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

In re:	)	
	)	
ConocoPhillips Company	)	**PSD Appeal No. 07-02**
	)	
Permit No.: 06050052	)	

MEMORANDUM IN SUPPORT OF PERMITTEE'S MOTION TO PARTICIPATE

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INTRODUCTION

Pursuant to Section III.D.4 of the Environmental Appeals Board ("EAB") Practice Manual,[1] Permittee, ConocoPhillips Company ("ConocoPhillips"), on behalf of itself as Operator of the Wood River Refinery, and WRB Refining LLC as owner, moves the EAB to allow it to participate in the above-captioned proceeding by filing this Memorandum and, if the EAB deems oral argument necessary, presenting oral argument. The EAB "exercises its authority to review [PSD] permits sparingly," *In re Westborough and Westborough Treatment Plant Board*, 10 E.A.D. 297, 303 (EAB 2002), and the Sierra Club and American Bottom Conservancy (collectively, "Petitioner") have not begun to justify a departure from the EPA's "policy favoring resolution of most permit disputes at the Regional level." *Id.*

The permit issuer, the Illinois Environmental Protection Agency ("IEPA"), issued a thorough, 50-page Responsiveness Summary, carefully (and correctly) addressing each of the arguments that Petitioner raised below. Petitioner has failed to show that IEPA's decision was "clearly erroneous," or that the issues raised in the Petition present an "important policy consideration" worthy of the EAB's review. 40 C.F.R. § 124.19(a). Indeed, in many cases Petitioner appears to complain about IEPA's adoption of *Petitioner's own arguments* in issuing the final permit. Moreover, Petitioner attempts to present numerous arguments on appeal that were not raised during the public comment period (but were "reasonably available" before that period closed), and thus are waived. *Id.* § 124.13. Review of the Petition should therefore be denied.[2]

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[1] The EAB Practice Manual directs that "the EAB will provide a permittee with notice that a petition for review has been filed concerning the permittee's permit at the same time that the EAB requests a response from the permit issuer and will entertain a motion by a permittee to participate in the proceeding." (Section III.D.4., page 35).

[2] As we explain in our accompanying Motion for Expedited Consideration, prompt disposition of this appeal is paramount for two reasons. First, ConocoPhillips is subject to an existing Consent Decree that *requires* it to undertake several measures authorized in the challenged permit. *See* Consent Decree, *United States of America and the States of Illinois, Louisiana and New Jersey, Commonwealth of Pennsylvania and the Northwest Clean Air Agency v. ConocoPhillips Company*, Civil Action No. H-05-0258 (S.D. Tex. Dec. 5, 2005) (ConocoPhillips Exhibit 6), available at http://www.epa.gov/compliance/resources/decrees/civil/caa/conocophillips-cd.pdf. Because the PSD ele-

STATEMENT OF FACTS

The IEPA issued the challenged permit[3] on July 19, 2007. *See* Construction Permit/PSD Approval No. 06050052 ("Final Permit") (Petitioner's Exhibit 1).[4] The permit authorizes ConocoPhillips to construct facilities at its Wood River refinery in Roxana, Illinois, to increase both its total crude processing capacity and the percentage of heavy crude the refinery processes. This permit contains state provisions, federal non-attainment new source review provisions, and prevention of significant deterioration provisions. Responsiveness Summary at 2.

IEPA conducted public hearings and received comments on the draft permit from March 23 to June 15, 2007. Petitioner submitted several sets of comments expressing concern about, among other things, emissions of carbon monoxide from flaring, and the PSD provisions included in the draft permit to monitor and control flaring. In response to Petitioner's comments, IEPA added several provisions strengthening the PSD permit conditions on flaring. IEPA then issued the final permit, along with a summary of its responses to public comments, on July 19,

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ments of the permit do not become effective until the resolution of this appeal, 40 C.F.R. § 124.15(b)(2), any delay in resolving this appeal jeopardizes ConocoPhillips' good-faith efforts to comply with the Consent Decree. Second, the implementation of this project will help alleviate continuing gasoline and diesel supply concerns in the Midwest and will reduce U.S. dependence on Middle Eastern sources of crude.

[3] Throughout this Memorandum we use the terms "permit," "permit decision," "PSD permit," or similar phrases to refer *only* to the PSD Approval portion of the Final Permit. The Final Permit is actually a consolidated permit that grants permission to construct certain emission sources and air pollution control equipment (the "Construction Grant") and grants PSD approval for carbon monoxide related activities (the "PSD Approval"). Such integrated permits are commonly issued in states such as Illinois that exercise delegated authority to implement PSD regulations but do not have a SIP-approved PSD program. *See, e.g., In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 162 (EAB 1999) ("permitting authorities that issue PSD permit decisions pursuant to a delegation agreement with EPA include requirements in a permit under both federal and state law. . . . Including such provisions in a PSD permit is legitimate, it consolidates all relevant requirements in one document and obviates the need for separate federal, state, and local permits."). However, "the Board and its predecessors have made clear that even where a permit proceeding involves requirements under both state and federal law, the scope of the Board's review is limited to issues relating to the federal PSD program and the Board will not assume jurisdiction over permit issues unrelated to the federal PSD program." *In re West Suburban Recycling and Energy Center, L.P.*, 6 E.A.D. 692, 704 (EAB 1996). Sections of the Final Permit that are unrelated to PSD are not before the EAB and not available for remand. Unless otherwise indicated, we use the term "permit" to refer *only* to the PSD portions of the Final Permit that are before the EAB.

[4] In the interest of economy, where Petitioner has already included relevant documents as exhibits to its Petition, this Memorandum does not include them as exhibits, but simply references them as "Petitioner's Exhibit _."

2007. Petitioner requested a copy of the Responsiveness Summary on July 21, 2007, and received a copy by mail seven days later. It filed this appeal on August 22, 2007.

SUMMARY OF ARGUMENT

I. Petitioner's leading point is a highly technical, non-substantive claim that the PSD provisions of the permit must be remanded because IEPA did not send Petitioner the Responsiveness Summary "simultaneously" with the notice of permit issuance. But the governing regulations, not quoted by Petitioner, require only that these documents be "issued" on the same day and then made "available to the public"—without specifying a particular day or method for making the Responsiveness Summary "available." *See* 40 C.F.R. § 124.17(a), (c). It is undisputed that the IEPA (1) issued both documents on the same day; (2) simultaneously notified Petitioners of the issuance of the final permit and availability of the Responsiveness Summary, and (3) promptly sent a copy of that summary upon Petitioner's request. This is sufficient to satisfy the requirements of 40 C.F.R. § 124.17(a), (c). Finally, Petitioner has not claimed (let alone shown) that it was prejudiced by this procedure—it had 26 days to review the Summary, and does not suggest that it was unable to develop any particular argument—and there is no basis to Petitioner's suggestion that "*potential* prejudice to the public" justifies a remand. Pet. 6 (emphasis added).

II. Perhaps aware of this difficulty, Petitioner resorts to another non-substantive argument —that the permit must be remanded because the Responsiveness Summary did not "[s]pecify which [PSD] provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change." Pet. 8. This claim, however, is demonstrably false: the Summary *does* describe and give reasons for the changes in the final permit, but in response to the public comments rather than in a separate section—a point Petitioner later *con-*

cedes. Pet. 8 (noting that IEPA addressed the changes "in response to individual comments"). Petitioner's claim is doubly puzzling, moreover, because many of the changes in the final permit were made at *Petitioner's* behest. Petitioner's claim thus amounts to an argument that a party may obtain a remand of a PSD approval on the ground that the agency failed to draft a *separate section* of its Responsiveness Summary that outlines the basis for permit changes that the party *itself* requested. That view is of course untenable. But even if there were something to it, a remand would not be appropriate: under EAB precedent, the procedural defect of failing to explain changes is cured by allowing Petitioner to file a reply brief in the EAB addressing the Region's response to the Petition.

III. Petitioner fares no better in arguing that IEPA failed (1) to conduct a BACT analysis for CO emissions from flaring, (2) to consider existing control technologies that Petitioner proposed, and (3) to require the most stringent control technology or adequately explain its reasons for not doing so. Pet. 12-21. To begin with, Petitioner argued below only that IEPA's BACT analysis was inadequate, not that IEPA failed to conduct such an analysis, so its claims on that score are waived. But in any event, IEPA expressly found that "a Best Available Control Technology (BACT) analysis is required," explained that analysis in its Project Summary, and refined its analysis in response to public comments. Project Summary at 10, 13 (ConocoPhillips Exhibit 2); Responsiveness Summary at 9 (ConocoPhillips Exhibit 1) ("ConocoPhillips must implement Best Available Control Technology (BACT) for emissions of carbon monoxide" from flaring). Thus, there is no basis to Petitioner's bald assertion that IEPA failed to conduct a BACT analysis.

Concerning the merits of that analysis, IEPA rejected ConocoPhillips' proposed emissions limitation, imposed a more stringent numeric limit, required ConocoPhillips to comply

with the New Source Performance Standards for flaring in 40 C.F.R. § 60.18, and imposed detailed work practices to minimize flaring. Indeed, IEPA imposed more stringent work practices than any BACT analysis for flaring currently contained in EPA's RACT/BACT/LAER clearinghouse. Moreover, IEPA not only *considered* all six control measures proposed by Petitioner, it *required ConocoPhillips to implement five of them.* As the Responsiveness Summary states: "the various approaches to minimization of flaring and flaring emissions discussed in [Petitioner's] comment are *required.*" Responsiveness Summary at 28 (emphasis added); Final Permit §§ 4.7.5 and 4.7.6-2. As to the "one exception"—Petitioner's recommendation for using thicker process vessel walls—IEPA explained that this was problematic because it would "entail operation of process vessels at higher pressures." Responsiveness Summary at 28. In short, IEPA adopted the vast majority of Petitioner's proposals and provided a reasonable explanation for its decision to reject a single component of Petitioner's proposal.

IV. Petitioner's fourth argument for a remand is that the PSD provisions of the final permit establish insufficient measures to monitor and assess flaring events. Pet. 22. Here again, however, Petitioner's argument is waived. Petitioner fails not only to cite any authority in support of its position that IEPA should incorporate into the PSD provisions of final permit all aspects of certain Bay Area Air Quality Management District regulations, but also to respond to IEPA's thorough explanation concerning why such regulation would not be appropriate for the Wood River facility. Responsiveness Summary at 32. Each of these failures is fatal to Petitioner's appeal. Moreover, the monitoring provisions—many of which were added at the request of Petitioner—are sufficient to ensure enforceability, and Petitioner offers no reason for concluding that IEPA's technical judgment on video monitoring or the equipment accuracy and sampling

methodology provisions of the Bay Area regulations was clearly erroneous or an important policy consideration requiring reversal by the Board. 40 C.F.R. § 124.19(a).

V. Finally, Petitioner argues that the permit must be remanded because it lacks a BACT emissions limit for greenhouse gases. Petitioner has waived this issue, however, by not raising it during the public hearing and public comment period. Petitioner's sole argument there was that IEPA should have estimated the magnitude of greenhouse gas emissions expected from the project and evaluated them in its consideration of alternatives under the Illinois Administrative Code, *not* that IEPA should have imposed a *Clean Air Act BACT limit* on greenhouse gas emissions, or that such gases are "subject to regulation." Moreover, any suggestion that this argument was not "reasonably ascertainable" until *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), is foreclosed by the fact that *Massachusetts* came down well before Petitioner filed comments below.

Even if the EAB were to examine the merits, however, controlling D.C. Circuit, EAB, and EPA precedent confirms that carbon dioxide is not "subject to regulation" under the Clean Air Act for the simple reason that EPA does not yet regulate it. As the EPA explained in a related appeal just days ago, EPA "has historically interpreted the term 'subject to regulation under the Act' to describe pollutants that are *presently subject* to a statutory or regulatory provision that requires '*actual control of emissions*' of those pollutants." Brief of the EPA Office of Air and Radiation, *In re Christian County Generation, LLC*, PSD Appeal No. 07-01 at 4 (filed Sept. 24, 2007) (ConocoPhillips Exhibit 5); *see also* USEPA, Response to Public Comments on PSD Permit No. PSD-OU-0002-04.00 at 5-6 (August 30, 2007) (ConocoPhillips Exhibit 4) (same). Moreover, any "important policy considerations" involved in this appeal counsel *against* review: EPA, Congress, and many other policy-makers are currently considering comprehensive regula-

tions on emissions of carbon dioxide, and localized, case-by-case permitting decisions would be a poor substitute for a comprehensive approach to this global issue. These national-level policy discussions are meant to include opportunities for public participation and the ability to weigh important, sometimes conflicting goals. Individual projects providing opportunities for economic development and stabilization of energy supplies in the United States or locally in Illinois should not be hindered while these policy discussions are ongoing. Review should therefore be denied.

STANDARD OF REVIEW

The EAB "exercises its authority to review [PSD] permits sparingly," *In re Westborough and Westborough Treatment Plant Board*, 10 E.A.D. 297, 303 (EAB 2002), recognizing that "EPA policy favors final adjudication of most permits at the regional level." *In re Hecla Mining Co., Lucky Friday Mine*, 13 E.A.D. (slip op. at 10), NPDES Appeal No. 06-05 (EAB 2006) (citing 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)). The EAB will grant review of a permitting decision only if it involves a "finding of fact or conclusion of law which is clearly erroneous," or an "exercise of discretion or an important policy consideration which the [EAB] should, in its discretion, review." 40 C.F.R. § 124.19(a)(1)-(2). The petitioner bears the burden of demonstrating the review is warranted. *In re Hecla Mining Co., Lucky Friday Mine*, 13 E.A.D. (slip op. at 10), NPDES Appeal No. 06-05 (EAB 2006).

