BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

AMEREN MISSOURI and PINCKNEYVILLE ENERGY CENTER,	)	
Petitioner,	)	
v.	)	**PCB 15-134**
	)	**(CAAPP Permit Appeal - Air)**
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

NOTICE OF FILING

To:

Mr. John T. Therriault, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, Illinois 60601
john.therriault@illinois.gov

Ms. Carol Webb, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601
carol.webb@illinois.gov

Mr. Christopher J. Grant
Assistant Attorney General
Office of the Attorney General
69 West Washington Street, Suite 1800
Chicago, Illinois 60602
cgrant@atg.state.il.us

PLEASE TAKE NOTICE that we have today filed with the Office of the Clerk of the Pollution Control Board **RESPONSE TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT** and **REPLY TO RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT**, a copy of which is herewith served upon you.

Raghav Murali

Dated: May 29, 2015

SCHIFF HARDIN LLP
Attorneys for Ameren Missouri and Pinckneyville Energy Center
Joshua R. More
Raghav Murali
233 South Wacker Drive
Suite 6600
Chicago, IL 60606
312-258-5500
Fax: 312-258-5600
jmore@schiffhardin.com
rmurali@schiffhardin.com

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

AMEREN MISSOURI and PINCKNEYVILLE ENERGY CENTER,	)	
Petitioner,	)	
v.	)	**PCB 15-134**
	)	**(CAAPP Permit Appeal – Air)**
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

RESPONSE TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND REPLY TO RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The Board should deny the Illinois Environmental Protection Agency's ("Respondent" or "Agency") Cross-Motion for Summary Judgment for the same reason it should grant Ameren Missouri and Pinckneyville Energy Center's ("Petitioner" or "Ameren") Motion for Summary Judgment – the Agency's new interpretation of 35 Ill.Adm.Code §§ 201.210 and 201.211 of the Illinois Administrative Procedures Act ("Sections 201.210 and 201.211") is plainly incorrect. Respondent misinterprets Section 201.210 as exclusive and limiting, which it is not, and misinterprets Section 201.211 as applying only to sources not listed under Section 201.210, which it does not. As a result of this misinterpretation, the Agency has failed to fulfill its obligation to make a determination regarding Petitioner's proposal that its natural gas heaters be treated as an insignificant activity under Section 201.211, a classification the Agency has conferred upon the identical heaters in the previous two CAAPP permits for the facility.

II. ARGUMENT

A. The Agency's Interpretation of Sections 201.210 and 201.211 is Plainly Incorrect.

Section 201.210 prescribes per se insignificant status to a number of activities or emission levels, including natural gas heaters "with a rated heat input capacity of less than 2.5 mmbtu/hr..." 35 Ill. Adm. Code § 201.210(a)(4)(A). Respondent asserts that "by including this category of insignificant activity in the regulation, the Board has explicitly excluded natural gas fired combustion emission units with a heat input of equal to or greater than 2.5 mmbtu/hr. from being considered insignificant activities." Respondent's Motion, p. 6-7. This assertion is patently false. Section 201.210 contains *no language* that "expressly excludes" any emission unit not specifically included on its list of per se insignificant activities, including natural gas heaters.

Section 201.210 merely sets forth activities which, by their very nature, are insignificant. These activities warrant no further information or analysis to be treated as such. Section 201.210, in containing *no "explicit exclusion" or limiting language of any kind*, does not preempt the Agency from considering under Section 201.211 emission sources like Petitioner's natural gas heaters which are listed but fail to meet certain criteria prescribed for those sources to be per se insignificant. In containing no limiting language, Section 201.210 works in concert with Section 201.211, which is designed for activities that are not per se insignificant activities contained in 201.210 and therefore warrant further analysis in order to be treated as such. To that end, Section 201.211 *requires* the Agency to make a determination on a proposed insignificant activity by reviewing a number of key factors.

Thus, the Agency is incorrect in its statement that "application of Section 201.210(a)(a)(A) *prevents* Illinois EPA from designating the Indirect Gas Heaters as

"insignificant activities" in a CAAPP permit." Respondent's Motion, p. 7. While Petitioner agrees that the Agency "correctly found that the Indirect Gas Heaters is not an "insignificant activity" pursuant to Section 201.210(a)(4)(A)," the Agency is still *required* to make a determination regarding Petitioner's application for the heaters to be treated as insignificant under the discretionary Section 201.211. *Id.*

B. **The Agency's Interpretation of the Phrase "Consistent With" in Section 201.211 is Incorrect and Renders the Section Meaningless.**

1. The Agency is Critically Misreading the Term "Consistent With."

Section 201.211(a) provides that:

> 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 and the owner or operator provides the information required in subsection (b) below regarding the emission unit:
>
> 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 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.
>
> 35 Ill. Adm. Code § 201.211(a).

