IN RE CONOCOPHILLIPS CO.

PSD Appeal No. 07-02

ORDER DENYING REVIEW IN PART & REMANDING IN PART

Decided June 2, 2008

Syllabus

American Bottom Conservancy and Sierra Club ("Petitioners") petitioned the Environmental Appeals Board ("Board") to review various aspects of a Clean Air Act ("CAA") Prevention of Significant Deterioration ("PSD") permit that the Illinois Environmental Protection Agency ("IEPA") issued to ConocoPhillips Company ("ConocoPhillips") on July 19, 2007. The permit authorizes the Coker and Refinery Expansion Project ("CORE Project") at the Wood River Refinery in Roxana, Illinois.

On appeal, Petitioners argue that IEPA's permit decision is deficient in five respects. First, Petitioners assert that IEPA failed to make its response to comments document, or "Responsiveness Summary," available to the public, as 40 C.F.R. § 124.17(c) requires, when IEPA did not include a copy of the Responsiveness Summary with its notice of the permit decision. Second, Petitioners assert that IEPA failed to adequately identify and explain in its Responsiveness Summary the changes made to permit provisions in the final permit decision in accordance with 40 C.F.R. § 124.17(a). Third, Petitioners challenge the adequacy of IEPA's BACT analysis for CO emissions from flaring. Fourth, Petitioners challenge the enforceability of its flare-related controls and monitoring requirements. Finally, Petitioners argue that IEPA failed to conduct a BACT analysis and to impose corresponding emissions limitations for greenhouse gas emissions (namely, CO_2 and methane).

Held: Under the circumstances of this case, where IEPA indisputably notified Petitioners by mail of the permit decision and explained that the Responsiveness Summary could be obtained by telephone, fax, email request, as well as by viewing the documents at one of three repositories, or online at a specific agency website, IEPA appropriately made available the Responsiveness Summary in accordance with 40 C.F.R. § 124.17(c).

IEPA failed, however, to specify in its Responsiveness Summary the provisions of the draft permit that had been changed in the final decision as 40 C.F.R. § 124.17(c) requires. Also in contravention of 40 C.F.R. § 124.17(c), IEPA failed to provide adequate rationale for its changes to the final permit. The Board determined that these omissions could neither be cured by viewing the Responsiveness Summary as a whole, nor by providing further clarification through briefing on appeal. As such, the permit decision is remanded to IEPA to identify and explain the changed provisions of the permit in a manner consistent with the applicable regulations and this opinion.

Because the added provisions of the permit, which concerned flare-related emissions controls and monitoring requirements, were not appropriately identified or explained by

IEPA, the Board was unable to evaluate the reasonableness and adequacy of these provisions. Nevertheless, mindful of the time-sensitive nature of PSD permitting, the Board provides certain observations for IEPA's consideration on remand, including the need for a proper BACT analysis for CO emissions from flaring and, based on that analysis, appropriate, enforceable CO BACT controls.

Finally, the Board denies review of the issue of whether IEPA improperly failed to include emissions limitations for greenhouse gases (carbon dioxide and methane, in particular) in the permit because, although this issue was reasonably ascertainable, it was not raised during the public comment period and therefore was not properly preserved for appeal.

Before Environmental Appeals Judges Edward E. Reich, Kathie A. Stein, and Anna L. Wolgast.

Opinion of the Board by Judge Wolgast:

American Bottom Conservancy and Sierra Club ("Petitioners") petitioned the Environmental Appeals Board ("Board") to review various aspects of a Clean Air Act ("CAA") Prevention of Significant Deterioration ("PSD") permit that the Illinois Environmental Protection Agency ("IEPA") issued to ConocoPhillips Company ("ConocoPhillips") on July 19, 2007.[1] The permit authorizes the Coker and Refinery Expansion Project ("CORE Project") at the Wood River Refinery in Roxana, Illinois.

For the reasons discussed below, we hold that IEPA appropriately made available the Responsiveness Summary in accordance with 40 C.F.R. § 124.17(c). IEPA failed, however, to adequately identify and explain changes it made to permit provisions in the final permit decision in accordance with 40 C.F.R. § 124.17(a). As a result, the Board cannot properly evaluate the reasonableness and adequacy of IEPA's selection of flare-related controls and monitoring requirements. Consequently, we remand the permit to IEPA to identify and explain the changed provisions of the permit in a manner consistent with the applicable regulations and this opinion. In the course of providing its rationale for the changes it made, IEPA should include a proper BACT analysis for CO emissions from flaring, as well as its rationale for concluding that the CO BACT provisions are enforceable. IEPA may supplement and, as necessary, reopen the record for public comment in accordance with 40 C.F.R. § 124.14.

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[1] The federal PSD program is administered by the United Stated Environmental Protection Agency ("EPA" or "Agency"). Illinois issues PSD permits as part of a delegation of federal PSD program authority to the State. *See* 40 C.F.R. § 52.21(a)(1), (u); *Delegation of Authority to State Agencies*, 46 Fed. Reg. 9580, 9582 (Jan. 29, 1981). PSD permits issued by delegated states, such as Illinois, are considered EPA-issued permits and are governed by federal regulations. *In re Christian County Generation, LLC*, 13 E.A.D. 449, 450 n.1 (EAB 2008) (citing *In re SEI Birchwood, Inc.*, 5 E.A.D. 25, 26 (EAB 1994); *In re Hadson Power 14-Buena Vista*, 4 E.A.D. 258, 59 (EAB 1992)).

Additionally, we deny review of the issue of whether IEPA improperly failed to include emissions limitations for greenhouse gases (carbon dioxide and methane, in particular) in the permit because, although this issue was reasonably ascertainable, it was not raised during the public comment period, and therefore was not properly preserved for appeal.

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

As noted above, Petitioners challenge a PSD permit issued under the CAA. Pursuant to the CAA, PSD permits are required prior to the construction or modification of any major emitting facility[2] located in an area that has been designated as being in "attainment"[3] with the national ambient air quality standards ("NAAQS"). CAA § 107(d), 42 U.S.C. § 7407(d). NAAQS are "maximum concentration 'ceilings'" for particular pollutants, "measured in terms of the total concentration of a pollutant in the atmosphere." U.S. EPA Office of Air Quality Planning & Standards, *New Source Review Workshop Manual* (Draft Oct. 1990) ("NSR Manual") at C.3. EPA has set NAAQS for six pollutants, including carbon monoxide ("CO"). *See* 40 C.F.R. §§ 50.4-50.12 (2002); *see also In re Christian County Generation, LLC*, 13 E.A.D. 449, 452-53 (EAB 2008). At the time of this decision, however, no such standard exists for either carbon dioxide ("CO_2") or methane. *Christian County*, 13 E.A.D. at 453. The PSD permitting requirements are pollutant-specific, which means that a facility may emit many air pollutants, but only one or a few may be subject to PSD review depending upon a number of factors including the amount of emissions of each pollutant by the facility. NSR Manual at 4. *See* CAA § 165(a)(1), 42 U.S.C. § 7475(a)(1); 40 C.F.R. § 52.21.

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[2] A "major emitting facility" is any of certain listed stationary sources (including petroleum refineries) which emit or have the potential to emit 100 tons per year ("tpy") or more of any air pollutant, or any other stationary source with the potential to emit at least 250 tpy of any air pollutant. CAA § 169(1), 42 U.S.C. § 7479(1).

[3] EPA designates areas, on a pollutant-by-pollutant basis, as being in either attainment or nonattainment with the national ambient air quality standards ("NAAQS"). An area is designated as being in attainment with a given NAAQS if the concentration of the relevant pollutant in the ambient air within the area meets the limits prescribed by the applicable NAAQS. CAA § 107(d)(1)(A), 42 U.S.C. § 7407(d)(1)(A). A nonattainment area is one with ambient concentrations of a criteria pollutant that do not meet the requirements of the applicable NAAQS. *Id.* Areas "that cannot be classified on the basis of available information as meeting or not meeting the [NAAQS]" are designated as unclassifiable areas. *Id.* PSD permitting covers construction in unclassifiable areas, as well as construction in attainment areas. CAA §§ 160-169B, 42 U.S.C. §§ 7470-7492; *see Christian County*, 13 E.A.D. at 452 (citing *In re EcoEléctrica, L.P.*, 7 E.A.D. 56, 59 (EAB 1997); *In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 766-67 (EAB 1997)).

A critical component of the PSD permitting process involves the selection of the "best available control technology" or "BACT" for inclusion among the permit conditions. *See* CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4); *Christian County*, 13 E.A.D. at 453; *In re BP W. Coast Prods., LLC*, 12 E.A.D. 209, 213-214 (EAB 2005) (*citing In re Knauf Fiberglass, GmbH*, 8 E.A.D. 121, 123-24 (EAB 1999) [hereinafter *Knauf I*] (referring to the BACT component as a "critical element")); *In re Hillman Power Co.*, L.L.C., 10 E.A.D. 673, 677 (EAB 2002) (acknowledging the BACT component as a "core" requirement of the PSD regulations) (quoting *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 247 (EAB 1999)); *see also In re Haw. Elec. Light Co.*, 8 E.A.D. 66, 73 (EAB 1998); NSR Manual at 5. BACT is a pollutant emission limitation that is based on what is achievable using the most effective pollutant control option available, after taking into account energy, environmental, and economic impacts and other costs.[4] CAA § 169(3), 42 U.S.C. § 7479(3); 40 C.F.R. § 52.21(b)(12); NSR Manual at B.5-.9. BACT is required for each pollutant subject to regulation under the CAA which has the potential to be emitted in significant amounts from any proposed source or modification.[5] 40 C.F.R. §§ 52.21(b)(12), (23), (j)(2); *see also* CAA §§ 165(a)(4), 169(3), 42 U.S.C. §§ 7475(a)(4), 7479(3). BACT determinations are "site-specific" and result in the selection of an emissions limitation that reflects the application of technology or methods that are "appropriate for the particular facility." *Christian County*, 13 E.A.D. at 454 (quoting *In re Cardinal FG Co.*, 12 E.A.D. 153, 161 (EAB 2005)) (some citations omitted).

In 1990, EPA issued draft guidance for permitting authorities to use in analyzing PSD requirements (among others) in a consistent and systematic way. *See generally* NSR Manual. The NSR Manual sets forth a "top-down" process for determining BACT for a particular regulated pollutant. The process includes five

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[4] BACT is defined by statute as follows:

> The term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant.

CAA § 169(3), 42 U.S.C. § 7479(3); *see also* 40 C.F.R. § 52.21(b)(12).

[5] Section 52.21(b)(23) of 40 C.F.R. defines "significant" in terms of: (1) specific numeric net emissions increase or potential to emit for certain listed pollutants; (2) any emissions rate for regulated NSR pollutants not specifically listed; and (3) any emissions rate or net emissions increase from a major stationary source constructed within ten kilometers of a Class I area. The significance level for carbon monoxide, for example, is set at 100 tons per year. 40 C.F.R. § 52.21(b)(23)(i).

steps: (1) identifying all available control options for a targeted pollutant; (2) analyzing the control options' technical feasibility; (3) ranking feasible options in order of effectiveness; (4) evaluating their energy, environmental, and economic impacts; and (5) selecting as BACT a pollutant emission limit achievable by the most effective control option not eliminated in a preceding step. NSR Manual at B.5-.9; *see Cardinal*, 12 E.A.D. at 162-63 (explaining steps in top-down analysis); *accord In re Three Mountain Power, L.L.C.*, 10 E.A.D. 39, 42-43 n.3 (EAB 2001); *Knauf I*, 8 E.A.D. at 129-31; *Haw. Elec. Light*, 8 E.A.D. at 84. Although it is not accorded the same weight as a binding Agency regulation, the NSR Manual has been considered by this Board to be a statement of the Agency's thinking on certain PSD issues. *See, e.g.*, *Cardinal*, 12 E.A.D. at 162 ("[A] careful and detailed analysis of the criteria identified in the regulatory definition of BACT is required, and the methodology described in the NSR Manual provides a framework that assures adequate consideration of the regulatory criteria and consistency within the PSD permitting program."); *In re Tondu Energy Co.*, 9 E.A.D. 710, 719 n.13 (EAB 2001); *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 183 (EAB 2000) ("This top-down analysis is not a mandatory methodology, but it is frequently used by permitting authorities to ensure that a defensible BACT determination, involving consideration of all requisite statutory and regulatory criteria, is reached."); *Knauf I*, 8 E.A.D. at 129 n.14, 134 n.25. The Board has previously noted that, while it "would not reject a BACT determination" that deviated from the NSR Manual's methodology, it would "scrutinize such a determination carefully to ensure that all regulatory criteria were considered and applied appropriately." *Knauf I*, 8 E.A.D. at 129-130, n.14.

