

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

EXXONMOBIL OIL CORPORATION	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 11-86
	)	PCB 12-46
ILLINOIS ENVIRONMENTAL	)	(cons.)
PROTECTION AGENCY,	)	(Variance – Air)
	)	
Respondent.	)	

**NOTICE OF FILING**

TO: Mr. John T. Therriault	Bradley P. Halloran, Esq.
Assistant Clerk of the Board	Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
James R. Thompson Center	100 West Randolph Street
100 West Randolph, Suite 11-500	Suite 11-500
Chicago, Illinois 60601	Chicago, Illinois 60601
<b>(VIA ELECTRONIC MAIL)</b>	<b>(VIA FIRST CLASS MAIL)</b>

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board **MOTION FOR LEAVE TO FILE *INSTANTER* and RESPONSE TO PUBLIC COMMENT**, a copy of which is herewith served upon you.

Respectfully submitted,

EXXONMOBIL OIL CORPORATION,  
Petitioner,

Dated: October 24, 2011

By:           /s/ Monica T. Rios            
One of Its Attorneys

Katherine D. Hodge  
Monica T. Rios  
HODGE DWYER & DRIVER  
3150 Roland Avenue  
Post Office Box 5776  
Springfield, Illinois 62705  
(217) 523-4900

**CERTIFICATE OF SERVICE**

I, Monica T. Rios, the undersigned, hereby certify that I have served the attached  
MOTION FOR LEAVE TO FILE *INSTANTER* and RESPONSE TO PUBLIC

COMMENT upon:

John T. Therriault  
Assistant Clerk of the Board  
Illinois Pollution Control Board  
100 West Randolph Street  
Suite 11-500  
Chicago, Illinois 60601

via electronic mail on October 24, 2011; and upon:

Gina Roccaforte, Esq.  
Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
Post Office Box 19276  
Springfield, Illinois 62794-9276

Bradley P. Halloran, Esq.  
Hearing Officer  
Illinois Pollution Control Board  
100 West Randolph Street  
Suite 11-500  
Chicago, Illinois 60601

Ellen Rundulich  
Citizens Against Ruining the Environment  
P.O. Box 536  
Lockport, Illinois 60441

by depositing said documents in the United States Mail, postage prepaid, in Springfield,  
Illinois on October 24, 2011.

By: /s/ Monica T. Rios  
Monica T. Rios

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**MOTION FOR LEAVE TO FILE *INSTANTER***

NOW COMES Petitioner, EXXONMOBIL OIL CORPORATION (“ExxonMobil”), by and through its attorneys, HODGE DWYER & DRIVER, pursuant to 35 Ill. Admin. Code § 101.500 and requests that the Illinois Pollution Control Board (“Board”) allow the filing *instanter* of ExxonMobil’s Response to Public Comment being filed herewith. In support of this Motion, ExxonMobil states as follows:

1. On September 19, 2011, the Board held a hearing in this matter. Pursuant to the schedule established at hearing and described in the September 29, 2011 Hearing Report, public comments in this matter were due on October 11, 2011, and the record in this proceeding will close on October 24, 2011. Hearing Report, *ExxonMobil Oil Corporation v. Illinois EPA*, PCB Nos. 11-86 and 12-46 (consol.) (Ill.Pol.Control.Bd. Sept. 29, 2011) (hereafter cited as “PCB No. 11-86”).

2. On October 11, 2011, an unsigned public comment was submitted to the Board on behalf of several organizations. Comments of Environmental Integrity Project, PCB No. 11-86 (Ill.Pol.Control.Bd. Oct. 11, 2011). ExxonMobil intends to provide a brief response, filed herewith, in order to provide clarification on several issues.

3. Since the record in this proceeding has not yet closed, the filing of the Response will not unduly delay this proceeding.

4. Therefore, ExxonMobil respectfully requests leave to file the attached Response to Public Comment *instanter*.

WHEREFORE, EXXONMOBIL OIL CORPORATION requests leave to file *instanter* the Response to Public Comment.

