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

IN THE MATTER OF:	)	
	)	
CONOCOPHILLIPS WOOD RIVER REFINERY	)	PSD APPEAL NO. 07-02
I.D. NO. 119090AAA	)	
PERMIT APPLICATION NO. 06050052	)	
	)	

PARTIAL RESPONSE TO PETITION

NOW COMES the Respondent, the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), and files a Partial Response to the Petition for Review (hereinafter "Petition") filed by the Petitioners, NATURAL RESOURCES DEFENSE COUNCIL *et al.*, in the above-referenced cause. This Partial Response addresses two procedural issues raised in the Petition. Given the procedural context of Petitioners' two arguments, it is anticipated that the Environmental Appeals Board (hereinafter "Board" or "EAB") may wish to consider the merits of these two issues at the earliest possible stage of this proceeding.[1] Accordingly, the Illinois EPA offers this Partial Response, including an abbreviated statement of facts and relevant background information, relating to the alleged failure of the Illinois EPA to serve the *Responsiveness Summary* with the notice of permit issuance and the alleged failure of the Illinois EPA to specify, together with accompanying reasons, in the *Responsiveness Summary* the provisions of the draft permit that have changed in the final permit. In the event that the Board does not wish to rule upon these two procedural issues at this time, the Illinois

[1] Respondent respectfully suggests that oral argument is not appropriate given that it would not likely assist the Board in deciding the merits of the two procedural issues briefed in this Partial Response. *See,* The Environmental Appeals Board, *Practice Manual* at 9 (June 2004).

EPA is seeking, as set forth in an accompanying motion, additional time to file a formal Response to all other remaining issues raised in the Petition.

I.
INTRODUCTION

The Petition involves a Construction Permit – National Emission Standards for Hazardous Air Pollutants ("NESHAP") – New Source Performance Standards ("NSPS") – Prevention of Significant Deterioration ("PSD") Approval, Permit No. 06050052, (hereinafter "Permit") issued by the Illinois EPA to ConocoPhillips Wood River Refinery for the construction of the Coker and Refinery Expansion ("CORE") project located at 900 South Central Avenue Roxana, Madison County, Illinois.[2]

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[2] The cover page to the permit identifies the permit as a combined "Construction Permit – NESHAP – NSPS – PSD Approval" and provides the Permittee with authorization to construct emission sources and air pollution control equipment based on the findings and the conditions contained within the permit. The findings and conditions in the permit make reference to both applicable state and federal requirements. The cover page further delineates that "[i]n conjunction with this permit, approval is given with respect to the federal regulations for Prevention of Significant Deterioration of Air Quality (PSD) for the above referenced project. . ." *See, Petitioners' Exhibit 1; see also, In re West Suburban Recycling and Energy Center, L.P.*, 6 E.A.D. 692, 695 (EAB 1996) ("Illinois law...provides for integrated permit review when a facility must obtain construction approval under various state and federal requirements."). In fact, the EAB has been reluctant to review opacity limits in permits combining both state and federal PSD requirements. *See, In re Knauf Fiber Glass, GmbH,* 8 E.A.D. 121, 172 (Feb. 4, 1999) ("We deny review of the issue related to enforcement of opacity limits because this issue is not a requirement of the federal PSD program and the petitioner has not shown that the issue otherwise falls within the purview of the federal PSD program"). The EAB's approach in these cases is consistent with Board precedence providing that the EAB's review is governed by the PSD regulations. "The authority of the Board to review permit decisions is limited by the statutes, regulations, and delegations that authorize and provide standards for such review." *See, In re Carlton, Inc. N. Shore Power Plant,* 9 E.A.D. 690, 692 (EAB 2001) citing 57 *Fed. Reg.* 5,320 (Feb. 13, 1992); *see also,* The Environmental Appeals Board, *Practice Manual* at 2 (June 2004).

The Illinois EPA issued a related Construction Permit – NESHAP – NSPS – PSD Approval, Permit No. 06110049 to ConocoPhillips Company, for the construction of a terminal expansion at 2150 South Delmar Avenue, Hartford, Madison County, Illinois. ConocoPhillips Company proposed changes at its Wood River Products Terminal in order to handle increased product throughput from the CORE project. As the Petitioners did not appeal this related permit, the Respondent will not address the terminal expansion Construction Permit – NESHAP – NSPS – PSD Approval in this filing.

Relevant case history

ConocoPhillips is subject to a Consent Decree entered on January 27, 2005, in *United States of America, et al., v. ConocoPhillips Company, US District Court for the Southern District of Texas,* Civil Action No. H-05-0258; the Consent Decree subjects the source to various requirements to minimize emissions from flaring incidents. ConocoPhillips subsequently submitted a permit application to the Illinois EPA's Division of Air Pollution Control/ Permit Section, on May 15, 2006 for the CORE project. The Illinois EPA subsequently prepared a draft permit for public notice and comment. Public notices were placed in a local newspaper, the Alton Telegraph on March 24, 2007, and again on March 31 and April 7, 2007. A public hearing was held at the Hartford Elementary School in Hartford, Illinois on May 8, 2007. The written comment period remained open until June 15, 2007.

