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

In the Matter of:	)	
	)	**PSD Appeal No. 09-04**
Power Holdings of Illinois, LLC	)	
	)	

PERMITTEE'S SUR-REPLY

As permitted by the Environmental Appeals Board's ("Board") March 17, 2010 Order, Power Holdings of Illinois, LLC ("Permittee") respectfully files the following Sur-Reply to Petitioner's April 5, 2010 Reply.

I. Flare Minimization Planning

Petitioner has offered nothing new in support of its arguments. Rather, Petitioner continues to implore the Board to extend its prior holding in *Rock Gen* beyond the facts and logic in that case – i.e. to make new law in this case.

Petitioner is asking the Board to prohibit permitting authorities from requiring future plans in PSD permits -- even if the scope and standards for such plans are fully defined by the permit, even if such plans do not establish alternative emissions limits or otherwise operate in lieu of emission limits established in the permit, and even if the information to be described in such plans is by its nature unavailable at the time of construction permitting.

Petitioner cites no new case law in support of its position – but rather re-argues its points at greater length based on the cases cited in the Petition. The fundamental flaw in

Petitioner's arguments is that all of these cases involve permits that failed to provide substantive BACT limits and plans that were designed to act *in lieu* of substantive permit requirements. Petitioner states that their point is that "all limits and substantive requirements must be in the permit review materials..." Permittee's point is that all limits and substantive requirements *are* in the permit in this case.[1]

Significantly, the permit does not require operation *in accordance with* the written flare minimization plan. Unlike the BACT requirements for compliance with the written SSM plan and the written inspection and maintenance procedures, the BACT "good air pollution control practice" for minimizing flare events under Condition 4.1.2-1(c) is the "*implementation of flare minimization planning,"* not any specific equipment configuration or operating or maintenance procedure.[2]

Under Condition 4.1.5-3, "the *flaring minimization planning* conducted by the Permittee ... shall include the preparation and maintenance of Flare Minimization Plans...that include the following..." What follows is a list of seven items which must be described in the FMP – including process flow diagrams, procedures, personnel

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[1] The overall BACT requirements for the gasification block (the only operation tied to the flare system) are described in Permit Condition 4.1.2-1: Subsection (a) requires specific design and equipment features to minimize emissions; Subsection (b) requires specific operating practices; Subsection (c) requires performance of certain "good air pollution control practices;" and Subsection (d) provides that "emissions of SO2, NOx, CO, PM and sulfuric acid mist from the flares ...shall not exceed the annual limitations in Condition 4.1.6(a)" and "emissions of SO2, NOx, CO, PM and sulfuric acid mist from the AGR units ...shall not exceed the hourly limitations in Condition 4.1.6(b)."

[2] The "good air pollution control practices" required by Condition 4.1.2-1(c) to minimize emissions due to flaring are threefold: 1) "Operation of emission units *in accordance with written operating procedures* that include startup, shutdown and malfunction plan(s)", 2) "Inspection and maintenance *in accordance with written maintenance procedures*," and 3) "*Implementation of flare minimization planning*, as further addressed in Condition 4.1.5-3." [emphasis added]

responsibilities – and one item (Condition 4.1.5-3(a)(viii)) which requires an evaluation of preventive measures to reduce the occurrence and magnitude of flaring, including a schedule to expeditiously address three specified flaring causes, to be considered in light of "past flaring activity as information for [sic] actual operation of the plant becomes available."

With the exception of the last item, Condition 4.1.5-3(a)(viii), the FMP is entirely descriptive – not proscriptive. While the permit contains detailed and enforceable standards for what the FMP must describe, no specific equipment arrangement, operating or maintenance procedures, or personnel assignments are required. It is not the intent of the permit to dictate these plant level operations. Rather than establishing particular operational procedures as BACT, the permit defines the Flare Minimization planning process as BACT, i.e. the requirement to *record the existing plant layout, operations, and procedures in the FMP*, as detailed in the permit conditions, to *engage in a process of evaluation of* future flaring events and plant operations and procedures based on actual experience and consistent with specific considerations and standards in the permit, and to expeditiously *address certain specified types of flaring events*. Following shakedown, even more rigorous "Root Cause" analysis, recordkeeping and reporting is required by the permit. These BACT "good air pollution control practices" are all stated in the permit.

Contrary to Petitioner's contention, the public had every opportunity to comment on the scope of information to be described in the FMP, the information to be evaluated in the planning process, and the sufficiency of this prescribed planning process in general. Notably, neither Petitioner nor any other party commented on the specific

information required to be described in the FMP or the process for evaluating flare events.

