BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

EMERALD PERFORMANCE MATERIALS, LLC (as purchaser of Noveon, Inc.) Petitioner,	)	
v.	)	PCB 04-102 (Permit Appeal – Air)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

NOTICE OF FILING

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PLEASE TAKE NOTICE that on **Monday, August 18, 2008,** the undersigned filed with the Clerk of the Office of the Illinois Pollution Control Board, **Petitioner's Post-Hearing Reply Brief,** a copy of which is herewith served upon you.

Dated: August 18, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lawrence W. Falbe, an attorney, hereby certify that on **Monday, August 18, 2008** a copy of the foregoing **Petitioner's Post-Hearing Reply Brief**, was sent to the following via first class mail:

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PETITIONER'S POST-HEARING REPLY BRIEF

I. INTRODUCTION

The Illinois Environmental Protection Agency's 66-page Response Brief boils down to this: IEPA wants to reverse course on over 25 years of consistent application of the SO_2 exception under 35 Ill. Adm. Code 214.382(a) to the Emerald facility, even though there is no change in factual circumstances that would warrant such a flip-flop. IEPA explains that it "historically made erroneous state operating permitting decisions" with regard to Emerald. (Response Brief, at 66) Thus, IEPA contends that it should not be bound to perpetuate its own flawed interpretation of the applicable regulation (regardless of how long this interpretation stood) because, among other reasons, allowing Emerald the benefit of the exception (notwithstanding the legalities or equities as to Emerald) would be 'bad for the environment.'

Despite the rampant obfuscation that pervades IEPA's super-sized brief, the truth of this matter really is quite simple. IEPA correctly interpreted the application of the SO_2 exception as to Emerald for decades, before IEPA reversed itself (prompted, as the evidence shows, by the

assignment of a new engineer, Dan Punzak, to the Emerald permit review) and decided that it did not like the results of that interpretation. Simply put, there is a vast difference between realizing that a regulation has been interpreted incorrectly, and belatedly deciding that one does not like the results of a long-standing interpretation.

What IEPA fails to acknowledge and admit is that 35 Ill. Adm. Code 214.382(a) contains what IEPA would consider a "loophole": the plain language of the regulation contains none of the limiting criteria that IEPA contends should apply to determine which facilities are eligible for the SO_2 exception and which are not eligible.

The remedy for closing such a so-called loophole is not to legislate by permit denial or limitation. Rather, IEPA must do what it should have done when it determined in its collective 'agency wisdom' that it was injudicious to allow the Emerald facility to escape the SO_2 emissions limitations that would have applied, but for the exception under 35 Ill. Adm. Code 214.382(a). That is, IEPA should propose a new or revised regulation and undertake the normal rulemaking procedures, including notice, public comment, hearing, and adoption by the Board, before IEPA can narrow the scope of the SO_2 exception and impose the qualifications on an entity like Emerald that IEPA now (despite years of contrary agency position) deems should apply. Only after IEPA complies with such procedures (and assuming IEPA is successful in promulgating such a new regulation) can IEPA deny the benefit of the SO_2 exception to Emerald for not meeting what IEPA thinks should be the qualifying criteria.

For the reasons set forth herein, and in Emerald's opening brief, the Board should find that IEPA inappropriately determined that the exception under 35 Ill. Adm. Code § 214.382(a) *did not* apply to the Facility, and the permit determination should be remanded to IEPA with

instructions to re-issue the permit with the acknowledgment that the Facility is entitled to the SO_2 exception, and is not subject to the 2000 ppm SO_2 limitation set forth in 35 Ill. Adm. Code § 214.301.

II. ARGUMENT

A. THE BOARD SHOULD APPLY A *DE NOVO* STANDARD OF REVIEW TO THE IEPA'S INTERPRETATION OF THE SO_2 EXCEPTION

IEPA asserts that Petitioner's burden of proof in this case is to show that the record establishes that the issuance of the permit will not violate the Act or Board rules, citing to (among other cases) *Des Plaines River Watershed Alliance, Livable Communities Alliance, Prairie Rivers Network and Sierra Club v. Illinois EPA and Village of New Lenox*, PCB 04-99, slip op. 2 (July 12, 2007). (Response Brief, at 8-10) None of the various cases cited by IEPA, however, deals with the circumstance where the primary issue in the case is whether IEPA appropriately determined that an exception to an emissions limitation was applicable or not. Rather, as explained by Petitioner in its Opening Brief, where the question involved is one of law, such as the proper interpretation of a statute or regulation, the decision-making agency's determination is not binding on the reviewing body (in the case, the Board), and such review is under the *de novo* standard. *Village of Fox River Grove v. Pollution Control Board*, 299 Ill. App. 3d 869, 877-78, 702 N.E.2d 656, 662 (2d Dist. 1998)(citing *Envirite Corp. v. Illinois Environmental Protection Agency*, 158 Ill. 2d 210, 632 N.E.2d 1035 (1994)); *see also Peoria Disposal Co. v. Illinois Environmental Protection Agency*, PCB 08-25, slip. op. at 31 (January 10, 2008)("[W]hen the Agency has resolved a legal question such as interpretation of a statutory provision, the Agency's determination is not binding upon the Board.").