Moreover, the petitioner may raise an issue on appeal only if it was either "raised during the comment period" or "not reasonably ascertainable" before the close of the public comment period. *In re Avon Custom Mixing Services, Inc.*, 10 E.A.D. 700, 704 (EAB 2002); 40 C.F.R. §§ 124.13 & 124.19(a). Otherwise, the issue is waived. For those issues that have been properly preserved, "the petitioner must then explain with sufficient specificity why a permit issuer's previous responses to those objections were clearly erroneous, an abuse of discretion, or otherwise

warrant Board review." *In re Hecla Mining Co., Lucky Friday Mine*, 13 E.A.D. (slip op. at 10), NPDES Appeal No. 06-05 (EAB 2006). "[I]t is not enough simply to repeat objections made during the comment period." *In re Zion Energy, LLC*, 9 E.A.D. 701, 705 (EAB 2001).

Finally, the EAB accords "broad deference to permitting authorities" on "issues requiring the exercise of technical judgment and expertise." *In re Newmont Nevada Energy Inv., L.L.C.*, 12 E.A.D. (slip op. at 21), PSD Appeal No. 05-04 (EAB December 21, 2005). On "a technical issue like a BACT limit," petitioners bear a particularly "heavy burden [in] obtaining review," *id.*, and must do more than merely "present[] a difference of opinion or alternative theory regarding a technical matter." *In re Town of Ashland Wastewater Treatment Facility,* 9 E.A.D. 661, 667 (EAB 2001) (quoting *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 657 (EAB 1998)). Rather, petitioners must demonstrate that the permitting authority's technical analysis was "clearly erroneous" or involves an "exercise of discretion or an important policy consideration which the [EAB] should review in its discretion." 40 C.F.R. § 124.19(a).

ARGUMENT

I. IEPA Properly "Issued" and Made "Available to the Public" Its Responsiveness Summary.

Petitioner's leading argument is based not on the merits, but on a procedural claim of the most technical variety. The PSD portions of the permit must be remanded, Petitioner says, because IEPA did not "simultaneously" provide the Responsiveness Summary together with the notice of permit issuance. Pet. 6. But Petitioner has not shown (or even claimed) that it was prejudiced by the manner of publication that IEPA used—Petitioner had nearly a month to review the Responsiveness Summary—and nothing in the governing regulations or EAB precedent requires "simultaneous" service of the Responsiveness Summary and notice of permit issuance.

To the contrary, the regulation relied upon (but never quoted) by Petitioners says that the permitting authority is (1) "required to *issue* a response to comments when a final permit is issued," and that (2) "[t]he response to comments *shall be available to the public*." 40 C.F.R. § 124.17(a), (c) (emphasis added). Nothing in the regulations, however, specifies *when* or *how* the response should "be available to the public." Indeed, the fact that the regulations require same-day "issu[ance]" of the response but say nothing about when or how the response should be made "available to the public," strongly suggests that "same-day availability" is *not* required. At the very least, nothing in the regulation suggests that the agency must mail its response to comments simultaneously with the notice of final permit issuance, to each and every participant in the permitting process. (Participants at a public hearing are frequently identified in the transcript of hearing by name only, or by organization, without U.S. mail contact information; and many such participants do not file written comments at all.)

IEPA therefore satisfied its duty under this regulation by (1) issuing the final permit, notice of issuance, and Responsiveness Summary on the same day (July 19, 2007); and (2) notifying Petitioners of the final permit issuance, explaining in the notice how to obtain a copy of Responsiveness Summary, and promptly sending a copy of that summary upon Petitioner's request. Petitioner requested a copy of the Responsiveness Summary on the same day that the permit was issued, and received its copy by mail seven days later. Moreover, the notice indicated that the Responsiveness Summary was available on IEPA's and USEPA's websites, Petitioner's Exhibit 4, and Petitioner has not explained why (or alleged that) it could not have obtained the Responsiveness Summary even earlier online.

In re Prairie State Generation Station, 12 E.A.D., PSD Appeal No. 05-02 (EAB, Mar. 25, 2005), the lone authority relied on by Petitioner, confirms that this is a proper procedure. As

Petitioner concedes, *Prairie State* did not require the permitting authority to provide the Responsiveness Summary together with the notice of permit issuance. Pet. 6. Rather, the Board ruled that an agency must "fully compl[y] with the requirement to give adequate and timely consideration to public comments at the time of issuing the final permit decision." *Prairie State*, 12 E.A.D. (slip op. at 6). The holding addressed only the requirement that IEPA *issue* its response to comments at the same time it issues the final permit—not when or how an agency must make its response "available to the public."

The problem in *Prairie State* was that IEPA issued the Responsiveness Summary seven days after it issued the final permit. *Id.* at 2. Here, however, Petitioner does not dispute that IEPA issued the Responsiveness Summary *on the same day* as the final permit and notice of final permit issuance. Furthermore, in *Prairie State*, the only way the public could access the Responsiveness Summary was via IEPA's website. *Id.* at 3. Here, not only was the Responsiveness Summary available on the website, but IEPA also explained in the notice of permit issuance how the public could obtain a physical copy, and promptly sent Petitioners a copy of the Responsiveness Summary when they requested it. This procedure fully complies with federal regulations and *Prairie State*.[5]

In any event, not only did IEPA properly make the Responsiveness Summary available to the public, Petitioner has not attempted to show that it suffered any prejudice. Although Petitioner complains that it had "a mere 23 days" to file its petition, it does not suggest that this was insufficient time to prepare a petition. Pet. 6. Nor does it allege that it was unable to obtain the Responsiveness Summary even earlier via IEPA's website. Rather, Petitioner argues that mere "*potential* prejudice to the public" is enough to justify a remand. *Id.* (emphasis added). More-

[5] Moreover, to ConocoPhillips' knowledge, IEPA has never mailed its responsiveness documents simultaneously with the notice of permit decision, so the procedure here was apparently consistent with longstanding IEPA practice.

over, Petitioner fails to disclose that it actually had 26 days to file the petition, not 23. Because IEPA served the notice of permit issuance through the mail, Petitioner had an extra three days to file a petition for review, 40 C.F.R. § 124.20(d), and it used every one of them. (IEPA served the final permit on July 20, and Petitioner filed 33 days later on August 22.) This 26-day period was ample time to file their petition for review, and Petitioner does not suggest that it was unable to develop any particular argument on appeal on account of the alleged shortfall.[6] A remand would therefore be inappropriate quite apart from whether IEPA complied with federal regulations, which, as discussed above, it did.

II. IEPA Adequately Specified the Changes to the Draft Permit in the Responsiveness Summary.

Petitioner's next (non-substantive) argument is that the PSD portions of the permit must be remanded because the Responsiveness Summary failed to "[s]pecify which [PSD] provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change." Pet. 8 (quoting 40 C.F.R. § 124.17(a)(1)). This claim, however, is not only demonstrably false, but puzzlingly ironic: Many of the changes between the draft and final permits were made in direct response to Petitioner's comments. To cite but one example, the final permit adopted Petitioner's proposals for minimizing flaring, and the Responsiveness Summary explains that "the various approaches to minimization of flaring and flaring emissions discussed in [Petitioner's] comment are *required*." Responsiveness Summary at 28 (emphasis added); Final Permit §§ 4.7.5 and 4.7.6-2. Thus, Petitioner (again) cannot point to any prejudice from IEPA's decision—unless IEPA's decision to adopt Petitioner's comments amounts to prejudice.

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[6] Petitioner used the full time period prescribed by 40 C.F.R. § 124.20(d), but fails to cite that regulation in its Petition—and still misstates what the regulation allows. Petitioner then essentially asks the Board to alter 40 C.F.R. §§ 124.17 and 124.20 in a permit appeal, rather than in a proper notice-and-comment rulemaking, based on *dictum* in a Board decision (*Prairie State*) that is clearly distinguishable from this case (because here IEPA issued the notice of final permit decision and Responsiveness Summary on the same day).

Contrary to Petitioner's claims, the Responsiveness Summary *does* describe the changes between the draft and final permit and *does* give reasons for those changes—it simply does so throughout its responses to public comments, rather than in a separate section of the document. *See, e.g.*, Responsiveness Summary, responses to comment numbers 25, 28, 58, 64-66, 68, 70, 72-75, 78-79 and 99. IEPA's Brief further demonstrates how the Responsiveness Summary "clearly and appropriately articulated [changes in the final permit,] and the reason[s] for the changes were also fully specified." IEPA Br. at 12. In fact, Petitioner *concedes* that IEPA addressed these changes "in response to individual comments concerning the lack of sufficient controls on flares." Pet. 8. Petitioner simply—and inaccurately—dismisses those responses as being made "only in passing." *Id.*.

Nothing in the regulations or EAB decisions requires IEPA to devote a *separate section* of the Responsiveness Summary to a description of changes, much less provide "redlining," as Petitioner suggests. Pet. 8; Pet. Exhibit 8 at 1. Moreover, although IEPA's Brief notes that it did not include a "list" of changes (IEPA Br. at 17), the regulations do not require such a list. They simply require that IEPA "specify which provisions . . . have been changed . . . and the reason for the change"—without mandating a particular format. 40 C.F.R. § 124.17(a); IEPA Br. at 16 ("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.") As both this Memorandum and IEPA's Brief demonstrate, IEPA repeatedly specified the changes and reasons for the changes in the course of responding to public comments in the Responsiveness Summary, and "[n]o legal error resulted" from this approach. IEPA Br. at 12. Indeed, the fact that IEPA made the vast majority (if not all) of the changes in response to public comments makes it eminently

appropriate to explain those changes in the course of responding to the comments that prompted them.

Moreover, even if IEPA had not specified the changes it made in the final permit, a remand would not be the appropriate remedy. The EAB has held that the "procedural defect" of failing to explain changes is "cured by allowing [Petitioner] to file a reply brief" in the EAB "addressing the Region's response" to the Petition—not by a formalistic remand. *In re Midwest Steel Division, National Steel Corporation*, 3 E.A.D. 835, 836 n.2 (EAB 1992). A remand is appropriate only if Petitioner offers "a compelling reason to believe that [the] failure to explain [the reason for changes] led to a clearly erroneous permit decision." *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 191 (EAB 2000). As explained in Parts III-V, however, Petitioner has failed to make this showing. Remand is therefore inappropriate.

A. The Responsiveness Summary specifically highlights the changes between the draft and final permit and explains the reasons for the changes.

Contrary to Petitioners' assertions, IEPA discussed changes between the draft and final permit numerous times. IEPA's responses to comment numbers 25, 28, 58, 64-66, 68, 70, 72-75, 78-79 and 99 reference changes in "the issued permit" and give specific reasons for the changes. For example, IEPA repeatedly noted that it had changed the control practices in the final permit based on public comments: "[t]he issued permit does not set BACT for CO in terms of this emission rate proposed by ConocoPhillips. BACT for CO is set in terms of work practices . . . [and] *[t]hese work practices have been further developed as a result of further review by the Illinois EPA in response to other public comments.*" Responsiveness Summary at 10 (emphasis added). Specifically, after describing the six control practices recommended by Petitioner as BACT, IEPA noted that the final permit incorporated five of the six, and explained why it did not adopt the sixth:

> As generally observed by this comment, there are many ways to reduce emissions from flaring. For the new process flare systems at the refinery, the various approaches to minimization of flaring and flaring emissions discussed in this comment *are required* as appropriate for the particular process units that are served by the flare system. *This has been clarified in the conditions of the issued permit for flaring.* The one exception is constructing stronger process vessels. *This has not been identified as a reasonable or recommended approach to reducing flaring emissions. It would pose operational concerns as it would implicitly entail operation of process vessels at higher pressures. In addition, careful management of depressurization of vessels during unit shutdowns appears to be very effective in minimizing and eliminating shutdowns as a contributor to flaring.*

Responsiveness Summary at 28 (emphasis added). IEPA has further explained that it adopted these additional work practices in order to maintain consistency with existing requirements in the federal Consent Decree. *Id.* at 12; IEPA Br. at 15 ("Th[e] discussion [in the Responsiveness Summary] 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."). As this example shows, IEPA both highlighted changes it made in the final permit and explained the reasoning behind the changes.

Another example is IEPA's response to a comment recommending increased compressor capacity for both new flares, because "adequate compressor capacity for recovery of waste gas [is] effective in minimizing flaring events." Responsiveness Summary at 28. IEPA noted that the final permit required additional compressor capacity for one flare but not the other, and explained why:

> The new flare system for the new Delayed Coker Unit will include redundant waste gas compressors, as currently used at the Shell, Martinez refinery. *A condition has been included in the issued permit requiring this as an element of BACT and LAER for this new flare system.* [Redundant waste gas compressors are not required for the new hydrogen plant, however, because] *[t]he flare for the new hydrogen plant does not handle a waste gas that is suitable for recovery for use in the refinery fuel gas system.*

Id. (emphasis added). Here, again, IEPA highlights changes in the final permit, explains the reason for the change (by summarizing the support for the change in the public comment), and further explains why it did not impose the change on both new flares.

