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

In the Matter of Power Holdings of Illinois, LLC	)	PSD Appeal No. 09-04 Permit No. 081801AAF (Illinois)

PETITIONER'S REPLY

Petitioner, Sierra Club, respectfully files this a reply to the Response of the Illinois Environmental Protection Agency ("IEPA"), which was filed with the Board on March 4, 2010, and to the Response of the Permittee, Power Holdings Illinois, LLC ("PHIL"), which was filed with the Board on February 26, 2010 and a copy of which was received by the Petitioner on March 1, 2010.

I. THE FLARE MINIMIZATION WORK PRACTICES ARE SUBSTANTIVE BACT REQUIREMENTS AND MUST BE SUBJECT TO PUBLIC NOTICE AND COMMENT, IEPA PRE-PERMIT APPROVAL, AND AN OPPORTUNITY FOR BOARD REVIEW PRIOR TO PERMIT ISSUANCE.

The first issue raised in Sierra Club's Petition is IEPA's error in reliance on "flare minimization planning," including preparation of a "Flare Minimization Plan" after the Permit issuance, to satisfy, in part, the best available control technology ("BACT") limits for the Power Holdings facility. (Pet. at 2-7.) Notably, the emissions from flaring at the Power Holdings facility are the largest single source of emissions at the facility. (*Id*. at 2, citing October 2007

Application, p.1-13 Table 3.) In its Statement of Basis, IEPA acknowledges that minimizing the number and length of flaring events is part of BACT and reduces emissions. (Pet. at 3, quoting Statement of Basis at 9, 24.) The BACT limit for these emission points is set forth at pages 13-15 of the Permit, requires that if gases from the gasification block are released, that they be flared, limits such flaring to periods of "startup, shutdown, or malfunction due to either failure of equipment or planning[1] and requires compliance with specified "good air pollution control practices," including "operation… in accordance with" startup plans and "implementation of flare minimization planning." Permit pp. 13-15, § 4.1.2(a)(ii), (b)(iii), (c).[2]

As Sierra Club sets forth in the Petition, when a plan required by a permit sets forth procedures, steps, actions, or methods of conduct required, that plan must be included in the review materials, approved by the agency, and included in the permit. (Pet. 2-7; *see also* IEPA Resp. at 9-10 (noting that BACT consists, in part, of measures to minimize flaring).) Indeed, as PHIL, itself, acknowledges:

> the Permit also requires… *ongoing flare minimization planning*… to be reflected in the FMP. The FMP must contain… a detailed description of procedures to minimize flaring events, a general description of preventive maintenance procedures… and an evaluation of preventive measures to reduce the occurrence and magnitude of flaring…

(PHIL Resp. at 17 (italics original, underlining added)). Therefore, as EPA Region 8 made clear in its comments on a proposed permit in South Dakota on this specific point, such flare

[1] It is especially concerning that flaring is largest source of emissions, that Permit section 4.1.2(b)(iii) prohibits flaring exempt during periods, inter alia, where equipment fails due to "failure of… planning," yet "planning" is also the method that IEPA proposes to use for minimizing emissions.

[2] IEPA reserves for itself the ability to review and comment on the plans after permit issuance, but does not review or approve the plans for adequacy prior to permit issuance, does not extend the ability to review and comment on the plans to the public, and does not allow for a request for review by the Board. *See e.g.*, Permit (Pet. Ex. 1) at p. 21 § 4.1.5-3(c)(i).

minimization planning and work practice development—comprising part of the BACT limit—must be developed as part of the PSD permitting process and cannot be deferred until after the public process and review procedures. (Pet. Ex 6, EPA Region 8 Air Program's Comments Submitted to South Dakota Department of Environment and Natural Resources on the Draft PSD Permit for the Hyperion Energy Center (Nov. 14, 2008)).

A. Inclusion of Some BACT Requirements Cannot Excuse IEPA's Failure to Include Other BACT Requirements In The Public Review Materials, to Review and Approve Them Prior To Permit Issuance, and to Include Them In The Final Permit.

IEPA asserts that the Flare Minimization Plan need not be part of the permit, nor subject to comment, because there are *other* BACT limits in the permit related to flaring and those *other* limits were subject to comment. (IEPA Resp. at 9 (stating that BACT is defined during startup, shutdown, and malfunction by "work practices and secondary emission limits…"), 10 ("the permit contains numerous emissions limitations that apply continuously to Power Holdings operations. The Flare Minimization Planning has no impact on these requirements"), 12 (noting that other permit limits set caps on "overall emissions"), 13 ("The Power Holdings permit which was available for comment ensures that emission limits will be met by the secondary BACT limits.").)[3] IEPA insists that "a great portion of the permit" relates to flaring, that the flaring conditions are "quite extensive," that the draft permit "dedicates inordinate space" to ensuring that flaring will be "properly conducted," and that "provisions for flaring were set forth in the draft permit which was available for review and comment." (IEPA Resp. at 11-12.) In short,

[3] It is unclear which limits IEPA is referring to in its Response as the "secondary BACT" limits. Sierra Club notes that the permit identifies the limits in section 4.1.2(d) as "secondary" to the limits in 4.1.2(a) through (c). (Pet. Ex. 1 at 15 ("Note: These conditions set "secondary" BACT limits for the units in the gasification block to accompany the equipment and work practice requirements established as BACT in Condition 4.1.2(a), (b) and (c).").)

IEPA insists that while the flare minimization planning "procedures" are part of the BACT limits, IEPA Resp. at 10, it is okay to leave the substance of those procedures out because the permit devotes significant space and detail to the *other* components of the BACT limits.

PHIL makes a similar argument and accentuates that some components of BACT—which PHIL refers to as the "primary and secondary" limits—were included in the permit and public review documents. (PHIL Resp. at 20.) PHIL contends that the minimization planning work practices are "a step beyond—the secondary BACT emission limitations that apply…," *id*. at 9-10, implying that as long as the permit provides at least "primary" and "secondary" BACT, then other components of the BACT limit are exempt from the public process. Neither IEPA nor PHIL cites any law for this "good enough" theory of partial compliance with the public process for establishing permit requirements.

Where a work practice comprises part of a BACT limit, such work practices must be demonstrated to be BACT-level. *E.g., In re Indeck-Elwood, LLC*, 13 E.A.D. __, Slip Op. at 68 (EAB Sept. 27, 2006) ("In setting non-numeric limitations the permitting authority must, to the extent possible, set forth the emission reductions expected from the implementation of these limitations. We also read this provision as requiring the emissions reductions associated with non-numeric limitations to be equivalent to those emissions achieved by the application of BACT limits." (internal citation omitted)). There is nothing in the regulations or administrative case law that allows work practices comprising part of BACT to be developed later, outside of the public comment and Board review procedures, when combined with other pieces of the BACT limit that were subject to such procedures. IEPA and PHIL clearly cite no such law.

B. PHIL Is Incorrect That the Flare Minimization Plan Does Not Define A Portion of the BACT Limit.

PHIL's Response consists mainly of PHIL denying, in several different ways, that the flare minimization planning that is to occur post-permit through the "Flare Minimization Plan" is part of the BACT requirements for the plant. For example, PHIL argues that the minimization steps do not "define or otherwise constitute 'BACT' for gas flaring under this Permit," PHIL Resp. at 3, are "not a directive to establish new limits or standards," *id*. at 9-10, are "not 'central' to BACT for the flares nor [are they] being relied upon to demonstrate compliance with BACT…," *id*. at 17, and not "substantive." *Id*. at 18; *see also id*. at 20 (accusing Sierra Club of making a "bald contention that the Power Holdings FMP somehow 'defines the BACT limits' for the flares."). As a slight variation of the same theme, PHIL contends that the Permit "contains both normal operating and secondary numeric emission limits for the flares…," PHIL Resp. at 11-12, provides a list of a number of limits in the permit for flaring that are not at issue in this case, *id*. at 13-17, and accuses Sierra Club of "ignor[ing] the very existence of the secondary BACT… and every other aspect of the very extensive permit provisions addressing the flare system." (PHIL Resp. at 12-13.) These assertions do not hold up to scrutiny.

