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

IN THE MATTER OF:	)	
	)	
CITY OF SPRINGFIELD	)	PSD APPEAL NO. 06-07
APPLICATION NO.: 04110050	)	
I.D. NO.: 167120AAO	)	

NOTICE

To:
Eurika Durr, Clerk of the Board
Environmental Appeals Board
U.S. Environmental Protection Agency
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have today filed with the Clerk of the Environmental Appeals Board an original (1) and five (5) copies of the **RESPONSE SEEKING SUMMARY DISPOSITION, CERTIFIED INDEX AND AFFIDAVITS** of the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, a copy of which is herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Sally Carter

Sally Carter
Assistant Counsel
Division of Legal Counsel

Date: September 28, 2006

Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
217/782-5544

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of September 2006, I did send, by Federal Express, postage prepaid, one (1) original and five (5) copies of the following instrument entitled **RESPONSE SEEKING SUMMARY DISPOSITION, CERTIFIED INDEX AND AFFIDAVITS** to:

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

and a true and correct copy of the same foregoing instruments, by First Class Mail with postage thereon fully paid and deposited into the possession of the United States Postal Service to:

SEE ATTACHED SERVICE LIST

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Sally Carter

Sally Carter
Assistant Counsel
Division of Legal Counsel

Date: September 28, 2006

Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
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This filing is submitted on recycled paper.

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RESPONSE SEEKING SUMMARY DISPOSITION

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I.D. NO.: 167120AAO	)	
	)	

RESPONSE SEEKING SUMMARY DISPOSITION

NOW COMES the Respondent, the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), and files its Response Seeking Summary Disposition ("Response") to the Petition filed by Donald M. Craven, Attorney, on behalf of David Maulding, in the above-referenced cause. The Illinois EPA formally requests that the Environmental Appeals Board (hereinafter "EAB" or "Board") dismiss the Petition for Review for the reasons set forth within this Response.

I.

INTRODUCTION

The Petition for Review ("Petition") purports to challenge a Construction Permit - PSD Approval issued by the Illinois EPA on August 10, 2006, to the City of Springfield ("Springfield" or "CWLP") for the construction of a new coal-fired electrical generating unit (Dallman Unit 4) at its existing facility in Sangamon County, Illinois.

A. Relevant Case History.

CWLP, the municipal utility of the City of Springfield, submitted an initial application for the Construction Permit - PSD Approval to the Illinois EPA's Division of Air Pollution Control/Permit Section on November 18, 2004. *See,* Respondent's Exhibit A. Thereafter, CWLP gathered additional information responsive to an Illinois EPA Request for Additional

Information, resulting in several changes to the application tendered in CWLP's initial permit application. *See*, Respondent's Exhibit B. In June 2005, CWLP revised its permit application, and subsequently, continued to provide the Illinois EPA with additional supplemental information.[1] *See*, Respondent's Exhibit C.

In its application, CWLP proposed the construction of a new coal-fired electrical generating unit (Dallman 4) with a nominal capacity of 250 megawatts (gross) at its existing power plant located adjacent to Lake Springfield, Sangamon County, in an area currently designated attainment for all criteria pollutants. The application further proposed the construction of the necessary associated ancillary facilities. Proposed Dallman 4 will replace the two oldest units currently operating at the existing plant, Lakeside Units 7 and 8. The other three existing coal-fired generating units, Dallman 1, 2 and 3, will continue in service.

The fuel for the proposed boiler will be Illinois coal with a design equivalent SO_2 content of 7.0 pounds per million Btu. The coal-fired boiler will be equipped with multi-stage pollution controls to minimize and control emissions. The pollution controls will consist of low nitrogen oxides ("NO_x") burners on the boiler and good combustion practices and additional add-on controls consisting of selective catalytic reduction ("SCR") for control of NO_x, wet flue gas desulfurization ("WFGD" or "scrubber") for control of sulfur dioxide ("SO_2"), a fabric filter or baghouse for control of particulate matter ("PM"), and a wet electrostatic precipitator ("WESP") for control of sulfuric acid mist ("H_2SO_4") and condensable PM. Good combustion practices

[1] On September 20, 2005, the Springfield City Council voted to increase utility rates by 34.1 percent over the following two and one half years to fund the proposed construction of Dallman 4. *See,* Respondent's Exhibit D. An initial 9 percent rate hike on rates per year would start on November 1, 2005, with subsequent rate increases occurring April and October 2006, April and October 2007, and April 2008. *Id.* The approved rate increases were not a factor in the Illinois EPA's permitting decision. *See,* Respondent's Exhibit E, Response to Comment No. 57. Rather, such information is provided to give context to the climate surrounding the proposed Dallman 4 in the City of Springfield.

will also reduce emissions of NO_x, carbon monoxide ("CO"), and volatile organic material ("VOM"). The boilers could also be required to use sorbent injection to control mercury emissions, if the effective control of mercury cannot be assured through the "co-benefit" of the control devices for other pollutants. After passing through the add-on controls, boiler exhaust will be vented through a 450-foot high stack.

Other proposed emission units include a cooling tower; storage, processing and handling equipment for coal, limestone, ash and other materials; emergency diesel engines; and other roadways and parking areas.

After reviewing the materials submitted by CWLP, the Illinois EPA determined that the proposed project would comply with applicable state emissions standards, meet applicable federal emissions standards, including applicable New Source Performance Standards ("NSPS"), and utilize Best Available Control Technology ("BACT") as required by the federal Prevention of Significant Deterioration ("PSD") program. The BACT determinations are reflected in the control technology determinations and emissions limits included in the permit. Further, the Illinois EPA reviewed the air quality analysis submitted by CWLP and determined that the proposed project would not cause or contribute to a violation of the National Ambient Air Quality Standards ("NAAQS") due to its emissions of PM and CO, PSD pollutants for which the United States Environmental Protection Agency ("USEPA") has adopted air quality standards, on ambient air quality.