In addition to the statutory and regulatory BACT requirements described above, applicable regulations impose obligations on persons objecting to a proposed permit to raise such objections to the permitting agency, and also require the permitting agency, at the time of permit issuance, to make available its response to the comments received. 40 C.F.R. §§ 124.13, .17. Specifically, pertinent to the issues raised in this case, 40 C.F.R. § 124.13 imposes an obligation on persons who believe that a proposed permit issuance is inappropriate to "raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position" during the public comment period. Additionally, 40 C.F.R. § 124.17 requires that, "[a]t the time that any final permit decision is issued * * * , [the permit issuer] must also 'issue a response to comments.'" That response to comments document must "specify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change[.]" *Id.* Further, the response to comments is required to be "made available to the public." *Id.* § 124.17(c). The regulations are silent regarding when and how the response to comments is to be made available.

When a state issues a PSD permit pursuant to a delegation of the federal PSD program, as is the case here, such permits are considered EPA-issued permits and, therefore, are subject to administrative appeal to the Board in accordance

with 40 C.F.R. § 124.19.[6] *See Christian County*, 13 E.A.D. at 450 n.1 (*citing In re Hillman Power Co.*, 10 E.A.D. 673, 675 (EAB 2002)) (some citations omitted). On appeal, a petitioner is required to demonstrate that "any issue being raised was raised during the public comment period * * * to the extent required [.]" 40 C.F.R. § 124.19(a).

B. *Factual Background*

The Wood River Refinery, operated by ConocoPhillips, is located in Roxana, Illinois (in an attainment area), and is considered a major stationary source of emissions under the CAA. *See* IEPA, Bureau of Air, Permit Section, Project Summary for Construction Permit Applications from ConocoPhillips Wood River Refinery and ConocoPhillips Wood River Products Terminal for a Coker and Refinery Expansion (CORE) Project (ConocoPhillips Ex. 2) (Administrative Record ("A.R.") 3) ("Project Summary"] at 9. The refinery produces a variety of petroleum products for distribution throughout the Midwest. *Id.* The permit challenged in this case authorizes ConocoPhillips to implement various changes to the refinery that will result in an increase in both the total crude processing capacity and the percentage of heavier Canadian crude that the refinery processes.[7] *Id.*; ConocoPhillips' Memo. in Supp. of Permittee's Mot. to Participate at 2 (Sept. 26, 2007) ("ConocoPhillips' Br."). The project, known as the Coker and Refinery Expansion Project or CORE Project, centers on the construction of a new "Delayed Coker Unit" that will be supported by a new elevated flare (the Delayed Coker Flare).[8] Project Summary at 4. The Delayed Coker Flare is equipped with a flare gas recovery system that serves to recover certain normally occurring process gas streams for fuel use rather than disposal as waste gas by flaring. *Id.* Nevertheless, as proposed, the project will result in an increase in annual CO emissions that is greater than 100 tpy. *Id.* at 9. Thus, the project is subject to the PSD permitting program under the CAA. The Delayed Coker Flare and an additional new flare at a newly constructed hydrogen plant (the "HP2" flare)

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[6] In general, the Board's jurisdiction to review permits issued by a state pursuant to a federal delegation is limited to those elements of the permit that find their origin in the federal PSD program – for example, the Board lacks authority to review conditions of a state-issued permit that are adopted solely pursuant to state law. *See In re Sutter Power Plant*, 8 E.A.D. 680, 688, 690 (EAB 1999) (explaining that "the Board has jurisdiction to review issues directly related to permit conditions that implement the federal PSD program" (citing *Knauf I*, 8 E.A.D. at 161), and that "[t]he Board may not review, in a PSD appeal, the decisions of a state agency made pursuant to non-PSD portions of the CAA or to state or local initiatives and not otherwise relating to the permit conditions implementing the PSD program" (citing *Knauf I*, 8 E.A.D. at 167-68)).

[7] In order to handle the increased production, ConocoPhillips also proposed certain changes at the Wood River Products Terminal and submitted a separate permit application in connection with that portion of the project (Permit ID No. 06110049). IEPA also issued that permit, but that permit has not been challenged before this Board.

[8] The proposed project entails numerous other changes as detailed in Project Summary at 2-3.

are among the new emissions units that will contribute to the increase in CO emissions.[9] *Id.* at 7.

ConocoPhillips submitted a PSD permit application to IEPA on May 15, 2006. IEPA made a preliminary determination to issue the permit and prepared a draft permit for review. *See* Notice of Public Hearing and Comment Period Concerning the Proposed Issuance of Construction Permits/PSD Approvals and an NPDES permit to ConocoPhillips Company in Roxanna and Hartford (Mar. 24, 2007). The public comment period opened on March 24, 2007, and ended on June 15, 2007. On May 8, 2007, IEPA held a public hearing at which representatives of Petitioners testified. *See* Hearing Transcript at 38, 47, 65 (Petition Ex. 3) (A.R. 10). Petitioners also submitted comments in writing to IEPA on June 14, 2007. Petition Ex. 2. Among other comments, Petitioners asserted that IEPA's BACT determination for CO emissions from flaring was, at best, inadequate. Petitioners included information regarding how other refineries and other regulatory jurisdictions have addressed CO emissions from flaring, which Petitioners believed IEPA should have considered in making its BACT determination. In particular, Petitioners argued that a plan to minimize flaring was a viable approach to controlling CO emissions.

IEPA issued the final permit to ConocoPhillips for the CORE Project on July 19, 2007. At the same time, IEPA issued its "Responsiveness Summary" summarizing the comments received and providing its responses to those comments. *See* IEPA, Bureau of Air, *Responsiveness Summary for Public Comments and Questions on the Coker and Refinery Expansion Project at the Wood River Refinery in Roxanna Illinois and the Wood River Products Terminal in Hartford Illinois* (July 2007) (Petition Ex. 6) (A.R. 12) ("Responsiveness Summary"). The final permit contained a number of changes to the BACT controls for flaring, including additional requirements aimed at reducing flaring.

IEPA provided notice to Petitioners and other interested persons of the issuance of the permit in the form of a letter that stated that the permit had been issued and that anyone who wanted to view the permit or the responsiveness summary could do so by contacting IEPA by phone, fax, or email, or by visiting any one of three repositories (in three different locations). *See* Letter from Bradley Frost, IEPA, *Notice of Final Permit Decision – ConocoPhillips Company* (Jul. 19, 2007) (Petition Ex. 4) (A.R. 15). The notice also stated that the documents were available online. *Id.*

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[9] Other emissions units that will contribute to the increase in CO emissions are: two process heaters, two existing fluidized catalytic cracking units, one restarted fluidized catalytic cracking unit, three thermal oxidizers (associated with the two new sulfur recovery units and the cracked gas plant), and loading rack control device. Project Summary at 10. Petitioners do not challenge any control measures associated with these emissions units.

IEPA served Petitioners with the above-described written notice by mail on July 20, 2007, but Petitioners actually learned of the permit issuance from IEPA's website. Petition for Review and Request for Oral Argument at 4 (Aug. 22, 2007) ("Petition"). On July 21, 2007, Petitioners requested a copy of the final permit, draft permit, and the Responsiveness Summary via email and received the same on July 28, 2007. *Id.* Petitioners timely filed this Petition on August 22, 2007.

Shortly after Petitioners filed this Petition, ConocoPhillips sought and received permission to participate in this appeal. *See* ConocoPhillips' Motion to Participate and Motion for Expedited Consideration, filed September 26, 2007; *In re ConocoPhillips Co.*, PSD Appeal No. 07-02 (EAB Oct. 1, 2007) (Order granting ConocoPhillips' Motion to Participate). Both IEPA and ConocoPhillips submitted responsive briefs to the Petition. *See* IEPA's Partial Response to Petition (Sept. 26, 2007); IEPA's Response to Petition (Nov. 2, 2007) (incorporating IEPA's Partial Response to Petition) ("IEPA Response"); ConocoPhillips' Br. Petitioners filed a reply. *See* Petitioners' Partial Reply Mem. in Supp. of Pet. for Rev. – Responsiveness Summary Issues (Oct. 29, 2007) ("Petitioners' RS Reply"); Petitioners' Suppl. Reply Mem in Supp. of Pet. for Rev. (Nov. 26, 2007) ("Petitioners' Suppl. Reply"). As of November 27, 2007, all briefing on this Petition was complete.

II. *STANDARD OF REVIEW*

As we have previously explained, "[t]he Board's review of PSD permitting decisions is governed by 40 C.F.R. part 124, which 'provides the yardstick against which the Board must measure' petitions for review of PSD and other permit decisions." *In re Prairie State Generating Co.*, 13 E.A.D. 1, 10 (EAB 2006) (quoting *In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 769 (EAB 1997); *In re Envotech, L.P.*, 6 E.A.D. 260, 265 (EAB 1996)). Pursuant to those regulations, a permitting authority's decision to issue a PSD permit will ordinarily not be reviewed unless the decision is based on either a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. 40 C.F.R. § 124.19(a); *accord, e.g.*, *In re Zion Energy, LLC*, 9 E.A.D. 701, 705 (EAB 2001); *Knauf I*, 8 E.A.D. at 126-27; *Commonwealth Chesapeake*, 6 E.A.D. at 769. The Agency stated in the Federal Register preamble to the part 124 regulations that the "power of review 'should be only sparingly exercised,' and that 'most permit conditions should be finally determined at the [permit issuer's] level.'" *Cardinal*, 12 E.A.D. at 160 (quoting 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)); *accord In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 114 (EAB 1997). The burden of demonstrating that review is warranted rests with the petitioner challenging the permit condition. To obtain review, a petitioner must describe each objection it is raising and explain why the permit issuer's previous response to each objection was clearly erroneous or oth-

erwise deserving of review. *In re Indeck-Elwood*, 13 E.A.D. 126, 143 (EAB 2006) (citing *Tondu Energy*, 9 E.A.D. at 714; *Encogen*, 8 E.A.D. at 252).

III. *DISCUSSION*

In this appeal, Petitioners argue that IEPA's permit decision is deficient in five respects. The first two issues relate to IEPA's response to comments document, or "Responsiveness Summary." The second two issues relate to IEPA's selection of control measures and monitoring provisions related to CO emissions. The final issue relates to Petitioners' objection to the lack of a BACT analysis and corresponding emission limitations for greenhouse gas emissions (namely, CO_2 and methane). We address each of these issues in turn below.

Ultimately, and for the reasons that follow, we conclude that IEPA made its Responsiveness Summary "available" to the public in accordance with 40 C.F.R. § 124.17(c) and, therefore, deny review on that ground. We also deny review of whether IEPA's failure to perform a BACT analysis and to include in the permit emissions limitations for greenhouse gases (CO_2 and methane, in particular) constitutes clear legal error because this issue, although reasonably ascertainable, was not raised during the public comment period and, therefore, this argument was not properly preserved for appeal. We remand the permit to IEPA, however, based on its failure to adequately identify and explain changes it made in the final permit decision. Additionally, to the extent possible based on the record before us, we evaluate IEPA's BACT analysis for CO emissions from flaring, as well as its rationale regarding the enforceability of the CO BACT provisions in order to provide guidance to IEPA on remand.

A. *IEPA'S Response to Comments Document*

Petitioners raise two issues related to IEPA's Responsiveness Summary. One issue challenges whether the manner of issuance complied with 40 C.F.R. § 124.17(a) & (c) (governing the issuance of response to comments). The other issue challenges the substance of the Responsiveness Summary and whether IEPA complied with the requirements of 40 C.F.R. § 124.17(a)(1) (requiring that permit decisions identify provisions changed from the draft to the final permit and the reasons for the change). ConocoPhillips refers to these issues repeatedly as "highly technical" and "non-substantive," perhaps to suggest that errors in procedure are somehow less significant. At the outset, we emphasize that the permitting procedures outlined in the Agency's regulations serve an important function related to the efficiency and integrity of the overall administrative scheme. This is true regardless of whether the procedures are applicable to would-be petitioners and are intended as prerequisites for review, or are applicable to the permitting agency and are intended to provide adequate notification to the public. *Cf. BP Cherry Point*, 12 E.A.D. at 219 (discussing the importance to the adminis-

trative process of the requirement to raise issues during the public comment period as a prerequisite to review). We do not view procedural arguments or errors as inherently insignificant. With that in mind, we address both of Petitioners' arguments concerning the Response to Comments document below.