The Illinois EPA fully considered comments prior to simultaneously issuing its Permit to ConocoPhillips and accompanying *Responsiveness Summary* on July 19, 2007. *See, Petitioners' Exhibits 1 and 6.*[3] On the same date, the Illinois sent written notices, by first class mail to persons who participated at the public hearing or who submitted any public comments informing them that the Illinois EPA had issued the Permit. *See, Petitioners' Exhibit 4.* The notices informed participants that copies of the final permit decision and *Responsiveness Summary* could be obtained by contacting the Illinois EPA by telephone (including a toll-free telephone number), facsimile, or electronic mail, by

[3] Certain portions of the Administrative Record relied upon in this Partial Response to Petition are attached hereto and are identified throughout as "Respondent's Exhibits." Where the Respondent has referred to a part of the Administrative Record that was the Petitioners' Exhibit, it is denominated herein as "Petitioners' Exhibit." The Certified Index of the Administrative Record and attached affidavits will be filed in conjunction with the Respondent's Response to Petition.

visiting the local repositories established for the hearing (including the Illinois EPA headquarters, the Illinois EPA Collinsville Regional Office, or the Hartford Public Library), or by visiting the Illinois EPA's website. *Id.* In a fifty-page *Responsiveness Summary*, the Illinois EPA explained its reasons for any changes between the draft permit and the final permit.

Petitioners filed their Petition with the Board on or about August 21, 2007. Based on information known to the Illinois EPA attorney in this case, the Illinois EPA has not received service of the Petition from Petitioners. However, a copy of the Petition and attached exhibits was received from the Board, together with the Board's initial order requesting a response to the Petition, on August 28, 2007.

Statutory background

For purposes related to this appeal, the Illinois EPA is a delegated state permit authority who "stands in the shoes" of the Administrator of the United States Environmental Protection Agency ("USEPA") in implementing the federal PSD program. *See,* 46 Fed. Reg. 9580 (January 29, 1981); *In re Zion Energy, LLC,* 9 E.A.D. 701, 701-702, fn. 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. §124.19. *See, In re Zion Energy, LLC* at 701-702, fn. 1.

II.
STANDARD OF REVIEW

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).

III.
ARGUMENT

A. The Illinois EPA Made the *Responsiveness Summary* Available to the Public

Petitioners make reference to 40 C.F.R. §124.17(a), requiring the permitting authority to issue a response to comments at the time of final permit decision, in support of its argument that the Illinois EPA failed to serve the *Responsiveness Summary* in conjunction with its notice of permit issuance. The Petitioners argue that the Illinois EPA's "failure to provide immediate access" to the *Responsiveness Summary* at the time of notice was a "significant procedural error" as it "could adversely affect appeal rights, which are time limited." *See, Petition at pages 5-6, citing, in part, In re Prairie State Generating Station,* PSD Appeal No. 05-02, slip opinion at 4, fn. 4 (EAB, March 25, 2005), 12 E.A.D. ___ (hereinafter "*Prairie State I*").[4] In conjunction with the argument, Petitioners assert that the first Prairie State decision "strongly implied but [did] not directly reach. . . that the [*Responsiveness Summary*] is indispensable to a determination whether to appeal, and hence must be provided simultaneously with the notice of permit issuance." *See, Petition at page 6, referencing Prairie State I.* With regard to this argument, Petitioners' line of reasoning is specious.

[4] In fact, the ConocoPhillips' notice informed those participants in the public comment period that the documents could not only be obtained by contacting the Illinois EPA by telephone (including a toll-free telephone number), facsimile, mail or electronic mail, but by visiting the local repositories established for the hearing (including the Illinois EPA headquarters, the Illinois EPA Collinsville Regional Office, or the Hartford Public Library), or by visiting the Illinois EPA's website. *See, Petitioners' Exhibit 4.*

At the outset, Petitioners construe 40 C.F.R. §124.17(a) and the *Prairie State I* decision to imply that the *Responsiveness Summary* should have been mailed to participants. In doing so, Petitioners have paid no heed to the clear mandate of 40 C.F.R. § 124.17(c) merely requiring that the "response to comments [shall] be [made] available to the public".[5] Section 124.17(c) does not require that the permitting authority mail copies of the *Responsiveness Summary* to all participants, but merely requires that the response to comments be "available" to the public. *Id.* Similarly, Section 124.15(a) does not ostensibly compel a permit authority to mail or serve a copy of the actual final permit to satisfy the "notice" requirement promulgated therein. Such distinctions are not only suggested by the plain language of the rule, but are equally compelling as a matter of common sense. Had the Board deemed it necessary for a permitting authority to satisfy these basic "notice" requirements by physically placing both the final permit decision and the response to comments in the United States mail, it conceivably would have promulgated rules in Part 124 to that clear effect.

