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

To: John Therriault, Assistant Clerk
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PLEASE TAKE NOTICE that on Friday, June 27, 2008, the undersigned filed with the Clerk of the Office of the Illinois Pollution Control Board, Petitioner's Post-Hearing Memorandum, a copy of which is herewith served upon you.

Dated: June 27, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lawrence W. Falbe, an attorney, hereby certify that on Friday, June 27, 2008 a copy of the foregoing Petitioner's Post-Hearing Memorandum, was sent to the following via first class mail:

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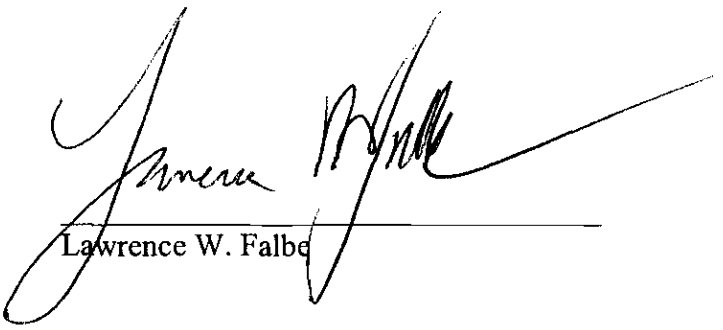

Lawrence W. Falbe

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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

PETITIONER'S POST-HEARING MEMORANDUM

Petitioner, EMERALD PERFORMANCE MATERIALS, LLC (as purchaser of Noveon, Inc.) ("Emerald")[1] hereby submits its post-hearing memorandum in the above-captioned matter.

I. QUESTION PRESENTED

The issue in this permit appeal is whether, if Petitioner's Facility would otherwise be subject to the 2000 part-per-million (ppm) sulfur dioxide (SO_2) limitation set forth in 35 Ill. Adm. Code § 214.301, is it exempt from this limitation under the exception provided under 35 Ill. Adm. Code § 214.382(a) because the Facility has "existing processes designed to remove sulfur compounds from the flue gases of petroleum and petrochemical processes." Related to this primary question is the issue of whether the Illinois Environmental Protection Agency

[1] An agreed motion to change petitioner's name from "Noveon" to "Emerald Performance Materials, L.L.C." to reflect the latter's May 2006 purchase of the facility whose permit is the subject of this appeal was granted by the Board on February 7, 2008. (*See also* Testimony of David Giffin, 9:20-13:12). To avoid confusion, all references to Emerald/Noveon shall be to "Petitioner" or "Emerald," regardless of the actual name of the company at the time.

("IEPA") should be estopped from changing its long-standing interpretation of 35 Ill. Adm. Code § 214.382(a) as applied to this particular Facility, despite a lack of changed circumstances.

II. STATEMENT OF THE CASE

On its face, this case is about whether the 2000 ppm SO_2 emission limitation set forth under 35 Ill. Adm. Code § 214.301 applies to Petitioner's Facility, given that Petitioner contends that it is entitled to the exception for certain processes that is provided under 35 Ill. Adm. Code § 214.382(a) (the "SO_2 exception"). This exception states that "Section 214.301 shall not apply to existing processes designed to remove sulfur compounds from the flue gases of petroleum and petrochemical processes." The regulation does not specify minimum criteria or standards for these processes, how they are designed, or how they relate to the rest of the system; indeed, the sole requirement is that the facility has "processes" that "are designed to remove sulfur compounds...." The regulation at issue is plainly-worded and unambiguous. Thus, this would seem to be a simple, straightforward, fact-based determination as to whether the processes that exist at Petitioner's Facility uses are so designed.

As set forth herein, the Record clearly indicates that Petitioner's Facility meets the requirements for the SO_2 exception. Moreover, given that Petitioner's Facility previously had in place an air pollution control operating permit granted by IEPA that recognized the applicability of the SO_2 exception to its processes, and this exception had been in place for over 25 years (since 1975), and further that no material changes in the Facility's processes had taken place during this period, it would appear that the answer to this question would be a no-brainer. Yet, in 2003, the IEPA decided to change course and overturn more than 25 years of its consistency in

administering the Facility's air permit, and decided that the exception really shouldn't apply to the Facility, after all.

Thus, what this case is really about is whether IEPA improperly overstepped its authority by mandating criteria for the SO_2 exception that do not exist in the regulation, and reversing course on decades of consistent interpretation of the regulation, despite no change in the regulations or the factual circumstances. Why did IEPA do this, after years of consistently determining that the exception applied? As discussed herein, the Record shows that this change occurred after a new IEPA engineer, Dan Punzak, was assigned to the Facility's permit file in 1993.

