issuance of the CAAPP permit in 2003, Emerald understood that the Illinois EPA disagreed with its position regarding the applicability of 35 Ill. Adm. Code 214.382 and yet, notified the Illinois EPA of its willingness to install a sulfur recovery device (NaSH system). [*Transcript at 43*]. At the time of its installation, Emerald grasped the parties disagreement over whether the source was entitled to the exemption in 35 Ill. Adm. Code 214.382. [*Transcript at 62*]. Given these demonstrable facts, Petitioner could not suggest a more plausible estoppel argument at hearing (i.e., Petitioner's *voluntary* installation of the NaSH unit would not have occurred and thus, its efforts to acquire emission reduction credits would not have occurred if it had been familiar with the Illinois EPA's interpretation of the relevant regulations).

[26] *See also, Concerned Neighbors for a Better Environment & William Scavarda v. County of Rock Island and Browning-Ferris Industries of Iowa, Inc.,* PCB 85-124 (January 9, 1986), *citing Cathryn Braet v. Illinois Pollution Control Board,* No. 3-84-0193 (Consolidated with No. 3-84-0221), slip op. at 32 (3rd Dist. August 23, 1985) (speculation regarding the possible reduction in factory value "by locating the facility on the site of a former paint factory and a former battery factory is insufficient to overcome the manifest weight of evidence" standard.).

February 22, 2001.[27] While it may not be evident how many days passed between the Illinois EPA's formal notification date and AEA's purchase date, what is clear is that the Illinois EPA notified Petitioner of potential concerns over the source's compliance with the applicable SO_2 regulations *prior* to AEA's purchase of the source. The mere fact that such formal notification may have occurred after BF Goodrich completed its due diligence disclosure to AEA does not somehow make Petitioner's decision to ignore the Illinois EPA's February 22, 2001, notification reasonable.[28] [*Transcript at 47-48*]. As such, Petitioner has failed to demonstrate that it detrimentally relied upon the actions of the Illinois EPA. *Accord., Gorgees v. Daley,* 256 Ill. App. 3d 143, 147, 628 N.E. 2d 721, 725 (1st Dist. 1993).

Significantly, the Board has also held that a change in the agency's interpretation of a statute over the course of time does not give rise to a claim of estoppel. In *Medical Disposal Service, Inc. v. Environmental Protection Agency,* 286 Ill. App. 3d 562, 677 N.E. 2d 428 (1st Dist. 1996), the Illinois EPA issued a letter stating that the local siting approval given to a medical waste treatment facility would extend to a subsequent

[27] Despite the fact that Mr. Punzak's deposition transcript was not part of the Administrative Record nor was it admitted into evidence at hearing, the Petitioner inappropriately relies upon certain assertions made by Mr. Punzak in his November 21, 2007, deposition. [*Petitioner's Post-Hearing Memorandum at 15*]. Petitioner selectively focuses on Mr. Punzak's statements indicating that prior to 1993, other Agency engineers had concluded the source was exempt from 35 Ill. Adm. Code 214.301 by means of 35 Ill. Adm. Code 214.382. [*Id. citing Deposition of Dan Punzak at 11:23-12:5 & 11:14-18*].

[28] The circumstances surrounding Mr. Giffin's statement that "[w]e did not consider the sulfur-reducing device issue to be an event, or we didn't consider it to be an issue at that time because we didn't know about it" is not clear. [*Transcript at 48*]. Nor is it not apparent when Mr. Giffin prepared the environmental disclosures on behalf of B.F. Goodrich for AEA. [*Id.*]. These statements may refer to whether B.F. Goodrich knew of a potential SO_2 issue at the time of its due diligence search in 2000 or at the time of the sale of the source to AEA in March 2001. Regardless of these ambiguous statements, the record is clear that the Illinois EPA's February 22, 2001, letter to B.F. Goodrich to the attention of Mr. Dave Giffin formally notified Petitioner that the Illinois EPA was reevaluating Emerald's compliance with the applicable SO_2 regulations. [*See, Public Version of Record at 1469-1471*].

purchaser. However, the Illinois EPA later denied a construction permit to the purchaser based on its failure to acquire separate siting approval. The purchaser appealed arguing, in part, that the Illinois EPA should be estopped from denying the permit as the applicant relied to its detriment on the prior letter. The Board denied the estoppel claim; the Appellate Court affirmed the Board's decision, stating:

> As the letter gave the agency's interpretation of the statute and its policy at the time, there were no misrepresentations made. The agency changed its policy after the letter was written.

Id. at page 570, 433. *See also, White & Brewer Trucking, Inc. v. Illinois EPA,* PCB 96-250, slip op. at 10 (March 20, 1997) (Petitioners failed to show any deliberate misrepresentation on the Illinois EPA's part, but at most showed a change in the Illinois EPA's interpretation of a regulation that did not give rise to an estoppel claim).