1. *Issuance of Response to Comments Document*

Petitioners contend that IEPA failed to provide a copy of the Responsiveness Summary to Petitioners *simultaneously* with the notice of the permit decision as purportedly required by 40 C.F.R. § 124.17(a). Instead, IEPA notified Petitioners by mail that a final permit decision had been issued and explained that copies of the final permit decision and the Responsiveness Summary could be obtained by any one of the following means: (1) by telephone, fax, or email request; (2) by viewing the documents at one of three repositories (in 3 cities); or (3) online at a specific IEPA website.[10] *See* Letter from Bradley Frost, IEPA, *Notice of Final Permit Decision – ConocoPhillips Company* (Jul. 19, 2007) (Petition Ex. 4) (A.R. 15). For the reasons that follow, we hold that in this case IEPA made available the response to comments document in accordance with 40 C.F.R. § 124.17(c).

The regulatory provisions governing the issuance of the response to comments document provide that "[a]t the time that any final permit decision is issued under § 124.15, the Director *shall issue* a response to comments" and that "[t]he response to comments *shall be available* to the public." 40 C.F.R. §§ 124.17(a), (c). This is distinct from the provision governing the issuance of the final permit decision, which provides that "[a]fter the close of the public comment period * * * the [permit authority] *shall issue* a final permit decision * * * [and] *shall notify* the applicant and each person who has submitted written comments or requested notice of the final permit decision. This notice shall include reference to the procedures for appealing a decision * * * ." *Id.* § 124.15(a) (emphasis added). Nothing in these provisions expressly requires the permit issuer to include its response to comments document with the notification of the permit decision. The regulations require only that the response to comments be made "available" to the public. No further explanation of what is meant by "available," is provided.

Petitioners cite *In re Prairie State Generation Station*, 12 E.A.D. 176 (EAB 2005) [hereinafter "*Prairie State I*"], for the proposition that directing interested

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[10] Notably, Petitioners learned of the permit issuance online. Petition at 4. On July 21, 2007, the day after the notice of the permit had been served by mail, they requested copies of the Responsiveness Summary and other documents by email and received them seven days later, more than three weeks before the appeal deadline. *Id.* Petitioners do not assert that, even though they learned of the permit decision online, they were unable to view the Responsiveness Summary itself online. Nor do Petitioners assert that they were prejudiced in any way by having received the Responsiveness Summary one week after the permit decision was issued, and more than three weeks before the appeal deadline.

parties to a website is not sufficient to make the responsiveness summary "available to the public" as 40 C.F.R. § 124.17(c) requires. In *Prairie State I*, the permit issuer – again IEPA – issued its response to comments seven days after issuing the final permit. *Prairie State I*, 12 E.A.D. at 178. Moreover, the permit issuer notified those who had participated during the public comment period by mail that the final permit had been issued and "directed persons interested in viewing the permit or the responsiveness summary to the website." *Id.* The Board held that IEPA violated the requirements of 40 C.F.R. §§ 124.17 and 124.18 when it issued its responsiveness summary seven days after issuing the final permit. *Id.* at 180. The Board also questioned, but did not decide, whether simply directing interested parties who participated during the comment period to a website was sufficient to notify interested parties as required by 40 C.F.R. § 124.15, or to make the responsiveness summary "available to the public" as required by 40 C.F.R. § 124.17(c). *Id.* at 178 n.4. The Board observed that notifying in such a manner presupposes that all persons who comment on permits will have access to the internet, which the Board has found to be an unreasonable assumption in some circumstances. *Id.* (citing *In re Hillman Power Co., L.L.C.*, PSD Appeal Nos. 02-04, 02-05, & 02-06 (EAB May 24, 2002) (Order Directing Service of PSD Permit Decision on Parties that Filed Written Comments on Draft PSD Permit), available electronically at http://www.epa.gov/eab/psd-int.loc.ords/hillman.pdf (hereinafter "*Hillman Interlocutory Order*").[11] The Board also noted that merely posting information on a website conceivably could adversely affect appeal rights, which are time-limited. *Id.*

In this case, IEPA issued its responsiveness summary on the same day or "at the time" that it issued its permit decision. Thus, the issue decided in *Prairie State I* is not present here. Rather, the question posed here is whether IEPA adequately "made available" its response to comments.

This case is also factually distinguishable from *Hillman*, where persons who submitted written comments but did not attend the public hearing were not personally notified in writing that the final decision had been issued and, therefore, such persons were left to continuously monitor the internet in order to learn of permit developments because the only means utilized to "make available" the permit decision was via internet posting. *Hillman Interlocutory Order* at 4. In this case, however, there is no question that IEPA notified Petitioners by mail that it

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[11] In *Hillman*, the permit issuer notified those who attended the public meeting by mail that the permit decision was posted on their website. *Hillman Interlocutory Order* at 2. Those who did not attend the hearing, but who did submit comments by mail were not personally notified at all. *Id.* In that context, the Board determined that the permit issuer had not adequately notified commenters of its final permit decision. *Id.* at 6-7. In so doing, the Board noted that "it is not reasonable to assume that all persons who comment on permits will * * * have access to the internet," and that it is not reasonable to "put[] the onus on the interested party to continually check for permit agency developments[.]" *Hillman Interlocutory Order* at 4.

had issued its permit decision, in accordance with 40 C.F.R. § 124.15. IEPA's notice informed Petitioners that the final permit decision had been issued and explained that copies of the final permit decision and the responsiveness summary could be obtained in any one of the following means: (1) by telephone, fax, or email request; (2) by viewing at one of three repositories (in three cities); or (3) online. IEPA did not mandate that Petitioners use the internet in order to get the documents. Petitioners in fact learned of the permit issuance online and requested by email that copies of the responsiveness summary be mailed to them, copies which were received seven days later, more than three weeks before the appeal deadline. Significantly, we find that no actual prejudice is alleged or present in this case.[12]

Moreover, we do not think it reasonable to mandate, nor do Agency regulations require, the permit issuer to reproduce and send a copy of its response to comments to every interested person (on the day of issuance) in order to satisfy its obligation to "make available" the response to comments pursuant to 40 C.F.R. § 124.17(c). In some cases the response to comments document, particularly when combined with the final permit, may consist of several volumes of documents, which would be cumbersome and costly, in addition to environmentally wasteful, to mail to each person participating in the permitting process.[13] Even among parties who wish to receive the permit and response to comments document, conceivably some would prefer to receive a copy electronically, while others may prefer to receive a hard copy. Given all of the possible variables, we believe the permit issuer must make a case-by-case determination of how best to satisfy the requirement to make available its response to comments, keeping in mind the regulatory language, the time-sensitive right of appeal, and the possibility that not all persons who comment on permits will have access to the internet.

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[12] Although Petitioners suggest that prejudice under these circumstances is possible, they do not allege prejudice occurred. *See* Petition at 6 (explaining that Petitioners submitted a request for the Responsiveness Summary the same day it learned via IEPA's website that the final permit had been issued and noting that such an immediate request may not be "realistically possible in many cases, particularly for commenters without access to the internet"); Petitioners' RS Reply at 3 n.3 (noting that "printing out a .pdf document such as the Responsiveness Summary [from a public library computer] can be a prohibitive cost for many"). Here, Petitioners clearly had access to the internet and, although they have asserted they had difficulty downloading the Responsiveness Summary, Petitioners' RS Reply at 3 n.3, they do not assert that they were unable to view the document. Additionally, although Petitioners raise the cost of printing the document at a public library as potentially prohibitive, they do not allege such was the case for Petitioners. *Id.* The delay between the permit issuance and receipt of the Responsiveness Summary was seven days and shortened the response time from thirty-three days to twenty-six (taking into account the additional time allowed for mailing). Although Petitioners refer to this delay as "substantial," they do not assert that they were prejudiced by this delay. Nor do we believe that, in this case, Petitioners were prejudiced by having only twenty-six days rather than the thirty-three. Thus, we find that no actual prejudice is alleged or present in this case.

[13] The combined total pages of the Responsiveness Summary and the PSD Approval for the CORE Project and terminal expansion was approximately 200 pages. *See* IEPA Response at 14 n.8.

For the reasons described above, we hold that, under the specific circumstances presented here, IEPA appropriately "made available" the Responsiveness Summary in accordance with 40 C.F.R. § 124.17(c). Accordingly, we deny review of this issue.

2. *Adequacy of the Response to Comments Document (Responsiveness Summary)*

As noted above, Petitioners also challenge the substance of the Responsiveness Summary. Specifically, Petitioners argue that IEPA did not adequately specify which provisions of the draft permit had changed in the final permit with respect to the flaring controls for CO or articulate the reasons for those changes in contravention of 40 C.F.R. § 124.17(a)(1). For the reasons that follow, we agree.

Under 40 C.F.R. § 124.17(a)(1), the permit issuer is required to "specify," in the response to comments document, "which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change[.]" This requirement is not trivial. As we have previously stated, "the response to comments document provides the Agency's final rationale for its decision," and "document[s] any changes between the draft and final permit[]." *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 533 (EAB 2006); *see also* 40 C.F.R. § 124.17 (a)(1)-(2); IEPA Response Br. at 22-23 (recognizing the importance of identifying changes to the permit along with rationale). We have also explained that "[c]ompliance with this requirement is of primary importance because it ensures that all significant permit terms have been properly noted in the record of the proceeding and illuminates the permit issuer's rationale for including key terms. It further 'ensures that interested parties have an opportunity to adequately prepare a petition for review and that any changes in the draft permit are subject to effective review.'" *Indeck-Elwood*, 13 E.A.D. 126, 147 (EAB 2008) (quoting *In re City of Marlborough, Mass. Easterly Wastewater Treatment Facility*, 12 E.A.D. 235, 245 (EAB 2005)). Absent an explanation for permit changes, the record does not reflect the "considered judgment" necessary to support the permit determination. *See City of Marlborough*, 12 E.A.D. at 245 (citing *In re Austin Powder*, 6 E.A.D. 713, 720 (EAB 1997); *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-418 (EAB 1997)). Where the permit issuer fails to adequately identify and explain changes to the permit as 40 C.F.R. § 124.17(a)(1) requires, the Board has not hesitated to remand the permit to the permitting agency for further consideration. *See, e.g., Indeck-Elwood*, 13 E.A.D. at 148; *City of Marlborough*, 12 E.A.D. at 245; *In re Amoco*, 4 E.A.D. 954, 980 (EAB 1993); *In re Matter of GSX Serv. of S.C., Inc.*, 4 E.A.D. 451, 467 (EAB 1992).

In this case, it is undisputed that significant changes were made to the provisions of the permit concerning flaring in response to public comment.[14] *See* Petition at 7-8 (summarizing the changes) and Petition Ex. 8 (specifically identifying the changes between the draft and final permit by document comparison); IEPA Response at 17; ConocoPhillips Br. at 15 n.8. However, IEPA's response to comments document, the "Responsiveness Summary," does not specify which provisions of the draft permit have been changed. Although the Responsiveness Summary vaguely references changes made in the permit in response to public comments, these references are not readily found, the changed provisions are not specifically identified (by number, description, or otherwise), and there is no attempt by IEPA to explain each change itself, why the change was made, or how the changed terms address the comments submitted.

For example, one comment, as summarized by IEPA, expressed concern that "[t]he proposed project will entail construction of two new flares and increased use of existing flares," yet, the permit does not "require BACT or LAER for flaring." Responsiveness Summary ¶ 58, at 25. IEPA responded:

> The existing flares are not subject to BACT or LAER because they are not being physically modified and will not experience a change in the method of operation. * * * *The issued permit includes additional requirements as part of BACT and LAER for the new flares in response to public comments.*

Id. (emphasis added). Although it is clear from this response that IEPA has added requirements to the permit in response to public comments, IEPA neither describes those "additional requirements" nor articulates any justification for them, let alone identify which provisions of the permit are affected.

In response to another comment (urging IEPA to reject a proposed CO emission limit as BACT because "[s]uch a limit would allow unlimited hours of routine flaring at [the proposed] rate, and by definition is not the best available technology but is instead an average or typical CO emission factor for flaring"), IEPA responded:

> *The issued permit* does not set BACT for CO in terms of this emission rate proposed by ConocoPhillips. BACT for CO is set in terms of work practices to minimize CO

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[14] Petitioners identify seven changes to various subsections of the permit concerning flaring, while IEPA categorizes the changes made as constituting one significant change between the draft and final permit. Petition at 7-8; IEPA Response to Petition at 17 n.12, 22 (Nov. 2, 2007). How the changes are categorized is insignificant to the outcome of this issue.