Mr. Punzak decided that, despite the previous and consistent decisions made by IEPA over many years (since 1975) as to the appropriateness of the exception as applied to Petitioner's Facility, he had a different opinion. As clearly indicated in the Record, when Mr. Punzak was assigned to review the Petitioner's air permit renewal application, he took issue with two aspects of the Petitioner's process that he determined disqualified the Facility for the exception. The two issues identified by Mr. Punzak were that, first, the sulfur removal process removed 'only' about 23% of the sulfur. Mr. Punzak was dissatisfied with this percentage and thought that the plant should be able to do better. Second, Mr. Punzak looked at the process itself and decided that the particular design of the process made it appear to him to be more of a "recovery" device than a "control" device,[2] which essentially meant that Mr. Punzak felt the sulfur recovery was

[2] As explained *infra*, the applicable regulation speaks in terms of "processes" and does not discuss types of devices, whether they might be deemed "control" devices or "recovery" devices, at all.

integrated into the manufacturing process to recover raw material, as opposed to a late-stage device strictly intended to capture emissions (like a scrubber).

Thus, Mr. Punzak's determination that the exception did not apply to Petitioner's Facility was clearly based on his reading two requirements into the regulation that plainly do not exist. In fact, the evidence in the Record is clear that, until Mr. Punzak became the reviewing engineer, IEPA was consistent in its position that the SO_2 exception did apply to Petitioner's facility, starting with the issuance of the operating permit in 1975, and each renewal thereafter (until 2003). Therefore, the issue in this case is really whether IEPA can set a standard for the efficiency and/or design of a process where none currently exists in the rules, simply by changing its long-standing position on whether a specific process at a specific facility meets this definition, even though no other facts have changed.

The answer to this question is clearly "no." IEPA does not have the right 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. Such action plainly constitutes rulemaking, which is the purview of the Pollution Control Board, not the IEPA. Moreover, IEPA does not have the unfettered discretion to ignore over 25 years of its own precedent as to the interpretation of this regulation, where the processes and circumstances at the Facility have not changed.

For these reasons, and as further discussed herein, 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 not subject to the 2000 ppm SO_2 limitation set forth in 35 Ill. Adm. Code § 214.301.

III. BACKGROUND FACTS AND PROCEDURAL HISTORY

Petitioner's Facility is a petrochemical manufacturing plant located at 1550 County Road, 1450 N in Henry, Illinois (Facility ID No. 123803AAD). The Facility manufactures organic chemicals, specifically antioxidants and accelerators to be used in the manufacture of rubber and plastics, coatings used in the electronics industry and personal care products used for personal hygiene such as hair conditioners. (See Public Hearing Transcript, Testimony of David Giffin, 13:21-15:12).[3] In addition, the Facility houses storage tanks for raw material, intermediates and finished products and operates a wastewater treatment facility and a small process fluid heater for process heat.

Since prior to 1972, the Facility has operated processes designed to remove sulfur compounds from the flue gases of petrochemical processes as part of its manufacture of a substance known as crude sodium MBT, which once purified, is then sold. (Testimony of D. Giffin, 15:13-16:6; 24:4-8). The sulfur is removed as carbon disulfide by the means of condensers. These condensers were part of the original process design prior to the 1960s. (Testimony of D. Giffin, 54:5-10). This operational configuration has historically exempted the Facility from the general SO_2 emission limitation of 2000 ppm found at 35 Ill. Adm. Code § 214.301.

[3] *All references to testimony* will be from the public hearing which was held before Hearing Officer Bradley P. Halloran on February 5, 2008.

Since the original air permitting in 1975, there have been no significant changes to the operation of the chemical manufacturing portion of the Facility, with the exception of the installation of a sodium hydrosulfide recovery system (known as a "NaSH" unit)[4] at the end point of the process. (Testimony of Dave Giffin, 13:13-20; 24:4-8).

On March 7, 1996, IEPA received a timely application for a Clean Air Act Permit Program ("CAAPP") permit (Application No. 96030152) for Emerald's Facility. (TSR - 000001- 002115).[5] On September 17, 2003, IEPA issued a draft CAAPP permit to the Facility and opened the 30-day public comment period soliciting comments about that permit. *Id.* During the public comment period, Emerald submitted detailed comments to IEPA regarding certain draft permit conditions. (R - 001253-1267). Among other comments, Petitioner noted that the draft permit "ignores the fact that the MBT-C reactor/blow down tank system is equipped with a system that recovers sulfur compounds from the flue gases of petroleum processes and this is subject to the exclusion set forth in 35 IAC 214.382." (*Id.* at R - 001260).

[4] The NaSH unit produces sodium hydrosulfide from the flue gas that previously went to be burned in a flare. The NaSH system recovers the carbon disulfide (CS_2) that is not removed in the condensers, which is then returned to the reactor. The remaining hydrogen sulfide (H_2S) gas stream is cleaned of impurities and reacted to produce sodium hydrosulfide, which is sold as a useful product. (Testimony of D. Giffin, 19:12-21:5). While the installation of the NaSH unit brings the Facility into compliance with the applicable air regulations even without the application of the SO_2 exception, Petitioner has never abandoned its legal position that it is entitled to the SO_2 exception, and has valid reasons for continuing this appeal. (Testimony of D. Giffin, 41:24-42:2; 46:13-47:7). Among other reasons, Petitioner has voluntarily complied with the SO_2 limitation so that, if its appeal is successful, it will be able to market SO_2 reduction credits. Petitioner also intends to seek modification of its construction permit for the NaSH system so that it can utilize its flare as its NESHAP control device for periods when the NaSH system is inoperable. (*Id.*)

[5] There were two records complied by IEPA for the permit appeal; one was composed of documents for which Petitioner claimed trade secret protection, and the other was an unprotected 'public' record. Citations to the Trade Secret Record will be to TSR - XXXXXX, and citations to the public record will be to R - XXXXXX.