In this case as well, not one piece of evidence shows that the Illinois EPA knowingly made an affirmative misrepresentation to Petitioner with knowledge that it was untrue. In fact, the Illinois EPA provided extensive testimony concerning its basis for subjecting the MBT-C condensers to the SO_2 limit contained in 35 Ill. Adm. Code 214.301 in Petitioner's CAAPP permit. The fact that the Agency unwittingly made a mistake in a number of prior state operating permit decisions does not amount to misrepresentation by Illinois EPA personnel. *Accord., People of the State of Illinois v. Panhandle Eastern Pipe Line Company,* PCB 99-191 (November 15, 2001), slip op. at 20. As such, Petitioner has failed to establish the existence of "compelling circumstances" as required to apply estoppel against the government. *Accord, People of the State of Illinois v. Panhandle Eastern Pipe Line Company*, PCB 99-191 (November 15, 2001), slip op. at 20. ("The General Assembly has given the Agency a central role in

Illinois' system of environmental law. Under the Act, the Agency's responsibilities include administering the various air pollution control programs. Those programs are a vital part of Illinois' 'effort to restore, maintain, and enhance the purity of the air in this State in order to protect health, welfare, and the quality of life and to assure that no air contaminants are discharged into the atmosphere without being given the degree of treatment or control necessary to prevent pollution.' 415 ILCS 5/8 (2000).")

Similar to the Board, Illinois courts have not favored the application of estoppel against the government in cases seeking to protect the environment. *Dean Foods Company v. Pollution Control* Board, 143 Ill. App. 3d, 322, 338 (2nd Dist. 1986). In *Dean Foods*, the petitioner claimed it expended in excess of a quarter of a million dollars in reliance on a post-mixture sampling point decision made by the Illinois EPA in its NPDES permit, however, the Second District Court of Appeals found no evidence that the changes made by Dean Foods were in reliance on the Illinois EPA's permitting decision. *Dean Foods Company v. Pollution Control Board,* 143 Ill. App.3d 322, 338 (2nd Dist.1986). The testimony merely showed that the changes were made to increase the facility's efficiency or to comply with the permit's effluent requirements. *Id.* In fact, Dean Foods failed to "show that the changes would not have been made, or would have been done differently," if the Illinois EPA made a different decision. *Id.* As such, the Court of Appeals reasoned that Dean Foods did not "show that it relied to its detriment on an Agency action." *Id.* Ultimately, the Court of Appeals concluded that:

> [a] more compelling reason for not complying the doctrine of estoppel here, however, is that what is involved is the protection of the environment and the people who inhabit it. An estoppel may not be invoked where it would operate to defeat the effectiveness of a policy adopted to protect the public. (*Tri-County Landfill Co. v. Pollution Control Board* (1976), 41 Ill. App. 3d, 249, 255, 353

N.E. 2d 316. Progress in controlling pollution should not be barred by methods of the past.

Id.

Just as progress in controlling pollution should not be thwarted by antiquated methodology, past mistakes by government personnel should not thwart future efforts to issue permits in accordance with the Act and implementing regulations. Nor has the Board wavered from such principle finding that prior erroneous Agency actions are properly remedied by correcting the error, not perpetuating it. *State Bank of Whittington v. IEPA,* PCB 92-152 (June 3, 1993). *Accord., Fiat Allis North American, Inc. v. Illinois Environmental Protection Agency,* PCB 93-108, slip op. at 7 (Oct. 21, 1993) (affirming the ability of the agency to "correct an error from one case to the next").

Appellate courts in Illinois have also generally recognized that administrative agencies are not bound by prior determinations in subsequent proceedings but that decisions are to be based on the current record before the administrative agency. *Daley v. License Appeal Commission et al.,* 55 Ill. App. 2d 474, 477-478 (1965) "An administrative agency has the power to deal freely with each situation that comes before it regardless of how it may have dealt with a similar or even the same situation in a previous proceeding." *Id., citing Mississippi River Fuel Corp. v, Commerce Com.,* 1 Ill.2d 509, 116 N.E. 2d 394; *see also, Hazelton v. Zoning Board of Appeals of the City of Hickory Hills, Cook County,* 48 Ill. App. 3d 348, 363 N.E. 2d 44 (1977); *American Federation of State, County and Municipal Employees, Council 31, AFL-CIO v. Chief Judge of the Circuit Court of Cook County,* 209 Ill. App.3d 283, 568 N.E.2d 139 (1991). This is due to each administrative decision being derived from its own distinct, administrative record. *Daley v. License Appeal Commission,* 55 Ill. App. 2d, 474, 478,

205 N.E. 2d 269, 272 (1st Dist. 1965). "The court's prior judgment having been based on a different record, would not be res judicata on the issue raised in the new cause of action." *Id.*

Consistent with this general principle enunciated in Illinois, the Second Circuit Court of Appeals has held in the context of environmental decisions that so long as an explanation has been provided, the United States EPA may depart from prior agency precedent. *New York Public Interest Research Group, Inc. v. Johnson*, 427 F.2d 172, 182 (C.A. 2nd, 2005). "Agencies are free to change course as their expertise and experience may suggest or require, but when they do so they must provide a 'reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.'" *Id. citing Greater Boston Television Corp. v, FCC,* 444 F.2d 841, 852 (D.C.Cir. 1970).

