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August 16, 2007

VIA HAND DELIVERY

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
Colorado Building
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

Re: *Christian County Generation, LLC*, PSD Appeal Number 07-01

Dear Clerk of the Board:

Enclosed please find an original and six copies of Christian Country Generations, LLC's Motion to Participate and Request for Oral Argument. Additionally, please find enclosed four copies of the exhibits to the Motion to Participate and Request for Oral Argument. Please return a file-marked copy of each document to the awaiting courier.

Please do not hesitate to contact me at (202) 282-5000 if you have any questions or concerns.

Sincerely,

Luke W. Goodrich

LWG/jmd

Via Federal Express with enclosures:

- David Bender, Garvey McNeil & McGillivray, S.C.
- Robert J. Meyers, Office of Air and Radiation
- Bruce Nilles, Sierra Club
- Richard Ossias, Office of General Counsel
- Robert A. Kaplan, U.S. EPA, Region 5
- Douglas P. Scott, Illinois Environmental Protection Agency

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

In re:	)	
	)	
Christian County Generation, LLC	)	**PSD Appeal No. 07-01**
	)	
Permit No. 021060ABC	)	

MOTION TO PARTICIPATE AND REQUEST FOR ORAL ARGUMENT

Permittee, Christian Country Generation, LLC, asks to participate in the above-captioned proceeding by filing the attached Memorandum and presenting oral argument.

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INTRODUCTION

Pursuant to Section III.D.4 of the Environmental Appeals Board ("EAB") Practice Manual,[1] Permittee, Christian County Generation LLC ("CCG") moves the EAB to allow it to participate in the above-captioned proceeding by filing this Memorandum and presenting oral argument. The EAB "exercises its authority to review [PSD] permits sparingly." *In re Westborough and Westborough Treatment Plant Board*, 10 E.A.D. 297, 303 (EAB 2002). Petitioner, Sierra Club, has not even begun to justify a departure from the EPA's "policy favoring resolution of most permit disputes at the Regional level." *Id.*

The permit issuer, the Illinois Environmental Protection Agency ("IEPA"), issued a thorough, 31-page Responsiveness Summary, carefully (and correctly) addressing each of the arguments that Sierra Club raised below. Sierra Club has failed to show that IEPA's decision was "clearly erroneous," or that the issues raised in the Petition present an "important policy consideration" worthy of the EAB's review. 40 C.F.R. § 124.19(a). Moreover, Sierra Club has attempted to present several new arguments on appeal, none of which were raised during the public comment period, and all of which were "reasonably available" before that period closed. 40 C.F.R. § 124.13. Review of the Petition should therefore be denied.

The principal issue presented for review in the Petition is whether, in light of *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007), and other provisions of the Clean Air Act 42 U.S.C. § 7401 et. seq. ("CAA"), IEPA was required to include in the permit a best available control technology ("BACT") emission limit for carbon dioxide. However, Sierra Club failed to raise this issue in any of its extensive written public comments or in public hearings below. Nor can Sierra Club say this issue was not "reasonably ascertainable" before the close of the public comment period.

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

40 C.F.R. § 124.13. Most of Sierra Club's arguments depend on statutory provisions or regulations that were not at issue in *Massachusetts*. But in any event, Sierra Club was one of the original parties that ***filed*** that case. It has therefore been pressing for ***years*** the very same arguments it now claims were not reasonably ascertainable or reasonably available before the close of the public comment period. Its failure to raise these arguments before IEPA means that these arguments are waived, and this, in and of itself, warrants dismissal.

Even if Sierra Club's arguments had not been waived, however, they would still lack merit. IEPA is required to impose a BACT emissions limitation for carbon dioxide only if carbon dioxide is "subject to regulation" under the CAA. 42 U.S.C. §§ 7475(a), 7479(3). According to Sierra Club, a pollutant is "subject to regulation" if it is merely "capable of being regulated" or "should" be regulated under the Act—even if it is not "currently regulated." Pet. 10. But both the EAB and the D.C. Circuit have rejected this interpretation, concluding that a pollutant is "subject to regulation[] under the CAA" only if it is a "pollutant for which a [regulation] *has been promulgated*." *In re Indeck-Elwood, LLC*, 13 E.A.D. (slip op. at 8 n.10), 2006 WL 3073109 (EAB 2006) (emphasis added). And important policy considerations—including the fact that Congress and EPA are currently considering comprehensive carbon dioxide regulations, and the fact that local, ad hoc permitting decisions are a poor mechanism for regulating carbon dioxide emissions—further militate strongly *against* granting review here.