On November 24, 2003, IEPA issued to Emerald a final CAAPP permit that became effective upon issuance. (R – 001980 – 002070). While IEPA modified some conditions of the final CAAPP permit in response to Emerald's comment letter, it did not modify the final CAAPP permit to respond to all of Emerald's significant comments. Petitioner filed the instant permit appeal, claiming that IEPA's failure to modify the final CAAPP permit, as requested, is inconsistent with the Illinois Environmental Protection Act and the corresponding regulations. While most of the other objections raised by Petitioner have been addressed, mooted or dismissed, the remaining issue is whether the condition set forth in the Permit that rejected the applicability of the under 35 Ill. Adm. Code § 214.382(a) was appropriate.

On February 5, 2008, a public hearing was held before Hearing Officer Bradley P. Halloran, although members of the public were excluded due to presence of trade secret information that was discussed as part of the Record. Emerald, through its attorney Roy Harsch, presented three witnesses:

1) **David Giffin**, who is currently the health, safety and environmental manager at the Facility. Mr. Giffin has been employed at the Facility for almost 38 years, and is the engineer assigned to the process at issue in this case. (Testimony of David Giffin, 9:20-10:12).

2) **Michael R. Corn**, who is president of AquAeTer, an environmental consulting firm. Mr. Corn has 33 years of experience as an environmental consultant and first became involved with the Facility in 1988. He and his firm were retained by Emerald to assist the company in the preparation of its first Title V air permit in the mid-1990s. (Testimony of M. Corn, 66:2-67:12).

3) **Bernard O. Evans**, who is currently employed by Environmental Resources Management (ERM). Mr. Evans supports the air program for ERM and has been consulting with industry on air matters for 30 years. He has been working with the company since

> 1988, and has been working with the Facility in particular since 2003. (Testimony of B. Evans, 80:2-82:14).

IPEA presented only the testimony of engineer Dan Punzak. Subsequent to the public hearing, Hearing Officer Halloran set a schedule for the parties' post-hearing briefing.

IV. ARGUMENT

A. PETITIONER'S FACILITY MEETS THE REQUIREMENTS OF 35 ILL. ADM. CODE § 314.382(a) AND IS ENTITLED TO THE SULFUR DIOXIDE EMISSION EXCEPTION

The requirements to qualify for the SO_2 exception under 35 Ill. Adm. Code § 214.382(a) are simple. The plain language of the regulation states:

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

As set forth in the Record, since prior to 1960 (which also predated the Illinois air emission regulations), the Facility has operated processes designed to remove sulfur compounds from the flue gases of petrochemical processes. (Testimony of D. Giffin, 54:5-10). This operational configuration has historically exempted the Facility from the general SO_2 emission limitation of 2000 ppm found at 35 Ill. Adm. Code § 214.301. IEPA has not disputed that the Facility is a petrochemical plant (Testimony of D. Giffin, 24:9-19), nor does either party dispute that, but for the § 214.382(a) exception, the § 214.301 SO_2 limitation would be applicable.

Pursuant to 35 Ill. Adm. Code § 214.382(a), the general SO_2 emission limitation of 2000 ppm does not apply to existing processes, like the Facility's, that have processes in place to remove sulfur compounds from the flue gases of its petrochemical manufacturing process. The emissions from the Facility's petrochemical batch reactor processes vent to condensers that

remove a substantial portion of the carbon disulfide (CS_2), a sulfur compound, from the emitted gases and recycle that material back into the process. That recycling activity reduces approximately 23% percent of the total sulfur from the batch process gases. Without these condensers, the sulfur captured by this process would be released out of the system.[6]

Each of the witnesses presented by Petitioner at the public hearing confirmed that he believed that 35 Ill. Adm. Code § 214.382(a) properly applied to the Facility. (*See* Testimony of D. Giffin, 25:5-26:1; Testimony of M. Corn, 70:4-24); Testimony of B. Evans, 86:9-87:7). As succinctly stated by Mr. Corn, in the context of his review of the Facility's permit application for its first Title V permit in the mid-1990s, he believed the exception properly applied to the Facility because in order to meet the exception, "it had to be a petrochemical process, and it had to remove sulfur. And from our review, both of those conditions were met." (Testimony of M. Corn, 72:7-11).