Thus, the proper framework for the legal analysis in this case is for the Board to review the IEPA's determination of whether the Emerald facility was entitled to the SO_2 exception was correct or incorrect. In order to do that, the Board must review the IEPA's interpretation of the regulation in light of the facts as applied to Emerald's facility.

In a sense, if the IEPA's determination as to the applicability of the exception to Emerald was correct, then the permit as applied for by Emerald would have violated the Act, and if IEPA was incorrect and Emerald was entitled to the exception, than Emerald's permit, as applied for, would not have violated the Act. But this way of looking at the legal analysis is unhelpful, as it essentially begs the real question, which is whether Emerald is or is not entitled to the SO_2 exception. Thus, Emerald submits that the more precise legal analysis to focus on in this case is the determination as a matter of law of whether the regulation should or should not apply to Emerald. As this involves the interpretation of the regulation by the Board, the applicable authority is clear that such an analysis is performed under the *de novo* standard of review.

Commensurate with Petitioner's request for relief that the Board remand the permit decision to IEPA with instructions to re-issue the permit with the acknowledgment that the Facility is entitled to the SO_2 exception, Petitioner need not prove at this stage of the proceedings that the permit as issued would not have violated the Act.[1] That argument can be made, and that standard applied, if needed, on any appeal, once IEPA revisits its permit decision with the question of the applicability of the SO_2 exception already resolved.

[1] If, on the other hand, IEPA is correct and Petitioner is wrong, then there seems to be little question that had IEPA ruled that the SO_2 exception applied to Emerald's permit request, granting the permit would not have violated the Illinois Environmental Protection Act, and it does not appear that IEPA seriously contests this point, especially since essentially identical permits have been issued for the facility by IEPA since 1975.

B THE PLAIN LANGUAGE OF THE SO_2 EXCEPTION SHOWS THAT IEPA'S FIRST AND LONG-STANDING INTERPRETATION OF THE REGULATION WAS CORRECT

As noted above, for over 25 years,[2] IEPA interpreted the plain language of the SO_2 exception under 35 Ill. Adm. Code 214.382(a) to apply to the Emerald facility. The language of the regulation itself is quite simple:

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

IEPA agrees that the language of 35 Ill. Adm. Code is clear and unambiguous (Response Brief, at 14-16)(stating in subheading (ii), "The applicable regulatory text, 35 Ill. Adm. Code 214.382, is clear on its face."))[3] Broken down, the regulation imposes only three criteria on a permit applicant that seeks to avail itself of this exception:

1) It must be a existing process;

2) that is designed to remove sulfur compounds from the flue gases;

3) of petroleum and petrochemical processes.

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[2] Inexplicably, IEPA takes issue with Petitioner's assertion that IEPA has consistently interpreted the SO2 limitation for over 25 years. By Petitioner's calculations, IEPA first issued the Emerald facility's permit in 1975 and successively renewed it several times, most recently in 1993, until 2001 when IEPA claims it informed Emerald that it no longer considered the SO_2 exception applicable to Emerald's facility (by means of a request for additional information regarding Emerald's processes). Even if one would accept IEPA's apparent argument that IEPA in fact first notified Emerald of IEPA's 'doubts' as to whether the exception should apply as evidenced by IEPA's request in February 2001 and again in May 2001 (see Response Brief, at 2), and that this notification (as opposed to an actual permit denial or modification) was sufficient, this still adds up to more than 25 years. More important than quibbling over whether IEPA held this view for 20 or 25 years, however, is Petitioner's point that IEPA should not be allowed to withdraw from this long-standing position without a change in factual circumstances, or a new rulemaking.

[3] It is a well-accepted rule of statutory construction, and IEPA does not argue otherwise, that the initial source for determining intent of the regulation is the plain meaning of the language used, and where *unambiguous*, the plain meaning of the language controls. *See, e.g., Board of Trustees of Southern*

IEPA breaks up the language of the regulation somewhat differently in its Response Brief (see pp. 15-16), but as a practical matter, IEPA concedes that the "the MBT-C is an existing process and that sulfur compounds stem from the flue gases of a petroleum and petrochemical process...." (Response Brief at 16) IEPA disputes, however, that Petitioner has shown that the process was actually "*designed*" for the purpose of removing sulfur compounds. (Id.)

IEPA's narrow and disproportionate emphasis on this single word in the regulation is misplaced, and its argument confused. While Petitioner agrees with IEPA that as a general rule of statutory construction, all words of an enactment should be given effect, if possible, IEPA seeks to expand the single word "designed" to encompass far more that is merited from the context of the regulation and was intended by the Board in adopting this language.

For starters, IEPA focused on determining the meaning of the word "design," because it is not specifically defined in the regulation. Thus, IEPA looked to the commonly-understood definition of the term to ascertain its meaning in the context of the regulation. According to the dictionary consulted by IEPA (Webster's Ninth New Collegiate Dictionary)(Response Brief at 17), the term "design" means "devise for a specific function or end." Fair enough—but IEPA never explains why it apparently "mistakenly" interpreted this simple word for 25 years, or what definition of "design" it previously used when considering this regulation, such that it had concluded (for all of Emerald's prior permit applications) that the MBT-C process was designed to "remove sulfur compounds from the flue gases of petroleum and petrochemical processes."