On February 4, 2006, the Illinois EPA made a draft permit available for public comment, together with a project summary. *See,* Respondent's Exhibits F and N. Public notice of the availability of the draft permit was placed in the State Journal Register on February 4th, 2004 and again on February 11th and 18th, 2006. A public hearing was held at Springfield Southeast High

School on the evening of March 22, 2006. A panel of representatives from the Illinois EPA was present to take comments and questions from the public regarding the permit application and the draft permit.[2] The comment period for the submittal of written comments on the draft permit was scheduled to close on April 21, 2006. However, due to public interest in this proposed project and CWLP's submittal of additional modeling since the initiation of the public comment period, the Illinois EPA extended the comment period to May 22, 2006.[3] During the public comment period, various members of the public, including environmental organizations such as Sierra Club submitted a variety of written comments to the Illinois EPA. Petitioner did not comment to the Illinois EPA on the draft permit.

On August 10, 2006, the City formally requested that the Illinois EPA incorporate additional requirements in the Construction Permit – PSD Approval that would memorialize commitments reached in an agreement between the Sierra Club and CWLP. The substance of the agreement addressed emissions, air quality and environmental impacts, which was negotiated, in part, to avoid a costly and prolonged appeal of the permit by Sierra Club. *See*, Respondent's Exhibits G and J. The Illinois EPA subsequently issued a Construction Permit - PSD Approval to CWLP authorizing construction of the coal-fired electrical generating unit, proposed Dallman 4 (Construction Permit No. 04110050). *See*, Respondent's Exhibit K. At the same time, the Illinois EPA also released the *Responsiveness Summary*. *See*, Respondent's Exhibit E.

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[2] A written transcript of the public hearing is available on the USEPA/Region V webpage. http://yosemite.epa.gov/r5/il_permt.nsf/f6a6e842b457fe2b86256ee80050d983/f997a517757940408525710b00430353/$FILE/CWLP%20Hearing%20Transcript.pdf

[3] http://yosemite.epa.gov/r5/il_permt.nsf/f6a6e842b457fe2b86256ee80050d983/f997a517757940408525710b00430353/$FILE/CWLP%20HRO%20Order%20Extension%20of%20Time.pdf

Prior to the permit applicant's August 10, 2006, request to the Illinois EPA, the Sierra Club and CWLP had introduced the agreement to the Springfield City Council as a proposed ordinance. In addition, both the Sierra Club and CWLP both participated in discussions with the Illinois EPA concerning the potential inclusion of the agreement in the Construction Permit – PSD Approval. *See,* Respondent's Exhibit H & I. The public disclosure of the private negotiations between the Sierra Club and CWLP, including the Springfield City Council's review of these negotiations and the related proposed ordinance, came under close public scrutiny in the local newspaper, *The State Journal Register*, and in the local news media. *See,* Respondent's Exhibit I & J. In addition, the various Springfield City Council meetings including the debates of this "contentious" ordinance were televised. *Id.* Concern focused on CWLP's estimates that the cost of the Sierra Club agreement would be 37 million dollars or 100 million dollars less than a prolonged appeal. *See*, Respondent's Exhibit K. On August 9, 2006, the Springfield City Council narrowly approved the ordinance in a six-to-five vote with the Mayor casting the deciding vote, split down political party lines. *See*, Respondent's Exhibit J.

On or about September 8, 2006, Petitioner filed a Petition for Review, challenging the Illinois EPA's decision to incorporate the terms of the voluntary agreement reached between Springfield and CWLP in the permit.

B. Statutory Background.

The federal PSD program principally regulates proposed new major sources and major modifications to existing sources in areas of the nation that are deemed attainment or unclassifiable with respect to the NAAQS, the exception is the emissions of pollutants from a project for which an area is designated nonattainment. *See,* 42 U.S.C. §7471. Among other things, the regulations require a pre-construction review of such proposed projects to ensure that

resulting emissions are not responsible for a violation of the NAAQS or applicable PSD ambient air quality increments, 40 C.F.R. §52.21(k), and a demonstration that subject sources will employ the BACT to minimize emissions for all PSD pollutants emitted in major or significant amounts. *See*, 40 C.F.R. §52.21(j).

The Illinois EPA administers the PSD program in Illinois pursuant to a delegation agreement with the USEPA/Region V. *See*, 46 *Fed. Reg.* 9,580 (January 29, 1981). As contemplated by the delegation agreement, the Illinois EPA conducts its PSD permit review in an "integrated" fashion with the Illinois construction permit program.[4] *Id.* For purposes related to this appeal, the Illinois EPA is a delegated state permit authority who "stands in the shoes" of the Administrator of the USEPA in implementing the federal PSD program. *See, Id.*; *In re Zion Energy, LLC,* 9 E.A.D. 701, 701-702, fn.1 (EAB 2001) ("*Zion Energy*"); *WSREC* at 695, fn. 4 ("For purposes of part 124, a delegate State stands in the shoes of the Regional Administrator [and must] follow the procedural requirements of part 124. . . .A permit issued by a delegate is still an 'EPA-issued permit' . . ."). The delegation agreement requires the Illinois EPA "to apply federal source review provisions and federal permit issuance procedures" to permits that implement PSD requirements. *See*, *WSREC* at 695. Relevant to this appeal, 40 CFR §124.19 provides for appeal to the Board of permits implementing the federal PSD program under 40 CFR § 52.21.

In taking final action on the PSD Approval, the Illinois EPA determined that CWLP's proposed coal-fired electricity generating boiler is a major source for PM, CO, and H_2SO_4 because potential emissions for each pollutant from the proposed facility exceed the significance

[4] The Illinois EPA explicitly recognizes that "nothing in this phrase can be reasonably read as abrogating the delegatee's responsibility to conduct its [PSD] review and make its decisions on the basis of the federal PSD program contained in 40 CFR § 52.21." *See, In re West Suburban Recycling and Energy Center, L.P.*, 6 E.A.D. 692, 707 (EAB 1996) ("*WSREC*").

threshold for that pollutant. The final permitting decision is also a reflection of Illinois' integrated permit system, which combined state and federal requirements into a single permit and eliminated the need for multiple construction permits.[5]

II.