Sierra Club's only other issue—whether IEPA clearly erred in conducting its collateral impacts analysis—is also both waived and without merit. It is waived because the EAB has repeatedly admonished petitioners that they cannot "simply repeat objections made during the comment period," but must instead "explain why the permit issuing entity's response to those objections is clearly erroneous or otherwise warrants review." *In re Zion Energy, LLC*, 9 E.A.D.

701, 705 (EAB 2001). Sierra Club has completely failed to engage IEPA's thorough, reasoned response to each one of its public comments—indeed, it has distorted IEPA's analysis in an attempt to preserve an appeal. But even if the Board were to reach the merits of this argument, it would find no flaw in IEPA's analysis. IEPA thoroughly considered the collateral impacts of the relevant technologies and concluded that the BACT selected here—Integrated Gasification Combined Cycle ("IGCC")—was "more advantageous" with respect to carbon dioxide emissions than any alternative technology, including "even the latest, high-efficiency boiler technologies." Responsiveness Summary at 9.

In sum, Sierra Club has failed to carry its heavy burden of justifying the EAB's review of the IEPA's reasoned and correct decision to grant the permit at issue here.

STATEMENT OF FACTS

The IEPA issued the Prevention of Significant Deterioration ("PSD") Permit at issue on June 5, 2007. *See* Permit Number 021060ACB, Application Number 05040027 (attached as Exhibit 1). The State of Illinois is authorized to administer the PSD permit program pursuant to a delegation of authority by the United States Environmental Protection Agency ("EPA"). The permit authorizes Permittee to construct a new, state-of-the-art Integrated Gasification Combined Cycle ("IGCC") energy facility, known as the Taylorville Energy Center, in Christian County, near Decatur, Illinois. As IEPA explained in its Responsiveness Summary, IGCC is "a developing technology that offers promising possibilities for greatly improved environmental performance, compared to existing boiler technology," but there are "only a handful of [IGCC] demonstration plants operating in the United States." Responsiveness Summary at 8 (attached as Exhibit 2). The development of IGCC technology is critical because it offers significant advantages over "even the latest, high-efficiency boiler technologies," including substantially reduced emissions, "significant improvements in energy efficiency," and the "potential for collection of CO_2

for sequestration." *Id.* at 9.[2] Thus, after considering and responding in detail to extensive public comments, including those of Sierra Club, IEPA concluded, pursuant to the Clean Air Act, 42 U.S.C. 7479(3), that IGCC is the best available control technology ("BACT") for the proposed plant and issued the necessary permit.

ARGUMENT

I. IEPA Correctly Concluded That A BACT Emissions Limit On Carbon Dioxide Was Unwarranted; And Petitioner's Argument On This Point Is Waived In Any Event.

Sierra Club first argues that IEPA improperly failed to include in the PSD permit a BACT emission limit for carbon dioxide. Sierra Club, however, failed to raise this issue before the IEPA even though it was "reasonably ascertainable," 40 C.F.R. § 124.13, and, in any event, Sierra Club has failed to demonstrate that IEPA's decision not to include an emission limit for carbon dioxide was "clearly erroneous" or involved an "important policy consideration" worthy of the EAB's review. 40 C.F.R. § 124.19(a). Review should be denied.

A. Petitioner Failed to Raise the Issue of a BACT Emissions Limit for Carbon Dioxide Even Though That Issue Was "Reasonably Ascertainable" Well Before the Public Comment Period Closed.

Because of the EAB's "policy favoring resolution of most permit disputes at the Regional level," the EAB "exercises its authority to review [PSD] permits sparingly." *In re Westborough and Westborough Treatment Plant Board*, 10 E.A.D. 297, 303 (EAB 2002). Moreover, the Board will review an issue on appeal only if the issue was either "raised during the comment period" or "not reasonably ascertainable" before the close of the public comment period. *In re Avon Custom Mixing Services, Inc.*, 10 E.A.D. 700, 704 (EAB 2002); 40 C.F.R. §§ 124.13 &

[2] Sierra Club attempts to mislead EAB by stating that the facility is a "new coal-fired power plant"—implying that this facility is yet another pulverized coal-fired plant that continues to fully combust coal as its fuel. Pet. 1. Instead, IGCC chemically treats coal to produce synthetic gas. After removing impurities, the *gas* is burned to generate electricity. IGCC emits only a fraction of the amounts of criteria pollutants emitted by traditional "coal-fired power plants," and is one of the most important and effective new energy technologies available today.