PHIL's insistence that the flare minimization planning requirements are not part of the BACT requirements is belied by the Statement of Basis, Pet. Ex. 4 at 9, 24, and IEPA's contention in its Response that the flare minimization planning constitutes part of the BACT limit. (IEPA Resp. at 9-10 (describing the "required BACT work practices" to include "a general approach to minimization of emissions through formal operating and maintenance procedures and flare minimization planning, which may be refined based on actual operating experience at the plant.").) PHIL's confusion may be based on its attempt to distinguish the flare

minimization plan document from the flare minimization planning work practices. (*See e.g.*, PHIL Resp. at 3 (asserting that BACT for flares is detailed in, inter alia, work practices, and "ongoing flare minimization planning requirements" but asserting that the Flare Minimization Plan document "is simply a planning document designed to reflect the ongoing flare minimization planning effort.").)[4] PHIL concedes that if the flare minimization planning steps "affect[] emission limits and rates, [they] must be included in PSD permits and subject to public scrutiny." PHIL Resp. at 10; *see also In re Steel Dynamics*, 9 E.A.D. 165, 172 (EAB 2000) (stating BACT is at the core of the PSD regulations); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 131 (EAB 1999) (same). Therefore, the sole question before the Board on this issue can be summarized as whether the flare minimization planning at issue is a work practice standard that affects limits and rates. If it is, the permit was issued in error because those planning and minimization steps are not all included in the permit.[5]

The flare minimization planning documents and the flare minimization planning work practices cannot be separated. The Permit does not include each of the work practice elements that will be required to meet BACT. Instead, the total reduction of flaring constituting part of the

[4] PHIL's Response also argues that the Flare Minimization Plan is not part of BACT, while stating that "BACT for the flares is detailed in the Permit in the form of… ongoing flare minimization planning requirements." (PHIL Resp. at 3.)

[5] PHIL identifies the provisions of Part 124 setting forth the required components of the public record subject to public notice and comment. (PH Resp. at 19-20.) PHIL contends that the Flare Minimization Plan does not constitute any of these components and, therefore, need not be subject to public review nor included in the permit. (*Id.*) PHIL provides no basis for this assertion; it merely asserts that the Plan is not part of the application, supporting data, the draft permit, statement of basis, document cited in the statement of basis, or the draft permit. (*Id.*) PHIL does not address the meaning of each of those terms and whether the Plan, because of what it is and how it is relied upon to define steps and methods to reduce flaring emissions, should be included in the application, supporting data, draft permit, and statement of basis. Indeed, the issue here is not whether the plan *was* included in those documents—is is uncontested that is was not. The issue is whether it *should have been* included in those documents because it will define some of the work practices to minimize flaring that, together with other requirements in the permit, define BACT.

BACT limits for the PHIL plant will depend on limits and work practices set forth in the permit *plus* additional work practices defined later through various plans, including startup plans and flare minimization plans. (Pet. Ex. 1 at pp. 14-15 § 4.1.2(c).) In fact, PHIL, itself, acknowledges that the flare minimization will be done in part through the flare minimization plan, which will include "a detailed description of procedures to minimize flaring events, a general description of preventive maintenance procedures… and an evaluation of preventive measures to reduce the occurrence and magnitude of flaring…" (PHIL Resp. at 17.) In other words, the plan (or FMP) will define some of the procedures and measures to reduce flaring.[6]

It is unclear what the basis or relevance is of PHIL's assertions that this flare minimization planning is "not 'central' to BACT," that it is not the basis for complying other limits in the permit, that it is a "'best management practice[],'" or that these work practices "cannot superseded any of the may substantive standards in the permit." (PHIL Resp. at 17.) It is also false to assert, as PHIL does, that the work practices involved in flare minimization "do[] not contain any substantive requirements." (*Id*.) IEPA is clear that it relies on these work practices—to be developed later through the flare minimization planning process as part of BACT. *See e.g.*, IEPA Resp. at 10 (noting that the flare minimization plans "represent a portion of BACT for gas flaring"); Statement of Basis (Pet. Ex. 4) at 9 ("The required BACT work practices for startup, shutdown and malfunction are intended to assure that appropriate measures are taken to minimize emissions… [including] a general approach to minimization of emissions

[6] The Permit also intends for IEPA to approve the plans after the PSD permit is issued, but does not identify what criteria IEPA will use to approve the plans, even though submission to and approval by IEPA is required. (Pet. Ex. 1 at 19, 21 §§ 4.1.5-2(c)(i) ("Permittee shall make changes to the Plan if required by the Illinois EPA…"), 4.1.5-3(c)(i) ("Permittee shall submit a copy of the initial Plan to the Illinois EPA for review and comments"), (c)(iii) ("Permittee shall make changes to the Plan if required by the Illinois EPA or USEPA to address an apparent deficiency…").

through… flare minimization planning…"), Attachment 2 (listing "Good combustion practices and flaring minimization planning." as BACT). It is also clear from PHIL's own description of them that these work practices contain "procedures to minimize flaring events," and "preventive maintenance procedures… and an evaluation of preventive measures to reduce the occurrence and magnitude of flaring…" (PHIL Resp. at 17.)

In short, it is impossible for the public to know whether the plans will be sufficient, or provide comments on them. The public can also not seek review by the Board of IEPA's later decision to approve these plans, as they will happen well after the permit is issued. Ironically, Power Holdings blames Petitioner for "not point[ing] to a single substantive requirement in the Power Holdings F[lare] M[inimization] P[lan]." (PH Resp. at 18.) Indeed, PHIL is correct. Sierra Club has not pointed to a single substantive requirement of the Plan because the Plan, and its substantive requirements, do not exist yet, have not been developed, were not in the application, and were not available to Sierra Club (or anyone else) to comment on.[7] In attempting to assign blame, PHIL has crystallized the problem with the permit.

C. Arguments That Including the Plan In The Permit Is Impractical Are Irrelevant.

IEPA and PHIL's argument that it would not be "practical" to define the work practices to minimize flaring prior to the permit issuance, and in a way that allows public participation, is unavailing. (IEPA Resp. at 10; PHIL Resp. at 26-28.) The public's participation rights, and

[7] PHIL does not identify an alternative basis for the Flare Minimization Plan if it is not a BACT requirement. The public notice and comment requirements, requirement for a complete application, and review procedures apply to *all parts* of a PSD permit-- not merely the BACT limits. 40 C.F.R. § 124.6(4)(iii) (requiring draft permits to include all conditions under 40 C.F.R. § 52.21), 124.9(b)(2) (record includes draft permit), (b)(5) (record contains all supporting documents for the permit), 124.11 (public can comment on any portion of the draft permit), 124.19(a) (providing for review of any condition of the permit decision). Therefore, even if the flare minimization was required for a reason other than BACT, it would not change the conclusion that IEPA improperly provides for the plan's development and substantive requirements to be developed outside of the permit and outside of the public process.