STANDARD OF REVIEW

The petition should be dismissed in its entirety because it fails to adequately state the necessary issues required to obtain review on the merits. As a threshold matter, 40 CFR Part 124 only applies to Resource Conservation and Recovery Act ("RCRA"), Underground Injection Control ("UIC"), PSD and National Pollutant Discharge Elimination System ("NPDES") permits. *See*, 40 CFR §124.1. In addition, a petitioner must have standing and the issues raised in the petition must have been properly preserved for review. *See*, *In re Knauf Fiber Glass, GmbH,* 8 E.A.D. 121, 126 (EAB 1999) ("*Knauf*").

If these threshold requirements are satisfied, the EAB will consider whether to grant review of any of the issues raised in the petition. *Id.* In making this determination, the EAB is guided by the permit appeal regulations in 40 CFR § 124.19. Review is warranted only if a petitioner demonstrates that the challenged permit or permit condition involves a "finding of fact or conclusion of law which is clearly erroneous" or where it involves "an exercise of discretion or an important policy consideration." *See*, 40 C.F.R. §124.19(a)(1) and (2).

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[5] The cover page to the permit identifies the permit as a combined "Construction Permit – PSD Approval" and provides the Permittee with authorization to construct emission sources and air pollution control equipment based on the findings and the conditions contained within the permit. The findings and conditions in the permit make reference to both applicable state and federal requirements. The cover page further delineates that "[i]n conjunction with this permit, approval is given with respect to the federal regulations for Prevention of Significant Deterioration of Air Quality (PSD) for this project. . ." *See*, Respondent's Exhibit K; *see also*, *WSREC* at 695 ("Illinois law...provides for integrated permit review when a facility must obtain construction approval under various state and federal requirements.").

In construing these requirements, the EAB has consistently recognized that its review authority is exercised "sparingly" and that the scope of such review is carefully circumscribed. *See*, 45 *Fed. Reg.* 33, 290, 33, 412 (May 19, 1980); *accord, Knauf* at 126-127; *Zion Energy* at 705. It is a long-standing USEPA policy to favor final adjudication of most permitting decisions at the Regional [or appropriate state] level. *See, In re MCN Oil & Gas Company,* UIC Appeal No. 02-03, slip op. at 6 (EAB, September 4, 2002). In the absence of clear error or other compelling reason warranting review, the EAB frequently defers to the Regional or delegated permitting authorities. *See, In re Metcalf Energy,* PSD Appeals Nos. 01-07 and 01-08, slip op. at 12 (EAB, August 10, 2001) ("*Metcalf Energy*"), *aff'd. Santa Teresa Action Group v. Environmental Appeals Board*, No. 01-71611 (9th Cir. Nov. 21, 2002).

As a rule, only those issues that have been preserved for appeal may be raised with the EAB. Accordingly, a petitioner seeking review must demonstrate that the issues and/or arguments supporting its position were raised, either by the petitioner or another commenter, during the public comment period. *See*, 40 C.F.R. §124.19; *In re Kendall New Century Development*, 11 E.A.D. 40, 48 (EAB 2003) ("*Kendall*"); *In re Avon Custom Mixing Services, Inc.*, 10 E.A.D. 700, 704-705 (EAB 2002) ("*Avon Custom*"). Alternatively, a petitioner may plead that the issue for which review is sought was not "reasonably ascertainable" during the public comment period. *See, In re Encogen Cogeneration Facility,* 8 E.A.D. 244, 250, fn. 8 (EAB 1999) ("*Encogen*"), *citing In re Keystone Cogeneration Systems,* 3 E.A.D. 766 (EAB 1992). In either event, the burden rests with the petitioner. The EAB has stated that it will not "scour the record" but, rather, will expect the petitioner to prove that an issue has been properly raised. *Id.* at 250, fn. 10.

Other procedural requirements borne by a petitioner in permit appeals are equally demanding. The EAB demands that a petitioner, in identifying its objections to a permit, make its allegations both "specific and substantiated," especially where the objection involves the "technical judgments" of the permit authority. *See, Avon Custom* at 705. This burden ensures that the issues and/or arguments on appeal are well defined and actually represent a "bona fide" disagreement between the petitioner and the permit authority. If expert opinions or data are in conflict, the EAB examines the record of the proceeding to determine whether the permit authority has adequately considered the issue and whether its decision is "rational in light of all the information in the record, including the conflicting opinions and data." *See, In re Three Mountain Power, LLC,* 10 E.A.D. 39, 50 (EAB 2001) ("*Three Mountain*"), *citing, In re Steel Dynamics, Inc,* 9 E.A.D. 165, 180, fn. 16 (EAB 2000).

III.

ARGUMENTS

The Petitioner's arguments fail to satisfy the EAB's threshold jurisdictional requirements for obtaining review. The Board's jurisdiction is limited to the review of issues directly related to permit conditions that implement the federal PSD program. *See, In re Sutter Power Plant,* 8 E.A.D. 680, 690 (EAB 1999) ("*Sutter Power*"). As discussed below, the Petitioner's challenge to the permit stems from grounds wholly unrelated to the federal PSD program. In the event the EAB determines that the Petitioner's arguments demonstrate the requisite basis for jurisdiction, such review should nevertheless be declined. The Petitioner's arguments lack sufficient specificity or substance to warrant review, and fail to address the Illinois EPA's explanation

provided in the Administrative Record. In totality, Illinois EPA's permit decision reflects considered judgment and is supported by the Administrative Record.[6]

Permit Requirements that Have Their Origin in an Agreement Between the Permittee and the Sierra Club Do Not Warrant Review.