Many other examples appear throughout IEPA's responses.[7] In fact, Petitioner identifies seven types of changes IEPA made in the final permit (Pet. 7-8), and the Responsiveness Summary addresses each one multiple times.[8]

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[7] *See, e.g.*, Responsiveness Summary at 12 (explaining, in response to a comment urging more stringent controls on flaring and giving reasons for the controls, that "*[p]rovisions have been included in the issued permit*" that require "root cause analyses," flare minimization, and "[d]etailed reporting" "based on the features in the design of the new Delayed Coker Unit . . . and in the context of existing requirements that address flaring at the Wood River refinery"); *id.* at 25 (noting, in response to Petitioner's comment that the project's two new flares should be subject to BACT for CO emissions and LAER for VOM, that "*the issued permit includes additional requirements* as part of BACT and LAER for the new flares in response to public comments"); *id.* at 29 (explaining, in response to a comment urging adoption of the BAAQMD rules on flaring, that "*the issued permit requires* that ConocoPhillips implement the measures similar to that specified by the BAAQMD to reduce flaring," including "preparation of and operation pursuant to a Flare Minimization Plan and performance of 'root cause analyses,'" and that the issued permit requires "redundant compressor capacity [even though] this is not a measure that is mandated by the BAAQMD rules"); *id.* at 32 (explaining, in response to a comment urging complete adoption of detailed reporting regulations, that "*[t]he issued permit includes* appropriate provisions for reporting related to flaring. Given the nature of the [IEPA's] procedures for review of reports from sources, detailed reporting related to flaring . . . will be more efficiently and effectively handled if it occurs in conjunction with routine quarterly reporting, rather than as stand-alone reports for significant flaring.") (all emphases added).

The Responsiveness Summary contains many more examples of explanations for changes between the draft and final permit.

[8] Although Petitioner (at 7-8) purports to identify seven changes in the final permit, IEPA points out that there is really only one: "the inclusion of various work practices to minimize emissions from the flares." IEPA Brief at 17 & n.12. Regardless of how this change is characterized, however, the Responsiveness Summary thoroughly addresses all seven areas identified by Petitioner:

1. **Control Requirements and Work Practices.** *See, e.g.*, Responsiveness Summary at 10 ("BACT for CO is set in terms of work practices to minimize CO emissions . . . [and] [t]hese work practices have been further developed as a result of further review by the [IEPA] in response to other public comments."); *id.* at 28 (noting that "[a] condition has been included in the issued permit requiring [redundant waste gas compressors] as an element of BACT and LAER for this new flare system"); *id.* at 12 (noting that "[p]rovisions have been included in the issued permit" that require "root cause analyses" and flare minimization).

2. **Flaring Minimization Plan.** *Id.* at 29 ("[T]he issued permit requires that ConocoPhillips implement the measures similar to that specified by the BAAQMD to reduce flaring," including "preparation of and operation pursuant to a Flare Minimization Plan."); *id.* at 30 ("The issued permit requires a Flaring Minimization Plan for the new coker flare . . . address[ing] the various approaches that have been taken by Shell Martinez to reducing flaring."); *id.* at 33 ("The issued construction permit also requires ConocoPhillips to develop and implement a Flaring Minimization Plan for the new Coker Unit and the new Hydrogen Plant.")

3. **Testing Requirements.** *Id.* at 34 (noting that the issued permit requires testing "to be able to determine flow and composition of waste gas"); *id.* at 32 (noting that "the issued permit . . . [requires] collection of data to identify when waste gases are flared and in what quantity").

Perhaps Petitioner would prefer to have more *extensive* responses, but there is no merit to the claim that IEPA failed to "[s]pecify" changes to the draft permit and give "reasons for the change." 40 C.F.R. § 124.17(a)(1). Nor was IEPA required to include those reasons in a separate section of the Responsiveness Summary. Indeed, if the law required public agencies to provide not only a reasoned basis for their decisions, but also a lengthy and detailed exegesis of every public comment, they would have little time to fulfill their important public mandates. The courts (and bodies such as the EAB) would do little else but hear appeals challenging the form rather than the substance of agency decisions. Remand is therefore wholly inappropriate in these circumstances.

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4. **Monitoring Requirements.** *Id.* at 31 ("The issued permit requires continuous monitoring to identify when waste gases are flared. This requirement is accompanied by requirements for monitoring or instrumentation to reasonably determine the amount of gas that is flared, requirements for sampling and analysis of waste gas or maintenance of records for the composition of the gas, and requirements for monitoring or records related to fuel usage for the pilot and venting of purge gas to the flare."); *id.* at 34 ("The issued permit requires that monitoring . . . be implemented for new flares to be able to determine flow and composition of waste gas.").

5. **Observation Requirements.** Petitioner's public comments did not separately address "observation requirements," but rather treated them as a subset of monitoring requirements and argued that IEPA should adopt BAAQMD Flare Monitoring Rule 12-11 in its entirety. Comments of the American Bottom Conservancy, Environmental Integrity Project, and Sierra Club, *Technical Analysis of Julia May* at 22-23 (June 14, 2007) (Petitioner's Exhibit 2) ("I urge IEPA to incorporate each and every requirement of the BAAQMD Flare Monitoring Rule into the CORE Project permit conditions."). The Responsiveness Summary responded in kind, treating "observation requirements" as a subset of monitoring, and explaining why IEPA did not fully adopt BAAQMD Rule 12-11. *See* Responsiveness Summary at 32 ("The issued permit includes an appropriate level of specificity for operational monitoring for flaring. . . . [I]t is not appropriate for the permit to include the detailed requirements for operational monitoring present in the BAAQMD's Flare Monitoring Rule [12-11]. Accordingly, the issued permit sets the purposes that must be fulfilled for the operational monitoring for flaring, i.e., collection of data to identify when waste gases are flared and in what quantity.").

6. **Recordkeeping Requirements.** *Id.* at 31 ("The issued permit requires . . . maintenance of records for the composition of [waste] gas, and . . . monitoring or records related to fuel usage for the pilot and venting of purge gas to the flare.") *Id.* at 34 ("The issued permit requires that . . . recordkeeping be implemented for new flares.").

7. **Reporting Requirements.** *Id.* at 32 ("The issued permit includes appropriate provisions for reporting related to flaring. Given the nature of the [IEPA's] procedures for review of reports from sources, detailed reporting related to flaring associated with this project will be more efficiently and effectively handled if it occurs in conjunction with routine quarterly reporting, rather than as stand-alone reports for significant flaring events."); *id.* at 41 (noting that the Consent Decree includes "provisions for detailed reporting for significant flaring incidents").

This is merely a sampling of IEPA's responses in each area, but amply demonstrates that the Responsiveness Summary addressed the changes between the draft and final permit.

B. Even if IEPA had not explained the changes to the final permit, a remand would not be appropriate.

Even if IEPA's discussion of changes had been inadequate (and it was not), it neither prejudiced Petitioner nor led to a clearly erroneous permitting decision. The purpose of the requirement to explain changes is to "illuminate[] the permit issuer's rationale for including key terms" and "ensure[] that interested parties have 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*, 13 E.A.D. (slip op. at 29), PSD Appeal No. 03-04 (EAB Sept. 27, 2006) (quoting *In re City of Marlborough, Mass. Easterly Wastewater Treatment Facility*, 12 E.A.D. (slip op. at 14), NPDES Appeal No. 04-13 (EAB, Aug. 11, 2005)). All of these purposes are satisfied here.

First, Petitioner does not dispute that the vast majority (if not all) of the changes in the final permit were adopted at Petitioner's behest, and that IEPA frequently stated that it made the changes precisely because it concurred with Petitioner's comments. Pet. 10. Thus, Petitioner not only knows, but frequently *supplied*, the "rationale for including key terms." *Indeck-Elwood*, 13 E.A.D. (slip op. at 29).

Petitioner responds that a "mere concurrence" with its own comments is not good enough. Pet. 10. But the only cases it cites in support of this assertion all involved concurrence with comments that the petitioner *opposed*, not concurrence with the petitioner's own suggestions. *Id.* (citing *In re Amoco Oil Co.*, 4 E.A.D. 954, 980 (EAB 1993); *Marlborough*, 12 E.A.D. (slip op. at 14)). In effect, this Petitioner refuses to take "yes" for an answer: not only must IEPA adopt Petitioner's recommendations and agree with its public comments, it must provide a thorough explanation for why Petitioner was right. But neither the regulations nor the EAB's

decisions—nor, for that matter, the most generous notions of responding to public comments—require such a result.[9]

Second, the EAB has refused to remand where the Petitioner fails to demonstrate "a compelling reason to believe that [the] failure to explain [the changes in the final permit] led to a clearly erroneous permit decision." *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 191 (EAB 2000); *see also In re Mecklenburg Cogeneration Ltd. Partnership*, 3 E.A.D. 492, 494 n.3 (Adm'r 1990) ("For a remand, there must be a compelling reason to believe that the omissions led to an erroneous permit determination—in other words, that they materially affected the quality of the permit determination."). Thus, the primary concern is with "the quality of the permit determination," *id.*, not with whether Petitioner is satisfied with all of the explanations. As shown below, the permit determination here was of the highest quality. Petitioner has failed to show *any* error (let alone clear error) or an important policy consideration warranting review. In such circumstances, a remand to compel the agency to explain why it agreed with Petitioner would be meaningless formalism at its worst.[10]

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[9] Although Petitioner identifies *no changes* in the final permit that it actually opposes, Petitioner does argue that, in some instances, IEPA did not go far enough in adopting the changes it proposed (and did not explain its reasons for not doing so). Pet. 10. This, however, is an argument that IEPA erroneously *failed* to adopt changes recommended by Petitioner, not an argument that IEPA inadequately explained changes that it did adopt. As such, it is better addressed in the substantive portions of Petitioner's brief. And as we explain below, Petitioner has failed to show clear error in any of IEPA's decisions to reject its proposed permit conditions.

[10] Nor is there any merit to Petitioner's argument that IEPA should have re-opened the public comment period because it made changes (requested by Petitioner) in the final permit. The EAB has "long acknowledged that the decision to reopen the public comment period is largely discretionary," *In re Dominion Energy Brayton Point, L.L.C.*, 12 E.A.D. (slip op. at 278), NPDES Appeal No. 03-12 (EAB Feb. 1, 2006), and no regulation requires an additional comment period after changes to a draft permit. *See In re Chem-Security Systems, Inc.*, 2 E.A.D. 804 (EAB 1989) (stating the permitting authority "is required only to specify and explain such changes, not to receive additional comment on them"); *Indeck-Elwood*, 13 E.A.D. (slip op. at 28) (stating that the regulations "do not call for a new comment period every time the permit issuer adds a new permit condition in response to comments on the draft permit"). As IEPA explained in the Responsiveness Summary, "[t]he public comments d[id] not raise any issues whose nature is such that they warrant preparation of a new draft permit by [IEPA] and re-opening of a public comment period. While various concerns are raised about the proposed project, the comments do not show that the project, as currently proposed by ConocoPhillips, would pose significant hazards to the public or should not be permitted." Responsiveness Summary at 50. Moreover, a new comment period is especially unnecessary here because the vast majority (if not all) of the changes were made at Petitioners' behest.

Finally, the EAB has held that the "fail[ure] to provide the specific reasons for requiring [additional permit] conditions [is] . . . [a] procedural defect" that can be "cured by allowing [the petitioner] to file a reply brief" with the EAB. *In re Midwest Steel Division, National Steel Corporation*, 3 E.A.D. 835, 836 n.2 (EAB 1992); *see also In re Dominion Energy Brayton Point, L.L.C.*, 12 E.A.D. (slip op. at 278), NPDES Appeal No. 03-12 (EAB Feb. 1, 2006) ("The Region may revise . . . permit conditions based on the comments . . . [and] where the Agency adds new information to the record in response to comments, *the appellate review process* affords petitioner the opportunity to question the validity of the material in the administrative record upon which the Agency relies in issuing a permit." (emphasis added; internal quotation, citation, and emphasis omitted). That is, if Petitioner is dissatisfied with IEPA's explanations for changes in the final permit, it can file an appeal (as it has done). If IEPA believes that it needs to supplement those explanations (which is plainly unnecessary here), it can do so in its response brief. Indeed, IEPA's recently filed response brief demonstrates that "the changes to the draft permit . . . were clearly and appropriately articulated by the Illinois EPA and the reason[s] for the changes were also fully specified." IEPA Br. at 12. If Petitioner is still not satisfied and EAB, in its discretion, wishes to provide further opportunity for comment, EAB may permit Petitioner to "file a reply brief . . . addressing the Region's" supplemental responses. *Midwest Steel*, 3 E.A.D. at 836 n.2. This procedure would ensure both that Petitioner had "an opportunity to adequately prepare a petition for review" and that the "changes in the draft permit are subject to effective review." *Indeck-Elwood*, 13 E.A.D. (slip op. at 29) (quoting *City of Marlborough*, 12 E.A.D. (slip op. at 14)). Petitioner has offered no explanation for why this procedural accommodation would not adequately address its concerns.

III. IEPA Properly Identified BACT for Flare-Related Emissions as an Emissions Limit Plus Required Work Practices.

Petitioner challenges IEPA's BACT analysis on both procedural and substantive grounds. Procedurally, Petitioner argues that IEPA (1) failed to conduct a BACT analysis for CO emissions from flaring, and (2) failed to consider existing control technologies proposed by Petitioner. Pet. 12-17. Substantively, Petitioner argues that IEPA failed to require the most stringent control technology or adequately explain its reasons for not doing so. Pet. 17-21. None of these arguments has merit.