At least one Board decision aptly illustrates this argument. While in the context of a discussion of 40 C.F.R. §§124.15 and 124.19, the *Hillman* decision reveals the Board's reluctance to impose additional requirements not articulated or even contemplated by Section 124.15. Instead, the Board opted for some form of personal notification "reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *See, In re Hillman*

[5] While arguing that the Illinois EPA neglected to "physically provide" the *Responsiveness Summary* in its mailing of the notice of permit issuance in accordance with 40 C.F.R. §124.17(a), Petitioners failed to raise the issue whether the Illinois EPA's notice complied with the requirements of 40 C.F.R. §124.15. As such, the Respondent will not directly address the issue in this filing. *Accord, Prairie State I* slip opinion at 4, fn. 4.

Power, LLC, PSD Appeal Nos. 02-04, 02-05, and 02-06, slip opinion at 6 (EAB, May 24, 2002) (hereinafter "*Hillman*") (Order Directing Service of PSD Permit Decision on Parties that Filed Written Comments on Draft PSD Permit Decision, Denying Motions to Dismiss, and Directing Briefing on Merits) *citing, Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950) (*citing, Milliken v. Meyer,* 311 U.S. 457 (1940)).

Rather than acknowledging the Board's previous exercise of restraint, the Petitioners selectively isolate a portion of a footnote excerpted from *Prairie State I.* In that ruling, the Board admittedly cautioned the Illinois EPA regarding the extent to which it must provide notice to participants of its final deliberations in future permitting matters. The entire context of the footnote is particularly relevant to the instant notice, which was developed to address the Board's guidance in this decision. In its entirety, the footnote provided that:

> Although Petitioners also use January 21 as the date of issuance for the responsiveness summary, the Board questions whether IEPA's action of simply directing those who participated during the comment period to IEPA's website was sufficient to make the responsiveness summary "available to the public" as required by 40 C.F.R.124.17(c). IEPA's actions in this regard presupposes that all persons who comment on permits will have access to the internet. In other analogous circumstances, we have found this not to be a reasonable assumption. *See In re Hillman Power Co. L.L.C.,* PSD Appeal Nos. 02-04, 02-05, and 02-06 (Order Directing Service of PSD Permit Decision on Parties that Filed Written Comments on Draft PSD Permit Decision, Denying Motions to Dismiss, and Directing Briefing on Merits) at 4 (EAB, May 24, 2002) ("Indeed, it is not reasonable to assume that all persons who comment on permits will even have access to the internet."). Moreover, merely notifying commenters by mail that a permit had been issued and directing them to a web site to view copies of the permit itself, as IEPA apparently did here, may not satisfy the obligation under 40 C.F.R. § 124.15 to notify "each person who submitted written comments or requested notice of the permit decision." *See In re Hillman Power Co., L.L.C., supra,* interlocutory order at 3-6 (EAB, May 24, 2002) (finding mere posting on permitting authorities' website to be insufficient to satisfy obligation under 40 C.F.R. § 124.15 to notify commenters of the permit decision), available electronically at http://www.epa.gov/eab/psd-int.loc.ords/hillman.pdf. While it is true that IEPA did give written notice that a permit decision had been issued, a

> commenter would have no way of determining whether to petition for review or the basis for any such petition until he or she had the opportunity to review the actual permit decision. One consideration raised in *Hillman* was whether merely posting information on a website could adversely affect appeal rights, which are time-limited. However, as these issues were not raised in the present matter, we do not address these issues here.

See, Prairie State I slip opinion. at 3-4, fn. 4.

For purposes of both 40 C.F.R. §124.15 and 40 C.F.R. §124.17, the Board's footnote emphasized the need to make material more readily available to the public in the future, beyond a written notice directing individuals to the Illinois EPA's website because it was not necessarily reasonable to assume that everyone has internet access. *Id. citing Hillman*. In light of the comments articulated by the Board in the above-referenced footnote, the Illinois EPA reflected further on the *Hillman* decision prior to notifying public participants of its final permitting decisions. As previously alluded to, in Hillman, the Michigan Department of Environmental Quality ("MDEQ") provided notice to the Michigan Environmental Council ("MEC") of its final permitting decision by merely "posting" the decision on MDEQ's website; no written notice of the posting on the website was ever provided to MEC. *See, Hillman* slip opinion at 2. While the Board agreed with MDEQ that 40 C.F.R. §124.15 "did not specify the means by which notice should be given of final permit decisions", the Board found fault with the MDEQ's notice as it could not be assumed that MEC received notice on the date of posting particularly since everyone does not have internet access. *Id.* at 4. Equally important was the Board's recognition that commenters would have no reason to know when the permit was issued and thus, when to check the agency's web page. *Id.* "This means of 'serving' improperly puts the onus on the interested party to continually check for permit agency developments, lest some portion of the party's time to appeal by lost." *Id.* Again, the