Petitioner denounces the Illinois EPA's decision to memorialize certain requirements derived from a voluntary agreement between the Permittee and the Sierra Club into the permit for this project. However, the main focus of the Petitioner's appeal does not appear to rest with the permit but, rather, resides with the separate agreement negotiated by the City of Springfield and the Sierra Club. The gist of Petitioner's argument focuses on the agreement and the role of the respective parties to the agreement, especially the City of Springfield. The Petition accuses city officials of making ill-informed decisions that unnecessarily enhanced the Sierra Club's leverage in its negotiations with CWLP and forced the City to take "desperate" measures to avoid an appeal. *See*, Petition at 4, 8 and 10. City officials are further accused, in essence, of practicing deceit by withholding critical information from the public. The petition summarizes these faults in this way:

> Thereafter, the City announced that it had already expended over $100 million on this project, despite the fact no permit had issued. The City also announced, to the surprise of the City Council and the tax- and rate-payers, that it had negotiated an agreement with the Sierra Club in order to avoid the possibility that the Sierra Club would appeal the issuance of a permit. The City argued that this project could not stand even the additional costs incurred by reason of the delay resulting from an appeal. The City argued it was compelled to come to an agreement with the Sierra Club in order to avoid any delays.

See, Petition at 4.

Once the Springfield City Council approved the agreement between the Sierra Club and CWLP, Petitioner claims that the Illinois EPA hastily included the agreement in the permit. *See*,

[6] The Certified Index of the Administrative Record, with attached affidavits, is also included in the Respondent's filing.

Petition at 7. In so doing, Petitioner alleges that the Illinois EPA inappropriately "delegated its regulatory function to a privately negotiated contract between the City and the Sierra Club."[7] *See*, Petition at 10. Aside from the Petitioner's perception of Springfield city politics, the Petitioner's arguments do not demonstrate that the contested requirements originate from or otherwise implicate the Illinois EPA's authority to implement the federal PSD program. Indeed, Petitioner's appeal can more aptly be construed as a collateral attack upon the City of Springfield's approval of its agreement with Sierra Club, rather than a purported challenge to the PSD permitting decision. Petitioner's arguments also do not contain evidence showing either clear error or an important public policy considerations warranting review.

A. The Issue Raised by Petitioner Is Outside of the Purview of the EAB's Jurisdiction to Review.

In practice, the EAB has not hesitated to carve out certain matters that are outside the scope of its review, including the review of permit appeals brought under 40 C.F.R. Part 124. The EAB's approach in any given case is shaped by those regulations that govern the permit and/or conditions of permits that are the subject of appeal. The Board's Practice Manual generally observes that jurisdiction is principally established "by regulation." *See*, The Environmental Appeals Board, *Practice Manual* at 2 (June 2004).[8] "The authority of the Board

[7] As an aside, Petitioner also argues that the Illinois EPA failed to explain why the draft permit did not satisfy regulatory requirements and thus, requests that the Board remand the permit for the purpose of allowing the immediate issuance of the permit "free from an[y] restrictions different from the draft permit." *See*, Petition at 10 and 12. In so doing, Petitioner ignores the changes to the Construction Permit – PSD Approval that were made in response to public comments separate from the terms of the voluntary agreement that is the subject of this appeal. *See*, Respondent's Exhibit K, pages 5-6 and 78-79. The Illinois EPA's consideration of public comments and the changes it facilitated to the final permit, as compared to the draft permit, is consistent with applicable requirements. *See*, 40 CFR Part 124.

[8] The narrative discussion from USEPA's original Part 124 rule-making, which formally created the EAB in February 1992, implies the same conclusion by referring to the Administrator's delegation of authority to the Board to review penalty and permit appeal cases "arising under" the specified environmental programs. *See*, 57 *Fed. Reg.* 5,320, 5,320-5,321, entitled *Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications* (February 13, 1992).

to review permit decisions is limited by the statutes, regulations, and delegations that authorize and provide standards for such review." *See, In re Carlton, Inc. N. Shore Power Plant,* 9 E.A.D. 690, 692 (EAB 2001) citing 57 *Fed. Reg.* 5,320 (Feb. 13, 1992).

In permit appeals brought under the PSD program, the EAB's review is governed by the PSD regulations. In short, issues that are encompassed by the PSD regulations are reviewable. Issues that fall outside of the purview of the regulations will not warrant the EAB's review even if they satisfy other procedural requirements for obtaining review. *See, Knauf* at 127. Stated more broadly, the EAB's permit review process for PSD permit appeals "is not an open forum for consideration of every environmental aspect of a proposed project, or even every issue that bears on air quality." *Id.* The EAB further explained that:

> Often permitting authorities that issue PSD decisions pursuant to a delegation agreement with EPA include requirements in a permit under both federal and state law. . . Including such provisions in a PSD permit is legitimate, it consolidates all relevant requirements in one document and obviates the need for separate federal, state and local permits. However, 'the Board will not assume jurisdiction over permit issues unrelated to the federal PSD program.' *In re West Suburban Recycling and Energy Ctr., L.P.,* 6 E.A.D. 692, 704 (EAB 1996); *see also In re American Ref-Fuel Co.,* 2 E.A.D. 280, 281 (Adm'r 1986) (matters not related to federally delegated PSD authority are not reviewable under 40 CFR § 124.19).

Id. at 162. Unless the permitting issue is an "explicit" requirement of, or "directly relates" to, the PSD program, the EAB has consistently refused to assume jurisdiction in the matter. *Id.* at 161-162; *see also, Metcalf Energy* slip op. at 43 (partial load emissions of certain toxic pollutants held not reviewable under PSD regulations); *Three Mountain* at 59-60 (permit condition relating to emission offsets was not covered under PSD program); *Encogen* at 259-260 (review denied of acid rain, noise and water-related issues); *In re Kawaihae Cogeneration Project,* 7 E.A.D. 107, 135 (EAB 1997)("*Kawaihae*") (non-PSD Title V portion of a permit denied review as a state

permit); *Sutter Power* at 689-690 (land use planning and emission reduction credits were not governed by PSD regulations stating 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 permit conditions implementing the PSD program").