Petitioner has identified no law supporting its broad theory that PSD permits which require future plans violate Part 124 requirements for public review and comment. While Permittee could point to a myriad of PSD permits that contain requirements for future plans – including, for example, sampling plans, monitoring plans, testing plans, startup, shutdown and malfunction plans, as well as flare minimization plans -- it is the Petitioner that bears the burden of proving its contention. In particular, Petitioner has identified no case in which a plan that is circumscribed by hard emission limits has been prohibited. Nor has Petitioner identified any case in which a requirement to prepare a well-defined, purely descriptive planning document and to perform ongoing evaluation of operations is prohibited in a PSD permit.

Petitioner's contention that the Board's decision in *RockGen Energy Center*, 8 E.A.D. 536, 551 (EAB 1999) and the other cases cited in Petitioner's Reply should be viewed as applying to plans that do not act *in lieu* of substantive standards is inconsistent with the facts in those cases and a plain reading of the decisions. As fully discussed in Permittee's Response Brief, p. 20- 22, the lynchpin of the *Rock Gen* decision was the fact that the PSD permit "allow[ed] RockGen to *exceed* the permit's emission limitations if emissions are temporary and due to startup or shutdown operations carried out in accord with a plan and schedule approved by the Department." *Id.* at 551. [emphasis added] The Board did not remand the permit in *RockGen* because the public had not been given the opportunity to review a plan prescribed by the permit. On the contrary, the Board remanded the permit because of a substantive deficiency in the permit with genuine air

quality consequences. The Board's remand order required the WDNR to "specify and carefully circumscribe in the permit the conditions under which *RockGen* would be permitted to exceed otherwise applicable emission limits and establish that such condition are nonetheless in compliance with applicable requirements, including NAAQS and increment provisions." *Id.* at 554 The concern in *RockGen* was that the SSM plan would allow an indefinite quantity of emissions that could not be modeled to assure air quality. To address this concern, the Board recommended that WDNR consider including secondary BACT limits in the RockGen permit. *Id.*

IEPA followed the Board's suggestion. Unlike WDNR in the *Rock Gen* case, IEPA included primary and secondary BACT emission limits in the Power Holdings' permit. IEPA also carefully circumscribed the scope and content of the FMP even though Power Holdings' permit does not allow an exceedance of the emission limitations during flaring.

While Petitioner dismisses the secondary BACT limits in Power Holdings' permit as insignificant, these limits provide the substantive quantifiable assurance that air quality will not deteriorate as a result of flaring activity. Unlike the permits in *RockGen* or any of the other cases cited by Petitioner, Power Holdings' permit contains primary and secondary emission limits for the flares, one of which applies at all times. Furthermore, Power Holdings submitted modeling demonstrating that both limits are protective of air quality. Notably, Petitioner never commented on these very important limits.

RockGen is not precedent for the holding Petitioner requests in this case and the Board should decline to extend its *RockGen* holding in a manner that disregards the content of the permit and the plan itself. To prohibit future planning, even where the

permit includes well-defined standards for that planning process, the plan itself contains no substantive requirements, and emissions are entirely circumscribed by hard emission limits, will draw into question all sorts of plans prescribed in PSD permits and unnecessarily hamstring permitting authorities.

II. Clean Fuels Analysis

Petitioner has once again failed to identify any comment in the administrative record which raised Petitioner's new argument that the emissions associated with the production of SNG at the facility must be included in the BACT clean fuels analysis for the Superheaters. Given IEPA's thorough response to other comments, IEPA no doubt would have responded to Petitioner's novel "production emissions" argument had it been raised. But it simply wasn't raised.

In its 99 page Responsiveness Summary, IEPA not only fully discussed the comments that Petitioner and other members of the public made regarding clean fuels, it actually amended the permit language to require "use of natural gas" as expressly requested by Petitioner:

> "Condition 4.2.2 Control Technology Determination
>
> a. Each affected superheater shall be equipped and operated with the following to control emissions;
> i. *Use of natural gas…*
> b. The affected auxiliary boiler shall be equipped an operated with the following to control emissions:
> i. *Use of natural gas…*" [emphasis added]
>
> "Condition 4.2.5 Operational and Production Limits and Work Practices
>
> a. *Natural gas shall be the only fuel combusted in the affected units...*" [emphasis added]

Petitioner points to its comments on "Clean Fuels" on pp. 38-39 of its May 4, 2009 comments (Pet. Ex. 2) as evidence that it raised and preserved this issue. However, the comments to which Petitioner points do not refer to emissions from the production of SNG. While Petitioner contends that its comments regarding natural gas being cleaner than "these coal-based SNG" were not limited solely to combustion emissions, nothing in its comments would have alerted IEPA to this unusual broader meaning. Rather, the focus of these comments clearly was on combustion emissions, even directly requesting that IEPA consider "combustion products" and "exhaust gas compositions" for the three gases:

> "It is not clear why product SNG or natural gas alone or in combination with syngas is not proposed to be used as fuel for all combustion sources. It is our understanding that natural gas is "cleaner" – meaning it will result in fewer emissions of at least one pollutant subject to BACT – compared to these coal-based SNG. Moreover, it is our understanding that SNG is cleaner than pre-processed synthetic gas. However, the relative cleanliness of potential fuels for combustion sources at the facility has not been documented. In order to make a proper evaluation of the *combustion products* from the proposed syngas to be used versus SNG or natural gas, product composition for SNG and syngas must be provided. Additionally, *exhaust gas composition for the combustion products of these three fuels must also be provided*...In order to even begin evaluating the potential use of clean fuel as the basis of BACT, IEPA must, at a minimum, identify the relative products of combustion of synthetic gas, SNG, and natural gas in the record." Pet. Ex. 2, pp. 38-39. [emphasis added]

If Petitioner at the time of its May 4, 2009 comments was thinking of SNG production emissions, it certainly didn't state that in its comments.Having obtained what it requested, Petitioner is now making a new argument. A Petitioner cannot be allowed to

"hide the ball" from a permitting authority and use that "hidden ball" as leverage to obtain a remand of a permit. Petitioner not only had a duty to raise this issue in the administrative record, it had a duty to raise it clearly. *In re ConocoPhilllips Co.*, 13 E.A.D. __, PSD Appeal No. 07-02, Slip. Op. at 45 (EAB June 2, 2008) ("Issues also must be raised with a reasonable degree of specificity and clarity during the comment period in order for the issue to be preserved for review.")

Petitioner argues that IEPA should have performed a formal collateral impacts analysis comparing the production emissions of geologic natural gas and SNG *even if* this issue was not raised in the record before IEPA. This is incorrect. Whether or not IEPA had an independent duty to consider this point, this issue was not raised in the record and cannot be considered by the Board.

Moreover, IEPA did not err by failing to address SNG production emissions in a formal collateral impact analysis. Petitioner's argument would extend the Step 4 collateral impacts analysis into the unprecedented territory of "indirect emissions" analysis. Petitioner has pointed to no case in which fuel production emissions have been compared in a BACT analysis for a combustion source. Indeed, this argument is inconsistent with EPA's stated position that collateral impact analysis should focus on "direct impacts." The EPA NSR Workshop Manual states that collateral impact analysis for energy "should consider only direct energy consumption and not indirect energy impacts...Indirect energy impacts (such as energy to produce raw materials for construction of control equipment) generally are not considered." EPA NSR Workshop Manual, 1990 Draft, p. B-30. Similarly, for collateral environmental impacts, the Manual states "In general, the BACT analysis should focus on the direct impact of the control

alternative... If the applicant accepts the top alternative in the listing as BACT, the applicant proceeds to consider whether impacts of unregulated air pollutants or impacts in other media would justify selection of an alternative control option." *Id.* p. B-8

That EPA has not extended collateral impact analysis to indirect emissions generated by the production of feedstocks, fuels, or other control technologies is consistent with the "emission unit" focus of a BACT analysis. The emissions associated with the production of a commodity such as a raw material or fuel are not generated by the use of that commodity at any particular combustion unit. As discussed in Permittee's Response Brief, whether or not SNG is used to fuel the Power Holdings' superheaters, will not increase or decrease the volume of SNG produced at Power Holdings' facility. Rather, the volume of SNG produced will be governed by independent factors, most importantly the production capacity of the facility and permit limitations directly regulating the production process.

Because this issue was not preserved for review, the Board has no jurisdiction to review this issue and must dismiss this new claim. (See pp. 30 -32 of Permittee's brief for further discussion of the standards governing the Board's review of issues not raised before the permitting authority or raised with insufficient specificity.)

III. Applicable Requirements Under the Illinois SIP

In its Reply, Petitioner continues to misinterpret the Illinois State Implementation Plan ("SIP") for PSD permitting. In the face of the long-standing EPA regulations defining the Illinois SIP at 40 CFR 52.720, et seq. and case law directly interpreting the scope of the Illinois SIP for PSD program administration, all as cited in Permittee's Response Brief, pp. 39-45, Petitioner again has failed to point to any authority for its

novel contention that Illinois is required to include a state regulation in its PSD permits.