Importantly, 35 Ill. Adm. Code § 214.382(a) does not expressly state a level of sulfur reduction that must be achieved for a source to be exempt from the 2000 ppm standard. Therefore, in the absence of such a standard in the regulation, IEPA may not arbitrarily impose one in the CAAPP permitting process. Similarly, 35 Ill. Adm. Code § 214.382(a) does not specify how the processes must be designed, how they relate to the rest of the system, or how they actually function, as long as the end result is that the process reduces sulfur emissions. Again, in the absence of such criteria in the regulation, IEPA cannot supplant the Board's role in rulemaking by mandating compliance with design standards or specifications that do not exist.

[6] Notably, 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).

As noted above, what led IEPA to turn its back on its decades-long interpretation of 35 Ill. Adm. Code § 214.382(a) was the assignment of a new engineer, Dan Punzak, to review Petitioner's permit renewal application. Despite the fact that IEPA had, for years, determined that the Facility was entitled to the SO_2 exception, and despite Mr. Punzak's knowledge of the IEPA's prior determination on this issue, Mr. Punzak concluded that two aspects of the Petitioner's process disqualified the Facility.

First, Mr. Punzak noted that the sulfur removal process removed about 23% of the sulfur. (R – 001545). To Mr. Punzak, this percentage was "questionable" and not good enough to qualify for the exception. (Testimony of D. Punzak, 115: 18-22). The Record shows that Mr. Punzak engaged in his own research of industrial plants in other states, such as West Virginia, Louisiana and South Carolina. (Testimony of D. Punzak, 122:18-23). The point of this research was to determine what percentage removal might be expected from a "true sulfur removal system." (Testimony of D. Punzak, 115:18-21). However, it does not appear that Mr. Punzak conducted this research with an open mind; rather, he sought data that would confirm his opinion that the condensers used in the Petitioner's process did not remove enough sulfur for his satisfaction. As he explained in a June 2001 e-mail to his contact with the West Virginia state EPA, Mr. Punzak hoped to use this information to "help us justify the operation here [Emerald] requiring better control." (R- 001553).

While one may assume that Mr. Punzak's objective in developing an argument that the § 214.382(a) exception should not apply to Petitioner's Facility was the otherwise laudable goal of trying to further reduce sulfur emissions from the Facility, it is clear that Mr. Punzak went *about this* the wrong way. In other words, by attempting to write into the regulation an

efficiency mandate that is not present, IEPA is attempting to administratively amend the actual rule. Absent appropriate rulemaking action by the Board, IEPA simply does not have the authority or discretion to demand regulatory compliance with an emissions criteria that exists nowhere except in the creative mind of one of its engineers.

In addition to his concern over the percentage of sulfur recovery that the Facility achieves, Mr. Punzak took issue with the fact that the reflux condensers that removed the sulfur made it appear to him to be more of a "recovery" or "process" device than a "control" device. Although the § 214.382(a) exception speaks only of requiring "processes" that remove sulfur compounds, Mr. Punzak interpreted this to mean a "control device." (R - 001543) Mr. Punzak believed that because the reflux condensers were designed to return captured sulfur to the system (in the form of CS_2), which was essentially recycled as raw material, such devices would be "considered to be process condensers and shouldn't be given any credit in terms of efficiency as a control device." (Testimony of D. Punzak, 115:24-116:2). Mr. Punzak also seemed to believe that if the sulfur was returned to the system during the process at any point, rather than somehow completely removed from the production process, this also disqualified the process from the SO_2 exception, no matter how much sulfur was removed from the flue gas. (Testimony of D. Punzak, 160:3-15).

Once again, however, Mr. Punzak's determination (as adopted by IEPA) to mandate a more stringent degree of sulfur removal by Petitioner's Facility was without a regulatory basis. It is unquestionable that the regulation makes no reference to "devices" of any type, much less differentiates them on the basis of whether they meet undefined specifications as "control" devices, "process" devices, or what-have-you. Tellingly, Mr. Punzak himself realized that his

attempt to write such a criteria into the regulation would be vulnerable to attack. He suggested in a February 2001 e-mail to Ms. Rachel Doctors, an IEPA lawyer, that before making this argument, he would attempt to determine if the Facility had made any material increases in its production levels, whereby Mr. Punzak might be able to require additional controls under the Prevention of Significant Deterioration (PSD) rules. As Mr. Punzak admitted to Ms. Doctors, "If we can show that they [Emerald] have made changes, we may be able to use the PSD rules to require control and not have to get into the semantics of whether the condenser is a control or recovery device."[7] (R- 001543).

Mr. Punzak admitted on cross-examination that the requirements IEPA was demanding in order to agree to the applicability of the SO_2 exception appeared nowhere in the regulatory language, and also that the CS_2 that was captured by the condenser was removed from the flue gases and not emitted to the atmosphere:

> Q. Does the term "pollution control device" appear in that rule [214.382]?
>
> A. No. It does not.
>
> Q. Does the word "reflux condenser" appear in that rule?
>
> A. No. It does not.
>
> Q. Do the words "process condenser" appear in that rule?
>
> A. No. It does not.
>
> Q. I think you testified on direct that this is a petrochemical process; the Agency accepts that?