While Emerald generally cites two lines of cases to support Petitioner's estoppel argument neither, in fact, pertain to estoppel. First, Petitioner relies upon caselaw generally stating that when a matter involves a question of law, the Agency's statutory or regulatory interpretation is not binding on the Board rather the proper standard of review is *de novo.* [*Petitioner's Post-Hearing Memorandum at 17, citing Village of Fox River Grove v. Pollution Control Board,* 299 Ill. App. 3d 869, 877-78, 702 N.E. 2d 656, 662 (2nd Dist. 1998), *see also, Peoria Disposal Co. v. Illinois Environmental Protection Agency,* PCB 08-25, slip op. at 31 (January 10, 2008)]. Petitioner not only disregards the relevant elements necessary to establish estoppel, but fails to delineate how such standard of review caselaw is relevant to any such claim. While the above-cited standard of review caselaw may be pertinent to the Board's regulatory review of 35 Ill. Adm. Code

214.382, as previously discussed, the Agency's interpretation of 35 Ill. Adm. Code 214.382 is well-supported by the language of the regulation.

Second, Petitioner relies upon *Central Illinois Public Service Co. v. Pollution Control Board,* 165 Ill. App. 3d 354, 518 N.E. 2d 1354 (4th Dist. 1988) (hereinafter "*CIPS*") Again, this is not an estoppel case, but Petitioner generally cites it for the proposition that "when interpreting a regulation that a governmental agency is charged with administering, assuming that the factual circumstances have not changed, the administrative agency is bound by a long-standing interpretation of the regulation" and that "administrative agencies are bound by their long-standing policies and customs of which affected parties had prior knowledge." [*Petitioner's Post-Hearing Memorandum at 18*]. Akin to the Board's account and distinction of *CIPS* in *Noveon, Inc. v. Illinois Environmental Protection Agency,* PCB 91-17 (September 16, 2004), slip op. at 12, *CIPS* is similarly distinguishable here. As explained by the Board:

> In CIPS, the appellate court considered whether the Agency properly included a condition limiting sulfur dioxide emissions in a steam generating operating permit that it had decided not to include in the company's prior permits. In 1978, the Board amended the sulfur dioxide emission limit finding it was technically and economically infeasible for large sources. The court held that the Agency's decision to impose the sulfur dioxide limit in CIPS' permit was inconsistent with the Board's interpretation that the particular sulfur dioxide limit did not apply to large emission sources after the 1978 amendment. Unlike in CIPS, the Board has not indicated that the ammonia limit is technically or economically infeasible or would not apply to facilities such as Noveon's.

Id. Unlike Emerald, the *CIPS* petitioner could demonstrate that the Agency's interpretation of the regulation was inconsistent with prior Board interpretations of the same regulation. No similar showing has been made here.

Regardless, Petitioners would have the Board believe based upon the 4th

District Appellate Court's *CIPS* decision published in February of 1988, that once a regulatory interpretation has been made without an accompanying change in circumstances, the administering agency is barred from correcting any erroneous interpretation and/or decision despite the consequences. However, consistent with the above-cited precedent, the Illinois Supreme Court stated in May of the same year that "[w]hile an agency is not required to adhere to a certain policy or practice forever, sudden and unexplained changes have often been considered arbitrary." *Greer v. Illinois Housing Dev. Auth.* 122 Ill. 2d 462, 506, 524 N.E. 2d 561, 581 (1988). If the agency is departing from prior precedent, a valid reason must be provided. *General Service Employees Union, Local 73 v. Illinois Education Labor Relations Board.,* 285 Ill. App. 3d 507, 517, 673 N.E.2d 1084, 1090 (1st Dist. 1996); *accord., New York Public Interest Research Group, Inc. v. Johnson*, 427 F.2d 172, 182 (C.A. 2nd, 2005). More recently, the Board has affirmed that the Board may depart from prior practice when good cause exists such as a change in law, different facts, *or a determination by the Agency that the prior practice was in error. Owens Oil Company v. Illinois Environmental Protection Agency,* PCB 98-32 (December 18, 1997) (*emphasis added*). As previously explained, although the language of the regulation has not changed, its recent interpretation is consistent with the information set forth in the Administrative Record, and is more aligned with the language of 35 Ill. Adm. Code 214.382, particularly the term "designed," including the Board's intent in promulgating the exemption.