Board found that the lack of specificity in the Part 124 regulations did not suggest that any form of "service" would be sufficient but must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 5-6 citing *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950) (citing *Milliken v. Meyer,* 311 U.S. 457 (1940)). The Board ultimately concluded that MEC "should have been mailed a copy of the final permit decision or provided some other form of personal notification."[6] *Id.* at 6. The Board's ruling reveals a spectrum of options that a permit authority, in its discretion, may turn to in providing notice of its final deliberations. As the Board recognized not just "any notice" is sufficient to fulfill an obligation to alert participants of final agency decisions, however, it does not mean that Petitioners' notion, i.e., the mailing of the *Responsiveness Summary*, is the only option.

After reviewing the Board's guidance in *Prairie State I*, the Illinois EPA subsequently declined to pursue the approach of mailing to each commenter the typically-voluminous final permitting decisions and Responsiveness Summaries that accompany its Construction Permits – PSD Approvals.[7] Neither the Part 124 regulations or Board

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[6] Although, the Board ultimately directed MDEQ to notify through mail or personal service any party similarly situated to MEC, such order was in response to the "less-than-thorough way in which MDEQ attempted to discharge its vital public participation responsibilities." *See, Hillman* slip opinion at 6-7. The Board's action reveals its decision to sanction MDEQ rather than establishing an absolute rule that effectively removes any latitude by the permit authority to satisfy its notice obligations. Moreover, as illustrated above, the same cannot be said of the Illinois EPA as the Hillman MDEQ due to the former's thorough consideration of the Part 124 regulations and related Board precedent in reevaluating the appropriate manner to apprise all participants in the public comment period of its final permitting decision and to make the *Responsiveness Summary* available to the public.

[7] For instance, the instant Construction Permit – NESHAP – NSPS – PSD Approval for the CORE project and terminal expansion and *Responsiveness Summary* combined for a total of approximately 200 pages.

caselaw dictate such a costly and paper-consumptive approach by permitting authorities.[8] However, the Illinois EPA did ultimately choose to modify the earlier notice that was addressed by the *Prairie State I* decision.[9] For instance, the written notice in *Prairie State I* merely directed participants in the public comment period to the Illinois EPA's website to retrieve copies of the final permit decision and the *Responsiveness Summary*. Subsequent written notices informed participants that copies of the final permit decision and *Responsiveness Summary* could be obtained by contacting the Illinois EPA by telephone (including a toll-free telephone number), facsimile or electronic mail, by visiting the local repository established for the hearing, or by visiting the Illinois EPA's website. *Compare, Respondent's Exhibits 3 and 4.*

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[8] Petitioners suggestion that commenters could be provided with an option to notify the permitting authority of their preference to receive the *Responsiveness Summary* "via the permitting authority's web site" runs counter to the concerns articulated by the Board in *Prairie State I,* (*i.e.,* "presupposes that all persons who comment on permits will have access to the internet"). Moreover, such a requirement would hardly minimize the administrative burden to the permitting authority, which would now be required to administer a yet-to-be-created web site for the purpose of determining whether particular commenters submitted an electronic mail request for a copy of the *Responsiveness Summary*.

[9] In fact, the EAB encouraged further discussion between the parties after its issuance of the *Prairie State I* decision. *See, Prairie State I* slip opinion at 7. In accordance with the EAB's order, the Illinois EPA met with representatives of the Sierra Club, American Bottom Conservancy and other Petitioners in the midst of the Prairie State proceedings. This discussion facilitated changes to the Prairie State notice issued on April 28, 2005, as compared to the notice issued on January 21, 2005. *See, Respondent's Exhibit 1; compare also, Respondent's Exhibits 2 and 3.* Consistent with the recent ConocoPhillips notice, the notice issued in the second Prairie State proceeding informed commenters that copies of the final permit decision and *Responsiveness Summary* could be obtained by contacting the Illinois EPA by phone (including a toll-free number), facsimile or electronic mail, by visiting the local repositories, or by visiting the Illinois EPA's website. *Compare, Respondent's Exhibits 3 and 4.* The Petitioners did not challenge the notice underlying the second Prairie State decision as legally deficient. *See, In re Prairie State Generating Company, LLC,* PSD Appeal No. 05-05, *Petition for Review,* dated June 8, 2005.