Respectfully submitted,

EXXONMOBIL OIL CORPORATION,  
Petitioner,

Dated: October 24, 2011

By:           /s/ Monica T. Rios            
                Monica T. Rios

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MOBO:027/Filings/PCB 11-86 and PCB 12-46/Motion for Leave to File Instanter

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**RESPONSE TO PUBLIC COMMENT**

NOW COMES ExxonMobil Oil Corporation (“ExxonMobil”), by and through its attorneys, HODGE DWYER & DRIVER, and hereby submits this Response to Public Comment:

**I. BACKGROUND**

On October 11, 2011, the Environmental Integrity Project (“commenters”)<sup>1</sup> submitted a public comment to the Illinois Pollution Control Board (“Board”) in the above-captioned matter. Comments of Environmental Integrity Project, *ExxonMobil Oil Corporation v. Illinois EPA*, PCB Nos. 11-86 and 12-46 (consol.) (Ill.Pol.Control.Bd. Oct. 11, 2011) (hereafter cited as “Comments”) (proceeding hereafter cited as “PCB No. 11-86”). Per the Hearing Report filed on September 29, 2011, the record in this matter closes on October 24, 2011. Hearing Report, PCB No. 11-86 at 2 (Ill.Pol.Control.Bd. Oct. 24, 2011) (hereafter cited as “Hearing Report”). Accordingly, as requested in the Motion for Leave to File *Instanter*, ExxonMobil is filing this Response

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<sup>1</sup> The document filed on October 11, 2011 purports to be submitted on behalf of several organizations; however, the document is not signed by any particular person or group.

to Public Comment (“Response”) prior to the close of the record, and thus, the consideration of this Response by the Board will not unduly delay this proceeding.

**II. A VARIANCE IS APPROPRIATE FOR THE RELIEF EXXONMOBIL SEEKS.**

As described in detail in the record of this consolidated variance proceeding, ExxonMobil has pursued multiple avenues to obtain relief from the NOx RACT Rule’s (“Rule”) December 31, 2014, and then January 1, 2015, compliance deadline. As part of its effort to extend the compliance deadline for certain emission units at its Joliet Refinery, ExxonMobil participated in the R11-24 rulemaking, which was proposed by Illinois Environmental Protection Agency (“Illinois EPA”) in order to revise the compliance date of the NOx RACT Rule from January 1, 2012 to January 1, 2015. Statement of Reasons, *In the Matter of: Nitrogen Oxides Emissions, Amendments to 35 Ill. Adm. Code 217*, R11-24 (Ill.Pol.Control.Bd. May 4, 2011) (hereafter cited as “R11-24”). In the R11-24 rulemaking, ExxonMobil requested that the Board extend the compliance date for certain emission units at the Refinery by revising the compliance date in Appendix H from December 31, 2014 to May 1, 2019, in order to postpone the installation of controls at the Joliet Refinery until the next scheduled turnaround. Prefiled Testimony of Robert Elvert and Prefiled Testimony of Doug Deason, R11-24 (Ill.Pol.Control.Bd. June 20, 2011); ExxonMobil Oil Corporation’s Post-Hearing Comments, R11-24 (Ill.Pol.Control.Bd. July 18, 2011).

In the Board’s Final Opinion and Order in R11-24, the Board directly addressed ExxonMobil’s request and declined to extend the compliance date for ExxonMobil’s emission units. Board Order, R11-24 at 32 (Ill.Pol.Control.Bd. Aug. 18, 2011) (hereafter cited as “R11-24 Final Order”). However, although the Board opted not to revise the

Appendix H compliance date for ExxonMobil in the R11-24 proceeding, the Board provided guidance on how ExxonMobil should pursue its request for an extension of the compliance deadline. The Board stated:

The Board noted that, upon Board adoption of rules in this consolidated docket and filing of the rules with the Secretary of State, ExxonMobil's Refinery would be subject to the generally applicable January 1, 2015 compliance deadline. The Act provides that the filing of a petition for adjusted standard or for variance within 20 days of the effective date stays the effective date of any rule adopted in this docket as it applies to the petitioner. See 415 ILCS 5/28.1(h) and 38(b)(2010). The Board did not see that any harm will come to ExxonMobil if the Board proceeded to complete rulemaking in this docket to provide relief to other affected sources; while ExxonMobil and the Agency await USEPA action that may affect ExxonMobil's situation. The Board stated that it will make a determination on the issue of appropriate relief for ExxonMobil in the context of any appropriate later regulatory or adjudicatory petition.