> emissions, *consistent with the general approach taken in the draft permit*. These work practices *have been further developed* as a result of further review by the Illinois EPA in response to other public comments.

Id. ¶ 25, at 10 (emphases added). Again, although it is clear that IEPA has included certain work practices that have been "further developed" in a manner "consistent with the general approach taken in the draft permit," in connection with its BACT determination for CO, IEPA's response neither describes the changes to the work practices, nor describes how IEPA presumably arrived at the conclusion that the work practices it ultimately imposed satisfied the BACT requirement for CO emissions from flaring. Additionally, it remains unclear what IEPA meant by the description "consistent with the general approach taken in the draft permit." Contrary to IEPA's assertion, this response to comment does little to clearly or appropriately articulate changes in the final permit concerning BACT for CO. *See* IEPA Response at 16.

In still another response, IEPA acknowledges that in the final permit it has required "as appropriate" the "various approaches to minimization of flaring and flaring emissions" that were suggested in the comment, but IEPA does not explain what is meant by "as appropriate."[15] Responsiveness Summary ¶ 64, at 27-28. It remains unclear whether the "approaches" added include all or some of the work practices included in the permit, whether IEPA has made these changes as a result of its BACT analysis, and why IEPA considers these specific work practices to be appropriate. Then, in response to a comment that BACT for flaring should be at least as stringent as the equipment and practices in Shell Martinez Refinery's flare minimization plan, IEPA responds that it has reviewed the Shell Martinez plan and that "the issued permit requires a Flare Minimization Plan that *addresses the various approaches* taken by Shell," but IEPA does not explain how or why its plan is different from Shell's. *Id.* ¶ 70, at 30.

Additionally, even where IEPA added permit conditions in response to comments, the newly added requirements are not identified as a change to the permit. For example, in response to one comment that the permit should require "a flare minimization plan to capture waste gas for use as fuel, rather than flaring it, so that flaring emissions are reduced," IEPA responded in part that "ConocoPhillips will be installing redundant waste gas recovery compressors for the new

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[15] In the same response IEPA provides some explanation for its rejection of one of the suggested approaches to minimizing flaring. Specifically, IEPA rejects constructing stronger process vessels as an unreasonable approach because it would pose "operational concerns" and because it views "careful management of depressurization of vessels during unit shutdowns * * * [as] very effective in minimizing and eliminating shutdowns as a contributor to flaring." Responsiveness Summary ¶ 64, at 28. However, IEPA does not identify or suggest that it has made any changes to ensure "careful management" of depressurization of vessels during unit shutdowns, its chosen alternative. *Id.*

Delayed Coker Unit," but IEPA did not indicate that this requirement was a change from the draft permit. *Id.* ¶ 78, at 33.

Nowhere in the Responsiveness Summary does IEPA identify precisely the conditions that were added to the permit as part of its BACT analysis for CO emissions from flaring, let alone explain why the conditions were added, how they were derived or how they satisfy the BACT requirement. The Responsiveness Summary simply does not represent the level of response that 40 C.F.R. § 124.17(a)(1) requires. Without more, the record does not reflect the "considered judgment" necessary to support the permit determination, making effective review impossible. *City of Marlborough,* 12 E.A.D. at 245; *Austin Powder,* 6 E.A.D. at 720; *Ash Grove,* 7 E.A.D. at 417-418.

In response to these apparent deficiencies, both IEPA and ConocoPhillips argue that, when viewed as a whole, the Responsiveness Summary adequately documents and justifies all of the changes made. *See, e.g.,* IEPA Response at 19-20; ConocoPhillips Br. at 12, 15, n.8. As explained above, the purpose of 40 C.F.R. § 124.17(a)(1) is to assist the public in identifying any changes between the draft and final permit and understanding the permitting authority's rationale for those changes so that interested persons can adequately prepare a petition for review, which in turn ensures that permits issued are subject to effective review. *See Indeck-Elwood,* 13 E.A.D. 146 (EAB 2008); *City of Marlborough,* 12 E.A.D. at 245. Even IEPA recognized the possibility that its failure to clearly identify changes in the Responsiveness Summary might result in remand given the significant role that the 40 C.F.R. § 124.17(a)(1) requirements play in the appeals process. IEPA Br. at 22-23.

Given the function and critical importance of the requirements, even if a petitioner could piece together all of the changes and corresponding rationale from the fifty pages of IEPA's comments and responses, in conjunction with the draft and issued permits, neither the letter nor the spirit of the rule would be met. A petitioner should not be required to compare a complex final document line by line with the draft in order to determine what changes were made. Nor should a petitioner be required to guess at what the permitting authority's rationale actually was. Requiring a petitioner to piece together or guess at changes and rationale would entirely defeat the purpose of 40 C.F.R. § 124.17(a)(1); yet, that is precisely what was required of Petitioners in this case. *See, e.g.,* Petition Ex. 8 (consisting of a petitioner-prepared redline of portions of the draft permit to portions of the final permit to identify changes). Certainly, IEPA cannot fairly complain that Petitioners have failed to address or have misstated IEPA's rationale for changes where Petitioners were forced to infer that rationale from the record "as a whole" due to IEPA's own failure to properly identify or explain changes in the first instance. Moreover, as highlighted above, our thorough review of the Responsiveness Summary leads us to conclude that the Responsiveness Summary,

even when viewed as a whole, does not adequately document or fully explain all of the changes made.

Furthermore, despite arguments to the contrary, it is of no consequence that at least some of the changes IEPA made to the permit were in response to Petitioners' comments. *See* ConocoPhillips Br. at 17, 18 n.9 (arguing that the purpose of the rule to explain changes in the final permit is served because the changes made were in response to Petitioners' comments (at "Petitioners' behest") and also that Petitioners were really arguing that IEPA failed to go far enough, not that it failed to explain the changes it did make); *see also* IEPA Response at 37 (noting that IEPA included many elements in its BACT determination at the "behest" of Petitioners). As we have explained before, it is not enough to merely concur with Petitioners' comments in making permit changes. *See Amoco*, 4 E.A.D. at 980 (remanding permit where permitting authority's "mere concurrence" with a comment failed to provide an adequate explanation for a change in draft permit and, thus, failed to provide the parties "with an opportunity to prepare an adequately informed challenge to the permit addition"). Rather, the permitting authority is obligated to explain its rationale for agreement. *Id.* Here, Petitioners assert that although the changes made to the permit conditions constituted an improvement over the draft, the permit conditions were significantly "watered down" from what Petitioners had proposed such that the conditions are "legally insufficient." *See, e.g.*, Petition at 10; Petitioners' RS Reply at 2, 4-5, 8-11. The need for IEPA to provide its rationale for the conditions it imposed, as well as those it rejected, is as significant when a permitting agency makes *some, but not all* of suggested changes in response to a petitioner's comments, as it would be if all changes, or no changes at all were made.[16] *See Amoco*, 4 E.A.D. at 980. Likewise, IEPA is not relieved of its obligation to provide its rationale for its final decision by virtue of the fact that the changes that it did make were at the behest of the petitioner.

Finally, ConocoPhillips argues that, even if IEPA failed to identify adequately the changes to the permit and explain its rationale, remand is not necessary because the failure to do so constitutes a "procedural defect" that is remedied by allowing Petitioners to file a reply brief addressing the Region's explanation in its response. ConocoPhillips Br. at 13 (citing *In re Steel Dynamics, Inc.* 9 E.A.D. 165, 191 n.31 (EAB 2000); *In re Midwest Steel Division*, 3 E.A.D. 835, 835 n.2 (Adm'r 1992)). We disagree. As previously stated, where the permit issuer fails to comply with 40 C.F.R. § 124.17, the Board typically remands the permit. *See Indeck-Elwood*, 13 E.A.D. at 146-47; *City of Marlborough*, 12 E.A.D. at 245;

[16] ConocoPhillips attempts to frame Petitioners' challenge as arguing only that IEPA failed to go far enough, rather than as opposing any of the changes actually made. ConocoPhillips Br. at 18 n.9. We believe this is a distinction without a difference. IEPA is obligated to provide its rationale for the final permit. This includes explaining the changes it adopted, as well as those it rejected. Petitioners challenge IEPA's failure to provide that rationale.

Amoco, 4 E.A.D. at 980; *GSX Services*, 4 E.A.D. 451, 467 (EAB 1992); *Austin Powder*, 6 E.A.D. at 720; *Ash Grove*, 7 E.A.D. at 417-18.[17] Even where the Board has determined that remand was not necessary based on the circumstances of a particular case, the Board has made clear that, "permitting agencies should not view [the decision not to remand] as an invitation to avoid their responsibilities to explain their decisionmaking." *Steel Dynamics*, 9 E.A.D. at 191 n.31.[18] The Board further stated that imprecision in explaining their decisions "can [] lead to potentially avoidable appeals, with their attendant delays, and unnecessarily increase the potential for remand." *Id.*

In this case, Petitioners challenge the sufficiency of the control measures imposed for flare-related emissions. The control measures imposed in the final permit are different from the control measures proposed in the draft permit, apparently due to changes IEPA made in response to public comments, including those of Petitioners. These changes were neither specifically identified nor adequately explained. Agency regulations provide that the record shall be complete on the date the final permit is issued. 40 C.F.R. § 124.18(c). The response to comments document, including the agency's rationale for its decision, is an essential part of that record. *Id.* § 124.18 (b)(4). On appeal, the EAB reviews the record of the permit decision, at least in part, to ensure that the record reflects the "considered judgment" necessary to support the permit determination. *Indeck-Elwood*, 13 E.A.D. at 126, 147; *GSX Services*, 4 E.A.D. at 467. Where a record is devoid of the permit issuer's rationale for specific changes (or rejections of changes) made, then the petitioner's ability to challenge the sufficiency of changes made (or rejected), as well as the Board's ability to review the permit decision is constrained. Moreover, 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. *Indeck-Elwood*, 13 E.A.D. at 147. Under these circumstances, we believe a remand is appropriate.

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[17] *But see In re Midwest Steel Div.*, 3 E.A.D. 835, 835 n.2 (Adm'r 1992) (noting in a footnote, that although the region had "failed to provide the specific reasons for requiring these conditions," and that this "procedural defect hindered [the petitioner's] ability to demonstrate that review of the added permit conditions [was] warranted," the "defect was cured by allowing [the petitioner] to file a reply brief * * * addressing the [r]egion's response to [the] issues.").

[18] ConocoPhillips cites *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 191 (EAB 2000) in support of its argument that a remand is not appropriate because Petitioners have offered no compelling reason to believe that the failure to explain the reason for the changes led to a clearly erroneous permit decision. ConocoPhillips at 13. We do not believe *Steel Dynamics* stands for that conclusion, nor do we believe it analogous. In *Steel Dynamics*, the permitting agency failed to explain what the Board determined was essentially a simple calculation that was fairly deducible. *Steel Dynamics*, 9 E.A.D. at 191. Remanding would have served only to elicit from the permitting agency a reassertion of the explanations the permitting agency submitted on appeal. *Id.* The explanation of changes here do not involve a simple calculation, nor are they fairly deducible.

Accordingly, we hold that IEPA failed to adequately specify which provisions of the draft permit were changed in the final permit and also failed to articulate the reasons for those changes in contravention of 40 C.F.R. § 124.17(a), and therefore remand the permit to IEPA. On remand, IEPA should specify each provision of the draft permit that has been changed in the final permit decision and provide reasons for each change, supported by record evidence, as is required by 40 C.F.R. § 124.17(a)(1). IEPA should supplement the record as necessary during the remand process. Additionally, IEPA may reopen the record for additional public comment as necessary, in accordance with 40 C.F.R. § 124.14.[19] If Petitioners or other participants are not satisfied with IEPA's explanation of changes on remand, Petitioners or other participants with standing may appeal the IEPA determination to this Board pursuant to 40 C.F.R. § 124.19.

B. *The Adequacy of Flaring Controls*

As a general matter, when issues on appeal challenge a permitting authority's technical judgments, the Board will defer to the permitting authority's determinations that depend heavily on the permitting authority's technical expertise and experience. *In re Envotech, L.P.*, 6 E.A.D. 260, 284 (EAB 1996); *see also Dominion*, 12 E.A.D. at 510; *In re Peabody W. Coal Co.*, 12 E.A.D. 22, 33-34 (EAB 2005); *Steel Dynamics*, 9 E.A.D. at 201. "The [permitting authority's] rationale for its conclusions, however, must be adequately explained and supported in the record." *Dominion*, 12 E.A.D. at 510. Only where the record demonstrates that the permitting authority duly considered the issues raised in the comments and that the approach ultimately adopted by the permitting authority is rational, in light of all the information in the record, will the Board defer to the permitting authority's expertise. *Id.* (citing, among others, *In re N.E. Hub Partners, L.P.*, 7 E.A.D. 561, 568 (EAB 1998)).

