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

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| IN THE MATTER OF: | ) | APPEAL NUMBER: 07-02 |
| CONOCOPHILLIPS | ) | APPLICATION NUMBER: 06050052 |
| COMPANY | ) | FACILITY ID NUMBER: 119090AAA |

# PARTIAL REPLY MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW – RESPONSIVENESS SUMMARY ISSUES

Ann Alexander
Natural Resources Defense Council
101 North Wacker Drive, Suite 609
Chicago, Illinois 60606
312-780-7427
AAlexander@nrdc.org
Council for Petitioner American Bottom Conservancy

Ben Wakefield
Environmental Integrity Project
1920 L Street NW, Suite 800
Washington, DC 20036
202-263-4450
bwakefield@environmentalintegrity.org
Council for Petitioner Sierra Club

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## PRELIMINARY STATEMENT

Petitioners[1] submit this memorandum in reply to the Illinois Environmental Protection Agency's ("IEPA's") partial response to the Petition for Review concerning two issues: IEPA's failure to provide the Responsiveness Summary ("RS") to the public in issuing the permit pursuant to 40 C.F.R. § 124.17(a), and its failure to comply with the requirement in 40 C.F.R. § 124.17(a)(1) that it "specify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change." This memorandum also replies to the Applicant's memorandum in support of its motion to participate as it pertains to these two issues.[2]

Neither IEPA's nor the Applicant's response reflects the Environmental Appeals Board's ("EAB" or "Board") oft-emphasized appreciation of the public's need for full information in the narrow window of time for appeals, and the central importance of the RS in providing that information. As discussed more fully below, when confronted in the past with an agency's failure to provide adequate notice of a permit decision, the Board has ordered the agency to provide affected commenters with a copy of the final permit *and* a copy of the Responsiveness Summary. This approach is supported by many years' worth of Board decisions establishing the key importance of the Responsiveness Summary to formulating an appeal.

IEPA and the Applicant both fail badly in their attempt to minimize the significance of the Agency's failure to comply with the simple requirement in 40 C.F.R. § 124.17(a) to identify and explain changes made in the final permit, and to disseminate

[1] Abbreviations used in this brief are defined in Petitioners' original Petition for Review unless otherwise noted.

[2] As indicated in Petitioners' accompanying motion for leave to submit this brief, Petitioners propose to submit an additional reply brief concerning the remaining issues after they are briefed by respondent IEPA.

that information promptly. Both response briefs essentially take the position that, since the Agency agreed to add provisions addressing the general subject matter of Petitioners' comments, Petitioners should be satisfied. While Petitioners are, of course, pleased that changes for the better were made, the fact remains that IEPA implemented only a highly watered-down version of what Petitioners recommended, and failed almost entirely to explain or justify its evisceration of these essential improvements. The appropriate remedy is a remand – as the Board has frequently ordered in the past in response to failure to comply with § 124.17(a) – to ensure both that the public has a full opportunity to provide input on formulation of the flare monitoring and control measures that IEPA has essentially admitted are essential, and that IEPA is made to justify in its RS any decision to implement them half-way.

## Argument

### Point I

### BOARD PRECEDENT AND THE INTEREST OF JUSTICE REQUIRED THAT IEPA PROVIDE THE RS WITH ITS NOTICE OF ISSUANCE OF THE PERMIT

Petitioners' initial pleading describes IEPA's delay in providing the RS following its issuance of the final permit, and cites authority demonstrating that such failure is inherently prejudicial given the very short time window for developing an appeal. Petition for Appeal at 5 – 7. IEPA's and the Applicant's essential response is that since this precise issue was not addressed by the Board in In re Prarie State Generating Station, PSD Appeal No. 05-02 (EAB, March 25, 2005) or In re Hillman Power Co. L.L.C., interlocutory order at 3-6 (EAB, May 4, 2002), there is no legal basis to challenge the delay.

