ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276 – (217) 782-3397
JAMES R. THOMPSON CENTER, 100 WEST RANDOLPH, SUITE 11-300, CHICAGO, IL 60601 – (312) 814-6026

ROD R. BLAGOJEVICH, GOVERNOR DOUGLAS P. SCOTT, DIRECTOR

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November 1, 2007

Ms. Eurika Durr
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1341 G Street NW, Suite 600
Washington, D.C. 2005

Re: ConocoPhillips Wood River Refinery
PSD Appeal No. 07-02

Dear Ms. Durr:

Please find enclosed the original (1) and five (5) copies of the **RESPONSE TO PETITION, CERTIFIED INDEX OF THE ADMINISTRATIVE RECORD** and **AFFIDAVITS** of the Respondent, Illinois Environmental Protection Agency, for filing with the United States Environmental Protection Agency's Environmental Appeals Board in regard to the above-captioned matter. The documents are being shipped by UPS for delivery on Friday, November 2, 2007.

If you require any additional information in this matter, you may reach me directly at (217) 782-5581.

Sincerely,

Sally A. Carter

Sally A. Carter
Assistant Counsel
Illinois EPA

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

IN THE MATTER OF:	)	
	)	
CONOCOPHILLIPS WOOD RIVER REFINERY	)	PSD APPEAL NO. 07-02
I.D. NO. 119090AAA	)	
PERMIT APPLICATION NO. 06050052	)	

NOTICE

PLEASE TAKE NOTICE that I have today sent, by UPS, to the Clerk of the Environmental Appeals Board a **RESPONSE TO PETITION, CERTIFIED INDEX OF THE ADMINISTRATIVE RECORD** and **AFFIDAVITS** on behalf of the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, a copy of which is herewith served upon each of the representatives identified in the attached service list.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Sally Carter
Assistant Counsel
Division of Legal Counsel

Date: November 1, 2007
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
217/782-5544

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

IN THE MATTER OF:	)	
	)	
CONOCOPHILLIPS WOOD RIVER REFINERY	)	PSD APPEAL NO. 07-02
I.D. NO. 119090AAA	)	
PERMIT APPLICATION NO. 06050052	)	

CERTIFIED INDEX OF ADMINISTRATIVE RECORD

1) Consent Decree entered in *United States of America and the States of Illinois, Louisiana and New Jersey, Commonwealth of Pennsylvania and the Northwest Clean Air Agency v. ConocoPhillips Company,* Civil Action No. H-05-0258 (S.D. Tex. December 5, 2005).

2) Notice of Public Hearing.

3) Project Summary for Construction Permit Applications from ConocoPhillips Wood River Refinery and ConocoPhillips Wood River Products Terminal for Coker and Refinery Expansion (CORE) Project.

4) DRAFT Construction Permit - NESHAP Source – NSPS Source - PSD Approval for the Terminal Expansion.

5) DRAFT Construction Permit - NESHAP Source – NSPS Source - PSD Approval for the Construction Permit Coker and Refinery Expansion (CORE) Project.

6) DRAFT Modified NPDES Permit to Discharge into Waters of the State.

7) Environmental Integrity Project FOIA Request for Documents related to ConocoPhillips Wood River Refinery in Roxana, Illinois, dated April 23, 2007.

8) Registration and Mailing List Cards from Public Hearing held on May 8, 2007.

9) Hearing Officer Draft Opening Statement.

10) Hearing Transcript from Public Hearing held on May 8, 2007.

11) Hearing Officer Order, dated June 6, 2007.

12) Responsiveness Summary for the Coker and Refinery Expansion Project at the Wood River Refinery in Roxana, Illinois and the Wood River Products Terminal in Hartford, Illinois, dated July 2007.

13) Final Construction Permit - NESHAP Source – NSPS Source - PSD Approval for the Terminal Expansion, dated July 19, 2007.

14) Final Construction Permit - NESHAP Source – NSPS Source - PSD Approval for the Construction Permit Coker and Refinery Expansion (CORE) Project, dated July 19, 2007.

15) Notice of Final Permit Decision letter, dated July 19, 2007.

Miscellaneous Modeling Documents

16) Miscellaneous Modeling Documents.

17) Miscellaneous Modeling Documents of Matt Will.

    a. ConocoPhillips Memo.

    b. ConocoPhillips Meeting Notes, dated April 11, 2006.

    c. ConocoPhillips Protocol.

    d. ConocoPhillips First Permit Application & AQA, dated July 10, 2006.

    e. ConocoPhillips Permit Application Revised, dated October 17, 2006.

    f. Meeting Notes, dated September 21, 2006.

    g. ConocoPhillips Permit Application (Tanks, etc.), dated November 21, 2006.

    h. ConocoPhillips AQA Revised, dated November 6, 2006.

    i. ConocoPhillips Revised Permit Application, dated January 31, 2007.

    j. ConocoPhillips Third AQ4, dated February 20, 2007.

    k. ConocoPhillips CORE Project AERMOD Input & Output Files, April 2007 – ESA.

    l. ConocoPhillips Personal Notes.

    m. ConocoPhillips Correspondence.

Public Comments

18) Comments of Prairie Rivers Network, dated May 8, 2007, and admitted at Public Hearing as Hearing Exhibit #6.

19) Comments of the Village of Hartford, dated May 4, 2007, and admitted at Public Hearing as Hearing Exhibit #7.

20) Comments of Congressman John M. Shimkus, dated May 8, 2007, and admitted at Public Hearing as Hearing Exhibit #8.

21) Comments of Senator Frank C. Watson, dated received May 8, 2007.

22) Facsimile from State Representative Thomas Holbrook, dated received May 8, 2007.

23) Comments of J. F Electric, Inc., dated received May 9, 2007.

24) Comments of State Representative Thomas Holbrook, dated received May 10, 2007.

25) Comments of Representative Dan Beiser, dated received May 16, 2007.

26) Comments of Joseph N. Brewster, dated received May 22, 2007.

27) Comments of Wayne Politsch, dated received June 7, 2007.

28) Comments of Carrie Hill, dated received June 11, 2007.

29) Comments of EIP, American Bottom Conservancy, Sierra Club, dated June 14, 2007.

30) Comments of Julia May, Environmental Consultant, dated June 14, 2007.

31) Comments of American Bottom Conservancy, Sierra Club, Kathy Andria, dated June 15, 2007.

32) Comments of EIP, Karla Raettig, dated June 15, 2007.

33) Comments of Sierra Club, dated June 15, 2007.

34) Comments of The Pembina Institute: Sustainable Energy Solutions, dated June 15, 2007.

35) Comments of American Bottom Conservancy, dated June 17, 2007.

36) Comments of Prairie Rivers Network, dated received June 18, 2007.

CORE Application File

37) Miscellaneous Undated Notes of Chris Romaine (Calculation Sheets).

38) Romaine Notes – ConocoPhillips IEPA Trinity, dated April 11, 2006.

39) Letter from Neal Sahni (Team Leader Environmental at ConocoPhillips) to Donald Sutton (Manager, Permit Section), Re: PSD and NANSR Construction Permit Application Coker and Refinery Expansion Project (CORE), dated received May 15, 2006.

40) Letter from Cathy Lanter (Environmental Engineer at ConocoPhillips) to Jason Schnepp (Illinois EPA, Air Pollution Control); Subject – PSD and Non-Attainment New Source Review (NANSR) Construction Permit Application CORE Project, dated received June 2, 2006.

41) Dispersion Modeling, dated received July 10, 2006.

42) Letter from Gina Nicholson (Health, Safety and Env. Manager at ConocoPhillips) to Donald Sutton (Manager, Permit Section, Illinois EPA); Subject – Modeling Addendum to Permit Application for CORE Project, dated received July 10, 2006.

43) Conditions for Flares in ConocoPhillips CORE Permit, dated August 18, 2006.

44) Authority to Construct Issued Pursuant to PSD Requirements at 40 CFR '52.21, dated September 2006.

45) Wood River Refinery CORE Meeting Agenda, dated September 21, 2006.

46) Romaine Note – Wood River Refinery-CORE Project Summary, dated September 21, 2006.

47) Letter from David Dunn (Environmental Director at ConocoPhillips) to Donald Sutton (Manager, Permit Section, Illinois EPA); Subject – Construction Permit Application for CORE Project, dated received September 25, 2006.

48) Letter from David Dunn (Environmental Director at ConocoPhillips) to Donald Sutton (Manager, Permit Section, Illinois EPA); Subject – Revised PSD and NANSR Construction Permit Application CORE Project, dated received October 18, 2006.

49) Letter from Donald Sutton (Manager, Permit Section, Illinois EPA) to Rachel Rinehart (USEPA, Region 5); Subject – ConocoPhillips Wood River Refinery – CORE Project Endangered Species Act Consultation, dated October 26, 2006.

50) Letter from Donald Sutton (Manager, Permit Section, Illinois EPA) to Constantine Blathras (USEPA, Region 5); Subject – ConocoPhillips Wood River Refinery – CORE Project, dated October 26, 2006.

51) Illinois EPA Division of Air Pollution Control Status of Open Section 31 Cases, last dated November 1, 2006.

52) Letter from David Dunn (Environmental Director at ConocoPhillips) to Donald Sutton (Manager, Permit Section, Illinois EPA); Subject – Modeling Addendum to Permit Revision for CORE Project, dated received November 6, 2006.

53) 40 CFR Part 63, Subpart EEEE, Organic Liquids Distribution (Non-Gasoline), printed December 8, 2006.

54) Letter from James Kavanaugh (Director, Air Pollution Control Program, Missouri Department of Natural Resources) to Martin Winger (Environmental, Health and Safety Manager, JW Aluminum); Subject – Emission Banking and Trading Request, faxed December 27, 2006.

55) Letter from David Dunn (Environmental Director at ConocoPhillips) to Edwin Bakowski (Acting Manager, Permit Section, Illinois EPA); Subject – Comments on Draft Construction Permit, dated received January 25, 2007.

56) Letter from David Dunn (Environmental Director at ConocoPhillips) to Edwin Bakowski (Acting Manager, Permit Section, Illinois EPA); Subject – PSD and NANSR Construction Permit Application – Revision No. 2, dated received February 6, 2007.

57) Letter from David Dunn (Environmental Director at ConocoPhillips) to Edwin Bakowski (Acting Manager, Permit Section, Illinois EPA); Subject – Comments on Draft Construction Permit dated February 23, 2007, dated received March 2, 2007.

58) Letter from David Dunn (Environmental Director at ConocoPhillips) to Edwin Bakowski (Acting Manager, Permit Section, Illinois EPA); Subject – Revised Modeling Analysis for CORE Project, dated received March 5, 2007.

59) Handwritten notes of Chris Romaine; Subject – "Conoco" Sources on Iceman, dated March 22, 2007.

60) Letter from David Dunn (Environmental Director at ConocoPhillips) to Rachel Rinehart (USEPA, Region 5); Subject – Endangered Species Act Deposition Modeling Results and Discussion for CORE Project WRB Refining (Report dated April 16, 2007), dated April 17, 2007.

61) Letter from David Dunn (Environmental Director at ConocoPhillips) to Rachel Rinehart (USEPA, Region 5); Subject – Endangered Species Act Deposition Modeling Results and Discussion for CORE Project, dated received April 19, 2007.

62) Letter from David Dunn (Environmental Director at ConocoPhillips) to Matt Will (Environmental Protection Specialist, Illinois EPA); Subject – Deposition Modeling Files for CORE Project Endangered Species Act Consultation, dated received April 20, 2007.

63) Letter from Donna Carvalho (ConocoPhillips) to Jason Schnepp (Env. Protection Engineer, Division of Air Pollution Control, Illinois EPA); Subject – Summary Document, dated received April 23, 2007.

64) Project Summary for Construction Permit *Applications* from ConocoPhillips Wood River Refinery and ConocoPhillips Wood River Products Terminal for a CORE Project and accompanying permits for Public Hearing dated May 8, 2007.

65) Notice of Additional Construction Permit Application Fees, dated June 1, 2007.

66) Letter from Pamela Blakley (Chief, Air Permits Section, Region 5) to Richard Nelson (Field Inspector, Rock Island Field Office, United States Fish & Wildlife Service), dated received July 2, 2007.

67) Draft of Revision from Chris Romaine & Jason Schnepp (Bureau of Air, Illinois EPA) to Cathy Lander (ConocoPhillips), faxed July 10, 2007.

68) Red Line Version of CORE Project Draft Construction Permit, undated.

69) Calculation Sheet, dated July 19, 2007.

70) Responsiveness Summary for Public Comments and Questions on the CORE Project at the Wood River Refinery in Roxana, Illinois and the Wood River Products Terminal in Hartford, Illinois, dated July 2007.

71) Permit File Copy of Construction Permit for ConocoPhillips Wood River Refinery, date issued July 19, 2007.

72) Miscellaneous Emails

Miscellaneous Documents including Reference Material

73) The Oil Sands Story: Upgrading & Fact Sheet printed from OilSandsDiscovery.com, undated.

74) Printout from Sierra Club Website on "Tar Sands" (Reference), undated.

75) Undated Reference Material – Standards of Performance for Petroleum Refineries – Proposed Rules.

76) Undated Reference Material – "Invest in the Future" (Article).

77) BP Carson Refinery & Climate Change Reference Material, printed from BP Website, Undated.

78) USEPA Guidance regarding Interim Guidance on NSR Questions Raised in Letters Dated September 9 and 24, 1992, dated November 19, 1992.

79) USEPA Guidance Letter regarding Union Carbide Chemicals & Plastics Company, Inc., PSD Applicability, dated September 17, 1993.

80) U.S. Department of Labor (osha.gov) "Hazard Recognition" (Undated) & "Corrosion of Piping in Hydroprocessing Units" (dated July 29, 1994).

81) Oil Sands Market Development Issues (Reference), dated March 14, 2001.

82) Miscellaneous permits of ConocoPhillips, dated from May 18, 2006 through September 6, 2001.

83) USEPA Guidance Letter regarding Motiva Enterprises, LLC, Low-Sulfur Gasoline Project – Related Emission Increase Methodology, dated July 25, 2001.

84) Trace Elements in West Virginia Coals "Nickel Summary Statistics", website last revised in March 2002.

85) ISA – "Selecting Hydrocracker Safety Integrity Levels: A Case Study" Article, dated October 1, 2003.

86) Bay Area Air Quality Management District Final Permit Evaluation and Statement of Basis for Major Facility Review Permit for Shell Martinez Refinery, Martinez, California, dated November 2003.

87) GRU – Future Power Plans – Frequently Asked Questions, dated 2004.

88) Carbon Dioxide Emissions data from 1990-2005 (Reference), dated 2005.

89) USEPA Guidance Letter regarding Request for PSD Applicability Determination from Murphy Oil, Superior, Wisconsin, dated February 24, 2005.

90) Financing Refinery Upgrades to Reduce Sulfur in Gasoline and Diesel Fuel (Conference), dated March 21-22, 2005.

91) Leveraging Process Knowledge to Maximize Reliability, dated 2006.

92) 4Q05 Results and Strategy Presentation Note, dated February 2006.

93) Letter from John Paul (RAPCA Supervisor) to USEPA - Air Docket, Docket ID # EPA-HQ-OAR-2002-0051, dated February 23, 2006.

94) Strip Mining for Oil in Endangered Forests (Reference), dated June 2006.

95) Oil Sands Feedstocks – 12th Diesel Engine Efficiency and Emissions Research Conference, dated August 20-24, 2006.

96) Arizona Clean Fuels Yuma, LLC – Permit # 40140 Notes (Reference), dated September 15, 2006.

97) Arizona Department of Environmental Quality – Air Quality Class I Permit, dated September 18, 2006.

98) Presentation to the Oil Sands Multi-Stakeholder Committee (Reference), dated September 26, 2006.

99) Green Car Congress "Report:Carbon-Neutral Oil Sands SCO Possible for an Extra $1.76 to $13.65 a Barrel," dated October 24, 2006.

100) "ConocoPhillips: The anti-Exxon" by Marc Gunther, dated April 11, 2007.

101) Athabasca Oil Sands, printed from Wikipedia, last modified June 21, 2007.

102) Electronic Code of Federal Regulations, last revised July 5, 2007.

STATE OF ILLINOIS
COUNTY OF SANGAMON

AFFIDAVIT

I, Matthew L.Will, being first duly sworn, depose and state that the following statements set forth in this instrument are true and correct, except as to matters therein stated to on information and belief and, as to such matters, the undersigned certifies that he believes the same to be true:

1. I am employed by the Illinois Environmental Protection Agency ("Illinois EPA") as a modeling analyst for the Division of Air Pollution Control's ("DAPC") Air Quality Planning Section located at 1021 North Grand Avenue East, Springfield, Illinois. I have been employed by the Illinois EPA since November 1, 1989.

2. As a modeling analyst for the Illinois EPA's Air Quality Planning Section, my primary responsibility is to conduct modeling in support of the Illinois State Implementation Plan ("SIP"), and secondarily to review air quality modeling analyses for permit or related applications. I have had the added responsibility for participating in federal and state-level consultation for threatened and endangered species in support of permitting actions. In this regard, I am familiar with the applicable requirements for SIP development modeling and modeling to support the Prevention of Significant Deterioration program.

3. As part of my responsibilities, I participated in the Illinois EPA's review of a permit application, Permit Application No. 06050052, involving ConocoPhillips Wood River Refinery and its proposed construction of the Coker and Refinery Expansion (CORE) project in Roxana, Illinois. Specifically, I reviewed modeling information submitted as part of the permit application.

4. Since becoming the assigned modeling analyst for this application, I have maintained responsibility for the modeling file and have overseen the management of all documents, as they were acquired, that related to the modeling portion of the permit application and the various analyses pertaining to the threatened and endangered species consultation. Such documents included materials pertaining to the modeling information submitted as part of the permit application, including documents relating to the threatened and endangered species consultation, written correspondence and other documents needed to evaluate all modeling information, and extraneous materials assembled by myself and other Illinois EPA personnel during the course of modeling review.

5. Based on my review of the modeling file for the ConocoPhillips CORE project, I have identified individual documents, including attachments thereto, and miscellaneous materials (some of which have been categorized by subject matter) that were directly or indirectly relied upon by the Illinois EPA in review of the modeling information submitted as part of the permit application, and the resulting permit issuance. In addition, I have identified individual documents, including attachments thereto that were copied to the Illinois EPA as a result of the threatened and endangered species consultations performed by the United States Fish and Wildlife Service and the Illinois Department of Natural Resources. I am thus able to certify that these documents are identified in the Administrative Record that has been prepared for the pending appeal before the Environmental Appeals Board.

Further affiant sayeth not.

Matthew L. Will

Matthew L. Will

Subscribed and sworn
To Before Me this 29th Day of October 2007

Brenda Boehner

STATE OF ILLINOIS
COUNTY OF SANGAMON

AFFIDAVIT

I, Jason Schnepp, being first duly sworn, depose and state that the following statements set forth in this instrument are true and correct, except as to matters therein stated to on information and belief and, as to such matters, the undersigned certifies that he believes the same to be true:

1. I am employed by the Illinois Environmental Protection Agency ("Illinois EPA") as a permit analyst for the Division of Air Pollution Control's ("DAPC") Air Permits Section located at 1021 North Grand Avenue East, Springfield, Illinois. I have been employed by the Illinois EPA since April 1994.

2. As a permit analyst for the Illinois EPA's Construction Unit, my primary job responsibility is to conduct reviews of construction permit applications for major sources of air pollution, primarily the refining industry. In this regard, I am familiar with the various air emission units and pollution control technologies associated with operations of refineries. I am also familiar with the applicable environmental regulatory and permitting requirements for refining projects, including, but not limited to, the Prevention of Significant Deterioration program. Among other things, I work closely with, and at the direction of, my supervisor, Mr. Christopher Romaine, Manager, Construction Unit, to prepare draft and final versions of construction permits. I am also involved in directing communications with permit applicants and interested persons in the permitting process, and researching, as necessary, available records and documents related to my review of permit applications and other associated work tasks.

3. As part of my responsibilities, I became the assigned permit analyst in the Illinois EPA's review of a permit application, Permit Application No. 06050052, involving ConocoPhillips Wood River Refinery and its proposed construction of the Coker and Refinery Expansion (CORE) project in Roxana, Illinois. I was assigned the permit application shortly after it was received by the Illinois EPA on May 15, 2006.

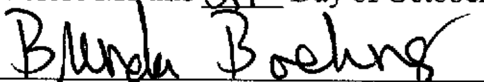
4. Since becoming the assigned permitting engineer for this application, I have maintained responsibility for the permitting file and have overseen the management of all documents, as they were acquired, that related to the permitting portion of the permit application and the various analyses pertaining to the threatened and endangered species consultation. Such documents included materials pertaining to threatened and endangered species consultation, written correspondence and other documents needed to evaluate all permitting information, and extraneous materials assembled by myself and other Illinois EPA personnel during the course of permitting review.

5. Based on my review of the permitting file for the CORE project, I have identified individual documents, including attachments thereto, and miscellaneous materials (some of which have been categorized by subject matter) that were directly or indirectly relied upon by the Illinois EPA in review of the permit application, and the resulting permit issuance. In addition, I have identified individual documents, including attachments thereto that were copied to the Illinois EPA as a result of the threatened and endangered species consultations performed by the United States Fish and Wildlife Service and the Illinois Department of Natural Resources. I am thus able to certify that these documents are identified in the Administrative Record that has been prepared for the pending appeal before the Environmental Appeals Board.

Further affiant sayeth not.

Jason Schnepp

Subscribed and sworn
To Before Me this 29th Day of October 2007



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

IN THE MATTER OF:	)	
	)	
CONOCOPHILLIPS WOOD RIVER REFINERY	)	PSD APPEAL NO. 07-02
I.D. NO. 119090AAA	)	
PERMIT APPLICATION NO. 06050052	)	

RESPONSE TO PETITION

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ENVIR. APPEALS BOARD

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

IN THE MATTER OF:	)	
	)	
CONOCOPHILLIPS WOOD RIVER REFINERY	)	PSD APPEAL NO. 07-02
I.D. NO. 119090AAA	)	
PERMIT APPLICATION NO. 06050052	)	
	)	

RESPONSE TO PETITION

NOW COMES the Respondent, the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), and files this Response to the Petition for Review ("Petition") filed by the Petitioners, NATURAL RESOURCES DEFENSE COUNCIL *et al.*, in the above-referenced cause. This Response to Petition addresses the issues raised in the Petition that were not addressed by the Illinois EPA's previously-filed Partial Response to Petition ("Partial Response"), and for the Environmental Appeals Board's (hereinafter "Board" or "EAB") ease of reference incorporates the Illinois EPA's Partial Response filed on September 26, 2007. More specifically this Response to Petition provides a complete response to the flaring and greenhouse gas issues. Further, this Response to Petition incorporates the Partial Response in which the Illinois EPA addressed the alleged failure of the Illinois EPA to serve the *Responsiveness Summary* with the notice of Permit issuance and the alleged failure of the Illinois EPA to specify, together with accompanying reasons, in the *Responsiveness Summary* the provisions of the draft permit that have changed in the final Permit. Based on the following analysis

and arguments, the Illinois EPA formally requests that the Board deny the Petition for Review for the reasons set forth within this Response.[1]

I.
INTRODUCTION

The Petition involves a Construction Permit – National Emission Standards for Hazardous Air Pollutants ("NESHAP") – New Source Performance Standards ("NSPS") – Prevention of Significant Deterioration ("PSD") Approval, Permit No. 06050052, (hereinafter "Permit") issued by the Illinois EPA to ConocoPhillips Wood River refinery for the construction of the Coker and Refinery Expansion ("CORE") project located at 900 South Central Avenue Roxana, Madison County, Illinois.[2]

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[1] Respondent respectfully suggests that oral argument is not appropriate given that it would not likely assist the Board in deciding the merits of the issues briefed in this Response to Petition particularly given that oral argument just occurred on the most significant issue, whether greenhouse gases are subject to BACT, in *In re Christian County Generation, LLC, PSD Appeal No. 07-01* ("Christian County"). *See,* The Environmental Appeals Board, *Practice Manual* at 9 (June 2004). With regard to the greenhouse gas issue, the same arguments are raised in the Christian County proceeding and in this action; the Illinois EPA's response is generally the same in both cases.

[2] The cover page to the permit identifies the permit as a combined "Construction Permit – NESHAP – NSPS – PSD Approval" and provides the Permittee with authorization to construct emission sources and air pollution control equipment based on the findings and subject to 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 the above referenced project. . ." *See, Petitioners' Exhibit 1; see also, In re West Suburban Recycling and Energy Center, L.P.*, 6 E.A.D. 692, 695 (EAB 1996) ("Illinois law...provides for integrated permit review when a facility must obtain construction approval under various state and federal requirements."). In fact, the EAB has been reluctant to review opacity limits in permits combining both state and federal PSD requirements. *See, In re Knauf Fiber Glass, GmbH,* 8 E.A.D. 121, 172 (Feb. 4, 1999) ("We deny review of the issue related to enforcement of opacity limits because this issue is not a requirement of the federal PSD program and the petitioner has not shown that the issue otherwise falls within the purview of the federal PSD program"). The EAB's approach in these cases is consistent with Board precedence providing that the EAB's review is governed by the PSD regulations. "The authority of the Board 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); *see also,* The Environmental Appeals Board, *Practice Manual* at 2 (June 2004).

A. **Relevant case history.**

ConocoPhillips is subject to a Consent Decree entered in *United States of America and the States of Illinois, Louisiana and New Jersey, Commonwealth of Pennsylvania and the Northwest Clean Air Agency v. ConocoPhillips Company,* Civil Action No. H-05-0258 (S.D. Tex. December 5, 2005)[3] (hereinafter "decree"); the decree subjects ConocoPhillips to various requirements to minimize emissions from flaring incidents at the Wood River refinery. ConocoPhillips subsequently submitted a permit application to the Illinois EPA's Division of Air Pollution Control/ Permit Section, on May 15, 2006 for a Coker and Refinery Expansion (CORE) project. A detailed description of the various changes to the refinery with the CORE project is provided in the application. *See generally, Respondent's Exhibit 6.*[4]

In general terms, the CORE Project would entail changes to the refinery to increase both the total amount of crude oil and the amount of heavier crude oil that the

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The Illinois EPA issued a related Construction Permit – NESHAP – NSPS – PSD Approval, Permit No. 06110049 to ConocoPhillips Company, for the construction of a terminal expansion at 2150 South Delmar Avenue, Hartford, Madison County, Illinois. ConocoPhillips Company proposed changes at its Wood River Products Terminal to handle increased product throughput associated with the CORE project. As the Petitioners did not appeal this related permit, the Respondent will not address the terminal expansion Construction Permit – NESHAP – NSPS – PSD Approval in this filing.

[3] This document may be found at http://www.epa.gov/compliance/resources/decrees/civil/caa/conocophillips-cd.pdf (last visited October 13, 2007).