The Agency incorrectly interprets the phrase "consistent with" to read "provided that the emission unit is not in a source category included on the list of insignificant activities contained in Section 201.210, but which does not meet the specific criteria prescribed for that category."

This convoluted notion is not what is intended by this simple phrase, one that is best interpreted by a basic canon of statutory construction.

"Noscitur a sociis" is a canon of statutory interpretation in which the "meaning of questionable words or phrases in a statute may be ascertained by reference to the meaning of words or phrases associated with it." *People v. Qualls,* 365 Ill.App.3d 1015, 1020 (2006). It is evident from a plain reading of Section 201.211(a) that the term "consistent with" is meant to qualify the phrase "be treated as an insignificant activity" because "consistent with" immediately follows that phrase. In other words, the term "consistent with" means that an owner or operator may apply for an emission unit to be treated as an insignificant activity by the Agency in the same manner the Agency treats the insignificant activities listed in Section 201.210. It is a "core administrative law principle that an Agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Utility Air Regulatory Group,* 134 S.Ct. 2427, 2446 (2014). For this reason, the Agency's new interpretation is not only illogical, but improper.

2. The Agency's Misreading of the term "Consistent With" Renders Section 201.211 Meaningless.

Further, Respondent alleges that its interpretation of the phrase "consistent with" harmonizes Sections 201.210 and 201.211 when all it actually does is render Section 201.211 meaningless in violation of the core administrative principle that "no part of the text should be rendered meaningless or superfluous." *People v. Lloyd*, 2013 IL 113510, ¶ 25. The Agency claims that "Section 201.211 can *only* apply to emission sources that are not specifically excluded from consideration as an insignificant activity in Section 201.210." Respondent's Motion, p.8. The result of the Agency's erroneous interpretation is that *Section 201.211 will apply to no emission sources.* Section 201.210(a) lists as a category of insignificant activities "*emissions units* with emissions that never exceed 0.1 lbs/hr of any regulated air pollutant in the

absence of air pollution control equipment and that do not emit any air pollutant listed as hazardous pursuant to section 112(b) of the Clean Air Act." 35 Ill.Adm.Code § 201.210(a)(2). Section 201.210(a) further lists "*emission units* with emissions that never exceed 0.44 tons/year of any regulated air pollutant in the absence of air pollution control equipment and that do not emit any air pollutant listed as hazardous pursuant to section 112(b) of the Clean Air Act. 35 Ill.Adm.Code § 201.210(a)(3). Because every "emission unit" an owner or operator would propose to be treated by the Agency as insignificant under Section 201.211 will inherently fall under the category of "emission unit" as listed in Section 201.210(a) and not meet the prescribed criteria, *all applications will be precluded from 201.211 consideration under the Agency's new interpretation.* The mere fact that Section 201.211 allows applicants to propose that their "emission unit" be treated as insignificant by the Agency when an "emission unit" is itself a source category listed under Section 201.210 either renders Respondent's interpretation meaningless or Section 201.211 meaningless. Clearly, the plain language of both sections reveals that Section 201.210 contemplates that certain activities, by their very nature, are insignificant and that other activities, even those in a listed source category but which fail to meet the prescribed criteria, warrant a more in depth 201.211 analysis to be treated as insignificant.

Ultimately, the Agency uses phantom language to construct its interpretation that 201.211 applies *only* to emission sources not listed in 201.210, an interpretation that a simple reading of the language strikes down as illogical. Mr. Ralston Cooper, in an email to Petitioner articulating the Agency's new interpretation, stated that "today we are reading the rule more closely than we did in the past, and thus giving rise to the issue." R 000789-R 000806. However, it is evident

from the logical failure of Respondent's new interpretation that the Agency is still not reading the rule closely enough.