These responses succeed only in demonstrating that Petitioners have raised a question of first impression, which Petitioners have already acknowledged. What these responses do not demonstrate – because they cannot – is any sound reason why withholding vital information from commenters is just or acceptable under the regulation and Board precedent. The Board was very clear in Prairie State (in dictum because the issue had not been raised by the parties) that mere notice of the fact of a decision is insufficient information to enable commenters to determine whether to appeal; and that the failure to provide the permit itself "could adversely affect appeal rights, which are time limited."[3] Prairie State at 4, *citing* Hillman Power at 3-6. There is no reasoned distinction between commenters' need to review the permit itself and their need to review the RS, since the RS is equally essential to determining whether an appeal is warranted. See Petition for Appeal at 5 n.4 (addressing the fact that an RS is a jurisdictional prerequisite for appeal).[4]

[3] The Applicant makes much of the pointless fact that Petitioners had 3 additional days to file their appeal due to the Board's time computation rule. Applicant's response at 10-11. The significant fact is that Petitioners' meaningful time to respond was substantially shortened by a delay in receipt of the RS. Neither are Petitioners required to specify on which specific arguments they could have worked harder in order to demonstrate prejudice. Any act of the Agency that limits Petitioners' already brief time to appeal is inherently prejudicial, as the Board pointed out in Prairie State and Hillman.

[4] Both IEPA and the Applicant now second-guess Petitioner American Bottom Conservancy's ("ABC's") need to obtain a paper copy of the RS, pointing out that it was posted on the web site where ABC learned of issuance of the permit. As any computer user should be aware, it can be significantly more difficult for many systems to download a large .pdf document than to simply read text on a web site, and this difficulty prevented petitioner ABC from obtaining the RS electronically. This fact is beside the point, however, as the larger question for the Board, here, is whether internet access is sufficient as the sole means to provide time-critical permit decision documents. Prairie State and Hillman – as well as Petitioner ABC's experience here – indicate that it is not. Even where members of the public have access to public library computers and know how to use them (which is often not the case), printing out a .pdf document such as the RS can cost $.10 or $.15 per page, a prohibitive cost for many.

In Hillman, the Board's solution was to require the agency to mail or personally serve on commenters "a copy of the decision, the response to comments document, and an explanation of their appeal rights."[5] The same requirement is appropriate here.[6]

## Point II

## IEPA'S FAILURE TO SPECIFY CHANGES TO THE DRAFT PERMIT, AND THE EXTENSIVE AND PROBLEMATIC NATURE OF THOSE CHANGES, REQUIRES A REMAND

In their comments on the draft permit, Petitioners pointed out very serious omissions by the Agency concerning control and monitoring of flares, which are a major source of air emissions at refineries such as the Applicant's facility. IEPA and the Applicant now take the position that, since IEPA acknowledged the seriousness of the problem described by Petitioners by taking some steps to correct it in the final permit, IEPA should not be required under 40 C.F.R. § 124.17(a)(1) to either describe and justify the extensive new provisions they added, or to allow any public input on the crafting of those provisions. Essentially, they argue, Petitioners should "take yes for an answer" and go away happy. See Applicant's response at 17.

The problem with this logic is that IEPA, while it took steps in the right direction, did *not* adequately address Petitioners' concerns or include the flare control and monitoring measures that Petitioners requested based on standards and practices in effect

[5] IEPA badly misconstrues Petitioners' suggestion that commenters could be given an option to obtain the RS electronically. See IEPA Response n. 8. First, it does not "run counter" to the concerns in Prairie State that not everyone has full access to the internet, because it would be merely an *option* (the other option being to obtain a paper copy). Second, there would be no need for a new web site of any sort. Commenters could simply state in their comments their willingness to receive comments electronically (for ease of administration, IEPA could provide a form for this request on its web site, and/or commenters could be asked to specify any such request prominently on the first page of their comments or on the registration sign-in sheet at public hearings).

[6] It is of no consequence that in a previous settlement discussion concerning a different matter, Petitioners agreed to a different solution (see Respondent's Exhibit 1). Petitioners had no authority to bargain away the public's right to adequate notice, and certainly had no such intention in the settlement.

at other refineries. As discussed at length in the Petition, the measures implemented by Petitioner were in many respects a watered-down version of the much more comprehensive and stringent measures in place in the Bay Area Air Quality Management District ("BAAQMD") and other regulations, and failed to effectively address the problems in question. See Petition for Appeal at 18-24.

Whether IEPA was required to take the stronger measures recommended by commenters is a separate issue. But 40 C.F.R. § 124.17(a)(1) required in the first instance that IEPA specify what those changes were and specifically why they were made, so that the public could evaluate them.