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[19] IEPA should also consider any new or additional information that comes to light during the course of remand. As the NSR Manual provides:

> The BACT emission limit in a new source permit is not set until the final permit is issued. * * * Consequently, in setting a proposed or final BACT limit, the permit agency can consider new information it learns, including recent permit decisions, subsequent to the submittal of a complete application. This emphasizes the importance of ensuring that prior to the selection of a proposed BACT, all potential sources of information have been reviewed by the source to ensure that the list of potentially applicable control alternatives is complete (most importantly as it relates to any more effective control options than the one chosen) and that all considerations relating to economic, energy and environmental impacts have been addressed.

NSR Manual at B.55.

As explained in Part A.1, above, the changes IEPA made to the final permit included adding certain control measures for flaring emissions that were not properly identified or explained in the Responsiveness Summary. *See also, e.g.*, Responsiveness Summary at 10, 12, 25, 27-28, 66, 68, and 70. This includes additional requirements incorporated as part of the BACT determination, as well as certain monitoring and reporting requirements, presumably for the purpose of ensuring compliance with BACT. Because these requirements were not properly identified or explained in the Responsiveness Summary, Petitioners' and the Board's ability to evaluate the reasonableness and adequacy of the newly added requirements is constrained. *See* Petition at 14, 20-21. Therefore, it would be premature for the Board to consider the adequacy of the flaring controls imposed prior to having IEPA's full explanation for such conditions and, thus, the Board declines to do so. Mindful of the time-sensitive nature of PSD permitting, however, the Board offers the following observations for IEPA's consideration on remand.

1. *IEPA's BACT analysis*

On appeal IEPA and ConocoPhillips frame Petitioners' argument as challenging IEPA's failure to conduct any BACT analysis whatsoever. *See* IEPA Response at 25; ConocoPhillips Br. at 20. Both respondents then contend that Petitioner's argument – so framed – is waived because it was not raised during the public comment period. *Id.* As explained in more detail in Part C, below, a prerequisite to appeal under 40 C.F.R. § 124.19 is that all reasonably ascertainable issues must be raised first to the permitting authority during the public comment period. 40 C.F.R. §§ 124.13, 124.19(a); *see, e.g., Christian County*, 13 E.A.D. at 449, 457-63. Our review, however, leads us to conclude that Petitioners' argument cannot be so easily framed or dismissed. Rather, the Petition clearly questions the *adequacy* of IEPA's BACT analysis – and, specifically, whether IEPA conducted *an appropriate* top-down BACT analysis. Petition at 12-21. The arguments raised on appeal, therefore, are entirely consistent with the issues raised during the public comment period, as evident from IEPA's own Responsiveness Summary. *See e.g.*, Responsiveness Summary at 11, 25-28 (identifying comments regarding the adequacy of IEPA's BACT analysis). Moreover, Petitioners' appeal specifically challenges the sufficiency of IEPA's BACT analysis as it pertains to permit conditions that were added *after* the close of public comment. Petition at 10, 12-24 (arguing that the BACT requirements imposed in the final permit were not derived through an appropriate BACT analysis); Petitioners' RS Reply at 4-13; Petitioners' Suppl. Reply at 2, 21. Thus, this appeal presents the first opportunity Petitioners have had to challenge whether the final (newly added) permit conditions were the result of an *appropriate* BACT analysis. Under these circumstances, we find unpersuasive any assertion that Petitioners' waived their arguments concerning IEPA's BACT analysis. We also find unpersuasive any assertion that Petitioners have simply repeated objections raised previously. *See* IEPA Response at 38. Though Petitioners may have raised similar arguments re-

garding the prior "BACT" conditions, the conditions now challenged are newly added and the arguments are specific to these newly added provisions; they are not merely repeated assertions. In any case, Petitioners may seek review of newly added or changed provisions on appeal. *See* 40 C.F.R. § 124.19.

We turn now to the adequacy of IEPA's BACT analysis. Petitioners assert not only that IEPA failed to conduct an appropriate top-down BACT analysis (which would have involved having before it necessary information to determine BACT) but also that, as a result, the numeric emissions limits set for the new flares are higher than what appears to be achievable through the types of control measures put into place. *See, e.g.*, Petition at 18. Additionally, Petitioners assert numerous other deficiencies in the control measures themselves. *Id.* at 18-21.

It is undisputed that IEPA was required to make a case-by-case BACT determination for CO as part of the review of the PSD permit that is the subject of this Petition. *See* Petition at 12; IEPA Response at 29; Project Summary at 9-10; Responsiveness Summary ¶ 22-23, at 9. As explained previously, the draft NSR Manual sets forth a five-step "top-down" process for determining BACT for a particular regulated pollutant. NSR Manual at B.5-.9; *see In re Prairie State Generating Company*, 13 E.A.D. 1, 13-14 (EAB 2006) [hereinafter "*Prairie State II*"]; *Cardinal FG*, 12 E.A.D. at 162-63 (explaining steps in top-down analysis); *accord Three Mountain Power*, 10 E.A.D. at 42-43 n.3; *Knauf I*, 8 E.A.D. at 129-31; *Haw. Elec.*, 8 E.A.D. at 84.

The first step of the top-down methodology is to "identify, for the emissions unit in question (the term 'emissions unit' should be read to mean emissions unit, process or activity), all 'available' control options." NSR Manual at B.5. The NSR Manual goes on to explain that the "control options" can be control technologies or *techniques* with a "practical potential for application to the emissions unit and the regulated pollutant under evaluation." *Id.* The guidance further clarifies that the permitting agency's consideration of technologies or techniques should be broad. *Id.* At the outset, all possible control options with potential application should be identified. *Id.* at B.5-7. Among other information sources, the NSR Manual identifies the following for consideration: EPA's database containing relevant RACT/BACT/LAER technology determinations ("RBLC")[20], other federal,

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[20] "RACT" refers to "reasonably available control technology." CAA § 172(c)(1), 42 U.S.C. § 7502(c)(1). For areas designated as nonattainment for a national ambient air quality standard, states must submit implementation plans that shall, at a minimum, provide for adoption of "reasonably available control technology." *Id.* "LAER" refers to the "lowest achievable emission rate." CAA § 171(3), 42 U.S.C. § 7501(3). In areas designated as nonattainment for a national ambient air quality standard, any permit issued to construct and operate a source must require that the source comply with the "lowest achievable emission rate" for the relevant air pollutant, as measured by the most stringent emission limitation for such class or category of source contained in any state implementation plan or

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state and local NSR permits and the associated inspection/performance test reports. *Id.* at B.11. The NSR Manual also indicates that "technologies outside the United States," as well as existing controls applied to similar sources other than the category in question" should be considered. *Id.* at B.5.

Once all possible control options are identified, step two allows the elimination of technically infeasible options. *Id.* at B.7. Step 3 then requires a ranking of all remaining control options by control effectiveness. *Id.* As part of Step 3, the effectiveness of each option is evaluated by looking at the expected emissions rate, the expected emissions reduction, and the control efficiency (i.e., percent pollutant removed), among other things. *Id.* at B.7-8, B.22-26. Only then, in Step 4, are the energy, environmental and economic impacts considered from the top-ranking control option down. *Id.* at B.8. If the top candidate control option is shown to be inappropriate due to energy, environmental or economic impacts, it may be eliminated, but the rationale for this finding should be documented for the public record. *Id.* at B.8-9. Then the next most stringent alternative is considered. *Id.* at B.9. Ultimately, in Step 5, the most effective control option that was not eliminated in Step 4 is selected as BACT for the pollutant and emission unit under review. *Id.* The reviewing authority should then specify an emission limit for the source that reflects the imposition of the control option selected. *Id.* at B.2, B.54; 42 U.S.C. § 7479(3); *see also Prairie State II*, 13 E.A.D. at 14, 51.

As previously explained, this 5-step method of determining BACT is not mandatory, however, "the methodology described in the NSR Manual provides a framework that assures adequate consideration of the regulatory criteria and consistency within the PSD permitting program." *Cardinal*, 12 E.A.D. at 162. Moreover, although the Board has said that it "would not reject a BACT determination" that deviated from the NSR Manual's prescribed methodology, the Board has also indicated that it would "scrutinize such a determination carefully to ensure that all regulatory criteria were considered and applied appropriately." *Knauf I*, 8 E.A.D. at 129-130, n.14.

In the Project Summary issued with the draft permit, IEPA purported to apply the NSR Manual's 5-step top-down BACT methodology. Project Summary at 10. With respect to the flares, however, IEPA's stated BACT analysis consisted of the following:

> The RBLC shows four BACT determinations for the control of CO emissions from refinery flares in recent years.

(continued)
achieved in practice by other sources in that class or category. *Id.*; CAA § 173(a)(2), 42 U.S.C. § 7503(a)(2).

> None of these previous determinations identifies the use of a CO control technology or methodology.
>
> Due to the inherent design of a flare (i.e., the pilot gas exhaust does not pass through a duct or stack), it is not possible to use any post-combustion air pollutant control devices. Furthermore, no process changes that would reduce the CO emissions exist. Since the flares serve as VOM control devices in an 8-hour ozone non-attainment area, their operation is necessary. Therefore, no CO control technologies exist for the new flares.

Id. at 13. Based on the above analysis, IEPA determined that the flares would be required to operate with "equipment design specifications and work practices consistent with the [New Source Performance Standards] for flares in 40 C.F.R. § 60.18." *Id.;* Draft Permit ¶ 4.7.5.a at 61. Without stating that these design specifications and work practices constituted the only control options or techniques available for limiting CO emissions from flares, or identifying and eliminating other possible options in accordance with the top-down methodology, IEPA indicated that the requirements it imposed would constitute BACT for the CORE Project flares. *Id.* at 62. An emissions limitation was also set for CO emissions from each flare: 24.3 tpy from the Delayed Coker Unit Flare, and 147.9 tpy for the HP2 flare. However, IEPA did not explain how it derived these emissions limitations, let alone whether the limits reflect the greatest degree of reduction in emissions achievable through application of the control requirements and work practices imposed in the draft permit. *See* CAA § 169(3), 42 U.S.C. § 7479(3).

Consequently, IEPA's BACT determination was questioned during the public comment period. *See generally* Responsiveness Summary ¶¶ 27-30, 58-84, at 11-13, 25-35. Among those comments was the suggestion that no BACT for flaring had been required at all, as well as the observation that the most stringent technologies were not considered in making the BACT determination. *Id.* at 12, 25. Still other comments suggested minimizing flaring as an approach toward controlling flaring emissions and offered a handful of additional approaches for minimizing flares. *Id*. at 26-27. Commenters also suggested that IEPA look to other specific refineries and air quality management regulations for examples of what types of technologies and approaches are available – namely, the Shell Martinez and Tesoro Avon Refineries and the standards of the Bay Area and South Coast Area Air Quality Management Districts (BAAQMD and SCAQMD). *See, e.g.*, Letter from Julia May, Environmental Consultant, to IEPA Hearing Officer, *Re: ConocoPhillips Wood River CORE Project (Coker and Refinery Expansion Project, New Source Review Permit Application)* at 16-19 (June 14, 2007) (Attached to Letter from Karla Raettig, Environmental Integrity Project, to IEPA Hearing Officer Re: ConocoPhillips CORE Project) (June 14, 2007) ("Petitioners'

Comments") (Petition Ex. 2) (A.R. 30); Responsiveness Summary ¶¶ 65-75, at 28-32.

In response to comments, IEPA added various control requirements and work practices for the two new flares to the final permit and again stated, without further explanation or analysis, that the conditions as imposed in the final permit constituted BACT. Final Permit § 4.7.5(a). In sum, the additional conditions required the permittee to:

(1) install redundant compressor capacity for the Delayed Coking Unit (DCU);

(2) recover waste gases during the depressurization of process vessels in the DCU, except during malfunction, where the pressure in the vessel reaches 5.0 lb per square inch gauge;

(3) minimize flaring in both the DCU and the HP by operating and maintaining the flares in accordance with a "Flaring Minimization Plan" (the details of which are provided in a newly added section of the permit);

(4) investigate flaring incidents (including, generally, a root-cause analysis for the incident); and

(5) comply with various monitoring and reporting requirements.