IEPA's obligation to comply, are no less applicable where defining BACT is difficult than where it is easy. IEPA has chosen to define the BACT limits for PHIL, in part, by establishing work practices to reduce the number and length of flaring events by defining "appropriate" steps and methods "to minimize the excess emissions during" flaring and to "reduce the likelihood" of flaring. (Pet. Ex. 1 pp. 20-21 §§ 4.1.5-3(a)-(b), (d)(ii)(D).) However, the Permit intends that some of those procedures and methods be defined and approved by IEPA later. (E.g., Pet. Ex. 1 at 19, 21 §§ 4.1.5-2(c)(i) ("Permittee shall make changes to the Plan if required by the Illinois EPA…"), 4.1.5-3(c)(iii).) BACT must be made part of the permit, subject to the public participation rights and review by the Board. (Pet 3-4.) Nothing in the rules or in the Board's prior decisions allows these requirements to be waived when a permitting agency finds them impractical. Neither IEPA nor PHIL has cited any such law.[8]

D. IEPA and PHIL Fail To Distinguish The Authorities Cited In The Petition.

IEPA and PHIL misread Petition and the cases cited for the public participation and review process for BACT requirements established in off-permit "plans." The point of the cases and EPA comments cited in the Petition is not that work practices must be included in the permit review materials and permit when they comprise the only applicable limit or are used in lieu of other limits—but that *all* limits and substantive requirements must be in the permit review materials, subject to public comment, and subject to review by the Board.

One of the central reasons that the Board remanded the permit in the *RockGen* case was that it purported to establish operating conditions that would be determined through a plan

[8] IEPA has also not explained why it matters, under the applicable law, that some of the flare minimization planning and implementation is based on regulations adopted by the San Francisco Bay Area Air Quality Management District ("BAAQMD"). (IEPA Resp. at 11-12.)

outside of the permit process. *In re RockGen Energy Center*, 8 E.A.D. at 553 ("Although RockGen is required to comply with the provisions of a plan to be approved by WDNR at a later date, there is no provision for the plan itself to be subject to the public notice and review requirements of 40 C.F.R. § 52.21 and part 124."). PHIL and IEPA's confusion may be attributed to the fact that there were two overlapping issues in the *RockGen* decision: the exemption from BACT during startup and shutdown, and the procedural requirements for permit conditions.[9] It is only the second part that is at issue in this case. Specifically, the Board's instructions in *RockGen* that secondary emission limits for startup and shutdown be "made part of the PSD permit" and that the agency "provide the public with an opportunity to submit comments and file a petition for review with the Board." 8 E.A.D. at 554-55. In other words, while the *RockGen* decision addressed a startup and shutdown plan that effectively defined the emission limits during periods of startup and shutdown, the Board's reasoning applies equally to

[9] In *RockGen*, the Board remanded a permit that defined BACT during periods of startup and shutdown if the facility complied with a startup/shutdown plan, but where the plan was not subject to public notice and comment and was not included in the permit. 8 E.A.D. 536, 553-54 (EAB 1999). Specifically, the Board held:

> Although RockGen is required to comply with the provisions of a plan to be approved by WDNR at a later date, there is no provision for the plan itself to be subject to the public notice and review requirements of 40 C.F.R. § 52.21 and part 124. The provision authorizing the plan does not specify what conditions might be included in a plan or indicate what criteria the State will use in approving the plan. Thus, although the permit appears to contemplate that emissions in excess of the limits established in the permit may well occur during startup and shutdown, it does not appear as if WDNR gave sufficient consideration to appropriate measures to minimize or eliminate such emissions….
>
> On remand WDNR must reconsider and revise this provision. In particular, if WDNR intends to include such a provision, it must make an on-the-record determination as to whether compliance with existing permit limitations is infeasible during startup and shutdown, and, if so, what design, control, methodological or other changes are appropriate for inclusion in the permit to minimize the excess emissions during these periods.

Id. (emphasis added).

a Flare Minimization Plan that is intended to define the mandatory actions to be taken by the facility to reduce flaring emissions. (Pet. at 6.) Neither PHIL nor IEPA why these procedural requirements should apply to limits that the agency labels as "primary" or "secondary," but not to other components of the BACT limit such as the flare minimization work practice requirements that IEPA relegates to post-permit development through a Flare Minimization Plan.

As in *RockGen*, the IEPA has not specified in the Power Holdings Permit all of the requirements will be required of Power Holding to reduce flaring events. Instead, some work practices are specified, while some work practices will be identified and defined later in various plans to be developed and revised after the Permit issues, including startup plans and flare minimization plans. (Pet. Ex. 1 pp. 20-21 §§ 4.1.5-3(a)-(b), (d)(ii)(D).) Moreover, the Permit fails to identify what criteria IEPA will use to approve the plans to be developed, even though submission to and approval by IEPA is required. (Pet. Ex. 1 at 19, 21 §§ 4.1.5-2(c)(i) ("Permittee shall make changes to the Plan if required by the Illinois EPA…"), 4.1.5-3(c)(i) ("Permittee shall submit a copy of the initial Plan to the Illinois EPA for review and comments"), (c)(iii) ("Permittee shall make changes to the Plan if required by the Illinois EPA or USEPA to address an apparent deficiency…").

Moreover, to the extent PHIL argues that the *RockGen* decision allows post-permit modifications to substantive requirements, PHIL reads too much into the Board's statements in *RockGen*. As PHIL points out, the Board's *RockGen* decision states that "the State may also require that once the facility is operational any permit provision designed to reduce emissions during startup and shutdown be refined over time so as to increase their efficiency and effectiveness. 8 E.A.D. at 554." (PHIL Resp. at 21-22.) PHIL apparently reads this statement to

mean that the state can modify the permit requirements after the permit is issued without complying with the procedural requirements, including public participation requirements, for modifying a permit. However, the Board's statement is correct—PSD permits can be revised—but that statement does not address, nor purport to waive, the procedural requirements for PSD permit revisions. A PSD permit can be revised through revocation and reissuance, subject to the same procedural requirements as a new permit issuance. 40 C.F.R. §§ 52.21(w),124.5(g)(2) (providing that PSD permits are not subject to modification under § 124.5). In other words, the Board's statement in the *RockGen* case that the permit requirements can be refined simply means that a permit can be modified by rescission and reissuance. It does not mean, as PHIL implies, that such modifications are exempt from the public participation procedures and rights that apply to any permit issuance.

PHIL similarly misreads Region 8's comments regarding the Hyperion facility in South Dakota by focusing on the fact that the permit in that case contained no "secondary" BACT limits. (PHIL Resp. at 22.) PHIL thus dismisses the comments because the Hyperion facility "relied entirely on post-permit FMP to ensure compliance." As with the *RockGen* case, the point of Region 8's comments (and the basis for Sierra Club's reliance on them) is that minimum public process and public rights apply to plans that comprise any part of a BACT limit; not that the only portions of the BACT limit subject to public process are the parts the agency labels "primary BACT" and "secondary BACT." Both the *RockGen* case and Region 8's Hyperion comments acknowledge that a plan comprising part of a BACT limit must be included in the permit and subject to full public process. *RockGen*, 8 E.A.D. at 554-55 (holding that if the agency defines BACT, in part, based on compliance with a plan, it "must provide the public with

an opportunity to submit comments and file a petition for review with the Board in accordance with the procedures of 40 C.F.R. part 124" regarding the contents of that plan.); Region 8 Comments, Pet 6, Exhibit 6 at 9 ("The flare minimization plan is not part of the permit. Given that this is part of BACT, it should be included in the permit… The plan should be enforceable and not be changeable without public process.") Nothing in these decisions suggest that they should be limited to plans representing primary BACT, secondary BACT, or any other subset, rather than to any plan comprising any part of a BACT limit.