[7] As admitted by Mr. Punzak under cross-examination at the public hearing, Petitioner's answers to IEPA's inquiry as to any possible changes in conditions with Petitioner's process did not support a PSD argument, and so Mr. Punzak was eventually forced to confront the 'semantics' *that he had hoped to avoid* in mustering support to compel a reduction in emissions at the Facility. (Testimony of D. Punzak, 144:13-145:12).

A. Yes.

Q. And it's clearly an existing process at the time that the Board wrote these rules?

A. Yes.

Q. Carbon disulfide is a sulfur compound?

A. Yes, it is.

Q. What happens to the carbon disulfide that is condenses in the condenser and sent back to the reactor?

A. Well, it's available for reaction.

Q. So it is tied up and reacts --

A. Yes.

Q. -- with the other raw materials?

A. Yes.

Q. So that carbon disulfide that's removed from a condenser and sent back to the reactor doesn't emit to the atmosphere, correct?

A. Yes. If it reacts, that's correct.

(Testimony of D. Punzak, 130:7-131:10).

Mr. Punzak's conclusions were refuted at the public hearing by Emerald's witnesses. Mr. Corn, for example, stated as follows:

Q. What is your understanding of the evolving Agency's decision?

A. That ... the condenser does not recover enough sulfur, a certain percentage of sulfur. There is nothing is the regulation that gives a percentage of sulfur recovery.

The second thing, I think he [Mr. Punzak] is claiming that a reflux condenser makes it a process and not a sulfur removal process. Regardless of whether it recovers that CS_2, carbon

> disulfide, and sends it back to the process, it's still recovering sulfur; and that's the requirement of the regulation of the exception. So that seems to be a moot point. It's not classified in a regulatory language of how much sulfur you have to recover.
>
> Q. Does the exemption in your view turn on whether the device is a process device or a control device, a reflux condenser, or something called a red apple?
>
> [objections and colloquy omitted]
>
> A. It does not require a specific type of control equipment. Most environmental regulations do not specify the type of control equipment you put on to reduce emissions, just that you reduce emissions. That's for a purpose. We as engineers have to put our stamp on that, not the regulators.
>
> Q. So is it your opinion that the fact that it condenses CS_2 and returns it back to the process makes any difference?
>
> A. Based on my reading of the regulations, that should not make any difference to the interpretation that it removes sulfur from the flue gases.

(Testimony of M. Corn, 73:5-74:15).

In summary, although Mr. Punzak might be commended for his tenaciousness in trying to find a way to compel increased efficiencies of sulfur removal at Petitioner's Facility, his strategy, and ultimately that of IEPA's, of effectively writing into the regulation requirements that clearly do not exist, was improper and should not be upheld. Illinois law provides that "where the language of a regulation is clear and certain, an administrative agency's interpretation of the regulation which runs counter to the regulation's plain language is entitled to little, if any, weight in determining the effect to be accorded the regulation." *Central Illinois Public Service Co. v. Pollution Control Bd.,* 165 Ill. App. 3d 354, 363 518 N.E.2d 1354 (4th Dist. 1988)(citing *Chicago Transit Authority v. Industrial Comm'n,* 141 Ill. App. 3d 930, 491 N.E.2d 58 (1st Dist.

1986)); accord *Dean Foods Company v. Pollution Control Board*, 143 Ill. App. 3d 322, 334, 492 N.E. 2d 1344, 1353 (2d Dist. 1986). Even where the language of a regulation is debatable (although not the case here), and circumstances have not changed, "an administrative agency is bound by a long-standing interpretation of the regulation." *Central Illinois Public Service Co.*, 165 Ill. App. 3d at 363, 518 N.E.2d at 1359. It is clear from the above discussion that, under the plain language of the § 214.382(a) exception, the Facility is entitled to the benefit of this exception, and is therefore exempt from the 2000 ppm SO_2 limitation set forth in 35 Ill. Adm. Code § 214.301.

B. IEPA IS ESTOPPED FROM REVERSING COURSE ON ITS 25-YEAR CONSISTENT DETERMINATION THAT PETITIONER'S FACILITY IS ENTITLED TO THE SULFUR DIOXIDE EMISSION EXCEPTION

As noted above, IEPA has, over the last 25 years, consistently approved the Facility's permits including the exception. Not only has Petitioner shown that it is entitled to the exception based on the plain language of the regulation, and the status of the Facility, as discussed above, IEPA should also be estopped from changing its mind after years of consistent application of the regulation to the Facility.

Mr. Punzak was informed when he was assigned the permit review for the Facility in 1993 that the IEPA had previously determined that the Facility was exempt from 35 Ill. Adm. Code § 301 because the exception on 214.382(a) applied to the Facility. (Deposition of Dan Punzak at 11:23-12:5). Previously, other engineers at IEPA had performed the permit review. (Deposition of Dan Punzak at 11:14-18). Although Mr. Punzak came to a different conclusion, and even solicited internal legal review at IEPA to support his interpretation of the regulation,

apparently a final decision was not made at that time to formally reject the application of the SO_2 exception to Petitioner's permit[8] It was not until 2003, in the context of IEPA's comments to Petitioner's permit renewal application, was the issue of IEPA's new determination that the exception did not apply even raised with the Petitioner. Thus, after the initial permit was issued in 1975, and during subsequent renewal analyses conducted by IEPA in 1978, 1983 and 1993, each time, IEPA formally determined that the SO_2 exception applied to the Facility. (R – 001474). Thus, the first time IEPA formally expressed its new interpretation that the SO_2 exception did not apply to the Facility, was the receipt by Petitioner of the IPEA comments to Petitioner's CAAPP permit application in 2003.

