BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

IN THE MATTER OF:	)	
	)	
CHRISTIAN COUNTY GENERATION, LLC	)	PSD APPEAL NO. 07-01
	)	
PERMIT NO. 05040027	)	

NOTICE

PLEASE TAKE NOTICE that I have today electronically filed with the Clerk of the Environmental Appeals Board an **APPEARANCE, RESPONSE TO PETITION** and the **AFFIDAVIT OF MR. CHRISTOPHER ROMAINE** on behalf of the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, a copy of which is herewith served upon each of the representatives identified in the attached service list.

Respectfully submitted by,

Robb H. Layman
Assistant Counsel

Date: August 24, 2007
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
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APPEARANCE

NOW COMES Robb Layman and enters his appearance on behalf of the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, in the above-captioned matter.

Respectfully submitted,

Robb H. Layman
Assistant Counsel

Dated: August 24, 2007
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RESPONSE TO PETITION

NOWS COMES the Respondent, the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), and files its Response to the Petition filed by the Petitioner, SIERRA CLUB (hereinafter "Petitioner" or "Sierra Club"), in the above-referenced cause. The Illinois EPA formally requests that the Environmental Appeals Board (hereinafter "Board"), as part of the administrative review tribunal of the United States Environmental Protection Agency (hereinafter "USEPA"), deny the Petition for Review for the reasons set forth below.

I.
INTRODUCTION

The Petition for Review (hereinafter "Petition") and Request for Oral Argument[1] involves a permit issued by the Illinois EPA issued to Christian County Generation, L.L.C., ("CCG") for the construction of an Integrated Gasification Combined Cycle ("IGCC") power plant, to be known as the Taylorville Energy Center, located near Taylorville, Christian County, Illinois.

A. Relevant case history.

CCG submitted an initial permit application to the Illinois EPA on April 14, 2005. The permit application proposed the construction of an IGCC power plant equipped with three gasifiers, two associated gasification cleanup trains, two combustion turbines, a sulfur recovery plant and various other operations. The proposed project will employ Illinois Basin coal as the feedstock for

[1] The Illinois EPA takes no position on the request by Petitioner for an oral argument in this proceeding.

the plant and will operate as a base load power plant generating a nominal net output of 630 MW for distribution to a regional electrical transmission grid. The power plant will also generate roughly 140 MW for internal consumption.

Following preliminary meetings and supplemental information provided by CCG, the Illinois EPA prepared a draft permit for the project, consisting of a state Construction Permit and a formal Approval under the federally-delegated Prevention of Significant Deterioration ("PSD") program of the Clean Air Act ("CAA"). The draft of the Construction Permit/PSD Approval was subsequently issued for public notice and comment on November 27, 2006. A formal document known as a Project Summary accompanied the draft permit, which informed interested members of the public as to significant features of the proposed project.

Public notice of the draft permit and a scheduled public hearing were placed in a local newspaper (i.e., Taylorville Breeze-Courier) on November 27, 2006, December 4, 2006, and again on December 11, 2006. A public hearing was subsequently held in Taylorville, Illinois, on the evening of January 11, 2007. A panel of representatives from the Illinois EPA received comments and addressed various questions from the public regarding the permit application and the draft permit. A written transcript of the public hearing was recorded. *See, Petitioner's Exhibit 4.*[2] The comment period for the draft permit closed on February 10, 2007.

On June 5, 2007, the Illinois EPA issued a Construction Permit/PSD Approval [Permit No. 05040027] to CCG authorizing construction of the proposed IGCC power plant. *See, Petitioner's Exhibit 1.* The Illinois EPA issued a Responsiveness Summary on that same date formally responding to significant public questions and comments about the project proposal and the issued permit. *See, Petitioner's Exhibit 3.*

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[2] All of the documents relied upon in this Response were already identified by the Petitioner in Attachments to its Petition. In the interests of economy, those documents have not been included as exhibits to this Response but, rather, are only referenced herein as "Petitioner's Exhibit __."

Petitioner filed its Petition with the Board on or about July 9, 2007, which challenged the Illinois EPA's permitting decision on two principal grounds. The Board subsequently instructed the Illinois EPA to file a Response to the Petition by August 24, 2007. By separate order, filed August 20, 2007, the Board also directed that USEPA's Office of Air and Radiation ("OAR") and the Office of General Counsel ("OGC") jointly file a brief responding to the issues set forth in the Petition. Following a recent extension of that filing deadline, the brief is now due with the Board on or before September 24, 2007.

B. Statutory background.

The CAA's PSD program principally regulates air pollution in areas of the Nation that are deemed attainment or unclassifiable with respect to the National Ambient Air Quality Standards ("NAAQS"). *See, 42 U.S.C. §7471.* The PSD regulations apply to new or modified sources of criteria pollutants that are established under the NAAQS. Among other things, the regulations require a pre-construction review of such sources to ensure that resulting emissions do not exceed the NAAQS or applicable PSD ambient air quality increments; *40 C.F.R. §52.21(k)*; and a demonstration that subject sources will employ the Best Available Control Technology ("BACT") to minimize emissions for all pollutants for which the source is major. *40 C.F.R. §52.21(j).*

For purposes related to this appeal, the Illinois EPA is a delegated state permit authority who "stands in the shoes" of the USEPA's Administrator in implementing the federal PSD program. *See, 46 Fed. Reg. 9580* (January 29, 1981); *In re Zion Energy, LLC,* PSD Appeal No. 01-01, slip op. at page 2, note 1 (EAB, March 27, 2001). A PSD permit issued by the Illinois EPA is subject to review by the Board in accordance with 40 C.F.R. Part 124.19. *In re Zion Energy, LLC,* at page 2, note 1.

CCG's proposed IGCC power plant is a major source of emissions for nitrogen oxides, sulfur dioxide, carbon monoxide, particulate matter/particular matter of 10 microns or less, and sulfuric

acid mist, as the emissions associated with the project potentially exceed the significance threshold designated under the PSD program for those pollutants. CCG's proposed construction of the IGCC power plant was therefore subject to PSD review for each of the aforementioned criteria pollutants. The proposed project also emits large amounts of carbon dioxide ("CO_2") emissions, a non-criteria pollutant, due to the combustion of the fossil-fuel feedstock.

II.
STANDARD OF REVIEW

While the Board's review of final PSD permit decisions is discretionary, the Board's exercise of such discretion is circumscribed. In accordance with the procedural requirements of 40 C.F.R. Part 124, a petitioner bears the burden of convincing the Board that review is warranted. The Board grants review under two sets of circumstances. First, the decision by the Regional Administrator or delegated state authority may be reviewed if it involves a "finding of fact or conclusion of law which is clearly erroneous." *40 C.F.R. §124.19(a)(1)*. Alternatively, review may be authorized if the decision involves discretionary matters or policy considerations that merit further review. *40 C.F.R. §124.19(a)(2).*

As a general rule, a petitioner who possesses standing to appeal is only permitted to raise issues that have been preserved for appeal. The Board has held that it will not "scour the record to determine whether an issue was properly raised below" but, rather, will expect the Petitioner to shoulder such responsibility. *In re Encogen Cogeneration Facility,* PSD Appeal Nos. 98-22 through 98-24, slip op. at 8 (EAB, March 26, 1999). Among other things, a petitioner must provide specific information that supports its contentions. A petitioner must clearly state its objections and, further, must "explain why the permitting authority's response to those objections is clearly erroneous or otherwise merits review." *Zion Energy, L.L.C.,* PSD Appeal No. 01-01, slip op. at 7 (EAB, March 27, 2001), citing *In re Knauf Fiber Glass, GmbH,* slip op. at 9, (EAB, February 4, 1999) 8 E.A.D.

121. A petitioner cannot simply repeat or restate the arguments presented during the public notice period, but must instead supply information or technical grounds in its petition that demonstrate the merits of administrative review. *See, In re Steel Dynamics, Inc.,* PSD Appeal Nos. 99-4 & 99-5, slip op. at page 89 (EAB June 22, 2000), 9 E.A.D. 165, *citing In re Maui Electric Company,* PSD Appeal No. 98-2, slip op. at 19 (EAB, September 10, 1998) 8 E.A.D. 1.

The Board also requires that "all reasonably available arguments" that support a position advocated by the petitioner must have been raised during the public comment period. *See,* 40 C.F.R. §124.13; *Steel Dynamics, Inc., supra*, slip op. at page 89. A petitioner is also obliged to allege arguments in a manner that are both specific and substantiated. *In re Avon Custom Mixing Services, Inc.,* NPDES Permit App. 02-03, slip op. at 6 (EAB, August 27, 2002), 2002 WL 2005529, 10 E.A.D. 700. These requirements ensure that any issues challenged on appeal are well defined and actually represent "bona fide" disagreements between the petitioner and the permit authority.

The Board frequently defers to regional and delegated permit authorities in its review of permit appeals, especially on matters of a technical nature. *In re Three Mountain Power, LLC,* PSD Appeal No. 01-05, slip op. at 22 (EAB, May 30, 2001), 10 E.A.D. 39. It is a long-standing USEPA policy to favor final adjudication of most permitting decisions at the regional [or delegated state] level. *See, In re MCN Oil & Gas Company,* UIC Appeal No 02-03, slip op. at 6 (EAB, September. 4, 2002) 2002 WL 31030985. As the Board has repeatedly observed, "most permit conditions should be finally determined at the Regional [or State] level" and therefore the power of review will only be employed "sparingly." *See,* 45 Fed. Reg. 33,290, 33,412 (May 19,1980); *accord, In re Zion Energy, L.L.C.,* PSD Appeal No. 01-01, slip op. at 7 (EAB, March 27, 2001), 9 E.A.D. 701.

III.
ARGUMENTS

Petitioner raises two principal arguments in this case. The first issue presented by the Petitioner is a purely legal question concerning the need for a Best Available Control Technology ("BACT") limit for CO2 emissions. The issue branches into various facets but the sum and substance of the issue does not appear anywhere in the public hearing transcript or written comments to the administrative record of this proceeding. Because the issue and supporting arguments were "reasonably ascertainable" at that earlier time, the Petitioner's failure to present them during the comment period is a grounds for the Board to decline consideration of the matter in this appeal. Moreover, even if the Board finds that the issue is preserved for appeal, the Petitioner's advocacy of it hinges on a strained reading of the Supreme Court's decision in *Massachusetts v. EPA,* 127 U.S. 1438, 167 L.Ed.2d 248 (2007) and an equally contorted reading of the PSD program's requirements with respect to pollutants "subject to regulation."

