BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

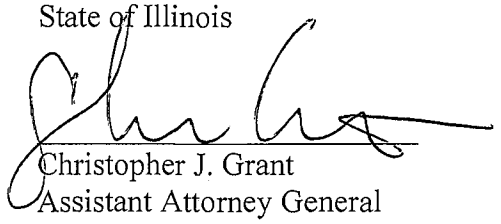
AMEREN MISSOURI AND GOOSE CREEK ENERGY CENTER,	)	
Petitioner,	)	
v.	)	PCB No. 15-89 (Permit Appeal-CAAPP)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY	)	
Respondent.	)	

NOTICE OF ELECTRONIC FILING

PLEASE TAKE NOTICE that on April 24, 2015, the undersigned filed Respondent's Motion for Summary Judgment and Response to Petitioner's Motion for Summary Judgment. A copy of the document so filed is attached hereto and served upon you.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By LISA MADIGAN
Attorney General of the
State of Illinois



Christopher J. Grant
Assistant Attorney General
Environmental Bureau
69 W. Washington Street
Suite 1800
Chicago Illinois, 60602
(312)814-5388

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

AMEREN MISSOURI AND GOOSE CREEK ENERGY CENTER,	)	
Petitioner,	)	
v.	)	PCB No. 15-89 (Permit Appeal-CAAPP)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY	)	
Respondent.	)	

ILLINOIS EPA'S MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Now comes, Respondent, Illinois Environmental Protection Agency, ("Illinois EPA"), by and through its attorney, Lisa Madigan, Attorney General of the State of Illinois, and pursuant to 35 Ill. Adm. Code 101.516, moves for Summary Judgment in its favor. Respondent also submits its Response to Petitioner's AMEREN MISSOURI AND GOOSE CREEK ENERGY CENTER's ("Petitioner's" or "Ameren's) Motion for Summary Judgment. In support thereof, Respondent states as follows:

I. INTRODUCTION

The Petitioner challenges provisions of a 2014 Clean Air Act Permit Program permit ("2014 CAAPP Permit") issued for operation of Ameren's Goose Creek electrical generation plant, 760 E. 2150 N Road, Monticello, Piatt County, Illinois ("Facility"). Illinois EPA has determined that a certain emission unit at the Facility, specifically a 9.5 mmbtu/hr. indirect natural gas pre-heater, designated in the permit application as emission unit GH-01 ("Indirect Gas

Heater") is not an "insignificant emission unit". Illinois EPA's determination is reflected in Conditions 4.0 and 7.2 of the 2014 CAAPP Permit.

II. ISSUES

The Petitioner has challenged Illinois EPA's decision not to list the Indirect Gas Heater as an insignificant emission unit. The Petitioner claims that Illinois EPA is bound under Section 201.211 of the Pollution Control Board ("Board") regulations, 35 Ill. Adm. Code 201.211 ("Section 201.211") to exercise the Agency's discretion and find that the Indirect Gas Heater is an insignificant activity. In its argument, the Petitioner relies on expired CAAPP permits which listed the Indirect Gas Heater as an insignificant activity. The Petitioner also claims that Illinois EPA did not meet its responsibility to provide "detailed written notice" to Ameren pursuant to 39.1(d) of the Act, 415 ILCS 5/39.1 (2014).

Illinois EPA's decision to exclude the Indirect Gas Heater from the list of insignificant emission units is based on its reading of the applicable Board regulations, Section 201.210 of the Board regulations, 35 Ill. Adm. Code 201.210 ("Section 201.210") and Section 211. In this case, the Indirect Gas Heater is precluded from designation as an insignificant activity given the Board's regulatory declaration that only those fuel combustion units sized less than a certain capacity may be categorized as an insignificant activity. Finally, Petitioner's reliance on Section 39.1 of the Act for alternative control strategies is misplaced, as that provision *does not apply* to the Agency's permit determination.

III. UNDISPUTED FACTS

a. Function and Operation of the Indirect Gas Heater

The Indirect Gas Heater is a fuel combustion emission unit, fueled by natural gas, used for the indirect heating of pipeline gas prior to fueling the electrical generating turbines. The Indirect Gas Heater has a heat input of 9.5 mmbtu/hr. **R. 503-R. 507.**[1] The Indirect Gas Heater was first identified in the Petitioner's July 2003 CAAPP Application **R. 503.** The Indirect Gas Heater is permitted to operate 2,856 hours per year. **R. 504.**[2] Typical of electrical generating "peaker" plants, the Facility operates intermittently depending on electrical demand, with 70% of expected operation occurring between June and August. **R. 504.**

The Indirect Gas Heater is integral to operation of the Facility. Its function is to pre-heat pipeline natural gas to a required temperature prior to injection into the electrical generating turbines. **R. 494**. All six of the generating turbines at the Facility are fueled through the Indirect Gas Heater. *See*: **R. 492.**

b. Agency Exclusion of the Indirect Gas Heater as an Insignificant Activity

Upon examination of Petitioner's application for the 2014 CAAPP Permit, Illinois EPA determined that the provisions of Section 201.210 prohibited it from listing the Indirect Gas Heater as an "insignificant emission unit", or "insignificant activity". This determination was communicated to Petitioner in a draft permit on June 2, 2014 and discussed with Petitioner on numerous occasions. **R 120-R 132, R 135-R 137, R 1207-R 1208.**.