R11-24 Final Order at 33. (Emphasis added.) As directed by the Board, ExxonMobil timely filed an Amended Petition, or in the Alternative, a New Petition with the Board, which stayed the effectiveness of the Rule as to ExxonMobil. The Board accepted the Petition for hearing, consolidated the new Petition (PCB No. 12-46) with the pending variance proceeding, and confirmed that the effectiveness of the NOx RACT Rule was stayed as to ExxonMobil. Board Order, PCB No. 11-86 (Ill.Pol.Control.Bd. Sept. 8, 2011).

Based on the Board's R11-24 Final Order, which seemed to suggest a variance petition as an approach to obtain relief from the Rule, and on the Board's action in this consolidated proceeding, i.e. accepting the new petition for hearing and confirming that the stay of the Rule applies, it appears that the Board itself views the variance as an appropriate mechanism to utilize in order to obtain the regulatory relief sought by ExxonMobil. Further, although ExxonMobil waived the right to a hearing in the initial

Petition, the Board, on its own motion, determined that a hearing would be appropriate. Board Order, PCB No. 11-86 (Ill.Pol.Control.Bd. June 2, 2011). Accordingly, ExxonMobil participated at hearing in this consolidated proceeding, where it provided sworn testimony and demonstrated that the variance request should be granted.

As allowed by the Act and Board regulations, ExxonMobil filed a request for variance from a Board Rule. The record in this consolidated proceeding, as well as in the R11-24 rulemaking, clearly demonstrate why compliance with the Rule by January 1, 2015 is an arbitrary and unreasonable hardship on ExxonMobil. *See generally* Hearing Exhibits 1-8, PCB No. 11-86 (Ill.Pol.Control.Bd. Sept. 19, 2011 and Sept. 29, 2011); Hearing Transcript, PCB No. 11-86 (Ill.Pol.Control.Bd. Sept. 19, 2011) (hereafter cited as "Tr."). Further the record shows that the basis for the Rule is no longer valid at this time, that there is substantial costs associated with compliance at this time, and there is minimal, if any impact to the environment if the variance is granted since ExxonMobil is achieving NOx emissions reductions now that are in excess of reductions from boilers and heaters that would result from compliance with the Rule. *Id.*; *see also* Post-Hearing Brief, PCB No. 11-86 (Ill.Pol.Control.Bd. Oct. 6, 2011). Not only has ExxonMobil demonstrated that a variance is warranted in these circumstances, but there is also potential harm that could occur to the public should the variance not be granted to May 1, 2019, which accounts for the Refinery's turnaround schedule. If ExxonMobil is required to install controls outside of a planned turnaround, there could be serious repercussions in terms of a possible disruption to the fuel supply for the Midwest and increased gasoline prices. Tr. at 14; *see also* Petition for Variance, PCB No. 11-86 at 34-35 (Ill.Pol.Control.Bd. May 18, 2011) (hereafter cited as "Petition"). Accordingly,



ExxonMobil's request for variance from the current January 1, 2015 deadline to May 1, 2019 is justified based on the record established in this proceeding and is tailored to minimize disruption to Refinery operations and the resulting impact on the public.