The inquiry undertaken by the EAB in determining its jurisdiction looks to "how the issue is framed in the petition for review, such as the basis upon which relief is being sought." *See, Knauf* at 161-162. In this instance, it is obvious that Petitioner seeks recourse before the EAB of a matter that derives its primary basis separate from the Illinois EPA's authority to implement the federal PSD program.[9] The Petition is framed principally in terms of the Illinois EPA exceeding its authority and jurisdiction, and the allegations speak exclusively to certain examples that allegedly illustrate that the requirements are not reasonably related to the "discharges" associated with proposed Dallman 4.[10] *See*, Petition at 11. In furtherance of his

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[9] Petitioner states that the Illinois EPA failed to disclose its regulatory basis for the inclusion of such voluntary terms. *See,* Petition at page 10. The Illinois EPA clearly explained that the agreements' terms were distinct from limits set as BACT under the PSD program and were reasonably related to emissions, air quality and environmental impacts. Thus, the Illinois EPA explicitly acknowledged that the contested requirements were not carved out of the PSD program. While no state statute or regulation requires the Illinois EPA to disclose its regulatory basis in a construction permit and supporting documents, said requirements are consistent with the Illinois EPA's permitting authority as provided by Section 39(a) of the Illinois Environmental Protection Act and 35 Ill. Adm. §201.156. *See,* Exhibits E, K and L. The former stating that "[t]he Agency may impose such other conditions as may be necessary to accomplish the purposes of the Act, and as are not inconsistent with the regulations promulgated by the Board hereunder" and the latter stating that the "Agency may impose such conditions in a construction permit as may be necessary to accomplish the purposes of the Act, and as are not inconsistent with the regulations promulgated by the Board thereunder. Except as herein specified, nothing in this Chapter shall be deemed to limit the power of the Agency in this regard." One such purpose of the Illinois Environmental Protection Act is to "restore, maintain, and enhance the purity of the air of this State in order to protect health, welfare, property and the quality of life and to assure that no air contaminants are discharged into the atmosphere without being given the degree of treatment or control necessary to prevent pollution." *See,* 415 ILCS 5/8.

[10] Petitioner cites a Second Circuit decision in *US v. Mango* for the proposition that "permit conditions must be reasonably related to the discharge to be valid." *See*, Petition at 11, citing *US v. Mango*, 199 F. 3d 85 (2nd Cir. 1999) ("*Mango*"). Mango had been charged with violations of the Clean Water Act ("CWA") and, as part of his defense, Mango argued that the Secretary of Army imposed conditions not directly related to the discharge of dredged or fill material into the navigable waters of the United States.

arguments, Petitioner selectively cite excerpts from the permit relating to the Illinois EPA's authority to include such requirements, notably Finding 9 of the Construction Permit – PSD Approval:

> This permit also includes requirements for proposed Dallman Unit 4, the existing generating units operated by the City at its Springfield power plant, and the City that have their origin in an agreement between the City and the Sierra Club. (See Condition 1.6) The City initiated discussions with the Sierra Club and voluntarily entered into this agreement with the objective of avoiding an appeal of this permit, which would act to delay the effectiveness of the permit. These additional requirements would only take effect if this objective is achieved, i.e., the issuance of the permit is not appealed. These requirements go beyond applicable regulatory requirements and address matters that the Illinois EPA would not normally be able to address during permitting. However, these additional requirements are reasonably related to the emissions and the air quality and environmental impacts of the proposed project and the City's activities and may be appropriately included in this permit. In this regard, these requirements are similar to the ambitious commitments and stringent restrictions at time voluntary accepted by sources for certain proposed projects to keep the projects from being major, with the objective of avoiding the substantive and procedural requirements for permitting of a major project.

See, Petition at 10, citing Finding 9 of the Respondent's Exhibit K (with Petitioner's reference to "City" rather than the "Permittee" and emphasis included). Thus, not only is the Petition bare of any facts that would substantiate the EAB's jurisdiction but Petitioner unwittingly argues against its jurisdiction (i.e., the contested requirements are derived from a statutory and regulatory framework beyond the federal PSD program).

Consistent with Petitioner's "argument", the permit separates these additional voluntary requirements from required elements of the PSD Approval in the Construction Permit – PSD Approval and thus, enables the EAB to keep the issues separate for purposes of review under 40

In ruling that any conditions imposed in a CWA permit "for discharge of dredged or fill material into navigable waters must be reasonably related to such discharge, not just activity involving the discharge, relationship between discharge and condition may be either direct or indirect," the Second Circuit relied upon 33 USC § 1344 (a) authorizing the Secretary "to issue permits...for the discharge of dredged or fill material..." and the regulations indicating that any discharge conditions can be indirectly or directly related so long as they are reasonably related. *See*, *Mango* at 92-94. While the Second Circuit did not require discharge conditions to have a direct relationship to the discharge of dredge or fill material, this CWA opinion is not authoritative for the air permitting of a new coal-fired electrical generating unit. *See,* 40 CFR §52.21 and 35 Ill. Adm. Code § 201.156.

CFR § 124.19. *See, In re American Reformulated Fuel Co.*, 2 E.A.D. 280, 286 (Adm'r 1986). With the exception of Finding 9, and one condition, Condition 1.6, the contested provisions of the permit are located in a series of separate attachments to the permit, Attachment 1, Table 1-C and Attachment 5 to the permit. Condition 1.6, itself, serves only to incorporate these attachments and Finding 9 merely explains the basis for such requirements. Meanwhile, pursuant to the Illinois EPA's federal PSD authority, the BACT determinations made by the Illinois EPA for PM, CO and H_2SO_4 are identified by "the control technology determinations" made for these pollutants and are contained in the body of the permit. *See*, Respondent's Exhibit K, Finding 4(b). Thus, the organization of the permit reflects the separate authority underlying the contested voluntary requirements and the federally-derived PSD conditions.