[4] Certain portions of the Administrative Record relied upon in this Response to Petition are attached hereto and are identified throughout as "Respondent's Exhibits". Where the Respondent has referred to a part of the Administrative Record that was the Petitioners' Exhibit, it is denominated herein as "Petitioners' Exhibit". Finally, where the Illinois EPA has referenced a part of the Administrative Record previously submitted an exhibit by ConocoPhillips it is referred to as "ConocoPhillips' Exhibit". The Certified Index of the Administrative Record and attached affidavits accompany this filing.

refinery can process and in doing so, increase the supply of petroleum products to the Upper Midwest. *ConocoPhillips' Exhibit 2, page 2.* The more significant changes taking place to the refinery with the CORE project include the installation of a new Delayed Coking Unit to allow the processing of a higher volume of heavy crude; metallurgical upgrades and other equipment revisions to the Distilling Unit 1 to allow the handling of high acid, high sulfur heavy crudes; restart of the idled Distilling Unit 2 Lube Crude column to allow for additional crude unit processing capacity; metallurgical upgrades and other equipment revisions to the Fluid Catalytic Cracking Units to allow the handling of higher acid charge; restart of the Distilling West Catalytic Cracking Unit to allow processing of additional gas oil; installation of a new Hydrogen Plant; restart of the Lube Vacuum Fractionation Column and the Catalytic Feed Hydrotreater; the addition of sulfur processing capacity, amine treating and sour water stripping; and modifications to the wastewater treatment plant. *ConocoPhillips' Exhibit 2, pages 2-3*; *see also, Respondent's Exhibit 6.*

Of significance to this proceeding is the Delayed Coker Flare that will support the Delayed Coking Unit. 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. *ConocoPhillips' Exhibit 2, page 4*; *see also, Respondent's Exhibit 6.* In addition, a dedicated flare will be constructed to support the Hydrogen Plant. *ConocoPhillips' Exhibit 2, page 7*; *see also, Respondent's Exhibit 6.*

Following review of the application for ConocoPhillips' CORE project, the Illinois EPA prepared a draft permit for public comment. Public notices were placed in a local newspaper, the Alton Telegraph on March 24, 2007, and again on March 31 and

April 7, 2007. A public hearing was held at the Hartford Elementary School in Hartford, Illinois on May 8, 2007. The written comment period remained open until June 15, 2007.

The Illinois EPA fully considered comments prior to simultaneously issuing its Permit and accompanying *Responsiveness Summary* on July 19, 2007. *See, Petitioners' Exhibits 1 and 6.* On the same date, the Illinois EPA sent written notices, by first class mail to persons who participated at the public hearing or who submitted any public comments informing them that the Illinois EPA had issued the Permit. *See, Petitioners' Exhibit 4.* The notices informed participants that copies of the Permit and *Responsiveness Summary* could be obtained by contacting the Illinois EPA by telephone (including a toll-free telephone number), facsimile, or electronic mail, by visiting the local repositories established for the hearing (including the Illinois EPA headquarters, the Illinois EPA Collinsville Regional Office, or the Hartford Public Library), or by visiting the Illinois EPA's website. *Id.* In a fifty-page *Responsiveness Summary*, the Illinois EPA explained its reasons for any changes between the draft permit and the final Permit.

Petitioners filed their Petition with the Board on or about August 21, 2007. Based on information known to the Illinois EPA attorney in this case, the Illinois EPA has not received service of the Petition from Petitioners. However, a copy of the Petition and attached exhibits was received from the Board, together with the Board's initial order requesting a response to the Petition, on August 28, 2007.

B. <u>Statutory background.</u>

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 National Ambient Air Quality Standards ("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. 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). 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,* 46 Fed. Reg. 9,580 (January 29, 1981); *In re Zion Energy, LLC,* 9 E.A.D. 701, 701-702, fn.1 (EAB, 2001). A PSD permit issued by the Illinois EPA is subject to review by the EAB in accordance with 40 C.F.R. §124.19. *Id.*

In taking action on the PSD Approval, the Illinois EPA determined that ConocoPhillips' proposed CORE project is a major source for carbon monoxide ("CO"), because potential emissions for this pollutant from the proposed facility exceed the significance threshold for the pollutant.

II.

STANDARD OF REVIEW

The EAB's review of final PSD permit decisions is governed by the procedural requirements of 40 C.F.R. Part 124. Review is warranted where the permit decision 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." 40 C.F.R. §124.19(a)(1) and (2). 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, In re Knauf Fiber Glass, GmbH,* 8 E.A.D. 121, 126-127 (EAB 1999); *In re Zion Energy, LLC,* 9 E.A.D. 701, 705 (EAB 2001).

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. *In re Metcalf Energy,* PSD Appeals Nos. 01-07 and 01-08, slip op. at 12 (EAB, August 10, 2001). Nowhere is the EAB's deference more evident than in matters that are "quintessentially technical" in nature. *Id.*; *In re Three Mountain Power, LLC,* 10 E.A.D. 39, 54 (EAB 2001).

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); *In re Avon Custom Mixing Services, Inc.*, 10 E.A.D. 700, 704-705 (EAB 2002). Alternatively, a petitioner may plead that the issue for which review is sought was not "reasonably ascertainable" during the public comment period. *In re Encogen Cogeneration Facility,* 8 E.A.D. 244, 250, fn. 8 (EAB 1999), *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. *In re Encogen Facility*, 8 E.A.D. 244, 250 fn. 10 (EAB 1999).

Other procedural requirements borne by a petitioner in permit appeals are equally demanding. A petitioner may only rely upon those issues that were "reasonably ascertainable" and may only advance those arguments supporting a position that were "reasonably available" during the public comment period. *See,* 40 C.F.R. §124.13. Those issues and/or arguments must have been raised with "sufficient specificity" in order to ensure that the permit authority is afforded notice and an opportunity to cure the alleged deficiencies in the permit prior to issuance. *In re Kendall New Century Development,* 11 E.A.D. 40, 48 (EAB 2003).

In a similar vein, a petitioner is obligated to "explain why the permitting authority's response to those objections is clearly erroneous or otherwise merits review." *Zion Energy, L.L.C.,* 9 E.A.D. 701, 705 (EAB 2001), citing *In re Knauf Fiber Glass, GmbH,* 8 E.A.D. 127 (EAB 1999). A petitioner cannot simply repeat or restate the arguments presented during the public notice period but must, instead, supply information or technical grounds in its petition that demonstrate the merits of administrative review. *See, In re Steel Dynamics, Inc.,* 9 E.A.D. 165, 226 (EAB 2000), *citing In re Maui Electric Company,* 8 E.A.D. 1, 8 (EAB 1998).

The EAB also demands that a petitioner, in identifying its objections to a permit, make its allegations both "specific and substantiated," especially where the object involves the "technical judgments" of the permit authority. *See, In re Avon Custom Mixing Services, Inc.,* 10 E.A.D. 700, 705 (EAB 2002). 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." *In re Three Mountain Power, LLC,* 10 E.A.D. 39, 50 (EAB 2001), *citing, In re Steel Dynamics, Inc,* 9 E.A.D. 165, 180, fn. 16 (EAB 2000).

III.

ARGUMENTS

A. The Illinois EPA Made the *Responsiveness Summary* Available to the Public.

Petitioners make reference to 40 C.F.R. §124.17(a), requiring the permitting authority to issue a response to comments at the time of final permit decision, in support of its argument that the Illinois EPA failed to serve the *Responsiveness Summary* in conjunction with its notice of permit issuance. The Petitioners argue that the Illinois EPA's "failure to provide immediate access" to the *Responsiveness Summary* at the time of notice was a "significant procedural error" as it "could adversely affect appeal rights, which are time limited." *See, Petition at pages 5-6, citing, in part, In re Prairie State Generating Station,* 12 E.A.D. 176, 178 fn. 4 (EAB 2005) (hereinafter "*Prairie State I*").[5] In conjunction with the argument, Petitioners assert that the first Prairie State decision "strongly implied but [did] not directly reach. . . that the [*Responsiveness Summary*] is

[5] In fact, the ConocoPhillips' notice informed those participants in the public comment period that the documents could not only be obtained by contacting the Illinois EPA by telephone (including a toll-free telephone number), facsimile, mail or electronic mail, but by visiting the local repositories established for the hearing (including the Illinois EPA headquarters, the Illinois EPA Collinsville Regional Office, or the Hartford Public Library), or by visiting the Illinois EPA's website. *See, Petitioners' Exhibit 4.*

indispensable to a determination whether to appeal, and hence must be provided simultaneously with the notice of permit issuance." *See, Petition at page 6, referencing Prairie State I.* With regard to this argument, Petitioners' line of reasoning is specious.

At the outset, Petitioners construe 40 C.F.R. §124.17(a) and the *Prairie State I* decision to imply that the *Responsiveness Summary* should have been mailed to participants. In doing so, Petitioners have paid no heed to the clear mandate of 40 C.F.R. § 124.17(c) merely requiring that the "response to comments [shall] be [made] available to the public".[6] Section 124.17(c) does not require that the permitting authority mail copies of the *Responsiveness Summary* to all participants, but merely requires that the response to comments be "available" to the public. *Id.* Similarly, Section 124.15(a) does not ostensibly compel a permit authority to mail or serve a copy of the actual final permit to satisfy the "notice" requirement promulgated therein. Such distinctions are not only suggested by the plain language of the rule, but are equally compelling as a matter of common sense. Had the Board deemed it necessary for a permitting authority to satisfy these basic "notice" requirements by physically placing both the final permit decision and the response to comments in the United States mail, it conceivably would have promulgated rules in Part 124 to that clear effect.

At least one Board decision aptly illustrates this argument. While in the context of a discussion of 40 C.F.R. §§124.15 and 124.19, the *Hillman* decision reveals the Board's reluctance to impose additional requirements not articulated or even

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[6] While arguing that the Illinois EPA neglected to "physically provide" the *Responsiveness Summary* in its mailing of the notice of permit issuance in accordance with 40 C.F.R. §124.17(a), Petitioners failed to raise the issue whether the Illinois EPA's notice complied with the requirements of 40 C.F.R. §124.15. As such, the Respondent will not directly address the issue in this filing. *Accord, Prairie State I* at 178, fn. 4.

contemplated by Section 124.15. Instead, the Board opted for some form of personal notification "reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *See, In re Hillman Power, LLC,* PSD Appeal Nos. 02-04, 02-05, and 02-06, slip opinion at 6 (EAB, May 24, 2002) (hereinafter "*Hillman*") (Order Directing Service of PSD Permit Decision on Parties that Filed Written Comments on Draft PSD Permit Decision, Denying Motions to Dismiss, and Directing Briefing on Merits) *citing, Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950) (*citing, Milliken v. Meyer,* 311 U.S. 457 (1940)).

Rather than acknowledging the Board's previous exercise of restraint, the Petitioners selectively isolate a portion of a footnote excerpted from *Prairie State I.* In that ruling, the Board admittedly cautioned the Illinois EPA regarding the extent to which it must provide notice to participants of its final deliberations in future permitting matters. The entire context of the footnote is particularly relevant to the instant notice, which was developed to address the Board's guidance in this decision. In its entirety, the footnote provided that:

> Although Petitioners also use January 21 as the date of issuance for the responsiveness summary, the Board questions whether IEPA's action of simply directing those who participated during the comment period to IEPA's website was sufficient to make the responsiveness summary "available to the public" as required by 40 C.F.R.124.17(c). IEPA's actions in this regard presupposes that all persons who comment on permits will have access to the internet. In other analogous circumstances, we have found this not to be a reasonable assumption. *See In re Hillman Power Co. L.L.C.,* PSD Appeal Nos. 02-04, 02-05, and 02-06 (Order Directing Service of PSD Permit Decision on Parties that Filed Written Comments on Draft PSD Permit Decision, Denying Motions to Dismiss, and Directing Briefing on Merits) at 4 (EAB, May 24, 2002) ("Indeed, it is not reasonable to assume that all persons who comment on permits will even have access to the internet."). Moreover, merely notifying commenters by mail that a permit had been issued and directing them to a web site to view copies of the permit itself, as IEPA apparently did here, may not satisfy the obligation under 40 C.F.R. § 124.15 to notify "each person who submitted written comments or

> requested notice of the permit decision." *See In re Hillman Power Co., L.L.C., supra,* interlocutory order at 3-6 (EAB, May 24, 2002) (finding mere posting on permitting authorities' website to be insufficient to satisfy obligation under 40 C.F.R. § 124.15 to notify commenters of the permit decision), available electronically at http://www.epa.gov/eab/psd-int.loc.ords/hillman.pdf. While it is true that IEPA did give written notice that a permit decision had been issued, a commenter would have no way of determining whether to petition for review or the basis for any such petition until he or she had the opportunity to review the actual permit decision. One consideration raised in *Hillman* was whether merely posting information on a website could adversely affect appeal rights, which are time-limited. However, as these issues were not raised in the present matter, we do not address these issues here.

See, Prairie State I at 178, fn. 4.

For purposes of both 40 C.F.R. §124.15 and 40 C.F.R. §124.17, the Board's footnote emphasized the need to make material more readily available to the public in the future, beyond a written notice directing individuals to the Illinois EPA's website because it was not necessarily reasonable to assume that everyone has internet access. *Id. citing Hillman.* In light of the comments articulated by the Board in the above-referenced footnote, the Illinois EPA reflected further on the *Hillman* decision prior to notifying public participants of its final permitting decisions. As previously alluded to, in Hillman, the Michigan Department of Environmental Quality ("MDEQ") provided notice to the Michigan Environmental Council ("MEC") of its final permitting decision by merely "posting" the decision on MDEQ's website; no written notice of the posting on the website was ever provided to MEC. *See, Hillman* slip opinion at 2. While the Board agreed with MDEQ that 40 C.F.R. §124.15 "did not specify the means by which notice should be given of final permit decisions", the Board found fault with the MDEQ's notice as it could not be assumed that MEC received notice on the date of posting particularly since everyone does not have internet access. *Id.* at 4. Equally important was the Board's recognition that commenters would have no reason to know when the permit was

issued and thus, when to check the agency's web page. *Id.* "This means of 'serving' improperly puts the onus on the interested party to continually check for permit agency developments, lest some portion of the party's time to appeal by lost." *Id.* Again, the Board found that the lack of specificity in the Part 124 regulations did not suggest that any form of "service" would be sufficient but must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 5-6 citing *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950) (citing *Milliken v. Meyer,* 311 U.S. 457 (1940)). The Board ultimately concluded that MEC "should have been mailed a copy of the final permit decision or provided some other form of personal notification."[7] *Id.* at 6. The Board's ruling reveals a spectrum of options that a permit authority, in its discretion, may turn to in providing notice of its final deliberations. As the Board recognized not just "any notice" is sufficient to fulfill an obligation to alert participants of final agency decisions, however, it does not mean that Petitioners' notion, i.e., the mailing of the *Responsiveness Summary*, is the only option.

After reviewing the Board's guidance in *Prairie State I*, the Illinois EPA subsequently declined to pursue the approach of mailing to each commenter the typically-voluminous final permitting decisions and Responsiveness Summaries that accompany its

[7] Although, the Board ultimately directed MDEQ to notify through mail or personal service any party similarly situated to MEC, such order was in response to the "less-than-thorough way in which MDEQ attempted to discharge its vital public participation responsibilities." *See, Hillman* slip opinion at 6-7. The Board's action reveals its decision to sanction MDEQ rather than establishing an absolute rule that effectively removes any latitude by the permit authority to satisfy its notice obligations. Moreover, as illustrated above, the same cannot be said of the Illinois EPA as the Hillman MDEQ due to the former's thorough consideration of the Part 124 regulations and related Board precedent in reevaluating the appropriate manner to apprise all participants in the public comment period of its final permitting decision and to make the *Responsiveness Summary* available to the public.

Construction Permits – PSD Approvals.[8] Neither the Part 124 regulations or Board caselaw dictate such a costly and paper-consumptive approach by permitting authorities.[9] However, the Illinois EPA did ultimately choose to modify the earlier notice that was addressed by the *Prairie State I* decision.[10] For instance, the written notice in *Prairie State I* merely directed participants in the public comment period to the Illinois EPA's website to retrieve copies of the final permit decision and the *Responsiveness Summary*. Subsequent written notices informed participants that copies of the final permit decision and *Responsiveness Summary* could be obtained by contacting the Illinois EPA by telephone (including a toll-free telephone number), facsimile or electronic mail, by

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[8] For instance, the instant Construction Permit – NESHAP – NSPS – PSD Approval for the CORE project and terminal expansion and *Responsiveness Summary* combined for a total of approximately 200 pages.

[9] Petitioners suggestion that commenters could be provided with an option to notify the permitting authority of their preference to receive the *Responsiveness Summary* "via the permitting authority's web site" runs counter to the concerns articulated by the Board in *Prairie State I*, (*i.e.*, "presupposes that all persons who comment on permits will have access to the internet"). Moreover, such a requirement would hardly minimize the administrative burden to the permitting authority, which would now be required to administer a yet-to-be-created web site for the purpose of determining whether particular commenters submitted an electronic mail request for a copy of the *Responsiveness Summary*.

[10] In fact, the EAB encouraged further discussion between the parties after its issuance of the *Prairie State I* decision. *See*, *Prairie State I* at 181, fn. 6. In accordance with the EAB's order, the Illinois EPA met with representatives of the Sierra Club, American Bottom Conservancy and other Petitioners in the midst of the Prairie State proceedings. This discussion facilitated changes to the Prairie State notice issued on April 28, 2005, as compared to the notice issued on January 21, 2005. *See, Respondent's Exhibit 1; compare also, Respondent's Exhibits 2 and 3.* Consistent with the recent ConocoPhillips notice, the notice issued in the second Prairie State proceeding informed commenters that copies of the final permit decision and *Responsiveness Summary* could be obtained by contacting the Illinois EPA by phone (including a toll-free number), facsimile or electronic mail, by visiting the local repositories, or by visiting the Illinois EPA's website. *Compare, Respondent's Exhibits 3 and 4.* The Petitioners did not challenge the notice underlying the second Prairie State decision as legally deficient. *See, In re Prairie State Generating Company, LLC,* PSD Appeal No. 05-05, *Petition for Review,* dated June 8, 2005.

visiting the local repository established for the hearing, or by visiting the Illinois EPA's website. *Compare, Respondent's Exhibits 3 and 4.*

The Illinois EPA nonetheless recognized the additional time associated with an individual requesting a copy of the final permit and the *Responsiveness Summary* through the mail.[11] In revising the notice, the Illinois EPA sought to maximize access by different individuals depending on their particular circumstances while at the same time minimizing the delay for any individual. For instance, the Illinois EPA's written notice not only provided the Illinois EPA's website, the appropriate staff contact's telephone and facsimile numbers and electronic mail address, but utilized a toll-free telephone number for those individuals that may not have access to long-distance telephone service or may not wish to incur the additional cost of a long-distance telephone call. In addition, consistent with the public comment period, the Illinois EPA made the final permitting decision and *Responsiveness Summary* available at the local repository established for hearing, the local public library. For these reasons, the Illinois EPA more than satisfied the standard of 124.17(c), "the response to comments shall be available to the public". In light of the clear mandate provided by 40 C.F.R. §124.17(c) and because Petitioners have failed to articulate a basis in support of its position that 40 C.F.R. § 124.17(a) requires the response to comments be contemporaneously served with the notice of permit issuance to commenters, review of this issue should be denied.

[11] Petitioners claim it requested a mailed copy of the *Responsiveness Summary* the same day it discovered the issuance of the final permit through the Illinois EPA's website. *See, Petition at page 6; see also, Petitioners' Exhibit 5.* While Petitioners purportedly did not receive a copy of the *Responsiveness Summary* until a week later, the *Responsiveness Summary* was available to the American Bottom Conservancy on the same web site it learned of the Illinois EPA's final permitting decision. *See,* www.epa.gov/region5/air/permits/ilonline.htm (refer to All Permit Records, PSD, New); *see also, Respondent's Exhibit 5.* American Bottom Conservancy's hardship was self-imposed; Petitioner deliberately chose not to avail itself of the *Responsiveness Summary* available to it on the Illinois EPA's website.

B. The Illinois EPA Specified the Changes and the Reasons for the Changes Between the Draft Permit and the Final Permit

In the second argument of their Petition, Petitioners assert that the Illinois EPA committed legal error by not specifying the changes and the reasons for the changes between the draft permit and the final Permit, focusing particular attention on the Illinois EPA's inclusion of additional work practices to minimize flaring emissions in the final Permit. *See, Petition at pages 7-11.* In support of the argument, Petitioners cite to the Part 124 requirements directing the Regional Administrator (or delegated permit authority) to "specify which provisions, if any, of the draft permit have been changed in the final permit decision and the reason for the change." *Id., citing* 40 C.F.R. §124.17(a). The Petitioners also cite to *In re Indeck-Elwood, LLC,* PSD Appeal No. 03-04, (EAB, September 27, 2006), 13 E.A.D. ___, and *In re City of Marlborough, Mass. Easterly Wastewater Treatment Facility,* 12 E.A.D. 235 (EAB 2005) to augment their request urging the Board to vacate the permitting decision and remand the matter to the Illinois EPA.

The *Responsiveness Summary* provides ample support for the Board to conclude that no legal error resulted from the Illinois EPA's issuance of the *Responsiveness Summary.* Contrary to Petitioners' arguments, the changes to the draft permit to incorporate additional work practices to minimize emissions from the flares at the Delayed Coker Unit and the Hydrogen Plant were clearly and appropriately articulated by the Illinois EPA and the reason for the changes were also fully specified.

The *Responsiveness Summary* documents that BACT for CO was determined based on work practices to minimize CO emissions consistent with the approach generally taken in the draft permit. *Petitioners' Exhibit 6, Response to Comment No. 25.*

In response to public comments, additional work practices were included in the final Permit. These work practices consisted of requiring continuous monitoring (including monitoring related to fuel usage for the pilot and venting of purge gas to the flare); ensuring the existence of redundant waste gas compressor capacity; sampling and analysis of waste gas; managing depressurization during unit shutdowns; preparing and implementing a Flare Minimization Plan investigating flaring incidents; performing root cause analyses; and accompanying recordkeeping and reporting requirements.[12] *Petitioners' Exhibit 6, Response to Comment Nos. 25, 28, 64, 65, 68, 70, 71, 72, 73, 78, and 84.*

The *Responsiveness Summary* made clear that proper flare operation is best addressed by particular work practices that prevent and minimize flaring rather than an emission limit that implicity requires proper flare operation. *Petitioners' Exhibit 6, Response to Comment No. 24.* As the discussion in the *Responsiveness Summary* makes evident, this decision was grounded, in part, on the Illinois EPA's review of similar requirements at other refineries, particularly, the Shell refinery in Martinez, California subject to the Bay Area Air Quality Management District ("BAAQMD") regulations. *Petitioners' Exhibit 6, Response to Comment Nos. 66, 68 and 70; see also, Petitioners' Exhibit 6, Response to Comment Nos. 65 and 71* (requiring sufficient redundant waste gas compressor capacity at the Delayed Coking Unit based on its successful use at the Shell Martinez refinery; however, not requiring the same for the Hydrogen Plant flare due to the unsuitability of its waste gas for recovery). The Illinois EPA further drew on the

[12] While Petitioners list seven changes to the draft permit, such "list" pertains to one subject, categorically all pertain to various work practices to minimize emissions from the flares at the Delayed Coker Unit and the Hydrogen Plant. *See, Petition at pages 7-8.*

BAAQMD requirements to minimize the possibility of flaring emissions at the Delayed Coking Unit flare and the Hydrogen Plant flare including requiring the "preparation of and operation pursuant to a Flare Minimization Plan and performance of 'root cause analyses' for significant flaring incidents". *Petitioners' Exhibit 6, Response to Comment Nos. 65, 68 and 78; see also, Petitioners' Exhibit 1, Unit-Specific Condition 4.7.5(a)(vi).*

While the Illinois EPA generally chose to follow the requirements of BAAQMD's Flare Monitoring Rule, the Illinois EPA opted not to prescribe the use of certain monitoring techniques and the means by which monitoring must be conducted. *Petitioners' Exhibit 6, Response to Comment No. 74; see also, Petitioners' Exhibit 6, Response to Comment No. 79* (explaining that the use of specific monitoring devices would ultimately be addressed in the processing of a revised Title V application). As articulated by the *Responsiveness Summary,* this decision was based on the low level of flaring expected at the ConocoPhillips refinery compared to the higher level of flaring at the California refineries that led to the promulgation of the BAAQMD Flare Monitoring rules. *Id.* Other differences between the issued Permit and the BAAQMD requirements were accounted for by the Illinois EPA. For instance, the Illinois EPA elected not to follow BAAQMD's additional reporting requirements for significant flaring events due to the Illinois EPA's established procedures for reviewing reports. *Petitioners' Exhibit 6, Response to Comment No. 75.* Consequently, the Illinois EPA chose to require detailed reporting of flaring events in conjunction with regular quarterly reporting. *Id.*

Moreover, the Illinois EPA's decision to incorporate additional work practices to minimize possible flaring events at ConocoPhillips was based on its analysis of the federal decree governing existing flares at the refinery, stating:

> The BACT/LAER evaluations for the proposed project for flaring was made based on the features in the design of the new Delayed Coker Unit that will act to minimize flaring and in the context of existing requirements that address flaring at the Wood River refinery. In particular, the Consent Decree also includes requirements related to hydrocarbon flaring events, as is relevant to emissions of CO and VOM from flaring. The cause of significant hydrocarbon flaring incidents must be investigated, including performance of root cause analyses, steps must be taken to correct the conditions that cause such incidents, and the number and extent of such incidents must be minimized. Detailed reporting is also required for these incidents. Provisions have been included in the issued permit that make similar requirement[s] applicable for the new flares that would be installed with the proposed project.

Petitioners' Exhibit 6, Response to Comment No. 28. This discussion makes evident that the inclusion of additional work practices for the new flares was meant to be consistent with similar requirements for existing flares in the federal decree.

Beyond its review of similar requirements at other refineries and its analysis of the requirements originating from the federal decree, the Illinois EPA also grounded its decision on its own technical expertise. The Illinois EPA opted to include additional requirements to manage vessel depressurization during unit shutdowns, as they appeared to be "very effective in minimizing and eliminating" these events as contributors to flaring incidents. *Petitioners' Exhibit 6, Response to Comment No. 64.* At the same time, however, the Illinois EPA chose not to require the construction of stronger process vessels as it had not been "identified as a reasonable or recommended approach to reducing flaring emissions." *Id.*

This over-arching discussion in the *Responsiveness Summary* dispels Petitioners' view that the Illinois EPA "completely failed to comply" with 40 C.F.R. § 124.17(a)(1). Taken as a whole, the *Responsiveness Summary* generally depicted the nature of the reasons for the changes made to the final Permit on this issue. *Petitioners' Exhibit 6, Response to Comment Nos. 24, 25, 28, 58, 64, 65, 66, 68, 70, 71, 72, 73, 74, 75, 78, 79,*

and 84. Beyond recognizing that the Illinois EPA discussed the changes to the draft permit "in response to individual comments concerning the lack of sufficient controls on the flares," Petitioners fail to acknowledge the remainder of the Illinois EPA's discussion specifying the changes and the reasons for the changes to the draft permit in the body of the *Responsiveness Summary. See, Petition at page 8, citing Petitioners' Exhibit 6, Response to Comment No. 25.* In all likelihood this is because Petitioners have difficulty refuting that an all-encompassing reading of the *Responsiveness Summary* comports with 40 C.F.R. §124.17.

Equally important, Petitioners neglect to cite any legal authority supporting an argument that the Illinois EPA may not specify changes to the draft permit, together with accompanying reasons, in the general body of the response to comments. In fact, the regulations weigh strongly against such an argument. Section 124.17(a) does not require a precise format in which changes between the draft permit and the final permit shall be specified by the permitting authority, but merely requires that such changes be specified within the response to comments. Had the Board deemed it necessary for a permitting authority to satisfy this requirement through the use of a precise format delineating how the changes to the draft permit were to be specified in the response to comments, requirements in Part 124 would likely have been promulgated to that clear effect.