The second issue presented by Petitioner is likewise not preserved for appeal. Petitioner contends that the CO2 emissions from the project were not properly considered in the BACT evaluation for the project. However, the Petitioner all but ignored the Illinois EPA's response to comments regarding the issue in its Responsiveness Summary and failed to substantiate its arguments concerning the need for output-based BACT limits. For these reasons, the Board should decline consideration of the issue. In the event that the Board decides to review Petitioner's arguments in this regard, the Board should nonetheless find that the Illinois EPA's decision rejecting the Petitioner's proposed BACT limits reflected a reasoned judgment that is supported by the Administrative Record.

A. Whether the Illinois EPA erred in its BACT evaluation by not imposing a CO_2 emission limit for the proposed IGCC power plant?

Petitioner challenges the Illinois EPA's permitting decision on the grounds that it does not contain a BACT limit for CO2 emissions. A pivotal part of this challenge rests upon a dubious interpretation of the Supreme Court's recent decision in *Massachusetts v. EPA*, 127, S.Ct. 1438 (2007). Attempting to cast its claim in the warm glow of that ruling, Petitioner exaggerates the breadth of the Court's opinion. The Supreme Court's ruling, while certainly important in its own right, does not speak to issue raised here. Moreover, the Petitioner's abundant reliance on the case is probably only a ploy to enable the Petitioner to raise its underlying argument. Because the argument concerning the meaning of the "subject to regulation" phrase was reasonably ascertainable during the public participation period in the subject proceedings, the Petitioner failed to preserve this first issue for appeal.

Once the Petitioner's implausible reading of the Supreme Court's ruling is dispelled, a light can be shone on Sierra Club's core assertion that a BACT limit must be established for CO2 emissions. The main focus of Petitioner's argument is that CO2 is "subject to regulation" and, hence, CO2 emissions must be addressed with a BACT limit because it is a pollutant that is currently regulated under either the CAA's Title IV requirements or Illinois' State Implementation Plan ("SIP"). Alternatively, Petitioner contends that CO2 is "subject to further regulation" and, thus, must be addressed with a BACT analysis because some regulatory entity might theoretically regulate it in the future. These arguments are the product of wishful thinking, as they lack any semblance of support in the CAA or USEPA's implementing regulations. To that end, the Petitioner fails to demonstrate that the Illinois EPA's failure to set a BACT emission limit was clearly erroneous. The Petitioner fails to identify any "important policy consideration" that warrants the Board's

consideration of this issue as well.[3] For these reasons, as set forth in more detailed arguments below, review of the Petitioner's first issue should be denied.

1. The *Massachusetts v. EPA* decision does not support Petitioner's assertions regarding the applicability of PSD and BACT emission limits.

Petitioner invokes the Supreme Court's *Massachusetts v. EPA* ruling at virtually every turn in the Petition but the decision's relevancy to the present proceeding is remote at best. In its Petition, Sierra Club cites to select portions of the Supreme Court's ruling addressing whether CO2 and at least three other greenhouse gases constitute a type of "air pollutant," as that term is defined by the CAA's general provisions By way of background, USEPA had declined to grant a rulemaking petition, initiated by states and other interested parties under Title II of the CAA, that sought the promulgation of mobile source emissions standards for CO2. In so declining, USEPA argued that greenhouse gases did not fall within the ambit of the "air pollution" definition and that the overall statutory scheme did not evidence congressional intentions to regulate such gases. The Court found otherwise, as aptly demonstrated by Petitioner's quote from the majority opinion: "[B]ecause greenhouse gases fit well within the CAA's capacious definition of 'air pollutant,' we hold that EPA has the statutory authority to regulate the emissions of such gases from new motor vehicles." *Petition at page 3 and 4, citing Massachusetts v. EPA,* 127 S.Ct. at 1462.

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[3] In the Memorandum filed on behalf of CCG in this appeal, CCG's attorneys argue that the Board should not review this issue as a result of policy considerations. Specifically, they claim that the lack of a comprehensive strategy by EPA, Congress and other policy-makers "militate strongly against granting review." *See, Memorandum of Christian County Generation, L.L.C., page 15.* CCG's attorneys contend that the solution to the problem of global warming "cannot be meaningfully addressed by 50 state permit issuers, forming a patchwork quilt of carbon dioxide regulations." *Id.* They also cite extensively from the Illinois EPA's Responsiveness Summary for their argument, including the Illinois EPA's view that current efforts seeking to dictate CO2 reductions through conventional permitting are "capricious" and would pose a "chilling effect" on the development of IGCC and other needed technologies. *Id., citing Petitioner's Exhibit 3, page 6.* The Illinois EPA generally agrees with the thrust of CCG's argument. However, the Illinois EPA will defer to the Board as to whether the Petitioner's first issue poses an important policy issue that sufficiently warrants the Board's review. Accordingly, the primary focus of the Illinois EPA's response to this issue addresses the clearly erroneous standard of the Board's review procedures. *See, 40 C.F.R. §124.19(a)(1).*

Seizing upon these passages, Petitioner hails the Court's ruling as if it blazed new trails into the PSD program and therefore directly controls the outcome of this appeal. Petitioner first summarily concludes that the Court has deemed CO2 emissions "subject to regulation" for purposes of the PSD program. *See, Petition at page 4.* In the same broad stroke, Petitioner goes on to proclaim that the Court's ruling compels PSD permit authorities to assume a legal responsibility of incorporating BACT limits for CO2 into PSD permits. *Id.* According to Petitioner's reasoning, the Illinois EPA erred in not reopening the PSD permit in the wake of the Supreme Court's ruling and, more significantly, failing to establish a BACT limit for CO2.

Petitioner's exuberance is misplaced, as its assertions are not supported by the *Massachusetts v. EPA* decision. The ruling considers the substantive merits of that case in two parts. First, the Court rejected USEPA's argument that it would overstep its statutory authority by regulating CO2 emissions from new mobile vehicles or engines. In holding that CO2 emissions are an "air pollutant" and can be regulated by USEPA under Title II, the Court focused on USEPA's policy arguments for declining the rulemaking petition, not the scientific considerations inherent in a finding that such pollutant "cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare." *See, 42 U.S.C. §7521.* The latter "endangerment clause," as reflected in the language of Section 202(a)(1) of the CAA, is both a statutory command and a critical prerequisite to the promulgation of rules under Title II.

USEPA's alternate rationale for denying the rulemaking petition dealt with the policy reasons that USEPA had articulated as to why the regulation of mobile source emissions under Title II was presently unwarranted. The Court found little room for accommodating those considerations in light of the limited discretion afforded by the statutory scheme of the CAA. In reaching this finding, the

Court stressed that USEPA's discretion under Title II's "endangerment clause" must hew closely to the kind of scientific analysis outlined in the statute's command. The Court stated:

> "EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies. But once EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute. Under the clear terms of the [CAA], EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do."

Massachusetts v. EPA, 127 S.Ct. at 1462. The Court also specifically rejected the argument that uncertainties regarding aspects of global warming justified delay in promulgating regulations until some later time. The majority's opinion observed: "If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether green-house gases contribute to global warming, EPA must say so." *Id.,* 127 S.Ct. at 1463.

While the Court's ruling touches on the parameters of Title II's "endangerment clause," it does not actually address any argument fitting within that construct, if for no other reason than because such events have yet to transpire. As shown, the majority opinion clearly contemplates as much, observing throughout that the necessary prerequisite for Title II rulemaking is a formal USEPA finding of endangerment.[4] CO_2 emissions may be a type of air pollutant, but USEPA has not made a final judgment that they cause "air pollution" under the auspices of Title II or anywhere else in the CAA.[5] This obvious reading of the Court's decision clearly undermines Petitioner's notion that CO_2 emissions are already "subject to regulation" for purposes of PSD.[6]

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[4] This distinction is evident from the Court's framing of the issue: "... the first question is whether §202(a)(1) of the [CAA] authorizes EPA to regulate greenhouse gas emissions from new motor vehicles *in the event* that it forms a 'judgment' that such emissions contribute to climate change {emphasis added}." *Massachusetts v. EPA,* 127 S.Ct. at 1459.

[5] Petitioner appears to find some significance in the fact that USEPA is currently defending litigation for its refusal to adopt performance standards for CO_2 emissions under Section 111 of the CAA. *See, Petition at page 12.* From all appearances, the litigation pending before that federal appeals court is simply a reprising of the arguments raised in

Moreover, the reach of the Supreme Court's decision should be limited to the specific context from which the controversy arose. The ruling addressed the legal adequacy of USEPA's regulatory actions under Title II and, apart from its brief consideration of one of the Act's generally applicable definitions, the majority opinion does not cast a significant shadow beyond the realm of mobile source emissions standards. As such, neither prongs of the Court's analysis can be said to address the applicability of CAA requirements beyond the scope of Title II.

Admittedly, the Court's ruling may offer a thread of support to the Petitioner's overarching arguments presented in this appeal. It stands to reason that a necessary element of Petitioner's case is to demonstrate that CO2 is an "air pollutant;" otherwise the PSD program would not be implicated at all. The *Massachusetts v. EPA* decision satisfies this element; however, any other comparisons must end there. Beyond that sliver of analogy, however, the decision, or even any divination of its broader meaning, fails to enlighten on the subject of Petitioner's arguments. Those arguments, to the extent that Petitioner has preserved a right to raise them here, must stand or fall on existing statutory and regulatory authorization.

2. The issue and related arguments concerning the applicability of PSD was not raised during the public comment process and were reasonably ascertainable.

In its appeal, Petitioner raises the issue and related arguments regarding the need for a BACT emission limit for CO2 emissions. Petitioner must demonstrate that these matters have been properly preserved for appeal. This burden requires a party to show that the issue presented on appeal was brought to the attention of the permit authority during the public comment period. *See, 40 C.F.R.*

Massachusetts v. EPA. To that end, the resolution of that pending appeal will not resolve the issues raised by Petitioner in this appeal any more than the Supreme Court's ruling did so.