Although such a change by the administering agency in its regulatory interpretation may admittedly make it difficult for "citizens and businesses to plan their affairs," the alternative obliquely suggested by Petitioner (i.e., administering agency

perpetuating its flawed regulatory interpretation) is markedly more egregious to public interest. [*Petitioner's Post-Hearing Memorandum at 18*]. While this is admittedly an unfortunate consequence of a shifting regulatory interpretation by an administering agency, forcing an administering agency to continue with a flawed regulatory interpretation is particularly troublesome when valuable public interests such as the protection of the environment are at stake. *Accord., Hickey v. Illinois Central R.R. Co.,* 35 Ill. 2d 427, 447-448, 220 N.E. 2d 415, 426 (1966). While Petitioner may herald this outcome, such a result opposes public policy given it would require the Agency to provide the benefit of this misguided interpretation to all similarly situated sources and, in this instance, would annually allow thousands of additional tons of SO_2 into the environment. Regardless of the unfortunate consequences to the public's ability to plan their affairs due to a change in regulatory interpretation, the Board has found that prior erroneous Agency actions are properly remedied by correcting the error, not perpetuating it. *State Bank of Whittington v. IEPA,* PCB 92-152 (June 3, 1993). *Accord., Fiat Allis North American, Inc. v. Illinois Environmental Protection Agency,* PCB 93-108, slip op. at 7 (Oct. 21, 1993) (affirming the ability of the agency to "correct an error from one case to the next"). The agency need only provide a reasoned explanation for a deliberate change in precedent from prior agency precedent. *New York Public Interest Research Group, Inc. v. Johnson*, 427 F.2d 172, 182 (C.A. 2nd, 2005).

Recognizing that it was departing from prior Agency precedent concerning the applicability of 35 Ill. Adm. Code 214.382 to this source, the Illinois EPA thoroughly considered all information contained within the Administrative Record and the relevant regulations prior to deliberately changing its position that the MBT-C condensers were

not entitled to the exemption. *Accord., New York Public Interest Research Group, Inc. v. Johnson*, 427 F.2d 172, 182 (C.A. 2nd, 2005). When coupled with the extensive caselaw holding that estoppel is disfavored when "what is involved is the protection of the environment and the people who inhabit it. . ." it becomes readily apparent that the Illinois EPA should not be estopped from appropriately subjecting Petitioner's MBT-C condensers to the applicable requirement in 35 Ill. Adm. Code 214.301. *Dean Foods Co. v. Pollution Control Board,* 143 Ill. App.3d 322, 338, 492 N.E. 2d 1344, 1356, 97 Ill. Dec. 471,483 (2nd Dist. 1986).

While it is evident that public policy disfavors estopping the Illinois EPA given such an outcome would annually result in the emission of thousands of additional tons of SO_2 into the environment, this is particularly true in light of Petitioner's admissions that it not only chose to install the NaSH system based on monetary motivations but has continued with this appeal predominantly based on the same incentive. (i.e., to enable it to market SO_2 reduction credits). [*Petitioner's Post-Hearing Memorandum at 6, fn. 4; see also, Transcript at 46*]. In the case at hand, the facts indicate that project financing played a pivotal role in the timing and implementation of Emerald's decision to install the NaSH unit to address Illinois EPA concerns over the applicability of 35 Ill. Adm. Code 214.301 to the MBT-C process. After receiving information from the Agency regarding sulfur recovery devices on similar processes in other states, Emerald had a better "understanding of what other companies were doing" and "felt that there was a lot of emissions of sulfur dioxide, that we needed to see if there was a reasonable way of reducing that." [*Transcript at 44*].

Emerald subsequently agreed to consider the control system information provided by the Illinois EPA to the extent practicable given a competing water issue involving ammonia. [*Transcript at 41-44*].[29] Initially, Emerald evaluated a form of a sulfur recovery device commonly referred to as a Claus Unit, but learned it did not provide a monetary return on recovered sulfur.[30] [*Transcript at 42*]. As recovered sulfur would have to be sent to a landfill at a significant cost, approximately $5 million dollars, Emerald concluded any investment in a Claus Unit would not provide a reasonable rate of return and thus, did not select this system. [*Transcript at 42-45*].

At about this time, the source had been purchased by Lubrizol and given that Lubrizol employed the NaSH system elsewhere in the company, Petitioner evaluated the financing underlying NaSH production as a potential means to control sulfur emissions from the MBT-C process. [*Transcript at 45-46*]. Petitioner found that "the revenue generated by . . . [the NaSH] system would *just about break even* as far as material cost going in and cost of product being sold so that overall financial impact would not be as great as the production." [*Transcript at 46 (emphasis added)*]. In addition to generating a product for sale from the previous H_2S-waste stream, Emerald knew that the possibility of sulfur dioxide credits (and even more money) existed from the United States Environmental Protection Agency (USEPA) if, first, the USEPA agreed that Emerald's

---

[29] An error exists at page 43 of the transcript indicating that Petitioner's schedule allowed it to obtain a ruling by the Pollution Control Board on the *MON issue*. [*Transcript at 43*]. As appropriately discussed elsewhere in the transcript, the referenced-ruling pertained to an ammonia issue before the Board. [*Transcript at 42*]; *see also Noveon, Inc. f/k/a BF Goodrich Corporation, (Henry Facility) v. Illinois Environmental Protection Agency,* PCB 91-17 (NPDES Permit Appeal).