---

[1] For simplicity, citations to the Record will omit zeros to the left of the page number. For example, the Record page bates stamped R 000168 will be cited as **R. 168**

[2] The operating parameters from the September 2002 CAAPP permit application are incorporated by reference in the applications for the 2009 and 2014 Permits. **R. 243, R. 286.**

IV. ILLINOIS EPA'S MOTION FOR SUMMARY JUDGMENT

Illinois EPA asserts that it is entitled to summary judgment in this matter, as the only issue is a matter of law.

a. Legal Standard for Summary Judgment.

Section 101.516 of the Board's Procedural Rules,35 Ill. Adm. Code 101.516, provides, in pertinent part, as follows:

> (b) If the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment.

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 483 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Id.* Summary judgment should be granted only when the movant's right to the relief "is clear and free from doubt." *Id.*, *citing Purtill v. Hess*, 111 Ill. 2d 299, 240 (1986). Summary judgment should only be used when resolution of case hinges on a question of law, and a moving party's right to judgment is clear and free from doubt. *Prettyman v. Commonwealth Edison Co*, 273 Ill. App. 3d 1090 (1st Dist. 1995).

A movant must provide sufficient facts in support of its motion, including affidavits where necessary (see, e.g., *Vogue Tyre v. Illinois EPA* PCB 96-10, September 4, 2003). An affidavit submitted in the summary judgment context serves as a substitute for testimony at trial.

Robidoux. v. Oliphant, 201 Ill.2d 324, 337 (2002).

In Permit Appeals, the Petitioner has the Burden of proof to demonstrate that no violation of the Act will occur if the permit is granted. *Panhandle Eastern Pipe Line Co. v. IEPA*, PCB 98-102, slip op. at 10 (Jan. 21, 1999).

V. ILLINOIS EPA IS ENTITLED TO SUMMARY JUDGMENT

Illinois EPA's Motion for Summary Judgment is based solely on the Permit Record and the proper interpretation of Section 201.210 and Section 201.211. There are no disputed facts regarding the emission unit in question. It is undisputed that the Indirect Gas Heater is a fuel combustion emission unit with a heat input of 9.5 mmbtu, fueled by natural gas, used for the indirect heating of pipeline gas prior to fueling the electrical generating turbines. **R. 494, R 503-R 507.** It is undisputed that the Petitioner sought inclusion of the Indirect Gas Heater in the 2014 CAAPP Permit's list of insignificant emission units, and that Illinois EPA determined that such request could not be granted based on the correct application of Sections 201.210 and 201.211. Therefore, the only in Illinois EPA's Motion for Summary Judgment is the whether Illinois EPA's interpretation of Sections 201.210 and 201.211 is legally correct. The Board's consideration of the Illinois EPA's Motion for summary judgment will be a question of law.

Illinois EPA has correctly determined that, pursuant to Section 201.210, the Indirect Gas Heater cannot be categorized as an insignificant activity, and that the provisions of Section 201.211 do not provide an exception to the provisions of Section 201.210. Illinois EPA is entitled to judgment as a matter of law.

a. Illinois EPA correctly applied Section 201.210 to the Indirect Gas Heater

In Section 201.210, the Board provides specific parameters for emission units that may be considered "insignificant activities". This Section provides, in pertinent part, as follows:

> **Section 201.210 Categories of Insignificant Activities or Emission Levels**
>
> a) The owner or operator of a CAAPP source, pursuant to 35 Ill. Adm. Code 270, shall submit to the Agency within its CAAPP application a list of the following activities or emission levels:
>
> * * *
>
> 4) Direct combustion units designed and used for comfort heating purposes and fuel combustion emission units as follows:
>
> A) Units with a rated heat input capacity of less than 2.5 mmbtu/hr. that fire only natural gas, propane or liquefied petroleum gas;

Section 211.2470 of the Board regulations, 35 Ill. Adm. Code 211.2470, defines the term "fuel combustion emission unit":

> "Fuel combustion emission unit" or "Fuel combustion emission source" means any furnace, boiler, or similar equipment used for the primary purpose of producing heat or power by indirect heat transfer.