In Section II.B. of the Comments, commenters cite several Board and Court cases in support of its allegation that ExxonMobil is utilizing the variance to avoid compliance with the NOx RACT Rule. Comments at 4-5. Generally, in the cases cited, the Board or Court make statements or cite to other cases describing a variance as a temporary relief mechanism that is intended to allow the petitioner flexibility in the time allowed to achieve compliance, and is not intended to be used to avoid compliance. However, commenters have grossly misstated the Board's conclusion in the *Lone Star Industries, Inc.* case. The commenters state that in *Lone Star* "the Board found that a variance could not be granted on the possibility of a regulatory change alone." *Id.* at 5. (citing *Lone Star Indus. v. Illinois EPA*, 1992 WL 331228 at 2-3 (Ill.Pol.Control.Bd. 1992).<sup>2</sup> This statement is clearly inaccurate. In the Board Order cited by commenters, the Board denied Illinois EPA's Motion to Dismiss and determined that "the information contained in the petition is sufficient and that dismissal of the petition at this point in the proceeding is unwarranted." *Lone Star* at 3-4. In fact, the Board eventually granted Lone Star's variance request. Board Order, *Lone Star Industries, Inc. v. Illinois EPA*, PCB No. 92-134 at 12-14 (Ill.Pol.Control.Bd. May 20, 1993). The commenters misconstrued the Board's statement and holding in the *Lone Star* order cited in the Comments. The statement referenced by the commenters that the Board made in that

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<sup>2</sup> The citation to the Board Order, available on the Board's website: Board Order, *Lone Star Industries, Inc. v. Illinois EPA*, PCB No. 92-134 at 3 (Ill.Pol.Control.Bd. Oct. 29, 1992). This version of the Board Order is hereafter cited in this Response as "*Lone Star* at \_\_\_."

particular *Lone Star* order was merely one of several statements made regarding the nature of variances and compliance plans. *Lone Star* at 3.

In addition to inaccurately portraying the Board holding in the *Lone Star* case, commenters also selectively cite from the record in this proceeding in an attempt to show that ExxonMobil is trying to avoid compliance with the NO<sub>x</sub> RACT Rule. ExxonMobil, however, agrees that a variance is intended to provide temporary relief from a rule and provide flexibility in the timing for compliance, which is why ExxonMobil has requested a four-year and four-month variance request, consistent with its turnaround schedule. This flexibility in the timeline for compliance is wholly consistent with the purpose of a variance request. Also, as stated in its Post-Hearing Brief, “ExxonMobil has consistently installed required controls and will continue to comply with federal and state regulations, resulting in decreased emissions from the Refinery.” Post-Hearing Brief at 15. In addition, in the R11-24 rulemaking, ExxonMobil’s Post-Hearing Comments explained:

Given the fact that Illinois EPA supported the extended deadlines for refineries in the initial rulemaking and the fact that the Rule is not even required at this time, it is reasonable to allow an extension to the compliance deadline for the Appendix H emission units, since installation of required controls is simply being delayed until Spring 2019. Allowing required controls to be installed during the Spring 2019 turnaround is consistent with Illinois EPA’s past practice of accommodating refineries’ turnaround schedules, and thus, an extension of compliance deadline to May 1, 2019 is reasonable.

Post-Hearing Comments, R11-24 at 9-10 (Ill.Pol.Control.Bd. July 18, 2011).

Throughout both the R11-24 rulemaking proceeding and the consolidated variance proceeding, ExxonMobil has articulated that compliance should not be required “at this time,” meaning that compliance would be required at a later date, and in this, case required by May 1, 2019, in order to temporarily delay the installation of required

controls until the next scheduled turnaround. Based on the records in the R11-24 rulemaking and this proceeding, ExxonMobil has demonstrated that compliance with the NOx RACT Rule at this time poses an arbitrary and unreasonable hardship, and its variance request, which is consistent with the purpose of the variance as described in the Act, Board regulations, and Board cases, should be granted.

Finally, commenters challenge the basis for ExxonMobil's hardship and claim that reliable evidence has not been submitted that demonstrates ExxonMobil's hardship or the impact on the environment. ExxonMobil strongly disagrees with commenters unsupported assertions. Not only in this consolidated proceeding, but also in the R11-24 rulemaking, ExxonMobil has presented sworn testimony and submitted comments clearly demonstrating the hardship posed by compliance with the NOx RACT Rule at this time, as well as the minimal, if any, environmental impact resulting from the grant of the variance request. Further, Illinois EPA filed a neutral recommendation in this matter, neither objecting to nor supporting the grant or denial of the request for variance. At hearing, Illinois EPA did not question or challenge ExxonMobil's testimony, and Illinois EPA also did not challenge or question any of the arguments or statements made by ExxonMobil in its Post-Hearing Brief. Had ExxonMobil failed to demonstrate the hardship posed by compliance with the Rule at this time or failed to submit ample evidence of the minimal environmental impact, Illinois EPA could have raised these issues at hearing or in a response to ExxonMobil's Post-Hearing Brief; however, it chose not to do so. Thus, ExxonMobil's sworn testimony supporting its request for variance remains unchallenged and uncontroverted, demonstrating that the variance request should be granted by the Board.