[30] In addition, given the operational challenges presented elsewhere by the Claus Unit and that the Claus Unit (and all sulfur recovery devices) require continuous feed to the equipment, the MBT-C batch process would present special challenges for delivering a constant supply of feed to this type of sulfur recovery device. [*Transcript at 44-46*].

installation of the NaSH unit was voluntary. [*Transcript at 46*]. However, given the finding in the CAAPP permit stating that the condensers on the MBT-C process are not control but an integral part of the process, any subsequent installation of a control device would not be voluntary but necessary to comply with 35 Ill. Adm. Code 214.301. [*Petitioner's Post-Hearing Memorandum at 6, fn.4*]. In practical terms, such a permitting decision by the Illinois EPA likely forecloses any conclusion by the USEPA's Acid Rain Program that the installation of the NaSH unit was anything but involuntary. [*Transcript at 46-47*].

And just as finances often take the forefront in project development and implementation, economics frequently take the lead in litigation decisions as well. [*Transcript at 46-47*; *see also, Petitioner's Post-Hearing Memorandum at 6, fn.4*]. Petitioner admitted that the sulfur dioxide credit issue "[w]as the primary driving force when the company proceeded with the appeal of the Agency's determination." [*Id.*]. If the Board were to conclude that the condensers were an existing process designed to remove sulfur compounds from the flue gases of a petrochemical process, Emerald would be able assert to the USEPA that the SO_2 emission reductions achieved by the NaSH unit were voluntary. Of particular significance to Emerald's finances, such a Board decision would allow it to lay claim to a host of emission reduction credits for actual SO_2 emissions that would have been emitted from the MBT-C process prior to the installation of the NaSH. *See generally,* §§ 403 & 408 of Clean Air Act and 40 CFR Parts 73 & 74. If given access to such credits, Emerald would be able to sell the credits on the open market so long as the source remains open and operates the NaSH unit. While Petitioner heralds such an outcome, the environment does not as it would annually allow thousands

of additional tons of SO_2 to be emitted into the environment. In conclusion, based on all the evidence before the Board, Petitioner's argument that the Illinois EPA should be estopped from subjecting the source to the applicable SO_2 standard should not be entertained by the Board.

E. The Hearing Officer's February 4, 2008, Ruling Refusing to Supplement the Record Was Entirely Reasonable and Should be Sustained by the Board.

During the February 5, 2008, hearing and in several pages of its Post-Hearing Brief, Petitioner expended considerable resources arguing that the Hearing Officer and now the Board should overturn the February 4, 2008, Hearing Officer Order excluding from the record for the CAAPP permitting decision all prior state operating permit decisions for the MBT-C condensers dating back to the early 1970s. In light of the Illinois EPA'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. As such, the Illinois EPA believes that the Board's ultimate decision will not be altered by its holding in response to Petitioner's current argument concerning the appropriate scope of the CAAPP record. Regardless, in order to preserve its arguments in the event of any subsequent appeal of the Board's order, the Illinois EPA provides the following response to Petitioner's recurring arguments.

Case law authorities and prior Board rulings make clear that the record for a permitting decision must include materials generally relied upon by the Illinois EPA in its decision. *Joliet Sand and Gravel v. Illinois Environmental Protection Agency,* PCB 86-159, (February 5, 1987) at page 5. Petitioner's statement that it "begs logic and common

sense that previous permits for the same facility, using the same processes would not be consulted by IEPA" ignores the lack of authority possessed by the Agency to act until it received an application from the applicant, (ie., one application – one decision). [*Petitioner's Post-Hearing Memorandum at 24-25*]. Moreover, upon receipt of an operating permit application, the Illinois EPA's review is based upon the material contained within the application which necessarily contains the most up-to-date information about the source. After receipt of the most current information from 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.