The Illinois EPA nonetheless recognized the additional time associated with an individual requesting a copy of the final permit and the *Responsiveness Summary* through the mail.[10] In revising the notice, the Illinois EPA sought to maximize access by different individuals depending on their particular circumstances while at the same time minimizing the delay for any individual. For instance, the Illinois EPA's written notice not only provided the Illinois EPA's website, the appropriate staff contact's telephone and facsimile numbers and electronic mail address, but utilized a toll-free telephone number for those individuals that may not have access to long-distance telephone service or may not wish to incur the additional cost of a long-distance telephone call. In addition, consistent with the public comment period, the Illinois EPA made the final permitting decision and *Responsiveness Summary* available at the local repository established for hearing, the local public library. For these reasons, the Illinois EPA more than satisfied the standard of 124.17(c), "the response to comments shall be available to the public". In light of the clear mandate provided by 40 C.F.R. §124.17(c) and because Petitioners have failed to articulate a basis in support of its position that 40 C.F.R. § 124.17(a) requires the response to comments be contemporaneously served with the notice of permit issuance to commenters, review of this issue should be denied.

[10] Petitioners claim it requested a mailed copy of the *Responsiveness Summary* the same day it discovered the issuance of the final permit through the Illinois EPA's website. *See, Petition at page 6; see also, Petitioners' Exhibit 5.* While Petitioners purportedly did not receive a copy of the *Responsiveness Summary* until a week later, the *Responsiveness Summary* was available to the American Bottom Conservancy on the same web site it learned of the Illinois EPA's final permitting decision. *See,* www.epa.gov/region5/air/permits/ilonline.htm (refer to All Permit Records, PSD, New); *see also, Respondent's Exhibit 5.* American Bottom Conservancy's hardship was self-imposed; Petitioner deliberately chose not to avail itself of the *Responsiveness Summary* available to it on the Illinois EPA's website.

B. The Illinois EPA Specified the Changes and the Reasons for the Changes Between the Draft Permit and the Final Permit

In the second argument of their Petition, Petitioners assert that the Illinois EPA committed legal error by not specifying the changes and the reasons for the changes between the draft permit and the final permit, focusing particular attention on the Illinois EPA's inclusion of additional work practices to minimize flaring emissions in the final permit. *See, Petition at pages 7-11.* In support of the argument, Petitioners cite to the Part 124 requirements directing the Regional Administrator (or delegated permit authority) to "specify which provisions, if any, of the draft permit have been changed in the final permit decision and the reason for the change." *Id., citing* 40 C.F.R. §124.17(a). The Petitioners also cite to *In re Indeck-Elwood, LLC,* PSD Appeal No. 03-04, (EAB, September 27, 2006), 13 E.A.D. ___, and *In re City of Marlborough, Mass. Easterly Wastewater Treatment Facility,* NPDES 04-13, (EAB, August 11, 2005) 12 E.A.D. ____ to augment their request urging the Board to vacate the permitting decision and remand the matter to the Illinois EPA.

The *Responsiveness Summary* provides ample support for the Board to conclude that no legal error resulted from the Illinois EPA's issuance of the *Responsiveness Summary.* Contrary to Petitioners' arguments, the changes to the draft permit to incorporate additional work practices to minimize emissions from the flares at the Delayed Coker Unit and the Hydrogen Plant were clearly and appropriately articulated by the Illinois EPA and the reason for the changes were also fully specified.[11]

[11] Petitioners' arguments that the Illinois EPA purportedly failed to identify BACT for the flare emissions and that the flare control measures were not practicably enforceable will be addressed by the Illinois EPA in its full response to the Petition. The Illinois EPA is requesting in its accompanying motion, additional time in which to file its response to the other issues raised in

The *Responsiveness Summary* documents that BACT for CO was determined based on work practices to minimize CO emissions consistent with the approach generally taken in the draft permit. *Petitioners' Exhibit 6,* No. 25. In response to public comments, additional work practices were included in the final permit. These work practices consisted of requiring continuous monitoring (including monitoring related to fuel usage for the pilot and venting of purge gas to the flare); ensuring the existence of redundant waste gas compressor capacity; sampling and analysis of waste gas; managing depressurization during unit shutdowns; preparing and implementing a Flare Minimization Plan investigating flaring incidents; performing root cause analyses; and accompanying recordkeeping and reporting requirements.[12] *Petitioners' Exhibit 6,* Nos. 25, 28, 64, 65, 68, 70, 71, 72, 73, 78, and 84.

The *Responsiveness Summary* made clear that proper flare operation is best addressed by particular work practices that prevent and minimize flaring rather than an emission limit that implicity requires proper flare operation. *Petitioners' Exhibit 6,* No. 24. As the discussion in the *Responsiveness Summary* makes evident, this decision was grounded, in part, on the Illinois EPA's review of similar requirements at other refineries, particularly, the Shell refinery in Martinez, California subject to the Bay Area Air Quality Management District (BAAQMD) regulations. *Petitioners' Exhibit 6,* Nos. 66, 68 and 70; *see also, Petitioners' Exhibit 6,* Nos. 65 and 71 (requiring sufficient redundant waste gas compressor capacity at the Delayed Coking Unit based on its successful use at the

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the Petition. This discussion is limited to the manner in which the Illinois EPA specified the changes to the draft permit, together with accompanying reasons, in its response to comments.