IEPA's and the Applicant's claims that passing references to the permit changes in the RS constitute sufficient notification of the substance and rationale of those changes fall apart upon inspection.[7] That fact is best illustrated by comparing the extensive list of changes made to the permit – prepared with considerable effort by Petitioners' consultant and appended to the Petition as Exhibit 8 – with the list provided by the Applicant in its footnote 8 setting forth essentially all of the information in the RS concerning those changes.

As a first order matter, the RS fails to even identify by number the conditions that were changed in the 87-page permit. As is clear from Petitioners' Exhibit 8, the changes were not inserted in one readily identifiable location, but are implemented as scattered

[7] IEPA's strange assertion that it did not separately identify the voluminous changes to the draft permit because those changes really only constituted a single change, and hence could not be "listed," hardly requires response. As the Applicant points out, 40 C.F.R. § 124.17(a) does not even use the term "list," nor does IEPA cite other authority using that term. In any event, it would conceptually be possible to generalize even the most voluminous set of changes to the point where they were identified as a single change, but that pointless semantic exercise would have no bearing on the question of whether the purposes of 40 C.F.R. § 124.17(a) – to ensure full public information and document the judgment of the Agency – had been fulfilled. Here, as acknowledged by the Applicant, there were at least seven distinct categories of changes made to the final permit. Applicant's Response at n.8.

amendments throughout a large section of the document, in some cases by amending existing provisions and elsewhere by adding entirely new ones. To require Petitioners to hunt through a complex document and compare the final permit line by line with the old one, rather than requiring the Agency that made the changes to simply identify them, comports with neither 40 C.F.R. § 124.17(a)(1) nor common sense. At the very minimum, that regulation must be construed to require that the Agency specify by number the conditions to which changes were made, and summarize in reasonable detail what was added or taken away from each such section. It would have been extremely easy for IEPA to identify these changes for the public by providing a redlined version (i.e., with insertions underlined and deletions crossed out as in Petition Exhibit 8) through use of standard word processing software – particularly since redlining was used extensively by IEPA staff in refining and exchanging drafts of the Applicant's permit.[8]

Beyond that fundamental omission, it is clear that in almost every instance, IEPA's purported "specification" of the changes to the draft permit were a "mere concurrence" with the general subject matter of Petitioners' recommendation, with no specifics provided as to how and to what degree of stringency that recommendation was being implemented. See In re Indeck-Elwood, LLC, PSD Appeal 03-04 (September 27, 2006), *citing* In re Amoco, 4 E.A.D. 954, 980 (November 23, 1993) ("mere concurrence" with comments is insufficient compliance with 40 C.F.R. § 124.17(a)(1)). Thus, in the present case, it was not possible to determine what aspects of the BAAQMD regulations or other measures requested by Petitioners were adopted and which were dropped without a painstaking line-by-line comparison of the draft and final permits.

[8] Petitioners are not arguing that redlining is per se necessary to comply with 40 C.F.R. § 124.17(a)(1), in this instance or in general. Identifying the changed provisions by number and substance, however, is clearly essential.

The following is a summary of specific instances in which the RS provided substantially insufficient information regarding the added permit terms and conditions, by failing to explain and justify the ways in which they differ from the BAAQMD requirements recommended by Petitioners and other obvious omissions in the permit language:

1. *Testing Requirements.* Regarding testing requirements (final permit condition 4.7.7), the RS states only, "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." RS at 32 (see Applicant's response at n.8, item 3). However, this one-sentence summary fails to inform the reader that the language purporting to establish these testing requirements (subsections b. and c. of condition 4.7.7) essentially takes the teeth out of the BAAQMD testing requirements that Petitioners recommended. See Petition for Appeal at 23 (describing deficiencies in equipment accuracy requirements and methodology).

2. *Compressor Capacity.* In response to Petitioners comments regarding the need for stronger process vessels as a means of controlling flares during shutdown, the RS states that IEPA is declining to adopt this method, but indicates that "careful management of depressurization of vessels" is a more effective means of controlling flaring emissions. However, the new provision added to address depressurization (4.7.5(a)(iii)) specifies, "depressurization of process vessels in the Delayed Coking Unit shall be conducted with waste gases recovered for use in the fuel gas system until the pressure in the vessel is no more than 5.0 lb per square inch gauge, before any waste gases are sent to be combusted in an affected unit." "Careful management" of depressurization would by any reasonable