124.19(a). At all times, the petitioner "bears the burden of demonstrating that review is warranted," and must submit "credible documentation showing that" issues were properly preserved. *Avon*, 10 E.A.D. at 704. Indeed, the EAB has frequently rejected appeals where the petitioner did not demonstrate that all reasonably ascertainable issues were raised during the comment period.[3]

1. Sierra Club raised none of its BACT arguments below.

Sierra Club presents three arguments for why carbon dioxide is "subject to regulation" under the CAA and why, therefore, the IEPA was required to include in the PSD permit an emission limit for carbon dioxide:

(1) "Carbon dioxide is currently regulated under the Clean Air Act's acid rain provisions" (Pet. 7-8);
(2) "Carbon dioxide is currently regulated under . . . the Illinois State Implementation Plan" (Pet. 8-10); and
(3) In the wake of *Massachusetts v. EPA*, carbon dioxide is "subject to further regulation" under Sections 111 and 202 of the CAA (Pet. 10-13).

These arguments lack any merit. But even if they were right, ***Sierra Club presented none of these arguments to the IEPA*** even though each one was "reasonably available . . . [before] the close of the public comment period." 40 C.F.R. § 124.13.

Sierra Club devoted the first nine pages of its written public comments to the issue of carbon dioxide, but the EAB will search in vain for any mention of these three arguments. Public Comments at 1-9 (attached as Exhibit 3).[4] It is no accident that the portion of the Petition ad-

[3] *See, e.g., In re Indeck Elwood, LLC*, 13 E.A.D. (slip op.) (EAB 2006) (declining to address petitioner's arguments regarding the permit's limits for NO_x and SO_2 because they were reasonably ascertainable and were not raised during the comment period); *In re New England Plating Co.*, 9 E.A.D. 726, 736-37 (EAB 2001) (holding that petitioner should have raised the need for a compliance schedule in its comments on the draft permit if it wanted to preserve the issue for review); *In re City of Marlborough, Massachusetts Easterly Wastewater Treatment Facility*, 12 E.A.D. (slip op.), 2005 WL 1993924 (EAB 2005) (concluding that petitioner's objections to interim phosphorus limitation were not raised during public comment period on the draft permit and were reasonably ascertainable, and thus the issues were not preserved for review by the Board).

[4] The Public Comments *did* raise the collateral impacts issue (Public Comments at 6-9; Pet. 13-15), and we address this issue at length in Section II, *infra*.

dressing emission limits on appeal (Pet. 3-12) cites Sierra Club's public comments *not a single time*—the public comments raised a completely different set of arguments.[5]

The portion of the Petition addressing the Acid Rain provisions of the Clean Air Act (at 7-8) has no counterpart anywhere in the public comments or public hearing testimony. Sierra Club never once even mentioned the Acid Rain provisions in its public comments. Review is therefore waived.[6]

Sierra Club's second argument—that carbon dioxide is "currently regulated under . . . the Illinois State Implementation Plan" (Pet. 8-10)—is also new. Sierra Club's public comments do mention the Illinois SIP, but not as part of any argument that carbon dioxide is "subject to regulation" under the CAA. Instead, the public comments argue that carbon dioxide constitutes "a public nuisance under the State Implementation Plan" (Comments at 3), and that the Illinois SIP and Administrative Code, of their own force, "prohibit[] [IEPA] from granting this permit without mitigating the global warming impacts." *Id.* at 8.

This is a far cry from arguing (as Sierra Club does here) that the Illinois SIP renders carbon dioxide a pollutant "subject to regulation" under the CAA and therefore subject to a mandatory BACT emissions limit. IEPA thoroughly responded to Sierra Club's public comments on

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[5] Sierra Club's written public comments succinctly summarized its arguments below as follows:

> There are at least four ways in which IEPA must consider the global warming impacts associated with this proposed project: (1) as part of the endangered species act consultation process, (2) as a non-regulated criteria pollutant in the BACT [collateral impacts] analysis, (3) as a public nuisance under the State Implementation Plan, (4) and in the alternatives analysis under CAA Section 165.

Public Comments at 3.