[12] While Petitioners list seven changes to the draft permit, such "list" pertains to one subject, categorically all pertain to various work practices to minimize emissions from the flares at the Delayed Coker Unit and the Hydrogen Plant. *See, Petition at pages 7-8.*

Shell Martinez refinery; however, not requiring the same for the Hydrogen Plant flare due to the unsuitability of its waste gas for recovery). The Illinois EPA further drew on the BAAQMD requirements to minimize the possibility of flaring emissions at the Delayed Coking Unit flare and the Hydrogen Plant flare including requiring the "preparation of and operation pursuant to a Flare Minimization Plan and performance of 'root cause analyses' for significant flaring incidents". *Petitioners' Exhibit 6,* Nos. 65, 68 and 78; *see also, Petitioners' Exhibit 1,* Unit-Specific Condition 4.7.5(a)(vi).

While the Illinois EPA generally chose to follow the requirements of BAAQMD's Flare Monitoring Rule, the Illinois EPA opted not to prescribe the use of certain monitoring techniques and the means by which monitoring must be conducted. *Petitioners' Exhibit 6,* No. 74; *see also, Petitioners' Exhibit 6,* No. 79 (explaining that the use of specific monitoring devices would ultimately be addressed in the processing of a revised Title V application). As articulated by the *Responsiveness Summary,* this decision was based on the low level of flaring expected at the ConocoPhillips refinery compared to the higher level of flaring at the California refineries that led to the promulgation of the BAAQMD Flare Monitoring rules. *Id.* Other differences between the issued permit and the BAAQMD requirements were accounted for by the Illinois EPA. For instance, the Illinois EPA elected not to follow BAAQMD's additional reporting requirements for significant flaring events due to the Illinois EPA's established procedures for reviewing reports. *Petitioners' Exhibit 6,* No. 75. Consequently, the Illinois EPA chose to require detailed reporting of flaring events in conjunction with regular quarterly reporting. *Id.*

Moreover, the Illinois EPA's decision to incorporate additional work practices to minimize possible flaring events at ConocoPhillips was based on its analysis of the federal consent decree governing existing flares at the refinery, stating:

> The BACT/LAER evaluations for the proposed project for flaring was made based on the features in the design of the new Delayed Coker Unit that will act to minimize flaring and in the context of existing requirements that address flaring at the Wood River refinery. In particular, the Consent Decree also includes requirements related to hydrocarbon flaring events, as is relevant to emissions of CO and VOM from flaring. The cause of significant hydrocarbon flaring incidents must be investigated, including performance of root cause analyses, steps must be taken to correct the conditions that cause such incidents, and the number and extent of such incidents must be minimized. Detailed reporting is also required for these incidents. Provisions have been included in the issued permit that make similar requirement[s] applicable for the new flares that would be installed with the proposed project.

Petitioners' Exhibit 6, No. 28. This discussion makes evident that the inclusion of additional work practices for the new flares was meant to be consistent with similar requirements for existing flares in the federal consent decree.

Beyond its review of similar requirements at other refineries and its analysis of the requirements originating from the federal consent decree, the Illinois EPA also grounded its decision on its own technical expertise. The Illinois EPA opted to include additional requirements to manage vessel depressurization during unit shutdowns, as they appeared to be "very effective in minimizing and eliminating" these events as contributors to flaring incidents. *Petitioners' Exhibit 6,* No. 64. At the same time, however, the Illinois EPA chose not to require the construction of stronger process vessels as it had not been "identified as a reasonable or recommended approach to reducing flaring emissions." *Id.*

This over-arching discussion in the *Responsiveness Summary* dispels Petitioners' view that the Illinois EPA "completely failed to comply" with 40 C.F.R. § 124.17(a)(1).

Taken as a whole, the *Responsiveness Summary* generally depicted the nature of the reasons for the changes made to the final permit on this issue. *Petitioners' Exhibit 6,* 24, 25, 28, 58, 64, 65, 66, 68, 70, 71, 72, 73, 74, 75, 78, 79, and 84. Beyond recognizing that the Illinois EPA discussed the changes to the draft permit "in response to individual comments concerning the lack of sufficient controls on the flares," Petitioners fail to acknowledge the remainder of the Illinois EPA's discussion specifying the changes and the reasons for the changes to the draft permit in the body of the *Responsiveness Summary. See, Petition at page 8, citing Petitioners' Exhibit 6,* No. 25. In all likelihood this is because Petitioners have difficulty refuting that an all-encompassing reading of the *Responsiveness Summary* comports with 40 C.F.R. §124.17.