Similarly, the Administrator's order in the We Energies Title V proceeding and two Clean Water Act cases cited in the petition all hold that where compliance with substantive permit requirements is defined by compliance with a plan, the plan must be made part of the permitting action and subject to the same procedural requirements as the permit itself. (Pet. at 4, 6-7, citing *In re We Energies Oak Creek Power Plant*, Order Objecting to State Issued Operating Permit at 24-27 (Adm'r June 12, 2009); *Waterkeeper Alliance v. EPA*, 399 F.3d 486, 500-04 (2nd Cir. 2005); *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832, 857-58 (9th Cir. 2003).). PHIL attempts to distinguish these cases by arguing that the plans in the permit for PHIL do not act "in lieu of an otherwise applicable standard nor… a means of determining compliance…" (PHIL Resp. at 24.) The requirement to subject plans that define required behavior to the same process as the permit (which also requires behavior) does not depend on whether the plan defines required behavior "in lieu of" or in addition to other requirements. Here, the PHIL permit intends to reduce emissions, in part, through steps, procedures and measures to reduce flaring emissions, but provides that those steps, procedures and measures will be defined off-permit, in various plans. (Permit (Pet. Ex. 1) § 4.1.2.c, 4.1.5-2.a.i., 4.1.5-3.a.ii-

viii, b., c., d.i.) This is similar to the plans at issue in each of the cases cited in the Petition—which defined actions to reduce pollution or to ensure compliance with the permit.

II. REMAND IS NECESSARY TO PROPERLY CONSIDER CLEAN FUELS IN THE BACT ANALYSIS.

As set forth in the Petition, Sierra Club's public comments on the draft permit for Power Holdings asked IEPA to establish BACT for the superheaters and auxiliary boiler based on natural gas. (Pet. at 8, citing Comments (Pet. Ex. 2) at 38-39.) The IEPA responded to these comments by establishing BACT based on either natural gas or synthetic gas (SNG) based on IEPA's belief that *either* natural gas or SNG would produce the same emissions. (*Id.*, citing Response to Comments (Pet. Ex. 7) at 30.) However, IEPA's response looked only at the emissions from combustion in the superheaters and auxiliary boiler; it did not look at the higher emissions upstream of those combustion units if SNG is used because of the need to manufacture SNG onsite. (*Id*. at 8-11.) IEPA and Power Holdings raise three responses to the second issue in the Petition: (1) characterizing the issue as a "lifecycle" argument and asserting that Sierra Club failed to preserve this issue through comments, IEPA Resp. at 13-14; PH Resp. at 29-32; (2) speculating that use of natural gas would not reduce emissions because overall manufacture of SNG would not decrease if natural gas rather than SNR were used to fuel the superheaters, IEPA Resp. at 15; PH Resp. at 39; and (3) arguing that BACT analyses should not consider emission increases or decreases from other emission points caused by the available control options, PH Resp. at 32-33.

A. Sierra Club Preserved The Clean Fuel Issue In Comments.

IEPA and Power Holding's argument that Sierra Club did not preserve the clean fuels issue misapprehends the issue in the Petition, the permit history in this case, and the top-down BACT process.

1. The Clean Fuels Issue For the Superheater Is About Emissions From The PHIL Facility And Not The Fuel's "Lifecycle" Emissions.

First, the Petition does not raise a "lifecycle" emissions argument. "Lifecycle" emissions means overall emissions attributable upstream and downstream in the economy as a whole, not the emissions directly from the emission source at issue. *See e.g.*, PHIL Resp. at 33 n.6, citing 2007 Energy Independence and Security Act § 202(a)(1) ("Act"); Act § 201(1)(H) (defining "lifecycle greenhouse gas emissions" as "related to the full fuel lifecycle, including all stages of fuel and feestock production and distribution, from feedstock generation or extraction through the distribution and delivery and use of the finished fuel to the ultimate consumer…"). Here, the issue is which pollution control option--specifically which fuel--results in fewer emissions *from the permitted source* in a BACT analysis. Specifically, the Petition raises the issues of direct emissions at PHIL as well as the collateral environmental impacts at the PHIL plant from two control options for the superheaters (SNG and natural gas). (Pet. at 9-11.)

For the same reasons, PHIL's argument that the Act applies to only major sources and emission units, PHIL Resp. at 33, is also confused and misses the point. Sierra Club is not arguing that off-site emissions, or emissions from a major stationary source other than the PHIL plant, must be accounted for in BACT.[10] Instead, the Petition points out that IEPA's initial

[10] Although there is no reason, in concept, that off-site collateral impacts should not be considered in step 4 of a top-down BACT process. *See e.g.*, NSR Manual at B.47.

analysis omitted cleaner fuels in step 1 and, in response to comments that natural gas was cleaner, skipped steps two through four and concluded that either SNG or natural gas would be the basis for BACT without actually documenting the impacts from each alternative fuel. If steps two through four of the BACT process had been documented they would have shown that more emissions from the PHIL plant would be produced if SNG is used than if natural gas is used. (Pet. at 10-11.)

2. The Option to Use Synthetic Gas (SNG) Arose Through IEPA's Response To Comments.

Neither IEPA nor PHIL argues that Sierra Club failed to raise the fact that natural gas is a cleaner fuel for the superheaters than coal-based fuels (including SNG). Sierra Club clearly preserved that issue. (Pet Ex. 2 at 38 ("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").) Those comments were not limited solely to combustion emissions, but note that using natural gas in the superheaters and auxiliary boiler would lower emissions. (*Id*.) What IEPA and PHIL seem to take issue with is that Sierra Club did not predict IEPA's response to comments—that either SNR or natural gas would emit equal emissions (and implicitly that neither can be rejected in step 4 of the top-down process)—and that Sierra Club did not provide a critique of a top-down BACT analysis that IEPA had not yet done (and still has not done) where SNG and natural gas are identified in step one of the top-down BACT analysis. *See generally*, *New Source Review Workshop Manual* at B.5-.9 (Draft 1990) (summarizing the five step process) ("NSR Manual"); *In re Desert Rock Energy Co. LLC*, 14 E.A.D. __, Case Nos. PSD 08-03; PSD 08-04; PSD 08-05; PSD 08-06, Slip Op. at 51-56 (EAB Sept. 24, 2009) (describing the top-down method). The

public should not be expected to complete a full top-down BACT analysis for the applicant and the agency where the public correctly identifies control options that were excluded in step one.

Here, Sierra Club commented that natural gas was omitted from step 1 of the top-down process. IEPA agreed, but instead of completing a full top-down analysis that included natural gas, it went straight to step 5 by establishing BACT based on either SNG or natural gas. The intervening steps, which IEPA skipped, would have shown the comparison between SNG and natural gas based on not only emission rates, but collateral cost, energy and environmental impacts. *NSR Manual* at B.7-.8 (listing required information in Step 3). Where a permitting agency fails to identify and include a pollution control option in step 1, all that the public can comment on, at that point, is the omission and the fact that the control option would lower emissions beyond the control assumed by the agency. Sierra Club did so here. The public cannot and should not be expected to critique an imaginary analysis in steps two through five of a top-down analysis that does not exist. Comments on a non-existent analysis are simply not "ascertainable" within the meaning of 40 C.F.R. § 124.13. *Cf.*, *In re ConocoPhilips*, 13 E.A.D. __, Slip Op at 22 (EAB June 2, 2008) (petitioners should not be expected to guess at the agency's rationale).