The Indirect Gas Heater indirectly heats the natural gas prior to injection into the electrical generating turbines at the Facility, and is therefore a "fuel combustion emission unit" as that term is defined in 35 Ill. Adm. Code 211.2470. In Section 201.210(a)(4)(A), the Board limits consideration of these emission units as insignificant activities to those units with a heat input *less than* 2.5 mmbtu/hr. By including this category of insignificant activity in the regulation, the Board has explicitly *excluded* natural gas fired fuel combustion emission units with a heat input of equal to or greater than 2.5 mmbtu/hr. from being considered an "insignificant activities".

The Indirect Gas Heater is fueled by natural gas and has a heat input of 9.5 mmbtu/hr. See: **R 503-R 507.** Because its heat input is significantly greater than 2.5 mmbtu/hr., application of Section 201.210(a)(4)(A) prevents Illinois EPA from designating the Indirect Gas Heater as an "insignificant activity" in a CAAPP Permit. Further, because the Indirect Gas Heater is an emission unit specifically covered in Section 201.210, it would be improper for Illinois EPA to perform an analysis using the general factors listed in Section 210.211. Illinois EPA correctly found that the Indirect Gas Heater is not an "insignificant activity" pursuant to Section 201.210(a)(4)(A), and, in its 2014 CAAPP Permit, Illinois EPA correctly did not consider the Indirect Gas Heater to be an insignificant emission unit.

b. Illinois EPA's Interpretation of Section 201.211 is *Consistent* with Section 201.210

Section 201.211 provides, in pertinent part, as follows:

Section 201.211 Application for Classification as an Insignificant Activity

a) An owner or operator of a CAAPP source may propose to the Agency in its CAAPP application that an emission unit at the source be treated as an insignificant activity *consistent with Section 201.210* of this Part, provided the emission unit meets the following criteria....(emphasis supplied)

1) The emission unit would not emit more than 1.0 lb/hr. of any regulated air pollutant not listed as hazardous pursuant to Section 112(b) of the Clean Air Act in the absence of air pollution control equipment;

2) The emission unit would not emit more than 0.1 lb/hr. of any regulated air pollutant that is listed as hazardous pursuant to Section 112(b) of the Clean Air Act in the absence of air pollution control equipment; and

3) The emission unit is not a process unit.

* * *

In Section 201.211, the Board directs that any determination made by the Agency be *"consistent"* with Section 201.210. The term "consistent" is not defined in the regulations, and it is appropriate to interpret "consistent" with its plain and ordinary meaning. "Consistent" means "in agreement or harmony" whereas "inconsistent" means, *inter alia*, "incompatible".[3] Applying Section 201.211 to an emission unit which is expressly *excluded* under Section 201.210(a)(4)(A) directly contradicts the terms and provisions of Section 201.120. Therefore, such an interpretation is "incompatible" and therefore "inconsistent" with Section 201.210. In other words, certain equipment is excluded from consideration as an insignificant activity through Section 201.211 by regulation (i.e. by Section 201.210) because it does not meet the criteria listed in Section 201.210. Illinois EPA has correctly determined that it could not use Section 201.211 to find that the 9.5 mmbtu/hr. Indirect Gas Heater, which is excluded from consideration by the plain language of Section 201.210(a)(4)(A), is an insignificant activity. Illinois EPA interpretation is "consistent" with both Sections 210.210 and 201.211.

Nor does Illinois EPA have the authority to make findings which conflict with the Board's decision to exclude a particular source from coverage as an insignificant activity. Accordingly, Section 201.211 can *only* apply to emission sources that are *not* specifically excluded from consideration as an insignificant activity in Section 201.210.

Illinois EPA's interpretation does not render Section 201.211 meaningless. Section 201.211 can still apply to minor sources, or yet-to-be-developed source categories. Section 201.211 can still apply to a CAAPP source that may operate a unit that was neither contemplated nor considered by the Board in its listing of the emission units in Section 201.210. Under these

3 WEBSTER'S NEW WORLD DICTIONARY 303, 712 (2nd Coll. Ed. 1980)

circumstances, the Board grants Illinois EPA the discretion, in Section 201.211, to consider the factors listed in 201.211, and make a determination that an emission unit is an insignificant activity. However, where the Board has set specific parameters for what constitutes an insignificant activity as listed in Section 201.210, Section 201.211 cannot be used to provide an exception. Illinois EPA's interpretation of Section 210.211 is "consistent" with Section 201.210, and therefore correct.

Illinois EPA's interpretation of Section 201.211 in this matter harmonizes the terms of the two regulations, resolves any conflict between the two Sections, and is "consistent with Section 201.210". However, Petitioner's interpretation can only be valid if the Board ignores the express 2.5 mmbtu limitation contained in Section 210(a)(4)(A). Petitioner's argument would invalidate the Board's listing of insignificant activities in Section 201.210, and is thereby "inconsistent" with Section 201.210. The Petitioner's interpretation is erroneous.

c. The Section 201.211(c) Factors are Not Applicable Because Section 201.210 Clearly Excludes the Indirect Gas Heater

The Petitioner urges the Board to find that the Agency had the authority to and should have evaluated the (non-specific) factors listed in 201.211(c) and find that the Indirect Gas Heater, a "fuel combustion emission unit" was an insignificant activity, despite the Board's specific description in Section 201.210(a)(4)(A) of units with fuel input *less than* 2.5 mmbtu/hr. Clearly, such action by the Agency would render the provisions of Section 201.210(a)(4)(A) meaningless, and would be "inconsistent" with Section 201.210.