Thus, this would seem to support Petitioner's point that IEPA did not mistakenly interpret the SO_2 exception regulation, or any of its terms, such as "design." Rather, IEPA simply decided

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Illinois University Governing Southern Illinois University, Edwardsville, Illinois Environmental Protection Agency, 2005 WL 2040591, PCB 02-105 (August 4, 2005), at * 11.

that it did not like the end result of having this exception apply to the Emerald facility. This is different, however, than claiming that it mistakenly applied a different definition of the term "design" all these years, and only recently has realized its error.

IEPA also appears to argue that because Petitioner did not produce a live witness that was present at the facility prior to 1960 who can personally testify as to the actual development of the MBT-C manufacturing process and its "design," or any "design specifications," Petitioners cannot meet their burden of showing that the equipment is "designed" to remove sulfur compounds. (Response Brief, at 23) This is nonsense. IEPA admits that the process does, in fact, remove sulfur compounds from the flue gases. (Response Brief, at 20) Unless IEPA is actually trying to argue that sulfur compounds are removed from the flue gases by *accident*, it seems self-evident that the MBT-C process, including the condensers, is "designed" to remove sulfur compounds because that is—unquestionably and undisputedly—what it does. Moreover, if any so-called "design specifications" might still exist for this decades-old equipment, it is unclear what such documents would reveal aside from what is already clear—the process is what the process is, and it does what it does.

Although IEPA takes a long time to get there, its real argument appears to be that the term "designed" really means 'designed exclusively,' as in, the equipment must be designed to remove sulfur compounds, but it cannot also return such removed sulfur (in any form) to the process to be re-utilized as raw material, or (apparently) perform any other function. Put another way, IEPA also appears to contend that the term "remove" in the regulation means 'remove from the system' and cannot apply to a process (like the one at the Emerald facility) that removes the sulfur compounds from the flue gases (i.e., prevents them from being emitted through the flue

gases) but re-directs those compounds back into the system, as opposed to eliminating them from the system entirely (i.e., like a scrubber). The plain language of the regulation, however, provides no support for either of the interpretations that IEPA insists on reading into the text of the exception.

IEPA provides copious information regarding the details of the MBT-C process to point out that the removal of sulfur compounds (specifically, carbon disulfide (CS_2)), is accomplished by using reflux condensers. (Response Brief, at 17-25) IEPA, without any authority or justification, simply offers its opinion that the SO_2 exception cannot apply to "[r]eflux or process condensors...as they are merely devices *designed to recover* raw materials." (emphasis in original)(Response Brief, at 21) IEPA believes that because the condensers perform in the process as a "material recovery device," such a function is mutually exclusive of also meeting the definition of being "designed to remove sulfur compounds from the flue gases of petroleum and petrochemical processes." (Response Brief, at 22)[4] Once again, there is no support in the plain language of the regulation for IEPA's interpretation.

If that weren't enough, IEPA then goes on to contend that while the regulation admittedly doesn't require a specific category of control equipment (belying its argument above that reflux condensers cannot qualify under the exception), "there is a connection between a process

[4] As noted in Petitioner's Opening Brief, at fn. 6, Petitioner's witness Mr. Giffin testified that it was perfectly possible to run the MBT reactors without the condensers; such a circumstance would merely mean that the CS_2 that is usually recovered by the condensers would not be recovered. (Testimony of D. Giffin, 27:2-23; 54:11-56:6; *see also* Testimony of M. Corn, 75:2-12). Thus, in such a circumstance, the CS_2 **would** be emitted to the flare and burned up, emitting to the atmosphere as SO_2. While IEPA criticizes Emerald on this point for the notion that Emerald has not always operated in compliance with its permit (assumedly under the principle that to qualify for the exception, the equipment that removes sulfur would have to operate 100% of the time)(Response Brief, at fn. 19 and accompanying text), IEPA overlooks the fact that if the condensers were not a part of the process, the sulfur that IEPA contends is recycled would be emitted into the atmosphere in the form of SO_2. Thus, it would seem that IEPA's own objection on this issue proves Petitioner's point that the condensers do act as sulfur removal devices.

designed to remove sulfur compounds and the percent removal achieved by a process purportedly designed to remove such compounds." (emphasis in original)(Response Brief, at 24) With all due respect to the agency, IEPA simply made this up. There is not a shred of justification anywhere in the language of the regulation to suggest that a specific percentage of sulfur recovery or effectiveness of removal is required to qualify for the exception. Yet, IEPA insists that "[i]t 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." (Response Brief, at 24) Thus, now IEPA equates "designed to remove" with 'designed to remove all (or almost all) sulfur compounds.' Once again, the simple language of the regulation contains absolutely nothing to so limit the exception as IEPA would like, nor even to imply that the Board intended such a limitation when it adopted the regulation.

Finally, IEPA also contends (once again, completely without support) that because the Emerald process removes only sulfur in the form of CS_2, but not does remove any H_2S (which is also present in the reaction, but is subsequently burned off in the flare) that such process cannot satisfy the regulation's requirement to "remove" sulfur compounds. (Response Brief, at 17-19) Once again, there is no more support in the plain language of the regulation to suggest that all types of sulfur compounds must be removed, any more than there is to suggest that all (or most) sulfur compounds by percentage must be removed.