Moreover, the task of completing the top-down process belongs to the permitting agency first. As the Board recently explained, where the analysis is incomplete, the burden falls on the permitting authority and a remand is appropriate:

> … BACT determinations, which are generally technical in nature, are one of the most critical elements in the PSD permitting process and thus "should be well documented in the record, and any decision to eliminate a control option should be adequately explained and justified." *Indeck*, slip op. at 11, 13 E.A.D. at __ (citing *In re Knauf Fiber Glass GmbH*, 8 E.A.D. 121, 131(EAB

> 1999)); *accord In re Newmont Nev. Energy Inv., LLC*, 12 E.A.D. 429, 442 (EAB 2005); *In re Gen. Motors, Inc.*, 10 E.A.D. 360, 363 (EAB 2002). Consequently, in evaluating a BACT determination on appeal, the Board looks at whether the determination "reflects 'considered judgment' on the part of the permitting authority," as documented in the record. *Knauf*, 8 E.A.D. at 132; *accord In re Masonite Corp.*, 5 E.A.D. 551, 566-69 (EAB 1994) (analyses incomplete); *In re Austin Powder Co.*, 6 E.A.D. 713, 720 (EAB 1997); *GSX Servs.*, 4 E.A.D. at 454. The Board has remanded permits where the permit issuer's BACT analyses were incomplete or the rationale was unclear. *E.g.*, *Knauf*, 8 E.A.D. at 134, 140 (BACT rationale unclear); *Masonite*, 5 E.A.D. at 566-69 (BACT analyses incomplete)…

Desert Rock Energy, Slip Op. at 50. In Desert Rock, the Board remanded a permit where the permitting authority failed to include an available control technology (in that case IGCC) in step 1 without requiring the petitioners to demonstrate that the technology would be selected in Step 4. *Id*. at 76-78. IEPA and PHIL should not be able to avoid their burden to provide an adequate BACT analysis supported by an adequate record by omitting control options at step one and blaming the public for not providing a complete top-down analysis when the public identifies control options that IEPA and PHIL omitted.

In this case, even if IEPA had been concerned with only the products of combustion from the superheaters, it should have nevertheless ranked SNG and natural gas in step 3 and considered the energy, environmental and economic impacts of each fuel in step 4. *NSR Manual* at B.7-.8, B.25 (all technologically feasible control options should be ranked and information about economics, environmental impacts and energy impacts are identified for each). There is no exception from providing this information for each option. Even where the applicant selects the top-ranked option, it is still required to "consider whether collateral environmental impacts… would justify selection of an alternative control option." *NSR Manual* at B.26. "This analysis of

environmental impacts should be performed for the entire hierarchy of technologies (even if the applicant proposes to adopt the "top," or most stringent, alternative)." *NSR Manual* at B.47. In this case, there was no comparison between the relative emissions, costs, energy and environmental impacts of SNG and natural gas. At a minimum, IEPA should be required to do so and allow the public to comment on that more complete top-down analysis before BACT is established based on SNG or natural gas rather than on only natural gas.

3. PHIL and IEPA's Argument That Natural Gas Clean Fuel Would Not Reduce Emissions Is Premised On Facts That Have No Basis In The Record.

PHIL and IEPA argue that there would be no overall reduction in emissions by the use of natural gas. (PHIL Resp. at 38-39; IEPA Resp. at 15.) However, this assumes a factual predicate that is not supported by the record and, therefore, cannot be the basis for upholding the IEPA's decision. 40 C.F.R. § 124.18(c) (administrative record for EPA-issued permit does not include parties' briefs because the record is considered complete on date final permit is issued); *In re Wash. Aqueduct Water Supply Sys.*, 11 E.A.D. 565, 589 (EAB 2004) (a permit issuer "cannot through its arguments on appeal augment the record upon which the permit decision was based"). This argument—that using natural gas in the production process does not reduce the overall emissions because it will not reduce overall SNG production—assumes that PHIL has customers who will buy every unit of SNG that PHIL can produce.[11] Only under that factual scenario, where each unit of SNG used for production reduces SNG sold without reducing SNG produced, would there be no reduction in emissions by using natural gas for the production

[11] This is unlikely, since PHIL is creating a product that will compete with a commodity (natural gas) at a cost that is likely higher than natural gas. *E.g.*, compare www.*nicholas.duke.edu/ccpp/ccpp_pdfs/**synthetic**.**gas**.pdf* § 3.2.2. (synthetic gas from coal projected to cost $8.42- $9.53/MMBtu) to http://www.wtrg.com/daily/gasprice.html (accessed April 5, 2010) (showing natural gas prices on April 1, 2010 for May delivery at $4.086/MMBtu). Regardless, there is no evidence in the record to support IEPA and PHIL's premise.

process. At a minimum, the permit must be remanded for IEPA to create a record that can support the factual assumption underpinning its argument.

III. IEPA HAS NOT COMPLIED WITH 40 C.F.R. § 52.21(j)(1) and 42 U.S.C. § 7475(a)(3)(C) BY ENSURING THAT PHIL WILL COMPLY WITH 35 Ill. Admin. Code § 201.141.

As set forth in the Petition, the IEPA refused to determine whether the PHIL plant would comply with 35 Ill. Admin. Code § 201.141 prior to issuing the permit. (Pet. at 11-17.) IEPA did not disagree that 35 Ill. Admin. Code § 201.141 is in the Illinois SIP, or that 42 U.S.C. § 7475(a)(3)(C) and 40 C.F.R. § 52.21(j)(1) require compliance with applicable standards in the SIP. Nor did IEPA disagree, in its response to comments, that global warming is a significant threat to human health and welfare and that it is caused by emissions of greenhouse gases (GHGs). (Pet. at 13-14, citing Response to Comments (Pet. Ex. 7).) Instead, in its Response to Comments, IEPA argued that: (1) GHGs are not "air contaminants," Response to Comments (Pet. Ex. 7) at 89; (2) 35 Ill. Admin. Code § 201.141 is an enforcement tool and not a regulatory standard that is applied when permitting, *id*. at 88-89; and (3) the regulation does not prevent emissions prospectively. As set forth in the Petition, these assertions by IEPA do not withstand scrutiny when compared to the regulation's plain language, prior enforcement and permitting actions, and Illinois case law. (Pet. at 15-17.)

Tellingly, IEPA's Response abandons the erroneous assertions in the Response to Comments and, instead, defends IEPA's failure to ensure compliance with the Illinois SIP based on a letter from Administrator Jackson. (IEPA Resp. at 17-18.) PHIL's Response similarly attempts to defend IEPA's failure based on legal argument about the Board's jurisdiction to

interpret 35 Ill. Admin. Code § 201.141, but not based on the indefensible arguments made in IEPA's Response to Comments.

There is no dispute that 34 Ill. Admin. Code § 201.141 has been incorporated into the Illinois SIP. 37 Fed. Reg. 10862 (May 31, 1972); PHIL Resp. at 41 ("The Illinois SIP incorporates the Illinois General Permitting regulations in Part 201, including Section 201.141…")). There is also no dispute that IEPA did not ensure that PHIL's CO_2 and methane emissions comply with this standard. Moreover, as explained in the Petition, which neither IEPA nor PHIL disputes in its response, § 201.141 prohibits emissions of any "contaminant" in concentrations that, when added to contaminants emitted from other sources, "cause or tend to cause air pollution" as defined in the regulations. 35 Ill. Admin. Code § 201.141. Neither IEPA nor PHIL disputes in its response that CO_2 and methane are "contaminants" or that global warming impacts are "air pollution" within the applicable definitions. Therefore, the only issues before the Board are: (1) whether the EPA Administrator's letter to Senator Rockefeller and attached to IEPA's Response precludes IEPA from applying its SIP to GHGs; and (2) whether compliance with SIP requirements, including 35 Ill. Admin. Code § 201.141, is a prerequisite of the federal PSD program and therefore within the Board's jurisdiction. As set forth below, IEPA and PHIL's arguments fail to excuse IEPA's refusal to ensure compliance with the Illinois SIP as required as a PSD prerequisite in 42 U.S.C. § 7475(a)(3)(C) and 40 C.F.R. § 52.21(j)(1).[12]

[12] PHIL takes issue with the cases and administrative decisions cited in the petition that applied 35 Ill. Admin. Code § 201.141. (PHIL Resp. at 45-48.) These cases were cited because each demonstrates error in the reasons IEPA gave in its Response to Comments for failing to address § 201.141. For example, they show that, contrary to the arguments made in IEPA's Response to Comments (Pet. Ex. 7), 35 Ill. Admin. Code § 201.141 has been applied by U.S. EPA and IEPA as a permitting standard, as a federally-enforceable SIP provision, as prohibiting prospective pollution, and as applicable to non-criteria pollutants. (See Pet. at 15-17.) Since neither IEPA nor PHIL continues to push the arguments made in the Response to Comments, these cases are largely moot. To the extent that PHIL contends that § 201.141 applies to non-criteria pollutants, but not to GHGs, PHIL Resp. at 47, it cites nothing to rebut the fact that the capacious definition of "air contaminant" includes GHGs.