Factual support also exists in the Administrative Record that the contested permit provisions were not included for purposes of PSD. The permit states that the contested voluntary requirements were derived from authority separate from the PSD portion of the permit. *See*, Respondent's Exhibit K, Finding 9 ("These requirements go beyond applicable regulatory requirements and address matters that the Illinois EPA would not normally be able to address during permitting."). This distinction was further highlighted by both the Illinois EPA's *Responsiveness Summary* and Calculation Sheet. *See*, Respondent's Exhibits E & L. In discussing the additional voluntary requirements, the Calculation Sheet explicitly explained that the voluntary requirements were separate from the PSD program and thus, did not constitute BACT:

> The commitments go beyond applicable regulatory requirements. In this regard, the limits pursuant to the parties' agreement are distinct from the emission limits set for BACT under the PSD program and are akin to a type of Supplemental Environmental Project voluntarily undertaken in resolution of possible legal action. Such limits are also similar to state-only requirements that are at times voluntarily accepted by sources for certain proposed projects to keep the projects from being major, with the objective of

> avoiding the substantive and procedural requirements for permitting as a major project. The requirements of this voluntary agreement are included as Attachment 5 to the construction permit.

See, Respondent's Exhibit L (emphasis added).

The record is clear. The Illinois EPA's authority for the additional voluntary permit requirements was not derived from any federal PSD authority. While the Illinois EPA's inclusion of the additional provisions in the permit following a request for such action by the Permit applicant is an action taken by the Illinois EPA under its general authority as the state pollution control authority for Illinois, this does not mean that this action was taken pursuant to authority under the PSD rules or reflects an exercise of specific discretionary authority with respect to the details of the agreement, as argued by the Petitioner. *See*, Respondent's Exhibit G. Under the recent circumstances where the Springfield City Council's review of the confidential agreement between CWLP and the Sierra Club came under close public scrutiny culminating in a narrowly approved city ordinance, continuing disagreement concerning the political process and the tactical decisions made by both CWLP and the members of the Springfield City Council in response to concerns over a likely Sierra Club-initiated lawsuit are inevitable. *See*, Respondent's Exhibit I & J.

The EAB has declined review under similar circumstances. For instance in *Knauf*, a variety of petitioners alleged that the PSD permit process was "tainted" by the political atmosphere of Shasta County. The *Knauf* petitioners charged that the Shasta County, California Air Quality Management District ("AQMD") could not possibly conduct an objective permit application review because its governing board was comprised of the same people that served on

the Shasta County Board of Supervisors that facilitated the company's location to the area.[11] The EAB responded that:

> We do not doubt that the Supervisors acted as advocates for this project. Very often, business and industrial development in a particular area only occurs with facilitation and support from local politicians. Local politicians are ultimately accountable for their actions through the electoral process. AQMD's permit process is not necessarily tainted simply because local politicians who may have been working in support of the Knauf project also provide policy oversight as the AQMD board.

Id. at 170.

Consistent with the construction permit in *Knauf*, local elected officials supported the construction of proposed Dallman 4 through rate hikes and, albeit controversial, through approval of various ordinances approving additional voluntary terms between CWLP and the Sierra Club in the hopes of thwarting an appeal. *See*, Respondent's Exhibits D & J. Beyond the inclusion of additional, voluntary and more stringent permit requirements, Petitioner does not indicate how such Springfield City Council support compromised the legitimacy of the PSD portion of the final permit.[12] As previously discussed, the Administrative Record documents that the additional voluntary terms are not derived from federal PSD authority. In this regard, nothing has been presented suggesting that members of the Springfield City Council were personally involved in the PSD review process. *See*, *Knauf* at 170.

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[11] The *Knauf* petitioners also complained that the AQMD governing board eliminated an AQMD rule requiring emission offsets pursuant to a state statute. The EAB concluded that it was without authority to review an action of the California legislature stating that "we will not review the AQMD board's decision to amend its local regulations when the subject of the amendment is beyond the scope of the federal PSD program, as is the case with AQMD's offset provision." *See*, *Knauf* at 170.

[12] In only one instance, Petitioner suggests that the additional voluntary terms would harm the environment rather than protect it. *See*, Petition at 11. In all other instances, the petition does not contend that the voluntary limits between the Sierra Club and CWLP are less stringent or are somehow harmful to the environment. In fact, the clause Petitioner contends would harm the environment, the prohibition against CWLP from selling mercury credits would, in actuality, benefit the environment. This is due to the stringent mercury limit specified by the agreement. If the agreement did not prohibit trading of credits, this would have been accompanied by fewer mercury reductions at other plants that would have relied on traded credits rather than actually reducing their emissions.

While in *Knauf,* the EAB acknowledged that there may be reviewable issues presented relating to the integrity of the permit process, the EAB noted that a basis for jurisdiction did not exist where "the specific complaints raised by the petitioners do not pertain to particular PSD requirements or determinations but involve challenges to certain political decisions per se." *See, Knauf* at 169, fn. 67. Consistent with the *Knauf* petitioners, Petitioner's challenge to CWLP's tactical decisions and the ultimate approval of the agreement by the Springfield City Council is not an appropriate challenge to the Illinois EPA's PSD decision.

Nor has review been granted by the EAB concerning the alleged loss of tactical advantage separate from any federal PSD permitting issues. For instance, in *Metcalf Energy*, petitioner argued that the permitting authority's decision to issue the Final Determination of Compliance despite holding the finalization of the PSD permit in abeyance until completion of Endangered Species Act consultation negatively impacted the petitioner's ability to raise funds to oppose the proposed facility. See, *Metcalf Energy* slip op. at 34-36.