[6] Petitioner admits that the absence of emission standards under Sections 111 and 202 of the CAA does not affect the outcome of this issue. *See, Petition at page 11.* The Petitioner states that "EPA's failure, thus far, to establish specific emission limits for carbon dioxide... is not determinative of whether carbon dioxide is "subject to regulation." *Id.* It is difficult to discern how this acknowledgement can be reconciled with Petitioner's earlier insistence that the *Massachusetts v. EPA* ruling held that CO2 emissions are "subject to regulation" and, consequently, that permit authorities are obliged to impose a BACT limit for CO2 emissions in PSD permits. *Petition at page 4.*

§124.13. In particular, a petitioner must have identified "all reasonably ascertainable issues" and must have put forth "all reasonably available arguments supporting [its] position" on or before the conclusion of the public comment period. *Id.*

The Board has previously stressed the importance of this requirement, emphasizing that it is not merely an "arbitrary hurdle" but, rather, is a substantive rule with exacting consequences. *See, In re Indeck-Elwood, LLC,* PSD Appeal No. 03-04, slip op. at 58 (EAB, September 27, 2006), 13 E.A.D. ___. *citing, In re BP Cherry Point,* PSD Appeal No. 05-01, slip op. at 14-15 (EAB, June 21, 2005), 12 E.A.D. ___. In the Board's view, the rule promotes "efficiency and integrity of the overall administrative permitting scheme," *Indeck-Elwood, LLC,* PSD Appeal No. 03-04, slip op. at 58, and its purpose will "ensure that the permitting authority first has the opportunity to address permit objections and to give some finality to the permitting process." *In re Sutter Power Plant,* 8 E.A.D. 670, 687 (EAB 1999). This purpose would not be served by allowing persons to raise objections, or any supporting grounds for the same, for the first time on appeal. It is noteworthy that the Board has not hesitated to deny review for allegations that fail to satisfy the requisite showing, notwithstanding the serious or genuine nature of the allegations. *Cf., Indeck-Elwood, LLC,* (review denied concerning permitting agency's alleged failed to consider use of low-sulfur coal in BACT evaluation); *In re Cherry Point, supra,* slip op. at 12-16 (denying review of permit authority's alleged failure to treat a nearby park as a Class I area).

In this instance, neither the issue nor the supporting legal arguments presented by Petitioner concerning the lack of BACT limit for CO_2 was raised during the public comment process.[7]

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[7] At least two representatives from Petitioner's organization presented comments at the public hearing that was held on January 11, 2007. No comments bearing upon the CO2 BACT limit were expressed at that time. *See generally, Petitioner's Exhibit 4.* Similarly, in written comments submitted to the Illinois EPA, the Petitioner confined its comments to global warming as it related to the federal Endangered Species Act, the collateral impacts analysis, a state-law prohibition against air pollution and the alternatives analysis. *See generally, Petitioner's Exhibit 2.* None of those issues touched, even tangentially, on the CO2 BACT limit issue and/or arguments now raised by Petitioner in its appeal.

Petitioner appears to admit as much, as the Petition lacks any mention of the Administrative Record in connection with this discussion. Instead, Petitioner relies upon the notion, though scarcely detailed, that the issue and supporting arguments pertaining to the CO2 BACT limit was not "reasonably ascertainable" at the time of the public comment period, but was borne instead from the *Massachusetts v. EPA* decision. *See, Petition at page 2.*[8] This contention is nonsense.

An examination of Board cases in this type of inquiry has not revealed any circumstances in which a legal issue and/or arguments were deemed "new" and, thus, not reasonably ascertainable, as a result of an intervening court decision. However, some principles that have guided the Board in its other rulings are instructive. First, the Board has stressed that the burden is on the petitioner to demonstrate that the new issue and/or legal arguments could not have been reasonably ascertained. *Cf, Indeck-Elwood, LLC,* slip op. at 119 (notwithstanding Sierra Club's assertion that newly obtained information revealed deficiencies with the NOx and SO2 BACT limits, EAB declined to consider the issues as they were reasonably ascertainable and not raised in public comment). Secondly, this burden is weightier when the petitioner makes the opposite argument in public comments than is made in the later appeal. *See, In re Dominion Energy Brayton Point, L.L.C.,* NPDES Appeal No. 03-12, 2006 WL 3361084 (EAB, February 1, 2006)(petitioner did not explain why issue regarding the alleged adoption of state water quality standards as the permit's applicable limits were not reasonably ascertainable at the time of the public comment period, especially given that petitioner made the reverse argument in its earlier comments). Lastly, the Board has held that a petitioner's failure to raise an issue is not excusable merely because a petitioner did not learn of the issue until

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[8] The Petitioner states that the issues raised in its appeal were either addressed during the public comment period or, alternatively, were "new" as a result of the Supreme Court's decision in early April 2007. However, the Petitioner does not expressly identify which of the issues are aligned with the separate burdens for preserving issues for appeal. For purposes of this Response, the Illinois EPA has assumed that the CO2 BACT limit issue and its associated arguments are premised on the *Massachusetts v. EPA* ruling, as the latter is mentioned throughout the discussion found in the first half of the Petition.

after the end of the comment period. *In re AES Puerto Rico, L.P.,* 8 E.A.D. 324, n.20 (EAB, May 27, 1999)(argument concerning a study was not preserved for appeal where petitioner's concern had always been in issue but it had not learned of study until after close of public comment; though petitioner's awareness of study was lacking at that time, it "does not mean that the study was not reasonably ascertainable at an earlier date").

In this instance, nothing barred the Petitioner from making its case for the applicability of a BACT limit for CO2 during the public comment period for the draft permit. The elements of the Petitioner's legal construct for the PSD program are drawn from the PSD program's definition of BACT, including the key phrase "subject to regulation," to which Petitioner devotes most of its attention. These elements are unquestionably the same as they were before the Supreme Court handed down its *Massachusetts v. EPA* ruling.

Additionally, Petitioner appears to have originally considered the issue in preparing comments to the draft permit and reached the opposite conclusion. In its comments, Petitioner as much as admitted that CO2 emissions are unregulated pollutants, but stressed that they should be considered under PSD's collateral impacts analysis. *See, Petitioner's Exhibit 2,* page 6; *see also, Memorandum of Christian County Generation, L.L.C., page 6, note 6.*[9] By acknowledging that USEPA does not regulate CO2 emissions, Petitioner's comments betray the legitimacy of the argument now raised on appeal. Moreover, it is reasonable to assume from those comments that the Petitioner considered the various legal postures that could be taken in its case, including in the manner in which the PSD program regulates CO2 emissions.[10]

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[9] The Memorandum filed by CCG's attorneys point out numerous instances in the Petitioner's comments wherein CO2 emissions were characterized as "non-regulated pollutants." This characterization runs counter to the Petitioner's theme that CO2 emissions are already "subject to regulation" and evidences a fundamental flaw in Petitioner's analysis that cannot be cured by merely citing to the *Massachusetts v. EPA* decision.

[10] The notion that the issue was not reasonably ascertainable by Sierra Club at the time of public comment is apparently incongruous with the organization's prior level of involvement in that very litigation. CCG's attorneys shrewdly observe

As mentioned, the Supreme Court's ruling does not speak to, implicitly or otherwise, the issue or the supporting arguments advocated by Petitioner here. Petitioner's concerted efforts to the contrary, the *Massachusetts v. EPA* decision did not widen the expanses of PSD to any and all sources of CO_2 emissions, nor did it intervene with or change settled law in the area of the PSD program. Petitioner trumpets the Court's recognition of CO_2 as an "air pollutant," but, as noted, it erroneously equates the designation of CO_2 as an air pollutant with the requirement that a pollutant be subject to regulation. Beyond some selective excerpts from the majority opinion and the hollow claim that the Supreme Court's ruling changed everything, the Petition offers no explanation as to why the issue of a CO_2 BACT limit was not reasonably ascertainable.

Apparently, Petitioner's reading of the *Massachusetts v. EPA* decision prodded it into thinking anew, or differently, about its strategy for this appeal. All the same, Petitioner cannot claim that a new issue has been presented by construing the Supreme Court's ruling as something it is not. Exaggerating a court ruling and bootstrapping it to an issue not raised in public comments does not sustain a petitioner's burden of showing that an issue is new and therefore was not reasonably ascertainable during public comment. For this reason, the Board should decline consideration of this issue and its attendant arguments.

3. The CO_2 emissions associated with the proposed IGCC power plant are not "subject to regulation" for purposes of the PSD program.

In the event that the Board agrees to hear the Petitioner's issue concerning the need for a CO_2 BACT limit, the principal consideration must be given to the meaning of "subject to regulation" found in both the statutory definition and preconstruction review requirements of the CAA's PSD

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that "Sierra Club treats *Massachusetts* as if it came out of nowhere... but neglects to mention (and failed to mention below) that *it was one of the original parties that filed* [the case] *in the first place, after petitioning EPA five years ago to regulate carbon dioxide under Section 202." See, Memorandum, supra, at page 8.* As such, Petitioner cannot credibly argue that it could not have reasonably ascertained the nature of the issue in this proceeding.

program. *See, 42 U.S.C. §§7479(3) and 7475(4).* Petitioner maintains that the phrase can be afforded at least two possible meanings, both of which would seemingly shore up its contention that CO_2 emissions are "subject to regulation" for purposes of the PSD program. First, Petitioner claims that the term encompasses CO_2 emissions because they are already regulated by either the CAA's Acid Rain requirements or the Illinois SIP. *See generally, Petition at pages 7-10.* Separately, Petitioner finds the language roomy enough to enclose air pollutants that are "capable of being regulated" in the future, thus even pollutants for which no regulatory program is currently in place are apparently beholden to BACT's requirements. *See generally, Petition at pages 10-13.*

Neither of the meanings articulated by Petitioner, however, are plausible interpretations of the statute's "subject to regulation" text. A proper application of the rules of statutory construction points to an altogether different meaning of the phrase than that afforded by Petitioner. Such a meaning is not so open-ended as to be defined by some future, indeterminate rulemaking. Similarly, the term is not so expansive that it covers virtually any form or type of regulation, including diminutive reporting or record-keeping requirements used to obtain anecdotal information.

a. The "subject to regulation" phrase in the PSD program should be governed by its plain meaning and surrounding context.