A. The Letter to Senator Rockefeller Is Not In The Record and Is Irrelevant To This Issue.

As set forth in the Petition, 42 U.S.C. § 7475(a)(3)(C) and 40 C.F.R. § 52.21(j)(1) require, as a prerequisite to issuing a PSD permit, that the source demonstrate compliance with "any other applicable emission standard or standard of performance under" the Act and that the source meets "each applicable emissions limitation under the State Implementation Plan," which in Illinois includes 35 Ill. Admin. Code § 201.141. Pet. at 11-17; 40 C.F.R. § 52.21(a)(2)(ii) ("The requirements of paragraphs (j) through (r) of this section apply to the construction of any new major stationary source…"), (iii) ("No new stationary source… to which the requirements of (j) through (r) of this section apply… shall begin actual construction without a permit that states that the major stationary source… will meet those requirements."). This issue is one of what SIP applies, what it requires, and whether the source meets those requirements. It is wholly distinct from the issue of whether GHGs are "subject to regulation" for purposes of applying BACT in 40 C.F.R. § 52.21(b)(50)(iv) and in 42 U.S.C. § 7475(a)(4). Nevertheless, IEPA's sole argument for why it should not be required to ensure compliance with 35 Ill. Admin. Code § 201.141 of the applicable SIP, pursuant to 42 U.S.C. § 7475(a)(3)(C) and 40 C.F.R. § 52.21(j)(1), is that "the US EPA Administrator has expressly stated that the regulation of greenhouse gas emissions from stationary sources in Clean Air Act permits will not commence until next year." (IEPA Resp. at 18.)[13] IEPA cites, as the sole support for this assertion, the Administrator's statements in a February 22, 2010, letter that IEPA attaches to its Response. The

[13] IEPA's Response cites to "Pet. Ex. 1, pg. 1." This cite is to the cover page of the Permit, which does not support IEPA's argument. Sierra Club assumes that IEPA meant to cite to Exhibit 1 to its Response, which is a letter from EPA Administrator Jackson to Senator Rockefeller of West Virginia.

letter post-dates the IEPA's Response to Comments and the close of the record. Moreover, the letter addresses BACT and application of provisions in the PSD program, and not the Illinois SIP provision at issue here. Therefore, the letter does not and cannot support IEPA's decision.

1. The Administrator's February 22nd Letter Is Not In The Record and Was Not Relied On In Issuing the Permit.

Administrator Jackson's letter, attached as Exhibit 1 to IEPA's Response, is dated February 22, 2010, approximately four months after IEPA issued the Power Holdings Permit on October 26, 2009. (*See* Pet. Ex. 1 at 1.) Therefore, it is not part of the record and IEPA could not have relied upon the letter at the time it issued the Permit. *See* Certified Index of Administrative Record, Docket No. 31 (February 2, 2010) (not including the letter from the Administrator to Senator Rockefeller dated February 22, 2010). IEPA did not rely on the letter in making its determination and, therefore, cannot rely on it to defend that decision here. 40 C.F.R. § 124.18(c) (administrative record is considered complete on date final permit is issued); *In re Northern Michigan University*, 14 E.A.D. ___, Slip Op. at 26 (EAB Feb. 18, 2009) (citing 40 C.F.R. § 124.18(c) and holding that a post-permit brief is not part of the record); *In re Amerada Hess Corp. Port Reading Refinery*, 12 E.A.D. 1, 19 (EAB Feb. 1, 2005) (holding that the permitting agency erroneously relied, in response to a petition for review, on a document which was "not a part of the record for the Permit since it was created well after the final Permit had been issued"); *see also In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 613 n.195 (EAB 2006) (striking documents from the record that were created after the record closed). IEPA's shift from its arguments in its Response to Comments to an argument based on the Rockefeller letter are attempts to "augment the record upon which the permit decision was

based" through new arguments on appeal—a strategy this Board has previously rejected. *In re Washington Aqueduct Water Supply System*, 11 E.A.D. at 589 (explaining that a permitting authority "cannot through its arguments on appeal augment the record upon which the permit decision was based") (citing *In re Chem. Waste Mgmt. of Ind., Inc*., 6 E.A.D. 144, 151-52 (EAB 1995); *In re Amoco Oil Co.*, 4 E.A.D. 954, 964 (EAB 1993).); *see also ConocoPhilips*, Slip Op at 24-25 ("Agency regulations provide that the record shall be complete on the date the final permit is issued. 40 C.F.R. § 124.18(c)… allowing the permit issuer to supply its rationale after the fact, during the briefing for an appeal, does nothing to ensure that the original decision was based on the permit issuer's 'considered judgment' at the time the decision was made.").

2. The Rockefeller Letter Does Not Address 35 Ill. Admin. Code § 201.141.

Even if the Rockefeller Letter predated the IEPA's decision and had been included in the permit record, it still could not justify IEPA's decision regarding 35 Ill. Admin. Code § 201.141 because it does not relate to that provision of the Illinois SIP, nor to 42 U.S.C. § 7475(a)(3)(C) or 40 C.F.R. § 52.21(j)(1), which require compliance with the SIP as a prerequisite to issuance of a PSD permit. The Rockefeller Letter addresses EPA's projected actions in pending rulemaking proceedings. Those proceedings include: (1) the "greenhouse-gas emissions standards for Model Year 2012-2016 light-duty motor vehicles," Rockefeller Letter at 2-3; (2) the requirement to apply BACT for pollutants "subject to regulation," *id*. at 3 n.12; (3) the so-called "tailoring rule." *Id*. at 3. The questions asked by Senator Rockefeller, to which Administrator Jackson responds in the attachment to the Rockefeller Letter, clearly address the PSD program's BACT requirements. Nothing in the letter suggests that it is providing EPA's interpretation of any state SIP requirements, much less that it applies to 35 Ill. Admin. Code § 201.141. Indeed, there is no

doubt that Delaware's SIP includes CO2 limits. 73 Fed. Reg. 23,101; 40 C.F.R. § 52.420(c); Pet. Ex. 12 ("EPA Region 3 issued a final approval of a Delaware State Implementation Plan (SIP) revision incorporating state regulations which include specific limitations on the rate of… carbon dioxide.") Therefore, statements in the Rockefeller Letter must be taken in context and do not literally mean that CO_2 emissions are not regulated anywhere.

3. The Rockefeller Letter Could Not Change The Approved SIP.

Additionally, even if the Rockefeller Letter could be read as stating that CO2 (and other GHGs) are not governed by any SIP, including 35 Ill. Admin. Code § 201.141, it would have no effect. It is black letter law that a regulation can only be changed by rulemaking; it cannot be changed or altered by a letter. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1028 (D.C. Cir. 2000). Here, it is uncontested that 35 Ill. Admin. Code § 201.141 was adopted into the Illinois SIP through rulemaking. No party offers any convincing argument (or any argument) that the plain language of § 201.141 does not apply to GHGs. Therefore, even if any statement in the Senator Rockefeller Letter was to the contrary, it would be legally irrelevant.

