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Illinois Pollution Control Board
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Re: Public Comment in Consolidated Docket Nos. PCB 2011-86 and 12-46 Submitted on Behalf of Natural Resources Defense Council, the Environmental Integrity Project, Respiratory Health Association of Metropolitan Chicago, and Citizens Against Ruining the Environment in Opposition to the Petition for Variance of ExxonMobil Oil Corporation from the January 1, 2015 Compliance Deadline for the Applicable Requirements of 35 Ill. Adm. Code 217, Subparts A, D, E, and F

Introduction

The Illinois Pollution Control Board should deny ExxonMobil's petition for variance to postpone compliance with the Illinois NO_x RACT Rule (applicable requirements codified at 35 Ill. Admin. Code Part 217, Subparts A, D, E, and F) until May 1, 2019. The bulk of ExxonMobil's principal argument is that the NO_x limits in question are not required by federal law. This is irrelevant. A variance should only be granted when 1) the purpose is to provide the petitioner with time to comply with the regulatory requirement, and 2) immediate compliance would impose an arbitrary or unreasonable hardship on the petitioner. ExxonMobil has not satisfied either of these criteria. Therefore, the Board should deny ExxonMobil's petition.

The Environmental Integrity Project (EIP) is a nonpartisan, nonprofit organization dedicated to more effective enforcement of environmental laws and to the prevention of political interference with those laws. EIP's research and reports shed light on how environmental laws affect public health. Headquartered in Washington, D.C., EIP works closely with communities in many states seeking to enforce their local laws.

Natural Resources Defense Council, Inc. (NRDC), a not-for-profit corporation organized and existing under the laws of the State of New York, is a national environmental organization with more than 400,800 members. More than 16,840 of these members live in the State of Illinois. NRDC is dedicated to the preservation, protection, and defense of the environment, its wildlife and natural resources, and actively supports effective enforcement of the CAA on behalf of its members.

Respiratory Health Association of Metropolitan Chicago (RHAMC) is a public health leader that addresses air quality issues with a comprehensive approach involving research, education and advocacy activities.

Citizens Against Ruining the Environment (CARE) is a Lockport, Illinois-based organization engaged in advocacy for better implementation and enforcement of the Clean Air Act in northern Illinois.

Background

A. Illinois NO_x RACT Rule

In August of 2009, the Illinois Pollution Control Board (IPCB or Board) promulgated new rules (NO_x RACT Rule or Rule) to control nitrogen oxide (NO_x) emissions from industrial boilers and process heaters at sources located in either the Chicago or Metro East areas of the state, and which emit or have the potential to emit NO_x in an amount equal to or greater than 100 tons per year. 33 Ill. Reg. 13345; 35 Ill. Admin. Code § 217. These rules apply to Petitioner because its Joliet Refinery meets these applicability criteria as described in 35 Ill. Adm. Code Part 217.150.

The NO_x RACT Rule requires affected sources to use Reasonably Available Control Technology (RACT) to control NO_x emissions. For ExxonMobil, this initially required the installation of NO_x control technology at several heaters and boilers at the Joliet Refinery beginning January 1, 2012. However, after negotiations with the refineries, including the Petitioner, Appendix H to Part 217 was added that includes compliance dates accommodating planned maintenance turnarounds. Hence, the promulgation of the December 31, 2014 compliance date for the Petitioner's emission units is set forth at Appendix H." *Illinois Environmental Protection Agency (IEPA) Recommendation* (Aug 18, 2011), at 10. The Board then extended the Rule's compliance deadline for all units until January 1, 2015, eliminating the 2014 deadline for units listed in Appendix H. 35 Ill. Admin. Code § 217.152(c). Illinois is currently working with the United States Environmental Protection Agency (USEPA) to revise state RACT requirements such that they will meet federal standards, but this process depends in large part on the pending reconsideration of the new federal ozone standard discussed below. ExxonMobil is now requesting an additional four-year and four-month extension of the compliance deadline so that compliance would not be required until May 1, 2019. *Initial Petition* (May 18, 2011), at 2.

B. Federal Ozone Standard

In 2008, USEPA revised its ozone NAAQS, lowering the primary ozone NAAQS from the 1997 Standard of 0.08 parts per million (ppm) to 0.075 ppm, and revising the secondary ozone NAAQS to the same 0.075 ppm standard. 73 *Fed. Reg.* 16436 (March 27, 2008). The revised standard was inconsistent with the recommendations of USEPA's Clean Air Scientific Advisory Committee (CASAC), which advocated a range of 0.060 to 0.070 ppm. *See, Letter from CASAC to Administrator Johnson*, April 7, 2008. The revised standard was also challenged by numerous groups in court. *State of Mississippi, et al. v. E.P.A.* (NO. 08-1200, D.C. Cir. 2008).