[6] Not only did Sierra Club *not* argue that the Acid Rain provisions rendered carbon dioxide a "regulated pollutant" under the CAA, but Sierra Club's public comments consistently maintained that carbon dioxide was a *non-regulated* pollutant. *See, e.g.*, Public Comments at 3 (IEPA must consider carbon dioxide "as *a non-regulated criteria pollutant* in the BACT analysis"); *id.* at 6 ("*Even in the absence of USEPA regulating carbon dioxide*, IEPA must still consider carbon dioxide as a non-regulated pollutant in the BACT analysis."); *id.* at 7 (IEPA should "minimize both the emissions of regulated pollutants and the collateral emissions of carbon dioxide"); *id.* at 8 (IEPA should "mitigate the emissions of criteria pollutants and *'non-regulated pollutants' such as carbon dioxide*") (all emphases added).

the Illinois SIP, explaining that its "language [does not] create[] enabling authority through which the Illinois EPA could lawfully seek to 'mitigate' or regulate the impacts of CO_2 emissions during permitting." Responsiveness Summary at 9. Yet Sierra Club has not challenged this explanation on appeal. Instead, it has now raised completely new and unrelated arguments, which, as explained below, were clearly ascertainable or reasonably available before the close of the public comment period, and are therefore waived.

Finally, Sierra Club raises the newfound argument that carbon dioxide is "subject to regulation" because EPA has authority to regulate it under Sections 111 and 202 of the CAA. (Section 111 requires EPA to establish new source performance standards for new stationary sources; Section 202 requires EPA to set standards for emissions of "any air pollutant" from motor vehicles.) Sierra Club's public comments, however, failed even to cite these sections, let alone develop any argument based on them. Because this argument was also "reasonably available" before the close of the public comment period, it too is waived.

2. Each of Sierra Club's BACT arguments was "reasonably available" before the close of the public comment period, regardless of *Massachusetts v. EPA*.

Because Sierra Club raised none of its BACT arguments below, its only hope for review is that its arguments were somehow not "reasonably available . . . by the close of the public comment period." 40 C.F.R. § 124.13. Accordingly, Sierra Club claims that these arguments "result[] from the Supreme Court's decision in *Massachusetts v. Environmental Protection Agency*" and, therefore, were unavailable before the close of the public comment period. Pet. 2.

The Court's decision, however, does not give rise to Sierra Club's new issues and arguments. The first two arguments are based on the Acid Rain provisions and the Illinois SIP, but both were in place well before, and remain unchanged after, the Court's decision in *Massachu-*

setts. Thus, Sierra Club could have argued below, as here, that carbon dioxide was "subject to regulation" because it was already regulated under these provisions.

The same is true of Sierra Club's third argument—namely, that EPA has authority to regulate carbon dioxide under Sections 111 and 202 of the CAA. First, this argument does not depend on the result in *Massachusetts* at all—as evidenced by the fact that the Sierra Club does not cite *Massachusetts* a single time in the portion of the Petition making this argument. Pet. 10-13. But even assuming that *Massachusetts* supports this argument (which, as we explain in Part I.B.1, it does not), the argument nevertheless does not "result[] from" *Massachusetts*, as a reading of that decision confirms. Sierra Club easily could have argued that carbon dioxide was "subject to further regulation" under the CAA well before the Supreme Court's decision in *Massachusetts*—and, thus, well before the close of the public comment period.

Sierra Club treats *Massachusetts* as if it came out of nowhere shortly after the close of the public comment period, but neglects to mention (and failed to mention below) that *it was one of the original parties that* ***filed*** Massachusetts v. EPA *in the first place, after petitioning the EPA five years ago to regulate carbon dioxide under Section 202.* Sierra Club has known of the very arguments that succeeded in *Massachusetts* for years, and has been consistently and repeatedly making those same arguments in a wide variety of fora—just not before IEPA. There is no merit to any claim that these issues were not "reasonably ascertainable, or these arguments not "reasonably available," before the close of the public comment period.[7]

In short, Sierra Club raised none of its arguments below, even though each one was more than "ascertainable"—especially for Sierra Club—well before the public comment period closed.

[7] As just one example of Sierra Club's awareness of these arguments, see its November 29, 2006 press release on oral argument in *Massachusetts v. EPA*, available at: http://www.sierraclub.org/pressroom/releases/pr2006-11-29.asp (last visited August 10, 2007). The press release was issued several months before Sierra Club's public comments to IEPA. It is attached as Exhibit 5.

But Sierra Club's attempt to use *Massachusetts* as a pretext for raising new arguments on appeal, if successful, would undermine the "longstanding policy" of "ensur[ing] that the Region has an opportunity to address potential problems with the Draft Permit before the permit becomes final," so that the permitting process can have "predictability and finality." *Westborough and Westborough Treatment Plant Board*, 10 E.A.D. 297, 304 (EAB 2002). The EAB should therefore reject Sierra Club's attempt to raise new arguments.