The "subject to regulation" phrase is contained within the preconstruction review requirements of Section 165(a)(4) of the CAA, as well as the BACT definition found at Section 169(3). *See, 42 U.S.C. §§ 7475(4) and 7479(3) respectively.* The phrase itself is not specifically defined in the CAA. USEPA's regulations implementing the PSD program borrow the same term in its definition of BACT. *See, 40 C.F.R. §52.21(b)(12).* As in the case of the statute, however, the regulations do not directly interpret the phrase and relatively few sources of authoritative guidance can be located that provide helpful meaning to the term.

Given the lack of explicit meaning to be derived from the statute or regulations, the Board's review of the issue should be governed by the rules of statutory construction. In the absence of a specific statutory or regulatory definition, words or phrases are to be accorded their plain or ordinary meaning. *In re Dominion Energy Brayton Point, L.L.C.,* NPDES Appeal No. 03-12, E.A.D. (EAB, February 1, 2006), *citing, In re Odessa Union Warehouse Co-op, Inc.,* 4 E.A.D. 550, 557 (EAB 1993)("[I]n the absence of a statutory or regulatory definition, it is appropriate to use the common meaning of the terms in question"); *In re Sultan Chemists, Inc.,* 9 E.A.D. 323, 331 (EAB 2000)("[I]n construing statutes, words should be interpreted where possible in their ordinary, everyday senses"). The Board frequently turns to the common dictionary definition of words or phrases in order to give meaning to them. *In re Prairie State Generating Station,* PSD Appeal No. 05-05, slip op. at page 27 (EAB, August 24, 2006); *In re Dominion Energy Brayton Point, L.L.C., supra.*

The starting point to the analysis is the lexical meaning. In this instance, the phrase's adjectival component, "subject to," modifies the preceding noun (i.e., pollutant) in the text and serves as language of qualification. Webster's Dictionary offers several distinct uses for "subject" in its adjective form:

> "**1** : falling under or submitting to the power or dominion of another {children ~ to their parents}: as **a** : owing allegiance to or being a subject of a particular sovereign or state {a colony is ~ to the mother country} {a ~ race} **b** : SUBJECTED **c**: OBEDIENT, SUBMISSIVE {be ~ to the laws} **2 a** : suffering a particular liability or exposure {~ to very severe colds} **3** *archaic* : situated under or below : SUBJACENT **4 :** likely to be conditioned, affected, or modified in some indicated way: having a contingent relation to something and usu. dependent on such relation for final form, validity, or significance {democratic representatives whose acts are ~ to discussion and criticism – M.R. Cohen} {a treaty ~ to ratification}."

See, Webster's Third New International Dictionary, (Unabridged, 1981 by G.&C. Merriam Co.). Another dictionary differs only in its descriptive qualities for the term, suggesting *prone* or *disposed*

in describing exposure and offering *dependent* in describing contingency. *See, The American Heritage Dictionary,* 2nd College Edition (1985).

The depiction relating to contingency has the most obvious application here. The essence of the word "subject" is meant to connote a sense of condition or contingency, as where a particular object (or event) is dependent upon the existence or occurrence of something else (object or event) for its operation or effect. Ascribing a contingent-like meaning to the "subject to" language would mean that a BACT level of control for any particular pollutant is *conditioned upon* that pollutant being regulated. This is certainly not an unnatural reading of the text.

Petitioner interprets "subject to" as though BACT can be applied to any pollutant "capable of being regulated." *See, Petition at page 10.* That is to say, Petitioner would have BACT apply equally to both pollutants that are currently regulated and pollutants for which no regulations currently exist. Given the varying depictions of "subject" commonly found in dictionaries, the only example that remotely approximates Petitioner's viewpoint carries with it the meaning of *prone* or *disposed.* While such a construction of "subject to" might be appropriate in some settings, it does not automatically follow that Petitioner's definitional analysis is warranted here.[11] As discussed below, even if the Petitioner's reading of the language is theoretically possible, the language must still be interpreted according to its context.

The meaning of the second prong of the "subject to regulation" phrase must also be examined. "Regulation" serves as an object in the phrase, whose existence, or the occurrence of, gives operation or effect to the word "pollutant." Webster's Dictionary defines it as follows:

> "**1** : an act of regulating or the condition of being regulated {the ~ of her mind} {business suffering from undue ~} **2 a** : an authoritative rule or principle dealing with details of procedure; *esp* : one intended to promote safety and efficiency (as in a school or factory) **b** : a rule or order having the force of law issued by an executive authority of a government usu.

[11] *Cf., People v. Hicks,* 22 Cal. App. 4th 12 (Ca. Ct. App. 1st Dist. 1994)(finding the phrase 'subject to' to be ambiguous).

> under power granted by a constitution or delegated by legislation; as (1) : a piece of subordinate legislation issued by a British administrative unit under the authority and subject to the veto of parliament – compare PROVISIONAL ORDER, STATUTORY ORDER (2) : one issued by the president of the U.S. or by an authorized subordinate – called also *executive order* (3) : an administrative order issued by an executive department or a regulatory commission of the U.S. government to apply and supplement broad congressional legislative enactments. . . "

See, Webster's Third New International Dictionary, supra. Black's Law Dictionary attributes a meaning to the term in the same vein (i.e., "act or process of controlling by rule or restriction"). *Black's Law Dictionary*, Eighth Edition (1990, Thomson-West).

While the phrase "subject to regulation" can easily be understood to mean *something regulated*, its breadth invites some level of textual ambiguity. The word is a generality. It is, at once, both broad and potentially restrained, as its meaning can be either widened or curbed depending upon its application. For example, the term could encompass virtually any and all types of regulation, including the mild-mannered CO_2 monitoring requirements cited by Petitioner. By the same token, the word could arguably embrace a more limited meaning, such as one that compels a BACT emissions limit for only those pollutants for which an emissions standard has been established. Words or phrases are ambiguous if they are "capable of being understood in two or more possible senses or ways." *In re Rochester Public Utilities, citing In re U.S. Army, Fort Wainwright Cent. Heating & Power Plant,* CAA Appeal No. 02-04, slip op. at 21 (EAB, June 5, 2003), 11 E.A.D. 593, *quoting, Chickasaw Nation v. U.S.*, 534 U.S. 84, 90 (2001).

Words cannot always be counted on in statutory construction. Quite often, in fact, the meaning of words and phrases possess more than one meaning depending on their use.[12] For this reason, the search for plain meaning does not end with a review of the definitional qualities of words and phrases but, rather, turns to their surrounding context. The Supreme Court has observed:

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[12] *Cf., Greenbaum v. USEPA,* 370 F.3d 527 (6th Cir. 2004)("most words admit of different shades of meaning, susceptible of being expanded or abridged to conform to the sense they are used," *quoting, Helvering v. Stockholms Enskilda Bank,* 293 U.S. 83, 87, 55 S.Ct. 50 (1934).

> "The "meaning – or ambiguity – of certain words may only become evident when placed in context. *See, Brown V. Gardner,* 513 U.S. 115, 118, 115 S.Ct. 552, 130 L.Ed.2d 462 (1992)("Ambiguity is a creature not of definitional possibilities but of statutory context"). It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view of their place in the overall statutory scheme. *Davis v. Michigan Dept. of Treasury,* 489 U.S. 803, 809, 109 S.Ct. 1500 (1989)."

See, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-133, 120 S.Ct. 1291 (2000). The Board has recognized the same proposition. *See, In re Howmet Corporation,* RCRA Appeal No. 05-04 *et al.,* slip op. at 13-14 (EAB, May 24, 2007)(citing *FDA v. Brown & Williamson Tobacco Corp.* for interpreting entire regulation, not simply the "provision at issue").

To the extent that textual ambiguity exists with each of the separate parts of the "subject to regulation" phrase, its surroundings should be examined. Within the structural setting of preconstruction review requirements and the BACT definition, the language in the phrase plays an important role in determining the scope of BACT applicability. Grammatically speaking, the phrase is meant to modify, or give meaning to, the "pollutant" that is made subject to the BACT requirement. The language defines a particular attribute of a pollutant that, in turn, determines whether BACT will be applied to a project that emits said pollutant. Likewise, the imposition of BACT occurs as a result of an event or occurrence; the construction of a new major source or major modification triggers BACT, as well as the other substantive requirements of PSD. In this context, the various attributes of the BACT definition in Section 169(3) can be seen as conditionally linked to one another, as where one attribute of the BACT definition is made dependent upon the existence or occurrence of something else. Similarly, the BACT obligation set forth in the preconstruction review requirements of Section 165(a)(4) is merely one part of a series of contingencies that determine whether a given major source can commence construction.

Ascribing a meaning of condition or contingency to the "subject to" language is in keeping with the context of the statutory framework of both the BACT definition and the reconstruction

review requirements. It is, in short, a more natural reading of the language than that advocated by Petitioner. By Petitioner's account, construing the "subject to language" to mean *prone to regulation* would all but remove the sense of contingency from this part of the text. That approach, in turn, would give a nearly limitless quality to the "subject to" phrase. Textual ambiguity aside, the notion that BACT should be applied to unregulated pollutants goes against the grain of common experience and would effectively sanction an absurdity. Absurd results are not favored in statutory construction and both the Board and courts are usually reluctant to countenance their creation. *See, In re Harmon Electronics, Inc.*, RCRA Appeal No. 94-4, slip op. at 29, n. 34 (EAB, March 24, 1997); *Gillespie v. Equifax Information Services, L.L.C.*, 484 F.3d 938 (7th Cir. 2007); *Broward Gardens Tenants Association v. USEPA*, 311 F.3d 1066, 55 ERC 1997 (11th Cir. 2002).