To its credit, IEPA has openly acknowledged that its new position on the non-applicability of the exception constitutes a change in position, even though there have been no changes to the regulation in question, nor a change in any of the applicable circumstances at the Facility:

> For the purposes of [Emerald's] claim that the Illinois EPA held a contrary permitting position for approximately twenty years with regard to the applicability of 35 Ill. Adm. Code 214.382, the Illinois EPA concedes the point.

(See IEPA's Response to [Emerald's] Motion to Supplement the Record, filed January 29, 2008, at ¶ 13). In fact, IEPA even attached an affidavit from Dan Punzak in which Mr. Punzak acknowledged that "since at least 1975 through 1993, IEPA issued permits authorizing the source to operate the process exempt from the requirement in 35 Ill. Adm. Code 214.301 based

[8] The Record appears to show that IEPA's reason for not informing Petitioner in 1993 that it had changed its mind about the applicability of the exception to the Facility was that IEPA expected *that new MACT standards* would soon be promulgated that might address the issue. (R – 001542).

on the applicability of 35 Ill. Adm. Code 214.382." (*See* Affidavit of Dan Punzak, attached to IEPA's Response to [Emerald's] Motion to Supplement the Record).

Counsel for IEPA also admitted this at the public hearing, where IEPA attorney Carter stated, "We had a contrary position for 20-some years. And we don't dispute that fact." (Public Hearing Transcript, Argument by Ms. Carter, IEPA Counsel, 152:8-10).

While unabashed in its admission that it did an about-face in interpreting the regulation, IEPA does not, however, explain the basis for its belief that it may arbitrarily rewrite years of consistent application of this regulation in the context of the permit program, simply because a new engineer assigned to the permit review adopted a different opinion on the applicability of the regulation to the Facility. Rather, IEPA seems to assume that whatever the prevailing opinion of the day is at the agency, that's the way it is, regardless of whether today's opinion is consistent with yesterday's (or indeed, the past 25 years') opinion. IEPA is wrong.

While an administrative agency's findings of fact should not be disturbed unless they are against the manifest weight of the evidence, the rule does not apply where the question involved is one of law, such as the proper interpretation of a statute. In such cases, the governing board's finding is not binding on the court, 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."). It is well-accepted that when interpreting a regulation that a

governmental agency is charged with administering, assuming that the factual circumstances have not changed, the administrative agency is bound by a long-standing interpretation of the regulation. *Central Illinois Public Service Co.*, 165 Ill. App. 3d at 363, 518 N.E.2d at 1359 (citing *United States v. Leslie Salt Co.* 350 U.S. 383, 396 (1956)). Illinois courts have likewise held that administrative agencies are bound by their long-standing policies and customs of which affected parties had prior knowledge. *Id., 165 Ill. App. 3d* at 363, 518 N.E.2d at 1360 (citing *Gatica v. Department of Public Aid*, 98 Ill. App. 3d 101, 423 N.E.2d 1292 (1st Dist. 1981); *Holland v. Quinn*, 67 Ill. App. 3d 571, 385 N.E.2d 92 (1st Dist. 1978)).

The reasons for this policy 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.

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.

C. THE HEARING OFFICER ERRED IN DENYING PETITIONER'S MOTION TO SUPPLEMENT THE RECORD WITH EVIDENCE RELATED TO IEPA'S PRIOR PERMITTING DECISIONS, AND ALSO ERRED BY SUSTAINING IEPA'S OBJECTIONS AS TO ANY DISCUSSION OF IEPA'S PRIOR PERMITTING DECISIONS AT THE HEARING

As a result of Petitioner's appeal of the improper permit conditions, and as required under the Act and applicable Board regulations, IEPA prepared the Record on Appeal and submitted the Record to the Board on April 26, 2007. Absent from the Record, however, were a number of pertinent documents (detailed below) that related to IEPA's many internal discussions over the years as to whether the Facility was in fact entitled to the SO_2 exception.