See Petition Ex. 8 (identifying changes from draft permit to final permit); *Compare* Draft Permit (*Construction Permit * * * PSD Approval for ConocoPhillips Wood River Refinery*, Permit No. 06050052, (March 2007) (IEPA Ex. 3) (A.R. 5)) §§ 4.7.5 to 4.7.10 *with* Final Permit §§ 4.7.5 to 4.7.10. Significantly, the CO emissions limits for the flares remained unchanged in the final permit. The Responsiveness Summary again does not explain how these emissions limits were derived, discuss whether the limits reflect the greatest degree of reduction in emissions achievable using the control requirements and work practices imposed in the final permit, or explain why the final limits are unchanged despite these additional conditions. Nor does the Responsiveness Summary purport to or effectively follow the 5-step top down methodology prescribed in the NSR manual. Although some rationale can be found for IEPA's rejection of one potential tech-

nique – the construction of stronger process vessels,[21] the Responsiveness Summary is devoid of any analysis that resembles the identification of all possible control techniques followed by a process of eliminating possible options in accordance with the top-down methodology set forth in the NSR manual after taking into account feasibility, effectiveness, and the energy, environmental and economic impacts. In fact, in its response to the Petition, IEPA suggests it "is not under an obligation to gather additional information" not otherwise provided to them concerning CO emissions from other refineries "for inclusion in the Administrative Record." IEPA Response at 39-40.[22] *See also* IEPA Response at 55 (noting that "Petitioners seek to compel [IEPA and ConocoPhillips] to embark upon an exploration of information about the cause and extent of past flaring events, existing compressor capacity, current monitoring practices and more" which is "unreasonable"). We find such statements to be inconsistent with IEPA's statutory obligation to ensure that PSD facilities are subject to the best available control technology. As stated in the NSR Manual:

> [i]t is the responsibility of the permit agency to review the documentation and rationale presented [by the applicant] and: (1) ensure that the applicant has addressed all of the most effective control options that could be applied and; (2) determine that the applicant has adequately demonstrated that energy, environmental, or economic impacts justify any proposal to eliminate the more effective control options. Where the permit agency does not accept the basis for the proposed elimination of a control option, the agency may inform the applicant of the need for more information regarding the control option.

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[21] *See supra* note 15. Although IEPA articulates some basis for its rejection of stronger process vessels, that basis does not go far enough. IEPA's stated reason, "operational concerns," is apparently offered as a rationale for why that control option is infeasible, but IEPA does not go on to explain the nature of the "operational concerns" or how they render this option infeasible.

[22] IEPA cites two cases, neither of which provides support for its position: *In re N.E. Hub Partners, L.P.*, 7 E.A.D. 561, 581, 583 (EAB 1998), and *In re Mecklenburg Cogeneration Ltd. P'ship Clarkesville, VA*, 3 E.A.D. 492 (Adm'r 1990). IEPA Response at 40. In *N.E. Hub*, the analysis that the petitioner sought to have the permitting authority perform was not one expressly required by regulations and the Board found the permitting authority had responded (albeit succinctly) to each comment. *N.E. Hub*, 7 E.A.D. at 581, 583. In *Mecklenburg*, the Board determined that the record demonstrated that the permitting authority had employed a top-down analysis (even if it did not identify, document, or consult every potential source available). *Mecklenburg*, 3 E.A.D. at 492. Here, IEPA is under a statutorily prescribed duty to ensure that a proposed facility is subject to the best available control technology. CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4). Further, this record does not demonstrate that a top-down analysis was employed, and does not adequately explain how IEPA's decision meets applicable statutory and regulatory requirements. The cases IEPA cites, therefore, are inapposite.

NSR Manual at B.53.[23] While a permitting authority may not be required to identify, document, and consult "every single potential source of information about the [BACT controls] in question," *In re Mecklenburg Cogeneration Ltd. P'ship Clarksville, VA,* 3 E.A.D. 492 (Adm'r 1990) (cited in IEPA Response at 40), permitting authorities are required to sufficiently analyze and consider available technologies and techniques in order to adequately make a BACT determination, and in doing so, must gather the necessary information (whether directly or by requesting more information from the permit applicant) to ensure and document that statutory and regulatory obligations have been met.

Based on the record before us, it is not clear to the Board whether IEPA employed a top-down analysis, despite its assertions that it did. The Responsiveness Summary does not describe anything resembling an analysis that first identifies all of the possible control measures, followed by a discussion of feasibility. There is no comparison of alternatives to determine relative effectiveness. And ultimately, there is no discussion of the energy, environmental, or economic impacts as a basis for selecting or eliminating control options. Further, the briefs IEPA and ConocoPhillips submitted provide no evidence that such an analysis was ever undertaken in the course of making its final BACT determination. *See, e.g.,* IEPA Response Br. at 33-37 (arguing that IEPA "properly reviewed the BACT analysis prepared by ConocoPhillips and considered additional measures to minimize CO emissions from flaring events consistent with public comments"). Moreover, even if IEPA opted not to employ the 5-step methodology, the Responsiveness Summary provides too little information and analysis to determine whether all statutory and regulatory criteria were nevertheless considered and applied appropriately in determining BACT for CO in the permit. *See Knauf I*, 8 E.A.D. at 129-30, n.14. Most significantly, we also find the record and the briefs devoid of any basis for the specific emissions limits set for each flare and, as such, have no record basis for determining whether the limits reflect the greatest degree of reduction achievable after considering the factors enumerated in the statute. CAA § 169(3), 42 U.S.C. § 7479(3). What we have found are conclusory statements that the measures and emissions limits selected constitute "appropriate" BACT requirements with little to no analysis to support that determination and no representation that the requirements reflect the "best" options or "greatest reduction in emissions achievable."

Accordingly, on remand, IEPA should not only identify and explain the changes it made in the final permit, but also should explain how it derived BACT

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[23] IEPA acknowledges incorporating "measures similar to [those] specified by the BAAQMD to reduce flaring" and taking into account the flare minimization plan prepared by Shell Martinez Refinery. Responsiveness Summary ¶¶ 68-70, at 29-30. Still, IEPA does not adequately explain its review of these measures, including what it rejected, what is incorporated, and, more importantly, why. The record contains no evidence of a top-down analysis, taking into account statutory factors for consideration, of the sort set forth in the NSR Manual.

for CO emissions from flaring, using either the NSR methodology or some other method that demonstrates that all the statutory and regulatory criteria were considered and applied appropriately. This demonstration should include the identification and consideration of all available options for control of CO emissions from flaring. To the extent that the minimization of flaring is the best or only option, IEPA should demonstrate that it identified and fully considered all available methods for minimizing flaring. To the extent that more stringent controls are available, but not selected, IEPA should explain why these controls are infeasible based on the statutorily defined factors. CAA § 169(3), 42 U.S.C. § 7479(3). Further, IEPA should explain how the emissions limit for CO was derived and should indicate whether it reflects the best emission rate achievable through application of IEPA's selected BACT, as set forth in the permit and in accordance with CAA § 169(3), 42 U.S.C. § 7479(3). Although the use of the top-down analysis prescribed in the NSR Manual is not mandatory, we reiterate that this methodology "provides a framework that assures adequate consideration of the regulatory criteria and consistency within the PSD permitting program." *Cardinal*, 12 E.A.D. at 162.

2. *Enforceability of Flare Control Measures*

Petitioners assert that, in addition to the inappropriate manner in which the flare control measures were derived, the control measures themselves fall short of what is required because they are unenforceable as a practical matter. More specifically, Petitioners argue that the principal control technique imposed – flaring minimization – is unenforceable because the permit fails to establish reliable, meaningful measures for monitoring and assessing flaring events. Petitioners contend that the permit conditions for monitoring and assessing flaring events are inadequate for several reasons: (1) the new permit contains inadequate observation requirements (i.e., video monitoring is not required and operator observation is unreasonably limited); (2) the monitoring equipment involved lacks accuracy requirements; and (3) the monitoring requirements do not specify the required frequency or method of sampling. Petition at 19-24. Consequently, Petitioners essentially argue, there is no way to determine whether flaring is being appropriately minimized pursuant to the permit, thus making the flare minimization requirements unenforceable. *Id.*

The flare monitoring and observation requirements challenged by Petitioners were all added to the permit in conjunction with the requirement to minimize flares, which was added in response to public comment. Comments on the draft permit suggested that rigorous operational monitoring should be required for flaring and, more specifically, that IEPA should incorporate into the permit the standards set forth by the BAAQMD. Responsiveness Summary ¶ 74, at 31. In the final permit, IEPA seemingly, at least partly, agreed and adopted some measures for flare monitoring and observation, stating:

> The issued permit includes an appropriate level of specificity for operational monitoring for flaring. As the fundamental objective for flaring is to minimize and eliminate flaring, it is not appropriate for the permit to include the detailed requirements for operational monitoring present in the [BAAQMD] Flare Monitoring Rule. Given the very low level of flaring that should occur in the future at the Wood River refinery, a simpler approach to operational monitoring at the refinery should be established, as compared to the circumstances of the refineries in California that led to the BAAQMD and SCAQMD adopting their Flare Monitoring rules several years ago. Accordingly, the issued permit sets the purposes that must be fulfilled for the operational monitoring for flaring, i.e., collection of data to identify when waste gases are flared and in what quantity. The permit does not prescribe what monitoring techniques must be used and how monitoring must be conducted.

Responsiveness Summary ¶ 74, at 32; *Changes in ConocoPhillips Wood River Refinery Core Permit from Draft to Final, Issued July 19, 2007 – Flare Section* (Petition Ex. 8) at 11-13.

As previously explained, any evaluation of the reasonableness of the monitoring and reporting provisions by the Board would be premature; thus, we decline to decide these issues in this appeal. Nevertheless, we touch briefly on some of the arguments made in order to guide IEPA's consideration of these issues on remand.

IEPA contends that Petitioners have waived their objections to the specific monitoring provisions because Petitioners do not address IEPA's explanation for why IEPA did not incorporate all of the provisions of the BAAQMD flare monitoring rule. IEPA Response at 71; *see also* ConocoPhillips Br. at 32. Rather, IEPA contends, Petitioners simply repeat the arguments made during the public comment period. IEPA Response at 76, 81, 87. We disagree. Petitioners do not simply repeat the comments made during the public comment period. Rather, Petitioners assert that the newly added monitoring conditions are inadequate for reasons specific to those provisions (for example, Petitioners assert that the specific terms of the newly added provisions allow flaring to occur unobserved, and the monitoring that is now required is not accompanied by equipment accuracy and methodology provisions, rendering the BACT requirements unenforceable). Moreover, as discussed in Part A.1, above, the Responsiveness Summary inadequately describes the changes made, and the bases for those changes as 40 C.F.R. § 124.17 requires. This includes IEPA's rationale for its Flare Minimization Plan and the associated observational monitoring requirements. *See*, Part A.1, *supra*. Although IEPA at-

tempts to generally explain the permit's final monitoring provisions, *see* Responsiveness Summary at 32, IEPA does not explain how the specific provisions added were derived, why they were included, or (as explained below) adequately justify why other provisions considered were rejected. It is this rationale that Petitioners, in the ordinary course, would be required to address. *See, e.g.*, *Encogen*, 8 E.A.D. at 251-52 (explaining that it is the petitioner's obligation to explain "why the permit decision maker's previous response to [a petitioner's] objections (i.e., the decision maker's basis for the decision) is clearly erroneous or otherwise warrants review.") (citations omitted). Therefore, we cannot conclude that Petitioners' arguments are waived.

Turning, then, to the issue of the enforceability of the BACT requirements, the NSR Manual provides that a PSD permit must, among other things, provide for adequate reporting and recordkeeping so that the permitting agency can determine the compliance status of the source. NSR Manual at B.56; Petition at 21; *see also In re Shell Offshore, Inc.*, 13 E.A.D. 357, 394 n.54 (EAB 2007) ("In addition to requiring conditions and limitations [that are] directly enforceable by regulators at both the federal and state level (*see* 40 C.F.R. § 52.21(b)(17)), the term "federal enforceability" has been interpreted as requiring practical enforceablity as well. That is, the permit must include conditions allowing the applicable enforcement authority to show continual compliance (or non-compliance) such as adequate testing, monitoring, and record keeping requirements.") (citing, *e.g.*, NSR Manual at A.5-.6). IEPA does not dispute that the flare minimization conditions must be practically enforceable and met on a continuous basis, and in fact asserts that they are.[24] IEPA Response at 72; *see also* NSR Manual at B.56.