There is very limited Board caselaw in this area. However, it is clear from Part 124 that no fixed requirement exists for the manner in which changes between the draft and the final permit are to be specified. Prior Board rulings suggest that the response to comments document need only *identify* any additional permit conditions included in the response to comments {emphasis added}, *In re Midwest Steel Division, National Steel*

Corporation, 3 E.A.D. 835, ____, fn. 2 (EAB 1992), or *document* the changes to the draft permit {emphasis added}. *In re Dominion Energy Brayton Point, LLC,* 12 E.A.D. 490, 533 (EAB 2006). No particular manner of identification or documentation has been required by the Board.[13]

The Illinois EPA must concede that the *Responsiveness Summary* did not contain a list of significant changes between the draft permit and the final Permit. As it happened, a review of the draft permit and final Permit had been undertaken by the Illinois EPA's technical staff in advance of permit issuance. After reviewing both documents, the Illinois EPA concluded that one significant change had taken place between the draft and final Permit, the inclusion of various work practices to minimize emissions from the flares at the Delayed Coker Unit and the Hydrogen Plant.[14] Illinois EPA technical staff seriously contemplated whether to create a "list" for this one significant change between the draft and final Permit in the *Responsiveness Summary* but chose not to based on its understanding of the term "list" to denote multiple items. The

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[13] While determining the extent to which the permitting authority must respond to comments in *NE Hub Partners,* the EAB recognized that the applicable regulation, 40 C.F.R. § 124.17(a)(2), "call[ed] for brevity" in said response. *In re NE Hub Partners, L.P.,* 7 E.A.D. 561, 583 (EAB 1998), *citing In re Hoechst Celanese Corp.,* 2 E.A.D. 735, 739, fn. 7 (Adm'r 1989) ("[o]nce the Agency has reached a reasonable and legally proper permit decision based on the administrative record, it need not provide detailed findings and conclusions, but instead must reply to all significant comments . . . as required by 40 CFR § 124.17"). Based, in large part, on the language of 40 C.F.R. § 124.17(a)(2), the EAB found that the "response to comments succinctly addressed the essence of each issue raised by Petitioners". In light of analogous EAB rulings on the manner for accessing the sufficiency of the response to comments and, to that end, some discretion should be afforded to a permitting authority in effectuating the procedural requirements of 40 C.F.R. § 124.17.

[14] *See, footnote 12, supra.*

The Illinois EPA is prepared to offer, as needed, affidavits of various representatives of the Illinois EPA's technical staff to verify the factual assertions set forth in both the Statement of Facts and Argument sections of this Response to Petition.

Illinois EPA's reasoning is clearly aligned with the meaning typically afforded to the word "list". When given its plain and ordinary meaning, the term means "a record consisting of a series of names, words, or the like; a number of names of persons or things set down one after another; a roll; a register; a catalog." *The Webster Reference Dictionary of the English Language* 557 (1983 Edition, 1983).[15]

The Illinois EPA's conclusion that only one significant change between the draft permit and the final Permit had occurred and thus, did not require the inclusion of a list specifying this change was reached in good faith. Again, this is underscored by the Illinois EPA's scrutiny of public comments as indicated by its discussion of the changes and the reasons for the changes between the draft permit and the final Permit. *Petitioners' Exhibit 6, Response to Comment Nos. 24, 25, 28, 58, 64, 65, 66, 68, 70, 71, 72, 73, 74, 75, 78, 79, and 84.* These discussions highlight the fact that the Illinois EPA did not intend to offend either the letter or spirit of the Part 124 regulations.

The Illinois EPA nonetheless recognizes that its decision to not provide a list in the *Responsiveness Summary* may not pass as harmless error. A review of the Board's past rulings reveals the significant role an identification of the changes and a discussion of the reasons for the changes between the draft permit and the final permit plays in the appeal process. *See, In re Midwest Steel Division, National Steel Corporation,* 3 E.A.D. 835, _____, fn. 2 (EAB 1992); *see also, In re Dominion Energy Brayton Point, LLC,* 12 E.A.D. 490, 533 (EAB 2006). These rulings particularly emphasize the need to ensure

[15] While *Black's Law Dictionary,* not surprisingly, interprets the definition of "list" in the legal arena, its approach likewise suggests a register of multiple items. *Black's Law Dictionary* 932 (6th ed., 1990). (List means a "docket or calendar of cases ready for trial or argument, or of motions ready for hearing. Entering in an official list or schedule; as, to list property for taxation, to put into a list or catalogue, to register, to list a property with a real estate broker. Official registry of voters.").

that the public has an "opportunity to adequately prepare a petition for review and that any changes in the draft permit are subject to effective review." *In re Indeck-Elwood, LLC,* PSD Appeal No. 03-04, slip opinion at 29 (EAB, September 27, 2006),13 E.A.D. ___, *citing In re City of Marlborough, Mass. Easterly Wastewater Treatment Facility,* NPDES Appeal No. 04-13, (EAB, August 11, 2005) 12 E.A.D. ____. The Illinois EPA respectfully maintains that its decision to not "list" the additional work practices to minimize flaring events between the draft and final Permit is not patently offensive to the applicable Part 124 regulations or the underpinnings of the Board's past rulings. This is particularly true in light of the Illinois EPA's discussion of the changes and the reasons for the change between the draft permit and final Permit. *Petitioners' Exhibit 6, Response to Comment Nos. 24, 25, 28, 58, 64, 65, 66, 68, 70, 71, 72, 73, 74, 75, 78, 79, and 84.*

Finally, Petitioners contend that the draft permit was so inadequate that it purportedly impacted the public's ability to "inform the agency's decision making" and the Illinois EPA's subsequent inclusion of conditions in response to public comments will allegedly allow these conditions to go unscrutinized. Aside from being unsupported by details, Petitioners' argument completely ignores the *Responsiveness Summary* and prior decisions by the EAB concerning those issues that may be raised on appeal. *See, Petitioners' Exhibit 6, Response to Comment No. 25* (BACT for CO was determined based on work practices to minimize CO emissions consistent with the approach generally taken in the permit); *see also, In re Avon Custom Mixing Services, Inc.,* 10 E.A.D. 700, 705 (EAB 2002) (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). 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, 46 (EAB 2003); *In re Avon Custom Mixing Services, Inc.*, 10 E.A.D. 700, 704-705 (EAB 2002). Alternatively, a petitioner may plead that the issue for which review is sought was not "reasonably ascertainable" during the public comment period. *In re Encogen Cogeneration Facility,* 8 E.A.D. 244, 250, fn. 8 (EAB 1999), *citing In re Keystone Cogeneration Systems,* 3 E.A.D. 766 (EAB 1992). Thus, the Board's procedural rules allow the public to scrutinize the permit either during the public comment period or, in the event of subsequent changes to the permit in response to comments, on appeal. As designed by the Board's procedural rules, this Permit has been scrutinized both during the public comment period and, for those changes that took place in response to public comments, the public has had an opportunity to scrutinize these changes on appeal. For all the reasons set forth herein, the Illinois EPA respectfully requests that the EAB deny review of this issue sought by Petitioners in this appeal.

C. The Illinois EPA Appropriately Identified BACT for the Flare.

Petitioners charge that the Illinois EPA did not perform a "top-down BACT analysis to set a technology-based permit limit on CO emissions from the flares" and thus, failed to assess the appropriate control options to identify BACT for the new flares at the Delayed Coker Unit and Hydrogen Plant. *See, Petition at pages 12-17.* Petitioners go on to speculate that the Illinois EPA's failure to conduct a top-down BACT analysis is the very reason why ConocoPhillips' emission limit for CO, based on unidentified

"extrapolations" is "higher than the CO emissions from all of the flares" at another refinery, the Shell Martinez facility in California. *See, Petition at page 15.* In the following subsection, Petitioners continue their argument by asserting that the Illinois EPA's inclusion of flaring conditions at Petitioners' suggestion was not adequate based, in large part, on inadequate information before the Illinois EPA. *See, Petition at pages 17-21.* Petitioners again conclude that these deficiencies resulted in higher limits than those actually achievable for the new flares. *See, Petition at page 18.* Both prongs to Petitioners' argument must fail on procedural and substantive grounds.

1. The Illinois EPA's BACT Analysis Complied with the Clean Air Act and Associated Regulations.

As framed by the caption of its argument in the Petition, Petitioners claim that the Illinois EPA failed to engage in an appropriate BACT analysis. At other points in their argument, Petitioners level a broader attack by alleging that the Illinois EPA had concluded that a "BACT analysis and limit-setting is generally inappropriate in addressing non-routine upset events." *Petition at page 16.* Petitioners' charge has not been preserved for appeal as Petitioners failed to raise it during the public comment period. To the extent that the EAB wishes to reach the merits of the issue, the Administrative Record provides ample support that the Illinois EPA performed a reasoned BACT determination of CO emissions from flaring events. In such a scenario, the EAB may appropriately deny review of this issue.

a. Petitioners' issue was not raised during the public review process.

Petitioners' issue is presented for the first time on appeal. Petitioners claim that the Illinois EPA *failed to conduct* a top-down BACT analysis without any mention of, or citation to, the relevant portions of the Administrative Record demonstrating that the

issue was raised during public comment or at the public hearing. Instead of identifying specific comments, Petitioners point to a multitude of references in public comments wherein the Petitioners purportedly cited to existing control technologies and existing standards that the Illinois *failed to consider as a part of its BACT analysis. See, Petition at pages 13-16.* As it happened, these references were made by Petitioners while evaluating the BACT analysis performed by the Illinois EPA.

As a general rule, the EAB requires a petitioner to demonstrate that objections raised on appeal were specifically raised during the public comment period or at the public hearing. *See, In re Sumas Energy 2 Generation Facility,* PSD Appeal No. 05-03, slip opinion at 8 (EAB, May 27, 2005); *see also, In re Maui Electric Company,* 8 E.A.D. 1, 8-9 (EAB 1998). This showing is a logical outgrowth of the EAB's requirement that persons "must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their positions" by the end of the public review process. *See,* 40 C.F.R. §124.13; *see also, In re Rockgen Energy Center,* 8 E.A.D. 536, 540 (EAB 1999). As the EAB has found, the purpose of this requirement is:

> to ensure that the permitting authority * * * has the first opportunity to address any objections to the permit, and that the permit process will have some finality. *See [In re] Encogen [Cogeneration Facility,* PSD Appeal Nos. 98-22 to -24,] slip op. at 8 [(EAB, Mar. 26, 1999)], 8 E.A.D. [249-50] ("The effective, 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."). "'In this manner, the permit issuer can make timely and appropriate adjustments to the permit determination, or if no adjustments are made, the permit issuer can include an explanation of why none are necessary.'" *In re Essex County (N.J.) Resource Recovery Facility,* 5 E.A.D. 218, 224 (EAB 1994) (quoting *In re Union County Resource Recovery Facility,* 3 E.A.D. 455, 456 (Adm'r 1990)).

In re Sutter Power Plant, 8 E.A.B. 680, 687 (EAB 1999). Moreover,

> [w]hile it is appropriate to hold permitting authorities accountable for a full and meaningful response to concerns fairly raised in public comments, such authorities are not expected to be prescient in their understanding of * * * imprecise comments * * * . "At a minimum, commenters must present issues with sufficient specificity to apprise the permit issuing authority of the issues being raised. Absent such specificity, the permit issuer cannot meaningfully response to comments."
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> *Sutter,* slip op. at 19 (quoting *In re RockGen Energy Center,* 8 E.A.D. at 694 (EAB 1999)).
>
> . . . We have often denied review of specific issues that were raised in a general manner during the public comment period. *See In re Florida Pulp & Paper ass'n.,* 6 E.A.D. 49, 54 - 55 (EAB 1995) (comment regarding sludge testing being unnecessary is not sufficient to preserve for appeal the question of legal authority to require sludge testing); *In re Pollution Control Indus. of Ind..,* Inc., 4 E.A.D. 162, 166-69 (EAB 1992) (comments on two aspects of testing requirement in permit are not sufficient to raise, on appeal, general objection to any testing requirement; *see also Maui,* 8 E.A.D. at 11-12 (comments raising general issue of whether particular fuel is available from fuel suppliers not sufficient to preserve objection raised on appeal that permit issuer had found this fuel to be available in recent permit decision).

In re Steel Dynamics, Inc. 9 E.A.D. 165, 229 – 231 (EAB 2000).

The Illinois EPA responded to comments about the BACT analysis it performed, particularly, in the context of the Illinois EPA's consideration of existing control technologies, existing standards and control measures employed at existing refineries.[16] None of the comments that accompany those issues dealt with concerns relating to the

[16] *See, Petitioners' Exhibit 2, attached Technical Analysis of Julia May, page 10* ("The application failed to provide the necessary analysis on available methods including but not limited to installing sufficient compressor and backup compressor capacity to rigorously prevent and minimize entire flaring events and thus achieve maximum controls and lowest emissions from flaring"); *see also, Id., page 11* (While commenting on the Project Summary's statement that the BACT analysis requires a consideration of the most stringent technologies available, Petitioners commented that "this PSD review for CO emissions failed to evaluate the most stringent technologies available. . ."); *see also, Id., page 15* (commenting that flare emissions had not been separately provided making it impossible to determine "what, if any, flare emissions have been calculated for the CORE project for BACT and LAER for flare CO and VOM emissions."); *see also, Id., page 16* (commenting that "[n]on-assisted flares should not be considered to meet BACT requirements"); *see also, Id., pages 16 – 17* (suggesting there were atleast six established methods to prevent flaring emissions that were not considered in the BACT analysis).

Illinois EPA's failure to perform an appropriate BACT analysis, itself. In doing so, Petitioners arguably try to challenge a different aspect of the BACT evaluation than that addressed by those comments. *See, In re Kendall New Century Development,* 11 E.A.D. 40, 55 (EAB 2003), *citing In re RockGen Energy Center,* 8 E.A.D. 536, 544-545 (EAB 1999). As such, it is not surprising that there is no affirmative discussion by the Illinois EPA in the *Responsiveness Summary* that it had, in fact, performed a BACT analysis of CO emissions from flaring events. *Accord, In re Steel Dynamics, Inc.* 9 E.A.D. 165, 229 – 231 (EAB 2000).[17]

Moreover, to the extent that the requirement to perform a BACT analysis is the core element to a PSD review, Petitioners should have been expected to raise such issue relating to the draft permit during the public comment period. If somehow issues relating to the Illinois EPA's alleged failure to perform a top-down BACT analysis were not reasonably ascertainable at the time of public comment, then Petitioners failed to make that showing in their Petition. For these reasons, the EAB should deny review of the Illinois EPA's purported failure to perform a top-down BACT analysis on the basis that it was not preserved for appeal.

b. Petitioner has failed to demonstrate that the Illinois EPA did not perform an appropriate BACT analysis, and that the BACT analysis performed by the Illinois EPA was clearly erroneous or otherwise warrants review.

The circumstances do not warrant a finding of clear error on this issue, rather the BACT conditions set by the Permit reflect considered judgment by the Illinois EPA and

[17] *See also, In re Steel Dynamics, Inc.* 9 E.A.D. 165, 235 (EAB 2000), *citing In re Florida Pulp & Paper ass'n.,* 6 E.A.D. 49, 54 – 55 (EAB 1995) (comment regarding one aspect of sludge testing required by permit is not sufficient to preserve for appeal the general question of authority to require any sludge testing); *see also, In re Pollution Control Board Indus. of Ind.,* Inc., 4 E.A.D. 162, 166 – 169 (EAB 1992) (comments on two aspects of testing requirement in permit are not sufficient to raise, on appeal, general objection to any testing requirement).

are "rational in light of all the information in the record, including the conflicting opinions." *See, In re Steel Dynamics Inc,* 9 E.A.D. 165, 180, fn. 16 (EAB 2000), *quoting, In re NE Hub Partners, L.P.,* 7 E.A.D. 561, 568 (EAB 1998). In this case, the Illinois EPA's BACT analysis was predicated upon the relevant materials in the Administrative Record, including information contained within ConocoPhillips' permit application, a review of applicable regulations to minimize flaring emissions in other jurisdictions and an examination of technical information by the Illinois EPA's permit staff. After a thorough and considered analysis, the Illinois EPA concluded that a multi-faceted approach, including operation in accordance with federal emission standards for flaring, particularly, requirements for equipment design specification and work practices, additional work practices to prevent and minimize flaring of CO emissions, and a ton per year liming on CO emissions constituted BACT.

i. The Administrative Record clearly demonstrates that the Illinois EPA performed an appropriate BACT analysis.

A BACT analysis is a case-by-case evaluation that ultimately arrives at a best control technology and a corresponding performance level for a particular source. *In re Three Mountain Power, LLC,* 10 E.A.D. 39, 47 (EAB 2002); *see also, Respondent's Exhibit 7, at page B.23.* In evaluating a chosen level of performance, the frequently used 'top-down' methodology of the BACT analysis usually will reflect factors that are considered appropriate for the particular source. *In re Three Mountain Power, LLC,* 10 E.A.D. at 47, citing *In re CertainTeed Corporation,* 1 E.A.D. 743, 747 (Adm'r 1982)(BACT determinations are "tailor-made for each pollutant emitting facility"). Typically, these considerations take the form of "manufacturers' data, engineering estimates and the experience of other sources." *Respondent's Exhibit 7 at page B.24.*

While permit authorities commonly look to recent permits for comparable sources and are "guided by nationwide trends in air pollution control efficiency, the BACT analysis is, at its core, a source-specific exercise." *In re BP Cherry Point,* 12 E.A.D. 209, 231 (EAB 2005). And although it may be presumed that a source can achieve the same emissions rate as another source, differences between them may justify an alternative result. *See, Respondent's Exhibit 7 at page B.24.*

The BACT analysis involves a weighing of factors and not a mechanical selection of the most-stringent performance level on record. Moreover, the selection of BACT permit limits are not "necessarily a direct translation of the lowest emissions rate that has been achieved by a particular technology at another facility." *In re Cardinal FG Company,* 12 E.A.D. 153, 170 (EAB 2005), citing *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 188 (EAB 2000)(chosen BACT level of performance does "not necessarily reflect the highest possible control efficiencies"). Petitioners do not generally oppose the inclusion of flare control measures to minimize CO emissions in the final Permit as previously suggested by Petitioners in public comment, but, rather, contend that, in the first place, the Illinois EPA did not perform a BACT analysis.

A review of the Administrative Record shows the thorough BACT analysis performed by the Illinois EPA; in fact, the Illinois EPA's basis for including flare control measures to minimize CO emissions is supported by facts that are facially evident from the Administrative Record. First, considering the Illinois EPA's review of application materials, ConocoPhillips discussed the lack of "technically feasible CO control options for the two new flares" but concluded it was still "necessary to evaluate BACT emission

limits for CO."[18] *Respondent's Exhibit 6, page 7-9.* In the RACT/BACT/LAER Clearinghouse ("RBLC") database, ConocoPhillips found that "[a]ll but one of the BACT emission limits . . . establish only pound per hour and ton per year limits" concluding that these limits were not necessarily transferable to other units. *Id.* As a result, ConocoPhillips proposed a CO emission limit of 0.37 lbs/MMBtu for the new flares. *Id.*

During its own review of the RBLC database, the Illinois EPA found four recent BACT determinations for control of CO emissions from refinery flares. However, none required the use of an add-on CO control technology or methodology. *See, ConocoPhillips' Exhibit 2, page 13.* In the initial portion of its analysis, the Illinois EPA found that:

> 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. Despite this initial conclusion with respect to add-on control technology, the Illinois EPA rejected ConocoPhillips' proposed BACT limit, 0.37 lbs/mmBtu, because it was a USEPA emission factor and would provide far less scrutiny than a "more traditional emission limit." *Petitioners' Exhibit 6, Response to Comment No. 24.* Recognizing that the CO emission limit for the Delayed Coker Unit Flare and the Hydrogen Plant Flare

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[18] In fact, Petitioners appeared to concede this very point in public comments when citing to conclusions of the Texas Commission on Environmental Quality finding that "an accurate emissions inventory must be developed first in order to identify and develop control options for refinery flare emissions. . ." *Petitioners' Exhibit 2, attached Technical Analysis of Julia May, page 23, citing TCEQ Master Control Strategy List, Point Sources,* page 5, 9/7/2005, attached as Exhibit O http:www.nctcog.org/trans/air/sip/future/lists/TCEQ-Point%20Source%20List.pdf; *see also, Petitioners' Exhibit 6, Response to Comment No. 74.*

should not only be expressed as an emission limit but should reflect proper flare operations, the Illinois EPA incorporated specific work practices in the draft permit to minimize flaring emissions. *Petitioners' Exhibit 6, Response to Comment Nos. 24 and 25.*

During the public comment period, Petitioners concurred with the Illinois EPA's rejection of ConocoPhillips' proposed emission limit, but rebuffed what they perceived to be limited work practices in the draft permit. *See, Petitioners' Exhibit 6, Response to Comments No. 25; see also, Petition at page 13, fn. 8.* Petitioners requested that the Illinois EPA incorporate in the final Permit the technology and operations put in place at other refineries to prevent and minimize flaring emissions. *Petitioners' Exhibit 2, attached Technical Analysis of Julia May, page 12.* Petitioners concluded that preventing or minimizing gases burned in flaring events "is the best method" to prevent VOM, CO and CO_2 emissions. *Id.*

With further particularity in public comment, Petitioners suggested there were numerous established methods to prevent flaring emissions, such as: "(1) adding sufficient compressor capacity . . .; (2) installing backup compressors. . . ; (3) slowing vessel depressurization . . .; (4) permanently fixing equipment that repeatedly malfunctions . . .; (5) designing thicker process vessel walls to increase allowable pressures . . .; and (6) setting in place detailed procedures to diagnose and eliminate unnecessary flaring." *Petitioners' Exhibit 2, attached Technical Analysis of Julia May, pages 16 – 17; see also Petitioners' Exhibit 6, Response to Comment No. 64.* Petitioners also criticized the draft permit for failing to include "rigorous flare monitoring, root cause analysis of flaring and a flare minimization plan" within its requirements. *Id. at page 22.*

Evidence from the Administrative Record provides ample support that the Illinois EPA's permit decision results from a proper exercise of its technical judgment. Faced with the difficult task of performing a BACT analysis that eliminates or minimizes emissions from process upsets and safety relief valves (i.e., flares) that typically dispose of flammable process gas that can not be recovered, and after thoroughly considering public comments on the matter, the Illinois EPA developed what is now a multi-faceted approach to BACT to comprehensively address CO emissions from the flares. *See, Petitioners' Exhibit 1, Unit-Specific Condition 4.7.1.*

First, the flares must generally be operated in accordance with the equipment design specifications and work practices as set forth in the applicable federal emissions standards for flaring, particularly the New Source Performance Standards (NSPS) for Petroleum Refineries, 40 CFR Part 60, Subpart J. *Petitioners' Exhibit 1, Unit-Specific Conditions 4.7.1 and 4.7.3(b); see also, Petitioners' Exhibit 6, Response to Comment No. 79; see also, ConocoPhillips' Exhibit 2, page 13.* For instance, ConocoPhillips must comply with measures delineated in 40 CFR § 60.18 (i.e., a flame must be present at all times during operation of the flare). *See, Petitioners' Exhibit 1, Unit Specific Condition 4.7.3(c); see also, ConocoPhillips' Exhibit 2, page 13* ("gaseous fuels meeting the requirements of 40 CFR 60.104(a)(1) and process upset gases (as defined in 40 CFR 60.101(e)) shall be the only gases combusted in the affected units."). The federal requirements ensure that the organic constituents in waste gas are effectively destructed and, effective combustion occurs relative to generation of CO emissions. *Petitioners' Exhibit 6, Response to Comment Nos. 76 and 79* (the permit also requires appropriate monitoring and recordkeeping in order to verify waste gas flow and composition).

Second and more specifically in response to Petitioners' comments, the Illinois EPA generally included Petitioners' suggested approaches to eliminate and reduce flaring emissions similar to the measures specified by the BAAQMD.[19] *See, Petitioners' Exhibit 6, Response to Comment Nos. 64 and 68.* In making its permitting decision, the Illinois EPA "closely reviewed" the Flare Minimization Plan put together by Shell Martinez of which the prominent feature is the use of redundant waste gas compressors. *See, Petitioners' Exhibit 6, Response to Comment Nos. 70 and 71.* Based, in large part, on this review, the Illinois EPA included as a component of BACT, a waste gas recovery system with redundant compressor capacity for the Delayed Coking Unit. This system ensures sufficient capacity exists to handle 100 percent of the routine flow of waste gas generated from operation of the Delayed Coking Unit to the fuel recovery system. *Petitioners' Exhibit 1, Unit-Specific Condition 4.7.5(a)(iii); see also, Petitioners' Exhibit 6, Response to Comment Nos. 71, 78 and 84.* In fact, the required redundant compressor capacity has the capability to cover startup and shutdown events and times "when one compressor is not in service, as may occur with routine preventative maintenance of compressors."[20] *Petitioners' Exhibit 6, Response to Comment No. 71.*

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[19] However, due to operational concerns, the Illinois EPA did not include the requirement for the construction of stronger process vessels. *See, Petitioners' Exhibit 6, Response to Comment No. 64* (stronger process vessels would necessitate the operation of process vessels at higher pressures). Petitioners did not appeal the Illinois EPA's conclusion that stronger process vessels were not warranted given that such vessels would require the operation of process vessels at increased pressures.

[20] Petitioners previously recognized that increased compressor capacity enables greater flare gas recovery possibly eliminating the need for flaring episodes. Due to its ability to recover valuable gas, increased compressor capacity is becoming increasingly popular. *Petitioners' Exhibit 2, attached Technical Analysis of Julia May, pages 17 and 21.* No requirements were included for redundant waste gas compressors at the new Hydrogen Plant because it "does not handle a waste gas that is suitable for recovery for use in the refinery fuel gas system." *Petitioners' Exhibit 6, Response to Comment No. 65.*

Third, any flaring from the Delayed Coker Unit and the Hydrogen Plant are further minimized by the operation and maintenance of said units in accordance with a Flare Minimization Plan built into the permit in response to comments. *Petitioners' Exhibit 1, Unit-Specific Condition 4.7.5(a)(v); see also, Petitioners' Exhibit 6, Response to Comment No. 78.* Fourth, and as a result of the Illinois EPA's BACT analysis, as well, the Permittee shall perform a root-cause analysis for significant hydrocarbon flaring incidents. *Petitioners' Exhibit 1, Unit-Specific Condition 4.7.5(a)(vi); see also, Petitioners' Exhibit 6, Response to Comment No. 72.* Fifth, the Permit requires "continuous monitoring to identify when waste gases are flared", including:

> monitoring or instrumentation to reasonably determine the amount of gas that is flared, requirements for sampling and analysis of waste gas or maintenance of records for the composition of the gas, and requirements for monitoring or records related to fuel usage for the pilot and venting of purge gas to the flare.

Petitioners' Exhibit 6, Response to Comment No. 73; see also, Petitioners' Exhibit 6, Response to Comment No. 74.

Finally, Unit Specific Condition 4.7.6-1(a) limits CO emissions from the Delayed Coker Unit Flare to 24.3 tpy and limits CO emissions from the Hydrogen Plant including the new flare to 147.9 tpy.[21] *Petitioners' Exhibit 1, Unit-Specific Condition 4.7.6-1(a).* Compliance with these annual limits is to be determined by ConocoPhillips from a running total of 12 months of data. *Id.*

Due to the inherent challenge of the BACT analysis, the Illinois EPA found it appropriate to more fully consider its analysis in the context of what the USEPA recently deemed appropriate control measures for flaring. *See, Consent Decree entered in United*

[21] Annual emissions of CO from the Hydrogen Plant Flare are expected to be no more than 36.2 tons. *Petitioners' Exhibit 6, Response to Comment No. 27.*

States of America and the States of Illinois[22]*, Louisiana and New Jersey, Commonwealth of Pennsylvania and the Northwest Clean Air Agency v. ConocoPhillips Company,* Civil Action No. H-05-0258 (S.D. Tex. December 5, 2005). Relying upon the federal decree, the Illinois EPA concluded:

> The BACT/LAER evaluations for the proposed project for flaring was made based on the features in the design of the new Delayed Coker Unit that will act to minimize flaring and in the context of existing requirements that address flaring at the Wood River refinery. In particular, the Consent Decree also includes requirements related to hydrocarbon flaring events, as is relevant to emissions of CO and VOM from flaring. The cause of significant hydrocarbon flaring incidents must be investigated, including performance of root cause analyses, steps must be taken to correct the conditions that cause such incidents, and the number and extent of such incidents must be minimized. Detailed reporting is also required for these incidents. Provisions have been included in the issued permit that make similar requirement applicable for the new flares that would be installed with the proposed project.