A decision by Illinois EPA to apply its discretion under Section 201.211 and nullify the regulatory standards in Section 201.210 would exceed the Agency's authority. The provisions of

the Act clearly define the powers of the Board and the Agency. Illinois EPA is responsible for determining policy, administering permit programs, and enforcement. Meanwhile the Board has authority over rulemaking, review and the granting of variances. *Jurcak v. Illinois EPA*, 161 Ill. App. 3d 48, 51 (1st Dist. 1987). Only the Board has the authority to adopt the substantive regulations, pursuant to Section 27 of the Act, 415 ILCS 5/27 (2014).

If Section 201.211(c) was interpreted to allow the Agency the authority to find that an emission unit listed in 201.211 was an insignificant activity, despite the Board's express finding that an emission source was excluded by regulation, such action would constitute substantive rulemaking by the Agency, and would be contrary to the Act.

d. The Board Should Interpret Sections 201.210 and 201.211 to Avoid a Conflict Between the Regulations

Clearly, Petitioner's interpretation of the regulations creates a conflict between the specific provisions of Section 201.210 and the more general provisions of Section 201.211. However, Illinois EPA's interpretation, as applied in its 2014 CAAPP Permit decision, allows for the two sections to be harmonized: Where an emission source is listed in Section 201.210, the Board's categorizations apply; if an emission source is not listed or referred to in 201.210, the Agency may, in its discretion, review the Section 201.211 factors.

The Board should apply established rules of statutory construction to resolve the issues in this case. In Illinois, the same rules of construction apply to statutes and regulations. *Hetzer v. State Police Merit Board*, 49 Ill. App. 3d 1045,1047 (2nd Dist. 1977). The Illinois Supreme Court and Appellate courts have consistently held that where two statutes are in apparent conflict, the court should interpret them in a way that preserves both. *Ferguson v. McKenzie*, 202 Ill.2d 304,

311-312 (2001), *Barragan v. Casco Design Corporation*, 216 Ill.2d 435, 441-442 (2005) ("Where two statutes are allegedly in conflict, a court has a duty to interpret the statutes in a manner that avoids an inconsistency and give effect to both statutes"). *People ex rel. Illinois Department of Corrections v. Hawkins*, 2011 IL 110792, ¶47 ("And always, when dealing with seemingly conflicting statutes dealing with the same subject matter, we must strive to interpret the statutes in a way which avoids inconsistency and gives effect to both.") See also, *Estate of Parker*, 2011 IL App (1st) 102871, ¶54.

The interpretation urged by Petitioner places Section 201.210 and 201.211 in direct conflict with one another, by allowing the general procedural factors in Section 201.211 to entirely nullify the categories of insignificant activities provided in Section 201.210(a)(4)(A). However, Illinois EPA's interpretation of the two sections "avoids inconsistency and gives effect to both". *Hawkins*, 2011 IL 110792, ¶45. Under the Agency's interpretation, Section 201.211 *complements* Section 201.210. The Board's detailed list of sources subject to listing as insignificant activities in Section 201.210 survives unaltered. Section 201.211, which deals with the "same subject matter" as Section 201.210, provides a procedure for evaluating minor non-process unit sources which are not specifically listed in Section 201.210. By determining that an emission unit at a source may not be treated as an insignificant activity under Section 201.211 where such treatment conflicts directly with the provisions of Section 201.210, Illinois EPA avoids a conflict between the two regulations, while giving effect to both regulatory sections. In accordance with Illinois law, the Board should interpret the provisions of Sections 201.210 and 201.211, and find that Illinois EPA correctly excluded the Indirect Gas Heater from treatment as an insignificant activity.

e. Conclusion

The facts relating to Illinois EPA's decision to exclude the Indirect Gas Heater from the list of insignificant activities in the 2014 CAAPP Permit are undisputed, and there are no remaining material facts at issue. As a matter of law, the Board should find that Illinois EPA's interpretation of Sections 201.210 and 201.211 is correct, and grant summary judgment in favor of Respondent and against Petitioner in this matter.