Equally important, Petitioners neglect to cite any legal authority supporting an argument that the Illinois EPA may not specify changes to the draft permit, together with accompanying reasons, in the general body of the response to comments. In fact, the regulations weigh strongly against such an argument. Section 124.17(a) does not require a precise format in which changes between the draft permit and the final permit shall be specified by the permitting authority, but merely requires that such changes be specified within the response to comments. Had the Board deemed it necessary for a permitting authority to satisfy this requirement through the use of a precise format delineating how the changes to the draft permit were to be specified in the response to comments, requirements in Part 124 would likely have been promulgated to that clear effect.

There is very limited Board caselaw in this area. However, it is clear from Part 124 that no fixed requirement exists for the manner in which changes between the draft and the final permit are to be specified. Prior Board rulings suggest that the response to

comments document need only *identify* any additional permit conditions included in the response to comments {emphasis added}, *In re Midwest Steel Division, National Steel Corporation,* 3 E.A.D. 835, ____, fn. 2 (EAB 1992), or *document* the changes to the draft permit {emphasis added}. *In re Dominion Energy Brayton Point, LLC,* NPDES Appeal No. 03-12, slip opinion at 59 (EAB, February 1, 2006), 12 E.A.D. ___. No particular manner of identification or documentation has been required by the Board.[13]

The Illinois EPA must concede that the *Responsiveness Summary* did not contain a list of significant changes between the draft permit and the final permit. As it happened, a review of the draft permit and final permit had been undertaken by the Illinois EPA's technical staff in advance of permit issuance. After reviewing both documents, the Illinois EPA concluded that one significant change had taken place between the draft and final permit, the inclusion of various work practices to minimize emissions from the flares at the Delayed Coker Unit and the Hydrogen Plant.[14] Illinois EPA technical staff seriously contemplated whether to create a "list" for this one

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[13] While determining the extent to which the permitting authority must respond to comments in *NE Hub Partners,* the EAB recognized that the applicable regulation, 40 C.F.R. § 124.17(a)(2), "call[ed] for brevity" in said response. *In re NE Hub Partners, L.P.,* 7 E.A.D. 561, 583 (EAB, May 1, 1998), *citing In re Hoechst Celanese Corp.,* 2 E.A.D. 735, 739, fn. 7 (Adm'r 1989) ("[o]nce the Agency has reached a reasonable and legally proper permit decision based on the administrative record, it need not provide detailed findings and conclusions, but instead must reply to all significant comments . . . as required by 40 CFR § 124.17"). Based, in large part, on the language of 40 C.F.R. § 124.17(a)(2), the EAB found that the "response to comments succinctly addressed the essence of each issue raised by Petitioners". In light of analogous EAB rulings on the manner for accessing the sufficiency of the response to comments and, to that end, some discretion should be afforded to a permitting authority in effectuating the procedural requirements of 40 C.F.R. § 124.17.

[14] *See, footnote 12, supra.*

The Illinois EPA is prepared to offer, as needed, affidavits of various representatives of the Illinois EPA's technical staff to verify the factual assertions set forth in both the Statement of Facts and Argument sections of this Partial Response.

significant change between the draft and final permit in the *Responsiveness Summary* but chose not to based on its understanding of the term to denote multiple items. The Illinois EPA's reasoning is clearly aligned with the meaning typically afforded to the word "list". When given its plain and ordinary meaning, the term means "a record consisting of a series of names, words, or the like; a number of names of persons or things set down one after another; a roll; a register; a catalog." *The Webster Reference Dictionary of the English Language* 557 (1983 Edition, 1983).[15]

The Illinois EPA's conclusion that only one significant change between the draft permit and the final permit had occurred and thus, did not require the inclusion of a list specifying this change was reached in good faith. Again, this is underscored by the Illinois EPA's scrutiny of public comments as indicated by its discussion of the changes and the reasons for the changes between the draft permit and the final permit. *Petitioners' Exhibit 6,* Nos. 24, 25, 28, 58, 64, 65, 66, 68, 70, 71, 72, 73, 74, 75, 78, 79, and 84. These discussions highlight the fact that the Illinois EPA did not intend to offend either the letter or spirit of the Part 124 regulations.

The Illinois EPA nonetheless recognizes that its decision to not provide a list in the *Responsiveness Summary* may not pass as harmless error. A review of the Board's past rulings reveals the significant role an identification of the changes and a discussion of the reasons for the changes between the draft permit and the final permit plays in the appeal process. *See, In re Midwest Steel Division, National Steel Corporation,* 3 E.A.D.

[15] While *Black's Law Dictionary,* not surprisingly, interprets the definition of "list" in the legal arena, its approach likewise suggests a register of multiple items. *Black's Law Dictionary* 932 (6th ed., 1990). (List means a "docket or calendar of cases ready for trial or argument, or of motions ready for hearing. Entering in an official list or schedule; as, to list property for taxation, to put into a list or catalogue, to register, to list a property with a real estate broker. Official registry of voters.").