A. IEPA conducted a thorough and appropriate BACT analysis.

Petitioner repeatedly accuses IEPA of "fail[ing]" and "refus[ing]" to conduct a BACT analysis.[11] According to Petitioner, the extraordinary remedy of a remand of the PSD approval is required because "[t]he only plausible reading of the Agency's [Responsiveness Summary] is that it concluded that *BACT analysis and limit-setting is generally inappropriate* in addressing non-routine upset events." Pet. 16 (emphasis added).

This argument fails for several reasons. First, it was not preserved for review. Until now, Petitioner has never alleged that IEPA failed to conduct a BACT analysis altogether. Instead, its public comments challenged only the *adequacy* of IEPA's analysis, arguing that IEPA "failed to evaluate the most stringent technologies available." Comments of the American Bottom Conservancy, Environmental Integrity Project, and Sierra Club ("Petitioner's Comments"), *Technical Analysis of Julia May* at 11 (June 14, 2007) (Petitioner's Exhibit 2). The argument that IEPA failed to conduct a BACT analysis is therefore waived. *In re Sumas Energy 2 Genera-*

[11] Pet. 12 ("Failure to Engage in Appropriate BACT Analysis"); *id.* at 13 ("IEPA did not engage in top-down BACT analysis."); *id.* at 14 (IEPA failed to do what "is required by that Act and would have been done in a full top-down BACT process"), *id.* at 15 (IEPA "did not obtain data . . . as would have been done in a top-down BACT analysis"); *id.* at 16 ("IEPA declined in the final permit to set flare emissions limitations through a top-down BACT analysis."); *id.* at 17 (IEPA "refus[ed] to conduct top-down BACT analysis"); *id.* at 18 ("failure to apply top-down BACT methodology, or any other coherent BACT analysis").

tion Facility, 2003 WL 1787939, PSD Appeal Nos. 02-10 & 02-11 (Mar. 25, 2003) ("Nothing in these comments was sufficient to apprise EFSEC that the Province was alleging that EFSEC had failed to conduct a top-down BACT analysis . . . . Review is therefore denied.").

Not only is the argument waived, however; it also badly mischaracterizes IEPA's analysis. Far from concluding that "BACT analysis . . . is generally inappropriate" and "refus[ing] to conduct" such analysis (Pet. 16-17), IEPA consistently and expressly maintained that "a Best Available Control Technology (BACT) analysis is required" and explained in its Project Summary the BACT analysis that it had conducted. Project Summary at 10, 13.

On flaring in particular, ConocoPhillips initially proposed a CO emissions limit of 0.37 lbs/MMBtu, and maintained that there were no technically feasible CO control options for flaring. Responsiveness Summary at 10. IEPA, however, rejected this proposal on the basis of its own BACT analysis. Specifically, IEPA explained that it had examined the USEPA's RACT/BACT/LAER clearinghouse, which contained "four BACT determinations for the control of CO emissions from refinery flares in recent years." Project Summary at 13 (ConocoPhillips Exhibit 2). None of those determinations, however, identified the use of a particular control technology for CO emissions from flaring. *Id.* As IEPA explained, "[d]ue to the inherent design of a flare (*i.e.*, the pilot gas exhaust does not pass through a duct or stack), it is not possible to use any post-combustion air pollutant control devices." *Id.* Instead, BACT for flaring consists of "equipment design specifications and work practices consistent with the NSPS [New Source Performance Standards] requirements for flares in 40 C.F.R. § 60.18."[12] *Id.*

Based on this analysis, IEPA rejected ConocoPhillips' proposed CO emissions limitation of 0.37 lbs/MMBtu—which, IEPA noted, was an emission factor, not an emission limit—and

[12] The NSPS requirements, incorporated by reference in the draft permit, include detailed specifications for the design and operation of flares. 40 C.F.R. § 60.18.

instead imposed a BACT CO emissions limit of 24.3 tons per year (tpy)[13] for the Delayed Coker Unit Flare (DCUF) and 147.9 tpy for the entire Hydrogen Plant (HP2), including the new flare. Draft Construction Permit/PSD Approval No. 06050052 ("Draft Permit") § 4.7.6 (ConocoPhillips Exhibit 3); Responsiveness Summary at 10-11. IEPA also required ConocoPhillips to comply with the New Source Performance Standards for flaring in 40 C.F.R. § 60.18. Draft Permit § 4.7.3(c).

Moreover, the final permit, like the draft permit, set BACT for flaring "in terms of work practices to minimize CO emissions." Responsiveness Summary at 10. It also "developed [those practices] as a result of further review . . . in response to other public comments"—including those of Petitioner. *Id.* Nothing in the record supports Petitioner's assertion that IEPA "refus[ed] to conduct" a BACT analysis.

Nor is there any basis for Petitioner's contention that "[t]he only plausible reading of the Agency's [Responsiveness Summary] is that it concluded that BACT analysis and limit-setting is generally inappropriate in addressing non-routine upset events" such as flaring. Pet. 16. Petitioner itself concedes (as it must) that "the permit sets tpy emissions limits on emissions from the two new flares." Pet. 16. The Responsiveness Summary also states that "ConocoPhillips must implement Best Available Control Technology (BACT) for emissions of carbon monoxide" from flaring. Responsiveness Summary at 9. Finally, the issued permit imposes a numeric limit on CO emissions from flaring—24.3 tpy for the Delayed Coker Unit Flare (DCUF) and 147.9 tpy for the Hydrogen Plant—and includes detailed work practices to minimize flaring. Final Permit

[13] A tons per year limit ensures that emissions are limited to an annual amount. The original factor proposed by ConocoPhillips would have set a concentration limit but would not have limited overall emissions except to the extent that ConocoPhillips was to exceed the concentration limit at a given moment in time. Thus, IEPA imposed a more stringent limit on ConocoPhillips based on its own BACT analysis.

§§ 4.7.5, 4.7.6-1, and 4.7.6-2. The fact that IEPA set these limits at a level that would not "restrict access to the flares when flaring is viewed as necessary for personnel or equipment safety" does not begin to suggest that IEPA believes "limit-setting is generally inappropriate." Pet. 16. It simply represents a well-reasoned policy judgment that the emissions limit should not be set so low that it forces the refinery to choose between maintaining safe operations and violating the permit. *See Newmont*, 12 E.A.D. (slip op. at 18) ("[P]ermit writers retain discretion to set BACT levels that . . . will allow permittees to achieve compliance on a consistent basis.").

B. IEPA considered all potentially applicable control technologies.

Perhaps aware of the implausibility of its argument that IEPA did not conduct a top-down BACT analysis, Petitioner resorts to the argument that IEPA's analysis was not thorough or specific enough.[14] In particular, Petitioner claims that it "alerted IEPA to existing control technologies that IEPA *should have evaluated* if it had engaged in appropriate BACT analysis," but that IEPA did not, in fact, do so. Pet. 14 (emphasis added). But this is simply not true.

Not only did IEPA *consider* every control measure proposed by Petitioner, it also *adopted* the vast majority and required ConocoPhillips to implement them in the final permit. Responsiveness Summary at 27-28. As the Responsiveness Summary says, "the various approaches to minimization of flaring and flaring emissions discussed in [Petitioner's] comment

[14] *See, e.g.*, Pet. 13 ("IEPA [did not] perform a *detailed assessment* of control options."); *id.* ("IEPA[] fail[ed] to *thoroughly evaluate* available technologies and methods."); *id.* at 13 n. 7 (conceding that IEPA "did identify some control options for flare-related emissions in the final permit," but complaining that "they failed entirely to explain if or how those emissions satisfy BACT"); *id.* at 13 (IEPA "did not . . . explain" its assumptions); *id.* at 14 ("IEPA again failed to *specifically describe* how it derived the requirements that it adopted."); *id.* at 15 ("IEPA did not obtain data concerning CO emissions from the Shell Martinez refinery flares."); *id.* at 16 (IEPA's BACT analysis should "have *specifically evaluated* the practices at Shell Martinez and Tesoro, and perhaps other relevant sources."); *id.* at 18 ("IEPA has failed utterly to *identify specifically* why more stringent controls are infeasible."); *id.* at 20 ("IEPA[] fail[ed] to assemble the necessary information and perform a *thorough* BACT review."); *id.* at 21 (IEPA's BACT analysis failed to "include[e] a *comparative assessment* of the performance of the Shell Martinez refinery and other appropriate sources.") (all emphases added).

are *required*" in the final permit. Responsiveness Summary at 28 (emphasis added); Final Permit §§ 4.7.5 and 4.7.6-2.

Petitioner's public comments highlighted six allegedly "proven methods for reducing flaring events[:] . . . (1) adding sufficient compressor capacity, (2) installing backup compressors, (3) slowing vessel depressurization, (4) permanently fixing equipment that chronically malfunctions and causes unnecessary 'emergency' flaring, (5) designing thicker process vessel walls to increase allowable pressures, and (6) setting in place detailed and extensive diagnostic procedures."[15] Pet. 14-15; Petitioner's Comments, *Technical Analysis of Julia May* at 16-17. IEPA required all but one of these control methods in the final permit. Final Permit §§ 4.7.5 and 4.7.6-2; Responsiveness Summary at 28. The "one exception" is the recommendation for using thicker process vessel walls, which, IEPA explained, was problematic because it would "entail operation of process vessels at higher pressures." *Id.*

Petitioner does not challenge the rejection of thicker process vessel walls on appeal. Nor does Petitioner dispute that IEPA *adopted* five of the six recommended control practices in the final permit. In the face of this accommodation, the claim that IEPA failed to *consider* Petitioner's recommended control technologies is simply not credible.

The same is true of the related claim that IEPA failed to "evaluate[] the practices at Shell Martinez and Tesoro"—two refineries that "reduced their flare emissions through adherence to" Petitioner's recommended control practices. Pet. 15-16. Quite apart from the fact that the final permit adopted many of the same practices used by Shell Martinez and Tesoro—something Petitioner does not dispute—the Responsiveness Summary references Shell Martinez or Tesoro more than 20 times, repeatedly explaining the reasons for adopting the same practices Petitioner now

[15] These methods are drawn in part from requirements put in place by the South Coast Air Quality Management District (SCAQMD) and the Bay Area Air Quality Management District (BAAQMD). Petition 14. The Responsiveness Summary addressed the SCAQMD and BAAQMD at length. *See* Responsiveness Summary at 13, 28-32.

claims IEPA failed to consider.[16] As IEPA said, it "closely reviewed" the practices at Shell and Tesoro. Responsiveness Summary at 30. Petitioner's unsupported assertion to the contrary is without merit.

C. IEPA's BACT determination is both reasonable and adequately explained.

Unable to expose any procedural flaw in IEPA's BACT analysis, Petitioner attempts to challenge the merits. The EAB, however, accords "broad deference to permitting authorities" on "issues requiring the exercise of technical judgment and expertise." *Newmont*, 12 E.A.D. (slip op. at 21). Petitioner bears a "heavy burden [in] obtaining review of a technical issue like a BACT limit," *id.*, and the EAB will exercise its authority to review such an issue only "sparingly." *In re Westborough and Westborough Treatment Plant Board*, 10 E.A.D. 297, 303 (EAB 2002). Petitioner, however, has not even begun to demonstrate that IEPA's technical analysis is "clearly erroneous." *Newmont*, 12 E.A.D. (slip op. at 24).

Petitioner challenges IEPA's technical analysis on two grounds: (1) "the numeric limits set for the new flares are significantly higher than what appears to be actually achievable through the . . . flare control measures that were put in place in the final permit," and (2) "the adopted control measures . . . are weak and deficient in numerous respects." Pet. 18. Neither challenge has merit.

1. The emissions limit on CO is reasonable.

[16] *See, e.g.*, Responsiveness Summary at 13 (discussing the "Flare Minimization Plan prepared by Shell Martinez"); *id.* at 28 ("The new flare system for the new Delayed Coker Unit will include redundant waste gas compressors, as currently used at the Shell, Martinez refinery."); *id.* at 30 ("[T]he Flare Minimization Plan prepared by Shell Martinez has been closely reviewed. . . . The issued permit requires a Flaring Minimization Plan . . . that address[es] the various approaches that have been taken by Shell Martinez to reducing flaring."); *id.* ("Shell Martinez, with its Delayed Coker Unit that was installed in the mid-1990's, also provides anecdotal evidence that operation of a modern Delayed Coker Unit does not significantly contribute to flaring emissions, given Shell Martinez's excellent record on minimizing flaring emissions as cited by [Petitioner]."); *id.* at 32 ("[A] simpler approach to operational monitoring at the refinery should be established, as compared to the circumstances of the refineries in California.").

With regard to the numeric limit, Petitioner neither discusses the specific CO limit chosen by IEPA[17] nor offers an alternative. It simply states, without support, that IEPA's limit is "higher than what appears to be actually achievable." Pet. 18. Neither the petition nor the public comments, however, provide data on CO emissions at other refineries or examples of CO emission limits adopted in other BACT determinations. Instead, Petitioner relies on the volatile organic matter (VOM) emissions from the Shell Martinez refinery, arguing that Shell's VOM emissions "are an order of magnitude lower than what is being permitted in the CORE Project." Pet. 15. Based on unspecified "[e]xtrapolations" from the VOM emissions data, Petitioner argues that the CO emission limit in the final permit is too high. *Id.*

This argument fails for several reasons. First, Petitioner failed to preserve it. The public comments challenged (1) the CO emission limit proposed by ConocoPhillips (which was never adopted),[18] (2) the use of a "blended" CO emission limit for the Hydrogen Plant (not the stringency of that limit),[19] and (3) the LAER limit on VOM emissions (which is, of course, different from the BACT limit on CO emissions and not on review here).[20] IEPA responded to each of Petitioner's CO objections, and Petitioner has not challenged those responses here. Instead, Petitioner raises the new argument that, based on "[e]xtrapolations" from the VOM data, the CO limit is too high.[21] This argument is waived, and the EAB should reject it on that ground alone.