Upon receipt of the Record, Petitioner reviewed the documents that were included in the Record and found two internal Memoranda that predated the filing of the CAAPP Application on March 7, 1996 which pertain to the issue of whether Petitioner is entitled to the exemption. These documents are a Memorandum with the subject of Request for Legal Interpretation of Rule 214 Subpart K from Don Sutton and Dan Punzak to Robert Sharpe, dated April 13, 1993 (R - 001477-001479) and a Memorandum with the subject of Legal Interpretation of Rule 214 Subpart K, from Rachel Doctors to Kathleen Bassi, dated May 13, 1993 (R - 001474-00176). These internal IEPA documents are clearly relevant to the issue on appeal and were included in the Record by the IEPA as part of the basis for IEPA's permitting analysis and decision. These documents pertain to the issuance of a renewal of the state operating permit N0. 72110935 for the facility (R - 001477). Furthermore, these documents clearly state that the IEPA had questioned the application of the exemption as part of the application for an operating permit in 1973, its subsequent issuance in 1975, and again as part of the subsequent issuance of operating permit renewals in 1978, 1983 (R - 001474). Finally the Request for Legal Interpretation of Rule

214 Subpart K, from Don Sutton and Dan Punzak to Robert Sharpe, dated April 13, 1993, states that: "Attached are copies of former analysis notes and some responses from BFG[9] to inquiries."(R - 001477). These referenced attachments were not included in the Record that was filed by IEPA.

Clearly, these earlier internal IEPA documents contained in the operating permit file relate to the issue of whether the Facility, in the opinion of IEPA personnel, qualified for the SO_2 emission exemption. Petitioner was not aware of the existence of these two Memoranda nor the apparent concern regarding the application of the exception prior to the filing of its CAAPP application. As was established by testimony at the public hearing, these documents were not produced by IEPA in response to a Freedom of Information Act ("FOIA") request submitted by Petitioner to review the operating permit files in advance of the preparation of the CAAPP application in the mid-1990s. (Testimony of D. Giffin, 29:6-30:15). Nor were they produced by IEPA in response to a FOIA request submitted to review the operating permit files as they pertain to the exemption issue which was submitted during the pendency of the CAAPP application when it became apparent that IEPA did not then believe the exemption applied. (Testimony of D. Giffin, 49:11-24).

Upon review of the Record, Petitioner began discussions with the attorney for the IEPA regarding the previous IEPA internal documents from the operating permit files that had not been included in the Record as filed. In lieu of formal discovery pursuant to agreement of counsel, Ms. Carter sent a letter dated October 3, 2007, voluntarily providing a number of documents from the operating permit files pertaining to the process. This letter and its enclosures were

[9] In 1993, the Facility was owned by B.F. Goodrich ("BFG").

attached as Exhibit A to Petitioner's Motion to Supplement the Record. Petitioner requested that Attachment A be included in the Record as a supplement to that which was filed by the IEPA. These documents were clearly relevant to the issue at hand, were referenced in documents included in the Record by IEPA and may in fact have been actual attachments to one such document. Thus, while some of the documents from the operating permit file relevant to the SO_2 emission exemption were included in the Record, the IEPA, in preparing the Record, apparently picked and chose among a group of relevant documents when preparing the Record it submitted. The request to supplement the Record with these documents was denied by the Hearing Officer in an Order dated February 4, 2008.

The Hearing Officer's February 4, 2008 Order denying Petitioner's Motion to Supplement the Record was in error. Under applicable Board regulations for CAAPP permit appeals, the IEPA has the responsibility for preparing the Record, and within 30 days after service of the appeal petition, must file "an answer consisting of **the entire Agency record** of the CAAPP application including the CAAPP permit application, the hearing record, the CAAPP permit denial or issuance letter, and correspondence with the applicant concerning the CAAPP permit application." (emphasis added). 35 Illinois Adm. Code 105.302(f).

Board decisions interpreting the scope of the IEPA's duty to prepare the Record and what it must contain have held that "the entire record" essentially includes everything existing in the IEPA's files that pre-dates the final decision on the permit. *See, e.g., Jack Pease, d/b/a Glacier Lake Extraction v. Illinois Environmental Protection Agency*, PCB 95-118, 1995 WL 314505 (May 18, 1995). Thus, the IEPA is not allowed to pick and choose among documents in its file to determine what it would like to include in the Record, and what it would like to exclude.

Even if the IEPA might intend to argue before the Board that certain documents may not be relevant to the issue on appeal, in that the IEPA did not "rely" on such documents in making its permit decision, such a position is not grounds for excluding such documents. As the Board has stated, "To the extent the [Illinois EPA] did not rely on any such documents when it made its determination, it can make those arguments at the hearing." *Id.*

The Board has also previously held that petitioners have broad latitude in requesting that the Record be supplemented in cases where the Record prepared by the IEPA is incomplete. For example, in *Joliet Sand and Gravel v. Illinois Environmental Protection Agency*, PCB 86-159, 1987 WL 55908 (February 5, 1987), the Board held that:

> To the extent that the [Illinois EPA] has relied upon information beyond that contained in the application, such information must be included in the permit record filed with the Board; if it is not, the applicant may properly submit such information to the Board during the course of the Board's hearing. Additionally, if there was information in the [Illinois EPA's] possession upon which it reasonably should have relied, the applicant may also submit such information to the Board for the Board's consideration.