3. Petitioner's Plain Reading Interpretation Does Not Create a Conflict Between Sections 201.210 and 201.211.

Respondent alleges that Petitioner's interpretation, which is in effect nothing more than a plain reading of the regulations, creates a conflict between the two sections. This assertion too is patently false. Specifically, Respondent claims that "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 201.210." Respondent's Motion, p. 8. There simply is no such "express exclusion." Section 201.210 merely lists certain activities or emission levels as per se insignificant and is silent as to whether any activities not included on the list may also be treated as insignificant. In fact, such is the very purpose of the Section 201.211 process. This process does not strike Petitioner as conflicting, but rather harmonious and logical.

Respondent further argues that Petitioner's interpretation creates conflict between the two sections because it allows Section 201.211 to "entirely nullify the categories of insignificant activities provided in Section 201.210(a)(4)(A)," while the Agency's interpretation "avoids inconsistency and gives effect to both." Respondent's Motion, p. 11. As stated above, Petitioner's interpretation is nothing more than a plain reading of the two sections as per se (201.210) and discretionary (201.211) processes working in conjunction with one another. Meanwhile, the Agency's interpretation would logically preclude owners or operators from proposing *any* "emission units" from being treated as insignificant under Section 201.211 because "emission unit" is a listed source category under Section 201.210. Such an interpretation not only fails to "give effect" to both sections, it renders one of them entirely void.

C. The Agency is *Required* to Make a Determination Regarding Petitioner's Natural Gas Heaters.

The Agency continues its misunderstanding of the two sections by claiming that "in section 201.211, the Board grants Illinois EPA *the discretion* to consider the factors listed in Section 201.211, and make a determination that an emission unit is an insignificant activity." Respondent's Motion, p. 9. This again is patently false. While the *owner or operator "may* propose to the Agency in its CAAPP application that an emission unit at the source be treated as an insignificant activity," the Agency "*shall* determine whether such emission unit may be treated as an insignificant activity considering factors including, but not limited to, the following:..." 35 Ill. Adm. Code § 201.211. In other words, while the owner or operator has the discretion to propose that their unit (provided it meets three criteria) be treated as insignificant by the Agency, once that proposal is made, the Agency is *required* to take into consideration certain factors and make a determination as to whether the unit actually will be. The Agency has failed to meet this obligation.

In defending its failure to make a 201.211 determination on Petitioner's natural gas heaters, the Agency claims that "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." Respondent's Motion, p. 9. A determination that the Petitioner's natural gas heaters are insignificant will not nullify Section 201.210's per se insignificant list. Rather, it will accomplish just what the language of Section 201.211 contemplates by requiring the Agency, after taking into consideration a myriad of environmental factors, to make a determination regarding the insignificant status of certain units not listed in Section 201.210. The Agency claims that "if Section 201.211(c) was interpreted to allow the Agency the authority to find that an emission unit listed in 201.211 [sic] 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." Respondent's Motion, p. 10. Because there is no such exclusion, let alone an "express finding," the Agency would be entirely within its authority to make a determination that the heaters are an insignificant activity and is in fact required to at least make *a* determination.

III. Reply to Respondent's Response to Petitioner's Motion for Summary Judgment

Ameren incorporates herein its arguments in Response to Respondent's Motion for Summary Judgment in Section II herein. Specifically, Respondent errs in its assertion that "Section 201.211 could not be used to ignore the plain meaning of the exclusions created by the Board in Section 201.210." Respondent's Response, p. 13. There simply are no exclusions in Section 201.210 – only prescribed per se insignificant activities - and therefore Respondent is plainly incorrect in claiming that a 201.211 determination is unavailable to Petitioner's natural gas heaters. As a result, the Agency is required to make a determination under Section 201.211 on Petitioner's proposal for its natural gas heaters to be treated as an insignificant activity consistent with the facility's two previous permits.

A. Respondent Failed to Provide Required Written Notification to Petitioner.

Respondent claims that "Illinois EPA provided sufficient prior notice of the Agency's proposed determination, i.e. that the Indirect Gas Heaters did not qualify as insignificant emissions units" well prior to the permit issuance date. Respondent's Response, p. 15. The Agency provided *no* notice, written or verbal, prior to sister facility Raccoon Creek's draft permit on June 2, 2014, which contained no explanation for the seemingly arbitrary change. Even after the Petitioner learned of the change in the Raccoon Creek draft permit, the Agency's "notice" consisted merely of informal *responses* to Ameren *contacting the Agency on its own initiative* to seek clarity and explanation regarding the changed permit condition. More

importantly, such "notice" did not comply with the Agency's notice requirement for this exact scenario under Section 201.211.