The meaning of "subject to regulation" should also be considered in the broader context of other parts of the PSD program. Specifically, the phrase must be examined alongside a related term, "regulated NSR pollutant," that is found in USEPA's regulatory scheme. In contrast to the terminology at issue, that phrase has been specifically defined by USEPA, and its accompanying definition is codified in the PSD regulations. *See, 40 C.F.R. §52.21(b)(50).* The full definition is cited in Petitioner's appeal, seemingly offered to underscore the text's reference to the "subject to regulation" phrase. *See, Petition at page 5.* However, this related term is significant for another reason.

The definition of "regulated NSR pollutant" contains four categories, three of which are pollutants specifically addressed by USEPA under significant rulemaking provisions of the CAA (i.e., NAAQS, NSPS and Title IV). Each of the separate sources of rulemaking authority have provided for the development of substantive emissions standard for the relevant pollutant or precursor. The fourth category of the definition covers "[a]ny pollutant that *otherwise* is *subject to*

regulation under the Act...(emphasis added)" *See,* 40 C.F.R. §52.21(b)(50). This last category is a catch-all provision, illustrated by the use of the word "otherwise," which connotes the existence of other pollutants subject to regulation *in another way* or *in a different manner. See, The American Heritage Dictionary,* 2nd College Edition (1985).

The framework outlined by the three initial categories is obviously one-dimensional, aimed at pollutants for which a substantive emissions standard has been developed. This attribute is significant because it evidences a discrete, regulatory threshold, one in which a performance standard is developed through a formalistic and comprehensive review by USEPA of the latest scientific technologies or preventative methods of pollution control. As discussed below, the attribute is pronounced not only in the definition, but is borne out in USEPA guidance as well.

That each of the three specific references would share a common characteristic lends credence for interpreting the catch-all category in a like manner. Such an approach would not only seem sensible from a grammatical perspective but it is also consistent with principles governing statutory construction. The rule of *ejusdem generis* is a formalistic, yet valuable, tool that essentially construes "general terms" through a window of preceding "specific terms." One federal court described the rule as follows:

> "[w]here general words follow the enumeration of particular classes of things, the general words are most naturally construed as applying only to things of the same general class as those enumerated."

See, American Mining Congress v. USEPA, 824 F.2d 1177, 1189-1190 (D.C. Cir. 1987)(where three specific classes of discarded wastes are accompanied by a fourth category of any "other discarded material," the latter should be interpreted to mean "similar types of waste, but not to open up the federal regulatory reach of an entirely new category of materials"); *cf., Olin Corporation v. Yeargin Incorporated,* 146 F.3d 398, 407 (6th Cir. 1998)(contractual language of indemnity "for property

damage, personal injury or death, or otherwise" requires limiting the residual clause to torts "of a similar kind and character"). When applied here, the principle of *ejusdem generis* suggests that all of the enumerated categories within the "regulated NSR pollutant" phrase are of like kind and, thus, only address pollutants for which a substantive emissions standard exists.

More fundamentally, to inquire as to the meaning of a "regulated NSR pollutant" arguably begs the question of whether a pollutant is "subject to regulation." However, once a pollutant is made "subject to regulation,' it presumably becomes a regulated "NSR pollutant." While the latter phrase may not directly define the former, it does bring it into sharper focus. By outlining the basic types of emission standards to be encompassed within it, the "regulated NSR pollutant" definition supports a less expansive construction of the "regulation" part of the "subject to regulation" phrase. This interpretation reflects upon the overall regulatory scheme and therefore correctly establishes a truer image of the phrase's plain meaning. Contrary to Petitioner's assertion, the plain meaning of the phrase encompasses only substantive emissions standards under the CAA, not all manner of requirements. Further, the plain meaning of the language also applies only to those standards currently in place, not to those potentially developed in the future.

b. The interpretation obtained from the phrase's plain meaning and context is supported by USEPA guidance and case law precedent.

As demonstrated above, the plain language and contextual framework of the PSD regulations support a construction of the "subject to regulation" phrase that reflects only current, substantive emissions standards. At least two supporting legal references can be identified that support this conclusion. The first is a guidance document by USEPA that addressed Title V's definition of regulated air pollutant. The second is a seminal federal appeals court ruling that addressed the scope and applicability of the PSD program.

The relevant guidance document assumes the form of a memorandum, dated April 26, 1993, from Lydia N. Wegman of USEPA's Office of Air Quality Planning and Standards to USEPA's Air Division Director for Regions I-X. The subject of the memorandum is entitled "Definition of Regulated Air Pollutant for Purposes of Title V." The guidance document lists a class of pollutants that are deemed "regulated air pollutants," as that term is specifically defined for purposes of the Title V operating permits program. *See, 40 C.F.R. §70.2.* The document also generally describes the manner in which the class of such pollutants can be altered based on evolving regulations.

Notably, the guidance memorandum purports to limit the Title V program's applicability by narrowly construing the CAA's definition of "air pollutant." The memorandum provides, in pertinent part:

> "Although section 302(g) can be read quite broadly, so as to encompass virtually any substance emitted into the atmosphere, EPA believes that it is more consistent with the intent of Congress to interpret this provision more narrowly. Were this not done, a variety of sources that have no prospect for future regulation under the Act would nonetheless be classified as major sources and be required to apply for title V permits. Of particular concern would be sources of carbon dioxide or methane."

Memorandum, at page 4. The memorandum further provides:

> "As a result, EPA is interpreting "air pollutant" for section 302(g) purposes as limited to all pollutants subject to regulation under the Act. This would include, of course, all regulated air pollutants plus others specified by the Act or by EPA rulemaking."

Id. With an eye towards future implications, USEPA went on to comment that "the 1990 Amendments to the Act did include provisions with respect to carbon dioxide (section 821) and methane (section 603), but these requirements involve actions such as reporting and study, not actual control of emissions." *Id.* This part of the discussion concluded that "[i]f the results of these studies suggest the need for regulation, these pollutants could be reconsidered at that time for classification as pollutants subject to regulation under the Act." *Id.*

The aforementioned portion of the guidance memorandum is certainly intriguing, no less so than because of its explicit consideration of CO2 emissions and its regulatory status across the spectrum of the CAA's programs.[13] The main significance here, however, is with analogy. Similar to the definition of "regulated NSR pollutant" in the PSD program, the memorandum categorizes the pollutants that are treated as "regulated air pollutants" under the Title V program. The marshalling of air pollutants within this framework is made in accordance with the regulatory definition and resembles the approach used in the PSD program, as it likewise is comprised of pollutants for which emissions standards have been promulgated. The memorandum points to this very observation with respect to CO2 emissions. Above all else, the memorandum articulates a use of the phrase that matches the analytical approach being advocated herein. The fact that the guidance document employs that phrase in a broad context, untied to the moorings of the Title V program, only confirms that it speaks to USEPA's understanding as to how the "subject to regulation" phrase should be applied in general.

Based on the Illinois EPA's examination of case law authorities, only one federal court ruling appears to address the meaning of the "subject to regulation" phrase. In *Alabama Power Co. v. Costle,* industry petitioners had appealed USEPA's final regulations implementing PSD in 1978. *See, Alabama Power Co. v. Costle,* 636 F.2d 323 (D.C. Cir. 1979). The D.C. Circuit Court of Appeals reviewed an abundance of issues concerning the original PSD regulations, including those parts of the final rule relating to fugitive dust emissions.

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[13] Petitioner will undoubtedly challenge the continued viability of part of this memorandum in the wake of the *Massachusetts v. EPA* ruling. For its part, the Illinois EPA does not express an opinion as to whether USEPA's narrow interpretation of "air pollutant" for purposes of the Title V operating permits program should still be respected given the expansive reading given to the definition by the Court. But even if the sentiments expressed in the earlier memorandum cannot be directly reconciled with the recent ruling, it would not negate any independent reasons supporting USEPA's action in construing congressional intent surrounding the Title V program. Moreover, it seems clear that the memorandum's reliance upon the Section 302(g) definition is separate and distinct from its discussion of the "subject to regulation" phrase. It is this latter component that is analogous to circumstances here.

In evaluating the validity of a provision exempting fugitive emissions, the appellate court devoted a lengthy footnote to some of the inner-workings of the PSD regulations and New Source Performance Standards ("NSPS") under Section 111 of the Act. *Id.*, 636 F.2d at 370, n. 134. In observing that USEPA could accomplish its intended objectives of the rule by conducting rulemaking under its NSPS authority, the opinion highlighted differences between standards of performance developed under Section 111 and the NAAQS developed under Section 108. Based on those differences, the opinion observed that certain "excluded particulates" could be subject to NSPS emissions standards even though no NAAQS had been developed. Once an NSPS performance standard was promulgated by USEPA for such excluded pollutants, the appellate court observed that "those pollutants become 'subject to regulation' within the meaning of Section 165(a)(4). . . requiring BACT prior to PSD permit approval." *Id.* This interpretation squares with the analysis advanced by the Illinois EPA here.

c. Petitioner's arguments concerning the meaning of the phrase ignore its plain meaning and context, as well as lack supporting legal authority.

As previously noted, Petitioner makes three basic arguments as to why CO_2 emissions from the proposed project are "subject to regulation" under the PSD program. Each of these arguments must fail.

i. CO_2 emissions are not currently "subject to regulation" by virtue of existing requirements implemented by USEPA under its Title IV authority.

Petitioner outlines several requirements promulgated by USEPA under the Acid Deposition Control provisions of the CAA's Title IV relating to the monitoring, record-keeping and reporting of CO_2 emissions from certain emission sources. *See, Petition at pages 7-8, citing 40 C.F.R. Part 75.* Without offering any kind of analysis, Petitioner summarily concludes that these requirements fulfill

the "subject to regulation" phrase under the PSD program and that CO2 emissions are therefore "already regulated" under the CAA. *Id. at page 8.*

Petitioner's argument is specious and unsupported by any source of legal authority. For reasons already explained, the plain language and context of the "subject to regulation" phrase do not hold up Petitioner's slap-dash reasoning. Rather, they reveal that the phrase is meant to contemplate the promulgation of a substantive emissions standard. Because the cited provisions are mere information-gathering requirements under the CAA, they do not constitute a type of substantive emissions standard that triggers the "subject to regulation" phrase of the PSD program.

ii. CO2 emissions are not "subject to regulation" by virtue of the regulatory nuisance provisions of the Illinois SIP.