USEPA subsequently announced its decision to reconsider the 2008 Standard. *See EPA's Notice That it is Reconsidering the Rule Challenged in these Cases*, filed September 16, 2009, in *State of Mississippi, et al. v. E.P.A.* Consequently, the United States Court of Appeals for the District of Columbia Circuit ordered that the case challenging the 2008 Standard – and effectively, the Standard itself – be held in abeyance. *See, Order,* filed March 9, 2009; *Order,* filed January 21, 2010; and *Order*, filed April 4, 2011, in *State of Mississippi, et al. v. E.P.A.* USEPA filed additional requests with the Court for continued abeyance, which were granted. *See, Order*, filed April 4, 2011, in *State of Mississippi, et al. v. E.P.A.* In January of 2010, USEPA proposed a new primary ozone standard consistent with the range suggested by CASAC: 0.060 to 0.070 ppm. 75 *Fed. Reg.* 2938 (Jan. 19, 2010). On September 2, 2011, President Obama stated that the scientific data on ozone is currently being updated, and a reconsidered ozone standard based on the most recent science is not expected until 2013.[1]

Discussion

I. Illinois is Permitted to Promulgate and Enforce Air Pollution Requirements That Are More Stringent Than Federal Standards

Assuming for purposes of discussion that Illinois' NO_x RACT rule is not federally required, ExxonMobil is not entitled to a variance on that ground. ExxonMobil has not provided any law or other legal precedent authorizing the Board to grant a variance on this basis. Yet ExxonMobil justifies this conclusion by stating that the Rule is "arbitrary since there is neither a federal basis nor need, at this time for the rule." *Initial Petition*, at 11. This is untrue. Indeed, the RACT requirement under the Rule is not required by federal law, since USEPA granted Illinois a waiver from the 1997 ozone standard on February 22, 2011. 76 *Fed. Reg.* 9655 (Feb. 22, 2011). However, this does not render Illinois' NO_x requirements "arbitrary." *Id*. Illinois adopted the NO_x RACT Rule to help comply with future ozone standards, as well as to help manage the air quality in Illinois and in downwind states. Specifically, the Illinois Environmental Protection Agency stated "the reductions provided by the subject NO_x RACT proposal will help meet [the 2008 ozone standard] *and* should help to address any future requirements to implement RACT for the [2008 ozone standards]." *See* Nitrogen Oxides Emissions from Various Source Categories: Amendments to 35 Ill. Adm. Code Parts 211 and 217, R08-19, slip op. at 7 (Aug. 20, 2009)(emphasis added). The 2008 ozone standard was already being held in abeyance when the Board issued this opinion, and thus the opinion was not born exclusively from federal requirement. More generally, the Board sought to address future ozone standards and future RACT requirements. Furthermore, it is not arbitrary for Illinois to adopt pollution control requirements that are stricter than federal law. The federal government specifically provided for this state power in the Clean Air Act by stating that the federal legal framework establishes a regulatory floor, not a ceiling. 42 U.S.C. § 7416; CAA § 166. Therefore, ExxonMobil's contention that the NO_x RACT Rule is arbitrary because it is not required by federal law is confused and irrelevant as to the requested variance. Furthermore, a variance granted on the basis that federal law does not require the particular pollution control

[1] *See, Statement by the President on the Ozone National Ambient Air Quality Standards* (Sept. 2, 2011), at: http://www.whitehouse.gov/the-press-office/2011/09/02/statement-president-ozone-national-ambient-air-quality-standards

regulation at issue would undermine the sovereignty of Illinois and its power to protect its citizens and the environment over and beyond the requirements of the Clean Air Act (CAA).

II. ExxonMobil Is Requesting the Issuance of a Variance for an Improper Purpose

A. The Purpose of a Variance Is Not to Analyze the Need for or Validity of a State Law

The issue of whether a state law is necessary is not properly argued under the guise of a request for a variance from that law. ExxonMobil states that a variance is now justified because the Rule is "arbitrary since there is neither a federal basis nor need, at this time for the rule." *Initial Petition*, at 11. ExxonMobil attempts to support its argument that there is no need for the NO_x RACT Rule with the 2009 and 2011 findings that the Chicago-Gary-Lake County Il-IN nonattainment area and the St. Louis, MO-IL nonattainment area, respectively, attained the 1997 $PM_{2.5}$ Standard. 74 *Fed. Reg.* 62243 (Nov 27, 2009); 76 *Fed. Reg.* 29652 (May 23, 2011). This claim by Petitioner is irrelevant because it addresses the justification for the NO_x RACT Rule itself, rather than the justification for the prospective variance. That is, in the matter before the Board, Petitioner bears the burden to prove that an arbitrary or unreasonable hardship will be imposed if the variance is not granted. 415 ILCS 5/35(a). The need for the law in general is not a matter presently before the Board.