Petitioners' Exhibit 6, Response to Comment No. 28. As the above discussion makes evident, the Illinois EPA's BACT analysis (and the provisions ultimately adopted) for CO emissions from flaring events is similar to the approach adopted by the USEPA for existing flares at this and related refineries. *See, Petitioners' Exhibit 6, Response to Comment Nos. 28, 78, and 99.*

In sum, the inclusion of requirements for equipment design specifications and work practices in accordance with the NSPS; a waste gas recovery system with redundant compressor capacity; the preparation and implementation of a Flare Minimization Plan; the performance of root cause analysis for significant hydrocarbon flaring incidents; and continuous monitoring for flaring all assure that the CO emissions will be appropriately limited during the course of the year. Furthermore, the emission limits for CO emissions

[22] While the State of Illinois was a party to this action through the Illinois Attorney General's Office, the Illinois EPA did not participate in this proceeding.

from the Delayed Coker Unit Flare and the Hydrogen Plant including the flare is within the scope of the BACT determination for the flares. That is, the Permit establishes BACT for all modes of operation, not only work practices and operational standards but through emission limits. If extended flaring would occur, the Permittee would not be excused from any of these BACT requirements.

Thus, the Administrative Record clearly demonstrates that the Illinois EPA properly reviewed the BACT analysis prepared by ConocoPhillips and considered additional measures to minimize CO emissions from flaring events consistent with Petitioners' public comments. In fact, this multi-faceted approach to BACT adopted by the Illinois EPA included many elements made at Petitioners' behest. Thus, the Illinois EPA's BACT analysis reflects considered judgment and is "rational in light of all the information in the record, including the conflicting opinions." *See, In re Steel Dynamics Inc,* 9 E.A.D. 165, 180, fn. 16 (EAB 2000), *quoting, In re NE Hub Partners, L.P.,* 7 E.A.D. 561, 568 (EAB 1998) . Petitioners' arguments contradict the weight of previous Board decisions concluding that issues that are technical in nature are largely left to the discretion of the permitting authority. *See, In re Peabody Western Coal Company,* PSD Appeal No. 04-01 (EAB, February 18, 2005), *citing In re Carlota Copper Co.,* NPDES Appeal Nos. 00-23 & 02-06, slip op. at 22 (EAB, Sept. 30, 2004), 11 E.A.D. ___; *see also, In re NE Hub Partners, L.P.,* 7 E.A.D. 561 (EAB 1998).

ii. Petitioners fail to show that the Illinois EPA's BACT analysis was clearly erroneous or otherwise warrant review.

Despite the Illinois EPA's inclusion of most control measures recommended by Petitioners during public comment in the final Permit, Petitioners repeat these comments in the Petition as if the Illinois EPA did not both thoroughly consider and *include* these

measures in the final Permit. *Petition at pages 14 – 15.* It is not sufficient for the petitioner to simply repeat objections previously articulated during the public comment period. *See, In re Knauf Fiber Glass, GMBH,* 9 E.A.D. 1, 5 (EAB 2000). "In order to establish that review of a permit is warranted, §124.19(a) requires a petitioner to both state the objections to the permit that are being raised for review, and to explain why the permit decision maker's previous response to those objections (i.e., the decision maker's basis for the decision) is clearly erroneous or otherwise warrants review." *In re Commonwealth Chesapeake Corp.,* 6 E.A.D. 764, 769 (EAB 1997) *citing, In re Puerto Rico Electric Power Authority,* 6 E.A.D. 253, 255 (EAB 1995); *In re Genesee Power Station L.P.,* 4 E.A.D. 832, 866 (EAB 1993). Petitioners have failed to supply any reason for the Board to deem the Illinois EPA's response inadequate. By failing to provide such an explanation, the Petitioner has failed to demonstrate the merits of obtaining administrative review. *In re Zion Energy, L.L.C.,* 9 E.A.D. 701 (EAB 2001).

Nothing presented by the Petitioners in their argument on appeal refutes the Illinois EPA's position identified in the Administrative Record. Rather, Petitioners essentially cite verbatim the comments raised during the public comment period in their Petition for Review. In fact, Petitioners acknowledge as much in their petition stating "[i]n their Comments, Petitioners alerted IEPA to existing control technologies that IEPA should have evaluated." *Petition at page 14.* In both documents, Petitioners state that additional methods exist to reduce flaring events such as "(1) adding sufficient compressor capacity, (2) installing backup compressors, (3) slowing vessel depressurization, (4) permanently fixing equipment that chronically malfunctions and causes unnecessary 'emergency' flaring, (5) designing thicker process vessel walls to

increase allowable pressures, and (6) setting in place detailed and extensive diagnostic procedures." *Petition at pages 14 – 15; see also, Petitioners' Exhibit 2, attached Technical Analysis of Julia May, pages 16 – 17; see also Petitioners' Exhibit 6, Response to Comment No. 64.* Further, in both, Petitioners voice concerns that the Illinois EPA gave no consideration to the methods employed by the Shell refinery in Martinez, California to reduce flaring events and emissions from this refinery. *See, Petition at page 15; see also, Petitioners' Exhibit 6, Response to Comment Nos. 70 and 71.* Nowhere in the Petition until a passing reference to the Illinois EPA's failure to obtain data about CO emissions from the Shell Martinez refinery is there an articulated basis for their argument in support of review. In the absence of a rationale, Petitioners at most merely restated the issue that was raised in the proceedings below and therefore fail to satisfy the EAB's procedural requirements for obtaining review. *See, In re Kendall New Century Development,* 11 E.A.D. 40, 46 (EAB 2003). Moreover, any insinuation by Petitioners that the Illinois EPA failed to thoroughly consider such comments has been refuted by the Administrative Record which supports the proper review given to the comments and, in a number of instances, their inclusion as permit conditions.

Concerning Petitioners' statement that the Illinois EPA failed to obtain data about CO emissions from the Shell Martinez refinery, this allegation does not begin to address the merits of the Illinois EPA's BACT analysis, particularly as the information provided by comments did not provide any data relating the levels of flaring that would occur to the various types of control measures for flaring as recommended by the Petitioners. *See, Petition at page 15.* Nor is the Illinois EPA under an obligation to gather additional information for inclusion in the Administrative Record. A permitting authority is not

required to document every potential source of information about a suggested technology in the response to comments. *In re NE Nub Partners, L.P.*, 7 E.A.D. 561, 581, 583 (EAB 1990) (responsiveness summary does not require detailed findings and conclusions, rather must merely demonstrate that all significant comments were considered). The Board has previously considered this issue concluding that "simply because the permit issuer may not have identified, documented, or consulted every single potential source of information about the technologies in question does not mean, as Petitioner implies, that the resulting permit determination is defective, or that the rejection of the [text omitted] technologies in question was not adequately justified. It is enough if the record as a whole reflects a reasoned analysis of current information about potentially available technologies." *In re Mecklenburg Cogeneration Limited Partnership Clarksville, VA*, 3 E.A.D. 492 (Adm'r 1990). Based upon a fair reading of the Administrative Record, the Petitioners fail to show the Illinois EPA's decision was clearly erroneous or otherwise warrants review. Accordingly, the Board should deny review of this issue as the Illinois EPA conducted a reasoned analysis of the methods employed by the Shell Martinez refinery and properly considered public comments.

Further, the Administrative Record is devoid of such information. Petitioners' suggestion that it provided information during public comment that *"other flare emissions"* (i.e., VOM emissions) are "an order of magnitude lower than what is being permitted in the CORE Project" and point to crude "extrapolations" that the "CO limit set in the final CORE Project permit for the two new flares is higher than the CO emissions from all of the flares at the entire Shell Martinez facility" in support of such assertion is effrontery. *Petition at page 15.* The first problem facing Petitioners is their

failure to present data during public comment on CO emissions from flares at the Shell Martinez refinery.[23] Petitioners were obligated to submit "all reasonably available arguments" supporting their position on a given issue by the close of the public comment period. *See,* 40 C.F.R. §124.13. The aforementioned representations are being offered for the first time on appeal as supporting argument to this issue, however, Petitioners have not demonstrated that the information was part of the public comments, or alternatively, was not reasonably available at the close of the public comment period. For this reason, the EAB's consideration of those representations should be denied because they were not properly preserved for appeal. *See, In re Kendall New Century Development,* 11 E.A.D. 40, 48-49 and 56 (EAB 2003); *In re AES Puerto Rico, LP,* 8 E.A.D. 324, 342, fn. 20 (EAB 1999).

Meanwhile, Petitioners attempt to compensate for this deficiency by making simplistic "extrapolations" concluding that CO emissions from the CORE project are "higher than CO emissions from all of the flares at the entire Shell Martinez facility."[24] [25]

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[23] During the public comment period, Petitioners presented information on VOM emissions from the Delayed Coker Unit Flare. *Petition at page 15.*

[24] Petitioners make a cursory statement that "the Tesoro refinery in Avon was able to achieve similar radical reductions in flaring events by adding compressor capacity and using other management practices." *Petition at page 15.* As discussed at length in the body of this response, the Illinois EPA incorporated the suggested compressor capacity and other management practices in the final permit. As Petitioners have failed to "explain why the permitting authority's response to those objections is clearly erroneous or otherwise merits review", review should be denied on this ground. *In re Zion Energy, L.L.C.,* 9 E.A.D. 701, 705 (EAB 2001), citing *In re Knauf Fiber Glass, GmbH,* 8 E.A.D. 127 (EAB 1999).

[25] As the Board has previously ruled BACT determinations must not, by necessity, represent the "highest possible control efficiency" achievable by the given technology. *In re Masonite Corporation,* 5 E.A.D. 551, 560 (EAB 1994). Nor is "a permit writer . . . required to use the lowest emissions limit that has been demonstrated in a similar facility." *In re Cardinal FG Company,* 12 E.A.D. 153, 173 (EAB 2005), *citing In re Kendall New Century Development,* 11 E.A.D. 40, 53 (EAB 2003), 11 E.A.D. 40. Rather the concept repeatedly embraced by the EAB is

Petition at page 15. While Petitioners recognize that ConocoPhillips Wood River is a larger refinery than Shell Martinez, they do not demonstrate that historic actual emissions from Shell Martinez are an appropriate basis to set an allowable emission limit for ConocoPhillips Wood River. *See, Petitioners' Exhibit 2, Technical Analysis of Julia May, page 20.* In sum, Petitioners fail to provide any sufficiently reliable information for the Board to conclude the Illinois EPA's BACT determination is not rationally supported by the record. *Accord, In re Zion Energy, L.L.C.*, 9 E.A.D. 701, 705 (EAB 2001); *In re Sutter Power Plant*, 8 E.A.D. 680, 688 (EAB 1999).

Ultimately, Petitioners' argument culminates in a critique of the Illinois EPA's response to one comment generally asserting that the annual *VOM emission rate* from flaring at Shell, Martinez should be used to establish a *LAER limit* for the proposed project. *Petitioners' Exhibit 6, Response to Comment No. 30.* While acknowledging that the quoted portion of the *Responsiveness Summary* is extensive, it is nonetheless critical to a full understanding of the review the Illinois EPA provided to this *LAER* issue.

> The information cited in this comment does not support setting a *LAER* requirement for the Wood River refinery that is expressed in terms of annual emissions. As noted by the comment[26], the relevant BAAQMD regulations do not prohibit flaring, as flaring is an appropriate action to address disposal of process

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that the permitting authority may consider "any practical difficulties associated with using the control technology."

[26] In fact, Petitioners provided as follows during public comment:

> Nothing in the BAAQMD flare control rule with its Flare Minimization Plan (FMP) requirement causes any compromise in safe refinery operations, which allowing flaring in a true emergency. However, the FMP does require rigorous monitoring, reporting, planning, and evaluation of flare events, and equipment improvements so that methods and hardware are in place in advance to prevent flaring and prevent emergencies. These methods make the refinery much safer by preventing emergency shutdowns and drastically reducing repeated flaring emissions.

Petitioners' Exhibit 2, attached Technical Analysis of Julia May, page 20.

> gas in emergencies. Likewise, Flare Minimization Plan prepared by Shell Martinez indicates that none of the procedures that are part of that plan would restrict access to the flares when flaring is viewed as necessary for personnel or equipment safety, which further necessitates flaring by operators without hesitation when warranted for safety. Setting a limit in terms of annual emissions of flaring, in the manner proposed by this comment, would potentially act to prohibit flaring when it was appropriate. It would set an absolute, enforceable limit on the extent of flaring that could occur at the refinery independent of the actual circumstances at the refinery in a particular year.

Id. (emphasis added). Culled from this response is Petitioners' suggestion that the Illinois EPA somehow concluded "that BACT analysis and limit-setting is generally inappropriate in addressing non-routine upset events." *Petition at page 16.* However, Petitioners' arguments are not reflective of the context in which this response was provided by the Illinois EPA. In particular, the Illinois EPA responded to comments about the use of *actual annual VOM emissions* at Shell Martinez as a basis for setting a *LAER limit* at ConocoPhillips. *Petitioners' Exhibit 6, Response to Comment No. 30.*

Petitioners now seek to parlay the Illinois EPA's generic responses to earlier comments about its LAER analysis into new BACT issues on appeal. In doing so, they arguably try to challenge a different aspect of the Permit than addressed by those earlier comments. *See, In re Kendall New Century Development,* 11 E.A.D. 40, 55 (EAB 2003), *citing In re RockGen Energy Center,* 8 E.A.D. 536, 544-545 (EAB 1999). In this regard, during pubic comment Petitioners merely commented that "the *methods* already in place at the Shell refinery in Martinez California should be considered BACT, and put in place for the ConocoPhillips CORE project." *Petitioners' Exhibit 2, attached Technical Analysis of Julia May, page 18.* After scouring Petitioners comments at length, Respondent can not locate one comment asserting that the *CO emission limits* achieved by Shell Martinez should somehow be deemed BACT by the Illinois EPA. Rather,

Petitioners commented that the Illinois EPA should evaluate Shell Martinez's Flare Minimization Plan and that it should be applied to ConocoPhillips "in order to meet required BACT . . . standards."[27] *Id.* And, as discussed at length above, this is what the Illinois EPA did.

As to the substance of the claims, the Illinois EPA's remarks about the establishment of an annual emission limit for flaring did not dispute the permitting authority's obligation to conduct a BACT analysis, or in the context of this comment, a LAER analysis but, rather, merely indicated the inappropriateness of setting an enforceable limit on a device that serves both as a control device and a safety mechanism for a refinery, on the basis suggested by the comments. *See, Petitioners' Exhibit 6, Response to Comment No. 30.* The fact that the Illinois EPA performed a BACT analysis and set a ton per year limit on flaring emissions reiterates the flaws inherent in Petitioners' reading of the response to comments. It should not be concluded as Petitioners now suggest that the Illinois EPA believes that it is inappropriate to set BACT emission limits for flares because they operate to address non-routine upset events. Admittedly, the *Responsiveness Summary* might have been clearer on the Illinois EPA's analysis, however, this should not form the basis for review. *Cf., In re Kendall New Century Development,* 11 E.A.D. 40, 50, fn. 13 (EAB 2003) (absence of direct response not grounds for review where response to comments was sufficient to convey basis of

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[27] Petitioners commented that Shell Martinez's 1.5 tpy VOM limit should be considered LAER for ConocoPhillips. *Petitioners' Exhibit 2, attached Technical Analysis of Julia May, page 20; see also, Petitioners' Exhibit 6, Response to Comment No. 30.* However, contrary to Petitioners statements on appeal, Petitioners previously commented that ConocoPhillips is larger than Shell Martinez and thus, warranted a 5.9 tpy VOM limit for flaring. *Compare, Petition at page 20 and Petitioner's Exhibit 2, attached Technical Analysis of Julia May, page 20.*

decision). In totality, the response to comments was sufficient to articulate the basis of the Illinois EPA's decision.

Petitioners also miss the point of the other reference, which simply conveyed the obvious understanding that a consideration of safety is all the more important whenever there is a greater margin for harm to plant personnel or equipment safety. *See also, Petitioners' Exhibit 6, Response to Comment No. 6* (the USEPA, as well, has substantiated that "the proper use of flaring is a good engineering practice, as flaring destroys hazardous and objectionable gases by burning those gases. Flaring also prevent[s] injuries to employees, fires and explosions, and damage to equipment"). Petitioners argument is all-the-more surprising given Petitioners' public comment that the Illinois EPA should consider safety implications while permitting the Delayed Cokers. *Petitioners' Exhibit 2, attached Technical Analysis of Julia May, pages 2 and 31-32; see also, Petitioners' Exhibit 6, Response to Comment Nos. 93 and 95.*

In their appeal petition, Petitioners make particular reference to the levels of actual emissions achieved by refineries in the Bay Area, notably the Shell refinery in Martinez, California. However, the Petitioners do not respond to the Illinois EPA's response with respect to reliance on actual emission levels as a basis to set LAER limits for the proposed flares. *Petitioners' Exhibit 6, Response to Comment No. 30.* In particular, the Petitioners did not address the impropriety of setting a limit, as proposed by comments, based on actual emissions when doing so would potentially result in either unsafe operation of a refinery without flaring or illegal flaring at a refinery in response to the occurrence of uncommon levels of emergencies. It is also well established that BACT limits must be achievable with a reasonable margin of safety. These sentiments

have been observed by the EAB in *Knauf Fiber Glass, GmbH,* which aptly illustrated that "[t]here is nothing inherently wrong" with the use of a reasonable safety factor and, further, that it is a "legitimate method of deriving a specific emission limitation that may not be exceeded." *In re Knauf Fiber Glass, GmbH,* 9 E.A.D. 1, 15 (EAB 2000). Similarly, the Three Mountain Power, LLC, ruling unequivocally rejected the argument that a BACT limit must be made "without regard to specifying an emission limitation that the proposed facility can demonstrate compliance with under all operational circumstances and have sufficient margin over actual operational data to avoid continual compliance difficulties." *In re Three Mountain Power*, LLC, 10 E.A.D. 39, 53 (EAB 2001). As operation of a refinery varies from year to year, it would be unsound to establish limits based on actual performance of a particular refinery in certain years.[28] In addition, Petitioners did not address the differences between refineries that affect their emissions, as generally addressed in Response to Comment number 102. *Petitioners' Exhibit 6, Response to Comment No. 102* (various factors affect refinery emissions such as "location and access to different source of crude oil, the nature of crude oil that a refinery is capable of processing, the nature of the refining processes at the refinery, age of the units at a refinery, and a number of other factors."). While the response was directed at emissions of SO2, as that was raised by Petitioners, the response is equally appropriate to emissions of CO.

Next, comparing flaring incidents to startup, shutdown, and malfunction events at coal fired boilers and based upon Petitioners' flawed reading of the *Responsiveness Summary,* Petitioners complain that the Illinois EPA neglected to subject flaring events to

[28] It is relevant that the BAAQMD's rules set for flares, Regulation 12, Rule 12, do not set limits on the amount of flaring that occurs.

BACT as most-recently expressed by the EAB in the *Indeck-Elwood* decision. *See, Petition at pages 16 – 17.* Beyond referencing its confused interpretation of the above response to comment, Petitioners make no mention of which permit condition(s) it is contesting but merely assail the Illinois EPA for purportedly adopting a "wait-and-see approach" to its BACT analysis. Interestingly, Petitioners' claim is pulled from one statement made by the Illinois EPA in response to a comment. (i.e., "any further discussion about whether a particular flaring event was avoidable will occur after the event has occurred").[29] *Petition at page 17, citing (RS at 26).* Apart from being confusing, not one commenter suggested that emissions from a safety device such as a flare were somehow analogous to emissions from startup, shutdown and malfunction events at coal-fired boilers and as such, should be subject to the principles articulated by the Board in the *Indeck-Elwood* decision. Moreover, Petitioners have not substantiated their argument in a manner that established clear error on the part of the Illinois EPA.

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); *In re Avon Custom Mixing Services, Inc.*, 10 E.A.D. 700, 704-705 (EAB 2002). While references to flaring events generally being subject to BACT were mentioned in comments submitted during the public comment period, based on the Illinois EPA's review of the transcript and comments, the

[29] This statement merely confirms the commonsense principle that the range of circumstances under which flaring may occur is such that the Illinois EPA or the USEPA will not be able to determine the appropriateness of flaring in particular cases on a theoretical or abstract basis but will have to review particular events or series of events that have occurred. Indeed, one element of the work practices for flaring is the performance of root cause analyses for significant flaring events.

Petitioners' representation concerning the need for the Illinois EPA to subject the flaring events to the principles articulated by the Board in *Indeck-Elwood* (i.e., the flaring events should be subject to "numeric BACT limits rather than work practices. . . unless the permitting authority specifically sets forth the emission reductions expected to be achieved by the work practices approach") was not included in public comments. Petitioners were obligated to submit "all reasonably available arguments" supporting their position on a given issue by the close of the public comment period. *See,* 40 C.F.R. §124.13. The aforementioned representations are being offered for the first time on appeal as supporting arguments to this issue, however, Petitioners have not demonstrated that the information was part of the public comments, or alternatively, was not reasonably available at the close of the public comment period.[30] For this reason, the EAB's consideration of those representations should be denied because they were not properly preserved for appeal. *In re Encogen Cogeneration Facility,* 8 E.A.D. 244, 250, fn. 8 (EAB 1999), *citing In re Keystone Cogeneration Systems,* 3 E.A.D. 766 (EAB 1992); *see also, In re Kendall New Century Development,* 11 E.A.D. 40, 48 – 49 (EAB 2003); *see also, In re AES Puerto Rico, LP,* 8 E.A.D. 324, 342, fn. 20 (EAB 1999).

Simply put, Petitioners mischaracterize the Illinois EPA's approach to BACT, as clearly appeared in the draft permit and as further expanded in the final Permit issued July 19, 2007. The Illinois EPA has never adopted a "wait-and-see" approach to its BACT analysis, rather the Illinois EPA developed extensive requirements, in large part based on public comments, to establish a multi-faceted approach to BACT that comprehensively addresses CO emissions from flaring. This approach includes annual

[30] The Board released the *Indeck-Elwood* decision in September of 2006; meanwhile the public comment period for the CORE project remained open through June 15th, 2007.

limits that address all emissions that occur during flaring events. *See, Petitioners' Exhibit 1, Unit-Specific Condition 4.7.6-1(a)* (emissions are limited to 24.3 tpy year of CO from the Delayed Coker Unit Flare and 147.9 tpy of CO from the Hydrogen Plant including the new flare). These limits act to directly assure that emissions from flaring events do not threaten the CO NAAQS. *ConocoPhillips' Exhibit 2, pages 14 – 15.*

In addition, the flares are subject to various equipment design specifications and work practices in accordance with federal emissions standards, *Petitioners' Exhibit 1, Unit-Specific Conditions 4.7.1 and 4.7.3(b);* the requirement for an additional waste gas recovery system with redundant compressor capacity at the Delayed Coking Unit, *Petitioners' Exhibit 1, Unit-Specific Condition 4.7.5(a)(iii)*; operation and maintenance of the Delayed Coker Unit and the Hydrogen Plant consistent with a Flare Minimization Plan, *Petitioners' Exhibit 1, Unit-Specific Condition 4.7.5(a)(v)*; the performance of a root-cause analysis subsequent to each hydrocarbon flaring incident, *Petitioners' Exhibit 1, Unit-Specific Condition 4.7.5(a)(vi)*; and extensive monitoring, recordkeeping and reporting requirements, *Petitioners' Exhibit 1, Unit-Specific Conditions 4.7.8-1(d), 4.7.9 and 4.7.10.* Such requirements apply at all times and are designed to ensure that emissions are avoided and minimized as possible.

While Petitioners' assert the Illinois EPA is required to subject flaring events to the principles articulated by the Board in *Indeck-Elwood,* particularly, flaring events should be subject to "numeric BACT limits rather than work practices. . . unless the permitting authority specifically sets forth the emission reductions expected to be achieved by the work practices approach", Petitioners ignore the annual numeric limitations provided by the Permit in conjunction with the detailed work practices set

forth above. These numeric limits directly apply to emissions from flaring. *See, Petitioners' Exhibit 1, Unit-Specific Condition 4.7.6-1(a)* (emissions are limited to 24.3 tpy year of CO from the Delayed Coker Unit Flare and 147.9 tpy of CO from the Hydrogen Plant including the new flare). While Petitioners appear to suggest that the Permit should have included short-term BACT limits during flaring events as well, the Petitioners neglect to specify or substantiate this argument. *Petition at page 17. See, In re Avon Custom Mixing Services, Inc.*, 10 E.A.D. 700, 705 (EAB 2002).(a petitioner, in identifying its objections to a permit, must make its allegations both "specific and substantiated," especially where the object involves the "technical judgments" of the permit authority). Under similar circumstances, the Board has denied review. *See, Indeck-Elwood, LLC,* PSD Appeal No. 03-04, slip opinion at 62, fn. 82 (EAB, September 27, 2006), 13 E.A.D. ___.[31]

Rather, Petitioners focus appears to be on the necessity of a calculation to determine emission reductions achieved by work practices as compared to numeric BACT limits. *Petition at page 17.* Subject to Petitioners' failure to specify the type of numeric limits to which it refers, the Illinois EPA's approach to BACT (i.e., annual emission limit, design specifications, work practices, etc.) is inherently reasonable given challenges present when establishing BACT for sudden, upset events (i.e., flaring) that typically dispose of non-recoverable flammable process gas. *See generally, Petitioners'*

[31] The EAB distinguished the *Indeck-Elwood* decision with its decision in *Indeck-Niles* to deny review based on the fact that the latter "petitioner did not challenge the permit provisions excluding compliance with short-term BACT limits during startup and shutdown events." This was despite the fact that the *Indeck-Niles* "permitting authority adopted a similar approach to the one IEPA adopted in this case (i.e., exempting permit holder from compliance with short-term emission limits during SSM events, but requiring compliance with long-term emission limits at all times)." *Indeck-Elwood, LLC,* PSD Appeal No. 03-04, slip opinion at 62, fn. 82 (EAB, September 27, 2006), 13 E.A.D. ___ referencing *In re Incek-Nile Energy Ctr.,* PSD Appeal No. 04-01 (EAB, September 30, 2004).