VI. RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT

In its Motion for Summary Judgment, the Petitioner claims that Illinois EPA misinterpreted the provisions of Sections 201.210 and 201.211, and that Illinois EPA should have exercised its discretion to find that, despite the provisions of Section 201.210(a)(4)(A), the Indirect Gas Heater could be categorized as an insignificant activity pursuant to Section 201.211. Petitioner also claims, without the support of evidence, affidavits, or other proof, that had the Agency evaluated factors listed in Section 201.211, it would have found that the Indirect Gas Heater was an insignificant activity.

The Petitioner argues that in two prior permit transactions for the Facility, Illinois "correctly determined" that the Indirect Gas Heater qualified as an insignificant emission unit, and that this prior determination binds Illinois EPA in consideration of 2014 CAAPP Permit application.

Finally, the Petitioner claims that the Agency was bound under Section 39.1 of the Act, 415 ILCS 5/39.1 (2014), to provide a detailed written explanation of its decision to not consider the Indirect Gas Heat an insignificant activity.

However, classifying the Indirect Gas Heater as an insignificant activity would be inconsistent with Section 201.210. As discussed herein, Illinois EPA correctly determined that Section 201.211 could not be used to nullify the express provisions of Section 201.210. Further, Petitioner has not, and cannot, demonstrate that the conditions of Section 201.211 "would be met", as that determination is wholly within the Agency's discretion. The conditions of expired CAAPP permits have no persuasive effect in support of Petitioner's Motion. Finally, the notice provisions of Section 39.1 do not apply to consideration of the 2014 CAAPP Permit.

The Petitioner cannot demonstrate that its request would not violate provisions of the Act, and therefore cannot meet its burden of proof. Therefore, Petitioner's Motion for Summary Judgment must be denied.

a. The Agency Correctly Applied Sections 201.210 and 201.211

Illinois EPA incorporates herein its argument in Support of its Motion for Summary Judgment contained in Sections IV and V herein. Illinois EPA has correctly concluded that applying Section 201.211 to invalidate the express provisions of Section 201.210(a)(4)(A) would not be "consistent with Section 201.210" and therefore a misapplication of both Section 201.210 and Section 201.211. Petitioner's Motion for Summary Judgment may be denied solely on this basis.

b. Illinois EPA Provided Adequate Prior Notice to Petitioner

1. 415 ILCS 5/39.1 Does Not Apply to this Permit Action

Petitioner claims that Section 39.1(d) of the Act, 415 ILCS 5/39.1(d) (2014), which calls for detailed written notice of a proposed decision "....applies to all applications for permits issued by the Agency". (Petitioner's Motion, p.18). This statement is plainly incorrect.

Section 39.1(a) of the Act, 415 ILCS 5/39.1(a) (2014), provides, in pertinent part, as follows:

> Section 39.1(a). In addition to such other procedures as may be available, owners or operators of emission sources, individually or collectively, may apply for and obtain from the Agency permits under this Section authorizing the construction and operation, or both, of a source or sources by use of *emission control strategies alternative but environmentally equivalent to emission limitations required of such sources by Board regulations or by the terms of this Act.* The Agency shall issue such a permit or permits upon a finding that 1) the *alternative control strategy* in the permit provides for attainment in the aggregate.....(Emphasis added).

Section 39.1 of the Act expressly provides an *alternate permitting mechanism* in the *specific and limited instances* where a permit applicant is proposing to deviate from otherwise legally binding emission control strategies. Section 39.1(d), cited by Petitioner, requires a "detailed written notice " of Illinois EPA's proposed decision on the alternative control, followed by an "opportunity for a hearing in accordance with procedures adopted by the Agency".

However, neither "detailed written notice" nor an Illinois EPA hearing were required in this case, because the Petitioner did *not* propose, and Illinois EPA did *not* consider, "emission control strategies alternative but environmentally equivalent to emission limitations required of such sources by Board regulations", i.e. an "alternative control strategy". In fact, no "emission control" strategy of any kind is at issue in this proceeding. The Petitioner admits that "there are no control measures or air pollution control required [for the Indirect Gas Heater]." *Petitioner's Motion*, p. 11. Thus, Section 39.1 clearly does not apply to Petitioner's 2014 CAAPP Permit application, or to the Agency's decision that the Indirect Gas Heater is not an insignificant emission unit. Because Section 39.1 does not apply to the permit action at issue in this matter,

Petitioner's reliance on Section 39.1(d) is incorrect, and its argument that Illinois EPA provided insufficient written notice to Petitioner based on this Section must fail.