Section 201.211(d) provides as follows:

> If the Agency determines that an emission unit cannot be treated as an insignificant activity pursuant to this Section, the Agency shall notify the owner or operator in writing and request that such owner or operator submit the information required in a CAAPP application pursuant to Agency procedures regarding the emission unit within a reasonable time frame. The owner or operator shall submit the requested information to the Agency within the time frame stated in the request.
>
> 35 Ill. Adm. Code § 201.211(d).

This provision of 201.211(d) applies to units the Agency determines do not qualify for a 201.211 analysis as opposed to units the Agency determines, following a 201.211 analysis, are not insignificant activities. It therefore required the Agency to specifically notify Ameren in writing of its determination that Section 201.211 is not, in the Agency's view, applicable to the natural gas heaters. Ameren received no such written notification. It is plain from the language above that such notice is not met by a draft permit which lists the natural gas heater as a significant emissions unit for the first time and without explanation, particularly where the change is not even included, let alone explained, in that draft permit's accompanying Statement of Basis.

B. The Agency is Reversing its Longstanding, and Correct, Interpretation of the Regulations.

The Agency alleges that it simply *does not know* whether its determinations that the natural gas heaters were an insignificant activity in Petitioner's previous two permits was the result of a 201.211 analysis. Respondent's Response, p. 17. Specifically, the Agency vaguely asserts that "it is equally likely that the inclusion was simply an inadvertent error by Illinois EPA's permit section." Respondent's Response, p. 18. Such an inadvertent error would be more

understandable were it a single mistake made in a single permit for a single facility. However, that is not the case here. The Agency listed the natural gas heaters as an insignificant activity not only in the previous two permits for Ameren's Pinckneyville facility, but in the previous two permits for its sister Raccoon Creek (PCB 2015-088) and Goose Creek (PCB 2015-089) facilities as well. Such frequent and consistent application of the regulations is not indicative of mere human error, but of an interpretation that the Agency put into place and, based on a plainly incorrect reading of the regulations, is now improperly reversing.

Even if one could reasonably accept the Agency's argument that its application of these regulations for the last several years over multiple permit cycles at multiple facilities was all one big "error" rather than a long-settled construction, the Agency would have to acknowledge that this means it has been abdicating its responsibility under 201.211 to review specific factors and make a determination regarding proposed insignificant activities. Moreover, without having made such determinations, the Agency has been in violation of the plain letter of the law.

Respondent defends its reinterpretation by alleging that the Agency "cannot be estopped from changing a permit condition, or even a prior interpretation of a regulation" by improperly citing Board opinions on equitable estoppel claims. *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). Petitioner is not making an equitable estoppel claim. Petitioner is merely requesting the Board to review the Agency's new – and plainly incorrect – interpretation of the language of Sections 201.210 and 201.211 and remand the permit to the Agency so that it can fulfill its obligation under Section 201.211 to make a determination regarding Petitioner's natural gas heaters as it did during the last two permit cycles. Moreover, Respondent's broad assertion that the Agency cannot be estopped under any circumstances is

belied by the very Board opinions it cites. Specifically, the Board in *White & Brewer Trucking, Inc.,* in striking down Petitioner's estoppel claim, differentiated the case from a number of other holdings which did exactly what Respondent broadly alleges they could not – estop the Agency. *Wachta v. PCBI,* 8 Ill. App. 3d 436, 289 N.E.2d 484 (2d Dist. 1971); *In the Matter of Pielet Brothers Trading* (July 13, 1989), AC 89-227, slip. op.; *IEPA v. Jack Wright* (August 30, 1990), AC 89-227, slip. op.; *Earl R. Bradd v. IEPA* (May 9, 1991), PCB 91-173, slip. op.; *Jack Pease v. IEPA* (July 20, 1995), PCB 95-118, slip. op. In *White & Brewer Trucking Inc.*, the Board primarily struck down Petitioner's estoppel claim because Petitioner's reliance was not reasonable, nor was it reliant on an official action by the Agency, two elements that, given the permit history of this unit at this facility, Petitioner is confident are present in this case. *White & Brewer Trucking,* slip op. at 11-12.