Exhibit 6, Response to Comment No. 30, 93 and 95 (recognizing that the Delayed Coker Unit and other operations at ConocoPhillips present potential safety concerns for plant personnel). Along these very lines, Petitioners avowed during public comment that "Delayed Coker Units . . . cause refinery accidents, extreme hazards to workers, releases of hazardous materials, and toxic gases, and fires." *Petitioners' Exhibit 2, page 32.*

Despite Petitioners' recognition of the safety issues that are addressed by flaring, Petitioners fail to acknowledge how this notable difference impacts a BACT analysis for a safety system such as a flare versus the BACT analysis for a typical emission unit with an add-on control device including startup, shutdown malfunction events. For instance, it is unclear how the Petitioners' believe emission reductions expected from work practices applied to new process emission units should be quantified given that process upsets and flaring events are sudden and unpredictable. Flaring events possess none of the predictive factors that typify startup and shutdown events at coal-fired power plants. While similar in some respects to malfunctions in terms of their occurrence, flaring events do not represent a failure of add-on pollution devices or control measures on a unit but a failure involving the associated process unit. The flaring events do not represent a failure of the flare, itself, which indeed operates as it is designed and intended. *See, Respondent's Exhibit 8, USEPA Response to Kay Phillips Regarding a Review on the Stack Height Regulations and Accompanying Preamble Language, dated April 1, 1982* (recognizing that "flares are designed primarily for the safe release of potential heat in the exit gases and are not conduits for a combustion process such as a boiler."). It is neither reasonable nor practical to require the emission reductions expected to be achieved during a flaring event by work practices to be quantified when the purpose of the relevant

work practices is to assure effective combustion of gases that are released during the event whereas the function of other work practices is to prevent and minimize the occurrence or reoccurrence of the flaring events at other times.[32] *See,* 40 C.F.R. § 60.18; *see also, Petitioners' Exhibit 1, Unit-Specific Condition 4.7.5(a).*

Petitioners conclude by misstating the context of the Illinois EPA's response to comment number 61 suggesting that the agency's statement that "any further discussion about whether a particular flaring event was avoidable will occur after the event has occurred" indicates a "wait-and-see" approach rather than the performance of an appropriate BACT analysis. *See, Petition at page 17.* The full response to the comment is illuminating, which might explain why Petitioners ignored it in their Petition. The Illinois EPA observed that the statement referenced in the application materials generally addressed the *existing situation* at the Wood River refinery, which is the subject of oversight by the USEPA pursuant to the decree, notably commenting:

> This statement was made in the context of the Wood River refinery, where measures to reduce hydrocarbon and thus VOM emissions from flaring by minimizing and eliminating such events are in place. Given that such measures are in place, the flaring events that actually do occur must generally be considered unavoidable, as indicated by the application. (Certainly, any further discussion about whether a particular flaring event was avoidable will occur after the event has occurred).

[32] Petitioners have not only failed to put forward a means to quantify emission reductions expected due to work practices but have passed on suggesting an additional method to establishing numeric CO limits during flaring events. *Accord, In re Prairie State Generating Company,* PSD Appeal No. 05-05, slip opinion at 117 (EAB, August 24, 2006), 13 E.A.D. ____ ("Petitioners, who bear the burden of proving that IEPA's decision was clear error, have not suggested any other appropriate method for calculating or establishing an emissions limit for these pollutants during periods of startup, shutdown or malfunction."); *see also, Id.,* slip opinion at page 118, fn. 96 and page 119.

Petitioners' Exhibit 6, Response to Comment No. 61. It seems perfectly clear that the discussion evidenced from the above-referenced response to comment is addressing to what extent future flaring events will be considered violations of applicable limitations or decree requirements. In this regard, the statement found so egregious by Petitioners, "any further discussion about whether a particular flaring event was avoidable will occur after the event has occurred", merely reflects applicable USEPA enforcement guidance.[33] *See, In re Indeck-Elwood, LLC,* PSD Appeal No. 03-04, slip opinion at 72, fn. 101 (EAB September 27, 2006), 13 E.A.D. ___ (recognizing that "excess emissions during startup, shutdown and malfunction events have been traditionally considered violations of applicable emission limitations" but more recently the USEPA "has adopted an 'enforcement discretion approach' for excess emissions resulting from unavoidable malfunctions.'"). As such, this statement is simply a sign of Illinois EPA's accurate understanding of applicable USEPA enforcement guidance.

In sum, the analysis conducted in this case by ConocoPhillips and the Illinois EPA was, as a whole, sufficient in scope and documentation. Given the challenges that may be present in a case-by-case analysis, it is not unreasonable for permitting authorities to be given some latitude in the decision making process. "Permit issuers must be free to exercise expert judgment and rely on the data they conclude are more accurate or comprehensive." *In re Inter-Power of New York, Inc.* 5 E.A.D. 130, 147 (EAB 1994); *see*

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[33] The USEPA has issued guidance on excess emissions. In 1982 and 1993, the USEPA issued guidance memoranda, respectively entitled, *Policy on Excess Emissions During Startup, Shutdown, Maintenance and Malfunction* and *Automatic or Blanket Exemptions for Excess Emission During Startup, Shutdown under PSD.* In 1999, the USEPA issued supplemental guidance on the topic entitled *State Implementation Plans: Policy Regarding Excess Emissions During Malfunction, Startup and Shutdown.* In 2001, the USEPA issued clarification guidance entitled *Re-Issuance of Clarification-State Implementation Plans (SIPS): Policy Regarding Excess Emissions During Malfunctions, Startup and Shutdown.*

also, In re Steel Dynamics, Inc., 9 E.A.D. 165, 201 (EAB 2000) ("[i]n general, the [EAB] accord[s] deference to permitting agencies when technical issues are in play"); *see also, In re Ash Grove Cement Co.*, 7 E.A.D. 387, 403 (EAB 1997) ("[t]he Board traditionally assigns a heavy burden to persons seeking review of issues that are quintessentially technical"). As set forth above, the Administrative Record reflects considered judgment by the Illinois EPA in its BACT analysis for CO emissions from flaring, the Petitioners must prove that the Illinois EPA's analysis was clearly erroneous and likely based upon inaccurate or incomplete data. *Id.* Petitioners' arguments clearly fail to satisfy this requirement.

2. The Flare Control Measures Included in the Permit Comport with the BACT Top-Down Analysis.

The main thrust of Petitioners' argument is that the Illinois EPA failed to have before it certain information when it permitted the proposed project. *Petition at page 18.* Due to this purported deficiency and other "analytical deficiencies" resulting from the Illinois EPA's failure to apply BACT, Petitioners assert that the permitted limits are higher than what are likely achievable by the final control measures. *Id.* As part of this broader challenge, the Illinois EPA seemingly erred by *failing to ensure that the new* flares and related systems are dedicated flare systems with no ability to impact emissions at existing flares. *Petition at pages 18 – 19.* The second prong to Petitioners' claim is that the flare observation requirements, particularly, the requirement for either video or observation monitoring, are not effective. *Petition at page 19.* Third, the monitoring provisions fail to include measures to ensure that the required monitoring is both accurate and reliable. *Petition at pages 19 – 20.* The final salvo in Petitioners' assault of the Permit is its alleged failure to consider increased flaring at existing flares due to increased

refinery production resulting from the CORE project. *Petition at pages 20 – 21.* Petitioners arguments not only ring hollow in all substantive respects, but must fail on procedural grounds as well.

The unifying premise to Petitioners' argument is that the Illinois EPA failed to have before it certain information when it permitted the proposed project. *Petition at page 18.* In this regard, Petitioners fault the Illinois EPA for failing to gather information "on baseline existing compressor capacity, current monitoring practices or quality control procedures for monitoring, root causes of flaring in the past at the facility, or the volume, duration, and emissions of individual past flaring events." *Id.* Petitioners also criticize the Illinois EPA for not obtaining information from Shell Martinez on its CO emissions and any corresponding emission reductions attributable to management practices. *Id.* Petitioners contend that without such information the BACT limit falls short of the maximum degree of reduction that is achievable. *Id.*

Petitioners seek to compel the Illinois EPA 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. *Id.* Petitioners' demand that a permitting authority or permit applicant conduct exhaustive and time consuming research by generating new data for the speculative purpose of discovering the cause and extent of past flaring events that have no bearing on emissions from the yet-to-be constructed process units and flares is unreasonable.[34] *See, Petitioners' Exhibit 6, Response to Comment No. 71* (Shell Martinez's record on minimizing flaring emissions at its Delayed Coker Unit installed in the mid-1990's suggests that operation of a modern

[34] Moreover, given the Clean Air Act's emphasis on granting or denying complete PSD permit applications within one year of filing, Petitioners' demand is all-the-more unreasonable. *See,* 42 U.S.C. §7475(c).

Delayed Coker Unit does not significantly contribute to flaring emissions). Moreover, in this case, these past flaring events are already being addressed by the USEPA in another forum and are subject to ongoing requirements pursuant to the federal consent decree. Thus, work is ongoing to reduce flaring events from the existing refinery, such that any effort would at best provide out-dated information. Petitioners fail to demonstrate a compelling reason that the Illinois EPA's response to comments are fatally flawed, and that the Illinois EPA's decision was erroneous.

While Petitioners' claim that knowledge about such information could have facilitated a more stringent limit, the public comments are devoid of information to support such a position.[35] Absent this information, in addition to particulars about what Petitioners' believed the permitted limits should have been and how these proposed limits compared to their respective permitted limits, all of which Petitioners' conspicuously did not provide, no tangible analysis could be ventured. The petitioner has the burden of demonstrating that review of a particular permit condition is warranted, and in doing so, the petitioner must include information specific to support its allegations. *In re Zion Energy, L.L.C.*, 9 E.A.D. 701, 705 (EAB 2001); *In re Sutter Power Plant*, 8 E.A.D. 680, 688 (EAB 1999). *Accord, In re Genesee Power Station*, 4 E.A.D. 832, 858 (EAB 1993) (petitioners argued that fuel blending should be required to manipulate the moisture content of the wood being burned so that a specific emission level could be achieved; review denied because petitioners failed to describe how it characterized fuel blending or how the fuel blending could be performed). Rather than including specific information to support its contentions during public comment, Petitioners informed the Illinois EPA that

[35] Indeed, the public comments are replete with information indicating that measures to reduce flaring emissions are readily available and can be directly implemented without referring to historical operating data. *See, Petitioners' Exhibit 2.*

the agency was lacking such information. *Petition at page 18, citing Petitioners' Comments at 21 – 22, 26 – 28.* The EAB should decline consideration of this issue because Petitioners failed to include the requisite information to support its claims in the Administrative Record.

As a part of this general challenge, Petitioners first claim that the Permit neglects to ensure that the new flares and associated equipment are dedicated to the CORE project, alone, without an ability to impact the existing flare's emissions. *Petition at page 18.* Concern exists because the existing flares do not purportedly have a monitoring or minimization plan comparable to that required by the Permit. *Id. at 18 – 19.* The Illinois EPA responded to the comment raising this issue in its *Responsiveness Summary* by observing that "[o]ther flares which would handle gases from the existing flare gas recovery system are not affected by this project." *Petitioners' Exhibit 6, Response to Comment No. 84.* The response went on to explain that:

> 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. This is because they will be in the same service, with the same process stream and function, as at present. Indeed, due to the requirements of the Consent Decree it is appropriate to anticipate that emissions of the existing process flares at the refinery will be declining.

Petitioners' Exhibit 6, Response to Comment No. 58. Petitioners fail to address the Illinois EPA's reasoned justification for declining to impose additional requirements to ensure that the new flares and related technology are dedicated flare systems. In the absence of a rationale, Petitioners have merely restated the issue that was raised in the proceedings below and therefore fail to satisfy the EAB's procedural requirements for obtaining review. *See, In re Kendall New Century Development,* 11 E.A.D. 40, 46 (EAB 2003). However, as is evidenced by its response to Petitioners' expert, the Illinois EPA

chose to rely upon its technical knowledge of both existing and proposed operations at the refinery. Far from being arbitrary, this decision reflected the understanding if ConocoPhillips' operations were modified by means of a physical change or change in the method of operation, such that a significant emissions increase occurred, this modification would be subject to 40 C.F.R. § 52.21. *See,* 40 C.F.R. § 52.21(b)(2)(i). Moreover, emission increases are to be confirmed by "flow meters or other reliable flow estimation parameters to determine emissions from flaring" at the existing flares as required by paragraph 165 of the federal decree. *Petitioners' Exhibit 6, Response to Comment No. 77; see also, Petitioners' Exhibit 6, Response to Comment No. 79* (the decree requires that ConocoPhillips be able to "reasonably determine flow and H2S content of waste gas" to existing flares).

In related responses, the Illinois EPA addressed Petitioners' concern that the existing flares do not have a similar monitoring or minimization plan, stating:

> For existing process units, requirements for minimization of flaring are established by the Consent Decree. The Decree requires ConocoPhillips to develop a plan that includes steps to correct the conditions that cause or contribute to excessive Acid Gas Flaring and Hydrocarbon Flaring.

Petitioners' Exhibit 6, Response to Comment No. 78. ConocoPhillips is also required to prepare and submit a Compliance Plan for (existing) Flaring Devices. *See, Petitioners' Exhibit 6, Response to Comment No. 77.* It is not surprising then that the Petitioners have overlooked requirements of the decree which subject ConocoPhillips to various measures to minimize emissions from flaring events comparable to those delineated in the Permit. Here too, Petitioners have merely restated the issue that was raised below and thus fail to comport with the EAB's procedural requirements for obtaining review. *In re Kendall New Century Development,* 11 E.A.D. 40, 46 (EAB 2003). Petitioners likewise have

failed to meet their burden as the existing flares are subject to a monitoring and minimization plan comparable to that required by the Permit. *Petition at page 19.* In fact, the Administrative Record reveals that the Illinois EPA's BACT analysis (and the approach ultimately adopted) for CO emissions from flaring events is similar to the approach adopted by the USEPA for existing flares at this and related refineries. *See, Petitioners' Exhibit 6, Response to Comment Nos. 28, 78, and 99.* The EAB should decline consideration of this issue because Petitioners fail to demonstrate clear error in the Illinois EPA's response to comments.

The second prong to Petitioners' attack of the Permit's CO control measures adequacy is that the flare observation requirements, particularly, the requirement for either video or observational monitoring rather than video monitoring supplemented by observational monitoring are "ineffectual." *Petition at page 19.* The core of Petitioners' claim relates solely to a technical determination wherein Petitioners simply present a conflicting opinion with that of the Illinois EPA. Where the issues raised by Petitioners in a permit appeal present conflicting expert opinions or data, the Board has concluded that it will "... look to see if the record demonstrates that the permitting agency duly considered the issues raised by the comments and if the approach ultimately selected is rational in light of all the information in the record, including the conflicting opinions and data." *In re Three Mountain Power,* LLC, 10 E.A.D. 39 (EAB 2001), *citing In re Steel Dynamics, Inc.,* 9 E.A.D. 165, 180, fn.16 (EAB 2000). Where the permitting authority gave consideration to Petitioners comments and adopted an approach that is rational and supportable, deference is typically afforded to the permitting authority's decision. *See, In re Tallmadge Generating Station,* PSD Appeal No. 02-12 (EAB, May 22, 2003). Clear

error is not established simply because Petitioners present a different opinion regarding a technical matter. *Id.* An examination of the Administrative Record confirms the Illinois EPA duly considered issues raised during public comment and that its decision is rational and supportable. As the Illinois EPA's decision was a proper exercise of its technical judgment, the Petitioners have failed to carry their burden.

Unit-Specific Condition 4.7.8-2 requires the Permittee to either utilize "continuous video image" at the flare tip or to "conduct observation for visible emissions from an affected unit when waste gases are flared for more than 30 minutes." *Petitioners' Exhibit 1, Unit Specific Condition 4.7.8-2.* The Permit conditions visual observations to flaring events that lasts longer than 30 minutes and beginning within 45 minutes after the start of the flaring event, giving the Permittee time to first eliminate the flaring event rather than merely observing it. Such approach is consistent with the overall approach to flaring in the permits, the elimination of flaring events or, in the event of a flaring event, minimizing such event. *Petitioners' Exhibit 6, Response to Comment No. 74.*

While observations are not required to take place when "all personnel capable of conducting such observations are engaged in other essential tasks related to the event, and during periods when such observations would pose a significant safety hazard to an observer due to the unusual circumstances of the event", such limitations are reasonable given the inherent safety concerns present in these operations. *Petitioners' Exhibit 1, Unit Specific Condition 4.7.8-2; see also generally, Petitioners' Exhibit 6, Response to Comment No.* 30, 93 and 95 (the Delayed Coker Unit and other operations at ConocoPhillips present safety concerns for plant personnel); *see also, Petitioners' Exhibit*

2, page 32 ("Delayed Coker Units . . . cause refinery accidents, extreme hazards to workers, releases of hazardous materials, and toxic gases, and fires.").

Petitioners fail to address the Illinois EPA's rationale for not mandating video monitoring in the final Permit. While the Illinois EPA generally followed the operational monitoring requirements in BAAQMD's Flare Monitoring Rule, the Illinois EPA chose not to include the more-prescriptive features in this rule including video monitoring given the Permit's objective to minimize and eliminate the flaring, in the first place, and due to the low level of flaring expected at the refinery in the future. *Petitioner's Exhibit 6, Response to Comment No. 74.*[36] Nor did Petitioners address the Permit's comprehensive strategy requiring continuous monitoring of waste gases sent to the flares, including sampling and analysis or maintenance of records for composition of waste gas; continuous monitoring of fuel usage for the pilot; and continuous monitoring of purge gas vented to the flare. *Petitioner's Exhibit 6, Response to Comment No. 73.* Rather, Petitioners merely repeated comments previously made during the public comment period. *In re Steel Dynamics, Inc.* 9 E.A.D. 165, 226 (EAB 2000). The burden rests with the petitioner to establish that the permit issuer's response to comments was inadequate. *In re GMC Delco Remy,* 7 E.A.D. 136, 141, fn. 14 (EAB 1997).

As discussed above, the response to comments was, as a whole, sufficient in scope and documentation. Given the complexities that may be present in a case-by-case analysis, it is not unreasonable for permitting authorities to be given some latitude in the decision making process. "Permit issuers must be free to exercise expert judgment and rely on the data they conclude are more accurate or comprehensive." *In re Inter-Power of*

[36] Petitioners' argument also ignores that the observation requirements in Unit-Specific Condition 4.7.8-2 are intended to act in combination with additional monitoring requirements incorporated in the permit. *See, discussion at pages 75-76.*

New York, Inc. 5 E.A.D. 130, 147 (EAB 1994). So long as the manner of compliance or noncompliance is established by the permit limit, any technical disagreement over the particular method in which it is achieved should be left to the sound discretion of the permitting authority. Issues that are technical in nature are largely left to the discretion of the permitting authority. *See, In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 201 (EAB 2000) ("deference to permitting agencies when technical issues are in play"); *see also, In re Ash Grove Cement Co.*, 7 E.A.D. 387, 403 (EAB 1997) (a heavy burden exists for those seeking review of "quintessentially technical" issues).

Third, Petitioners challenge the incorporated monitoring provisions for failing to include measures that guarantee "the accuracy and reliability of the required monitoring". *Petition at pages 19 – 20.* Particularly, Petitioners focus their attention on the Illinois EPA's purported failure to set detection limits for monitoring equipment; to require flare monitoring equipment meet standard test method requirements; to incorporate measures to verify monitoring equipment accuracy; to set sampling frequency requirements; to limit equipment downtime; and to require flare header monitoring. *Id.* In sum Petitioners' arguments are not only procedurally deficient but fail to consider the comprehensive program established by the Illinois EPA to determine compliance. Because Petitioners fail to explain why the Illinois EPA's response to comments was clearly erroneous, the Petitioners have failed to meet their burden.

The Illinois EPA addressed this issue in the *Responsiveness Summary*, with perhaps its most relevant response pointing out that:

> 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's Flare*

> *Monitoring Rule.* Given the 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 o the circumstances of the refineries in California that led to the BAAQMD and SCAQMD adopting their Flare Monitoring rules several years ago.

Petitioners' Exhibit 6, Response to Comment No. 74. (emphasis added). However, Petitioners failed to explain how the *Responsiveness Summary* neglected to respond to their concerns. In order to establish review of a permit is appropriate, a petitioner must explain how the response to comment is clearly erroneous or otherwise warrants review. *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 125 (EAB 1997) citing *In re Puerto Rico Electric Power Authority,* 6 E.A.D. 253, 255 (EAB 1995). In fact, Petitioners merely repeated comments made during the public comment period. A petitioner cannot simply repeat or restate the arguments presented during the public notice period but must, instead, supply information or technical grounds in its petition that demonstrate the merits of administrative review. *See, In re Steel Dynamics, Inc.,* 9 E.A.D. 165, 226 (EAB 2000), *citing In re Maui Electric Company,* 8 E.A.D. 1, 8 (EAB 1998).

Notwithstanding this procedural deficiency, on the merits, there exists no issue. The *Responsiveness Summary* is clear, the Permit's fundamental objective is to minimize and eliminate flaring emissions *in the first place. Petitioners' Exhibit 6, Response to Comment No. 74.* Precision in the quantification of emissions from flaring that does occur does not directly further the Permit's purpose of eliminating flaring events. While the *Responsiveness Summary* might have been a bit clearer on the latter part of the Illinois EPA's analysis, this should not form the basis for review. *Cf., In re Kendall New Century Development,* 11 E.A.D. 40, 50, fn. 13 (EAB 2003) (absence of direct response not grounds for review where response to comments was sufficient to convey basis of

decision). The response to the comment was sufficient to articulate the basis of the Illinois EPA's decision. *Id.*

In addition to taking appropriate measures and implementing a plan to minimize flaring events in the first place, the Permittee must also conduct monitoring as necessary to reasonably calculate emissions. For instance, Unit-Specific Condition 4.7.8-1(c) requires the Permittee to continuously monitor waste gases from each affected unit associated with the Delayed Coking Unit. In addition, the Permittee must either continuously monitor the flow, hydrocarbon and sulfur content of the waste gas to each Delayed Coking Unit flare or must determine the operating parameters of the Delayed Coking Unit and flares in order to calculate the flow and composition of waste gas to the flares. *Petitioners' Exhibit 1, Unit-Specific Condition 4.7.8-1(d).*

A review of the final Permit further reveals that it addresses the operation and maintenance of these monitoring systems. Particularly, the Permit requires data collected by the monitoring systems be kept in conjunction with records documenting their necessary operation and maintenance. *Petitioners' Exhibit 1, Unit-Specific Condition 4.7.8-1(e) (emphasis added).* Required records also include information on any time when the monitoring instrument was not in operation, with accompanying explanation. *Petitioners' Exhibit 1, Unit-Specific Condition 4.7.8-1(e).*

In conjunction with the previous monitoring requirements, the Permit requires compliance through extensive recordkeeping. Unit Specific Condition 4.7.9(b)(i)-(iii) conspicuously requires the Permittee to develop and maintain procedures indicating the manner in which flaring emissions will be calculated. *Petitioners' Exhibit 1, Unit-Specific Condition 4.7.9(b)(i)-(iii).* Based on these defined procedures, the Permittee is

required to calculate emissions and maintain records detailing the extent and duration of flaring events, the cause of the flaring event and subsequent measures taken to prevent future events. *Petitioners' Exhibit 1, Unit-Specific Conditions 4.7.9(d)(i) and (ii).* As such, the Permit sets forth a comprehensive strategy for verifying compliance with and administration of the flare minimzation conditions that is in harmony with prior EAB precedent. *Accord, In re Newmont Nevada Energy Investment, L.L.C.* 12 E.A.D. 429, 472-475 (EAB 2005).

Nor should it be ignored that the Permit includes even further recordkeeping requirements. Records of CO emissions from each flare in tons/month and tons/year and each instance that an exceedance of a limit occurred are required to be kept. *See, Petitioners' Exhibit 1, Unit-Specific Conditions 4.7.9(c) and (e).* Deviations from Permit requirements are to be promptly reported to the Illinois EPA. *Petitioners' Exhibit 1, Unit-Specific Condition 4.7.10(b).* Similar requirements exist for malfunction and breakdown events. *Petitioners' Exhibit 1, Unit-Specific Condition 4.7.9(f) and Condition 4.7.10(c).* Finally, the Permittee is obligated to submit further information about each flaring event in its Annual Emission Report. *Petitioners' Exhibit 1, Unit-Specific Condition 4.7.10(d).* Taken as a whole, the Permit contains a significant number of compliance monitoring, recordkeeping and reporting requirements that readily verify the Permittee's compliance with the conditions in the Permit for the flares. *Accord, In re Newmont Nevada Energy Investment, L.L.C.* 12 E.A.D. 429, 472-475 (EAB 2005), 12 E.A.D. ____; *see also, In re Steel Dynamics, Inc.* 9 E.A.D. 165, 234 (EAB June 22, 2000).

Notably, the Illinois EPA included these additional operating monitoring requirements in response to public comments, but no effort has been made by the Petitioners to refute the narrative explanation offered by the Illinois EPA, particularly, its statement that:

> The issued permit requires continuous monitoring to identify when waste gases are flared. This requirement is accompanied by requirements for monitoring or instrumentation to reasonably determine the amount of gas that is flared, requirements for sampling and analysis of waste gas or maintenance of records for the composition of the gas, and requirements for monitoring or records related to fuel usage for the pilot and venting of purge gas to the flare.

Petitioners' Exhibit 6, Response to Comment No. 73; see also, Petitioners' Exhibit 6, Response to Comment No. 79 ("the issued permit requires that monitoring and recordkeeping be implemented for the new flares to be able to determine flow and composition of waste gas"). Instead, Petitioners complain that the Permit is silent with respect to the frequency of sampling and the location of the monitoring thereby enabling the use of compliance calculations to determine flaring emissions.[37] While Petitioners call into question the use of calculations to ascertain flaring emissions, Petitioners fail to substantiate its argument with supporting fact. *See, BP Cherry Point,* 12 E.A.D. 209, 228 (EAB 2005); *see also In re Three Mountain Power, LLC,* 10 E.A.D. 39, 58 (EAB 2001) (The Board has previously held that it "will not overturn a permit provision based on speculative arguments").

Other than repeating comments made during the public comment period, the Petition does not present any basis for the EAB to review this argument. No relevant facts or technical details are provided to support the Petitioners' contention and they fail to offer any reason or empirical evidence as to why the additional monitoring equipment

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[37] Emission testing may also be required upon a request by the Illinois EPA. *Petitioners' Exhibit 1, Unit-Specific Condition 4.7.7(a)(i).*

accuracy requirements proffered in comments should have been included when the fundamental objective of the Permit is to eliminate flaring events and in light of the limited flaring expected to take place at the refinery in the future. To warrant EAB review, these particulars should have been articulated with greater specificity than that alleged in the Petition. *See, In re BP Cherry Point,* 12 E.A.D. 209-217(EAB 2005) (petitioners must include "specific information in support of their allegations"); *see also, In re Inter-Power of New York,* 5 E.A.D. 130, 153 (EAB 1994). Because the Petitioners fail to explain why the Illinois EPA's response to comments was clearly erroneous, the EAB should decline review of this argument.

Finally, Petitioners charge the Permit failed to consider increased flaring emissions at existing flares due to increased refinery production, as a whole, from the CORE project and summarily conclude that BACT-level controls are required on existing flares to address emissions due to increased production levels. *Petition at page 20.* The EAB should deny review of this issue because like Petitioners' first argument, both consider whether the Permit appropriately addressed the CORE project's impact on emissions from existing flares, and similar to Petitioners' first argument, this challenge suffers from the same failing to demonstrate clear error by the Illinois EPA in its response to comments. To merely summarize the Illinois EPA's response to comments discussed at length above, the *Responsiveness Summary* observed that the pre-existing flares would not be impacted by the CORE project as they were not being physically modified or changing their operation. *Petitioners' Exhibit 6, Response to Comment Nos. 58 and 84.* In fact, due to requirements of the decree, emissions were expected to decrease at the existing process flares. *Petitioners' Exhibit 6, Response to Comment No.*

58. Here, too, Petitioners fail to address the Illinois EPA's justification and have merely restated the issue raised below and therefore fail to satisfy the EAB's procedural requirements for obtaining review. *See, In re Kendall New Century Development,* 11 E.A.D. 40, 46 (EAB 2003).

Moreover, review should be denied because Petitioners fail to demonstrate clear error in the Illinois EPA's response to comments. As evidenced by its response, the Illinois EPA chose to rely upon its technical knowledge of existing operations at the refinery. Here, too, this decision reflected the understanding if ConocoPhillips' operations were modified by means of a physical change or change in the method of operation, such that a significant emissions increase occurred, this modification would be subject to 40 C.F.R. § 52.21. *See,* 40 C.F.R. § 52.21(b)(2)(i); *see also, Petitioners' Exhibit 6, Response to Comment No. 77* (decree requires confirmation of emission increases is to be confirmed by flow meters or other reliable means to determine flaring emissions from the existing flares); *see also, Petitioners' Exhibit 6, Response to Comment No. 79* (the decree requires the flow and H2S content of waste gas to existing flares to be determined).