2. Petitioner was given Sufficient Notice Prior to Permit Issuance

The CAAPP Permit at issue in this case was issued on October 16, 2014. Petitioner mailed its application on June 10, 2014, and it was received by Illinois EPA on June 19, 2014. **R. 1253, R. 2**. However, Illinois EPA and the Petition began discussing the appropriate listing of the Indirect Gas Heater, and Illinois EPA's reasons therefore, no later than June 10, 2014. Petitioner Ameren had also submitted its application for the Raccoon Creek Energy Center, and the issues with the Raccoon Creek and Goose Creek permits were similar or identical.[4] The Discussion between Illinois EPA and Petitioner covered both facilities, and were extensive. On June 10, 2014, Permit Engineer Michael John responded to a June 9, 2014 voice mail from the Petitioner on June 10, 2014. **R. 1351**. In his response, Mr. John provided a detailed explanation of the Agency's interpretation of Sections 201.210 and 201.211, and the reasons that listings in prior permits for the facility had been incorrect. Detailed discussions occurred between the parties during the month of June 2014. **R 120-R 132, R 135-R 137, R 1207-R 1208**. Finally, Petitioner was given the opportunity, and did, provide public comments on the proposed CAAPP permit provisions well prior to the October 16, 2014 issue date. **R. 708**.

It is clear from the Record that Illinois EPA communicated, discussed, and explained its basis for the classification of the Indirect Gas Heater on numerous occasions prior to issuance of the 2014 CAAPP Permit. The Petitioner cannot now claim arbitrary Agency action, unfairness, or surprise.

4 The Raccoon Creek Permit Appeal is pending before the Board as case No. PCB 15-88.

c. The 2003 and 2009 CAAPP Permits do not Support Petitioner's Motion for Summary Judgment

As previously noted, during the Review of the 2014 CAAPP Permit application, Illinois EPA found that the Indirect Gas Heater had been erroneously included in the "insignificant activities" section of the two expired CAAPP Permit for the facility. In removing the Indirect Gas Heater from consideration as an insignificant activity in the 2014 Permit, the Agency simply did not repeat this mistake.

1. Illinois EPA Must Correct Previous Errors

Section 39(a) of the Act directs Illinois EPA to issue permits that "...are not inconsistent with the regulations promulgated by the Board hereunder." In its consideration of the application leading to the 2014 CAAPP Permit, Illinois EPA determined that the Indirect Gas Heater was incorrectly listed by Petitioner as an insignificant activity in the application, and that this listing was inconsistent with Section 201.210. Pursuant to 415 ILCS 5/39(a) (2014), the Agency was required to exclude such listing in the 2014 CAAPP Permit.

2. Illinois EPA is not Estopped from Changing Erroneous Conditions

The Agency cannot be estopped from changing a permit condition, or even a prior interpretation of a regulation. See, e.g., *White & Brewer Trucking, Inc. v. Illinois EPA*, PCB 96-250 (March 29, 1997, slip op. at 12); *Noveon v. Illinois EPA*, PCB 91-17 (September 16, 2004, slip. op, at 11) (Illinois EPA cannot be estopped from changing its position in a renewal permit).

Further, conditions contained in prior permits for the Facility have no real relevance to the issue before the Board in this case. As the Board has noted, any individual permit must stand or

fall on whether it is supported by the law and regulations. *Emerald Performance Materials LLC v. Illinois EPA*, PCB 04-102 (October 15, 2009, slip op., p.12).

The previous CAAPP Permit for the Facility expired on March 20, 2014. The 2014 Permit is a *new* permitting transaction, and must "stand or fall" independent of conditions which were present in expired permits issued for the Facility. Pursuant to Section 39(a), the Agency was authorized to "impose such other conditions as may be necessary to accomplish the purpose of this Act, and as *are not inconsistent with the regulations promulgated by the Board hereunder"* (emphasis added). The Record shows that Permit Engineer Roston Cooper advised the Petitioner that "The Agency appears to have been in error in prior permitting actions as related to this emission unit type and its significance status". **R 854.** The Agency concluded that listing the Indirect Gas Heater as an insignificant activity in the expired permits had been erroneous, and did not repeat the error in the 2014 CAAPP Permit, a new permitting action. Illinois EPA did not "depart from a long-settled construction" as claimed by Petitioner; it merely did not repeat a mistake.[5]

3. The Petitioner Cannot Show that Prior Agency Permits Decisions Relied on Section 201.211

The Petitioner filed its Motion for Summary Judgment without attached affidavits, and no discovery has been conducted in this matter. Accordingly, only evidence in the Record can be used to support Petitioner's Motion for Summary Judgment. While Illinois EPA concedes that the two expired CAAPP Permits for the Facility included the Indirect Gas Heater under the list of insignificant activities, and that it advised Petitioner that the previous permit conditions had been included in error, it is unclear from the Record when or how this mistake had originally been made.