Regardless, contrary to implications made by Petitioner, the existence of prior permitting decisions relating to the MBT-C process and particularly, the treatment of the SO_2 issue, was known to the applicant and was likewise part of the Illinois EPA's institutional knowledge, and, above all, that of the prior state operating permit engineer for the MBT-C process, Mr. Dan Punzak.[31] [*Petitioner's Post-Hearing Memorandum at*

[31] In support of its argument, Petitioner attempts to make much of its counsel's cross of Mr. Punzak to suggest that he had reviewed and relied on state operating permitting files pertaining to the MBT-C process while drafting the CAAPP permit. [*See, Petitioner's Post-Hearing Memorandum, pages 23-24, citing Transcript at 146:19-148:19*]. A closer review of Mr. Punzak's testimony indicated, at most, that Mr. Punzak had the state operating permit file at his desk, had volunteered to make copies for other Agency personnel, and would be bringing certain documents from the file to legal counsel for the Agency. Admittedly, Mr. Punzak's testimony indicates that he had the underlying state permitting files at his desk. However, the mere existence of these files at his desk means little as the Illinois EPA had to retrieve the two internal 1993 memorandum from these files to serve as attachments to the Memorandum from Don Sutton to Julie Armitage, dated January 12, 2001. [*Transcript at 146-150*]. Given Mr. Punzak was the prior state operating permit engineer for the source in 1993, he not only knew of the existence of these two earlier documents but understood all-to-well that the Agency's CAAPP permitting decision contradicted prior state operating permit decisions made by the Illinois EPA. [*Transcript at 148 ("[w]ell, I knew I had contradicted some of the past decisions. So, therefore, why go into the details when I already knew that . . . my decision was different than what other Agency employees had made.")*]. Merely because Mr. Punzak pulled a few documents from state

pages 24-25; see also, Transcript at 148]. 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 SO_2 issue. [*Id.*]. It did not, however, draw upon those permits, for support or sustenance. [*Id.*]. The Illinois EPA'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 Illinois EPA). And as such, no part of these earlier decisions (ie., operating permits) found their way into the instant CAAPP permit.

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 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

---

operating permit files does not mean that the Agency reviewed and relied upon twenty years of contrary permitting history in its ultimate CAAPP permitting decision. Admittedly, Mr. Punzak could have been more precise in response to certain aspects of cross examination by Petitioner's counsel, but as Mr. Punzak explained it made little sense for him to explore the underpinnings of prior Agency decisions given that the Agency's CAAPP permit decision would contradict earlier state operating permit decisions.

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.").

Petitioner seizes again 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 its 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 CAAPP 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).

The additional documents referenced by Petitioner, 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.[32] As such, these documents were not part of the "entire Agency record of the CAAPP application" and were not included in the CAAPP permit record.

Petitioner tries to prejudice the Illinois EPA before the Board by bolstering its argument with allegations that it sought access to Illinois EPA state operating permit files by way of the FOIA but the Agency violated its right to review certain information contained with its files, particularly, by denying Petitioner access to these two internal Agency memoranda from 1993. [*Petitioner's Post-Hearing Memorandum at page 20*]. A closer review of the evidence and the applicable law in this area reveal that the Illinois EPA did no such thing.

During direct examination, Mr. Giffin generally observed that its initial request was made prior to its submittal of the CAAPP application to "make sure that we understood the *posture* of the EPA concerning our processes and to understand if we

---

[32] 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 SO_2 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, Petitioner's Post-Hearing Memorandum at pages 19-20*]. These documents were never attached to the 2001 Memorandum from the assigned permitting analyst. [*Transcript at 107*]. Consequently, the referenced documents were only included in the state operating permit file 72110935, not the CAAPP file 96030152.

were *interpreting* the regulations appropriately." [*Transcript at 29-30 (emphasis added)*]. Given Petitioner failed to admit into evidence this particular FOIA request and the Illinois EPA's response, we are left to interpret Mr. Giffin's testimony regarding the nature of the request and accompanying response. Seeing that the purpose of the request was to become more familiar with the Agency's opinion concerning the applicability of certain regulatory requirements to the source, it is not surprising that certain internal memorandums, etc. may have been withheld from viewing. Selected documents are exempt from disclosure under the state's Freedom of Information Act, including "[p]reliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated." 5 ILCS 140/7(1)(f) (2006). In addition, other documents may be withheld from disclosure if they represent "communications between a public body and an attorney . . . representing the public body that would not be subject to discovery in litigation, and materials prepared or compiled by or for a public body in anticipation of a criminal, civil or administrative proceeding upon the request of an attorney advising the public body. . . " 5 ILCS 140/7(1)(n). Based on the evidence before the Board, particularly, the two 1993 memorandum between permitting staff and its attorney not only requesting legal counsel but in which opinions were expressed and/or policies or actions were formulated, it is plain that the Illinois EPA acted in accordance with the express legal authority under state law by refusing to disclose the contents of these documents to Emerald.

Petitioner can cite to no legal authority for the proposition that the Illinois Environmental Protection Act or implementing regulations compel the release of materials exempt from disclosure under the state's Freedom of Information Act. While

the Illinois EPA recognizes the importance of the permittee securing access to the basis of any formal permitting decision by the Agency in addition to the opportunity to submit evidence during the application process,[33] the permittee's right of participation in state permitting programs do not render meaningless any and all confidentiality or privacy laws. *See, Wells Manufacturing Company v. Illinois Environmental Protection Agency,* 195 Ill. App. 3d 593, 552 N.E. 2d 1074 (1990). This is particularly true where an application is not yet pending before the Illinois EPA but where the Permittee is merely seeking guidance from the Agency concerning those regulatory requirements applicable to the source.