In sum, the regulation does **not** say that the process designed to remove sulfur compounds from the flue gases cannot also serve other functions, such as recover that sulfur; the regulation does **not** say that the equipment designed to remove the sulfur compounds must remove them completely from the system, or that the removed sulfur cannot be re-used in the

process; the regulation does **not** say that the process at issue must be designed to remove all (or almost all) of the sulfur compounds; and, the regulation does **not** say that all types of sulfur compounds must be removed.

While IEPA criticizes Petitioner's interpretation of the regulation as not rational, Emerald submits that it is IEPA that stretches the plain language of the regulation way past the breaking point to accomplish its desired goal. Therefore, as explained above, Petitioner has met its burden to prove that it is entitled to the exception, just as it did for each of its previous permits that were issued by IEPA to Emerald in 1978, 1983 and 1993, and for which permits IEPA agreed that Petitioner had met the requirements in the regulation each and every time it had come up for review. Petitioner has satisfied each of the criteria specified in the regulation, and IEPA has not explained how its previous treatment of Emerald's facility (with no change in circumstances) was a "mistake" under the plain language of the regulation. The dissatisfaction of current IEPA personnel with the fact that the Emerald facility clearly qualifies under the simple and plain language of the regulation is not grounds for imposing criteria upon Emerald that exist nowhere in the regulation. If IEPA wishes a different treatment of processes like Emerald's under the regulations, it must comply with the procedures for a change in rulemaking, not simply re-interpret an existing regulation in a new way to achieve its desired result.

C. IEPA'S RELIANCE ON EXTRINSIC EVIDENCE TO SUPPORT ITS INTERPRETATION OF THE SO_2 EXCEPTION IS IMPROPER AND UNAVAILING

Realizing that the simple, plain and admittedly unambiguous language of the SO_2 exception regulation is its greatest challenge to supporting IEPA's tortured interpretation of the *regulation, IEPA* appeals to extrinsic evidence, including its own "institutional knowledge" of

the background of the original rulemaking in 1972, "information from regulators in other states," and U.S. EPA "guidance."[5] Even assuming that use of such extrinsic sources was proper under well-accepted rules of statutory interpretation (which it is not, considering IEPA's admission that the language of the regulation is clear and unambiguous), the references made by IEPA do not compel the Board to adopt the interpretation of the SO_2 exception urged by IEPA.

1. IEPA's "Institutional Knowledge" Existed Since 1972

IEPA's reliance on its so-called "institutional knowledge" is odd, considering that any such knowledge was obviously in existence and available to IEPA personnel long before the agency recently 'changed its mind.' Indeed, IEPA's appeal on this point is focused on the rulemaking for the original regulation from 1972 (Docket R 71-23). Nowhere does IEPA explain why or how, for 25 years, it supposedly misinterpreted the background information that it now relies upon, or what that contrary interpretation was. Whatever the case, an examination of the actual discussion of the air regulations promulgated back in the early 1970s shows that IEPA's current interpretation is fatally flawed. Simply put, IEPA got it right the first time.

As borne out by rulemaking docket 71-23 as cited by IEPA on its own behalf, the original comprehensive air regulations at issue, as a whole, were meant to deal with the somewhat panicked realization in the 1970s that air pollution was a serious problem, especially in the Chicago area. The various exceptions that were provided in the new emission control scheme were intended to balance the hardship on existing sources and make wise decisions about where

[5] In a bit of extreme irony that apparently is lost on the agency, IEPA fails to recognize that while it appeals to certain types of so-called "institutional knowledge" as a basis for its re-interpretation of the SO_2 exception, it steadfastly refuses to acknowledge that IEPA's engineer Dan Punzak reviewed the most pertinent "institutional knowledge" that IEPA possessed on the issue—the files concerning the prior permit application of Emerald, and the inter-agency discussions, memos and documents that were part of these files. (See discussion *infra*, at section II.E.)

mandating new technologies and retrofitting of plants would be efficient, and where it would be a waste of resources.[6]

A review of the original rulemaking docket for the 1972 air standards, focusing on Rule 204 (the precursor to 214.382), shows that the concern of IEPA at that time was much broader than just petroleum refineries, which in fact appeared to be only a segment of the various industrial processes that IEPA determined were a source of sulfur dioxide pollution that needed to be reduced, especially as to new sources. The discussion of Rule 204 in the 1972 rulemaking begins as follows:

> Rule 204: Sulfur Dioxides. Illinois is long overdue in regulating the emission of sulfur dioxides, which constitute a major pollution problem in certain parts of the State. Emitted principally as a result of coal combustion and to a lesser extent from certain industrial processes, sulfur dioxide is a gas which, together with particulate matter, has been responsible for catastrophes such as the London killer smogs.