Nor are BACT-level controls required on existing flares given the Petitioners have failed to present one scintilla of evidence suggesting that emissions will increase; moreover, the decree already subjects existing flares to minimization and to monitoring requirements that includes measures to correct conditions that may contribute to excessive Acid Gas Flaring and Hydrocarbon Flaring. *Petitioners' Exhibit 6, Response to Comment Nos. 77 and 78.* It is not surprising then that the Petitioners have overlooked requirements of the decree which subject ConocoPhillips to various measures to

minimize emissions at existing flares. As such, Petitioners have merely restated the issue raised below thereby failing to satisfy the EAB's procedural requirements for obtaining review, *In re Kendall New Century Development,* 11 E.A.D. 40, 46 (EAB 2003), and have also failed to demonstrate clear error in the Illinois EPA's response to comments. Consequently, there exists no need for the Board to hear this issue much less afford the relief suggested by Petitioners to wit a "remand of the permit to IEPA with instructions that it perform top-down BACT analysis." *Petition at page 21.*

D. The Flare Control Measures Established in the Permit are Practicably Enforceable.

Petitioners continue a refrain of objections with respect to the flare control measures. Although these issues are developed separately in the Petition, they tend to run together to make a single point; the flare minimization conditions are not practicably enforceable. Specifically, Petitioners charge that the flare observation, monitoring equipment and sampling requirements are not sufficient to guarantee that the conditions are "enforceable as a practical matter."

1. Petitioners' argument fails to satisfy the EAB's procedural requirements for obtaining review.

Comments submitted during the public comment period faulted the Illinois EPA for failing to include adequate flare monitoring requirements. *See, Petitioners' Exhibit 6, Response to Comment Nos. 66, 73, 74, 76.* The Illinois EPA responded to this issue in the *Responsiveness Summary*, explaining that "[t]he extent of future flaring at the Wood River refinery is minimized by operational and economic incentives to maintain stable process operation with consistent product yields to recover waste gas that is produced for use as fuel." *Petitioners' Exhibit 6, Response to Comment No. 66; see also, Petitioners'*

Exhibit 2, attached Technical Analysis of Julia May, page 17 (recognizing that an economic incentive exists to recover "valuable gas" that "may be used as fuel gas of feed for refinery processes"). Nonetheless, the Illinois EPA required ConocoPhillips to perform certain measures to minimize flaring events including requirements that "address proper operation of a flare for effective destruction of organic constituents in waste gas and effective combustion as related to generation of CO." *Petitioners' Exhibit 6, Response to Comment No. 76.* The Illinois EPA concluded that due to the low level of flaring expected in the future at the refinery, it was not necessary to "prescribe what monitoring techniques must be used and how monitoring must be conducted" rather it was sufficient to require the "collection of data to identify when waste gases are flared and in what quantity." *Petitioners' Exhibit 6, Response to Comment No. 74; see also, Petitioners' Exhibit 6, Response to Comment No. 71* (Shell Martinez's record on minimizing flaring emissions at its Delayed Coker Unit installed in the mid-1990's suggests that operation of a modern Delayed Coker Unit does not significantly contribute to flaring emissions)*; see also, Petitioners' Exhibit 2, attached Technical Analysis of Julia May, page 17* (the inclusion of additional compressor capacity in the final permit ensures that flare gases will generally be recovered rather than routed to the flare). Particularly, the issued Permit included requirements for continuous monitoring or instrumentation to determine the amount of gas flared, "requirements for sampling and analysis of waste gas or maintenance of records for the composition of the gas, and requirements for monitoring or records related to fuel usage for the pilot and venting of purge gas to the flare." *Petitioner's Exhibit 6, Response to Comment No. 73.*

Interestingly, Petitioners do not suggest the Illinois EPA's response to comments is clearly erroneous or otherwise warrants review. In fact, Petitioners do not address the Illinois EPA's response to public comments at all. "In order to establish that review of a permit is warranted, §124.19(a) requires a petitioner to both state the objections to the permit that are being raised for review, and to explain why the permit decision maker's previous response to those objections (i.e., the decision maker's basis for the decision) is clearly erroneous or otherwise warrants review." *In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 769 (EAB 1997) *citing, In re Puerto Rico Electric Power Authority*, 6 E.A.D. 253, 255 (EAB 1995); *In re Genesee Power Station L.P.*, 4 E.A.D. 832, 866 (EAB 1993). A petitioner may not simply repeat objections previously made during the public comment period. *See, In re Knauf Fiber Glass, GMBH,* 9 E.A.D. 1, 5 (EAB 2000), *citing Sutter,* 8 E.A.D.680, 687 (EAB 1999); *In re Encogen Cogeneration Facility,* 8 E.A.D. 244, 251-252 (EAB 1999). The burden is on the petitioner to establish that the permit issuer's response to comments was inadequate. *In re GMC Delco Remy,* 7 E.A.D. 136, 141, fn. 14 (EAB 1997); *see also, In re Exxon Co., U.S.A.*, 6 E.A.D. 32, 38-39, fn. 7 (EAB 1995); *see also, In re South Shore Power, L.L.C.*, PSD Appeal No. 03-02, slip op. at 12-15 (EAB, June 4, 2003) (review denied where Petitioners neglected to address how the Administrator's response to comments failed to respond to Petitioners terrain and meteorology concerns).

2. Petitioners fail to show that the Illinois EPA's imposition of permit requirements relating to the flare control measures were clearly erroneous, arbitrary or otherwise warrants review.

Turning to the merits of the issue, Petitioners contend that the recently-added flare minimization conditions are not federally enforceable in accordance with USEPA

guidance. This is purportedly due to the Permit allowing for either video monitoring or operator monitoring rather than requiring video monitoring supplemented by operator monitoring; the Permit neglecting to incorporate requirements ensuring the effective functioning of monitoring equipment; and the Permit failing to require monitoring at the flare header and to condition the frequency of sampling. *See, Petition at pages 22 - 24.* Petitioners generally seize upon language in the *NSR Workshop Manual* that stress the desirability of enforceable BACT limits. *See, Petition at page 21, citing NSR Workshop Manual at page B.56.* In particular, the *NSR Workshop Manual* plainly discusses the need for enforceable BACT limits and, in particular, it provides that BACT emission limits must be practically enforceable and met on a continuous basis. *See, Respondent's Exhibit 7 at page B.56.* The document gives meaning to federal enforceability as a permit that "contains appropriate averaging times, compliance verification procedures and recordkeeping requirements." *Id.* The *NSR Workshop Manual* further states that the permit must:

- be able to show compliance or noncompliance (i.e., through monitoring times of operations, fuel input, or other indices of operating conditions and practices); and
- specify a reasonable averaging time consistent with established reference methods, contain reference methods for determining compliance, and provide for adequate reporting and recordkeeping so that the permitting agency can determine the compliance status of the source.

Id. As explained below, the EAB should recognize that the flare minimization conditions are practically enforceable and thus, represent a lawful exercise of permitting authority under the PSD program in accordance with the *NSR Workshop Manual* and EAB precedent. Accordingly, the EAB should defer to the Illinois EPA's technical judgment in this matter.

a. The Permit contains adequate flare observation requirements.

In their initial argument concerning the Permit's purported enforceability "shortcomings", Petitioners claim that the Permit must require video monitoring. *Petition at page 22.* Particularly, Petitioners charge that Permittee's compliance with certain flare control measures may only be demonstrated through video monitoring supplemented by operator monitoring rather than allowing for either video monitoring or operator monitoring. *Id.* However, this argument is clearly dispelled by reading from a portion of the *NSR Workshop Manual* cited by Petitioners. *See, Petition at pages 22-23; see also, Respondent's Exhibit 7 at page B.56.* While compliance must be readily verifiable, the manner in which it is achieved is permissible so long as it shows compliance or noncompliance either through "monitoring times of operation, fuel input, or other indices of operating conditions and practices", specifies reasonable averaging times and includes "reference methods for determining compliance." *Id.* Nothing in the *NSR Manual* suggests that one type of monitoring is preferable to another type of monitoring so long as the terms of the permit are readily verifiable. Given the deference typically provided to permitting authorities in technical matters, the Board should be reluctant to review such specific details in permitting. *See, BP Cherry Point,* 12 E.A.D. 209, 228 (EAB 2005).

In fact, the terms of this Permit are readily enforceable; Unit-Specific Condition 4.7.8-2 requires the Permittee to either utilize "continuous video image" at the flare tip or to "conduct observation for visible emissions from an affected unit when waste gases are flared for more than 30 minutes." *Petitioners' Exhibit 1, Unit Specific Condition 4.7.8-2.* Contrary to Petitioners' insinuations, the fact that there are two options available to the

Permittee does not make either or both options unenforceable. Further, that the Permit provides the Permittee a limited time frame to eliminate a flaring event after discovery does not make the visual observation requirement unenforceable.[38] Such conditions are reasonable given that the primary purpose of the Permit is to minimize and eliminate flaring not to simply observe such events. *Petitioners' Exhibit 6, Response to Comment No. 74.*

Moreover, that observations are not required to take place when "all personnel capable of conducting such observations are engaged in other essential tasks related to the event, and during periods when such observations would pose a significant safety hazard to an observer due to the unusual circumstances of the event" does not make the visual observation requirement unenforceable. *Petitioners' Exhibit 6, Unit Specific Condition 4.7.8-2.* Such limitations are reasonable given the inherent safety concerns present in these operations. *See generally, Petitioners' Exhibit 6, Response to Comment No.* 30, 93 and 95 (recognizing that the Delayed Coker Unit and other operations at ConocoPhillips present safety concerns for plant personnel). In fact, Petitioners, are on record stating that "Delayed Coker Units . . . cause refinery accidents, extreme hazards to workers, releases of hazardous materials, and toxic gases, and fires." *Petitioners' Exhibit 2, page 32.*

The conditions are readily verifiable consistent with the guidance dictated by the *NSR Workshop Manual.* In fact, contrary to Petitioners' assertion, their preferred use of video monitoring supplemented by operator monitoring verifies compliance in generally the same manner as that specified in the Permit. Petitioners' brief supported the inclusion

[38] The presence of visible emissions at a flare may readily be determined by human observers by USEPA Method 22.

of operator monitoring as a compliance verification tool and, in fact, was included in the Permit in response to comments. *Petition at page 23; Petitioner's Exhibit 6, Response to Comment No. 73. Accord, In re Prairie State Generating Company,* PSD Appeal No. 05-05, slip op. at 81, fn. 64 (EAB, August 24, 2006), 13 E.A.D. ____ (acknowledging that the petitioners supported a control efficiency limit incorporated in the permit due to public comments).

Moreover, Petitioners fail to address the Illinois EPA's rationale for not mandating video monitoring in the final Permit. The Illinois EPA generally followed the operational monitoring requirements in BAAQMD's Flare Monitoring Rule, opting not to adhere to some of the more-detailed obligations specified in this rule, 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's Flare Monitoring Rule. Given the very low level of flaring that should occur in the future at the Wood River refinery, a simpler approach to operational monitoring at the refinery should be established, as compared to the circumstances of the refineries in California that led to the BAAQMD and SCAQMD adopting 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.

Petitioner's Exhibit 6, Response to Comment No. 74; *see also, Petitioner's Exhibit 6, Response to Comment No. 79* (indicating that the use of specific monitoring devices may be addressed while processing a revised Title V permit).

Petitioners' argument also ignores that the observation requirements in Unit-Specific Condition 4.7.8-2 are intended to act in combination with other monitoring requirements incorporated in the Permit. *See, Petitioners' Exhibit 1, Unit-Specific*

Condition 4.7.3(c)(vii) ("Owners or operators of flares used to comply with the provisions of 40 CFR 60.18 shall monitor these control devices to ensure that they are operated and maintained in conformance with their designs"); *see also, Petitioners' Exhibit 1, Unit-Specific Condition 4.7.8-1(b)* ("[t]he Permittee shall continuously monitor each affected unit for the presence of a flare pilot flame using a thermocouple or any other equivalent device to detect the presence of a flame"); *see also, Petitioners' Exhibit 1, Unit-Specific Condition 4.7.8-1(c)* ("[t]he Permittee shall continuously monitor each affected unit associated with the Delayed Coking Unit for the occurrence of flow of waste gases, other than normal flow of purge gas and leakage from "closed" pressure relief valves, to the affected unit"); *see also, Petitioners' Exhibit 1, Unit-Specific Condition 4.7.8-1(d)* ("[t]he Permittee shall continuously monitor either: (1) [t]he flow and hydrocarbon and sulfur content of waste gas to each affected unit associated with the Delayed Coking Unit; or (2) [t]he operating parameters of the Delayed Coking Unit and affected units as needed for the flow and composition of waste gas to the affected united to be determined"). These requirements as well verify the accuracy of the flare control measures.

Nor did Petitioners address the Permit's approach to monitoring waste gas flare articulated in an additional response to comment, stating:

> The issued permit requires continuous monitoring to identify when waste gases are flared. This requirement is accompanied by requirements for monitoring or instrumentation to reasonably determine the amount of gas that is flared, requirements for sampling and analysis of waste gas or maintenance of records for the composition of the gas, and the requirements for monitoring or records related to fuel usage for the pilot and venting of purge gas to the flare.

Petitioner's Exhibit 6, Response to Comment No. 73. Rather, Petitioners merely repeated comments made during the public comment period. *In re Steel Dynamics, Inc.* 9 E.A.D.

165, 226 (EAB 2000) (finding that petitioners' claims that sulfur limits were not practically enforceable merely repeated its claims during the public comment period and did not rebut explanations provided by the permitting authority in its response to comments document). The burden rests with the petitioner to establish that the permit issuer's response to comments was inadequate. *In re GMC Delco Remy,* 7 E.A.D. 136, 141, fn. 14 (EAB 1997).

As discussed above, the Permit and the response to comments are, as a whole, sufficient in scope and documentation. Given the complexities that may be present in a case-by-case analysis, it is not unreasonable for permitting authorities to be given some latitude in the decision making process. "Permit issuers must be free to exercise expert judgment and rely on the data they conclude are more accurate or comprehensive." *In re Inter-Power of New York, Inc.* 5 E.A.D. 130, 147 (EAB 1994). So long as the manner of compliance or noncompliance is established by the permit limit, any technical disagreement over the particular method in which it is achieved should be left to the sound discretion of the permitting authority. Issues that are technical in nature are largely left to the discretion of the permitting authority. *See, In re Peabody Western Coal Company,* PSD Appeal No. 04-01 (EAB, February 18, 2005), *citing In re Carlota Copper Co.,* NPDES Appeal Nos. 00-23 & 02-06, slip op. at 22 (EAB, Sept. 30, 2004), 11 E.A.D. ___; *see also, In re NE Hub Partners, L.P.,* 7 E.A.D. 561 (EAB 1998).

Finally, Petitioners make a fleeting statement that the observation requirements for flaring make it impossible to determine compliance with federal limits on smoking events (that are limited to 5 minutes in any two hour period) and with visible emission limits. However, exactly the opposite is the case. The Permit establishes certain

procedures whereby the Permittee must take action to verify compliance with such requirements; in the future, these procedures may be supplemented with further procedures in the Title V permit for the refinery. *See, Petitioners' Exhibit 1, Unit-Specific Condition 4.7.8-2; see also, generally, Petitioners' Exhibit 6, Response to Comment No. 79.* Nor do such procedures act to prevent other observation or credible evidence from being used to determine compliance with the applicable standard for visible emissions.

b. The Illinois EPA appropriately rejected the inclusion of the monitoring equipment accuracy requirements of BAAQMD Regulation 12-11.

In their second argument, Petitioners claim that the Permit does little to ensure the effective functioning of monitoring equipment and thereby does not ensure the enforceability of the flare-related limits. *Petition at page 23.* Petitioners profess to support this assertion by setting forth a litany of items the Permit fails to include (i.e., " (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 the accuracy of the equipment, or (iv) limit equipment downtime and set conservative assumptions for calculating emissions when monitoring equipment is down"). *Id.* Petitioners conclude the monitoring requirements of BAAQMD Regulation 12-11 previously pointed to in the public comment period should have been included in the final Permit. *Id.; see also Petitioners' Exhibit 6, Response to Comment No. 74.* Petitioners' arguments are procedurally deficient and substantively misplaced.

The Illinois EPA addressed this issue in the *Responsiveness Summary*, with perhaps its most relevant discussion coming in response to Petitioners' comment that

each requirement of BAAQMD Regulation 12 Rule 11 should be incorporated in the Permit due to the "large increase in refinery capacity and the refinery's history of flaring." *Petitioners' Exhibit 6, Response to Comment No. 74.* In response, the Illinois EPA pointed out that:

> 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's Flare Monitoring Rule.* Given the 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.

Id. (emphasis added). However, Petitioners failed to explain how the *Responsiveness Summary* neglected to respond to their concerns.

> [I]n order to establish that review of permit is warranted, §124.19(a) requires a petitioner to both state the objections to the permit that are being raised for review, and to explain why the permit decision maker's previous response to those objections (i.e., the decision maker's basis for the decision) is clearly erroneous or otherwise warrants review.

In re Kawaihae Cogeneration Project, 7 E.A.D. 107, 125 (EAB 1997) citing *In re Puerto Rico Electric Power Authority,* 6 E.A.D. 253, 255 (EAB 1995); *In re Genesee Power Station L.P.*, 4 E.A.D. 832, 866 (EAB 1993); *In re Commonwealth Chesapeake Corp,* 6 E.A.D 764, 769 (EAB 1997). In fact, Petitioners merely repeated comments made during the public comment period. A petitioner cannot simply repeat or restate the arguments presented during the public notice period but must, instead, supply information or technical grounds in its petition that demonstrate the merits of administrative review. *See, In re Steel Dynamics, Inc.,* 9 E.A.D. 165, 226 (EAB 2000), *citing In re Maui Electric Company,* 8 E.A.D. 1, 8 (EAB 1998).

Beyond this procedural deficiency, on the merits, there exists no issue. The *Responsiveness Summary* is clear, the Permit's fundamental objective is to minimize and eliminate flaring emissions *in the first place. Petitioners' Exhibit 6, Response to Comment No. 74.* Precision in the quantification of emissions of flaring that does occur does not directly further the Permit's goal to eliminate flaring. While the *Responsiveness Summary* might have been a bit clearer on the later part of the Illinois EPA's analysis, this should not form the basis for review. *Cf., In re Kendall New Century Development,* 11 E.A.D. 40, 50 fn. 13 (EAB 2003) (absence of direct response not grounds for review where response to comments was sufficient to convey basis of decision). The response to the comment was sufficient to articulate the basis of the Illinois EPA's decision. *Id.*

Significantly, in addition to implementing a plan to minimize flaring emissions in the first place, the final Permit addresses the operation and maintenance of the monitoring systems. Particularly, the Permit requires that records of data collected by the monitoring systems be kept in conjunction with records documenting their necessary *operation and maintenance. Petitioners' Exhibit 1, Unit-Specific Condition 4.7.8-1(e) (emphasis added).* Required records further include the "date and duration of any time when a required monitoring instrument or device for an affected unit was not in operation, with explanation." *Petitioners' Exhibit 1, Unit-Specific Condition 4.7.8-1(e).*

Consistent therewith, the USEPA provided the Illinois EPA with relevant guidance by means of the decree it entered in *United States of America and the States of Illinois, Louisiana and New Jersey, Commonwealth of Pennsylvania and the Northwest Clean Air Agency v. ConocoPhillips Company,* Civil Action No. H-05-0258 (S.D. Tex. December 5, 2005) of what it found to be appropriate investigative, reporting and

corrective action requirements for flaring incidents. For instance, paragraphs 153 through 157 of the decree indicate how Acid Gas Flaring and Tail Gas Incidents are to be investigated, reported and corrective actions implemented; paragraph 167 incorporates by reference paragraphs 153 through 157 for purposes of hydrocarbon flaring incidents. A review of these paragraphs reveals a broad approach to investigative, reporting and corrective action requirements similar to that adopted by the Illinois EPA in the challenged Permit. *See, Petitioners' Exhibit 6, Response to Comment Nos. 28, 78, and 99.*

Other than repeating comments made during the public comment period, the Petition does not present any basis for the EAB to review this argument. No relevant facts or technical details are provided to support the Petitioners' contention and they fail to offer any reason or empirical evidence as to why the additional equipment accuracy requirements proffered in comments should have been included when the fundamental objective of the Permit is to eliminate flaring events, in light of the limited flaring expected to take place at the refinery in the future, and the additional requirements discussed at length above. These particulars should be articulated with greater specificity for seeking EAB review than that alleged in the Petition. *See, In re BP Cherry Point,* 12 E.A.D. 209, 217(EAB 2005) (petitioners must include "specific information in support of their allegations"); *see also, In re Inter-Power of New York,* 5 E.A.D. 130, 153 (EAB 1994). Because the Petitioners fail to explain why the Illinois EPA's response to comments was clearly erroneous, the EAB should decline review of this argument.

Finally, Petitioners make passing reference that the Permit's purported lack of equipment accuracy requirements makes it impossible to determine compliance with the

Permit limits for "CO, NOx and VOM (and, indirectly, PM)". *Petition at page 23.* The argument is flawed as the accuracy or precision of a determination does not affect the feasibility of making such determination. It merely affects the accuracy or precision of the determination.[39] In this regard, Petitioners do not address why the provisions that the Illinois EPA set forth in the Permit are not sufficient to enable a reasonable determination of compliance with emission limits.[40] Moreover, the Environmental Appeals Board's jurisdiction is principally established "by regulation." *See, The Environmental Appeals Board Practice Manual at page 2* (June 2004). The narrative discussion contained within USEPA's original rule-making, which formally created the Board in February 1992, implies the same conclusion, referring to the Administrator's delegation of authority to the Board to review penalty and permit appeal cases "arising under" the specified environmental programs.[41]

In permit appeals brought under the Clean Air Act's PSD program, the Board's review is governed by the PSD regulations. Issues that are "covered" by the PSD regulations are reviewable; issues that fall outside of the purview of the regulations will not warrant the Board's review even if they satisfy the Board's other procedural

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[39] Moreover, any malfunction of monitoring equipment would be a failure to properly monitor and thus, constitute noncompliance. It would not preclude the use of other information, under the principle of credible evidence, to determine compliance.

[40] It is also relevant that other aspects of the CO BACT determination for flaring are enforceable independently and separate from compliance with applicable limits. In particular, the requirements to properly operate and maintain the flare, to have redundant compressor capacity, to implement a flare minimization plan, to perform root cause analyses for flaring, and to periodically report the occurrence of flaring events are all directly enforceable.

[41] *See*, 57 Fed. Reg. 5,320, 5,320-5,321 (February 13, 1992). (The rule-making identified the various types of matters that the Board is permitted to review under both the applicable regulatory and delegated authority from the USEPA Administrator and outlined the specific appellate functions that the Board must serve).

requirements. *See, In re Knauf Fiber Glass, GmbH,* 8 E.A.D. 121, 127 (EAB 1999). Stated more broadly, the Board'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.* Unless the permitting issue is an "explicit" requirement of, or "directly relates" to, the PSD program, the Board has consistently refused to assume jurisdiction in the matter. *Id. at pages 161-162.* While CO emissions from this project are subject to PSD review, and thus, subject to review by the Board, NOx, VOM and PM emissions from the CORE project are not. *See, Petitioners' Exhibit 1, Unit-Specific Condition 2.3.* This project's VOM emissions are subject to state regulations for Major Stationary Sources Construction and Modification ("MSSCAM") found at 35 Ill. Adm. Code 203. *Id; see also, In Genesee Power Station Limited Partnership,* 4 E.A.D. 832, 859-860 (EAB 1993) ("non-attainment issues are generally not reviewable in the context of a PSD appeal."). Emissions of NOx and PM from this project are not significant and are only subject to state permit requirements. *Petitioners' Exhibit 1.* Emissions subject to state-only requirements are clearly beyond the statutory and regulatory framework of the PSD program. Because such arguments are generally beyond the EAB's jurisdiction, review should be denied.

c. The Permit includes enforceable monitoring requirements.

In their third point, Petitioners aver the lack of sampling frequency and monitoring location requirements in the Permit asserting that these deficiencies allow the Permittee to merely calculate flaring emissions something they characterize as "a far less accurate method" than performing monitoring at the flare header. *See, Petition at pages 23 – 24.* These arguments are unfounded. While Petitioners fail to cite to any portion of

the Permit that purportedly allow ConocoPhillips to "make an end run around sampling and monitoring requirements" through the performance of "infrequent" sampling events, the key provisions for addressing the Petitioners' concerns are found in the limits themselves. *See, Petition at page 23.*

First, as a more practical matter future flaring at the refinery is expected to be at a low level. The inclusion of an additional waste gas recovery system with redundant compressor capacity for the Delayed Coking Unit makes certain sufficient capacity exists to handle 100 percent of the routine flow of waste gas generated from operation of the Delayed Coking Unit to the fuel recovery system. *Petitioners' Exhibit 1, Unit-Specific Condition 4.7.5(a)(iii); see also, Petitioners' Exhibit 6, Response to Comment Nos. 71, 78 and 84.* As such, flare gases will generally be recovered rather than routed to the flare. *See, Petitioners' Exhibit 2, attached Technical Analysis of Julia May, page 17; see also, page 26* ("As found by the BAAQMD and SCAQMD, compressor capacity is key in preventing flaring. It allows the refinery to recycle gases back to the refinery to be used as fuel, rather than burning these gases in the flare and creating unnecessary additional air pollution. As discussed in the Shell Martinez Flare Minimization Plan, adding compressor capacity allowed Shell to reduce to very low levels compared to other refineries, including emergency flaring."). What's more, the Flare Minimization Plan not only addresses the adequacy of the recovery system, but the Permit requires additional measures that "address proper operation of a flare for effective destruction of organic constituents in waste gas and effective combustion as related to generation of CO." *Petitioners' Exhibit 6, Response to Comment Nos. 74, 76 and 84.* For these reasons, a

low level of flaring is expected in the future at the refinery. *Petitioners' Exhibit 6, Response to Comment No. 74.*

Second, a review of the Permit reveals that the Permittee must continuously monitor a number of different variables that are necessary to determine flare emissions. For instance, Unit-Specific Condition 4.7.8-1(c) requires the Permittee to continuously monitor waste gases from each affected unit associated with the Delayed Coking Unit. In addition, the Permittee must either continuously monitor the flow, hydrocarbon and sulfur content of the waste gas to each Delayed Coking Unit flare or must determine the operating parameters of the Delayed Coking Unit and flares in order to calculate the flow and composition of waste gas to the flares.[42] *Petitioners' Exhibit 1, Unit-Specific Condition 4.7.8-1(d).*

In conjunction with the previous monitoring requirements, compliance is verified through extensive recordkeeping. Unit Specific Condition 4.7.9(b)(i)-(iii) requires the Permittee to develop and maintain a file indicating the manner in which flaring emissions will be calculated; particularly, the Permittee is obligated to define the following procedures:

> i. A description of the procedure for calculating emissions attributable to combustion of fuel for the pilot flame fuel, purge gas and waste gas.
> ii. A description of the procedures for determining flows of different streams to the flare as related to operational monitoring, if continuous monitoring is not conducted for a stream.
> iii. A description of the procedures for determining the composition of different streams to the flare as related to operational monitoring, if continuous monitoring is not conducted for a stream, with the composition that will be used for different streams, with supporting documentation.