The specific documents in Exhibit A that Petitioner sought to add to the Record are all part of the IEPA's operating permit file for the Facility. As noted above, these documents relate to the internal discussions and analysis of SO_2 emission exemption. While some documents from the operating permit file were included in the Record, most of the documents in Exhibit A were not. The operating permit program for major sources was replaced by the CAAP program. Not only should these documents have been included in the Record simply due to their presence in the IEPA air pollution permit files, *Jack Pease, supra,* but these documents are of the type that IEPA relied on, or should have relied on, in making its permitting decision. *Joliet Sand and Gravel, supra.*

Even notwithstanding the above, the Record in this case is replete with references to the fact 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. And, contrary to the position taken by the IEPA in briefing Petitioner's Motion, the testimony at the public hearing strongly implied that, in fact, Mr. Punzak had reviewed and relied on the permit files for the prior decisions of the IEPA with regard to the Facility, and specifically, the issue of the application of the SO_2 exception:

> Q. [Please read] [t]he last sentence [of document 1542].
>
> A. Oh, okay. "I have the State operating permit file at my desk to make a copy for you."
>
> Q. So at the time you were reviewing the initial CAAPP application that the company submitted, it appears you did, in fact, have the State operating permit files at your desk and you were offering to make copies for other Agency employees; is that correct?
>
> A. It appears that way.
>
> Q. I show you [document] 1543. It's your memo to Rachel Doctors of the same February 2001.
>
> A. Okay.
>
> Q. In that memorandum you're offering -- you're discussing your '93 analysis and offering to bring it up and discuss it with her?
>
> A. Well, this is where I said we decided to delay our decision on BF Goodrich until the MACT was issued.
>
> Q. If I draw your attention to the first -- I'll read it. "I will be bringing up to your desk shortly several documents related to the above subject. One is my analysis notes from 1993 in which we decided to delay our decision on BF Goodrich until the MACT was issued." That analysis would have been contained in the operating permit records that you had at your desk at that time, correct?

A. I think -- I think I may have put it in my calculation sheet, but I'm not 100 percent sure.

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, 146:19-148:19).

Thus, the hearing testimony of Mr. Punzak seems to indicate 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. Therefore, even under the IEPA's argument, such documents should have been made part of the Record.

At various times, IEPA seems to argue that any records that pre-date the permit application simply are not appropriate documents to have placed in the Record, and also that documents that relate to another permit previously issue somehow are *de facto* excluded from consideration of the present permit. On its face, it somewhat begs logic and common sense that

previous permits for the same facility, using the same processes, would not be consulted by IEPA, if for no other reason, than to maintain consistency from permit to permit as they are renewed or revised. IEPA's position is not only fairly nonsensical, it is also belied by the testimony of Mr. Punzak as referenced above.

Thus, it is evident even from the documents that were incorporated into the Record by IEPA that IEPA was quite concerned over the problem posed by the inconsistent interpretation that it wished to take, even to the point of requesting a legal interpretation. Yet, IEPA attempted to parse out whether such documents were relied on by IEPA with respect to this permit decision, as opposed to all of the prior permits. To argue that these internal discussions are not relevant to the permit proceeding and were justifiably withheld from the Record seems disingenuous at best. Moreover, to the extent that Petitioner has made an issue of the lack of consistency of IEPA's interpretation of 35 Ill. Adm. Code § 214.382(a) as it applied to Petitioner's Facility, it would seem the relevance of that issue should have been fair game at the public hearing.[10] The Hearing Officer, however, relied on his previous ruling on Petitioner's Motion, and excluded any testimony or discussion of the history of IEPA's permitting decisions and prior interpretations of 35 Ill. Adm. Code § 214.382(a), even after the Hearing Officer was asked to reconsider his decision in light of Mr. Punzak's testimony regarding his reliance on the

[10] Counsel for IEPA repeatedly argued that, because IEPA had admitted the inconsistency in its interpretation on the SO_2 exception, any discussion of the permitting history was now superfluous and out-of-bounds at the public hearing. The Hearing Officer erroneously agreed with IEPA's position, and severely limited Petitioner's counsel from his ability to raise this issue at the hearing. (Public Hearing Testimony, 31:4-32:24; 34:13-36:19; 71:1-72:2; 133:6-138:19; 148:20-151:19).

excluded documents. (See Public Hearing Transcript, 148:20-152:24).[11] This decision also was in error, and should be overruled by the Board.

V. CONCLUSION

As set forth above, IEPA does not have the right 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. Such action plainly constitutes rulemaking, which is the purview of the Pollution Control Board, not the IEPA. IEPA simply cannot administratively mandate more stringent standards or requirements than those that exist in the plain language of the SO_2 exception regulation. Moreover, IEPA does not have the unfettered discretion to ignore over 25 years of its own precedent as to the interpretation of this regulation, where the processes and circumstances at the Facility have not changed.

For these reasons, 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.

[11] The Hearing Officer did, however, allow counsel for Petitioner to make an offer of proof of the documents that were attached as Exhibit A to Petitioner's Motion to Supplement the Record. (Public Hearing Testimony, 32:14-33:20).

Respectfully submitted,

EMERALD PERFORMANCE
MATERIALS, LLC

By: _____
One of Its Attorneys

Dated: June 27, 2008

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