5 Petitioner's Motion, p.16

The Petitioner has not provided any further evidence, and cannot provide any proof of its claim that "Employing the ....Section 201.211(c) criteria, the Agency previously determined that the natural gas heater would be treated as an insignificant activity".[6]

The Petitioner did *not* list the Indirect Gas Heater as an insignificant activity in the initial CAAPP Permit Application for the Facility. **R 501**. There is no information in the Record explaining how the emission unit came to be listed as an insignificant emission unit in the 2003 CAAPP Permit Itself, or repeated in the 2009 CAAPP Permit. While Petitioner claims that the Agency "chose" to apply Section 201.211(c), it is equally likely that the inclusion was simply an inadvertent error by Illinois EPA's Permit Section. Accordingly, the Record does *not* support Petitioner's claim regarding the Agency's purported consideration of 201.211 as an exception to Section 201.210. Further, as previously discussed, any error by a permit reviewer or other Agency employee in a prior permitting transaction should not, and cannot, bind the agency to repeat the error in the 2014 CAAPP Permit action, a "new" permit action.

d. Petitioner's Motion for Summary Judgment is Factually Insufficient

Illinois EPA denies that the provisions of Section 201.211 provide an exception to the express provisions of Section 201.210, and create an alternate basis for establishing an emission unit as an "insignificant activity". However, even if the Board were to accept such an interpretation, the Petitioner has failed to provide sufficient evidence in its Motion for Summary Judgment that the Indirect Gas Heater meets the criteria of Section 201.211.

1. Only Illinois EPA is Granted Discretion to Evaluate the Section 201.211 Factors

6 Motion for Summary Judgment, p.10

As a preliminary matter, Illinois EPA notes that the express terms of Section 201.211(c) apply only to the Agency. The Board grants Illinois EPA the exclusive authority to make a determination based on factors provided by the Board. Only after the Agency makes a positive determination under Section 201.211(c) can the emission unit be classified as an insignificant activity under Section 201.210. The Agency has already determined that no determination can be made which conflicts with the specific provisions of Section 201.210. Because the Indirect Gas Heater obviously does not meet the standards of section 201.210(a)(4)(A), the Agency has not evaluated the Section 201.211 factors.

In its Motion, the Petitioner attempts to exercise the discretion of Illinois EPA and "make a determination" under Section 201.211(c) in its favor. However, Petitioner has no authority to evaluate the Section 201.211 factors and make a finding pursuant to Section 201.210(a)(1). Petitioner's attempt to circumvent the express provisions of the regulations must be denied

2. Petitioner has Failed to Provide Evidence Supporting the Section 201.211(c) Factors

Pursuant to Section 40.2(a) of the Act, 415 ILCS 5/40.2(a) (2014), the burden of proof in this case is on the Petitioner. The Petitioner must prove that the application, as submitted to Illinois EPA, demonstrated that no violation would occur if the permit was granted. *Panhandle Eastern Pipe Line Co. v. IEPA*, PCB 98-102 (January 21, 1999, slip op. at 10).

Whereas Illinois EPA's Motion for Summary Judgment was based solely on a matter of law, the Petitioner's Motion for Summary Judgment requires that certain facts be established to show that it is entitled to judgment. Specifically, Petitioner's theory that Section 201.211 "trumps" Section 201.210 requires proof that the Indirect Gas Heater's operations would qualify

after 1) it meets the three standards in Section 201.211(a), 2) it provides all of the information required under Section 201.211(b), and 3) [the Agency] makes a determination considering the eight factors listed in Section 201.211(c). As previously argued, the evaluation and decision is for *the Agency*, not Petitioner. However, even if the Board were to allow the Petitioner to establish the elements of 201.211(c), the Petitioner has failed to provide any evidence or proof in its Motion for Summary Judgment.

The Petitioner cannot meet its burden of proof in this case, because the Petitioner has not provided affidavits, evidence, or other proof supporting its bare assertions related to the Section 201.211(c) factors. The information cited from the Permit Record is irrelevant. Petitioner cites only an excerpt from a CAAPP Permit which had been issued in error on September 26, 2014 relating to Clean Air Interstate Rule Provisions [**R 127-129;** the erroneous permit was replaced by the October 16, 2014 CAAPP Permit, in the record beginning at **R 2]**, and a permit calculation sheet from the Record that has no relevance to Petitioner's claims. **R 237-R 240.**

Petitioner addresses the Section 201.211 factors in it Motion, but its statements are conclusory, unverified, and apparently provided only by Petitioner's counsel. Several of the statements are overbroad and misleading. For example, factor 201.211(c)(3) directs the Agency to "The expected consistency and reliability of operation of the emission unit". In response, Petitioner states:

> *The emission unit is a natural gas fired fuel heater. It consists of a simple natural gas burner and pilot. The system needs little maintenance due to the lack of fouling and also operates reliably. The unit operates only when the main emission units (the turbines) operate as the emission unit heats the natural gas fuel used in the turbines.*[7]

7 Petitioner's Motion, p.10

The unverified claims that the "system needs little maintenance" and "operates reliably" are simply conclusions, apparently made by opposing counsel.