835, _____, fn. 2 (EAB 1992); *see also, In re Dominion Energy Brayton Point, LLC,* NPDES Appeal No. 03-12, slip opinion at 59 (EAB, February 1, 2006), 12 E.A.D. ___ . These rulings particularly emphasize the need to ensure that the public has an "opportunity to adequately prepare a petition for review and that any changes in the draft permit are subject to effective review." *In re Indeck-Elwood, LLC,* PSD Appeal No. 03-04, slip opinion at 29 (EAB, September 27, 2006),13 E.A.D. ___, *citing In re City of Marlborough, Mass. Easterly Wastewater Treatment Facility,* NPDES Appeal No. 04-13, (EAB, August 11, 2005) 12 E.A.D. ____. For this reason, the Illinois EPA elected to await the outcome of any ruling on these purely procedural matters to the Board rather than risk additional delay while the Respondent briefed the more-substantive matters currently pending before the Board.

Finally, Petitioners contend that the draft permit was so inadequate that it purportedly impacted the public's ability to "inform the agency's decision making" and the Illinois EPA's subsequent inclusion of conditions in response to public comments will allegedly allow these conditions to go unscrutinized. Aside from being unsupported by details, Petitioners' argument completely ignores the Responsiveness Summary and prior decisions by the EAB concerning those issues that may be raised on appeal. *See, Petitioners' Exhibit 6,* No. 25 (BACT for CO was determined based on work practices to minimize CO emissions consistent with the approach generally taken in the permit); *see also, In re Avon Custom Mixing Services, Inc.,* 10 E.A.D. 700, 705 (EAB 2002) (the EAB demands that a petitioner, in identifying its objections to a permit, make its allegations both "specific and substantiated," especially where the object involves the "technical judgments" of the permit authority). A petitioner seeking review must

demonstrate that the issues and/or arguments supporting its position were raised, either by the petitioner or another commenter, during the public comment period. *See,* 40 C.F.R. §124.19; *In re Kendall New Century Development,* 11 E.A.D. 40, 46 (EAB 2003); *In re Avon Custom Mixing Services, Inc.*, 10 E.A.D. 700, 704-705 (EAB 2002). Alternatively, a petitioner may plead that the issue for which review is sought was not "reasonably ascertainable" during the public comment period. *In re Encogen Cogeneration Facility,* 8 E.A.D. 244, 250, fn. 8 (EAB 1999), *citing In re Keystone Cogeneration Systems,* 3 E.A.D. 766 (EAB 1992). Thus, the Board's procedural rules allow the public to scrutinize the permit either during the public comment period or, in the event of subsequent changes to the permit in response to comments, on appeal. As designed by the Board's procedural rules, this permit has been scrutinized both during the public comment period and, for those changes that took place in response to public comments, the public has had an opportunity to scrutinize these changes on appeal.

The Illinois EPA respectfully requests that the Board accept this Partial Response to Petition to address the alleged failure by the Illinois EPA to specify the changes and the reasons for the changes between the draft and the final permit. The Illinois EPA respectfully maintains that its decision to not "list" the additional work practices to minimize flaring events between the draft and final permit is not patently offensive to the applicable Part 124 regulations or the underpinnings of the Board's past rulings. This is particularly true in light of the Illinois EPA's discussion of the changes and the reasons for the change between the draft permit and final permit. *Petitioners' Exhibit 6,* Nos. 24, 25, 28, 58, 64, 65, 66, 68, 70, 71, 72, 73, 74, 75, 78, 79, and 84. For the reasons set forth herein, the Illinois EPA respectfully requests that the EAB deny review of this issue

sought by Petitioners in this appeal or, in the alternative, order such relief that is deemed just and appropriate.[16]

Respectfully submitted,

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[16] The Illinois EPA notes that the Board has remanded some cases requiring adherence with 40 C.F.R. §§ 124.17(a) and 124.18 prior to reviewing the merits of the substantive arguments. *See, Prairie State I*; *In re: Weber #4-8*, 11 E.A.D. 241 (EAB 2003); *In re: Atochem North America, Inc.*, RCRA Appeal No. 90-23, 3 E.A.D. 498 (EAB, January 24, 1991). In other cases, the Board has ordered remand in conjunction with its ruling addressing all of the substantive issues raised on appeal. *See, In re: Amerada Hess Corporation Port Reading Refinery,* PSD Appeal No. 04-03 (EAB, February 1, 2005) 12 E.A.D. ___; *In re: Rockgen Energy Center,* 8 E.A.D. 536 (EAB, August 25, 1999). Should the Board be inclined to delay any ruling on the merits of the procedural issue for a later time, the Illinois EPA is requesting in its accompanying motion, additional time in which to file its Response to the other issues raised in the Petition.

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of September 2007, I did send, by UPS postage prepaid, one (1) original and five (5) copies of the following instrument entitled **APPEARANCE, MOTION FOR EXTENSION OF TIME TO FILE RESPONSE** and **PARTIAL RESPONSE TO PETITION** 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 25th day of September , 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.

Sally Carter
Assistant Counsel
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