The EAB responded that:

> [T]he fact that Petitioner perceives itself as having lost the opportunity to raise more funds to mount a campaign in opposition to the proposed facility cannot serve as a foundation for granting review of the permit determination. . . The alleged prejudice is nothing more than a purported loss of tactical advantage and in no way foreclosed Petitioner from exercising any rights conferred by law to participate in the proceeding.

Id. at 36. Consistent with the *Metcalf Energy* petitioner, Petitioner's concerns about the tactical decisions made by the permit applicant when faced with the possibility of a protracted appeal involving the Sierra Club are not appropriate matters for review by the EAB.

Because Petitioner is unable to articulate any basis showing that the contested requirements are derived from federal PSD authority, his professed concerns must be deemed to

reflect matters that necessarily fall outside of the purview of the EAB's jurisdiction. For these reasons, review of this issue should be denied.

B. The Petitioner's Arguments Lack Sufficient Specificity to Warrant Review; the Illinois EPA's Permit Decision Reflects Considered Judgment and Is Supported by the Administrative Record.

The Board should dismiss all of the issues raised in the petition because Petitioner has failed to articulate with sufficient specificity his objections to the permit at issue and to explain why the Illinois EPA's response is clearly erroneous or otherwise warrants review. *See, In re GMC Delco Remy*, 7 E.A.D. 136, 141, fn. 14 (EAB 1997). As review "should be only sparingly exercised" and "most permit conditions should be finally determined at the [permitting authority] level," the EAB should appropriately decline consideration of this issue. *See, Knauf* at 127, *citing,* 45 *Fed. Reg.* 33, 290, 33, 412 (May 19, 1980).

The relevant facts are straightforward. At some time during the pendency of the application, CWLP and the Sierra Club entered into confidential negotiations in an effort to avoid an appeal of the impending permit for proposed Dallman 4. On June 27, 2006, CWLP and the Sierra Club jointly met with the Illinois EPA to present a tentative agreement between themselves, subject to Springfield City Council approval, that included additional voluntary limits and requirements upon the proposed project and CWLP. *See*, Respondent's Exhibit H. One feature of the tentative agreement between CWLP and Sierra Club was inclusion of the agreement in the Construction Permit – PSD Approval. *Id.* Following this meeting, the Springfield City Council ultimately approved the agreement on the evening of August 9, 2006.[13] *See*, Respondent's Exhibits M & J. A copy of the approved agreement was formally provided to

[13] Petitioner erroneously states that the Illinois EPA "issued this permit the evening of August 10, 2006, after the Springfield City Council approved the agreement with the Sierra Club earlier that evening." *See*, Petition at 7. While the Illinois EPA issued the permit on August 10, 2006, the Springfield City Council approved the agreement the evening of August 9, 2006. *See*, Respondent's Exhibit J.

the Illinois EPA via courier on August 10, 2006; the Illinois EPA subsequently issued the Construction Permit – PSD Approval and *Responsiveness Summary* later that day. *See*, Respondent's Exhibits E, G & K. As a consequence of the June 27th meeting and subsequent communications between CWLP and the Sierra Club, the Illinois EPA had already considered the inclusion of this voluntary agreement in the Construction Permit – PSD Approval as recognized by Finding 9 of the permit:

> These requirements go beyond applicable regulatory requirements and address matters that the Illinois EPA would not normally be able to address during permitting. However, these additional requirements are reasonably related to the emissions and the air quality and environmental impacts of the proposed project and the Permittee's activities and may be appropriately included in this permit. In this regard, these requirements are similar to the ambitious commitments and stringent restrictions at time voluntary accepted by sources for certain proposed projects to keep the projects from being major, with the objective of avoiding the substantive and procedural requirements for permitting of a major project.

See, Respondent's Exhibit K; *see also,* Respondent's Exhibit E. In discussing the additional voluntary requirements, the Calculation Sheet explicitly recognized that:

> The commitments go beyond applicable regulatory requirements. In this regard, the limits pursuant to the parties' agreement are distinct from the emission limits set for BACT under the PSD program and are akin to a type of Supplemental Environmental Project voluntarily undertaken in resolution of possible legal action. Such limits are also similar to state-only requirements that are at times voluntarily accepted by sources for certain proposed projects to keep the projects from being major, with the objective of avoiding the substantive and procedural requirements for permitting as a major project. The requirements of this voluntary agreement are included as Attachment 5 to the construction permit.

See, Respondent's Exhibit L.[14]

First, Petitioner looks past the timing of CWLP's and Sierra Club's initial presentation of the additional commitments to the Illinois EPA by training his attention to the events of August 9th and 10th, 2006, to suggest that the Illinois EPA merely rubber-stamped the agreement without

[14] Petitioner completed a Freedom of Information Act review of the Administrative Record on August 31, 2006.

considering whether the additional voluntary terms were reasonably related to the air quality and environmental impacts associated with the construction of proposed Dallman 4. *See*, Petition at 7-10. Contrary to Petitioner's insinuations, the Springfield City Council's approval of the agreement on the evening of August 9, 2006 and the Illinois EPA's issuance of the Construction Permit – PSD Approval on August 10, 2006, does not imply that the Illinois EPA failed to consider whether the additional voluntary terms were reasonably related to the air quality and environmental impacts associated with the proposed project. In fact, the Administrative Record presents evidence to the contrary. *See*, Respondent's Exhibits G, K & E. ("However, these additional requirements are reasonably related to the emissions and the air quality and environmental impacts of the proposed project and the City's activities and may be appropriately included in this permit").[15] As such, the Administrative Record demonstrates Petitioner's argument is based on pure supposition. The EAB has declined review under similar circumstances.[16] *See, In re Tondu Energy Company,* 9 E.A.D. 710, 725 (EAB 2001) (allegations of "general error" will not satisfy threshold requirements); *see also, In re Hadson Power 14 –*

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[15] Again, the inclusion of such voluntary terms is consistent with the Illinois EPA's permitting authority as provided by Section 39 of the Illinois Environmental Protection Act and 35 Ill. Adm. §201.156, generally stating that the "Agency may impose such conditions in a construction permit as may be necessary to accomplish the purposes of the Act" and one articulated purpose of the Illinois Environmental Protection Act is to "restore, maintain, and enhance the purity of the air of this State in order to protect health, welfare, property and the quality of life and to assure that no air contaminants are discharged into the atmosphere without being given the degree of treatment or control necessary to prevent pollution." *See,* 415 ILCS 5/8.