Nonetheless, Petitioner's argument focuses on the plain letter of the law and its firm belief that the Agency is misinterpreting it. And on this matter, despite Respondent's contention that the Agency's new interpretation is effectively beyond reproach, the Board has held that it will "consider the Agency's arguments on statutory construction, but the Agency's arguments are not considered with any greater or lesser weight." *Atkinson Landfill Company v. Illinois Environmental Protection Agency,* PCB 13-8 (June 20, 2013, slip. op. at 8). To that end, the plain meaning of the regulations is clear and supports Petitioner's plain-reading interpretation. However, even "if the meaning of a regulation is debatable, and circumstances have not changed, an administrative agency is bound by a long-standing interpretation of the regulation." *Central Illinois Public Service Co. v. PCB*, 165 Ill. App. 3d 353, 518 N.W.2d 1354 (4th Dist. 1988). Because the Agency has had a long-standing interpretation, evidenced by its treatment of the

natural gas heaters at this facility, along with its two sister facilities, over the course of the last decade, Respondent's new interpretation would fail on this basis too.

C. The Agency Has Not Fulfilled Its *Obligation* to Make a Determination on Petitioner's Natural Gas Heaters under Section 201.211.

Ameren incorporates herein its arguments in Response to Respondent's Motion for Summary Judgment in Section II(C) herein. Petitioner acknowledges that the Agency does have the discretion under Section 201.211(c) to determine whether the natural gas heaters are or are not insignificant. However, as Petitioner stated in Section II(C) herein, the Agency plainly does not have the discretion as to whether or not it may make a determination. For this reason, Petitioner respectfully requests the Board to remand the permit to the Agency so that the Agency can make its required determination regarding the insignificant status of Petitioner's natural gas heaters. Petitioner further requests that, despite the Agency's discretion, the Board require the Agency to issue a determination, consistent with its prior two determinations, that the heaters are an insignificant activity.[1]

IV. Conclusion

The Board should grant Petitioner's Motion for Summary Judgment and dismiss Respondent's Motion for Summary Judgment because the Agency's interpretation of Sections 201.210 and 201.211 is dependent on specific language the Agency apparently believes exists, but plainly does not. Nothing in Section 201.210 expressly excludes or limits what activities the Agency may determine to be insignificant under Section 201.211. Section 201.210 merely lists activities which by their very nature are per se insignificant. Further, the term "consistent with" in Section 201.211 does not limit the applicability of that section only to source categories not included in Section 201.210, but rather references the similar treatment the Agency will render

[1] No facts have changed to justify different determination from the prior two permits.

insignificant units under both sections. In addition, the Agency believes it has the discretion to make a determination regarding an insignificant activity when it does not. While it has the discretion to determine whether or not an activity may be treated as insignificant, taking into account a number of factors, the Agency is *required* to make a determination. Petitioner asks that the Board dismiss Respondent's Motion for Summary Judgment, grant Petitioner's Motion for Summary Judgment, and remand the permit to the Agency to make a determination whether the heaters may be treated as an insignificant activity as required under Section 201.211. Petitioner further asks that the Board require the Agency to exercise its discretion and render a determination consistent with its prior two determinations that the heaters are an insignificant activity.[2]

[2] No facts have changed to justify a different determination from the prior two permits.

CERTIFICATE OF SERVICE

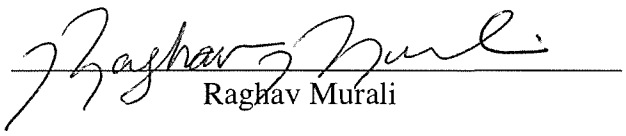
I, the undersigned, certify that on this 29th day of May, 2015, I have served electronically the attached **RESPONSE TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT** and **REPLY TO RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT** upon the following persons:

Mr. John T. Therriault, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, Illinois 60601
john.therriault@illinois.gov

Mr. Christopher Grant
Assistant Attorney General
Office of the Attorney General
69 West Washington Street, Suite 1800
Chicago, Illinois 60602
cgrant@atg.state.il.us

and their having waived paper service, electronically upon the following person:

Ms. Carol Webb, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601
carol.webb@illinois.gov



Raghav Murali

Joshua R. More
Raghav Murali
SCHIFF HARDIN LLP
233 South Wacker Drive
Suite 6600
Chicago, IL 60606
312-258-5500
Fax: 312-258-5600
jmore@schiffhardin.com
rmurali@schiffhardin.com