Although IEPA contends that the flare minimization conditions are enforceable, it does not provide a cohesive explanation for why that is so. This is best illustrated by examining some of IEPA's responses to Petitioners' arguments for why the permit's BACT conditions are unenforceable. Petitioners first contend that the flaring observation requirements are ineffectual because they allow the permittee to either use video monitoring or operator observation (to the extent an operator is available). Petition at 22. The relevant permit condition provides an exemption from operational monitoring when the operator is engaged in "tasks essential to the flaring event" or when the operator's safety would be compromised. *See* Final Permit § 4.7.8-2. Additionally, observation is not required to begin until forty-five minutes after a flaring event has started and is only required to continue if the event continues more than 30 minutes. *Id.* Petitioners argue that

[24] To be clear, it is the enforceability of the BACT requirements that we are concerned with here, not the enforceability of the monitoring requirements. The monitoring requirements are the method used to ensure compliance with the BACT requirements. Although IEPA discusses the enforceability of the BACT controls imposed, it also focuses portions of its response on the enforceability of the monitoring and reporting provisions themselves. *See* IEPA Response at 74.

these limitations on observational monitoring requirements, in conjunction with the option to use either video or operator observation, "could result in highly polluting thirty-minute flaring events coming and going" before any observation of it is required. Petition at 19. Petitioners further assert that the flaring observation requirements are critical to any root cause analysis to find and eliminate causes of flaring.

IEPA does not specifically address Petitioners' contention that the flaring observation provision (Final Permit § 4.7.8-2), by itself, will allow certain flaring events to go unobserved. Rather it asserts that such conditions are reasonable given that: (1) the primary purpose is to minimize and eliminate flaring not simply to observe such events; (2) the inherent safety concerns present; and (3) the fact that this condition is intended to act in combination with other monitoring requirements incorporated in the Permit. *Id.* at 74-78. These three points, however, do not address Petitioners' comment that the flaring observation provision of the permit will allow certain flaring events to go unobserved, and is thus unenforceable.

First, in order to ensure flaring is being minimized, there must be a reliable method for determining whether that is the case. In other words, explaining that minimizing flaring is the objective and that "very low level[s] of flaring" are expected, does not relieve IEPA of ensuring that accurate and reliable reporting mechanisms are in place to determine whether in fact flaring is being minimized, and if not, to determine why not, so that the flare minimization condition of the permit can be enforced.

Second, the inherent safety concerns IEPA identified speak only to the reasonableness of the limitations in the provision generally. The safety concerns do not address the question of enforceability. If IEPA believes that safety concerns prevent the continuous monitoring of all flaring events, then it must say so and justify that rationale in the record. On the contrary, IEPA contends the provisions are enforceable, but does not specifically acknowledge or deny that some flaring events may go unobserved.

Third, IEPA asserts that Condition 4.7.8-2 is intended to act in conjunction with other monitoring requirements incorporated into the permit (which presumably is intended to show that, together, the conditions ensure enforceability). Although IEPA identifies in its response brief certain other provisions, the majority of which are newly added and some of which are specifically challenged by Petitioners, IEPA does not explain how these other monitoring provisions address the particular concern Petitioners raise on appeal (that flaring events will go unobserved). Thus, although IEPA asserts, generally, that the BACT requirements are enforceable, its defense of the flaring observation requirements does not support that assertion.

IEPA's defense of its decision not to include provisions ensuring the technical accuracy of the monitoring equipment fares no better. In particular, Petitioners argue that the monitoring provisions fail to:

> (i) set detection limits for the equipment used to measure flare flow and flare chemical consistency, (ii) require the flare monitoring equipment to meet standard test method requirements, (iii) require any measures to verify accuracy of the equipment, or (iv) limit equipment downtime and set conservative assumptions for calculating emissions when monitoring equipment is down.

Petition at 23. In response, IEPA again cites to its explanation in the Responsiveness Summary that the fundamental objective is to minimize flaring, and thus the low level of flaring that should occur renders its provisions "appropriate." IEPA Response at 78-79 (citing Responsiveness Summary ¶ 74, 32). Again, as stated above, we find this explanation to be circular and insufficient. IEPA also asserts that "precision in the quantification of emissions * * * does not directly further the Permit's goal to eliminating flaring," and suggests that the lack of accuracy or precision does not affect the feasibility of making such determinations, "it merely effects the accuracy or precision of the determination." *Id.* at 80, 81-82. We find both of these statements to be fundamentally flawed. The failure to ensure the accuracy and reliability of the monitoring that does occur – which, again, is essential to assessing flaring events to ensure they are being effectively minimized – would render the monitoring provisions ineffectual. *See* Petition at 19-22 (asserting that the monitoring provisions fail to employ standard measures and methodology to ensure the accuracy and reliability of monitoring); Petitioners' RS Reply at 9. Simply put, an erroneous determination of compliance is not a determination of compliance nonetheless. Moreover, ensuring compliance with permit conditions most definitely furthers the purpose of the permit; without a reliable and accurate means of ensuring compliance, emissions controls would be meaningless because they would be unenforceable.

Next IEPA suggests that the records requirements in the permit will be sufficient to demonstrate when instruments are not working. IEPA Response at 80 (referring to Final Permit § 4.7.8-1(e) which requires records documenting the "operation and maintenance" of monitoring systems including the date and time when an instrument or device was not in operation, with explanation). IEPA does not explain, however, how a requirement to keep records of the operation and maintenance of the monitoring systems will appropriately ensure the technical accuracy of the equipment.

Finally, with respect to provisions ensuring the accuracy of the monitoring equipment, IEPA implies that its approach to investigation and reporting requirements for flaring incidents is reasonable because it is based on a similar approach

taken in a consent decree entered into by the United States, the State of Illinois and ConocoPhillips, among others ("Consent Decree").[25] *Id.* at 80-81. IEPA does not, however, explain how the approach taken in the Consent Decree is sufficient to ensure the technical accuracy of the equipment. Moreover, the existence of that Consent Decree, does not relieve IEPA of its independent statutory obligation to impose appropriate enforceable conditions in this PSD permit. In sum, IEPA's defense of its monitoring provisions does not provide assurance that the CO BACT provisions are enforceable.[26]

Both IEPA and ConocoPhillips have suggested repeatedly that IEPA is entitled to discretion on such matters as the technical details of the monitoring provisions. IEPA Response at 61-62, 77, 88 (citing *In re Inter-Power of New York*, 5 E.A.D. 130, 147 (EAB 1994); *Steel Dynamics*, 9 E.A.D. at 201; *Ash Grove*, 7 E.A.D. at 403); ConocoPhillips Br. at 32-38 (citing, among others, *Peabody*, 12 E.A.D. at 33-34; *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001)). As stated above, however, the fact that the Board will generally defer to IEPA on technical issues does not relieve IEPA of its obligation to adequately explain and support its rationale in the record. *See Dominion*, 12 E.A.D. at 510 (explaining that even in areas involving technical expertise, the permitting authority must adequately explain and support its rationale in the record) (citing, among others, *N.E. Hub*, 7 E.A.D. at 568). IEPA may not state simply that the technical requirements that it has selected are "appropriate" or that requirements not included are "inappropriate" without providing a basis for that determination. Again, as explained in Part A.1, above, IEPA has not provided sufficient rationale for the Board to determine whether it exercised considered judgment.

On remand, IEPA should not only explain the monitoring and observation provisions added and how they were derived, but also should ensure and explain how the conditions of the permit serve the purposes for which they are intended.

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[25] IEPA repeatedly references the consent decree entered by the United States and the State of Illinois, among others, with ConocoPhillips, which apparently subjects ConocoPhillips to various requirements to minimize emissions from flaring at various facilities, including the Wood River Refinery. IEPA Response Br. at 3, 56, 58, and 68 (citing Consent Decree entered in *United States of America, et al. v. ConocoPhillips Company*, Civ. Action No. H-05-0258 (S.D. Tex. Dec. 5, 2005)).

[26] IEPA's defense of Petitioners' third argument on enforceability is similarly unpersuasive. Petitioners challenge the lack of adequate sampling frequency and monitoring location requirements. In response, IEPA relies again on the low level of flaring that is expected, which we have already explained is insufficient to either support enforceability or justify the lack of enforceability. IEPA also asserts that its provisions "speak to the nature of the data that must be collected and the schedule for the required activities, continuous monitoring to ensure compliance [sic]." IEPA Response at 88. We are uncertain how this statement addresses the concerns Petitioners raise. Nor are we able to conclude from the information provided that the recordkeeping requirements are sufficient to verify compliance, as IEPA suggests. *Id.* at 85-86.

In other words, if the monitoring and observation requirements are designed to support the requirement to conduct root cause analysis of flaring events, which in turn is designed to ensure the minimization of flaring, then the monitoring and observation requirements necessarily should be effectual. The permit provisions should enable the permitting authority to accurately determine whether flaring is being appropriately minimized. Moreover, IEPA's rationale in determining that the monitoring and observation requirements are effectual should be apparent from the record. Further, we note that any general requirement that monitoring be continuous may be ineffectual if the monitoring provisions also provide exceptions from monitoring in circumstances that are likely to occur simultaneously with flaring. *See* Petition at 23; IEPA Response at 75-78.

C. *IEPA's Alleged Failure to Include BACT for Greenhouse Gas Emissions*

Finally, Petitioners argue that IEPA erred by not imposing in the permit a BACT limit on greenhouse gas emissions (for CO_2 and methane emissions, in particular). Petition at 24-35. Both IEPA and ConocoPhillips contend that the Board should decline review of this issue because Petitioners failed to raise the issue during the public comment period. Thus, we consider first whether this issue was properly preserved.

The regulations require any person who believes that a permit condition is inappropriate to raise "all reasonably ascertainable issues and * * * all reasonably available arguments supporting [petitioner's] position" during the comment period on the draft permit. 40 C.F.R. § 124.13. That requirement is made a prerequisite to appeal by 40 C.F.R. § 124.19(a), which requires any petitioner to "demonstrat[e] that any issue[] being raised [was] raised during the pubic comment period * * * to the extent required[.]"). *See also, e.g., Christian County*, 13 E.A.D. 449, 457-63 (EAB 2008); *Shell Offshore*, 13 E.A.D. 357, 394-95 n.55 (EAB 2007); *BP Cherry Point*, 12 E.A.D. at 218-20; *Encogen*, 8 E.A.D. at 249.

As we have stated before, "[t]he regulatory requirement that a petitioner must raise issues during the public comment period 'is not an arbitrary hurdle, placed in the path of potential petitioners simply to make the process of review more difficult; rather it serves an important function related to the efficiency and integrity of the overall administrative scheme.'" *Christian County*, 13 E.A.D. at 459 (quoting *BP Cherry Point*, 12 E.A.D. at 219) (citation omitted). "The purpose of such a provision is to 'ensure that the Region has an opportunity to address potential problems with the draft permit before the permit becomes final, thereby promoting the longstanding policy that most permit decisions should be decided at the regional level, and to provide predictability and finality to the permitting process.'" *Shell Offshore*, 13 E.A.D. at 394-95 n.55 (quoting *In re New England Plating Co.*, 9 E.A.D. 726, 732 (EAB 2001)); *In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999); *see also Christian County*, 13 E.A.D. at 459 ("The effec-

tive, efficient and predictable administration of the permitting process demands that the permit issuer be given the opportunity to address potential problems with draft permits before they become final.") (quoting *Encogen*, 8 E.A.D. at 250). The Board routinely denies review of issues raised on appeal that were reasonably ascertainable, but were not raised during the public comment period. *Christian County*, 13 E.A.D. 449, 457 (EAB 2008) (citing, *e.g.*, *Shell Offshore*, 13 E.A.D. at 457 *; BP Cherry Point*, 12 E.A.D. at 218-20; *In re Kendall New Century Dev.*, 11 E.A.D. 40, 55 (EAB 2003); *In re Haw. Elec. Light Co.*, 10 E.A.D. 219, 227 (EAB 2001); *Encogen*, 8 E.A.D. at 249-250).