B. PHIL Ignores The PSD Program's Requirement To Ensure Compliance With All Applicable SIP Requirements.

The central theme to PHIL's arguments in its Response is that 35 Ill. Admin. Code § 201.141 is not a part of the PSD program reviewable by this Board. (PHIL Resp. at 40-45.) PHIL's Response fails to directly confront the provisions of the PSD program which clearly require, as part of the PSD program over which this Board has jurisdiction, that compliance with all applicable SIP requirements is a condition precedent to issuance of a PSD permit: 42 U.S.C. § 7475(a)(3)(C) and 40 C.F.R. § 52.21(j)(1).

1. PHIL's Argument That 35 Ill. Admin. Code § 201.141 is limited to the Non-attainment New Source Review and Title V Programs Lacks Any Legal Basis.

PHIL argues that 35 Ill. Admin. Code § 201.141 only applies to sources in non-attainment areas and in the Title V program in Illinois. PHIL's Response is not clear on this issue. It asserts, for example, that Petitioner "blithely and erroneously states that the Illinois SIP contains an Illinois regulation, 35 Ill. Admin. Code § 201.141… This is not true." (PHIL Resp. at 40.) Yet, a page later PHIL admits that "[t]he Illinois SIP incorporates the Illinois General Permitting regulations in Part 201, including Section 201.141…" (*See e.g.*, PHIL Resp. at 41.) Thus, PHIL appears to reluctantly accept that § 201.141 is in the Illinois SIP. But, PHIL then argues that § 201.141 is included in the Illinois SIP "solely for purposes of implementing Illinois federally-approved Title I Subpart D non-attainment area regulations and Illinois' federally-approved Title V Operating Permit regulations." (*Id*.) In support, PHIL cites the *entire* Illinois SIP. (Id., citing 40 C.F.R. 52.720, *et seq*.) Nothing in the Illinois SIP generally, or in 35 Ill. Admin. Code § 201.141 specifically, suggests that the regulation is limited only to non-attainment area permitting or to Title V permitting.

PHIL's argument related to Title V permitting is particularly meritless since the Title V program was added to the Clean Air Act in 1990, Pub. L. 101–549, title V, § 501, Nov. 15, 1990, 104 Stat. 2635, almost twenty years *after* 35 Ill. Admin. Code § 201.141 was added to the Illinois SIP. 37 Fed. Reg. 10862 (May 31, 1972). Moreover, it is fundamental to the Title V program that Title V permits do not create new emission standards, but collect those SIP requirements that already applied to the source. *See* 42 U.S.C. §§ 7661a(a) and 7661c(a); 57 *Fed. Reg.* at 32250, 51 (July 21, 1992) (stating that one purpose of the title V program is to "enable the source, states,

EPA, and the public to better understand the applicable requirements to which the source is subject…."). Therefore, 35 Ill. Admin. Code § 201.141 could not have been intended to apply only to implement the Title V program.

2. The Cases Cited By PHIL Are Inapposite.

The premise to PHIL's Response is that 35 Ill. Admin. Code § 201.141 "has not been incorporated into the Illinois SIP for PSD purposes" and, therefore "the Board has no jurisdiction" to consider it. (PHIL Resp. at 43.) To the extent that PHIL argues that § 201.141 is not part of the federal PSD program that has been incorporated into the Illinois SIP, PHIL has the analysis backwards. The issue here is that 42 U.S.C. § 7475(a)(3)(C) and 40 C.F.R. § 52.21(j)(1), which are undeniably part of the PSD program, prohibit IEPA from issuing a PSD permit unless "the owner or operator of such facility demonstrates… that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of… any other applicable emission standard or standard of performance under this chapter" and unless the plant "meet[s] each applicable emissions limitation under the State Implementation Plan…" The Board has jurisdiction to review the IEPA's decision to issue a PSD permit to PHIL despite IEPA's refusal to ensure compliance with 35 Ill. Admin. Code § 201.141 of the Illinois SIP. 40 C.F.R. § 124.19.

Because PHIL fails to address the requirements of 42 U.S.C. § 7475(a)(3)(C) and 40 C.F.R. § 52.21(j)(1), which require compliance with the approved state SIP as a precondition of PSD permit issuance, PHIL erroneously cites prior decisions of this Board that did not apply 42 U.S.C. § 7475(a)(3)(C) and 40 C.F.R. § 52.21(j)(1). Those prior decisions stand only for the

proposition that state law requirements that are unconnected to the PSD program by either the permitting agency or the petitioner are not reviewable in an appeal of a PSD permit.

PHIL relies upon the Board's decision in *In re West Suburban Recycling & Energy Center*, 6 E.A.D. 692 (EAB 1996) ("WSREC"). (PHIL Resp. at 42.) The Board's decision in WSREC does not support PHIL's argument here because WSREC did not address the PSD provisions at issue in this case: 42 U.S.C. § 7475(a)(3)(C) and 40 C.F.R. § 52.21(j)(1). In *WSREC*, the Board held that IEPA could not deny a permit where IEPA conceded that all PSD requirements were met. 6 E.A.D. at 698 (IEPA noted that there were no PSD deficiencies in the application), n.22 (noting that the state requirements were "unrelated to the PSD program"), 704 (holding that the Board would not assume jurisdiction over issues unrelated to the PSD program). Here, in contrast, the Petition is explicitly based on the PSD program; specifically, the requirement that the source comply with the applicable SIP in addition to meeting BACT limits and air quality standards. 42 U.S.C. § 7475(a)(3)(C); 40 C.F.R. § 52.21(j)(1). These PSD provisions were not mentioned in the *WSREC* case.

PHIL's reliance on the Board's decision in *In re Amerada Hess Corporation*, 12 E.A.D. 833 (EAB 2005), is similarly inapt. In *Amerada Hess*, the Board specifically distinguished between those "conditions of a state-issued permit that are adopted solely pursuant to state law," and elements that "find their origin in the federal PSD program." 12 E.A.D. at 5. As to the later, the Board's decision notes that "[a] permitting authority may not issue a PSD permit unless the applicant demonstrates compliance with the substantive PSD requirements." *Id*. at 4. In that case, the Board determined that the conditions at issue appeared to be required only by state law and were not connected to the PSD program. *Id*. at 11, 14. Notably, however, the Board

clarified that it was not concluding that all state regulations are exempt from PSD permitting or consideration by the Board—only that PSD permitting could not include provisions that "bear no relationship to the federal PSD program." *Id*. at 14 n.27. As in *WSREC*, there was no mention in *Amerada Hess* of 42 U.S.C. § 7475(a)(3)(C) or 40 C.F.R. § 52.21(j)(1) and none of the parties raised those provisions.

The Board's decision in *In re Knauf Fiber Glass GmbH*, 8 E.A.D. 121 (EAB 1999) (*Knauf I*), also did not address 42 U.S.C. § 7475(a)(3)(C) or 40 C.F.R. § 52.21(j)(1). The regulations at issue in that case were described as "non-PSD" and "ha[d] not been otherwise linked to the federal PSD program in the context of th[at] case." *Id*. at 162; *see also id*. at 172 (denying review of an issue which was "not a requirement of the federal PSD program" and where "the petitioner has not shown that the issue otherwise falls within the purview of the federal PSD program.") Therefore, PHIL's reliance on it in this case is misplaced, PHIL Resp. at 43, because this case involves the PSD requirements in 42 U.S.C. § 7475(a)(3)(C) and 40 C.F.R. § 52.21(j)(1), which do "link" the Illinois SIP's standards to the PSD program. Similarly, in *In re Sutter Power Plant*, 8 E.A.D. 680 (EAB 1999), the Board addressed a petition raising issues that were not part of the PSD program and which were "not otherwise relating to permit conditions implementing the PSD program." *Id*. at 690.