Factor 201.211(c)(4) requests analysis of "[t]he operating schedule or intended use of the emission unit", to which Petitioner responds:

> *The emission unit operates infrequently and only when the combustion turbines operate. Because the combustion turbines do not operate year round due to plant wide operating limits, the natural gas heater also has limited operation. For example in 2011, sister facility Raccoon Creek operated for 610 hours, in 2012, it operated for 370 hours, and in 2013 it operated for only19 hours.*

This statement refers to another operating unit in Clay County, Illinois, that is the subject of Petitioner's appeal in PCB 14-88. Petitioner does not here even touch on the actual operating hours of the source at issue in this case. Also, it is grossly misleading. While electrical generating "peaker" plants may only operate infrequently, the Petitioner sought, and obtained in the 2014 CAAPP Permit, authority to operate this emission unit for *2,856 hours* per year from 2014 to 2019 for both the Ameren Goose Creek and the Ameren Raccoon Creek plants. *See:* **R. 504.** One year's experience at a 'sister' facility is not relevant.

Section 101.516 of the Board's Procedural Rules provides, in pertinent part, as follows:

> (b) If the record, including *pleadings, depositions and admissions on file, together with any affidavits*, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment. (emphasis supplied).

Where facts need to be established and no affidavits are provided, the Board will deny a Motion for Summary Judgment. *People v. Craig Linton*, PCB 98-80 (August 6, 1998, slip op. at 1), *Vogue Tyre & Rubber Company v. Illinois EPA*, PCB 96-10 (September 4, 2003, slip op. at 2)

In our case, the Petitioner has failed to provide any affidavits or other evidence to establish the Section 201.211(c) factors, a necessary predicate to supporting its theory that Section 201.211 may be used to find that the Indirect Gas Heater is an insignificant activity pursuant to Section 201.210. The Petitioner has failed to provide proof sufficient to obtain summary judgment, and its Motion must be denied.

e. Conclusion

Illinois EPA correctly applied the Board regulation by not listing the Indirect Gas Heater under the "insignificant activities" section of the 2014 CAAPP Permit. The facts relating to Illinois EPA's decision to exclude the Indirect Gas Heater from the list of insignificant activities in the 2014 CAAPP Permit are undisputed, and there are no remaining material facts at issue. As a matter of law, the Board should find that Illinois EPA's interpretation of Sections 201.210 and 201.211 is correct, and grant summary judgment in favor of Respondent and against Petitioner in this matter.

The Petitioner has failed to meet its burden of proof, and its Motion for Summary Judgment must be denied. First, Petitioners interpretation of the relevant sections of the Board regulations is legally incorrect. Illinois EPA has correctly concluded that the provisions of Section 201.211 cannot be used to nullify the specific provisions of Section 201.210.

The Petitioner has also failed to provide any legal basis which prevents Illinois EPA to correct an erroneous condition in expired permits for the Facility. The Petitioner also misconstrues Section 39.1 of the Act, which is does not apply to this permitting transaction. Further, the Record shows that Illinois EPA provided substantial notice and explanation for exclusion of the Indirect Gas Heater from the list of insignificant activities. Finally, the Petitioner

improperly seeks authority give solely to Illinois EPA. The Petitioner also has failed to provide affidavits or any other evidence to support the factual matters necessary for it to obtain summary judgment. For the reasons set forth herein, Illinois EPA's Motion for Summary Judgment should be granted, and Petitioner's Motion for Summary Judgment should be denied.

WHEREFORE, Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY respectfully requests that the Board issue an order:

1. Granting Respondent's Motion for Summary Judgment;
2. Denying Petitioner's Motion for Summary Judgment; and
3. Grant such other relief as the Board deems appropriate.

RESPECTFULLY SUBMITTED

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

by LISA MADIGAN,
Attorney General of the State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

ELIZABETH WALLACE, Chief
Environmental Bureau North

BY: 

CHRISTOPHER J. GRANT
Environmental Bureau
Assistant Attorneys General
69 W. Washington Street, #1800
(312) 814-5388

CERTIFICATE OF SERVICE

I, CHRISTOPHER GRANT, an attorney, do certify that I caused Respondent's Motion for Summary Judgment and Response to Petitioner's Motion for Summary Judgment, and Notice of Electronic Filing, to be served upon the persons listed below on April 24, 2015, by electronic mail and by placing same in an envelope bearing sufficient postage with the United States Postal Service located at 100 W. Randolph, Chicago, Illinois.

CHRISTOPHER GRANT

Mr. John Therriault
Assistant Clerk
Illinois Pollution Control Board
100 W. Randolph
Chicago, Illinois 60601
(by electronic filing)

Ms. Carol Webb
Hearing Officer
Illinois Pollution Control Board
(by electronic mail)

Mr. Joshua R. More
Mr. Raghavf Murali
Schiff Hardin, LLP
6600 Willis Tower
233 S. Wacker Drive
Chicago, IL 60606-6473
jmore@schiffhardin.com
rmurali@schiffhardin.com
(by electronic mail and first class mail)