B. Even If Sierra Club's BACT Arguments Were Preserved, Sierra Club Has Failed to Demonstrate That IEPA's Decision Was "Clearly Erroneous" Or "Involves An Important Policy Consideration That the Board Should Review."

Even assuming that Sierra Club's arguments were preserved, they are meritless. Sierra Club has failed to demonstrate that IEPA's decision was "clearly erroneous" or involves "an important policy consideration which the EAB should, in its discretion, review." 40 C.F.R. § 124.19 (a)(1),(2).

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

Second, to the extent that there are any "important policy considerations" involved in this appeal at all, they militate overwhelmingly *against* review. EPA, Congress, and many other policy-makers are currently considering comprehensive regulations on emissions of carbon dioxide. Case-by-case permitting decisions by local authorities (which, in any event, can regulate only new sources, not existing ones) are appropriate for PSD permitting, but are a poor mecha-

nism for regulating the global issue of greenhouse gas emissions. Review of the Petition should therefore be denied.

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

Sierra Club argues that *Massachusetts* "triggered the obligation for permitting agencies to include carbon dioxide emission limits in PSD permits." Pet. 4. This is allegedly so because of a syllogism: (1) all PSD permits must include a BACT limit for each pollutant "subject to regulation" under the CAA (Pet. 5); (2) carbon dioxide is "subject to regulation" under the CAA because, in the wake of *Massachusetts*, it "can and should be regulated" (Pet. 13); and (3) PSD permits must, therefore, include limits on carbon dioxide emissions. *See* Pet. 5, 10-12.

The problem is that the second premise—that carbon dioxide is "subject to regulation" after *Massachusetts* because it allegedly "can and should be regulated" under the CAA—is flat wrong. The EAB's own decisions establish that a pollutant is "subject to regulation[]" only when "a [regulation] *has been promulgated*" for that pollutant—not when a regulation *could* or *should* be promulgated. *In re Indeck-Elwood, LLC*, 13 E.A.D. (slip op. at 8 n.10), 2006 WL 3073109 (EAB 2006) (emphasis added). The Court's decision in *Massachusetts* merely held that EPA is *authorized* to regulate carbon dioxide. Carbon dioxide does not become "subject to regulation" until EPA *has actually promulgated regulations.* Until then, PSD permits need not (and indeed cannot) include emission limits for carbon dioxide. IEPA's decision is therefore correct.

Sierra Club's error flows from a distortion of *Massachusetts*, and a distortion of the term "subject to regulation." First, Sierra Club treats *Massachusetts* as if it decided the issue of regulating carbon dioxide under the CAA once and for all—but this is simply not true. *Massachusetts* involved a challenge to EPA's refusal to regulate carbon dioxide emissions from mobile sources under Section 202. EPA based its refusal to regulate on two arguments. First, EPA ar-

gued that it *lacked authority* to regulate carbon dioxide because carbon dioxide did not fit within the CAA's definition of "pollutant." The Court rejected this argument, concluding that carbon dioxide is a "pollutant" and therefore that EPA has authority to regulate it. 127 S.Ct. at 1459-60.

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

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

permitting agencies to include carbon dioxide emission limits in PSD permits." Pet. 4. In fact, *Massachusetts* triggered only the obligation for the EPA to reconsider whether or not to regulate carbon dioxide—nothing more, and nothing less. IEPA drew the same conclusion in its Responsiveness Summary (which Sierra Club fails to address),[8] and that conclusion was correct.[9]

Even more important than Sierra Club's misunderstanding of *Massachusetts*, however, is its erroneous interpretation of the phrase "subject to regulation." As Sierra Club correctly points out, this phrase is key because PSD permits require BACT emissions limitations only for pollutants "subject to regulation" under the CAA. Pet. 5. But according to Sierra Club, a pollutant is "subject to regulation" if it is "capable of being regulated" or "should" be regulated—even if it is not "currently regulated." Pet. 10.

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

The first is a quote from the EPA's responses to comments on a rule changing the definition of "major source" under Sections 111 and 112 of the CAA. There, the EPA stated that "[t]echnically, a pollutant is considered regulated once it is *subject to regulation* under the Act.

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[8] As IEPA explained: "The U.S. Supreme Court's decision in *Massachusetts et. al v. EPA* potentially signals the development of CO_2 regulations for automobiles and other mobile sources, while impending Congressional hearings are likely to explore ways to regulate stationary sources, including power plants and other key sectors of our economy. Until such approaches are put into place by the appropriate legislative authorities, attempts to force controls or compel individual action on global warming through conventional environmental permitting programs are capricious and, even if implemented, would probably provide only illusory benefits." Responsiveness Summary at 6.