Under Rule 204, emissions of sulfur dioxide into the atmosphere from any "process emission source" were limited to 2000 ppm. (Rule 204(f)(1)(A)). Subsequent subparagraphs of Rule 204 exempted from the general emissions limitations some specific processes, namely: new sulfuric acid manufacturing processes (Rule 204(f)(1)(B)), processes designed to remove sulfur compounds from the flue gases of fuel combustion emission sources (Rule 204(f)(1)(C)), and processes designed to remove sulfur compounds from the flue gases of "petroleum and petrochemical processes." (Rule 204(f)(1)(D)). Thus, it is clear from the original promulgation

[6] In addition, the discussion in the text of the rulemaking makes it clear that the focus of the pollution control strategy outlined in the regulations was on command and control of new operations and facilities as a practical way to reduce future emissions, and much less so on mandating changes to existing processes. This greatly undercuts IEPA's emphasis on the word "design," as it is clear that the actual *ability* of the existing process to remove sulfur compounds from the air is what was important, not that a

of the rule that exceptions were available to a wide variety of process emission sources, not just petroleum refineries, as wrongly asserted by IEPA.

The specific language from the rulemaking cited by IEPA is misleading, as it relates only to the application of sulfur recovery in oil refineries. (Response Brief, at 26) Strangely, what IEPA intentionally overlooks is that the Emerald facility is not a petroleum refinery; it is a petrochemical facility. Contrary to IEPA's assertion ("sulfur recovery units at petroleum refineries [are] the units meant to be covered by the rulemaking")(Response Brief, at 3), it appears clear from the rulemaking history and the title of the regulation itself, that not only petroleum refineries were intended to be potentially able to qualify for the exception; petrochemical facilities were also specifically included.

Moreover, a close examination of the rulemaking docket that IEPA references in support of its argument actually belies its claim that the exception was meant to apply only to petroleum refineries. The excerpt taken by IEPA from the 1972 rulemaking is as follows:

> 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.

(Response Brief, at 26)

However if the entire paragraph, from which IEPA excerpted only a snippet, is examined, the context becomes clear and it is apparent that not only were petroleum refineries not the exclusive focus of the regulation or the associated exceptions, they were not even the primary focus:

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process had to be retroactively proven to be 'exclusively' designed for that purpose, or that removed sulfur compounds could not be reused in the process without disqualifying a process from the exception.

> The process sources covered by Rule 204(f) will usually be sulfuric acid plants and sulfur recovery units. Rook of American Cyanimid (R. 976-985), Weber of Monsanto (R. 1590-1595) and Hall of New Jersey Zinc (Ex. 114, No. 52) suggested 2000 ppm as a reasonable level for existing sulfuric acid plants which could be achieved under normal operating conditions. A stricter concentration limit would require plant derating or addition of auxiliary scrubbing systems and has not been shown to be uniformly necessary to meet air quality standards. *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.*

(R 71-23 Opinion of the Board, April 13, 1972)(italics signifying IEPA's excerpt).

Thus, while IEPA's expansive explanation about what is 'usual' control equipment and the like for petroleum refineries (and their corresponding effectiveness in removing sulfur compounds) clearly does not apply across the board to any kind of petrochemical facility, which could encompass a large variety of different types of industrial operations. There is no dispute (even from IEPA) that the Emerald facility qualifies under the regulation (Response Brief, at 12), and the Emerald facility is clearly not a refinery. Thus, it would seem equally clear and logical that one cannot apply the criteria that the Board may have had in mind as to petroleum refineries with a broad brush to all petrochemical facilities that are potentially within the reach of the regulation. Trying to fit the square peg of petrochemical facilities into the round hole of petroleum refineries is illogical and unpersuasive.

Subsequent changes to Rule 204 and then 214.382 also show that the Board and IEPA knew how to specifically reference a "petroleum refinery" when the occasion suited and a provision of the regulation was intended to apply only to such facilities: Section 214.382(c)

specifically references "any petroleum refinery in the Village of Roxana," a provision that was added in 1988. (See 12 Il. Reg. 20778 (Dec. 5, 1988)).

Thus, for all of the above reasons, it seems clear that the exception under 35 Ill. Admin. Code 214.382 cannot be intended to only apply to petroleum refineries. IEPA's heavy reliance on what kinds of operations and specific expectations for the effectiveness of sulfur recovery equipment typically are found in petroleum refineries are therefore limited at best, in terms of divining the intent of the Board in adopting section 214.382. If the Board had intended to so limit the exception, it knew perfectly well how to do so, but chose not to. To pretend that the 214.382(c) exception can only apply to petroleum refinery processes, or that other processes must be held to the same emission reduction standard as petroleum refineries, is futile, as shown by the language of the rulemaking itself, and should be disregarded by the Board.

2. Information From Regulators In "Other States" Was Not Likely Considered By the Board In Adopting the SO_2 Exception Limitation

Leaving aside the clear evidence in the record that Mr. Punzak[7] sought out information from other states not to shed light on the Board's original intent in promulgating the SO_2 exception regulation, but rather to support his own interpretation of the regulation that he wished IEPA to adopt (see Petitioner's Opening Brief, at 10),[8] there is no evidence in the rulemaking

[7] IEPA characterizes Petitioners references to Mr. Punzak as some kind of inappropriate "highly-charged" personal attack. (Response Brief, at 6) To the contrary, the language of Petitioner's Opening Brief shows that while Petitioner in fact acknowledged the underlying virtue of Mr. Punzak's goal in finding a way to achieve reductions in SO_2 emissions, it is clear that Mr. Punzak went about achieving this goal in a way that, absent appropriate rulemaking, IEPA was simply not authorized to do. (Opening Brief, at 14) Far from a "caustic denunciation," Petitioner's discussion is professional and matter-of-fact, simply noting that Mr. Punzak's actions were improper and exceeded IEPA's statutory authority. (Id.)