Similarly, Petitioner argues that it later submitted a FOIA request to the Illinois EPA subsequent to a July 12, 2001, meeting in an effort to obtain certain documents from the Agency that would explain its revised interpretation of 35 Ill. Adm. Code 214.382. [*Petitioner's Post-Hearing Memorandum at page 20; see also, Transcript at 49*]. Petitioner charges that the Illinois EPA withheld "all of the documents relevant to these internal discussion regarding the applicability of the exemption and their concerns

[33] In this instance, prior to the Illinois EPA's final CAAPP permitting decision, the Agency notified Emerald that it was "reevaluating whether the MBT-C process was in compliance with the applicable SO_2 regulations" and requested that Petitioner provide additional information to aid in this decision. [*See, Public Version of Record at 1469-1471*]. This letter to Mr. Giffin dated February 22, 2001 predated the March 21, 2001, letter referenced by Mr. Giffin as the first formal communication to Emerald indicating that the Illinois EPA "had concerns regarding the application of the exemption" to Emerald. [*See, Transcript at 37-38; see also, Public Version of Record at 1464-1466*]. Subsequent to the February Request for Additional Information, the Illinois EPA sent Emerald a second Request for Additional Information on May 16, 2001, notifying the applicant that the condenser on the MBT-C process did not qualify for the exemption in 35 Ill. Adm. Code 214.382 and requested the submittal of a compliance plan by Emerald. [*See, Public Version of Record at 1459-1460*]. Letters and meetings followed wherein Petitioner expressed its disagreement with the Illinois EPA's conclusion. [*See, Trade Secret Version of Record at 2116-2118*; *see also, Public Version of Record at 1420; see also, Transcript at 40-41*].

regarding the exemption" suggesting that the Agency inappropriately withheld such information from the Petitioner. [*Transcript at 49*; *see also, Petitioner's Exhibit 2*].

A state permit authority does not violate the basic rules for public disclosure whenever confidentiality is asserted, provided that the basis for the withholding is valid and not otherwise overturned on appeal. Emerald chose not to pursue an appeal of the Agency's response to its state Freedom of Information Act requests, so it cannot be heard to complain about the denial of access to exempt records. *See,* 5 ILCS 140/10 & 140/11 (2006); 2 Ill. Adm. Code 1828.505; [*see, Transcript at 62-63; see also, Petitioner's Exhibit 2*].

Although Petitioner later places 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. *Petitioner's Post-Hearing Memorandum at 21.* 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 application[34]; the Agency opposed their inclusion on the basis that the record

[34] 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

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 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.[35]

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

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

---

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.

[35] 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.

envision that its review of a CAAPP permit decision will be based on information contained within the previous state operating permit files that are each centered on their 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 permit application* or other request that resulted in the Agency's decision" for non-CAAPP permit appeals.

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 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 these condensers 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).[36]

[36] 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

For purposes of Emerald'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 previously conceded the point.[37] *Petitioner's Exhibit 1.* When coupled with the Illinois EPA's admission that it previously concurred in the applicability of 35 Ill. Adm. Code 214.382 to the source, it is readily apparent that supplementing the record will do little to further substantiate Emerald's estoppel claim. 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 SO_2 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.

Hearing Officer Halloran's February 4, 2008, Order, reasonably concluded that the additional documents, dated between 1972 and 1993, that Petitioner sought to include in the record involved various state operating permit applications (application number 72110935) that pre-dated the Petitioner's 1996 CAAPP application (application number

---

could potentially require the Agency to copy files for countless, often hundreds of 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.

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

96030152) under review in this proceeding. [*Hearing Officer Order, dated February 4, 2008, page 5*]. The Hearing Officer went onto rule:

> 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 predates 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.

[*Id.*]. Finally, the Hearing Officer considered Petitioner's reliance on the *Pease* decision in its initial Motion to Supplement the Record for the proposition that the record includes all documents contained within *all* Agency files that pre-date the final permitting decision. [*Motion to Supplement the Record at ¶10; see also, Petitioner's Post-Hearing Memorandum at page 21*]. The Hearing Officer reasonably concluded Petitioner's reliance on *Pease* was not appropriate given that the documents in said proceeding were "letters generated during the pendency before the Agency of the mining permit application that was the subject of the appeal to the Board." [*Hearing Officer Order, dated February 4, 2008, page 5*]. Meanwhile, Emerald sought to supplement the instant record with documents from prior state operating permitting records from 1972 through 1993 that pre-dated the CAAPP application in 1996.[38] [*Id.*]

---

[38] Consistent with case law cited elsewhere in this Post-Hearing Brief, Hearing Officer Halloran questioned the relevancy of the two 1993 internal Agency memorandum given a recent Board decision affirming an Illinois EPA decision wherein the "Agency had retreated from its previous historical interpretation of statutory exemption." [*Hearing Officer Order, dated February 4, 2008, pages 3-4, fn.2, citing Peoria Disposal Company v. Illinois Environmental Protection Agency,* PCB 8-25, slip op. at 14, n.## (January 10, 2008)].