Petitioner claims that the Illinois SIP provides a source of authority for the regulation of CO2 emissions such that a BACT emission limit must be established under PSD. *See, Petition at page 8.* The argument draws attention to a regulatory provision contained within the State's administrative code of regulations and promulgated by the Illinois Pollution Control Board. The provision is entitled "Prohibition of Air Pollution," and provides:

> "[N]o person shall cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as, either alone or in combination with other source, to cause or tend to cause air pollution in Illinois."

35 Ill. Adm. Code §201.141.[14] Petitioner also makes a point of finding similarities between the State's definition of "air pollution"[15] and the same term defined in the CAA. *See, Petition at page 10.* Because of the close parallels in the language and the Supreme Court's consideration of the

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[14] The provision, which was incorporated into the Illinois SIP as far back as 1972, is nearly identical to language prohibiting certain acts of air pollution under state law. *See, 415 ILCS 5/9(a)(2006).*

[15] The State's Environmental Protection Act defines the term as "the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property." *See, 415 ILCS 5/3.115(2006).* The regulatory definition found in the Pollution Control Board's administrative regulations is identical. *See, 35 Ill. Adm. Code 201.102.*

CAA's term in *Massachusetts v. EPA*, Petitioner concludes that the CO_2 emissions from the proposed project will cause "air pollution," which, in turn, warrants the imposition of a BACT emissions limit because CO_2 emissions are thus so regulated. *Id.*

This argument is flawed on multiple grounds. First and foremost, Petitioner neglects to demonstrate how this issue is lawfully before the Board in this PSD permit appeal. In permit appeals brought under the Clean Air Act's PSD program, the Board's review is governed by the PSD regulations. Issues that are "covered" by the PSD regulations are reviewable; however, issues falling outside of the purview of the regulations do not warrant the Board's review even if they satisfy the Board's other procedural requirements. *See supra, In re: Knauf Fiber Glass, GmbH,* 8 E.A.D. 121, 127 (EAB 1999). The Board has observed that its permit review process for PSD permit appeals "is not an open forum for consideration of every environmental aspect of a proposed project, or even every issue that bears on air quality." *Id.* Unless the permitting issue is an "explicit" requirement of, or "directly relates" to, the PSD program, the Board should refuse to assume jurisdiction in the matter. *Id. at pages 161-162.*[16]

The Illinois EPA does not dispute that the regulatory provision cited by Petitioner is part of the Illinois SIP. It is also acknowledged that SIP-related requirements can be regarded as federally enforceable for purposes of seeking judicial review under the CAA, a principle that is not even alluded to by Petitioner. However, it is not clear from the Petition how the cited SIP provision, not to mention the permit applicant's alleged noncompliance therewith, is a requirement of PSD.

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[16] *See also, In re: Sutter Power Plant,* PSD Appeal Nos. 99-6 and 99-73 at page 6 (EAB, December 2, 1999)(land use planning and emission reduction credits were not governed by PSD regulations); *Metcalf Energy Center, supra* (partial load emissions of certain toxic pollutants held not reviewable under PSD regulations); *In re: Three Mountain Power, LLC,* PSD Appeal No. 01-05, *slip opinion* (EAB, May 30, 2001)(permit condition relating to emission offsets was not covered under PSD program).

Because the Petitioner does not show that the regulatory provision relates to, or is derived from, PSD's requirements, the Board should decline consideration of the issue.

Petitioner also fails to demonstrate why review of the issue is warranted in light of the Illinois EPA's response to comments. As previously noted, a petitioner must explain why the permitting authority's response to those objections is clearly erroneous or otherwise merits review." *Zion Energy, L.L.C.,* PSD Appeal No. 01-01, slip op. at 7 (EAB, March 27, 2001), citing *In re Knauf Fiber Glass, GmbH,* slip op. at 9, (EAB, February 4, 1999) 8 E.A.D. ___. This obligation cannot be sustained by merely repeating an earlier argument but, instead, must affirmatively show why the issue merits review. *See, In re Steel Dynamics, Inc.,* PSD Appeal Nos. 99-4 & 99-5, slip op. at page 89 (EAB June 22, 2000), 9 E.A.D. ___, *citing In re Maui Electric Company,* PSD Appeal No. 98-2, slip op. at 19 (EAB, September 10, 1998) 8 E.A.D. _.

Petitioner raised the substantially same issue in comments submitted to the Illinois EPA during the public comment period. The gist of those comments alleged that the Illinois EPA could not issue a permit in the absence of permit requirements "mitigating the global warming impacts" of the project. *See, Petitioner's Exhibit 2, at page 8.* The legal basis for Petitioner's claim rested on the belief that CO_2 emissions from the proposed project would be emitted "in such quantities" as would cause "air pollution" in violation of the Illinois SIP. *Id.* The comments also postulated that CO_2 emissions, in and of themselves, constitute "air pollution" and that the addition of such pollutants through a permitting action would "cause additional injury to human health and the health of animal and plant life." *Id. at page 9.*

The Illinois EPA responded to this issue in the Responsiveness Summary at considerable length, explaining that the regulatory provision was a nuisance-based mechanism more suited for

purposes of enforcement than regulation or permitting. *See, Petitioners' Exhibit 3, pages 9-10.* The Illinois EPA offered, in pertinent part:

> "The proposition argued in the comment is erroneous in several respects. First, the statutory framework for "air pollution," as cited by the commenter, is geared towards enforcement, not regulation. The language of both the statute and regulation is that of prohibition, whose redress would normally be found in an injunction or other equitable remedy before a court. It is not language that creates enabling authority through which the Illinois EPA could lawfully seek to "mitigate" or regulate the impacts of CO_2 emissions during permitting. Moreover, the concept of a statutory prohibition does not lend itself to partial restraints; the offending conduct is to be prohibited, not mitigated or sanctioned. Given the absence of proven technology to eliminate CO_2 emissions from fossil fuel combustion, it is not clear how the remaining amounts of CO_2 that the commenter would allow from the plant could be judged any less harmful or offending to society if, as alleged, CO_2 emissions are deemed a form of "air pollution." Finally, to the extent that the commenter would have the Illinois EPA itself constrained through such a prohibition, the premise is likewise misplaced. State courts have rejected the notion that the Illinois EPA is subject to enforcement when acting in its established role as a permitting authority."

Id.

In the same response, the Illinois EPA addressed other implications posed by Petitioner's recommended approach. *Petitioners' Exhibit 3, at page 10.* Commenting on some of the legal difficulties of a nuisance-based action, the Illinois EPA observed that Petitioner's argument did not account for the problems with legal proof, especially as to causation and injury. *Id.* The Illinois EPA also noted that the state courts might be reluctant to embrace Petitioner's argument because it contemplated an "unconventional" approach that failed to recognize both the ubiquitous nature of CO_2 emissions and the absence of a current regulatory structure for achieving Petitioner's objective in this permit proceeding. *Id.* The crux of the Illinois EPA's response, implicit in the several passages contained therein, was that any enforcement path available through a nuisance-based action was not an appropriate means of regulating CO_2 emissions through permitting.

In raising this issue, Petitioners do not repudiate any aspect of the Illinois EPA's response to comment. In fact, Petitioners ignore the better part of it. The Petitioner does suggest that the recent

Supreme Court decision rebutted the legal proof problems raised in the Illinois EPA's response.[17] *See, Petition at page 10.* However, this wax on the *Massachusetts v. EPA* ruling will not shine. As previously discussed, the Supreme Court did not prejudge the merits of any decision relating to Title II's endangerment clause, as USEPA has yet to make such a decision. Moreover, the attempted analogy is misplaced. The endangerment clause in Title II, which possesses similar language as that found in the Illinois SIP provision, is part and parcel of a provision designed to develop and implement emission standards to address the endangerment finding. In contrast, the prohibitory language reflected in both the state statute and regulations is an enforcement-related provision that is not a substitute for CO_2 regulations that would support a BACT requirement for CO_2 emissions.

iii. CO_2 emissions are not "subject to regulation" by virtue of being subject to future regulation under the CAA.

The last argument in the Petitioner's discussion of the issue attempts to frame the analysis in terms of future regulation. The Petitioner's contention that the "subject to regulation" phrase means "capable of being regulated," is unavailing. As previously mentioned, the plain meaning of the phrase and its statutory and regulatory context negate the Petitioner's argument.

It should also be noted that the examples cited as support for Petitioner's construction of the phrase are inapposite. Petitioner cites USEPA comments to a Title V rulemaking for the proposition that a "pollutant need not be specifically regulated by a section 111 or 112 standard to be considered regulated." *Petition at pages 10-11, citing 66 Fed. Reg. 59161,* Change to Definition of Major Source (November 27, 2007)(*quoting 40 C.F.R. Part 70*). USEPA's comment was arguably a little

[17] Petitioner makes a point of mentioning the State's efforts to address global warming, including the creation of a Climate Change Advisory Group through executive order. *See, Petition at page 9.* These types of exploratory efforts currently underway in many states do not address the federal law requirements of the CAA which, as here, govern the applicability of a delegated PSD program. Moreover, such efforts do not sanction or otherwise warrant the imposition of CO_2 limits or controls through administrative fiat. As the Illinois EPA indicated in its Responsiveness Summary, the Illinois EPA would prefer that "limits on production outputs or global warming emissions be established by treaty, statute or regulation, rather than by ad-hoc permitting that is limited in scope to new projects and is unable to reach or affect existing sources which contribute the majority of emissions of concern." *Petitioner's Exhibit 3, page 8.*

open-ended but nothing from the text of the public notice evinces an intention by USEPA to depart from its traditional understanding of a regulated pollutant, let alone embrace the radical construction offered by Petitioner. If anything, USEPA simply stopped short in its explanatory reference, not intending to ignore the other means by which a pollutant can become a regulated pollutant under the CAA.