**III. UPDATE ON AND/OR CLARIFICATION OF OZONE AND RACT RELATED ISSUES**

ExxonMobil does not dispute that Illinois EPA has the authority to propose rules that are more stringent than the requirements of the Clean Air Act (“CAA”). However, Illinois EPA clearly stated when it proposed the NOx RACT Rule that the Rule was needed in order to aid in the attainment of the federal 1997 8-hour ozone standard. *Statement of Reasons, In the Matter of: Nitrogen Oxide Emissions from Various Source Categories, Amendments to 35 Ill. Adm. Code Parts 211 and 217, R08-19* (Ill.Pol.Control.Bd. May 9, 2008). Not only has the United States Environmental Protection Agency (“USEPA”) stated that the Rule was not needed to attain the 1997 ozone standard, but Illinois EPA also testified that the Rule is not currently required by the CAA. 76 Fed. Reg. 9655 (Feb. 22, 2011) (stating the Chicago area has attained the 1997 ozone standard without implementation of the NOx RACT Rule and granting a waiver of NOx RACT requirements); Hearing Transcript, R11-24 at 19-21 (Ill.Pol.Control.Bd. June 2, 2011) (hereafter cited as “June 2 Hearing Tr.”). Further, as discussed in ExxonMobil’s Post-Hearing Brief, Illinois EPA has submitted a redesignation request to USEPA asking that the Chicago area be redesignated as in attainment of the 1997 8-hour ozone standard. Post-Hearing Brief at Exhibit 1. As detailed in the record of this proceeding, the NOx RACT Rule was not necessary for purposes of attaining the 1997 ozone standard, and it is currently not required by the CAA. *See generally* Petition (describing USEPA’s approval of the NOx RACT waiver request); June 2 Hearing Tr. (Illinois EPA’s testimony regarding the basis for the Rule and the deficiencies identified by USEPA); Hearing Exhibit 2 (Mr. Deason’s testimony regarding the federal ozone standards and RACT requirement).

In addition, the Board should note, as addressed in the Post-Hearing Brief, that the anticipated 2011 ozone standard will be withdrawn, and the 2008 ozone standard is in effect. Post-Hearing Brief at 7-10. According to recently issued USEPA guidance, neither the Chicago area nor the Southwest Michigan region are included on a list of areas expected to be in nonattainment of the 2008 standard based on 2008-2010 data. Post-Hearing Brief at Exhibit 3. The fact that the Chicago area attained the 1997 ozone standard without implementation of the NO<sub>x</sub> RACT Rule and could be designated in attainment of the 2008 ozone standard demonstrates that air quality in the Chicago area is improving and will likely continue to improve as new federal regulations are implemented and emission reductions resulting from compliance with consent decrees and/or facility shut downs are realized. Also, as Mr. Kohlmeyer, who testified on behalf of ExxonMobil, explained at hearing, the air quality in the Chicago area benefits from the significant NO<sub>x</sub> emission reductions resulting from the installation of a selective catalytic reduction unit at the Joliet Refinery. Tr. at 42-44. This approximately 1300 tpy reduction in NO<sub>x</sub> emissions, which is being realized now, is well beyond the estimated 370 tpy reduction from boilers and heaters resulting from compliance with the Rule, which would not be realized until 2015.