definition require that the vessel be slowly depressurized, to allow the gases to be used in other parts of the refinery rather than used in the flare. Yet although IEPA is claiming in the RS to have added a provision requiring "careful management" in response to Petitioners' concerns, the actual provision effectively allows vessel depressurization to proceed -- without any requirements on slowing this depressurization -- until the pressure gets down to 5 lbs/square inch. That is, ConoocPhillips is allowed in this case to depressurize as fast as possible, and then is allowed to open the vessel up to the atmosphere and allow the remaining vapors to dump directly to the air. IEPA additionally provided no information on the emissions associated with the 5 lbs/square inch evacuation of the vessel. IEPA should be required to do more than simply state that its added measures constitute "careful management." It should provide a reasoned explanation why that is the case in light of all appearances to the contrary.

4. *Flare Minimization Plan.* The RS states that, in response to Petitioners' comments, the final permit will require a Flare Minimization Plan based upon review of the Shell Martinez plan. RS at 30. However, it fails to note that the Plan requirements in the final permit are far less comprehensive than those contained in the BAAQMD regulations, pursuant to which Shell Martinez developed its plan. Among other things, new condition 4-7-6.2, unlike the BAAQMD regulations, contains no detailed requirements concerning the nature of the technical data that must be provided (e.g., BAAQMD section 12-12-401 requires a detailed process flow diagram and descriptions of monitoring and control equipment), no requirement for provision of information regarding planned reductions and reductions previously realized, and no public comment requirements. Simply stating in the RS that a Plan will be required does not sufficiently

inform the public concerning the substantive nature of the added provision, nor reflect any considered judgment regarding the decision to require far less than BAAQMD requires for such plans.

5. *Monitoring Requirements.* With respect to monitoring requirements, the RS summarizes the three new subsections added to section 4.7.8 (without specifying that they were made to that section) 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.

RS. At 31 (see Applicant's response at n.8, item 4) . What is unclear in this generic summary is that IEPA inexplicably failed to impose essential protocols to ensure the accuracy of this monitoring, of the type outlined in BAAQMD Regulation 12. See Petition for Appeal at 23-24. Without those protocols, there is significant danger that the monitoring will be substantially inaccurate. IEPA should, at minimum, have been required to specify what was omitted from the recommended monitoring requirements and why.

6. *Observational Requirements.* With respect to observational monitoring requirements for flaring events, the RS contains no explanation as to why IEPA declined to adopt the BAAQMD dual requirement of video and human observational monitoring in its new Section 4.7.8-2, and instead allowed the Applicant to choose one or the other. As explained in the Petition, the human observation requirements crafted by IEPA are extremely porous, essentially allowing highly polluting flaring events that last less than

30 minutes to go unobserved. Petition for Appeal at 22. If the Applicant were to choose the video monitoring option instead, it could avoid even these weak requirements entirely simply by installing a video monitor that only records once every hour, or only once a day, or even once a year, since the IEPA language inexplicably failed to adopt the BAAQMD requirement that images be recorded at a rate of at least 1 frame per minute. As an overall matter, video monitoring and human observational monitoring are both required by BAAQMD because they serve different functions – the video monitoring keeps a record of events while personnel address the emergency conditions, but human observational monitoring allows operators to respond quickly to flaring events. The RS provides no specific explanation of IEPA's facially irrational decision to make these requirements alternative rather than concurrent, and then to water down both options.

The one brief explanation offered in the RS for IEPA's failure to adopt the monitoring requirements in place elsewhere, aside from being sorely lacking in detail about either the substance or location of the omissions from the BAAQMD requirements, makes no sense. The RS states:

> 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 the Flare Monitoring rules several years ago. 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. The permit does not prescribe what monitoring techniques must be used and how monitoring must be conducted.

RS at 32. This provision fails to explain how making the monitoring requirements more vague and easier to evade by eliminating the BAAQMD protocols and other quality assurance requirements is an appropriate response to the identified difference in severity of the flaring problem. Neither does it provide any information to back up its claim that flaring has been worse at Bay Area refineries, which is called into question by Petitioners' data indicating that the Shell Martinez refinery in the Bay Area (and subject to BAAQMD regulations) has extremely low levels of flaring.