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

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

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

This straightforward memorandum offers Sierra Club no support. It says that a point source is "subject to permits" whenever it "should have" a permit, whether it in fact has one or not. But the only reason it "should have" a permit is that the Clean Water Act requires one, and the point source is "in violation of the CWA" if it doesn't. Thus, the point source is "subject to

permits" only because the Clean Water Act *already requires* the point source to have a permit in place. Again, this actually *undermines* Sierra Club's argument because it indicates that "subject to permits" means that the Act *already requires* a permit.

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

For the correct reading of "subject to regulation," the EAB need look no further than its own decisions, which plainly establish that a pollutant is "subject to regulation" only when EPA has *already* promulgated regulations governing it. In *In re Indeck-Elwood, LLC*, 13 E.A.D. (slip op. at 8 n.10), 2006 WL 3073109 (EAB 2006), the EAB unambiguously stated that pollutants "subject to regulation[] under the CAA" are "pollutants for which a NAAQS *has been promulgated*, pollutants subject to standards *promulgated* under section 111 of the CAA, and Class I or Class II substances subject to title VI of the CAA." (emphasis added) (citing 40 C.F.R. § 52.21(b)(50)). Thus a pollutant is "subject to regulation" for purposes of PSD permitting when it is *already covered* by existing regulations.

In re Umetco Minerals Corporation, 6 E.A.D. 127, 127-28 (EAB 1995), confirms this conclusion. There, the Board explained that "radon emissions from uranium byproducts that result from uranium milling are *subject to regulation* under the Clean Air Act" because "EPA *has designated* radionuclides (including radon) as hazardous air pollutants under section 112(a) of the Clean Air Act, 42 U.S.C. § 7412(a). . . . [and,] [i]n accordance with CAA § 112(d)(1), EPA *has issued* National Emission Standards for Hazardous Air Pollutant (NESHAP) for 'radon emissions from operating mill tailings' at 40 C.F.R. Part 61 Subpart W." *Id.* (emphasis added). Here

again, the EAB made clear that a pollutant is "subject to regulation" when the EPA "has designated" it as hazardous under Section 112 or "has issued" a national emission standard for it—not when EPA *could* (but does not) regulate it. *Id.*

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

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

If there is any "important policy consideration" at issue here, it is *not* one identified by the Sierra Club (which never attempts to identify any such "policy consideration"), but rather by IEPA: the fact that the regulation of carbon dioxide emissions is currently the subject of intense study by the EPA, Congress, and numerous other interested policy-makers. It would be inappropriate for a local permitting body to use its case-by-case authority over PSD permits as a broad mandate to undertake what would be (at best) piecemeal, localized regulation of the global issue of greenhouse gas emissions. What is a global problem, or even just a national problem, cannot be meaningfully addressed by 50 state permit issuers, forming a patchwork quilt of carbon dioxide regulations. Indeed, it is difficult to conceive of a worse mechanism for regulating global greenhouse gas emissions than the control program that Sierra Club (now) advocates.

As IEPA explained, "[t]he U.S. Supreme Court's decision in *Massachusetts et. al v. EPA* potentially signals the development of CO_2 regulations for automobiles and other mobile sources, while impending congressional hearings are likely to explore ways to regulate stationary sources, including power plants and other key sectors of our economy. Until such approaches are put into place by the appropriate legislative authorities, attempts to force controls or compel individual action on global warming through conventional environmental permitting programs are capricious and, even if implemented, would probably provide only illusory benefits." Responsiveness Summary at 6. IEPA rightly emphasized that it "is not a legislative or quasi-legislative body. Rather, it is a creature of statute and the responsibilities for administering a permit program are tied to applicable rules and regulations. . . . [P]ermitting is not a substitute for rule-making." *Id.*

Sierra Club, however, essentially asks the EAB to rush ahead of Congress and EPA—both of which are currently considering how best to regulate carbon dioxide—and impose the Sierra Club's own vision of carbon dioxide regulation on a plant-by-plant, PSD-permitting basis. Not only is this "capricious" and unwise, but, as IEPA pointed out, it would also "have a stifling effect on the continuing development and deployment of IGCC technology"—technology with "promising possibilities for greatly improved environmental performance" compared with "even the latest, high-efficiency boiler technologies." *Id.* at 9. Any "important policy considerations" therefore counsel strongly *against* granting review, and the petition should be denied.