ExxonMobil provided sworn testimony, in both the R11-24 rulemaking proceeding and this consolidated variance proceeding, explaining in detail why the Rule poses an arbitrary and unreasonable hardship. ExxonMobil's testimony also provided information on the substantial resources, approximately \$28 million, that could be deemed a misappropriated investment if compliance is mandated with a non-federally required rule by January 1, 2015, and further discussed the shortcomings of the Rule,

including the uncertainty surrounding the issuance and implementation of the 2008 ozone standard and the future ozone standard. In addition, ExxonMobil's testimony leaves little doubt as to the minimal, if any, impact that granting the variance would have on the environment. During the hearing in this consolidated proceeding, not a single question was asked to ExxonMobil's witnesses by Illinois EPA or by members of the public that were present during the testimony. Further, although the Board asked questions of ExxonMobil and of Mr. Rob Kaleel of Illinois EPA, the sworn testimony provided by ExxonMobil remains uncontroverted and unchallenged. Also note that the sworn testimony provided at hearing in the R11-24 rulemaking has been incorporated into the record of this proceeding, and ExxonMobil's prefiled testimony filed in R11-24 has been entered into this record as if read. Hearing Report at 1-3 (listing as Exhibits 1-3 and 8 ExxonMobil's prefiled testimony and the hearing transcripts from R11-24, respectively).

In past cases, the Board has noted that testimony provided under oath and subject to cross-examination is afforded more weight than public comments. *See Illinois v. Community Landfill Co. and City of Morris*, PCB No. 03-191 (Ill.Pol.Control.Bd. June 18, 2009) (where the Board stated that "[m]embers of the public are extended some latitude under the Act and Board's rules so that they can express their opinions and beliefs concerning environmental issues without being unduly hampered by procedural barriers. These opinions and beliefs are afforded lesser weight than evidence and statements that are subject to cross-examination."); *Rochelle Waste Disposal, LLC v. City Council of the City of Rochelle, Illinois*, PCB No. 03-218 (Ill.Pol.Control.Bd. April 15, 2004) (stating that "public comments are entitled to less weight than is sworn testimony subject to cross-examination."); *Industrial Fuels & Resources/Illinois, Inc. v. City*

*Council of the City of Harvey*, PCB No. 90-53 (Ill.Pol.Control.Bd. Sept. 27, 1990) (stating that unsworn comments provided at hearing “may be admitted as public comments, and not as testimony, and their probative weight thereby is reduced accordingly.”). In addition, note that the Board’s rules provide that participants in a proceeding may submit written statements prior to or at hearing; however, written statements submitted “without the availability of cross-examination will be treated as public comment in accordance with subsection (c) of this Section and will be afforded lesser weight than evidence subject to cross-examination.” 35 Ill. Admin. Code § 101.628. Although Section 101.628 is directed to participants in a proceeding, it provides clear guidance on how public comments that are not subject to cross-examination are treated by the Board.

In this proceeding, several public comments have been submitted, either orally at hearing or in writing after the hearing. In accordance with the Board’s precedent regarding public comments, the public comments, especially the unsigned comment, submitted to the Board, should be afforded less weight than the sworn and uncontroverted testimony provided by ExxonMobil.

ExxonMobil appreciates the time and resources Illinois EPA has spent discussing NOx RACT issues, and ExxonMobil commits to continuing to work with Illinois EPA on issues that may be raised in the future regarding NOx RACT and the implementation of federal ozone standards. ExxonMobil also thanks the Board for the opportunity to provide testimony at hearing and submit its Post-Hearing brief and this Response. Based on the record in this consolidated proceeding, ExxonMobil has demonstrated that compliance with the NOx RACT Rule by January 1, 2015 poses an arbitrary and

unreasonable hardship, and accordingly, the Board should grant a variance from the January 1, 2015 compliance deadline to May 1, 2019, consistent with the Refinery's turnaround schedule.

WHEREFORE, EXXONMOBIL OIL CORPORATION respectfully requests that the Illinois Pollution Control Board grant its request for variance from the NOx RACT Rule's January 1, 2015 compliance deadline until May 1, 2019, as described in its Petitions.

Respectfully submitted,

EXXONMOBIL OIL CORPORATION,  
Petitioner,

DATE: October 24, 2011

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One of Its Attorneys

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