On a more basic level, IEPA's explanation is simply irrational. The only way that ConocoPhillips can achieve low levels of flaring at its facility is through stringent flare control measures implemented with strong monitoring measures. It is well established that stringent quality control measures for monitoring must be in place in order to provide confidence in the results of pollution monitoring, and hence in the effectiveness of control measures.[9] By the same token, poor monitoring is generally associated with sloppy controls and unnecessary additional pollution, because of the lack of feedback when problems occur. Petitioners provided specific information to IEPA showing that representatives at Shell Martinez California found that good monitoring and rigorous root cause analysis were essential in achieving a low level of emissions from flaring. Yet according to its cursory justification for weakening the BAAQMD monitoring requirements, IEPA is simply assuming that flaring levels at the Applicant's facility will be low, and in turn using that assumption to justify reduced monitoring.

[9] The USEPA Administrator stated, "We have also found that quality, accurate environmental monitoring data is essential in making good, quality decisions." http://66.218.69.11/search/cache?ei=UTF-8&p=EPA%2C+good+monitoring+is+essential&fr=slv8-acer&u=yosemite.epa.gov/opa/admpress.nsf/8d49f7ad4bbcf4ef852573590040b7f6/cccbcf9b5fe824428525706800077eb1a%21OpenDocument&w=epa+good+monitoring+essential+essentials&d=EinozedmPpzq&icp=1&.intl=us (USEPA Administrator's speech, 7/26/05).

This chain of reasoning, and the total absence of explanation elsewhere for the gutting of essential controls implemented elsewhere, does not reflect the "considered judgment" necessary to support a permit determination. See In re Indeck-Elwood, slip op. at 19, *citing* In re Austin Powder Co., 6 E.A.D. 713, 720 (January 26, 2997) (absent an explication of new permit terms pursuant to 40 C.F.R. § 124.17(a)(1), "it does not appear that the record reflects the 'considered judgment' necessary to support the permit determination"). On a more fundamental level, by failing to even inform Petitioners where to find its changes and what they consist of with any reasonable detail, IEPA has failed to "adequately document its decision making." Id., *citing* In re Ash Grove Cement Co., 7 E.A.D. 387, 417-18 (EAB 1997).

As the Board made clear previously in Indeck-Elwood, a remand is the appropriate remedy to ensure the integrity of the public comment process where the Agency has added significant new and inadequately explained permit terms that may adversely impact the quality of the permit. Id., slip op. at 19. This conclusion was consistent with the Board's past practice. See, e.g., In re Austin Powder Co., 6 E.A.D. at 715 ("the permit is remanded and the Region is ordered to either clarify its basis ... (and allow Austin to submit comments on this explanation) or to revise the permit..."); In re GSX Services of South Carolina, Inc. , 4 E.A.D. 451, 452 (December 29, 1992) ("the permit is remanded and the Region is directed to establish a new permit term and to allow the permittee and other interested parties an opportunity to submit comments"); In re City of Marlborough, E.A.B. Appeal No. 04-13 (August 11, 2005), slip op. at 14 (remanding permit with orders that the Region either provide an explanation or change the permit term); In re Amoco, 4 E.A.D. at 965 ("On remand, the Region must publicly notice the

risk assessment provision and allow Amoco and other interested parties the opportunity to submit comments"). The authority cited by the Applicant (Applicant's response at 18) simply stands for the corollary proposition that, where the changes are trivial and have not been shown to "materially affect[] the quality of the permit determination," a remand is unnecessary. In re Mecklenburg Cogeneration Ltd. Partnership, 3 E.A.D. 492, 494 n.3 (Adm'r 1990).

Here, Petitioners have presented substantial and extensive reasons why IEPA's failure to document and explain its changes to the final permit reflect larger failures of its permit determination. Petition for Appeal at 18-24. It is essential that the public be given the opportunity to vet and comment on these changes on remand.

## CONCLUSION

For the foregoing reasons, we respectfully request that the Board review and remand IEPA's permit issued to ConocoPhillips for the CORE Project.

October 25, 2007

Respectfully submitted,

Ann Alexander
Natural Resources Defense Council
101 North Wacker Drive, Suite 609
Chicago, Illinois 60606
312-780-7427
AAlexander@nrdc.org
Council for Petitioner American Bottom Conservancy

Ben Wakefield
Environmental Integrity Project
1920 L Street NW, Suite 800
Washington, DC 20036
202-263-4450
bwakefield@environmentalintegrity.org
Council for Petitioner Sierra Club