Issues also must be raised with a reasonable degree of specificity and clarity during the comment period in order for the issue to be preserved for review. *Shell Offshore*, 13 E.A.D. at 394-95 n.55 *; New England Plating*, 9 E.A.D. at 732; *Steel Dynamics*, 9 E.A.D. at 230-31; *In re Maui Elec. Co.*, 8 E.A.D. 1, 9 (EAB 1998); *In re Fla. Pulp & Paper Ass'n*, 6 E.A.D. 49, 54-55 (EAB 1995). Here, Petitioners bear the burden of demonstrating that they raised the greenhouse gas BACT issue during the public comment period. 40 C.F.R. § 124.19(a); *Shell Offshore*, 13 E.A.D. at 394-95 n.55; *Encogen*, 8 E.A.D. at 249. As the Board has stated before, it is not the Board's responsibility "'to scour the record to determine whether an issue was properly raised below.'" *Shell Offshore*, 13 E.A.D. at 394-95 n.55 (quoting *Encogen*, 8 E.A.D. at 250 n.10).

In this case, Petitioners do not identify any comment in the record below that expressly raises the issue of whether a BACT limit was required for greenhouse gases. The Petition for Review states only, and without record citation, that Petitioners "express[ed] extensive concern with greenhouse gas emissions anticipated to result from the CORE Project." Petition at 25-26 and n.10; Petitioners' Suppl. Reply at 28. The fact that Petitioners' comments expressed "extensive concern" regarding greenhouse gas emissions, however, does not by itself reflect the requisite level of specificity required to properly preserve the issue of whether BACT for CO_2 and methane was required.[27] *New England Plating*, 9 E.A.D. at 732; *Steel Dynamics, Inc.*, 9 E.A.D. at 230-31; *Maui Elec. Co.*, 8 E.A.D. at 9.

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[27] In fact, Petitioners' comments on the draft permit suggested only that IEPA should have estimated the magnitude of greenhouse gas emissions expected from the CORE Project so that those estimations could properly have been evaluated in the consideration of alternatives which was required under the Illinois Administrative Code. *See* Petitioners' Comments, at 32-36 (cited in IEPA Response at 96-97); ConocoPhillips Br. at 40. These comments do not in any way suggest that IEPA was required under the CAA to impose a BACT limit on greenhouse gas emissions (and for CO_2 and methane emissions in particular) that are anticipated from the project. Even when a representative, speaking on behalf of Petitioners, at a public hearing on the CORE Project permit, specifically commented on an unnamed recently issued Supreme Court decision – presumably *Massachusetts v. EPA*, ___ U.S. ___, 127 S. Ct. 1438 (2007) (interpreting the CAA to authorize EPA to regulate CO and methane as air pollutants)) – the representative did not assert that *Massachusetts* effectively required a BACT emissions limit for CO_2 or methane under the CAA. *See* Hearing Transcript at 95 (Petition Ex. 3).

Rather than pointing to their own comments to demonstrate that the issue was properly preserved, Petitioners rely primarily on a statement IEPA made in its Responsiveness Summary which Petitioners argue indicates IEPA's "acknowledge[ment]" that this issue was raised. Petition at 25-26. (citing Responsiveness Summary, ¶ 55, at 24); Petitioners' Suppl. Reply at 28. Specifically, in response to public comments, IEPA stated that "[t]reating emissions of CO_2 and other greenhouse gases as regulated air pollutant[s] is effectively being requested by this comment." Petitioners assert that "[r]egardless of [the] context" in which the statement was made "IEPA was by its own admission on notice" that the legal issue "at the heart of Petitioners' argument" was that "CO_2 is a pollutant 'subject to regulation' for purposes of 42 U.S.C. § 7475(a)(4)." Petitioners' Suppl. Reply at 28. We disagree.

IEPA's response and the comment to which it relates, in context, were as follows:

[Comment:]	Emissions of greenhouse gases should be *monitored and measured*. *How much* methane and CO_2 would be released by uncontrolled pressure-relief devices? *How much* CO_2 will be released by the hydrogen plant?
[IEPA Response:]	Treating emissions of CO_2 and other greenhouse gases as regulated air pollutant[s], as is effectively being requested by this comment, would be inconsistent with current Illinois law. In particular, CO_2 is a compound that is present in the earth's atmosphere, occurring both naturally and as a product of fossil fuel combustion. CO_2 in the atmosphere has not been commonly regarded as an air "pollutant."[28] Indeed, the ecosphere depends upon the presence of CO_2 emissions to support green plants. Historically, CO_2 in the ambient atmosphere has not been considered harmful to humans or the environment.

[28] Although not inaccurate historically speaking, IEPA's statement regarding CO_2 ignores the Supreme Court's prounouncement in *Massachusetts v. EPA*, ___ U.S. ___, 127 S.Ct. 1538 (2007), which determined that CO_2 is an "air pollutant" under the CAA.

> At the same time, the Illinois EPA is working to develop requirements for *tracking and reporting* of emissions of CO_2 and perhaps other greenhouse gases in Illinois in the near future. This activity would be comprehensive, as it would address all significant stationary sources of these emissions. *Improved tracking of emissions* of such emissions [sic] is important in conjunction with Illinois' current initiative to reduce emissions of greenhouse gases.

Responsiveness Summary ¶ 55, at 24 (emphases added).

IEPA's summary of the comment, as well as its response, demonstrate that it understood the comment to relate to the monitoring and/or quantification of greenhouse gas emissions. This conclusion is consistent with the written comments submitted by Petitioners which essentially suggested that IEPA "should have reviewed the environmental and social impacts of emissions of CO_2 and Methane, which requires a quantification of these emissions." *See, e.g.*, Petitioners' Comments at 35 (Petition Ex. 2). It is also clear that IEPA understood the comment to relate to concerns regarding requirements under Illinois law and not the Clean Air Act. Again, this is consistent with the written comments Petitioners submitted. *Id.* at 32-33 (citing Ill. Admin. Code tit. 35, § 203.306). Nothing in the Responsiveness Summary suggests that IEPA understood Petitioners' comments or any other comments to be raising the issue of whether a BACT limit was required for greenhouse gas emissions under 42 U.S.C. § 7475. Nor is there any attempt by IEPA to respond to any greenhouse gas BACT-related issue. Under these circumstances, we cannot say this issue was properly preserved.[29]

Moreover, although the Board has on occasion exercised its discretion to review issues not properly preserved, we do not believe the exercise of our discretion is appropriate here. The presumed impetus behind this issue – the Supreme Court's decision in *Massachusetts v. EPA*, ___ U.S. ___, 127 S. Ct. 1438 (2007), which determined that CO_2 and methane are pollutants that EPA has the authority to regulate under the CAA, does not compel us to examine the improperly preserved CO_2 and methane BACT issue in this case.[30] *See Massachusetts*, 127 S. Ct.

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[29] As we pointed out in *Christian County*, we recently granted review and set a briefing schedule in another case, involving a PSD permit for the Bonanza power plant in Utah, where a greenhouse gas (CO_2) BACT issue was raised during the public comment period and therefore was preserved for appeal. *Christian County*, 13 E.A.D. at 460 (referring to *In re Deseret Power Elec. Coop.*, PSD Appeal No. 07-03 (Nov. 21, 2007) (Order Granting Review)).

[30] Petitioners do not and cannot assert that this issue was not reasonably ascertainable prior to the *Massachusetts* decision. The *Massachusetts* case was decided April 2, 2007. Petitioners submitted
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at 1460; *see also* Petition at 24-25 (relying heavily, if not solely, on the *Massachusetts* decision from the outset of its arguments on this issue). As we explained in *Christian County Generation*, the *Massachusetts* decision does not represent the final word with respect to the greenhouse gas BACT issue that Petitioners attempt to raise here. *Christian County*, 13 E.A.D. 449, 461 (EAB 2008). Although the Supreme Court's conclusion that EPA has the legal authority to regulate CO_2 and methane as air pollutants under the CAA is significant, it does not resolve all of the issues necessary to determine whether the PSD permit issued for the Wood River Refinery must contain a CO_2 or methane BACT emissions limit. *See Christian County*, 13 E.A.D. at 461. Specifically, as discussed in *Christian County Generation*, only air pollutants that are "subject to regulation" and emitted by the facility in amounts exceeding the applicable "significance level" must be controlled by a BACT limit. *Christian County*, 13 E.A.D. at 461; *see also* Petition at 26-36 (arguing that CO_2 and methane are "subject to regulation" and that *any* emission of them will exceed the significance level). "Whether CO_2 [or methane] is a pollutant 'subject to regulation' remains a matter of considerable dispute." *Christian County*, 13 E.A.D. at 461. If we were to decide that CO_2 (or methane) is a pollutant "subject to regulation" under the CAA, that determination would result in further delay on remand than would otherwise be required. Application of BACT to projected CO_2 and methane emissions at the Wood River Refinery would require ConocoPhillips to supplement its application and IEPA to conduct a case-specific BACT analysis for every relevant CO_2 and methane emissions unit. *See Christian County*, 13 E.A.D. at 454; *Prairie State II*, 13 E.A.D. at 12; *Cardinal*, 12 E.A.D. at 161 (explaining that BACT determinations are site-specific); *see also Three Mountain Power*, 10 E.A.D. at 47; *Knauf I*, 8 E.A.D. at 128-129; *In re CertainTeed Corp.*, 1 E.A.D. 743, 747 (Adm'r 1982). To allow Petitioners to raise this issue at this stage would frustrate the Agency's important policy of ensuring predictability, efficiency, and finality in the permitting process by allowing the permit issuer the opportunity to address objections to the permit in the first instance. *Accord Christian County*, 13 E.A.D. at 460.[31]

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comments at a hearing one month later, on May 8, 2007. Petitioners did not submit comments in writing until June 14, 2007. The public comment period did not close until June 15, 2007, more than two months *after* the *Massachusetts* decision was issued. Additionally, one of the Petitioners, Sierra Club, was a party to the Supreme Court case. Under these circumstances, the issue – whether a CO_2 or methane BACT limitation was required – was undeniably ascertainable. *See Christian County*, 13 E.A.D. 449, 454, 461 (EAB 2008) (determining that the CO_2 BACT issue was reasonably ascertainable in a permit proceeding in which the public comment period closed *before* the *Massachusetts* decision was issued, where the petitioner, also Sierra Club, was a party to *Massachusetts* and admitted during oral argument before the Board that it had contemplated the holding of *Massachusetts*).

[31] Moreover, as we recently noted, the Board has in at least two cases reached the merits of an issue notwithstanding uncertainty regarding whether the issue was properly preserved and, in doing so, referred to the importance or significance of the issue. *See Christian County*, 13 E.A.D. at 461 n.20 (citing *In re Campo Landfill Project*, 6 E.A.D. 505, 519 n.19 (EAB 1996); *In re Marine Shale Proces-*
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Based on the foregoing, we decline to exercise our discretion under 40 C.F.R. § 124.19(a) to review the greenhouse gas BACT issue in this case.

IV. *CONCLUSION*

For the reasons discussed above, we remand the PSD permit issued by the Illinois Protection Agency, as delegate of U.S. EPA Region 5, to ConocoPhillips for the proposed CORE Project at the Wood River Refinery. On remand, IEPA shall identify and explain the changed provisions to the permit in a manner consistent with this opinion and applicable regulations, and shall provide a proper BACT analysis for CO emissions from flaring, as well as its rationale for ensuring the enforceability of the CO BACT provisions. IEPA may supplement and, as necessary, reopen the record for public comment. Petitioners or other participants in any such subsequent IEPA proceeding who are not satisfied with IEPA's explanation of changes on remand may appeal the IEPA determination to this Board pursuant to 40 C.F.R. § 124.19. For the reasons stated above, we deny review of all other issues raised.

So ordered.

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sors, Inc., 5 E.A.D. 751, 763 n.11 (EAB 1995)). Neither of these cases, however, is analogous to the one before us. In *Campo Landfill*, we concluded that the improperly preserved issue was *not* reasonably ascertainable. *Campo Landfill*, 6 E.A.D. at 519 n.19 ("Although we conclude that the issue raised by petitioners was not 'reasonably ascertainable' during the pubic comment period, we note that, given the importance of the offset requirement, we can exercise our discretion to consider the issue on that basis as well."). In *Marine Shale*, we addressed the improperly preserved issues in large part because they had been raised by individuals other than the petitioner during the public comment period and the permitting authority had addressed many of those issues in responding to public comments. *Marine Shale*, 5 E.A.D. at 763 n.11 (holding that "given the importance of the issues involved and the fact that the [permit issuer] * * * proceeded to address many of these issues [in response to comments], the Board has decided that, regardless [] which issues were or were not raised during the comment period, the Board will examine the merits of [the] petition."). Thus, although this issue is indisputably important, the cases described above do not compel the Board's exercise of discretion to decide matters not properly preserved in this case.