[16] In a NPDES permitting decision by the State of Massachusetts, the EAB declined to review an allegation by the City of Marlborough that the EPA phosphorous limitations and conditions were an attempt by the EPA to arrive at an impermissible political compromise and that state permitting officials were inappropriately subjected to "intense political and bureaucratic pressure" by the EPA. Review was declined due to the City's failure to provide "addition evidence, explanation, or analysis in support of these assertions" consistent with prior Board precedence. *In re City of Marlborough, Massachusetts Easterly Wastewater Treatment Facility,* NPDES Appeal No. 04-12, slip op at 14 (EAB, March 11, 2005), *dismissed, City of Marlborough, et al v. Environmental Protection Agency,* No. 05-2022 (1st Cir. November 22, 2005).

Buena Vista, 4 E.A.D. 258, 275 (EAB 1992) ("speculation as to the possible applicability" of a permit provision will not suffice to establish review).

Next, the petition fails to raise any of its objections to the permit with sufficient specificity to satisfy the requirements of 40 CFR § 124.19. *See, In re SEI Birchwood, Inc.*, 5 E.A.D. 25 (EAB 1994). Except for a few statements, the issues have been raised only generically, which provide neither the Illinois EPA nor the Board with more than a generic ability to respond to the issues. *See, Encogen* at 251, fn. 12. The petition only makes a generalized statement concerning the Illinois EPA's statement in the Construction Permit – PSD Approval and the *Responsiveness Summary* that the "requirements go beyond applicable regulatory requirements," suggesting this raises a "very serious public policy issue". *See,* Petition at 8. However, the Petitioner does not provide the specific nature of that public policy issue. Given other matters touched upon in the petition, the public policy issues that appear to be of concern to the Petitioner, are actions by CWLP, the Sierra Club and the Springfield City Council, the Petitioner fails to acknowledge the Illinois EPA's reasoning elsewhere in the Administrative Record, particularly the Construction Permit – PSD Approval, the *Responsiveness Summary* and the Calculation Sheet, let alone demonstrate that the Illinois EPA's response is clearly erroneous or otherwise merits review. *See,* Petition at 8.

While Petitioner focuses on Illinois EPA's statement that "the requirements go beyond applicable regulatory requirements", Petitioner failed to respond to the further statement that "these additional requirements are reasonably related to the emissions and the air quality and environmental impacts of the proposed project and the City's activities and may be appropriately included in this permit." *See,* Respondent's Exhibits K & E. Nor did Petitioner address Illinois EPA's considered judgment that the inclusion of such requirements based upon an agreement

between CWLP and Sierra Club are analogous to the permitting commitments a source may voluntarily undertake to avoid being major or are akin to a Supplemental Environmental Project ("SEP") a source may voluntarily commit to perform to resolve a possible legal action. *See*, Respondent's Exhibits E, L & K. Apart from restating obvious statements in the *Responsiveness Summary*, Petitioner does not substantiate his argument. *Cf.*, *Avon Custom* at 708. The Board has previously held to warrant review, a petitioner's allegations must be substantiated and specific. *See, In re Hadson Power 14 - Buena Vista,* 4 E.A.D. 258 (EAB 1995). The Petitioner has failed to meet this requirement. Rather than substantiating his premise that the Illinois EPA's simple but clearly articulated position is flawed, Petitioner poses a series of questions concerning how various requirements relate to the permitting process. *See*, Petition at 8-9. Absent more substantiated argument, Petitioner should not be allowed to rely upon a mere litany of questions to demonstrate the Illinois EPA erred, particularly where the Illinois EPA's permitting decision is plainly supported by the Administrative Record. The mere allegation of error is not sufficient to support review. *See, In re Phelps Dodge Corp.,* 10 E.A.D. 460, 496 (EAB 2002) *citing In re Steel Dynamics, Inc.,* 9 E.A.D. 165, 235-236 (In order to justify review before the Board, the issues must be presented with sufficient specificity).

Finally, Petitioner broadly attacks the Illinois EPA's inclusion of the voluntary agreement as an inappropriate delegation of its regulatory function to a private agreement between CWLP and the Sierra Club, and apart from a generic reference to a "deviation from the normal scope of the permitting process constitutes a significant policy issue," Petitioner has not set forth any sufficiently reliable information supporting his argument. As discussed herein, Petitioner has failed to demonstrate how the Administrative Record failed to adequately respond to his concerns. Again, the Illinois EPA explained that the incorporation of such agreement was

analogous to other additional permitting commitments a source may voluntarily undertake to avoid being major or a SEP that a source may voluntarily commit to perform to avoid potential legal action.[17] *See,* Respondent's Exhibits E, L and K. "In order to establish that a review of a permit is warranted, §124.19 requires a petitioner to both state the objections to the permit that are being raised for review, and to explain why the permit decision . . . basis for the decision . . . is clearly erroneous or otherwise warrants review." *See, In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 769 (EAB 1997), citing *In re Puerto Rice Electric Power Authority*, 6 E.A.D. 253, 255 (EAB 1995). Accordingly, Petitioner has failed to demonstrate that the Illinois EPA's response is clearly erroneous or otherwise warrants review.

[17] Again, the inclusion of such voluntary terms is consistent with the Illinois EPA's permitting authority as provided by Section 39 of the Illinois Environmental Protection Act and 35 Ill. Adm. §201.156. *See, infra,* footnotes 9 and 15.