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[17] That limit is 24.3 tpy for the Delayed Coker Unit Flare (DCUF) and 147.9 tpy for the Hydrogen Plant (HP2), including the new flare. Final Permit § 4.7.6-1.

[18] Petitioner's Comments, *Technical Analysis of Julia May* at 12-13 ("The 0.37 lbs/MMBtu CO emission limit proposed by ConocoPhillips is nonsensical and unenforceable.").

[19] *Id.* at 15 ("Unfortunately, the flare emissions are not provided separately, so it is impossible to tell exactly what, if any, flare emissions have been calculated for . . . flare CO and VOM emissions.").

[20] *Id.* at 20 (Shell's "limit should be applied to ConocoPhillips as LAER.").

[21] In contrast to its comments on CO, Petitioner's comments on the SOx emission limit *did* argue that the limit was too high. *See* Petitioner's Comments, *Technical Analysis of Julia May* at 9.

Not only is this argument waived, however, it is also meritless. "Extrapolations" from VOM emission data at a single facility are an inadequate basis for setting an emission limit on CO *at all*, let alone for overturning the permitting authority's reasoned decision on the issue. And even if Petitioner had provided data on CO emissions from the Shell Martinez facility[22]—for example, data showing that Shell Martinez had achieved lower CO emissions than the limit in the final permit—the EAB has repeatedly held that "a permit writer is not required to set the emissions limit at the most stringent emissions rate that has been demonstrated by a facility using similar emissions control technology." *In re Newmont Nevada Energy Inv., L.L.C.*, 12 E.A.D. (slip op. at 17), PSD Appeal No. 05-04 (EAB December 21, 2005) (citing *In re Kendall New Century Dev.*, 11 E.A.D. (slip op. at 17), PSD Appeal No. 03-01 (EAB Apr. 29, 2003)). Rather, the permitting authority has "discretion to set BACT levels that . . . will allow permittees to achieve compliance on a consistent basis." *Id.* at 18. Petitioner has failed to demonstrate that IEPA's BACT analysis was clearly erroneous.[23]

2. The emission control measures are reasonable.

Petitioner also fails to carry its "heavy burden" in challenging the required emission control measures. Although Petitioner acknowledges that IEPA required ConocoPhillips to "install redundant compressor capacity and waste gas recovery in the Delayed Coking Unit, perform root

[22] Petitioner suggests that IEPA should have gone hunting for Shell's CO emissions data itself. Pet. 15 ("IEPA did not obtain data concerning CO emissions from the Shell Martinez refinery flares—as would have been done in a top-down BACT analysis."). But Petitioner has given no reason to believe this data exists, let alone a reason why it did not provide this data itself. The burden is on Petitioner to demonstrate that IEPA's technical analysis was clearly erroneous. Petitioner has not carried that heavy burden.

[23] Petitioner's argument is similar to that rejected in *In re Newmont Nevada Energy Inv., L.L.C.*, 12 E.A.D., PSD Appeal No. 05-04 (EAB December 21, 2005)—only far weaker. In *Newmont*, the petitioner challenged the BACT analysis for a coal-fired steam boiler that set an emission limit of 0.067 pounds of NOx per MMBtu on a 24-hour rolling average basis. *Id.* at *13. The petitioner argued that the permitting authority should have set a lower emission limit, and provided a wide variety of specific examples supporting a lower limit. In light of the permitting authority's reasoned responses to public comments, however, the EAB concluded that the petitioner had failed to carry its "heavy burden" of demonstrating clear error. The only difference here is that, unlike the petitioner in *Newmont*, Petitioner has provided *no* evidentiary basis for its challenge to IEPA's BACT analysis, and does not even attempt to show that IEPA's analysis was "clearly erroneous" as a technical matter.

case analysis of flaring incidents, vent gases containing reduced sulfur compound concentrations to the coker flare only in defined circumstances, prepare a Flare Minimization Plan, and comply with monitoring and reporting requirements"—all at Petitioner's behest—Petitioner argues that these control measures are "weak and deficient in numerous respects." Pet. 17-18. Specifically, Petitioner complains that (1) the permit governs emissions only at new flares, not existing flares (Pet. 18, 20); and (2) the permit contains inadequate flare observation and monitoring requirements (Pet. 19-20).

IEPA provided responses on both of these issues. On existing flares, IEPA explained that BACT and LAER were inapplicable because those flares "are not being physically modified and will not experience a change in the method of operation." Responsiveness Summary at 25. Existing flares are also subject to an existing consent decree that requires additional emissions reductions and includes measures for flare gas recovery, flare minimization plans, reporting, and recordkeeping. *Id.* Concerning observation and monitoring requirements, IEPA explained that the level of detail requested by Petitioner was "not appropriate . . . [g]iven the very low level of flaring that should occur in the future at the Wood River refinery." Responsiveness Summary at 32. Instead, IEPA adopted "a simpler approach to operational monitoring . . . as compared to the circumstances of the refineries in California that led to . . . their Flare Monitoring rules [adopted] several years ago." *Id.*

Instead of taking issue with these responses, Petitioner simply re-asserts the comments it made below. "As the Board has stated on numerous occasions," however, "it is not enough simply to repeat objections made during the comment period. . . . [A] petitioner must explain why the permit issuing entity's response to those objections is clearly erroneous or otherwise warrants

review." *In re Zion Energy, LLC*, 9 E.A.D. 701, 705 (EAB 2001). Petitioner has not done so, and review should therefore be denied.

Moreover, the emission control measures adopted by IEPA are reasonable. Petitioner does not dispute that IEPA adopted the vast majority of control measures it requested. Nor does it dispute that these control measures will significantly reduce flaring. Indeed, the work practices imposed in the final permit are more stringent than any BACT analysis for flaring recorded in EPA's RACT/BACT/LAER clearinghouse. *See In re Kendall New Century Dev.*, 11 E.A.D. 40, 52 (EAB 2003) (affirming BACT analysis where "IEPA's determination falls within [the] range" shown in the RACT/BACT/LAER clearinghouse). Finally, for the one requested measure IEPA did not adopt, it provided reasoned explanations—none of which Petitioner has challenged. Under these circumstances, Petitioner has not begun to carry its "heavy burden" of demonstrating the need for review of IEPA's technical analysis. *Newmont*, 12 E.A.D. (slip op. at 31).

IV. Petitioner's Arguments that the Flare Control Measures in the Final Permit are Not Practically Enforceable are Both Waived and Meritless.

Petitioner also seeks remand of the PSD approval on the ground that the final permit "fall[s] short on establishing reliable, meaningful measures to monitor and assess flaring events." Pet. 22. Specifically, Petitioner challenges the final permit's monitoring, equipment accuracy, and sampling methodology requirements. *Id.* at 22-24.

These arguments, however, are waived because Petitioner fails to address IEPA's thorough response to its comments and fails to offer any legal authority in support of its argument for remand. Moreover, the monitoring provisions—many of which were added at the request of Petitioner—are sufficient to ensure enforceability, and Petitioner offers no reason for concluding that IEPA's technical judgment on this point was clearly erroneous. Finally, Petitioner has failed to demonstrate that IEPA's decision on video monitoring or the equipment accuracy and sam-

pling methodology provisions of Bay Area Air Quality Management District (BAAQMD) Regulation 12-11 was clearly erroneous or an important policy consideration requiring reversal by the Board. 40 C.F.R. § 124.19(a). Review therefore should be denied.

A. Petitioner waived its argument regarding flare control measures.

Petitioner has failed to preserve its arguments on the issues of video monitoring, equipment accuracy, and sampling methodology. "As the Board has stated on numerous occasions, it is not enough simply to repeat objections made during the comment period. Rather, in addition to stating its objections to the permit, a petitioner must explain why the permit issuing entity's response to those objections is clearly erroneous or otherwise warrants review." *In re Zion Energy, LLC*, 9 E.A.D. 701, 705 (EAB 2001). In its public comments, Petitioner suggested that IEPA should incorporate all aspects of BAAQMD Regulation 12-11 into the final permit. Although IEPA provided a thorough response to Petitioner's comments, explaining why BAAQMD Regulation 12-11 requirements were not appropriate for the Wood River facility, *see* Responsiveness Summary 32, Petitioner fails to address IEPA's response—which is fatal to its appeal. *See* Pet. 22-24.

In particular, IEPA stated that it was "not appropriate for the permit to include the detailed requirements for operational monitoring present in the BAAQMD's Flare Monitoring Rule . . . [g]iven the very low level of flaring that should occur in the future at the Wood River refinery." Responsiveness Summary at 32. IEPA went on to explain that the situation in the California refineries that led to the BAAQMD adopting Regulation 12-11 was distinct from the present circumstances, and thus a "simpler approach to operational monitoring at the refinery should be established" to accomplish the fundamental objective to "minimize and eliminate flaring." *Id.*; *see also* IEPA Br. at 14. Rather than respond to IEPA's analysis, however, Petitioner has simply restated its opinion that IEPA should have "impos[ed] the specific monitoring requirements con-

tained in BAAQMD Regulation 12-11." Pet. 23. With regard to video monitoring, Petitioner simply restates its opinion that the requirements are insufficient. Pet. 22-23. Petitioner makes no attempt to demonstrate why IEPA's reasoning for declining to make the requested changes—specifically, the fact that not all provisions of BAAQMD Regulation 12-11 are appropriate for the Wood River facility—is erroneous or warrants review. *See In re Zion Energy, LLC*, 9 E.A.D. 701, 705 (EAB 2001). This argument is therefore waived.

B. Remand to the permitting authority is inappropriate because Petitioner has failed to provide any legal basis for a remand.

Petitioner's argument also fails because it cites no statutory, regulatory, or judicial authority in support of its position. *See In re Newmont Nevada Energy Inv., L.L.C.*, 12 E.A.D. (slip op. at 80), PSD Appeal No. 05-04 (EAB December 21, 2005) (denying review where petitioner merely repeated comments on appeal and did not supply Board with legal authority to support remand). During the comment period, Petitioner submitted a summary of the BAAQMD Regulation 12-11 requirements and urged IEPA to adopt them without modification. Petitioner's Comments, *Technical Analysis of Julia May* at 22-25. Not only does Petitioner simply repeat the same request here, however, it also fails to identify any legal basis for requiring IEPA to incorporate the requirements of BAAQMD Regulation 12-11 in the final permit.[24] Pet. 22-23. As explained below, no such legal basis exists. But even if that were not so, mere repetition of comments on appeal, with no statutory, regulatory, or case law support, is an insufficient basis for remand. *See Newmont*, 12 E.A.D. (slip op. at 80). Review should therefore be denied.

[24] In support of their contention that the final permit does not contain established limits that are "enforceable as a practical matter," Petitioner cites the U.S. EPA New Source Review Workshop Manual ("NSR Manual"). However, the NSR Manual itself states that it "is not intended to be an official statement of policy and standards and does not establish binding requirements; such requirements are contained in the regulations and approved state implementation plans." NSR Manual at 1. The NSR Manual therefore does not supply the "statutory, regulatory, or caselaw support" required to support remand. *See Newmont*, 12 E.A.D. (slip op. at 80).

C. Petitioner has failed to demonstrate that IEPA's decisions on particular flare control measures were "clearly erroneous" or "involve an important policy consideration that the Board should, in its discretion, review."

Not only are Petitioner's arguments on enforceability waived, they are meritless. The EAB accords broad deference to the permitting authority on questions of technical judgment, *In re Peabody W. Coal Co.*, 12 E.A.D. (slip op. at 16-17), CAA Appeal No. 04-01 (EAB, Feb. 18, 2005), and petitioners seeking review of essentially technical issues bear a heavy burden. Petitioner cannot not simply "present[] a difference of opinion or alternative theory regarding a technical matter." *In re Town of Ashland Wastewater Treatment Facility,* 9 E.A.D. 661, 667 (EAB 2001) (citing *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 657 (EAB 1998)). Rather, it must demonstrate that IEPA's technical analysis is "clearly erroneous" or involves an "exercise of discretion or an important policy consideration [that] the Board should review in its discretion." 40 C.F.R. § 124.19(a). Petitioner makes neither showing here.

1. IEPA's decision on video monitoring is reasonable.

Petitioner first argues that the monitoring requirements are insufficient because they allow, but do not require, video monitoring. Pet. 22. According to Petitioner, operator monitoring is insufficient because certain smoking events might go unobserved. *Id.*

This argument, however, simply represents a difference of opinion on a technical matter. Moreover, Petitioner ignores the fact that IEPA not only addressed its comments in the Responsiveness Summary, but included many of Petitioner's suggestions in the final permit. *See* Final Permit § 4.7.8–4.7.10. Indeed, Petitioner concedes that (1) the final permit requires monitoring of the affected units, Pet. 23; (2) IEPA adjusted the monitoring requirements in the final permit in accordance with Petitioner's comments, *Id.* at 21-22; and (3) the monitoring provisions in the final permit are "an improvement over the draft permit." *Id.*

In direct response to Petitioner's comments, IEPA added a section to the final permit requiring either video monitoring or, pursuant to specific procedures, visual observation of affected units. Final Permit § 4.7.8-2 ("Observation Requirements"). IEPA also (1) clarified that ConocoPhillips must continuously monitor each affected unit for the presence of a flare pilot flame using a thermocouple or equivalent device; (2) added a requirement that ConocoPhillips continuously monitor each affected unit associated with the Delayed Coking Unit for the occurrence of flow of waste gases; and (3) added a requirement that ConocoPhillips continuously monitor either the flow and hydrocarbon and sulfur content of waste gas to each affected unit associated with the Delayed Coking Unit or continuously monitor the operating parameters of the Delayed Coking Unit and affected units. Final Permit § 4.7.8-1(b)-(d).