Petitioner also cites to a USEPA memorandum purporting to interpret point sources that are "subject to permits" under the Clean Water Act as meaning that such sources should, in fact, hold a permit. The example does not appear at all analogous to the present matter, if only because it is beside the point. A source that is "subject to" a permit will naturally mean that the source should have a permit. By the same token, a source that is "subject to" some form of emission standard will be required to comply with the standard. Whatever Petitioner's purpose in offering the illustration, it does not warrant construing the "subject to regulation" phrase so broadly as to ignore common sense and the overall scheme of the PSD program.

B. Whether the Illinois EPA erred in its BACT evaluation by not establishing output-based limits in the PSD permit?

The Petitioner also challenges the Illinois EPA's permitting decision on the grounds that it did not establish output-based limits for all regulated PSD pollutants as part of a collateral impacts analysis. Specifically, the Petitioner contends that the Illinois EPA did not properly consider CO2 emissions in the collateral impacts analysis of the BACT evaluation. *See, Petition at page 13-14.* This conclusion apparently stems from the Illinois EPA's failure to include permit conditions for output-based limits correlating with reduced CO2 emissions from the proposed project. Petitioner's argument is lacking in both form and substance.

1. The Petitioner does not demonstrate why this issue should merit review in light of the Illinois EPA's prior response to comments.

The issue of output-based limits was raised by Petitioner in written comments during the public comment period. In those comments, Petitioner observed that even if CO_2 was not a regulated pollutant, the Illinois EPA was obliged to "consider carbon dioxide as a non-regulated pollutant in the BACT analysis." *See, Petitioner's Exhibit 2, page 6.* On that basis, the Petitioner urged the Illinois EPA to impose output-based limits for each pollutant requiring the permit applicant to achieve a "net thermal efficiency at or above 41 percent." *Id. at page 7.* The proposed limits, according to Petitioner, would "minimize" emissions from the collateral impacts associated with CO_2.

The Illinois EPA responded to the Petitioner's comments in two ways. First, the Illinois EPA considered the extent to which the issue of output-based limits was warranted under a collateral impacts analysis. In this regard, the Illinois EPA acknowledged that the consideration of collateral environment impacts in Step 4 of the Top-Down methodology[18] may legitimately include consideration of non-regulated pollutants, including greenhouse gases. *See, Petitioner's Exhibit 3, page 8, citing New Source Review Workshop Manual (Draft 1990) at page B.49.* The Illinois EPA went on to state:

> "...the focus of this analysis is whether the selection of the most effective control alternative is appropriate given the projected collateral or secondary impacts for non-regulated pollutants. As the USEPA's Environmental Appeals Board has said, this focus is "couched in terms of discussing which available technology, among several, produces less adverse collateral effects, and, if it does, whether that justifies its utilization even if the technology is otherwise less stringent." Thus, if a given technology causes collateral impacts on non-regulated pollutants, such impacts may be relevant in selecting the technology best suited for the control of regulated pollutants. However, the collateral consideration of CO_2

[18] USEPA's NSR Workshop Manual contains a "top-down," five-step review process that serves as guidance to permit authorities for evaluating BACT. *See, NSR Workshop Manual at page B.5-9.* The Board has held that the top-down process is not "mandatory" but that it is nonetheless recommended, as it provides a proper framework for evaluating the adequacy of the BACT review and for ensuring consistency. *See, Newmont Nevada Energy Investment, L.L.C., supra, citing In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 183 (EAB 2000).

> emissions does not lead to any changes to or adjustment of the BACT determination made for emissions of PSD pollutants from the proposed plant. Similar to power plants using coal-fired boiler technology, the proposed plant will emit CO_2. However, there is no indication that conventional boiler power plants, including even the latest, high efficiency boiler technologies, are better on a life-of-plant basis for control of CO_2 emissions. As previously mentioned, IGCC technology appears more advantageous than conventional boiler power plants in its potential for collection of CO_2 for sequestration. IGCC technology also has the potential to provide significant improvements in energy efficiency."

Petitioner's Exhibit 3, pages 8-9. The Illinois EPA's response to Petitioner's comment also noted:

> "The consideration of CO_2 emissions in the collateral environmental impacts analysis does not provide leverage to impose requirements on this project related to CO_2 emission, such as out-put based limit based on a net thermal efficiency for the combustion turbines, as this commenter recommended in other comments. The commenter also argues that a cleaner feedstock should be required for the gasifiers as either a complete substitute for coal (i.e., natural gas) or as a blend (i.e., coal with biomass). The commenter relies upon the collateral impacts analysis as a basis to impose both requirements but stops short of identifying the impacts posed by IGCC technology. This erroneously attempts to introduce earlier steps of the Top-Down Process into the collateral impacts analysis."

Id., page 9.

The Illinois EPA's overall response sought to illustrate why Petitioner's comments did not fit into the overall scheme of a collateral impacts analysis. Perhaps Petitioner's focus was concentrated on achieving a certain objective (i.e., a specific limit addressing CO_2 emissions), but the thrust of its comments did not address how collateral impacts from CO_2 emissions should translate into the selection of a different control technology for the proposed project. Such inquiry forms the essence of the collateral impacts analysis. Like a traditional boiler-based power plant, an IGCC plant will generate large amounts of CO_2. However, Petitioner's comments do not indicate that collateral impacts from CO_2 emissions associated with the proposed project necessarily favor the selection of one type of control technology over another. For this reason, the Illinois EPA rejected the notion that consideration of output-based limits must occur within the context of the collateral impacts analysis.

The Illinois EPA's response to the Petitioner's comments also addressed technical and policy-related aspects of the Petitioner's proposed output-based limits. The Illinois EPA observed that Petitioner's comments lacked technical support and could potentially impede the development of the most promising form of CO_2 controls to date. Specifically, the Illinois EPA stated:

> "This comment is not accompanied by any support to show that the recommended limit could be achieved by the proposed plant. Based on the application, the plant would be predicted to have a net thermal efficiency of about 37 percent. Given the developing nature of IGGC technology it would be reasonable for the actual efficiency to be higher, but nothing would suggest that 41 percent efficiency is achievable. In addition, requiring this level of efficiency or any reasonable level of efficiency to be achieved by the proposed plant as initially constructed would be counterproductive for the future capture and sequestration of CO_2. This is because the efficiency requirement would not account for the substantial reduction in net output from the plant that would accompany future capture of CO_2 for sequestration, due to the energy that will be consumed by the equipment for capture and transfer of CO_2."

Petitioner's Exhibit 3, pages 10-11.

The first part of this response addressed the lack of accompanying technical justification for the proposed output-based limits, emphasizing that nothing in the comments actually substantiated the permit applicant's achievability of the limits. The second part of the response identified a relevant policy concern regarding the suitability of the proposed limits as they relate to the capture and sequestration of CO_2 emissions from the plant in the future.

Petitioner has not rebutted any of the explanations presented in the Responsiveness Summary on this issue or offered any reason why the Illinois EPA's response was clearly erroneous. Admittedly, the Petitioner points to some of the Illinois EPA's remarks in the Petition and, at one point, it feigns to turn those remarks into an argument concerning the scope of the Illinois EPA's legal authority. *Petition at page 14.* However, Petitioner clearly does not confront the reasons presented by the Illinois EPA that go to the heart of this issue. In this respect, the Petitioner does not attempt to challenge Illinois EPA's explanation regarding the legal basis for considering the limits in the context of a collateral impacts analysis. Similarly, the Petitioner does not address either the

technical or policy-based considerations that led the Illinois EPA to reject output-based limits for the PSD permit. Petitioner simply reiterated the arguments from its earlier comments. For these reasons, the Board should decline consideration of this issue.

2. The Illinois EPA's decision rejecting output-based limits reflects considered judgment.

In the event that the Board chooses to consider the merits of the Petitioner's issue concerning collateral impacts and the purported need for output-based limits, the Board will examine whether the permit authority's decision can be affirmed based on facts or arguments reflected in the administrative record of the proceeding. In this instance, the Illinois EPA's overall consideration of this issue reflects a considered and well-reasoned judgment that is "rational in light of all the information in the record, including the conflicting opinions." *See, In re Steel Dynamics Inc,* PSD Appeals Nos. 99-4 and 99-5, slip op. at 23, note 16 (EAB, June 22, 2000), *quoting, In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 568 (EAB 1998). As noted, the Illinois EPA's considered approach to the issue rested, in part, upon the Petitioner's purported basis for requiring the consideration of specified output-based limits as part of the collateral impacts analysis. However, the Illinois EPA also considered the technical and policy-related merits for imposing any such limits on the proposed project.

The Illinois EPA's evaluation of the collateral impacts analysis for the proposed project and its response to Petitioner's comment is not "clearly erroneous." For one thing, the Petitioner's argument for output-based BACT limits is not supported by the USEPA's top-down methodology. In the Responsiveness Summary, the Illinois EPA maintained that the Petitioner's comments did not support a consideration of output-based limits as a result of the collateral impacts analysis of the top-down BACT framework. This rationale is confirmed by USEPA's Draft Workshop Manual, whose discussion of the analysis primarily focuses upon an examination of secondary impacts caused by a

given control technology *in comparison to* a less stringent control option. *See, New Source Review Workshop Manual (Draft 1990) at page B.46, B49.* The significance of a collateral impacts analysis thus lies with its ability to "affect the selection or elimination of a control alternative." *Id. at page B.47.*

A review of Board cases examining the nature of the collateral impacts analysis also confirms the appropriateness of this approach. The Responsiveness Summary quoted a Board ruling that emphasized the limited relevancy of the analysis, confining review to the question of which technologies "produce less adverse collateral impact" and whether those impacts are "justified" even though they result in the selection of a less effective technology. *See, Petitioner's Exhibit 3, page 8, quoting In re Dominion Electric Coop,* 3 E.A.D. 779, 792 (EAB 1992). Among other things, the Board recognizes that the underlying purpose of this type of scrutiny is to "temper the stringency of the technology requirements whenever one or more specified collateral impacts – energy, environmental, or economic – renders use of the most effective technology [for a particular PSD-regulated pollutant] inappropriate." *In re Hillman Power Company, L.L.C.,* PSD Appeal Nos. 02-04, 02-05 and 02-06, slip op at __ (EAB July 31, 2002), *quoting, In re Columbia Gulf Transmission Co.,* 2 E.A.D. 824, 826 (EPA Adm'r 1989). The Board also characterizes this type of review as being a "narrow" one and as allowing for "a great deal of discretion" by the permitting authority. *Id.*

Petitioner does not address the issue of the output-based limits in terms of the selection or elimination of control options. As the Illinois EPA explained in its Responsiveness Summary, the Petitioner's analysis "stops short" of identifying the impacts posed by IGCC technology in relation to other control options. Nothing in the Petitioner's argument therefore brings it within the framework of the collateral impacts analysis. From all appearances, Petitioner is simply attempting to force the issue of output-based limits into that framework, as it represents the one area in which

permitting authorities can assess the impact of non-regulated pollutants. For these reasons, the Illinois EPA did not err in refusing to consider the Petitioner's proposed limits in the context of the collateral impacts analysis.