[42] It also bears mentioning that in addition to requiring continuous monitoring of the above items, the Permittee must keep records incumbent with the operation of these systems including records of those times when the monitoring device is not in operation. *Petitioners' Exhibit 1, Unit-Specific Condition 4.7.8-1(e).*

Petitioners' Exhibit 1, Unit-Specific Condition 4.7.9(b)(i)-(iii). Based on these defined and documented procedures, the Permittee is required to calculate emissions and maintain records detailing:

i. Operation and emissions associated with the pilot flame and purge gas streams.

ii. Information for each period when waste gas was flared, including date, time and duration, reason for flaring, total volume of gas flared*, whether any waste gas was recovered for fuel with estimated amount, hydrocarbon and sulfur content of the waste gas *, total emissions of VOM and SO2, detailed explanation of the reason for flaring, any measures taken to prevent similar events and other relevant information related to the flaring event.

* Accompanied by supporting calculations

Petitioners' Exhibit 1, Unit-Specific Conditions 4.7.9(d)(i) and (ii). As such, the Permit sets forth a comprehensive approach to determining emissions from flaring that is in accord with prior EAB precedent. *Accord, In re Newmont Nevada Energy Investment, L.L.C.* 12 E.A.D. 429, 472-475 (EAB 2005).

In fact, the Permit contains even more extensive recordkeeping requirements. Records of CO emissions from each flare in tons/month and tons/year and each instance that an exceedance of a limit occurred are required to be kept. *See, Petitioners' Exhibit 1, Unit-Specific Conditions 4.7.9(c) and (e)* (requiring identification of the limit possibly exceeded; duration of any likely exceedance; an estimate of excess emissions; an explanation of the cause of the potential exceedance; and the time compliance was established). Deviations from permit requirements are to be promptly reported to the Illinois EPA. *Petitioners' Exhibit 1, Unit-Specific Condition 4.7.10(b).* Similar requirements exist for malfunction and breakdown events. *Petitioners' Exhibit 1, Unit-*

Specific Condition 4.7.9(f) and Condition 4.7.10(c). Finally, the Permittee is obligated to submit information about each waste gas flaring event, a summary of the year's flaring activity and emissions, an analysis of the amount of waste gas recovered as related to the amount of flared waste gas and an analysis of the cause of each flaring event in its Annual Emission Report. *Petitioners' Exhibit 1, Unit-Specific Condition 4.7.10(d).* Taken as a whole, the Permit contains monitoring and recordkeeping requirements that are reasonably developed to determine emissions from flaring as well as address other requirements of the permit related to flaring. *Accord, In re Newmont Nevada Energy Investment, L.L.C.* 12 E.A.D. 429, 472-475 (EAB 2005); *see also, In re Steel Dynamics, Inc.* 9 E.A.D. 165, 234 (EAB June 22, 2000).

Notably, the Illinois EPA included these additional operational monitoring requirements in response to public comments, but no effort has been made by the Petitioners to refute the narrative explanation offered by the Illinois EPA, particularly, its statement that:

> The issued permit requires continuous monitoring to identify when waste gases are flared. This requirement is accompanied by requirements for monitoring or instrumentation to reasonably determine the amount of gas that is flared, requirements for sampling and analysis of waste gas or maintenance of records for the composition of the gas, and requirements for monitoring or records related to fuel usage for the pilot and venting of purge gas to the flare.

Petitioners' Exhibit 6, Response to Comment No. 73; see also, Petitioners' Exhibit 6, Response to Comment No. 79 ("the issued permit requires that monitoring and recordkeeping be implemented for the new flares to be able to determine flow and composition of waste gas"). Instead, Petitioners complain that the Permit is silent with respect to the frequency of sampling and the location of the monitoring thereby enabling the Permittee to employ what it characterizes as a "less accurate method", compliance

calculations, to determine flaring emissions.[43] While the Permittee's compliance methodology does include calculations whose accuracy has been called into question by the Petitioners, Petitioners' argument is not substantiated with supporting fact. Here, the Petitioners offer a one-sentence argument and nothing more. This type of minutia in permitting detail reflects the sort of review that the Board should be averse to accept in view of the deference typically afforded to permit authorities in technical matters. *See, BP Cherry Point,* 12 E.A.D. 209, 228 (EAB 2005); *see also, In re Three Mountain Power, LLC,* 10 E.A.D. 39, 58 (EAB 2001) (The Board has previously held that it "will not overturn a permit provision based on speculative arguments").

Admittedly the above-conditions do not specify a particular frequency of sampling, however, they speak to the nature of the data that must be collected and the schedule for the required activities, continuous monitoring to ensure compliance.[44] As such, it provides an adequate basis to assess compliance with emission limits.

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[43] Petitioners make passing reference that the permit's monitoring deficiencies make it impossible to determine compliance with the permit limits for "CO, NOx and VOM (and, indirectly, PM)". *Petition at page 24.* As set forth above, issues that are "covered" by the PSD regulations are reviewable; issues that fall outside the purview of the regulations will not warrant the Board's review even if they satisfy the Board's other procedural requirements. *See, In re Knauf Fiber Glass, GmbH,* 8 E.A.D. 121, 127 (EAB 1999). While CO emissions from this project are subject to PSD review, and thus, subject to review by the Board, NOx, VOM and PM emissions from the CORE project are not. *See, Petitioners' Exhibit 1, Unit-Specific Condition 2.3.*

[44] Emission testing may also be required upon a request by the Illinois EPA. Unit-Specific Condition 4.7.7(a)(i) generally provides that the Permittee must test the flares upon a request by the Illinois EPA under any conditions specified by the Illinois EPA and/or the USEPA. The testing must be performed in accordance with the following methods: the heating value of gas combusted in a flare shall be determined in accordance with 40 CFR 60.18(f)(3), *Petitioners' Exhibit 1, Unit-Specific Condition 4.7.7(a)(ii)(B);* USEPA Reference Methods 2, 2A, 2C, or 2D as appropriate, to determine the actual exit velocity of the flares as delineated by 40 CFR 60.18(f)(4), *Petitioners' Exhibit 1, Unit-Specific Condition 4.7.7(a)(ii)(C);* and the maximum permitted velocity for flares and for air assisted flares shall be determined, respectively, by the equations in 40 CFR 60.18(f)(5) and 40 CFR 60.18(f)(6). *Petitioners' Exhibit 1, Unit-Specific Conditions 4.7.7(a)(ii)(D) and (E).*

In sum, Petitioners isolate portions of the Permit in lieu of considering the comprehensive program established by the Illinois EPA to determine compliance, thereby, giving the appearance that the Illinois EPA's response was somehow inadequate. However, the Illinois EPA put together an all-embracing program that presents no obstacles to compliance determinations or enforcement. The Permit clearly sets forth a program to eliminate and minimize flaring events, the means by which compliance with these conditions shall be measured including extensive recordkeeping and reporting requirements. Finally, because the Petitioners fail to explain why the Illinois EPA's response to comments was clearly erroneous, the Petitioners have failed to meet their burden.

E. The Illinois EPA Did Not Err in Its Decision to Not Impose a CO_2 and Methane Emission Limit as a Part of Its BACT Analysis[45]

Petitioners challenge the Illinois EPA's permitting decision on the grounds that it does not contain a BACT limit for CO2 and methane emissions.[46] A pivotal part of this

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Additional testing requirements are contained in Condition 4.7.7(b) for the project. The permit requires the permittee to "conduct sampling of process streams in the Delayed Coker Unit to obtain representative samples of the waste gases that would be sent to the flare for the Unit if waste gases were to be flared" at the request of the Illinois EPA. *Petitioners' Exhibit 1, Unit-Specific Condition 4.7.7(b)(i); see also, Petitioners' Exhibit 1, Unit-Specific Condition 4.7.7(b)(ii)* (required sampling analysis to be performed by the permittee in accordance with applicable ASTM Test methods or other standard method).

[45] While Petitioners summarize their issue presented for review as "[w]hether IEPA's failure to consider emissions reduction technologies for carbon dioxide (CO2) and methane as part of top-down BACT analysis or *in BACT collateral impacts analysis* was a clearly erroneous conclusion of law, or an important policy consideration that the Board should review and reverse", Petitioners make no argument or statement in the body of their Petition with regard to the BACT collateral impact analysis. *Petition at page 3* {emphasis added}. As Petitioners have waived this issue, the Illinois EPA provides no response to this portion of Petitioners' characterization of their issue presented for review.

[46] The USEPA has recently presented its view of the appropriate treatment of CO2 emissions in PSD permitting decisions in its brief filed in the *Christian County Generation* matter. *See, Brief of the EPA Office of Air and Radiation, In re Christian County Generation, LLC,* PSD Appeal

challenge rests upon a dubious interpretation of the Supreme Court's recent decision in *Massachusetts v. EPA*, 127, S.Ct. 1438 (2007). Attempting to cast their claim in the warm glow of that ruling, Petitioners exaggerate the breadth of the Court's opinion. The Supreme Court's ruling, while certainly important in its own right, does not speak to the issue raised here. Because the argument concerning the meaning of the "subject to regulation" phrase was reasonably ascertainable during the public participation period in the subject proceedings, the Petitioners failed to preserve this last issue for appeal.

Once the Petitioners' implausible reading of the Supreme Court's ruling is dispelled, a light can be shone on their core assertion that a BACT limit must be established for greenhouse gas emissions. The main focus of Petitioners' argument is that greenhouse gases are "subject to regulation" and, hence, CO_2 and methane emissions must be addressed with a BACT limit because they are pollutants that are currently regulated under either the Clean Air Act's ("CAA") Title IV requirements or Illinois' State Implementation Plan ("SIP"). Alternatively, Petitioners contend that CO_2 and methane are "subject to further regulation" and, thus, must be addressed with a BACT analysis because some regulatory entity might theoretically regulate them in the future. These arguments are the product of wishful thinking, as they lack any semblance of support in the CAA or USEPA's implementing regulations. To that end, the Petitioners fail to demonstrate that the Illinois EPA's failure to set a BACT emission limit was clearly erroneous. The Petitioners fail to identify any "important policy consideration"

No. 07-01. In that brief, the USEPA generally asserts that CO2 is not a regulated pollutant for purposes of PSD permitting.

that warrants the Board's consideration of this issue as well.[47] For these reasons, as set forth in more detailed arguments below, review of the Petitioners' first issue should be denied.

1. The *Massachusetts v. EPA* decision does not support Petitioners' assertions regarding the applicability of PSD and BACT emission limits.

Petitioners invoke the Supreme Court's *Massachusetts v. EPA* ruling at virtually every turn in the Petition but the decision's relevancy to the present proceeding is remote at best. In their Petition, Petitioners cite to select portions of the Supreme Court's ruling addressing whether CO2, methane and at least two other greenhouse gases constitute a type of "air pollutant," as that term is defined by the CAA's general provisions By way of background, USEPA had declined to grant a rulemaking petition, initiated by states and other interested parties under Title II of the CAA, that sought the promulgation of mobile source emissions standards for greenhouse gas emissions. In so declining, USEPA argued that greenhouse gases did not fall within the ambit of the "air pollution" definition and that the overall statutory scheme did not evidence congressional intentions to regulate such gases. However, the Court found otherwise, stating: "[B]ecause greenhouse gases fit well within the CAA's capacious definition of 'air pollutant,' we

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[47] In the Memorandum filed on behalf of ConocoPhillips in this appeal, ConocoPhillips' attorneys argue that the Board should not review this issue as a result of policy considerations. Specifically, they claim that the solution to the problem of global warming should not be addressed through a local permitting body's case-by-case authority over PSD permits that would at best offer only a "piecemeal, localized regulation of a global issue." *See, Memorandum in Support of Permittee's Motion to Participate, page 52.* They also cite extensively from the Illinois EPA's *Responsiveness Summary* for their argument, including the Illinois EPA's view that the challenge to global warming requires a "comprehensive regulatory approach" imposed by the United States Congress. *Id., citing Petitioner's Exhibit 6,Response to Comment No. 51.* The Illinois EPA generally agrees with the thrust of ConocoPhillips' argument. However, the Illinois EPA will defer to the Board as to whether the Petitioners' last issue poses an important policy issue that sufficiently warrants the Board's review. Accordingly, the primary focus of the Illinois EPA's response to this issue addresses the clearly erroneous standard of the Board's review procedures. *See, 40 C.F.R. §124.19(a)(1).*

hold that EPA has the statutory authority to regulate the emissions of such gases from new motor vehicles." *Massachusetts v. EPA,* 127 S.Ct. at 1462.

Petitioners hail the Court's ruling as if it blazed new trails into the PSD program and therefore directly controls the outcome of this appeal. Petitioners first summarily conclude that the Court has deemed greenhouse gas emissions "subject to regulation" for purposes of the PSD program. *See, Petition at page 25.* In the same broad stroke, Petitioners go on to proclaim that the Court's ruling compels PSD permit authorities to assume a legal responsibility of incorporating BACT limits for greenhouse gases into PSD permits. *Id.* According to Petitioners' reasoning, the Illinois EPA erred in failing to establish a BACT limit for CO_2 and methane emissions in the wake of the Supreme Court's ruling.

Petitioners' exuberance is misplaced, as their assertions are not supported by the *Massachusetts v. EPA* decision. The ruling considers the substantive merits of that case in two parts. First, the Court rejected USEPA's argument that it would overstep its statutory authority by regulating greenhouse emissions from new mobile vehicles or engines. In holding that greenhouse gas emissions are "air pollutants" and can be regulated by USEPA under Title II, the Court focused on USEPA's policy arguments for declining the rulemaking petition, not the scientific considerations inherent in a finding that such pollutants "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." *See, 42 U.S.C. §7521.* The latter "endangerment clause," as reflected in the language of Section 202(a)(1) of the CAA, is both a statutory command and a critical prerequisite to the promulgation of rules under Title II.

USEPA's alternate rationale for denying the rulemaking petition dealt with the policy reasons that USEPA had articulated as to why the regulation of mobile source emissions under Title II was presently unwarranted. The Court found little room for accommodating those considerations in light of the limited discretion afforded by the statutory scheme of the CAA. In reaching this finding, the Court stressed that USEPA's discretion under Title II's "endangerment clause" must hew closely to the kind of scientific analysis outlined in the statute's command. The Court stated:

> "EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies. But once EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute. Under the clear terms of the [CAA], EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do."

Massachusetts v. EPA, 127 S.Ct. at 1462. The Court also specifically rejected the argument that uncertainties regarding aspects of global warming justified delay in promulgating regulations until some later time. The majority's opinion observed: "If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether green-house gases contribute to global warming, EPA must say so." *Id.,* 127 S.Ct. at 1463.

While the Court's ruling touches on the parameters of Title II's "endangerment clause," it does not actually address any argument fitting within that construct, if for no other reason than because such events have yet to transpire. As shown, the majority opinion clearly contemplates as much, observing throughout that the necessary prerequisite for Title II rulemaking is a formal USEPA finding of endangerment.[48]

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[48] This distinction is evident from the Court's framing of the issue: "... the first question is whether §202(a)(1) of the [CAA] authorizes EPA to regulate greenhouse gas emissions from new

Greenhouse gas emissions may be a type of air pollutant, but USEPA has not made a final judgment that they cause "air pollution" under the auspices of Title II or anywhere else in the CAA.[49] This obvious reading of the Court's decision clearly undermines Petitioners' notion that greenhouse gas emissions are already "subject to regulation" for purposes of PSD.[50]

Moreover, the reach of the Supreme Court's decision should be limited to the specific context from which the controversy arose. The ruling addressed the legal adequacy of USEPA's regulatory actions under Title II and, apart from its brief consideration of one of the Act's generally applicable definitions, the majority opinion does not cast a significant shadow beyond the realm of mobile source emissions standards. As such, neither prongs of the Court's analysis can be said to address the applicability of CAA requirements beyond the scope of Title II.

Admittedly, the Court's ruling may offer a thread of support to the Petitioners' overarching arguments presented in this appeal. It stands to reason that a necessary element of Petitioners' case is to demonstrate that CO_2 and methane are "air pollutants";

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motor vehicles *in the event* that it forms a 'judgment' that such emissions contribute to climate change {emphasis added}." *Massachusetts v. EPA,* 127 S.Ct. at 1459.

[49] Petitioners appear to find some significance in the fact that USEPA is currently defending litigation for its refusal to adopt performance standards for CO_2 emissions under Section 111 of the CAA. *See, Petition at page 34-35.* From all appearances, the litigation pending before that federal appeals court is simply a reprising of the arguments raised in *Massachusetts v. EPA.* To that end, the resolution of that pending appeal will not resolve the issues raised by Petitioners in this appeal any more than the Supreme Court's ruling did so.

[50] Petitioners admit that the absence of emission standards under Sections 111 and 202 of the CAA does not affect the outcome of this issue. *See, Petition at page 34.* The Petitioners state that "USEPA's failure, thus far, to establish specific emission limits for carbon dioxide and methane… is not determinative of whether these GHGs [greenhouse gas emissions] are 'subject to' regulation." *Id.* It is difficult to discern how this acknowledgement can be reconciled with Petitioners' earlier insistence that the *Massachusetts v. EPA* ruling held that CO_2 emissions are "subject to regulation" and, consequently, that permit authorities are obliged to impose a BACT limit for greenhouse gas emissions in PSD permits. *Petition at page 25.*

otherwise the PSD program would not be implicated at all. The *Massachusetts v. EPA* decision satisfies this element; however, any other comparisons must end there. Beyond that sliver of analogy, however, the decision, or even any divination of its broader meaning, fails to enlighten on the subject of Petitioners' arguments. Those arguments, to the extent that Petitioners have preserved a right to raise them here, must stand or fall on existing statutory and regulatory authorization.

2. The issue and related arguments concerning the applicability of PSD was not raised during the public comment process and were reasonably ascertainable.

In their appeal, Petitioners raise the issue and related arguments regarding the need for a BACT emission limit for greenhouse gas emissions. Petitioners must demonstrate that these matters have been properly preserved for appeal. This burden requires a party to show that the issue presented on appeal was brought to the attention of the permit authority during the public comment period. *See, 40 C.F.R. §124.13.* In particular, a petitioner must have identified "all reasonably ascertainable issues" and must have put forth "all reasonably available arguments supporting [its] position" on or before the conclusion of the public comment period. *Id.*

The Board has previously stressed the importance of this requirement, emphasizing that it is not merely an "arbitrary hurdle" but, rather, is a substantive rule with exacting consequences. *See, In re Indeck-Elwood, LLC,* PSD Appeal No. 03-04, slip op. at 58 (EAB, September 27, 2006), 13 E.A.D. ___., *citing, In re BP Cherry Point,* PSD Appeal No. 05-01, slip op. at 14-15 (EAB, June 21, 2005), 12 E.A.D. ___. In the Board's view, the rule promotes "efficiency and integrity of the overall administrative permitting scheme," *Indeck-Elwood, LLC,* PSD Appeal No. 03-04, slip op. at 58, and its

purpose will "ensure that the permitting authority first has the opportunity to address permit objections and to give some finality to the permitting process." *In re Sutter Power Plant,* 8 E.A.D. 670, 687 (EAB 1999). This purpose would not be served by allowing persons to raise objections, or any supporting grounds for the same, for the first time on appeal. It is noteworthy that the Board has not hesitated to deny review for allegations that fail to satisfy the requisite showing, notwithstanding the serious or genuine nature of the allegations. *Cf., Indeck-Elwood, LLC,* slip op. at 52-59, (review denied concerning permitting agency's alleged failed to consider use of low-sulfur coal in BACT evaluation); *In re BP Cherry Point,* 12 E.A.D. 209, 218 -221 (EAB 2005) (denying review of permit authority's alleged failure to treat a nearby park as a Class I area).

In this instance, neither the issue nor the supporting legal arguments presented by Petitioners concerning the lack of a BACT limit for CO2 and methane was raised during the public comment process. While the Illinois EPA responded to general comments about greenhouse gas emissions, these comments pertained to the agency's failure to quantify emissions of greenhouse gases from the CORE project and the need for the agency to evaluate such emissions in its alternatives analysis pursuant to state nonattainment regulations for Major Stationary Sources Construction and Modification found at 35 Ill. Adm. Code 203.306. *See, Petitioners' Exhibit 2, attached Technical Analysis of Julia May, pages 32 – 36; see also, Petitioners' Exhibit 6, Response to Comment Nos. 49-57.* Petitioners now seek to piece apart the Illinois EPA's response to this comment as a basis to support the Board's review of their greenhouse gas arguments. For instance, Petitioners selectively cite from a comment stating that greenhouse gases should be monitored and measured consistent with state law to suggest that the Illinois

EPA was on notice of its argument that the agency should treat greenhouse gases as regulated pollutants. *Petition at pages 25-26; see also, Petitioners' Exhibit 6, Response to Comment No. 55.* The response does no such thing, but merely responds to a concern about the quantification of emissions for purposes of the alternatives analysis, particularly stating that: "Treating emissions of CO2 and other greenhouse gases as regulated air pollutants, as is effectively being requested by this comment, would be inconsistent with *current Illinois law.*" *Petitioners' Exhibit 6, Response to Comment No. 55*; *see also, Petitioners' Exhibit 2, attached Technical Analysis of Julia May, pages 32 – 36.* In doing so, Petitioners try to challenge a different aspect of public comments pertaining to greenhouse gases than addressed by those comments. *See, In re Kendall New Century Development,* 11 E.A.D. 40, 55 (EAB 2003), *citing In re RockGen Energy Center,* 8 E.A.D. 536, 544-545 (EAB 1999). It seems particularly egregious to allow the Illinois EPA's passing reference to state nonattainment requirements as a basis to warrant review in this appeal.

Moreover, Petitioners fail to demonstrate that their issues on appeal were not "reasonably ascertainable," and that any supporting arguments were not "reasonably available," at the close of the public comment period. *See,* 40 C.F.R. §124.13. The Board has stressed that the burden is on the petitioner to demonstrate that the new issue and/or legal arguments could not have been reasonably ascertained. *Cf, Indeck-Elwood, LLC,* slip op. at 119 (notwithstanding Sierra Club's assertion that newly obtained information revealed deficiencies with the NOx and SO2 BACT limits, EAB declined to consider the issues as they were reasonably ascertainable and not raised in public comment). The Board has also held that a petitioner's failure to raise an issue is not excusable merely

because a petitioner did not learn of the issue until after the end of the comment period. *In re AES Puerto Rico, L.P.*, 8 E.A.D. 324, fn.20 (EAB, May 27, 1999)(argument concerning a study was not preserved for appeal where petitioner's concern had always been in issue but it had not learned of study until after close of public comment; though petitioner's awareness of study was lacking at that time, it "does not mean that the study was not reasonably ascertainable at an earlier date").

In this instance, nothing barred the Petitioners from making their case for the applicability of a BACT limit for greenhouse gas emissions during the public comment period for the draft permit. The elements of the Petitioners' legal construct for the PSD program are drawn from the PSD program's definition of BACT, including the key phrase "subject to regulation," to which Petitioners devote most of their attention. These elements are unquestionably the same as they were before the Supreme Court handed down its *Massachusetts v. EPA* ruling. Moreover, the *Massachusetts* decision was issued on April 2, 2007, in the midst of the public comment period for the CORE project. While the public comment period did not close until June 15, 2007, as early as May 8, 2007, Petitioner, American Bottom Conservancy, recognized this ruling publicly stating "the Supreme Court has just declared CO2 is going to have to be regulated." *Petitioners' Exhibit 3, page 95.*

As mentioned, the Supreme Court's ruling does not speak to, implicitly or otherwise, the issue or the supporting arguments advocated by Petitioners here. Petitioners' concerted efforts to the contrary, the *Massachusetts v. EPA* decision did not widen the expanses of PSD to any and all sources of greenhouse gas emissions, nor did it intervene with or change settled law in the area of the PSD program. Petitioners trumpet

the Court's recognition of CO_2 and methane as "air pollutants," but, as noted, they erroneously equate the designation of greenhouse gases as air pollutants with the requirement that a pollutant be subject to regulation. Beyond some selective excerpts from the majority opinion and the hollow claim that the Supreme Court's ruling changed everything, the Petition offers no explanation as to why the issue of a greenhouse gas BACT limit was not reasonably ascertainable, particularly given that the *Massachusetts v. EPA* decision came out two months prior to the close of the public comment period in this matter. For these reasons, the Board should decline consideration of this issue and its attendant arguments.

3. The greenhouse gas emissions associated with the proposed CORE project are not "subject to regulation" for purposes of the PSD program.

In the event that the Board agrees to hear the Petitioners' issue concerning the need for a CO_2 and methane BACT limit, the principal consideration must be given to the meaning of "subject to regulation" found in both the statutory definition and preconstruction review requirements of the CAA's PSD program. *See, 42 U.S.C. §§7479(3) and 7475(4).* Petitioners maintain that the phrase can be afforded at least two possible meanings, both of which would seemingly shore up their contention that greenhouse gas emissions are "subject to regulation" for purposes of the PSD program. First, Petitioners claim that the term encompasses CO_2 and methane emissions because they are already regulated by either the CAA's Acid Rain requirements or the Illinois SIP. *See generally, Petition at pages 28-32* (In particular, Petitioners claim that CO_2 is currently regulated by CAA's Acid Rain requirements while both CO_2 and methane are regulated by the Illinois SIP). Separately, Petitioners find the language roomy enough to

enclose air pollutants that are "capable of being regulated" in the future, thus even pollutants for which no regulatory program is currently in place are apparently beholden to BACT's requirements. *See generally, Petition at pages 33-36.*

Neither of the meanings articulated by Petitioners, however, are plausible interpretations of the statute's "subject to regulation" text. A proper application of the rules of statutory construction points to an altogether different meaning of the phrase than that afforded by Petitioners. Such a meaning is not so open-ended as to be defined by some future, indeterminate rulemaking. Similarly, the term is not so expansive that it covers virtually any form or type of regulation, including diminutive reporting or record-keeping requirements used to obtain anecdotal information.

a. The "subject to regulation" phrase in the PSD program should be governed by the rules of statutory construction.

The "subject to regulation" phrase is contained within the preconstruction review requirements of Section 165(a)(4) of the CAA, as well as the BACT definition found at Section 169(3). *See, 42 U.S.C. §§ 7475(4) and 7479(3) respectively.* The phrase itself is not specifically defined in the CAA. USEPA's regulations implementing the PSD program borrow the same term in its definition of BACT. *See, 40 C.F.R. §52.21(b)(12).* As in the case of the statute, however, the regulations do not directly interpret the phrase and relatively few sources of authoritative guidance can be located that provide helpful meaning to the term.

Given the lack of explicit meaning to be derived from the statute or regulations, the Board's review of the issue should be governed by the rules of statutory construction. In the absence of a specific statutory or regulatory definition, words or phrases are to be accorded their plain or ordinary meaning. *In re Dominion Energy Brayton Point, L.L.C.,*

12 E.A.D. 490, 637 (EAB 2006), *citing, In re Odessa Union Warehouse Co-op, Inc.*, 4 E.A.D. 550, 557 (EAB 1993)("[I]n the absence of a statutory or regulatory definition, it is appropriate to use the common meaning of the terms in question"); *In re Sultan Chemists, Inc.*, 9 E.A.D. 323, 331 (EAB 2000)("[I]n construing statutes, words should be interpreted where possible in their ordinary, everyday senses"). The Board frequently turns to the common dictionary definition of words or phrases in order to give meaning to them. *In re Prairie State Generating Station,* PSD Appeal No. 05-05, slip op. at page 27 (EAB, August 24, 2006) 13 E.A.D. ____ ; *In re Dominion Energy Brayton Point, L.L.C., supra.*

The starting point to the analysis is the lexical meaning. In this instance, the phrase's adjectival component, "subject to," modifies the preceding noun (i.e., pollutant) in the text and serves as language of qualification. Webster's Dictionary offers several distinct uses for "subject" in its adjective form:

> "1 : falling under or submitting to the power or dominion of another {children ~ to their parents}: as a : owing allegiance to or being a subject of a particular sovereign or state {a colony is ~ to the mother country} {a ~ race} b : SUBJECTED c: OBEDIENT, SUBMISSIVE {be ~ to the laws} 2 a : suffering a particular liability or exposure {~ to very severe colds} 3 *archaic* : situated under or below : SUBJACENT 4 : likely to be conditioned, affected, or modified in some indicated way: having a contingent relation to something and usu. dependent on such relation for final form, validity, or significance {democratic representatives whose acts are ~ to discussion and criticism – M.R. Cohen} {a treaty ~ to ratification}."