[8] IEPA's response to Petitioner's assertions in this regard (Response Brief, at 28, fn. 11) is particularly weak, apparently suggesting that Mr. Punzak's intent in soliciting information was not so closed-minded, but that such an impression was inadvertently made due to the lack of articulateness of the e-mails and the "unfortunate consequences" of modern e-mail conventions in conveying information. Given that in one

record or anywhere else to suggest that IEPA or the Board ever considered how other states regulated processes similar to Emerald's. Thus, the supposed use of such information to assist IEPA in divining the intent of the SO_2 exception is without basis, and should also be disregarded.

3. U.S. EPA Guidance Also Was Not Likely Considered By the Board In Adopting the SO_2 Exception Limitation

Similarly, IEPA appeals to U.S. EPA guidance concerning control of VOC emissions from chemical processes (Response Brief, at 32) as evidence of the Board's intent in promulgating the SO_2 exception and its alleged goal (albeit unstated in the regulation or the rulemaking) of excluding equipment that is "integral" to the production process, and therefore, not appropriately characterized as "emission control." IEPA neglects, however, to note that the U.S. EPA guidance IEPA relied upon was issued in 1994, which clearly was not available to be considered by the Board in 1972. There is also absolutely no reference in the rulemaking to the kind of discussion that IEPA cites from the U.S. EPA guidance on the issue of whether condensers such as Emerald's should properly be considered an integral part of the process, or stand-alone emission control devices, or whether that matters.

Moreover, IEPA's basic premise that devices that are "integral" to the production process cannot also qualify as a process designed to remove sulfur compounds from flue gases under the plain language of 35 Ill. Adm. Code 214.382 is not supported by the language of the regulation or anything in the U.S. EPA guidance. IEPA's dogged attempts to read an exclusion of

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of Mr. Punzak's e-mails to the West Virginia EPA thanking the correspondent for the information with which Mr. Punzak was provided, Mr. Punzak noted that "[t]he information you have provided so far...*can help us justify the [Emerald] operation here requiring better control*," it seems that Mr. Punzak's agenda was very clearly communicated indeed. (R- 001553, emphasis added) There can be little doubt that Mr. Punzak acquired such information to justify his own desire to compel a reduction in emissions for the Emerald facility, and not to investigate the intent of the Board when it promulgated the original exception.

"integral" processes from the scope of the SO_2 exception are therefore unavailing, and the U.S. EPA guidance is helpful neither to understand the intent of the Board, nor why IEPA decided it was misreading the regulation these many years.

D. WHILE THE DOCTRINE OF "EQUITABLE ESTOPPEL" MAY NOT STRICTLY APPLY, IEPA SHOULD STILL BE HELD TO ITS PREVIOUS INTERPRETATION OF THE SO_2 EXCEPTION BECAUSE ITS PRIOR APPLICATION OF THE REGULATION TO EMERALD WAS CORRECT

Petitioner acknowledges that it used the term "estoppel" twice in its opening brief in reference to its argument that IEPA should be bound by its long-standing interpretation of the SO_2 exception; however, Petitioner's intent was not to invoke the doctrine of equitable estoppel. Petitioner admittedly should have been more artful in framing its argument, and IEPA is correct that Petitioner did not address or prove the classic elements of estoppel, which include among other things, proof of a false or incorrect statement by an employee or agent of the entity against which estoppel is sought. (Response Brief, 35-52)

Rather, Petitioner's argument was intended to rely on the well-accepted principle that a governmental agency charged with administering a regulation must adhere to past long-standing interpretations of that regulation, assuming that the factual circumstances have not changed, citing to *Central Illinois Public Service Co. ("CIPS")*, 165 Ill. App. 3d 354, 363, 518 N.E.2d 1354, 1359 (4th Dist. 1988)(Response Brief, at 15-18); *see also Saline Co. Landfill, Inc. v. Illinois Environmental Protection Agency and County of Saline*, 2004 WL 1090244, PCB 04-117 (May 6, 2004).

IEPA correctly points out that *CIPS* is "not an estoppel case," but contends that Petitioner has not shown that IEPA's current interpretation is inconsistent with prior Board interpretations of the same regulation. IEPA's point is somewhat unclear, but it seems to be suggesting that

CIPS is distinguishable because Petitioner in the case at bar has cited to no Board interpretations of the SO_2 exception. If this is IEPA's point, it is an empty one, as the record is replete with evidence the IEPA's current interpretation of the SO_2 regulation is inconsistent with its own long-standing interpretation of the regulation from the agency's perspective. Whether the Board has or has not had occasion to rule on the correctness of either interpretation is irrelevant; the point is that IEPA, as the regulating agency and the one charged with implementing the SO_2 emission regulations, has by its own admission, interpreted the regulations in a way that is diametrically opposed to the current interpretation that it wishes the Board to now adopt and to which it desires Emerald to adhere.