Petitioner has failed to show why not adding mandatory video monitoring to these requirements was clearly erroneous. In exercising its considerable technical expertise, IEPA determined that in lieu of video monitoring ConocoPhillips can conduct observation for visible emissions from an affected unit using U.S. EPA Method 22. Final Permit § 4.7.8-2. But either video monitoring or observation using EPA Method 22 *must* be employed. *Id.* Furthermore, in the event ConocoPhillips utilizes EPA Method 22, IEPA included detailed procedures in the final permit regarding the start, duration, frequency and logging of flaring observations. *Id.* Responding to Petitioner's comments, IEPA also explained that it was not necessary to incorporate *all* provisions of BAAQMD Regulation 12-11 (including mandatory video monitoring) due to the very low level of flaring expected at the Wood River refinery, and differences between the circumstances of refineries in California and this facility. Responsiveness Summary at 32. The record thus shows that IEPA assessed Petitioner's arguments and made a reasoned decision regarding the appropriate monitoring requirements for the units at issue. Petitioner has shown

nothing "clearly erroneous" in this decision. Review should therefore be denied. *See Newmont*, 12 E.A.D. (slip op. at 62) (finding no clear error or other reason to remand where permit contains adequate compliance monitoring provisions); *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001) (insufficient reason for remand where Petitioner simply differs in opinion from permitting authority regarding technical matter).

2. IEPA's decision not to incorporate all of the equipment accuracy and sampling methodology requirements of BAAQMD Regulation 12-11 in the final permit was reasonable.

Petitioner next contends that the flare monitoring provisions in the final permit are inadequate because IEPA has not adopted the specific requirements set forth in BAAQMD Regulation 12-11 concerning equipment accuracy and sampling methodology. Pet. 23. As noted above, this argument is not adequately preserved for review. But in all events, IEPA's decision not to adopt the requirements of BAAQMD Regulation 12-11 was both reasonable and supported by the record. *See In re Peabody W. Coal Co.*, 12 E.A.D. (slip op. at 17), CAA Appeal No. 04-01 (EAB, Feb. 18, 2005) (deference to Region's decision appropriate where record demonstrates Region considered comments and Region's approach is rational in light of evidence in record).

The Board has consistently held that "[w]here 'the views of the Region and the petitioner indicate bona fide differences of expert opinion or judgment on a technical issue,' deference to the Region's decision is generally appropriate if 'the record demonstrates that the Region duly considered the issues raised in the comments and if the approach ultimately selected by the Region is rational in light of all of the information in the record.'" *Id.* (citing *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567-68 (EAB 1998)). The record in this matter shows that IEPA fully considered the issues raise by Petitioner, but rejected Petitioner's views based on circumstances specific to the Wood River refinery. Petitioner has shown no clear error in this decision, and review should therefore be denied. *See* 40 C.F.R. § 124.19(a).

IEPA set forth precise reasons why the requirements of BAAQMD Regulation 12-11 are not suitable for application to the Wood River facility at issue here:

> As the fundamental objective for flaring is to minimize and eliminate flaring, it is not appropriate for the permit to include the detailed requirements for operational monitoring present in the BAAQMD's Flare Monitoring Rule. Given the very low level of flaring that should occur in the future at the Wood River refinery, a simpler approach to operational monitoring at the refinery should be established, as compared to the circumstances of the refineries in California that led to the BAAQMD and SCAQMD adopting their Flare Monitoring rules several years ago.

Responsiveness Summary at 32. The record is thus clear that IEPA duly considered the issues raised in Petitioner's comments and ultimately selected an approach that, while varying from Petitioner's, is "rational in light of all of the information in the record" (*Peabody*, 12 E.A.D. (slip op. at 17)), given "the very low level of flaring" expected at Wood River. Responsiveness Summary at 32.

IEPA's judgment on this issue is supported not only by the low level of flaring expected at Wood River in the future, but also by its observation that the present circumstances differ from those in California because ConocoPhillips is subject to a preexisting Consent Decree for the Wood River refinery, which includes provisions to minimize flaring-related compliance issues.[25] In particular, IEPA stated that the Consent Decree requires preparation and submission of a Compliance Plan for Flaring Devices at the refinery by December 31, 2007, Responsiveness Summary at 33, "use [of] flow meters or reliable flow estimation parameters to determine the emissions from flaring," *id.*, and requires that the refinery "must be able to reasonably determine

[25] The Consent Decree applies to several refineries in different states, including the Wood River refinery, and imposes a variety of conditions designed to reduce flaring. *See* Consent Decree at ¶¶ 138-149 and 151-170, *United States of America and the States of Illinois, Louisiana and New Jersey, Commonwealth of Pennsylvania and the Northwest Clean Air Agency v. ConocoPhillips Company*, Civil Action No. H-05-0258 (S.D. Tex. Dec. 5, 2005) (available at http://www.epa.gov/compliance/resources/decrees/civil/caa/conocophillips-cd.pdf (last visited September 19, 2007)); Responsiveness Summary at 9.

flow and H_2S content of waste gas." *Id.* at 34. Given these factors, IEPA made a rational technical assessment that Wood River refinery is sufficiently distinct from the California refineries to justify not incorporating all elements of BAAQMD Regulation 12-11 into the final permit. Responsiveness Summary at 32; *see also Newmont*, 12 E.A.D. (slip op. at 67) (rejecting Petitioner's contention that a permit must be remanded because it did not require installation of technology; the fact that technology may be installed on equipment at certain facilities did not mean that it must be installed in every allegedly similar case).

In sum, Petitioner has failed to show that IEPA's conclusion on this issue was clearly erroneous, and review should therefore be denied.

3. The final permit contains adequate and enforceable monitoring requirements.

Finally, Petitioner's focus on individual flare control measures ignores the big picture. IEPA has ensured that the final permit provisions form a comprehensive program to ensure continuous compliance monitoring and reporting. IEPA summarized the monitoring requirements in the final permit as follows:

> The issued permit requires continuous monitoring to identify when waste gases are flared. This requirement is accompanied by requirements for monitoring or instrumentation to reasonably determine the amount of gas that is flared, requirements for sampling and analysis of waste gas or maintenance of records for the composition of the gas, and requirements for monitoring or records related to fuel usage for the pilot and venting of purge gas to the flare.

Responsiveness Summary at 31. Petitioner does not dispute that the monitoring provisions included in the final permit meet applicable federal requirements. Responsiveness Summary at 32-33. As IEPA explained, "The monitoring requirements of the applicable federal rules for flaring are appropriately incorporated by the permit by reference to those rules. These requirements address proper operation of a flare for effective destruction of organic constituents in waste gas and effective combustion as related to the generation of CO." *Id.* at 33. IEPA also observed that the

affected units are subject to New Source Performance Standards (NSPS) for Petroleum Refineries, 40 C.F.R. Part 60, Subpart J, and National Emission Standards for Hazardous Air Pollutants (NESHAP) for flares. Responsiveness Summary at 34. Owners or operators of such control devices are required to monitor the flares to ensure "that they are operated and maintained in conformance with their designs." Final Permit § 4.7.3(c)(vii); Responsiveness Summary at 34.

Thus, in issuing the final permit, IEPA made a well-supported technical judgment that the permit conditions conformed to existing regulatory requirements, and that such requirements were adequate to ensure compliance. *See Newmont*, 12 E.A.D. (slip op. at 64-65) (upholding permitting authority's technical judgment regarding adequate monitoring where petitioner failed to present "specific factual or legal evidence" that judgment was erroneous); *In re Carlota Copper Co.*, 11 E.A.D. 692, 708 (EAB 2004) (the EAB generally defers to the permitting authority on questions of technical judgment). Petitioner's "difference of opinion" with IEPA does not begin to justify a different result; deference to IEPA's reasoned judgment on the matter is required. *Id.* at 720; *In re Town of Ashland Wastewater Treatment Facility,* 9 E.A.D. 661, 667 (EAB 2001) (quoting *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1998)).

Finally, the Board has repeatedly found that remand is not appropriate where, as here, a final permit contains significant monitoring and recordkeeping obligations that, taken together, will ensure the enforceability of the permit limits. *See, e.g., Newmont*, 12 E.A.D. (slip op. at 61) (no clear error or other reason to remand in case where, as here, permit contains fully adequate compliance monitoring provisions). In particular, the Board has refused to remand a final permit where it determined that the permit contained a substantial number of compliance monitoring and recordkeeping obligations that, taken as a whole, will ensure that the emissions limits are

fully enforceable on a continuous basis. *See, e.g., Newmont*, 12 E.A.D. (slip op. at 61-62). As explained above, such is the case here.

In sum, not only has Petitioner failed to preserve its arguments, but those arguments are meritless. IEPA considered Petitioner's technical arguments, made appropriate changes in the final permit, and provided reasoned explanation in instances where it declined to adopt Petitioner's views. Petitioner has demonstrated no clear error in IEPA's decision, and review should therefore be denied.

V. A BACT Limit on Carbon Dioxide and Methane Is Inappropriate Because Those Gases Are Not "Subject to Regulation" Under the Clean Air Act.

Petitioner's last argument is that the PSD approval contained in the permit must be remanded because it lacks a BACT emissions limit for greenhouse gases,[26] but this argument too fails. To begin with, Petitioner has waived the issue by failing to raise it during the public comment period—its sole argument below was that IEPA should have estimated the magnitude of greenhouse gas emissions expected from the project and evaluated them in its consideration of alternatives under the Illinois Administrative Code, *not* that IEPA should have imposed a *Clean Air Act BACT limit* on greenhouse gas emissions, or that such gases are "subject to regulation."

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[26] Petitioner states that the issue presented for review is "[w]hether IEPA's failure to consider emissions reduction technologies for carbon dioxide (CO2) and methane as part of top-down BACT analysis *or in BACT collateral impacts analysis* was a clearly erroneous conclusion of law, or an important policy consideration that the Board should review and reverse." Pet. 3 (emphasis added). Petitioner, however, provides no argument regarding IEPA's collateral impacts analysis. This aspect of the issue is therefore waived.

In any event, U.S. EPA has thoroughly explained in a related permit appeal why consideration of greenhouse gas emissions is neither required nor appropriate in a BACT collateral impacts analysis. *See* Brief of the EPA Office of Air and Radiation, *In re Christian County Generation, LLC*, PSD Appeal No. 07-01 (filed Sept. 24, 2007). "EPA has historically interpreted the phrase 'environmental impacts' in the BACT [collateral impacts] analysis to focus on local environmental impacts that are directly attributable to the proposed facility." *Id.* at 13 n.6. Greenhouse gas emissions, by contrast, have a global impact that is not directly attributable to the proposed facility. "Accordingly, the collateral impacts analysis of BACT is not the appropriate mechanism for addressing the potential *global* impacts of CO_2 emissions." *Id.*

Finally, although Petitioner cursorily states that IEPA should have included a BACT emissions limit for *both* carbon dioxide and methane, its argument focuses only on carbon dioxide. Pet. 28-36. This response therefore focuses on carbon dioxide as well.

Nor may Petitioner now suggest that this argument was not "reasonably ascertainable" until *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007). That decision came down well before Petitioner filed its comments below, and Petitioner was a *party* to that case for years before the Court's decision.

Even if the EAB were to examine the merits, however, Petitioner has failed to demonstrate that IEPA's decision was "clearly erroneous" or involved an "important policy consideration" meriting review. 40 C.F.R. § 124.19(a). Under controlling D.C. Circuit, EAB, and EPA precedent, carbon dioxide is not "subject to regulation" under the Clean Air Act for the simple reason that EPA does not yet regulate it. As USEPA explained in a related appeal just days ago, EPA "has historically interpreted the term 'subject to regulation under the Act' to describe pollutants that are presently subject to a statutory or regulatory provision that requires '*actual control of emissions*' of those pollutants." Brief of the EPA Office of Air and Radiation, *In re Christian County Generation, LLC*, PSD Appeal No. 07-01 at 4 (filed Sept. 24, 2007) (ConocoPhillips Exhibit 5) (emphasis added); *see also* USEPA, Response to Public Comments on PSD Permit No. PSD-OU-0002-04.00 at 5-6 (August 30, 2007) (ConocoPhillips Exhibit 4) (same). Moreover, to the extent that there are "important policy considerations" involved in this appeal, they all counsel *against* review: EPA, Congress, and many other policy-makers are currently considering comprehensive regulations on emissions of carbon dioxide. Localized, *ad hoc* permitting decisions would be a poor mechanism for regulating this global issue. Review should therefore be denied.

A. Petitioner failed to raise the issue of a BACT emissions limit for greenhouse gases during the public comment period.

The Board will review an issue on appeal only if the issue was either "raised during the comment period" or "not reasonably ascertainable" before the close of the public comment pe-

riod. *In re Avon Custom Mixing Services, Inc.*, 10 E.A.D. 700, 708 (EAB 2002); 40 C.F.R. §§ 124.13 & 124.19(a). At all times, the petitioner "bears the burden of demonstrating that review is warranted," and must submit "credible documentation showing that" issues were properly preserved. *Avon*, 10 E.A.D. at 704.