In *In re Hillman Power Co*., 10 E.A.D. 673 (EAB 2000), the Board denied a petitioner's request for review based on a Michigan law prohibiting "emissions that cause a public nuisance." *Id*. at 698. The Board stated that this law was "a state-specific issue that is not subject to regulation under the federal PSD program." *Id*. In that case, there was no discussion of 42 U.S.C. § 7475(a)(3)(C) or 40 C.F.R. § 52.21(j)(1). In fact, the regulation at issue, Mich. Admin.

Code r.336.1901, is not even in the Michigan SIP. *See generally*, http://www.epa.gov/reg5oair/sips/ (click on "View All SIP's by State online", and then on "Michigan").

3. PHIL's Argument Would Make 42 U.S.C. § 7475(a)(3)(C) and 40 C.F.R. § 52.21(j)(1) Surplusage.

To the extent PHIL is arguing that the PSD program does not require compliance with SIP requirements outside of those requirements specifically listed in 40 C.F.R. § 52.21(d) and (j)(2) through (r), PHIL's interpretation would make 42 U.S.C. § 7475(a)(3)(C) and 40 C.F.R. § 52.21(j)(1) mere surplusage. Regulations must be read to avoid any superfluous provisions. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("No clause, sentence, or word shall be superfluous, void or insignificant."). To have any independent purpose and meaning, beyond that already contained in the other provisions of § 52.21, § 52.21(j)(1) must require compliance with requirements other than the requirements already listed elsewhere in other part of 42 U.S.C. § 7475 and 40 C.F.R. § 52.21. In other words, it must mean that the permittee must demonstrate that it will comply with all applicable PSD requirements, including those beyond the PSD program SIP provisions. Yet, PHIL would have the Board interpret them as requiring nothing more than what is already required by the other provisions in the PSD program.

Moreover, 42 U.S.C. § 7475(a)(3)(C) requires compliance with "any other" SIP requirement. The plain language of the regulation controls. *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 577 (2007); *M. Kraus & Bros., Inc. v. United States*, 327 U.S. 614, 622 (1946); *Bd. of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986). The use of the phrase "any other," as Congress did in 42 U.S.C. § 7475(a)(3)(C), signifies an intent to provide a catch-

all. *See e.g., Communities for a Better Environment v. CENCO Refining Co*, 180 F. Supp. 2d 1062, 1076 (C.D. Cal. 2001) (interpreting 42 U.S.C. § 7604(f)(4) and holding that "[t]he introductory words 'any other' suggest that this clause… is meant to serve a catch-all purpose."); *cf. Massachusetts v. EPA*, 549 U.S. 497, 528-29, 127 S.Ct. 1438 (2007) (finding that the word "any" is intended to be given expansive meaning) (*citing Dept. of Housing and Urban Development v. Rucker*, 535 U.S. 125, 131 (2002)). Section 52.21(j)(1) similarly requires compliance with "each" SIP requirement. This language plainly mandates compliance with each applicable SIP requirement as a precondition of a PSD permit. It is telling that PHIL has offered no alternate meaning to these provisions other than their plain language meaning, requiring a demonstration of compliance with applicable SIP provisions as a prerequisite to a PSD permit. Since there is no dispute that IEPA refused to consider, much less determine that PHIL would comply with 35 Ill. Admin. Code § 201.141, IEPA failed to comply with 42 U.S.C. § 7475(a)(3)(C) and 40 C.F.R. § 52.21(j)(1) and remand is necessary.

IV. EPA'S RECENT FINAL ACTION REGARDING THE AGENCY'S INTERPRETATION OF "SUBJECT TO REGULATION."

In the Petition, Sierra Club noted that IEPA's refusal to include BACT limits for carbon dioxide (CO_2) and methane was based on the so-called "Johnson Memo" purporting to set forth the EPA's interpretation of the phrase "subject to regulation" in 40 C.F.R. § 52.21(b)(50)(iv) and in 42 U.S.C. § 7475(a)(4). (Pet. at 22-24.) As noted in the Petition, the Johnson Memo suffered from procedural flaws because it was not the result of notice and comment, as this Board had cautioned the Administrator to do in the *Deseret* case. Pet. at 38-39; *Deseret*, Slip Op. at 52, 62-63 (noting that it was "questionable" whether the Agency's prior interpretation could be revised

without notice and comment, citing *Farmers Tel. Co., v. FCC*, 184 F.3d 1241, 1250 (10th Cir. 1999); *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999); *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997).) Moreover, the Petition noted, the Johnson Memo did not represent the EPA's position because Administrator Jackson had granted reconsideration. (Pet. at 39.) In fact, EPA was in the process of seeking public comment on its reconsideration of the Johnson Memo at the time the Petition was filed. *See* 74 Fed. Reg. 51,535 (Oct. 7, 2009).

On March 30, 2010, four months after this case was filed, the EPA finalized its interpretation of "subject to regulation" through a final action following its notice and comment process. *See* Environmental Protection Agency, Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, EPA-HQ-OAR-2009-0597; RIN 2060-AP87 (March 30, 2010) ("Reconsideration Final Decision"), available at http://www.epa.gov/nsr/documents/psd_memo_recon_032910.pdf. In that final decision, EPA concludes that "subject to regulation" means "actual control" as of the date of that a regulatory requirement "is operative on the activity regulated." *Id.* 78; *see also id*. at 13, 18 ("Regarding GHGs, EPA has concluded that PSD program requirements will apply to GHGs upon the date that the anticipated tailpipe standards for light-duty vehicles take effect… which is no earlier than January 2, 2011"), 87-88. Therefore, according to EPA's recent final Federal Register notice, BACT limits for greenhouse gases are not subject to BACT limits until January 2, 2011. *Id*. at 18.

The Reconsideration Final Decision further addresses most of the arguments made in the Petition in this action. *See generally, id.* Thus, for purposes of this case before the Board[14], issue four of the Petition, Pet. at 17-39, is now controlled by the Reconsideration Final Decision. Consequently, if the Reconsideration Final Decision is overturned or vacated by the Circuit Court of Appeals for the District of Columbia, 42 U.S.C. § 7607(b)(1), Reconsideration Final Decision, *supra*, at 114, the PHIL permit must contain a BACT limit for CO_2 or methane. Similarly, if the Permit is not final prior to January 2, 2011, it will require BACT limits for these pollutants. *See* Reconsideration Final Decision at 100-03 (stating that no grandfathering is allowed and that permits that are not final prior to January 2, 2011 will need a BACT limit for GHGs); *see also* 40 C.F.R. §§ 124.15(b) (a final decision becomes effective after review under § 124.19, if such review is requested), 124.19(f)(1) (final agency actions occurs when the PSD permit is issued after completion of review and remand, if any); *Ziffrin v. United States*, 318 U.S. 73, 78 (1943) ("*A fortiori*, a change of law pending an administrative hearing must be followed in relation to permits for future acts."); *cf. In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 614-15 (EAB 2006) (distinguishing applicability of rules that are expressly prospective to new *applications* and not pending permits, as in that case, from rules that do not contain such express limitation).

[14] Sierra Club does not agree that the Reconsideration Final Decision is a correct interpretation of law, nor that a state should follow it when interpreting the state's implementation plan. *See* Reconsideration Final Decision at 106 (stating that states "have some independent discretion to interpret state laws, provided those interpretations are consistent with minimum requirements under the federal law.") Those issues will be addressed in the appropriate forum.

Conclusion

For the foregoing reasons, and the reasons set forth in the Petition, the Board should grant review and set further briefing, including a briefing opportunity for amici.

Respectfully submitted this 5th day of April, 2010.

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CERTIFICATE OF SERVICE OF PETITIONER'S REPLY

On April 5, 2010, I caused to be delivered a copy of the foregoing Reply to:

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I declare that the foregoing is true to the best of my knowledge.

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