The Board's holding in *West Suburban Recycling & Energy Center*, ("WSREC") 6 E.A.D. 692, 707 (EAB 1996) is clear and directly on point: "Obviously, U.S.EPA would not be free to deny a federal PSD permit solely on the basis of failure to comply with state permitting requirements. Therefore, IEPA may not do so." *Id.* at 707. Petitioner attempts to distinguish WSREC by arguing that the Board's decision did not address Petitioner's attenuated Clean Air Act Section 165 (42 U.S.C. 7475(a)(3)(c)) and 40 C.F.R. 52.21(j)(1) argument. But Petitioner's argument assumes what it must prove – i.e. that Illinois regulations are "applicable requirements" for Illinois' delegated federal PSD program. In fact, Petitioner is reading the word "applicable" out of the phrase "applicable emission standard or standard of performance" in both 42 U.S.C, 7475(a)(3)(c) and 40 C.F.R. 52.21(j)(1).

Opening a backdoor for state regulations to be given the force of federal law in an Illinois PSD permit, Petitioner's Section 165 argument would lead to the absurd consequence that despite EPA's express determination that Illinois' regulations are inadequate to prevent significant deterioration of air quality and the fact that Illinois has not been delegated PSD permitting authority, Illinois regulations are nonetheless federally required PSD requirements. This interpretation obliterates the distinction between states with fully authorized PSD permit programs and those with only EPA delegated permitting authority.

As the Board has no authority to review state regulatory requirements – or lack thereof – in an Illinois PSD permit, this claim must be dismissed.

IV. Greenhouse Gas ("GHG") Regulation Under the CAA

Petitioner's fourth claim must also be dismissed because it is based on the contention that greenhouse gases are a regulated pollutant under the Clean Air Act. In *In re Deseret Power Cooperative*, 14 E.A.D. __, PSD appeal No. 07-03, slip Op. (EAB Nov.13, 2008), the Board found that the language of the Clean Air Act does not require this interpretation and that whether GHGs are currently regulated under the Clean Air Act was a question requiring definitive EPA interpretation. In its Reply, Petitioner has now conceded that EPA's March 30, 2010 Final Rule on Reconsideration of the Johnson Memo is a definitive EPA interpretation. That interpretation finds that GHGs are not currently regulated under the CAA. (Reply, pp. 31-33) Petitioner has also conceded that "The Reconsideration Final Decision further addresses most of the arguments made in the Petition in this action." *Id.* at 33. Petitioner does not specify any argument not addressed by the Administrator's March 30th Final Decision. Based on these concessions and EPA's March 30, 2010 Final Rule, the Fourth Claim of the Petition must be dismissed because it asks the Board to require BACT limits for pollutants which are not subject to regulation or currently regulated under the Clean Air Act.

V. Petitioner's New Prayer for Relief

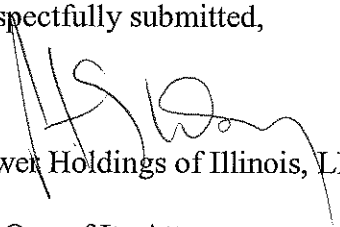
In the Conclusion to its Reply, Petitioner makes the backdoor suggestion that further briefing should be allowed, including "a briefing opportunity" for some unidentified *amici.* No reason is cited for this new and extraordinary request. Petitioner's mysterious and completely unsupported suggestion that further briefing might be allowed at this 11th hour by some previously disinterested party is a transparent effort to obtain

delay for delay's sake. This case has been fully briefed on the merits and is ready for final decision. Granting of this request would be entirely unwarranted and highly prejudicial to the Permittee. The Board has already stated its intent to follow its policy of expediting review of PSD permit appeals and has ordered that no further briefing will be allowed following this round of Reply and Sur-Reply. The Board should remain resolute in bringing this matter to an expeditious conclusion.

Conclusion

Petitioner bears the burden of proof in this case and has clearly failed to carry that burden. Petitioner has failed to demonstrate that the flare minimization planning process prescribed in Power Holdings' permit was not adequately defined and circumscribed by emission limitations and standards in the permit. Petitioner has failed to identify comments in the administrative record regarding consideration of fuel production emissions in establishing "clean fuel" BACT requirements for the Superheaters or to otherwise identify a BACT requirement for the consideration of production emissions at a combustion source. Petitioner is clearly mistaken in its reading of the applicable requirements for Illinois PSD permits under the Illinois SIP. Finally, Petitioner has conceded that EPA has issued a definitive interpretation of the meaning of "subject to regulation" finding that there is no current Clean Air Act requirement to regulate GHG's in a PSD permit.

Respectfully submitted,



Power Holdings of Illinois, LLC

By One of Its Attorneys

Date: April 19, 2010

Patricia F. Sharkey
McGuireWoods LLP
77 West Wacker Drive
Suite 4100
Chicago, Illinois 60601
Direct: (312) 750-8601
Fax: (312) 849-3690
psharkey@mcguirewoods.com