As explained in Petitioner's Opening Brief, the reasons for this well-reasoned legal doctrine should be self-evident: governmental agencies in the position of administering regulations and statutes that affect the rights of private and corporate citizens must adhere to an expected level of reasonableness and consistency, regardless of the personal viewpoints of any of the employees who might be employed at such agency at any given time. Otherwise, there would be no way for citizens and businesses to plan their affairs, for fear of capricious and ever-shifting interpretations of statutes and regulations, even though the laws themselves have not changed. (Opening Brief, at 18)

Tellingly, IEPA acknowledges that Petitioner has a point, but falls back on the notion that protection of the environment outweighs the niceties of regulatory consistency when necessary: "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." (Response Brief, at 48)

No one would argue that protection of the environment is not a compelling interest. But IEPA's suggestion that its duty to protect the environment somehow trumps its obligation to provide logic and consistency in exercising its regulatory prerogatives is unpersuasive. Indeed, such an argument could be made as to almost any regulation that IEPA is charged with administering, as its fundamental obligation is to protect the environment for the benefit of the citizens of the State. Protection of the environment, no matter how important, does not provide IEPA with carte blanche to subject industrial operators in the State to arbitrary and capricious changes in its regulatory scheme, especially where the alternative remedy (new rulemaking) is clearly the preferred course of action to preserve order and the expectations of the regulated community. Contrary to what the IEPA would have the Board believe, the Board is not presented with a Morton's Fork: either capitulate to IEPA's strained and incorrect interpretation of the SO_2 exception, or allow facilities such as the Emerald facility to emit tons of pollutants into the atmosphere.[9] Rather, as explained above, the proper relief in this case is for IEPA to

[9] The dire consequences presented by IEPA if it did not deny the exception to Emerald, which would allow "thousands of additional tons of SO_2 into the environment" (Response Brief, at 48) and the frantic nature of the emergency as presented by the agency, is belied by the Record. The Record shows that IEPA, through engineer Dan Punzak, had originally started to rethink its position on the applicability of the SO_2 exception as to Emerald as early as 1993, when Mr. Punzak became involved, but deferred action at that time anticipating that U.S. EPA would promulgate an applicable federal standard. (R 001542-43). U.S. EPA never did so, and thus in 2001, Mr. Punzak then conjectured that if Emerald had made intervening changes to the facility, IEPA could use the Prevention of Significant Deterioration (PSD) rules to require increased emissions controls "and not have to get into the semantics of whether the condenser is a control or recovery advice." (R 001543). Only when that strategy also failed was IEPA forced to try to "re-interpret" the regulation in order to achieve its desired ends. Thus, the environmental consequence that IEPA shrilly warns of in its brief, while real, is hardly the time-critical emergency that one would imagine from the hyperbole used by the agency to describe the situation. It also shows that re-interpretation of the SO_2 regulation was only the final last-ditch effort made by IEPA to find a way to

promulgate a new set of regulations and go through the process of having those regulations adopted by the Board.

In sum, given the 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, it should be clear that the IEPA's "new" interpretation of 35 Ill. Adm. Code § 214.382(a) is improper, is not entitled to deference, and IEPA should be bound by its previous interpretation of the instant regulation.

E. THE HEARING OFFICER ERRED BY EXCLUDING DOCUMENTARY AND TESTIMONAL EVIDENCE RELATED TO IEPA'S PRIOR PERMITTING DECISIONS

The final issue in this case comes down to whether or not prior permitting decisions of the IEPA, at least in this specific case, are fair game for inquiry, not only as to the inclusion of certain pertinent documents that were intentionally omitted from the Record by IEPA, but also as to the Hearing Officer's refusal to allow counsel for Petitioner to explore this issue at the hearing. (See Opening Brief, 19-25) IEPA asserts that the entire issue is mooted, either through revisiting the issue of the completeness of the record, or the exclusion of such testimony at the hearing, as it unabashedly admits that it made a "mistake" for 20 years. IEPA also warns that allowing any consideration of material that "pre-dates" the specific permitting decision at issue open a Pandora's Box that threatens to make "all previous state operating permits for these condensers dating back to the early 1970s" an issue. (Response Brief, at 61)[10]

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compel a reduction in emissions at the Emerald facility, and was not the premise with which IEPA originally began this exercise.

[10] In fact, IEPA *goes further and suggests* that to find in favor of Petitioner's argument would compel IEPA to "include each and every underlying permitting decision in the Administrative Record regardless of whether the Agency specifically relied upon it or not," with a correspondingly horrendous burden on

As noted above, it seems supremely ironic that IEPA appeals to many types of so-called "institutional knowledge" as a basis for its re-interpretation of the SO_2 exception (as well as all sorts of other 'sources' such as U.S. EPA guidance and other states' experiences), but is adamant that the files concerning the prior permit application of Emerald, and the inter-agency discussions, memos and documents that were part of these files, are not properly a part of the Record and simply cannot be discussed in the context of this permit appeal.

Petitioner will not repeat its thorough treatment of this issue in its Opening Brief. Petitioner wishes to emphasize, however, that it seems clear that the documents that were contained in the operating permit file for the Emerald facility that relate to the issue of whether the Facility, in the opinion of IEPA personnel, qualified for the SO_2 emission exception, were considered by Mr. Punzak and other IEPA personnel with regard to the current permitting decision.