II. Sierra Club Waived Its Collateral Impacts Argument By Failing to Address IEPA's Thorough Response, And, In Any Event, its Argument Is Meritless

A. Sierra Club Waived Its Collateral Impacts Argument.

Like its arguments on BACT emissions limits, Sierra Club has failed to preserve its argument on the issue of collateral impacts—only for a different reason: "As the Board has stated

on numerous occasions, it is not enough simply to repeat objections made during the comment period. Rather, in addition to stating its objections to the permit, a petitioner must explain why the permit issuing entity's response to those objections is clearly erroneous or otherwise warrants review." *In re Zion Energy, LLC*, 9 E.A.D. 701, 705 (EAB 2001). Here, however, not only has Sierra Club simply restated its collateral impacts objection and failed to engage the IEPA's thorough response, it has mischaracterized IEPA's response in an attempt to make its own arguments appear worthy of review. This complete failure to address the IEPA's reasoned response on collateral impacts analysis should, therefore, "result in a denial of review." *Id.*

Sierra Club alleges that "IEPA failed to consider carbon dioxide emissions as part of its BACT collateral impacts analysis," and that IEPA concluded "that it lacks the authority to establish output-based standards." Pet. 13-14. IEPA, however, squarely considered carbon dioxide as part of its collateral impacts analysis, and squarely considered output-based standards. Moreover, it offered sound reasons for rejecting Sierra Club's argument on both points—reasons that Sierra Club does not address.

Regarding consideration of carbon dioxide emissions, IEPA expressly stated that its collateral impacts analysis could consider "issues such as 'noise levels, radiant heat, or dissipated static electrical energy, *or greenhouse gas emissions*.'" Responsiveness Summary at 8 (emphasis added). IEPA then offered several reasons why "the collateral consideration of CO_2 emissions does not lead to any changes to or adjustment of the BACT determination made for emissions of PSD pollutants from the proposed plant." *Id.*

First, the use of IGCC technology is "better on a life-of-plant basis for control of CO_2 emissions" than "even the latest, high-efficiency boiler technologies." *Id.* at 9. Second, IGCC technology is "more advantageous than conventional boiler power plants [because of] its poten-

tial for collection of CO_2 for sequestration." *Id.* Finally, "IGCC technology also has the potential to provide significant improvements in energy efficiency," thus reducing overall emissions of carbon dioxide. *Id.* In short, IEPA considered the collateral impacts of using IGCC technology and concluded that IGCC's carbon dioxide benefits actually offered additional support for granting the PSD permit here. Moreover, the IEPA (rightly) faulted Sierra Club for its "erroneous[] attempts to introduce earlier steps of the Top-Down [BACT] Process into the collateral impacts analysis"—a charge that Sierra Club neither mentions nor addresses here. *Id.*

As to output-based standards, Sierra Club contends that IEPA concluded that it "lack[ed] the authority to establish output-based standards." Pet. 14. Yet IEPA both considered and specifically rejected Sierra Club's argument that IEPA should impose "[a] stringent output-based standard"—including a requirement that the plant maintain a net thermal efficiency at or above 41 percent—in order to "minimize CO_2 emissions." Responsiveness Summary at 10. IEPA pointed out that the "comment [was] not accompanied by any support to show that the recommended limit could be achieved by the proposed plant." *Id.* Moreover, IEPA reasoned that because IGCC is such a new technology, "requiring this level of efficiency . . . to be achieved by the proposed plant as initially constructed would be counterproductive for the future capture and sequestration of CO_2," as it would discourage investment in what promises to be a highly beneficial technology. *Id.* at 11. Finally, IEPA pointed out that Sierra Club's desired output-based limitation was shortsighted because it "would not account for the substantial reduction in net output from the plant that would accompany future capture of CO_2 for sequestration, due to the energy that will be consumed by the equipment for capture and transfer of CO_2." *Id.* Nowhere did IEPA even suggest (let alone conclude) that it "lack[ed] the authority to establish output-

based standards" as Sierra Club suggests. Pet. 14. Sierra Club's contrary characterization is false.

In spite of IEPA's reasoned rejection of its claims, Sierra Club now "merely reiterates comments previously submitted to IEPA during the comment period without indicating why IEPA's responses to these comments were erroneous." *In re Zion Energy, LLC*, 9 E.A.D. 701, 707 (EAB 2001). Worse, the Petition affirmatively mischaracterizes IEPA's response in an attempt to gain traction on appeal. This constitutes ample grounds for "denial of review." *Id.* at 705.