See, Webster's Third New International Dictionary, (Unabridged, 1981 by G.&C. Merriam Co.). Another dictionary differs only in its descriptive qualities for the term, suggesting *prone* or *disposed* in describing exposure and offering *dependent* in describing contingency. *See, The American Heritage Dictionary,* 2nd College Edition (1985).

The depiction relating to contingency has the most obvious application here. The essence of the word "subject" is meant to connote a sense of condition or contingency, as where a particular object (or event) is dependent upon the existence or occurrence of something else (object or event) for its operation or effect. Ascribing a contingent-like meaning to the "subject to" language would mean that a BACT level of control for any particular pollutant is *conditioned upon* that pollutant being regulated. This is certainly not an unnatural reading of the text.

Petitioners interpret "subject to" as though BACT can be applied to any pollutant "capable of being regulated." *See, Petition at page 33.* That is to say, Petitioners would have BACT apply equally to both pollutants that are currently regulated and pollutants for which no regulations currently exist. Given the varying depictions of "subject" commonly found in dictionaries, the only example that remotely approximates Petitioners' viewpoint carries with it the meaning of *prone* or *disposed.* While such a construction of "subject to" might be appropriate in some settings, it does not automatically follow that Petitioners' definitional analysis is warranted here.[51] As discussed below, even if the Petitioners' reading of the language is theoretically possible, the language must still be interpreted according to its context.

The meaning of the second prong of the "subject to regulation" phrase must also be examined. "Regulation" serves as an object in the phrase, whose existence, or the occurrence of, gives operation or effect to the word "pollutant." Webster's Dictionary defines it as follows:

> "1 : an act of regulating or the condition of being regulated {the ~ of her mind} {business suffering from undue ~} 2 a : an authoritative rule or principle

[51] *Cf., People v. Hicks,* 22 Cal. App. 4th 12 (Ca. Ct. App. 1st Dist. 1994)(finding the phrase 'subject to' to be ambiguous).

> dealing with details of procedure; *esp* : one intended to promote safety and efficiency (as in a school or factory) b : a rule or order having the force of law issued by an executive authority of a government usu. under power granted by a constitution or delegated by legislation; as (1) : a piece of subordinate legislation issued by a British administrative unit under the authority and subject to the veto of parliament – compare PROVISIONAL ORDER, STATUTORY ORDER (2) : one issued by the president of the U.S. or by an authorized subordinate – called also *executive order* (3) : an administrative order issued by an executive department or a regulatory commission of the U.S. government to apply and supplement broad congressional legislative enactments. . . "

See, Webster's Third New International Dictionary, supra. Black's Law Dictionary attributes a meaning to the term in the same vein (i.e., "act or process of controlling by rule or restriction"). *Black's Law Dictionary,* Eighth Edition (1990, Thomson-West).

While the phrase "subject to regulation" can easily be understood to mean *something regulated,* the core term "regulation" invites some level of textual ambiguity. The word is a generality. It is, at once, both broad and potentially restrained, as its meaning can be either widened or curbed depending upon its application. For example, the term could encompass virtually any and all types of regulation, including the CO_2 monitoring requirements cited by Petitioners. By the same token, the word could arguably embrace a more limited meaning, such as one that compels a BACT emissions limit for only those pollutants for which an emissions standard has been established. Because the word "regulation" is susceptible to both broad and narrow readings, its meaning should be considered inherently ambiguous. Words or phrases are ambiguous if they are "capable of being understood in two or more possible senses or ways." *In re Rochester Public Utilities,* 11 E.A.D. 593, 603 (EAB 2004) *citing In re U.S. Army, Fort Wainwright Cent. Heating & Power Plant,* 11 E.A.D. 126, 141 (EAB 2003), *quoting, Chickasaw Nation v. U.S.,* 534 U.S. 84, 90 (2001). Even the Petition admits to the ambiguity, construing the "subject to regulation" phrase to possess at least two alternative

meanings. *Cf., Petition at pages 28 – 32* (i.e., CO2 and methane are currently regulated by the CAA and/or the Illinois SIP); *Petition at pages 33 – 36* (i.e., CO2 and methane are subject to further regulation under the CAA). This recognition by Petitioners is especially significant to the extent that they would argue that the statutory phrase is plain on its face and therefore negates certain USEPA policy guidance and rulemakings that run counter to Petitioners' argument.

Words cannot always be counted on in statutory construction. Quite often, in fact, the meaning of words and phrases possess more than one meaning depending on their use.[52] For this reason, the search for plain meaning does not end with a review of the definitional qualities of words and phrases but, rather, turns to their surrounding context. The Supreme Court has observed:

> "The "meaning – or ambiguity – of certain words may only become evident when placed in context. *See, Brown V. Gardner,* 513 U.S. 115, 118, 115 S.Ct. 552, 130 L.Ed.2d 462 (1992) ("Ambiguity is a creature not of definitional possibilities but of statutory context"). It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view of their place in the overall statutory scheme. *Davis v. Michigan Dept. of Treasury,* 489 U.S. 803, 809, 109 S.Ct. 1500 (1989)."

See, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-133, 120 S.Ct. 1291 (2000). The Board has recognized the same proposition. *See, In re Howmet Corporation,* RCRA Appeal No. 05-04 *et al.,* slip op. at 13-14 (EAB, May 24, 2007) 13 E.A.D. ___ (citing *FDA v. Brown & Williamson Tobacco Corp.* 529 U.S. 120, 132, for interpreting entire regulation, not simply the "provision at issue").

Within the context of preconstruction review requirements and the BACT definition, the "subject to regulation" language in the phrase plays an important role in

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[52] *Cf., Greenbaum v. USEPA,* 370 F.3d 527 (6th Cir. 2004)("most words admit of different shades of meaning, susceptible of being expanded or abridged to conform to the sense they are used," *quoting, Helvering v. Stockholms Enskilda Bank,* 293 U.S. 83, 87, 55 S.Ct. 50 (1934).

determining the scope of BACT applicability. Grammatically speaking, the phrase is meant to modify, or give meaning to, the "pollutant" that is made subject to the BACT requirement. The language defines a particular attribute of a pollutant that, in turn, determines whether BACT will be applied to a project that emits said pollutant. Likewise, the imposition of BACT occurs as a result of an event or occurrence; the construction of a new major source or major modification triggers BACT, as well as the other substantive requirements of PSD. In this context, the various attributes of the BACT definition in Section 169(3) can be seen as conditionally linked to one another, as where one attribute of the BACT definition is made dependent upon the existence or occurrence of something else. Similarly, the BACT obligation set forth in the preconstruction review requirements of Section 165(a)(4) is merely one part of a series of contingencies that determine whether a given major source can commence construction.

Ascribing a meaning of condition or contingency to the "subject to" language is in keeping with the context of the statutory framework of both the BACT definition and the reconstruction review requirements. It is, in short, a more natural reading of the language than that advocated by Petitioners. Moreover, construing the "subject to regulation" language to mean *prone to regulation* would all but remove the sense of contingency from this part of the text. That approach, in turn, would give a nearly limitless quality to the "subject to" phrase. Textual ambiguity aside, the notion that BACT should be applied to unregulated pollutants goes against the grain of common experience and would effectively sanction an absurdity. Absurd results are not favored in statutory construction and both the Board and courts are usually reluctant to countenance their creation. *See, In re Harmon Electronics, Inc.*, 7 E.A.D. 1, 29-30, fn. 34 (EAB 1997); *Gillespie v. Equifax*

Information Services, L.L.C., 484 F.3d 938 (7th Cir. 2007); *Broward Gardens Tenants Association v. USEPA*, 311 F.3d 1066, 55 ERC 1997 (11th Cir. 2002).

The meaning of "subject to regulation" should also be considered in the broader context of other parts of the PSD program. Specifically, the phrase must be examined alongside a related term, "regulated NSR pollutant," that is found in USEPA's regulatory scheme. In contrast to the terminology at issue, that phrase has been specifically defined by USEPA, and its accompanying definition is codified in the PSD regulations. *See, 40 C.F.R. §52.21(b)(50).* The full definition is cited in Petitioners' appeal, seemingly offered to underscore the text's reference to the "subject to regulation" phrase. *See, Petition at page 27.* However, this related term is significant for another reason.

The definition of "regulated NSR pollutant" contains four categories, three of which are pollutants specifically addressed by USEPA under significant rulemaking provisions of the CAA (i.e., NAAQS, NSPS and Title IV). Each of the separate sources of rulemaking authority have provided for the development of substantive emissions standard for the relevant pollutant or precursor. The fourth category of the definition covers "[a]ny pollutant that *otherwise* is *subject to regulation* under the Act…(emphasis added)" *See,* 40 C.F.R. §52.21(b)(50). This last category is a catch-all provision, illustrated by the use of the word "otherwise," which connotes the existence of other pollutants subject to regulation *in another way* or *in a different manner. See, The American Heritage Dictionary,* 2nd College Edition (1985).

The framework outlined by the three initial categories is obviously one-dimensional, aimed at pollutants for which a substantive emissions standard has been developed. This attribute is significant because it evidences a discrete, regulatory

threshold, one in which a performance standard is developed through a formalistic and comprehensive review by USEPA of the latest scientific technologies or preventative methods of pollution control. As discussed below, the attribute is pronounced not only in the definition, but is borne out in USEPA guidance as well.

That each of the three specific references would share a common characteristic lends credence for interpreting the catch-all category in a like manner. Such an approach would not only seem sensible from a grammatical perspective but it is also consistent with principles governing statutory construction. The rule of *ejusdem generis* is a formalistic, yet valuable, tool that essentially construes "general terms" through a window of preceding "specific terms." One federal court described the rule as follows:

> "[w]here general words follow the enumeration of particular classes of things, the general words are most naturally construed as applying only to things of the same general class as those enumerated."

See, American Mining Congress v. USEPA, 824 F.2d 1177, 1189-1190 (D.C. Cir. 1987)(where three specific classes of discarded wastes are accompanied by a fourth category of any "other discarded material," the latter should be interpreted to mean "similar types of waste, but not to open up the federal regulatory reach of an entirely new category of materials"); *cf., Olin Corporation v. Yeargin Incorporated,* 146 F.3d 398, 407 (6th Cir. 1998)(contractual language of indemnity "for property damage, personal injury or death, or otherwise" requires limiting the residual clause to torts "of a similar kind and character"). When applied here, the principle of *ejusdem generis* suggests that all of the enumerated categories within the "regulated NSR pollutant" phrase are of like kind and, thus, only address pollutants for which a substantive emissions standard exists.[53]

[53] USEPA has arguably stressed this point in earlier PSD rulemaking proceedings. *See,* 43 Fed. Reg. 26388, 26397 (June 19, 1978)(identifying pollutants governed by BACT's requirements as

More fundamentally, to inquire as to the meaning of a "regulated NSR pollutant" arguably begs the question of whether a pollutant is "subject to regulation." However, once a pollutant is made "subject to regulation,' it presumably becomes a regulated "NSR pollutant." While the latter phrase may not directly define the former, it does bring it into sharper focus. By outlining the basic types of emission standards to be encompassed within it, the "regulated NSR pollutant" definition supports a less expansive construction of the "regulation" part of the "subject to regulation" phrase. This interpretation reflects favorably upon the overall regulatory scheme established by USEPA and therefore, the phrase encompasses only substantive emissions standards under the CAA, not all manner of requirements or standards potentially developed in the future.

b. The proper interpretation of the "subject to regulation" phrase is supported by USEPA guidance and case law precedent.

As demonstrated above, the language and contextual framework of the PSD regulations support a construction of the "subject to regulation" phrase that reflects only current, substantive emissions standards. At least three sources of legal authority support this conclusion. The first is a guidance document by USEPA that addressed Title V's definition of regulated air pollutant. The second is a seminal federal appeals court ruling that addressed the scope and applicability of the PSD program. Finally, prior Board rulings suggest that CO_2 and other greenhouse gases should not be treated as regulated pollutants for purposes of PSD.

The relevant guidance document assumes the form of a memorandum, dated April 26, 1993, from Lydia N. Wegman of USEPA's Office of Air Quality Planning and

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pollutants regulated under various CAA provisions); 61 Fed. Reg. 38250, 38309-10 (July 23, 1996)(identifying a list of pollutants subject to PSD review which addressed only those particular pollutants regulated by emission control requirements of the CAA's various programs).

Standards to USEPA's Air Division Director for Regions I-X. The subject of the memorandum is entitled "Definition of Regulated Air Pollutant for Purposes of Title V." The guidance document lists a class of pollutants that are deemed "regulated air pollutants," as that term is specifically defined for purposes of the Title V operating permits program. *See, 40 C.F.R. §70.2*. The document also generally describes the manner in which the class of such pollutants can be altered based on evolving regulations.

Notably, the guidance memorandum purports to limit the Title V program's applicability by narrowly construing the CAA's definition of "air pollutant." The memorandum provides, in pertinent part:

> "Although section 302(g) can be read quite broadly, so as to encompass virtually any substance emitted into the atmosphere, EPA believes that it is more consistent with the intent of Congress to interpret this provision more narrowly. Were this not done, a variety of sources that have no prospect for future regulation under the Act would nonetheless be classified as major sources and be required to apply for title V permits. Of particular concern would be sources of carbon dioxide or methane."

Memorandum, at page 4. The memorandum further provides:

> "As a result, EPA is interpreting "air pollutant" for section 302(g) purposes as limited to all pollutants subject to regulation under the Act. This would include, of course, all regulated air pollutants plus others specified by the Act or by EPA rulemaking."

Id. With an eye towards future implications, USEPA went on to comment that "the 1990 Amendments to the Act did include provisions with respect to carbon dioxide (section 821) and methane (section 603), but these requirements involve actions such as reporting and study, not actual control of emissions." *Id.* This part of the discussion concluded that "[i]f the results of these studies suggest the need for regulation, these pollutants

could be reconsidered at that time for classification as pollutants subject to regulation under the Act." *Id.*

The aforementioned portion of the guidance memorandum is certainly intriguing, no less so than because of its explicit consideration of CO2 and methane emissions and its regulatory status across the spectrum of the CAA's programs.[54] The main significance here, however, is with analogy. Similar to the definition of "regulated NSR pollutant" in the PSD program, the memorandum categorizes the pollutants that are treated as "regulated air pollutants" under the Title V program. The marshalling of air pollutants within this framework is made in accordance with the regulatory definition and resembles the approach used in the PSD program, as it likewise is comprised of pollutants for which emissions standards have been promulgated. The memorandum points to this very observation with respect to CO2 and methane emissions. Above all else, the memorandum articulates a use of the phrase that matches the analytical approach being advocated herein. The fact that the guidance document employs that phrase in a broad context, untied to the moorings of the Title V program, only confirms that it speaks to USEPA's understanding as to how the "subject to regulation" phrase should be applied in general.

[54] Petitioners could challenge the continued viability of part of this memorandum in the wake of the *Massachusetts v. EPA* ruling. For its part, the Illinois EPA does not express an opinion as to whether USEPA's narrow interpretation of "air pollutant" for purposes of the Title V operating permits program should still be respected given the expansive reading given to the definition by the Court. But even if the sentiments expressed in the earlier memorandum cannot be directly reconciled with the recent ruling, it would not negate any independent reasons supporting USEPA's action in construing congressional intent surrounding the Title V program. Moreover, it seems clear that the memorandum's reliance upon the Section 302(g) definition is separate and distinct from its discussion of the "subject to regulation" phrase. It is this latter component that is analogous to circumstances here.

Based on the Illinois EPA's examination of case law authorities, only one federal court ruling appears to address the meaning of the "subject to regulation" phrase. In *Alabama Power Co. v. Costle,* industry petitioners had appealed USEPA's final regulations implementing PSD in 1978. *See, Alabama Power Co. v. Costle,* 636 F.2d 323 (D.C. Cir. 1979). The D.C. Circuit Court of Appeals reviewed an abundance of issues concerning the original PSD regulations, including those parts of the final rule relating to fugitive dust emissions.

In evaluating the validity of a provision exempting fugitive emissions, the appellate court devoted a lengthy footnote to some of the inner-workings of the PSD regulations and New Source Performance Standards ("NSPS") under Section 111 of the Act. *Id.,* 636 F.2d at 370, fn. 134. In observing that USEPA could accomplish its intended objectives of the rule by conducting rulemaking under its NSPS authority, the opinion highlighted differences between standards of performance developed under Section 111 and the NAAQS developed under Section 108. Based on those differences, the opinion observed that certain "excluded particulates" could be subject to NSPS emissions standards even though no NAAQS had been developed. Once an NSPS performance standard was promulgated by USEPA for such excluded pollutants, the appellate court observed that "those pollutants become 'subject to regulation' within the meaning of Section 165(a)(4)... requiring BACT prior to PSD permit approval." *Id.* This interpretation squares with the analysis advanced by the Illinois EPA here.

The Board has previously addressed, albeit without much substantive analysis, the issue of whether CO_2 is a regulated pollutant for purposes of the PSD program. The Board's decision in *Inter-Power of New York* held that CO_2 was not a regulated pollutant

and therefore did not require an analysis of BACT-level control options. *See, Inter-Power of New York, Inc.*, 5 E.A.D. 130, 151 (EAB1994). The Board's ruling in *Kawaihae Cogeneration Project* found no reason to disturb the permit authority's response to comments, which had responded to a comment about greenhouse gases by observing that "there are no regulations or standards prohibiting, limiting or controlling the emissions of greenhouse gases from stationary sources" and, as such, CO_2 is not a regulated air pollutant. *See, In re Kawaihae Cogeneration Project,* 7 E.A.D. 107, 132 (EAB 1997).

c. Petitioners' arguments concerning the meaning of the phrase ignore its more natural reading and context, as well as lack supporting legal authority.

As previously noted, Petitioners make three basic arguments as to why CO_2 and methane emissions from the proposed project are "subject to regulation" under the PSD program. Each of these arguments must fail.

i. CO_2 emissions are not currently "subject to regulation" by virtue of existing requirements implemented by USEPA under its Title IV authority.

Petitioners outline several requirements promulgated by USEPA under the Acid Deposition Control provisions of the CAA's Title IV relating to the monitoring, record-keeping and reporting of CO_2 emissions from certain emission sources. *See, Petition at page 29, citing 40 C.F.R. Part 75.* Without offering any kind of analysis, Petitioners summarily conclude that these requirements fulfill the "subject to regulation" phrase under the PSD program and that CO_2 emissions are therefore "already regulated" under the CAA. *Id. at page 29.*

Petitioners' argument is specious and unsupported by any source of legal authority. For reasons already explained, the plain language and context of the "subject

to regulation" phrase do not hold up Petitioners' slap-dash reasoning. Rather, they reveal that the phrase is meant to contemplate the promulgation of a substantive emissions standard. Because the cited provisions are mere information-gathering requirements under the CAA, they do not constitute a type of substantive emissions standard that triggers the "subject to regulation" phrase of the PSD program.

ii. Greenhouse gas emissions are not "subject to regulation" by virtue of the regulatory nuisance provisions of the Illinois SIP.

Petitioners claim that the Illinois SIP provides a source of authority for the regulation of CO2 and methane emissions such that a BACT emission limit must be established under PSD. *See, Petition at pages 29-30.* The argument draws attention to a regulatory provision contained within the State's administrative code of regulations and promulgated by the Illinois Pollution Control Board. The provision is entitled "Prohibition of Air Pollution," and provides:

> "[N]o person shall cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as, either alone or in combination with other source, to cause or tend to cause air pollution in Illinois."

35 Ill. Adm. Code §201.141.[55] Petitioners also make a point of finding similarities between the State's definition of "air pollution"[56] and the same term defined in the CAA. *See, Petition at page 31.* Because of the close parallels in the language and the Supreme

[55] The provision, which was incorporated into the Illinois SIP as far back as 1972, is nearly identical to language prohibiting certain acts of air pollution under state law. *See, 415 ILCS 5/9(a)(2006).*

[56] The State's Environmental Protection Act defines the term as "the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property." *See, 415 ILCS 5/3.115(2006).* The regulatory definition found in the Pollution Control Board's administrative regulations is identical. *See, 35 Ill. Adm. Code 201.102.*

Court's consideration of the CAA's term in *Massachusetts v. EPA*, Petitioners conclude that the CO_2 and methane emissions from the proposed project will cause "air pollution," which, in turn, warrants the imposition of a BACT emissions limit because CO_2 and methane emissions are thus so regulated. *See, Petition at pages 29-32.*

This argument is flawed on multiple grounds. First, Petitioners failed to raise this issue during the public comment period. 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); *In re Avon Custom Mixing Services, Inc.*, 10 E.A.D. 700, 704-705 (EAB 2002). Petitioners have made no attempt to meet this burden.[57]

Second, Petitioners neglect to demonstrate how this issue is lawfully before the Board in this PSD permit appeal. In permit appeals brought under the Clean Air Act's PSD program, the Board's review is governed by the PSD regulations. Issues that are "covered" by the PSD regulations are reviewable; however, issues falling outside of the purview of the regulations do not warrant the Board's review even if they satisfy the Board's other procedural requirements. *See supra, In re Knauf Fiber Glass, GmbH,* 8 E.A.D. 121, 127 (EAB 1999). The Board has observed that its permit review process for PSD permit appeals "is not an open forum for consideration of every environmental

[57] In fact, a review of public comments shows that while Petitioners raised the issue of greenhouse gases in the state regulatory context, comments were limited to the alternatives analysis required by state nonattainment regulations for Major Stationary Sources Construction and Modification found at 35 Ill. Adm. Code 203. *See, Petitioners' Exhibit 2, attached Technical Analysis of Julia May, pages 32-36; see also, 35 Ill. Adm. Code 203.306.* Given such comments were based on nonattainment new source review, they provide no support for Petitioners' argument that the Illinois SIP provides authority for the regulation of CO_2 and methane emissions in the PSD context. *See, Petition at pages 29-30.*

aspect of a proposed project, or even every issue that bears on air quality." *Id.* Unless the permitting issue is an "explicit" requirement of, or "directly relates" to, the PSD program, the Board should refuse to assume jurisdiction in the matter. *Id. at pages 161-162.*[58]

The Illinois EPA does not dispute that the regulatory provision cited by Petitioners is part of the Illinois SIP. It is also acknowledged that SIP-related requirements can be regarded as federally enforceable for purposes of seeking judicial review under the CAA, a principle that is not even alluded to by Petitioners. However, it is not clear from the Petition how the cited SIP provision, not to mention the permit applicant's alleged noncompliance therewith, is a requirement of PSD. Because the Petitioners do not show that the regulatory provision relates to, or is derived from, PSD's requirements, the Board should decline consideration of the issue.[59]

iii. Greenhouse gas emissions are not "subject to regulation" by virtue of being subject to future regulation under the CAA.

The last argument in the Petitioners' discussion of the issue attempts to frame the analysis in terms of future regulation. *Petition at pages 33-36.* The Petitioners' contention that the "subject to regulation" phrase means "capable of being regulated," is

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[58] *See also, In re: Sutter Power Plant,* 8 E.A.D. 680, 690 (EAB 1999)(emission reduction credits were not governed by PSD regulations); *see also, In re: Three Mountain Power, LLC,* 10 E.A.D. 39, 59-60 (EAB, May 30, 2001)(permit condition relating to emission offsets was not covered under PSD program).

[59] Petitioners make a point of mentioning the State's efforts to address global warming, including the creation of a Climate Change Advisory Group through executive order. *See, Petition at page 30.* These types of exploratory efforts currently underway in many states do not address the federal law requirements of the CAA which, as here, govern the applicability of a delegated PSD program. Moreover, such efforts do not sanction or otherwise warrant the imposition of CO2 limits or controls through administrative fiat. As the Illinois EPA indicated in its Responsiveness Summary, the Illinois EPA would prefer that the challenge of global warming be addressed by a "comprehensive regulatory approach" with regulations "imposed by Congress on a national level." *Petitioner's Exhibit 6, Response to Comment No. 51.*

unavailing. As previously mentioned, the plain meaning of the phrase and its statutory and regulatory context negate the Petitioners' argument.

It should also be noted that the examples cited as support for Petitioners' construction of the phrase are inapposite. Petitioners cite USEPA comments to a Title V rulemaking for the proposition that a "pollutant need not be specifically regulated by a section 111 or 112 standard to be considered regulated." *Petition at page 33, citing 66 Fed. Reg. 59161,* Change to Definition of Major Source (November 27, 2007)(*quoting 40 C.F.R. Part 70*). USEPA's comment was arguably a little open-ended but nothing from the text of the public notice evinces an intention by USEPA to depart from its traditional understanding of a regulated pollutant, let alone embrace the radical construction offered by Petitioners. If anything, USEPA simply stopped short in its explanatory reference, not intending to ignore the other means by which a pollutant can become a regulated pollutant under the CAA.

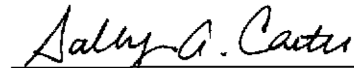
Petitioners also cite to a USEPA memorandum purporting to interpret point sources that are "subject to permits" under the Clean Water Act as meaning that such sources should, in fact, hold a permit. *Petition at pages 33-34.* The example does not appear at all analogous to the present matter, if only because it is beside the point. A source that is "subject to" a permit will naturally mean that the source should have a permit. By the same token, a source that is "subject to" some form of emission standard will be required to comply with the standard. Whatever Petitioners purpose in offering the illustration, it does not warrant construing the "subject to regulation" phrase so broadly as to ignore common sense and the overall scheme of the PSD program.

IV.

CONCLUSION

For the reasons set forth herein, the Illinois EPA respectfully requests that the EAB deny review of all issues sought by Petitioners in this appeal or, in the alternative, order such relief that is deemed just and appropriate.

Respectfully submitted,
ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,



Sally Carter
Assistant Counsel
Illinois EPA

Dated: November 1, 2007

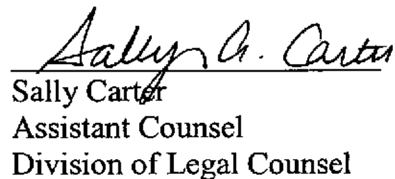
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of November 2007, I did send, by UPS postage prepaid, one (1) original and five (5) copies of the following instrument entitled **RESPONSE TO PETITION, CERTIFIED INDEX OF THE ADMINISTRATIVE RECORD** 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 that on the same day, the 1st day of November, 2007, I did send 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 those representatives identified in the service list.



Sally Carter
Assistant Counsel
Division of Legal Counsel

SERVICE LIST

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

Robert A. Kaplan,
Acting Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3507

Richard Ossias
Associate General Counsel
Office of General Counsel
1200 Pennsylvania Ave., NW
Washington, D.C. 20460-0001

Robert J. Myers
Acting Assistant Administrator
Office of Air and Radiation
U.S. EPA (MC-6101A)
Ariel Rios Building
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

Ann Alexander
Natural Resources Defense Counsel
101 North Wacker Drive, Suite 609
Chicago, Illinois 60606

Karla Raettig
Environmental Integrity Project
1920 L Street NW, Suite 800
Washington, D.C. 20036

James H. Russell
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, Illinois 60601

Steffen N. Johnson
Luke W. Goodrich
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006