Here, Petitioner presents two arguments for why greenhouse gases are "subject to regulation" under the CAA and why, therefore, the IEPA was required to include in the PSD permit an emission limit for those gases:

(1) Greenhouse gases are "currently regulated under the Clean Air Act's acid rain provisions and the Illinois State Implementation Plan" (Pet. 28-32); and

(2) In the wake of *Massachusetts v. EPA*, carbon dioxide is "subject to further regulation" under Sections 111 and 202 of the CAA (Pet. 33-36).

As explained below, these arguments lack any merit. But even if they were correct, Petitioner presented none of them to the IEPA even though both were "reasonably available . . . [before] the close of the public comment period." 40 C.F.R. § 124.13.

Petitioner devoted several pages of written public comments to the issue of greenhouse gases, but the EAB will search these comments in vain for any mention of these new arguments. *See* Petitioner's Comments, *Technical Analysis of Julia May* at 32-36. Petitioner's *sole* argument on greenhouse gases was that IEPA should have estimated the magnitude of greenhouse gas emissions expected from the project and evaluated those emissions in its consideration of alternatives *under the Illinois Administrative Code* (35 IAC § 203.306).[27] *Id.* at 32-33. Nowhere do the comments suggest that IEPA should impose a *Clean Air Act BACT limit* on greenhouse

[27] *See, e.g.*, Petitioner's Comments, *Technical Analysis of Julia May* at 33 ("[T]he extremely high energy use of the new Project and resultant emissions of Greenhouse Gases (GHGs) should have been considered *pursuant to [Illinois Administrative Code] Section 203.306*, as a major environmental and social cost of the Project."); *id.* at 36 ("The Greenhouse Gas emissions for the ConocoPhillips Wood River are likely to be even higher than for the Rodeo facility, can readily be calculated by ConocoPhillips, and need to be estimated *to comply with Illinois Regulations*.") (emphases added).

gas emissions, or that greenhouse gases are "subject to regulation" under the acid rain provisions, the Illinois SIP, *Massachusetts v. EPA*, or anything else.

Seemingly aware of its waiver problem, Petitioner argues that its comments "express extensive concern with the GHG emissions anticipated to result from the CORE Project." Pet. 25-26. It then quotes an out-of-context snippet from the Responsiveness Summary, suggesting that IEPA knew Petitioner was asking it to "[t]reat[] emissions of CO2 and other greenhouse gases as regulated air pollutant [sic]." Pet. 26 (quoting Responsiveness Summary at 24).

This is a half-truth. To be sure, Petitioner's comments do express concern with greenhouse gas emissions, but they argue only that those emissions should be considered in the analysis of alternatives under the Illinois Administrative Code. That, of course, is the context in which IEPA responded. The full quote from the Responsiveness Summary states that "[t]reating emissions of CO_2 and other greenhouse gases as regulated air pollutant[s], as is effectively being requested by this comment, *would be inconsistent with current Illinois law*." Responsiveness Summary at 24. And the comment to which IEPA was responding argued that "[e]missions of greenhouse gases should be monitored and measured" under *Illinois* law—not that IEPA was required to imposed a BACT emissions limit under the Clean Air Act. *Id.*

IEPA thoroughly responded to Petitioner's comments on the Illinois Administrative Code, and Petitioner does not and cannot challenge those responses here.[28] Responsiveness Summary at 20-25. Petitioner's attempt to raise a new argument instead undermines the "long-standing policy" of "ensur[ing] that the Region has an opportunity to address potential problems with the Draft Permit before the permit becomes final." *In re Westborough and Westborough*

[28] The EAB does not review state-law issues unrelated to the federal PSD program. *In re West Suburban Recycling and Energy Center, L.P.*, 6 E.A.D. 692, 704 (EAB 1996)

Treatment Plant Board, 10 E.A.D. 297, 304 (EAB 2002). Petitioner's greenhouse gas argument should therefore be rejected.[29]

B. Even if Petitioner's greenhouse gas arguments were preserved, they are meritless.

Even if the EAB were to reach the merits, Petitioner has failed to demonstrate that IEPA's decision was "clearly erroneous" or involves "an important policy consideration which the EAB should, in its discretion, review." 40 C.F.R. § 124.19 (a)(1),(2).

First, carbon dioxide is not "subject to regulation" under the Clean Air Act for the simple reason that EPA has not yet regulated it. Petitioner's arguments based on (1) *Massachusetts* and (2) the Acid Rain provisions and Illinois State Implementation Plan fundamentally misconstrue not only the Supreme Court's decision in *Massachusetts*, but also the EAB's, EPA's, and D.C. Circuit's interpretations of the term "subject to regulation."

Moreover, to the extent that there are any "important policy considerations" involved in this appeal at all, they militate overwhelmingly *against* review. EPA, Congress, and many other policy-makers are currently considering comprehensive regulations on emissions of carbon dioxide. In the absence of comprehensive regulations, isolated, ad hoc permitting decisions by local authorities would be a poor mechanism for regulating the global issue of greenhouse gas emissions. Review of the Petition should therefore be denied.

1. *Massachusetts v. EPA* does not change the fact that carbon dioxide is not yet "subject to regulation" under the Clean Air Act.

Petitioner argues that *Massachusetts* "triggered the obligation for permitting agencies to include carbon dioxide and other GHG emission limits in PSD permits." Pet. 25. According to

[29] Petitioner does not attempt to argue that its arguments were not "reasonably ascertainable" before the close of the public comment period, nor can it. 40 C.F.R. § 124.19(a). The acid rain provisions and Illinois SIP have been in place for years, and even if *Massachusetts v. EPA* were relevant to Petitioner's argument (which, as we explain below, it is not), it was decided more than a month before the close of the public comment period. Petitioner (Sierra Club) was a participant in that case.

Petitioner, because carbon dioxide "can and should be regulated" in the wake of *Massachusetts v. EPA*, it is "subject to regulation" for purposes of the PSD program, and IEPA erred by failing to impose an emission limit. Pet. 35.

Petitioner's understanding of "subject to regulation," however, is wrong. The EAB's own decisions establish that a pollutant is "subject to regulation[]" only when an emission standard "*has been promulgated*" for that pollutant—not when an emission standard *could* or *should* be promulgated. *In re Indeck-Elwood, LLC*, 13 E.A.D. (slip op. at 8 n.10), PSD Appeal No. 03-04 (EAB Sept. 27, 2006) (emphasis added). The Court's decision in *Massachusetts* merely held that EPA is *authorized* to regulate carbon dioxide. Carbon dioxide does not become "subject to regulation" until EPA *has actually promulgated* emission standards. Until then, PSD permits need not (and indeed cannot) include emission limits for carbon dioxide. IEPA's decision is therefore correct.

Petitioner's error on this point flows from (1) a distortion of *Massachusetts*, and (2) a misinterpretation of the term "subject to regulation."

a. *Massachusetts v. EPA* merely *authorizes* EPA to regulate carbon dioxide.

First, Petitioner treats *Massachusetts* as if it decided the issue of regulating carbon dioxide under the CAA once and for all—but this is simply not true. *Massachusetts* involved a challenge to EPA's refusal to regulate carbon dioxide emissions from mobile sources under Section 202. EPA based its refusal to regulate on two arguments. First, EPA argued that it *lacked authority* to regulate carbon dioxide because carbon dioxide did not fit within the CAA's definition of "pollutant." The Court rejected this argument, concluding that carbon dioxide is a "pollutant" and that EPA therefore has authority to regulate it. 127 S. Ct. at 1459-60.

Second, however, EPA argued that "even if it does have statutory authority to regulate greenhouse gases," it had *discretion* under the CAA not to do so. *Id.* at 1462. On this point, the Court partially agreed, noting that EPA was not required to regulate carbon dioxide unless it formed a "judgment" that carbon dioxide "causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare." *Id.* at 1462 (quoting 42 U.S.C. § 7521(a)(1)). In other words, EPA may decline to regulate carbon dioxide "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." *Id.* Ultimately the Court concluded that EPA had failed to "ground its [refusal to regulate] in the statute," and remanded the case for further proceedings. *Id.* at 1463. The Court expressly declined to "reach the question whether on remand EPA must make an endangerment finding" (and thus regulate carbon dioxide), leaving that decision to the EPA. *Id.* at 1463. The Court "h[e]ld only that EPA must ground its reasons for action or inaction in the statute." *Id.*

Contrary to Petitioner's characterization of *Massachusetts*, then, it remains an open question whether, and certainly how, EPA will regulate carbon dioxide. EPA could conduct a rulemaking and decide that the emission of carbon dioxide cannot "reasonably be anticipated to endanger public health or welfare," or that EPA "cannot . . . determine" whether carbon dioxide endangers public health. *Id.* at 1462. In that case—absent further action by Congress, the President, or EPA—carbon dioxide might not even become a regulated pollutant. But it is certainly premature to conclude (as does Petitioner) that *Massachusetts* "triggered the obligation for permitting agencies to include carbon dioxide emission limits in PSD permits." Pet. 4. In fact,

Massachusetts triggered only the obligation for the EPA to *reconsider* whether or not to regulate carbon dioxide—nothing more, and nothing less.[30]

This is also the official position of USEPA. In a final decision on a PSD permit just a few weeks ago, USEPA concluded that *Massachusetts* "does not require the Agency to set CO_2 emission limits in [a] PSD permit." USEPA, Response to Public Comments on PSD Permit No. PSD-OU-0002-04.00 at 6 (August 30, 2007) (ConocoPhillips Exhibit 4). As the Agency explained, "the Court did not hold that EPA was required to regulate CO_2 and other GHG emissions under Section 202, or any other section, of the Clean Air Act. Rather, the Court concluded that . . . EPA *could* regulate them . . . subject to certain Agency determinations pertaining to mobile sources." *Id.* USEPA has taken the same position in a related appeal pending before the EAB. *See* Brief of the EPA Office of Air and Radiation, *In re Christian County Generation, LLC*, PSD Appeal No. 07-01 at 6 (filed Sept. 24, 2007) (ConocoPhillips Exhibit 5) ("[T]he [*Massachusetts*] decision does not require permitting authorities (including IEPA) to set CO_2 emission limits in PSD permits in the absence of some other regulatory action. . . . Rather, the Court concluded that these emissions are 'air pollutants' under the Act, and therefore found that EPA *could* regulate them . . . subject to certain Agency endangerment determinations pertaining to mobile sources.") (internal citations omitted). This is further ground for rejecting Petitioner's position.

[30] Petitioner also glosses over the fact that *Massachusetts* dealt only with the regulation of carbon dioxide emissions from *new motor vehicles* under Section 202 of the CAA. *See* 127 S.Ct. at 1459. The case did not address whether EPA can or should regulate emissions of carbon dioxide from *new stationary sources* such as the Permittee here, and on that issue, EPA has concluded that it lacks authority to regulate. Although that conclusion is the subject of a challenge pending in the D.C. Circuit, *New York v. EPA*, No. 06-1322, it remains binding on IEPA and this Board until it is overturned. EPA's conclusion on this issue is therefore an additional, independent ground for denying review.

b. Petitioner's interpretation of "subject to regulation" is unprecedented and incorrect.

Even more important than Petitioner's misunderstanding of *Massachusetts*, however, is its erroneous interpretation of the phrase "subject to regulation." As Petitioner correctly points out, IEPA may impose a BACT emissions limitation for carbon dioxide only if carbon dioxide is "subject to regulation" under the CAA. Pet. 27. But according to Petitioner, a pollutant is "subject to regulation" if it is "capable of being regulated" or "should" be regulated—even if it is not "currently regulated." Pet. 10. That is not the law.

Petitioner fails to cite a single court decision, EAB opinion, or federal regulation in support of this counterintuitive understanding of "subject to regulation." Pet. 10-11. Instead, it cites two obscure sources that do not address the issue and, if anything, undermine its argument.

The first is a quote from the EPA's responses to comments on a rule changing the definition of "major source" under Sections 111 and 112 of the CAA. There, the EPA stated that "[t]echnically, a pollutant is considered regulated once it is *subject to regulation* under the Act. A pollutant need not be specifically regulated ***by a section 111 or 112 standard*** to be considered regulated." Pet. 10 (quoting 40 C.F.R. Part 70, Change to Definition of Major Source, 66 Fed. Reg. 5961 (Nov. 27, 2007)). In the context of its response, EPA was explaining to commenters what pollutants would and would not be part of "major source" determinations, and it was clearly stating that a pollutant is "subject to regulation" not only when it is "specifically regulated by a Section 111 or 112 standard," but also when it is specifically regulated "under [any ***other*** provisions of] the Act." *Id.* In other words, a pollutant is subject to regulation when it is "specifically regulated by a Section 111 or 112 standard" *or* when it is "specifically regulated . . . under [any other provision of] the Act"—but it must be specifically regulated under *some* provision. This statement therefore *undermines* Petitioner's position.

Petitioner's only other (supposed) source of support is an informal memorandum on the Resource Conservation and Recovery Act (RCRA) from the Office of Solid Waste. There, the office director stated that "EPA has consistently interpreted the language 'point sources *subject to permits* under [section 402 of the Clean Water Act]' to mean point sources that *should have a NPDES permit in place*, whether in fact they do or not. Under EPA's interpretation of the 'subject to' language, a facility that should, but does not, have the proper NPDES permit *is in violation of the CWA.*" Pet. 11 (quoting Memo from Michael Shapiro and Lisa Friedman to Waste Management Division Directors, *Interpretation of Industrial Wastewater Discharge Exclusion from the Definition of Solid Waste* at 2 (Feb. 17, 1995) (emphasis added)).