Given the foregoing, the Hearing Officer's Order reasonably considered that the CAAPP permit record included all documents relied upon by the Agency that post-dated the application submittal in 1996 through the issuance of the CAAPP permit in 2003. Two notable exceptions were the two internal Agency memoranda from 1993 that predated the filing of the CAAPP application, however, consistent with 35 Ill. Adm. Code 105.302(f), such documents were included in the record by the Illinois EPA due to their physical attachment to a 2001 memorandum contained in the CAAPP permit file. Finally, given the Illinois EPA's willingness to admit that the Agency held a contrary regulatory interpretation for approximately twenty years, it made little sense for the Hearing Officer to subject this proceeding to an in-depth review of permitting decisions not before the Board today.[39] Accordingly, the Hearing Officer's ruling was entirely appropriate and should be sustained by the Board.

The Illinois EPA's objection to the inclusion of such material in the record, particularly given that Petitioner neglected to articulate a rationale for why such evidence was necessary in light of the Agency's admission, was intended to limit the record to those documents relied upon by the Agency in its decision consistent with the applicable procedural rules and prior Board precedent. The Agency determined that maintaining the integrity of the record, rather than voluntarily agreeing to expand the scope of the CAAPP record to include twenty years of prior state operating permitting history would not only assist the Board, rather than requiring it to steer through a needless review of

[39] While Petitioner did, indeed, attempt to make "an issue of the lack of consistency of IEPA's interpretation of 35 Ill. Adm. Code 214.382(a) as applied to Petitioner's facility," Petitioner failed to articulate how an issue remained after the Illinois EPA admitted to formally changing its regulatory interpretation by means of its 2003 issuance of the CAAPP permit to the source. [*Petitioner's Post-Hearing Memorandum at page 25*]. In light of such admission by the Agency, Emerald neglected to explain how it was prejudiced by Hearing Officer Halloran's ruling.

extraneous information, but would avoid establishing a burdensome precedent for both the Agency and the Board to follow in future CAAPP permit appeals. In light of the Illinois EPA's admission that it previously held a contrary interpretation, the inclusion of twenty years of permitting history would do little to further substantiate Petitioner's estoppel claim. As a consequence, the Illinois EPA does not believe that the Board's determination would change in any way by the inclusion of such material in evidence.

III.

Conclusion

Consistent with the plain language of the regulation and information submitted by Petitioner in its application, the Illinois EPA appropriately concluded that the condensers are not designed to remove sulfur compounds from the flue gas of a petrochemical process and thus, are not entitled to the 35 Ill. Adm. Code 214.382 exemption. As elaborated upon above, the Illinois EPA's decision not only centered on a detailed review of the workings of the MBT-C process in light of the applicable regulatory language as well as a consideration of the percent of total sulfur compounds recovered by the condensers; the Agency's conclusion was also based upon its institutional knowledge (i.e., the intent of the original rulemaking for 35 Ill. Adm. Code 214.382, particularly given the differences at sulfur recovery units at petroleum refineries, the units meant to be covered by the rulemaking, verses the condensers on the MBT- C process); information from regulators in other states; and USEPA guidance. Based on this evidence, Petitioner has fallen short of demonstrating that the requested permit would have resulted in a violation of the Act or implementing regulations. *Joliet Sand & Gravel*

Company v. Illinois EPA & Illinois Pollution Control Board, 163 Ill. App. 3d 830, 516 N.E. 2d 955 (3rd Dist. 1987).

Nor has Emerald presented the requisite evidence vital to support an estoppel claim. At most, Petitioner demonstrated that the Illinois EPA historically made erroneous state operating permitting decisions however, this is not sufficient to justify a claim of estoppel against the government. Moreover, Petitioner has failed to establish that the Hearing Officer's Order denying Emerald's Motion to Supplement the Record with documents, dated between 1972 and 1993 from various state operating permit applications was anything but reasonable.

WHEREFORE, for the foregoing reasons, Respondent, Illinois Environmental Protection Agency, respectfully requests that the Board DENY the petition for review in this case and uphold the Illinois EPA's CAAPP decision that the condensers on the MB I-C process are not entitled to the exemption found in 35 Ill. Adm. Code 214.382 and thus, are subject to 35 Ill. Adm. Code 214.301.

Respectfully submitted,

Sally A. Carter

Sally A. Carter
Assistant Counsel

Dated: July 23, 2008
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217)782-5544