B. Petitioner's Collateral Impacts Argument Is Meritless.

If the EAB were to address the merits of Petitioner's claim, it would find that the Petition avoids and obfuscates the IEPA's collateral impacts analysis for a reason: IEPA's analysis is both reasonable and correct.

IEPA "possesses a great deal of discretion" in conducting its collateral impacts analysis. *In re Hillman Power Company, LLC*, 10 E.A.D. 673, 684 (EAB 2002). Moreover, as IEPA pointed out in its Responsiveness Summary, the collateral impacts inquiry is "couched in terms of discussing which available technology, among several, produces less adverse collateral effects, and, if it does, whether that justifies its utilization." Responsiveness Summary at 8 (quoting *In re Hawaiian Commercial & Sugar Company*, 4 E.A.D. 95, 97 n.5 (EAB 1992); *accord In re Genesee Power Station*, 4 E.A.D. 832, 848 (EAB 1993) (where choosing one regulated pollutant control technology over another "has the incidental effect of increasing or decreasing emissions of unregulated pollutants[,]" this effect "is relevant to the selection of an appropriate control technology for regulated pollutants").

Here, as noted above, IEPA considered the collateral impacts of IGCC technology compared with other methods of control and concluded that IGCC was "more advantageous" with

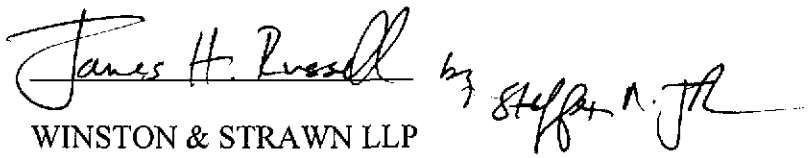
respect to carbon dioxide emissions than "even the latest, high-efficiency boiler technologies." Responsiveness Summary at 9. This is because IGCC "provide[s] significant improvements in energy efficiency" (and, thus, reduced carbon dioxide emissions), and because the IGCC plant at issue comes carbon-capture-ready, thus offering tremendous "potential for collection of CO_2 for sequestration." *Id.* In short, not only did IEPA consider the collateral impacts of the proposed technology, it concluded that IGCC was clearly superior to the alternatives with respect to carbon dioxide emissions.

IEPA also pointed out that Sierra Club failed to "identify[] the [collateral] impacts posed by IGCC technology," or compare those impacts with alternative technologies—the very heart of collateral impacts analysis. *Id.* Instead, Sierra Club simply advocated an "out-put based limit based on a net thermal efficiency for the combustion turbines," or use of "a cleaner feedstock." *Id.* But as IEPA rightly observed, this "stops short" of the required comparison of the collateral impacts of alternative technologies and instead represents an "erroneous[] attempt[] to introduce earlier steps of the Top-Down [BACT] process into the collateral impacts analysis." *Id.* As IEPA concluded: the "stringent output-based standard" advocated by Sierra Club would actually "be counterproductive for the future capture and sequestration of CO_2" because it would stifle investment in the highly promising, but still "developing," IGCC technology. *Id.* at 10-11. This fact alone is ample ground for rejecting Sierra Club's argument. Sierra Club has completely failed to show that *any* of IEPA's reasons for rejecting its position were erroneous, let alone clearly so. Review of the Petition should therefore be denied.

CONCLUSION

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

Respectfully Submitted.



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Dated: August 16, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of August, 2007, a true and correct copy of this Motion to Participate and accompanying Memorandum was served by Federal Express to:

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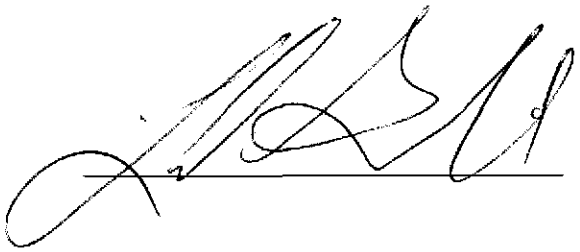

EXHIBIT LIST

Exhibit	Description
1	PSD Permit No. 021060ACB
2	Illinois Environmental Protection Agency Responsiveness Summary (June 2007)
3	Public Comments filed on behalf of the Sierra Club (Feb. 2007)
4	Transcript of Public Hearing on the PSD Permit (Jan. 11, 2007)
5	Sierra Club Press Release, "Bush EPA's Refusal to Follow Law on Trial at Supreme Court" (Nov. 2006)