This straightforward memorandum offers Petitioner no support. It says that a point source is "subject to permits" whenever it "should have" a permit, whether it in fact has one or not. But the only reason it "should have" a permit is that the Clean Water Act requires one, and the point source is "in violation of the CWA" if it doesn't. Thus, the point source is "subject to permits" only because the Clean Water Act *already requires* the point source to have a permit in place. Here again, this memorandum *undermines* Petitioner's argument because it indicates that "subject to permits" means that the Act *already requires* a permit.

In sum, neither source cited by Petitioner supports its understanding of "subject to regulation." Indeed, the fact that these unhelpful sources are all that Petitioner can muster for its position demonstrates just how far-fetched its interpretation of "subject to regulation" really is.

c. Carbon dioxide is not "subject to regulation" because it is not yet regulated.

For the correct reading of "subject to regulation," the EAB need look no further than its own decisions, which plainly establish that a pollutant is "subject to regulation" only when EPA has *already* promulgated an emissions standard. In *In re Indeck-Elwood, LLC*, 13 E.A.D. (slip

op. at 8 n.10), PSD Appeal No. 03-04 (EAB Sept. 27, 2006), the EAB unambiguously stated that pollutants "subject to regulation[] under the CAA" are "pollutants for which a NAAQS *has been promulgated*, pollutants subject to standards *promulgated* under section 111 of the CAA, and Class I or Class II substances subject to title VI of the CAA." (emphasis added) (citing 40 C.F.R. § 52.21(b)(50)). Thus, a pollutant is "subject to regulation" for purposes of PSD permitting when it is *already subject* to emission standard.

In re Umetco Minerals Corporation, 6 E.A.D. 127, 127-28 (EAB 1995), confirms this conclusion. There, the Board explained that "radon emissions from uranium byproducts that result from uranium milling are *subject to regulation* under the Clean Air Act" because "EPA *has designated* radionuclides (including radon) as hazardous air pollutants under section 112(a) of the Clean Air Act, 42 U.S.C. § 7412(a). . . . [and,] [i]n accordance with CAA § 112(d)(1), EPA *has issued* National Emission Standards for Hazardous Air Pollutants (NESHAP) for 'radon emissions from operating mill tailings' at 40 C.F.R. Part 61 Subpart W." *Id.* (emphasis added). Here again, the EAB made clear that a pollutant is "subject to regulation" when the EPA "has designated" it as hazardous under Section 112 or "has issued" a national emission standard for it—not when EPA *could* regulate it, but does not. *Id.*

The EAB has already applied this standard to carbon dioxide and concluded that it is not a regulated pollutant for PSD permitting purposes. In *In re Inter-Power of New York, Inc.*, 5 E.A.D. 130, 151 (EAB 1994), the petitioner argued that the permitting authority should have considered various technologies for controlling emissions of carbon dioxide and hydrogen chloride in its BACT analysis. The EAB rejected this argument, however, explaining that "[b]oth carbon dioxide and hydrogen chloride are . . . unregulated pollutants. In such circumstances, the Region was not required to examine control technologies aimed at controlling these pollutants."

Id. See also In re Kawaihae Cogeneration Project, 7 E.A.D. 107, 132 (EAB 1997) (finding no error in the permitting authority's conclusion that "[c]arbon dioxide is not considered a regulated air pollutant for permitting purposes" because "at this time there are no regulations or standards prohibiting, limiting or controlling the emissions of greenhouse gases").

Moreover, the D.C. Circuit addressed this issue shortly after the Clean Air Act Amendments of 1977. In *Alabama Power Co. v. Costle*, 636 F.2d 323, 370 n.134 (D.C. Cir. 1979), the Court considered when, in the absence of a NAAQS, a pollutant becomes "subject to regulation" for purposes of PSD permit approval. The Court explained that "***[o]nce a standard of performance has been promulgated*** [by EPA under Section 111] . . . , those pollutants become 'subject to regulation' within the meaning of section 165(a)(4), 42 U.S.C. s 7475(a)(4) (1978), the provision requiring BACT prior to PSD permit approval." *Id.* Thus, not only the Board but also the D.C. Circuit has explained that "subject to regulation" for purposes of PSD permitting means that an emission standard has already been promulgated.

Finally, USEPA recently confirmed its "historical[]" position that "subject to regulation" means "pollutants that *are presently subject* to a statutory or regulatory provision that requires actual control of emissions of that pollutant." USEPA, Response to Public Comments on PSD Permit No. PSD-OU-0002-04.00 at 5-6 (August 30, 2007) (ConocoPhillips Exhibit 4) (emphasis added). As early as 1978, EPA interpreted "subject to regulation" to mean "all criteria pollutants subject to NAAQS review, pollutants regulated under the Standards of Performance for new Stationary Sources (NSPS), pollutants regulated under the National Emission Standards for Hazardous Air Pollutants (NESHAP), and all pollutants regulated under Title II of the Act regarding emission standards for mobile sources"—that is, pollutants that were *already subject* to emission standards under the CAA. 43 Fed. Reg. 26388, 26397 (June 19, 1978). And as USEPA ex-

plained, it "continues to interpret the phrase 'subject to regulation under the Act' to refer to pollutants that are *presently subject to a statutory or regulatory provision* that requires actual control of emissions of that pollutant." USEPA, Response to Public Comments on PSD Permit No. PSD-OU-0002-04.00 at 6 (August 30, 2007) (emphasis added). USEPA has taken the same position in a related appeal pending before the EAB. *See* Brief of the EPA Office of Air and Radiation, *In re Christian County Generation, LLC*, PSD Appeal No. 07-01 at 3-6 (filed Sept. 24, 2007) (ConocoPhillips Exhibit 5). In short, the Board, the D.C. Circuit, and USEPA all confirm that "subject to regulation" means that a pollutant is already subject to emission control.

2. Neither the acid rain provisions nor the Illinois State Implementation Plan render carbon dioxide "subject to regulation."

Recognizing the weakness of its "capable of being regulated" argument, Petitioner next argues that carbon dioxide is "subject to regulation" because it is "*currently* regulated under the Clean Air Act's acid rain provisions and the Illinois State Implementation Plan." Pet. 28-29 (emphasis added). According to Petitioner, because the acid rain provisions require monitoring and reporting of carbon dioxide emissions, carbon dioxide is "subject to regulation" under the CAA and, therefore, subject to PSD permitting requirements. Pet. 29-30.

But not only does this argument appear nowhere in the public comments below, Petitioner cites no authority for its key proposition that monitoring or reporting requirements render a pollutant "subject to regulation" under the CAA—nor can it. This interpretation runs directly contrary to EAB, D.C. Circuit, and USEPA opinions cited above, which hold that a pollutant is "subject to regulation" only when it is subject to an *emission control standard*—not mere monitoring or reporting requirements.

As USEPA has explained, "EPA has historically interpreted the term 'subject to regulation under the Act' to describe pollutants that are presently subject to a statutory or regulatory

provision that requires *actual control of emissions* of that pollutant." USEPA, Response to Public Comments on PSD Permit No. PSD-OU-0002-04.00 at 5-6 (August 30, 2007) (ConocoPhillips Exhibit 4) (emphasis added). "The CAA acid rain program provision cited by Petitioner does not establish emissions control requirements on CO_2 and thus does not make CO_2 'subject to regulation under the Act' for PSD permitting purposes." Brief of the EPA Office of Air and Radiation, *In re Christian County Generation, LLC*, PSD Appeal No. 07-01 at 7 (filed Sept. 24, 2007) (ConocoPhillips Exhibit 5). And, as noted above, the EAB has stated that pollutants "subject to regulation[] under the CAA" are "pollutants for which a NAAQS has been promulgated, pollutants subject to standards promulgated under section 111 of the CAA, and Class I or Class II substances subject to title VI of the CAA"—that is, pollutants subject to an emission control standard. *In re Indeck-Elwood, LLC*, 13 E.A.D. (slip op. at 8 n.10), PSD Appeal No. 03-04 (EAB Sept. 27, 2006) (emphasis added) (citing 40 C.F.R. § 52.21(b)(50)). These opinions contradict Petitioner's assertion that the monitoring requirements of the acid rain provisions trigger full PSD permitting authority.[31]

Moreover, if Petitioner's argument were correct, every PSD permitting authority in the nation should have been controlling carbon dioxide emissions since 1993—when EPA first implemented the acid rain provisions. *See* 58 Fed. Reg. 3590, 3702 (January 11, 1993) (Acid Rain Program: General Provisions and Permits, Allowance System, Continuous Emissions Monitoring, Excess Emissions and Administrative Appeals). This, of course, is not the case. The fact

[31] The Illinois SIP does not require monitoring or reporting of carbon dioxide. Petitioner argues instead that, in light of *Massachusetts*, carbon dioxide fits the definition of "air pollution" in the Illinois SIP and is therefore "subject to regulation." Pet. 29-30. Petitioner points to no regulations in the SIP specifically addressing carbon dioxide, much less restricting carbon dioxide emissions. The argument based on the Illinois SIP therefore fails for the same reasons as the arguments based on *Massachusetts* and the acid rain provisions. *See* Brief of the EPA Office of Air and Radiation, *In re Christian County Generation, LLC*, PSD Appeal No. 07-01 at 6 (filed Sept. 24, 2007) (ConocoPhillips Exhibit 5) ("Similarly misplaced is Petitioner's reliance on the general nuisance provision of the Illinois State Implementation Plan (SIP) to argue that CO_2 is 'subject to regulation' for the purpose of this PSD permitting action.")

that fourteen years of EPA and local permitting practice directly contradict Petitioner's position further confirms that it has no basis in law.

3. The only "policy considerations" relevant here militate *against* granting review.

Finally, important policy considerations militate strongly against granting review here. In the wake of *Massachusetts*, Congress, EPA, and numerous other policy-makers are taking the first steps toward regulating carbon dioxide and other greenhouse gases. It would be inappropriate for a local permitting body to use its case-by-case authority over PSD permits as a broad mandate to undertake what would be (at best) piecemeal, localized regulation of a global issue. As IEPA explained, "the challenge of global warming will require a comprehensive regulatory approach in the United States, which is ultimately imposed by Congress at a national level. Until specific regulations are put into place by the appropriate state or national authorities, ad-hoc actions to compel individual action on global warming through conventional environmental permitting programs are capricious." Responsiveness Summary at 22. Indeed, it is difficult to conceive of a worse mechanism for regulating the global issue of greenhouse gas emissions.

The national level policy discussions are meant to include opportunities for public participation and the ability to weigh important conflicting goals. Individual projects providing opportunities for economic development and stabilization of energy supplies in the United States or locally in Illinois should not be hindered while these policy discussions are ongoing.

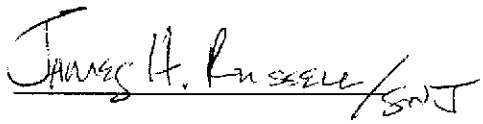
In spite of this, Petitioner essentially asks the EAB to rush ahead of Congress and EPA—both of which are currently considering how best to regulate carbon dioxide—and impose the Petitioner's own vision of carbon dioxide regulation on a plant-by-plant, PSD-permitting basis. If any "important policy considerations" are at issue here, they counsel strongly *against* such a

"capricious" result. 40 C.F.R. § 124.19(a); Responsiveness Summary at 22. Review should therefore be denied.

CONCLUSION

For the foregoing reasons, review of the Petition should be denied.

Respectfully submitted.



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Dated: September 26, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 2007, a true and correct copy of Permittee's Motion to Participate and Motion for Expedited Consideration, along with the supporting Memorandum, was served by Federal Express to:

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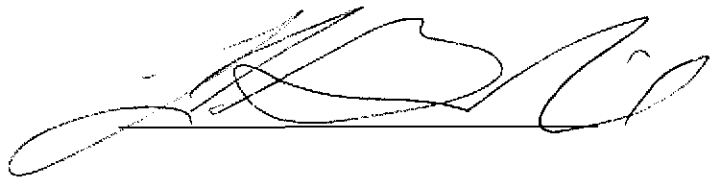

LIST OF EXHIBITS

Exhibit	Description
1	Illinois Environmental Protection Agency, Responsiveness Summary (July 2007)
2	Illinois Environmental Protection Agency, CORE Project Summary
3	Draft Permit (March 2007)
4	United States Environmental Protection Agency, Region 8 Air & Radiation Program, Response to Public Comments on PSD Permit No. PSD-OU-0002-04.00 (Aug. 30, 2007) (pages 1-9)
5	Brief of the EPA Office of Air and Radiation, *In re Christian County Generation, LLC*, PSD Appeal No. 07-01 (Sept. 24, 2007)
6	Consent Decree, *United States of America and the States of Illinois, Louisiana and New Jersey, Commonwealth of Pennsylvania and the Northwest Clean Air Agency v. ConocoPhillips Company*, Civil Action No. H-05-0258 (S.D. Tex. Dec. 5, 2005)
7	First Amendment to Consent Decree, *United States of America and the States of Illinois, Louisiana and New Jersey, Commonwealth of Pennsylvania and the Northwest Clean Air Agency v. ConocoPhillips Company*, Civil Action No. H-05-0258 (S.D. Tex. May 1, 2007)
8	Energy Information Administration, *This Week in Petroleum* (Sept. 19, 2007)
9	Executive Orders from the states of Minnesota, Kansas, Iowa, North Dakota, and Nebraska
10	Letter from the Democratic Governors Association to President George W. Bush (May 22, 2007)