The Illinois EPA's refusal to include output-based BACT limits into the final permit is also not "clearly erroneous." Notwithstanding the Illinois EPA's rejection of Petitioner's argument in the context of a collateral impacts analysis, the Illinois EPA gave passing consideration to the practical feasibility of the recommended limits relative to the proposed project. However, as stated in the Responsiveness Summary, the Illinois EPA could not ultimately conclude that the proposed output-based limits were warranted. Part of this reasoning reflected concerns about the technical basis of support advanced by Petitioner's argument.

In its comments, and again in its argument on appeal, Petitioner provided essentially only one source of data: a table citing particular levels of thermal efficiency for different types of power plants. *See, Petitioner's Exhibit 2, page 7.* The 41.8 percent efficiency cited for IGCC power plants gasifying bituminous coal generally reflects the approximate level of thermal efficiency that is expected for such plants as their technology continues to mature and improve. Using the terminology of USEPA in the *Environmental Footprints and Costs of Coal Based Integrated Gasification Combined Cycle and Pulverized Coal Technologies*, EPA-430/R-06/006, it reflects the likely performance of the "n^{th}" IGCC plant. The numerical value for the net thermal efficiency cited by Petitioner, however, does not actually address the level of efficiency that will be achievable by the proposed plant, given the current status of IGCC technology.[19] It is also commonly recognized that capture and sequestration of CO_2 at a power plant will significantly reduce the net thermal efficiency of the plant, lowering the thermal efficiency by over 10 percent. As such, an IGCC plant

[19] Based on publicly available information, the two IGCC demonstration projects run by the United States Department of Energy (i.e., the Polk and Wabash River plants) have not achieved a net thermal efficiency of 41 percent. Neither of those plants is equipped to capture and sequester CO_2 emissions at this time.

achieving a net thermal efficiency of roughly 40 percent without control of CO_2 could be estimated to achieve a thermal efficiency of no more than 36 percent after CO_2 controls are introduced.

Aside from whether a legal basis exists for imposing a broad-based efficiency requirement as a component of BACT for this particular source, it is not self-evident that the Petitioner's limited technical data supports such a requirement. Petitioner supplied references to NSPS-related data identifying a range of net thermal performance efficiencies and comparisons relates to a regulation that, of necessity, addresses boiler units of different types, sizes and ages. Similarly, those efficiencies contemplate the construction of boiler units being spread out over time and occurring at different sources. To the extent that such information relating to the development of output-based limits is placed in the context of emission standards for a collection of sources, it was within the Illinois EPA's discretion to reject the proposed limits as part of the BACT conditions of a permit for a specific source.

It should also be noted that the final BACT limits in the permit, expressed in lb/mmBTU heat input, were not appealed by the Petitioner in this case. If they are to be functionally recognized as BACT, then the placement of the proposed limits into the permit would require altering the format of those BACT limits so as to introduce another feature involving the operation of the source (i.e., net thermal efficiency). Likewise, the Petitioner's recommended limits would seemingly constitute BACT limits, which require an assessment of a proposed plant's capabilities in meeting the limit on a continuous basis for the lifetime of the plant.[20] For both of these reasons, as well as the novelty associated with IGCC plants, it was entirely appropriate for the Illinois EPA to have required

[20] *Cf., In re Newmont Nevada Energy Inv., L.L.C.,* PSD Appeal No. 05-04, slip op. at 15-19 (EAB, December 21, 2005)(finding that "[a] permit issuer may appropriately consider, as part of its BACT analysis, the extent to which available data in the record evidence the ability to consistently achieve certain emission rates or control efficiencies").

substantial justification from Petitioner's comments before bowing to its demand for the proposed output-based limits.[21]

Under the present circumstances, the burden of persuasion rested with the Petitioner to rebut the scientific findings underlying the Illinois EPA's permitting decision. *See supra, Indeck-Elwood, L.L.C.*, slip op. at page 80, n. 116 ("[O]nce the permitting authority identifies an explanation in the record for the permitting decision, only then does the burden shift to the party challenging the petition to demonstrate that the decision was clearly erroneous"). The Illinois EPA's overall conclusion reflects a finding of scientific uncertainty as to whether the proposed limit could be achieved in practice by the permit applicant. This kind of review is "quintessentially technical" and, in the absence of clear error or other compelling reason warranting review, the Board routinely extends deference to permitting decisions within that context. *In re Metcalf Energy Center,* PSD Appeals Nos. 01-07 and 01-08, slip op. at 12 (EAB, August 10, 2001); *In re Three Mountain Power, LLC,* PSD Appeal No. 01-05, slip op. at 17 (EAB, May 30, 2001). Given the Petitioner's evident failure to substantiate the technical aspects of its argument, deference to the permitting authority in the matter at hand is both reasonable and appropriate.

Lastly, the Illinois EPA's refusal to apply an output-based limit to the BACT provisions of the permit also rested on certain policy considerations. As already mentioned, the specific reason identified in the Responsiveness Summary related to a concern about impeding the future development of CO2 sequestration. An output-based limit could become "counter-productive" to the future capture and sequestration of CO2, as the limit would not address the "substantial reduction in

[21] As discussed in the Standard of Review section of this Response, the Board has held that any right of appeal for permitting decisions must include allegations that are both substantiated and framed in specific terms, especially those appeals that are inherently technical. *In re Avon Custom Mixing Services, Inc.*, NPDES Permit App. 02-03, slip op. at page ___ (EAB, August 27, 2002), 2002 WL 2005529.

net output" resulting from the consumption of energy needed to facilitate the capture and compression of CO2 from such plants. *See, Petitioner's Exhibit 3, at page 11.*

The aforementioned rationale, in conjunction with the lack of technical justification accompanying the comments relating to this issue, was a legitimate consideration. *Cf., Prairie State Generating Station, supra, at pages 43* (reliance upon various policy considerations in considering project alternatives "are legally appropriate and sufficient grounds for IEPA to have decided not to limit the size of the proposed facility or to prohibit construction altogether"). It also dovetailed closely with at least two other policy considerations underlying the Illinois EPA's permitting decision. One such rationale recognized the State's strategic interests in promoting the development of a coal-fired, IGCC plant, given the benefits accruing from the use of abundant Illinois coal, as well as the technology's enhanced energy efficiency and improved environmental performance. *See generally, Petitioner's Exhibit 3, pages 7, 11-12.* The other rationale recognized the State's interests in facilitating the pursuit of energy technologies that are "carbon capture ready." *See generally, Petitioner's Exhibit 3, pages 5, 6-7.*

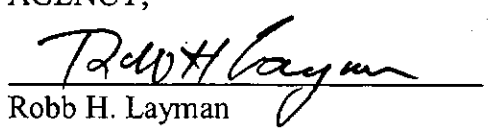
Petitioner's arguments concerning the issue of the collateral impact analysis and output-based BACT limits do not demonstrate clear error. Likewise, the Petitioner does not articulate any reason as to why this issue involves an "important policy consideration" which warrants the Board's review. Accordingly, review of the Petitioner's second issue should be denied.

IV.
CONCLUSION

For the reasons set forth herein, the Illinois EPA respectfully requests that the Board deny review of all issues sought by the Petitioner in this appeal or, in the alternative, order such relief that is deemed just and appropriate.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,



Robb H. Layman
Assistant Counsel

Dated: August 24, 2007
Illinois Environmental Protection Agency
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STATE OF ILLINOIS
COUNTY OF SANGAMON

AFFIDAVIT

I, Christopher Romaine, being first duly sworn, depose and state that the following statements set forth in this instrument are true and correct, except as to matters therein stated to on information and belief and, as to such matters, the undersigned certifies that he believes the same to be true:

1. I am employed by the Illinois Environmental Protection Agency ("Illinois EPA") as a professional engineer. I am the Manager of one of the analysis units in the Division of Air Pollution Control's Permit Section whose offices are located at 1021 North Grand Avenue East, Springfield, Illinois. I have been employed with the Illinois EPA since 1976.

2. As part of my job responsibilities, I assisted in the review of a permit application, Permit Application No.05040027, involving Christian County Generation and its proposed construction of an IGCC power plant electric generating facility to be located near Taylorville, Christian County, Illinois. By virtue of my involvement in the review of the application and the resulting issuance of a state Construction Permit and Prevention of Significant Deterioration Approval, I am familiar with the issues presented in the current permit appeal proceeding.

3. I have reviewed the Illinois EPA's Response to the Petition, including the factual representations and technical details relating to its discussion regarding the output-based BACT limit, and, to the best of my knowledge, find those statements to be true and accurate.

OFFICIAL SEAL
BRENDA BOEHNER
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 11-3-2009

Further affiant sayeth not.

Christopher Romaine

Subscribed and Sworn
To Before Me this 23rd Day of August 2007

Brenda Boehner

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of August, 2007, I did electronically file the following instruments entitled **APPEARANCE, RESPONSE TO PETITION** and **AFFIDAVIT OF MR. CHRISTOPHER ROMAINE** to:

Eurika Durr,
Clerk of the Board
Environmental Appeals Board
U.S. Environmental Protection Agency
1341 G Street N.W. Suite 600
Washington, D.C. 20005

and that on the same day, the 24th day of August, 2007, I did send a true and correct copy of the same foregoing instruments, by First Class Mail with postage thereon fully paid and deposited into the possession of the United States Postal Service, to those representatives identified in the service list.

Robb H. Layman
Assistant Counsel

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