The Record in this case clearly shows that IEPA was very concerned about defending the incongruity between its prior decisions and the conclusion it wished to justify with regard to the present permit. But, IEPA still somehow contends that the presence of these files on the desk of the permit engineer reviewing the current permit application and his reliance on at least some of the documents, allows IEPA the ability to parse out which documents were actually relied upon and which were not. In fact, according to Mr. Punzak, it was the very group of documents that

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IEPA to copy warehouses full of files each time a permit was up for review. (Response Brief, at fn. 36) Needless to say, if IEPA is truly concerned that such would be the result of finding in favor of Petitioner's argument, then IEPA misses the point of Petitioner's permit appeal. Only in cases where the prior permitting decision is specifically relevant to the current decision, as in this case where IEPA ignored 25 years of prior precedent, would, under Petitioner's argument, such documents and testimony be relevant.

were presumably most pertinent to the prior permitting decisions of the agency (and that contradicted the stance that Mr. Punzak now wished to take) that he did not consider:

> Q. If the operating permit record was at your desk, you were offering to make copies of it for other Agency people to review as part of the Title V application. In this memorandum two days later you are talking about reviewing documents from your permit decision in 1993 when you were the permit review engineer for the operating permit, correct?
>
> A. Yes.
>
> Q. And you're pulling documents, your review notes and discussing those with Agency people. Explain to me how you are not relying on those documents as part of your review of the CAAPP application if you can?
>
> A. Well, I was relying on the -- some of the memos, not necessarily every single permit file.
>
> Q. So you were relying on part of the documents but not all of the documents from the past operating permit files?
>
> A. Well, I knew I had contradicted some of the past decisions. So, therefore, why go into the details when I already knew that I was -- my decision was different than other Agency employees had made.

(Testimony of D. Punzak, 147:23-148:19).

Although IEPA half-heartedly attempts to dismiss the presence of these files at Mr. Punzak's desk during the permit review (as well as his offer to disseminate particular documents for other IEPA personnel)(Response Brief, at fn. 31), it seems clear from the testimony of Mr. Punzak that the contents of the prior permit files for the Facility were indeed part and parcel of the permit decision that is the subject of this appeal, and IEPA loses serious credibility when it

claims otherwise.[11] IEPA's argument that any records that pre-date the permit application and documents that relate to another permit previously issue somehow are automatically excluded from inclusion into the Record is more artful, but still defy logic, as one would imagine that if the agency knew it was going to make a decision that was contrary to 25 years of contradictory permitting decisions, such information would be the most important information for IEPA to consider—not the information that it would run away from at all costs.

In sum, IEPA is willing to look everywhere it can to find support for its new interpretation of the SO_2 exception regulation, except the very place where the most pertinent such information obvious can be found—its own permitting files—precisely because it admits that the information that resides there contradicts the regulatory position it now wants to defend. IEPA's position in this regard strains logic and credulity. Moreover, even if such documents were not considered by IEPA in its permit review, they should have, and therefore should have been included in the Record. (Opening Brief, at 22-23) The lack of consistency of IEPA's interpretation of 35 Ill. Adm. Code § 214.382(a) as it applied to Petitioner's facility is the meat of this entire permit appeal, and the relevance of this issue should have been fair game at the public hearing, but was excluded, even after the Hearing Officer was asked to reconsider his decision in light of Mr. Punzak's testimony regarding his reliance on the excluded documents. Petitioner should have had the full and unfettered ability to explore and explain, though documents and testimony, why IEPA got the interpretation of the SO_2 exception right the first time, more than 25 years ago, and anything less is a denial of justice to Petitioner. This decision

[11] IEPA appears to once again blame the impreciseness of Mr. Punzak's statements (this time, in the context of Mr. Punzak's testimony under cross-examination) to explain away the incongruities in IEPA's position. (Response Brief, at fn. 31)

should therefore be overturned, and remanded back for further proceedings, if necessary depending on the Board's decision on the ultimate interpretation of the applicability of the SO_2 exception under 35 Ill. Admin. Code 214.382(a).

III. CONCLUSION

IEPA does not have the right to engage in rulemaking without going through the formal process and should not be allowed to regulate by permit denial. It simply does not have the authority to arbitrarily incorporate additional criteria in a regulation such as 35 Ill. Adm. Code § 214.382(a) where such criteria do not exist in the language of the regulation. In addition, IEPA's position that it made a "mistake" in interpreting the SO_2 exception appears much more likely to be cover for the fact that IEPA now has decided it does not like the results of how that regulation has been consistently applied to the Emerald facility for over 25 years. IEPA cannot, however, simply ignore over 25 years of its own precedent as to the interpretation of this regulation, where the processes and circumstances at the Emerald facility have not changed, and it cannot even explain the supposed flaws in its reasoning for the last quarter-century.

For these reasons, and as set for in Petitioner's Opening Brief, the Board should find that IEPA inappropriately determined that the exception under 35 Ill. Adm. Code § 214.382(a) did not apply to the Facility, and the permit determination should be remanded to IEPA with instructions to re-issue the permit with the acknowledgment that the Facility is entitled to the

SO_2 exception, and is not subject to the 2000 ppm SO_2 limitation set forth in 35 Ill. Adm. Code § 214.301.

Respectfully submitted,

EMERALD PERFORMANCE MATERIALS, LLC

By: _____
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