Illinois has authority to pass and enforce laws that improve its region's air quality, provided state standards are no less stringent than federal standards. 42 U.S.C. § 7416; CAA §116. Illinois must also enact laws which address the impact of emissions from its industry on downwind states. 42 U.S.C. § 7410; CAA § 110(a)(2)(D). Specifically, IEPA and the Board have authority to promulgate such regulations which improve air quality and protect human health and the environment. 415 ILCS 5/4, 5, 8, 9, 27, 28. In 2009, the Board promulgated the NO_x RACT Rule. 33 Ill. Reg. 13345. If ExxonMobil seeks to challenge the validity of environmentally protective regulation such as the NO_x RACT Rule, it must demonstrate in the proper venue that there is no substantial evidence to support the agency's decision. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 401 (1971). Because the purpose of a variance is not to indirectly challenge the validity of state law, the Board should deny ExxonMobil's request for variance. Therefore, regardless of whether an arbitrary or unreasonable hardship exists, a variance should not be granted to ExxonMobil in this case.

B. The Purpose of a Variance Is Not to Avoid Compliance Pending Speculative Change in the Law, but Rather to Allow Time for Compliance to be Achieved

ExxonMobil argues that the changing regulatory landscape is an arbitrary and unreasonable hardship which justifies the use of the proposed variance in this case. This argument asks that the requested variance be misused for the improper purpose of compliance avoidance pending speculative change in the law. The purpose of a variance is to provide time for compliance to be achieved — not to ride out regulatory uncertainty. *Marathon Oil Company v. IEPA*, 1996 WL 271684,*6 (Ill. Pol. Control. Bd. 1996)("The purpose [of a variance] is not to avoid compliance, but rather only to allow for time for compliance to be achieved."); *see also Monsanto Co. v. IPCB*, 10 Ill.Dec. 231, 235 (Ill. 1977)(explaining that "a variance which permanently liberates a polluter of a board regulation is wholly inconsistent with the purpose of the Environmental

Protection Act"); *City of Mendota v. IPCB*, 112 Ill.Dec. 752, 757 (Ill. App. Ct. 1987); *City of Dekalb v. IEPA*, 1991 WL 155646, 5 (Ill. Pol. Control Bd. 1991)("A variance is a temporary reprieve from the Board's regulations until compliance is achieved. [Petitioner] is not avoiding compliance and has in fact agreed to make every effort to achieve compliance by the terms of the variance"); *Lone Star Indus. V. IEPA*, 1992 WL 331228, *2 (Ill. Pol. Control Bd. 1992). In *Lone Star Industries* petitioners requested a variance because the regulations in question were under review. *Lone Star Indus*, 1992 WL at *2. The Board found that a variance could not be granted on the possibility of a regulatory change alone. *Id*. at 2-3 ("The pendency of rulemaking does not stand by itself as grounds for grant of a variance")(*citing Citizens Utilities Co. v. IPCB*, 479 N.E.2d 1213).

In this case, Petitioner does not seek a "temporary reprieve . . . until compliance is achieved," but is instead *avoiding* compliance with state law pending review of a federal standard. *City of Dekalb*, 1991 WL at *5. ExxonMobil seeks to avoid spending money on control technology "which may not even be necessary," since it remains unclear, according to Petitioner, "whether RACT will be needed at all." *Initial Petition*, at 34. ExxonMobil's petition plainly requests a variance to "allow ExxonMobil to delay spending resources at this time to comply . . . until there is more certainty." *Initial Petition*, at 21. Because the purpose of a variance is not to enable polluters to avoid compliance during regulatory uncertainty, the Board should deny ExxonMobil's petition. Again, regardless of whether an arbitrary or unreasonable hardship exists, a variance should not be granted to ExxonMobil in this case.

III. Petitioner Fails to Establish that It Would Suffer an Arbitrary or Unreasonable Hardship if Required to Comply with the Rule

The Board should deny ExxonMobil's request for a variance because Petitioner has not shown that it would suffer an arbitrary or unreasonable hardship if required to comply with the Rule. A regulated entity is only entitled to a variance if it can show that compliance with a regulation will impose "an arbitrary or unreasonable hardship." 415 ILCS 5/35(a). To show that a regulation will cause an arbitrary or unreasonable hardship the petitioner must "show the hardship it will encounter from the denial of the variance will outweigh any injury to the public or the environment from the grant of the variance." *Marathon Oil Company v. Environmental Protection Agency* (1993), 242 Ill.App.3d. 200, at 206. ExxonMobil has not shown that it will suffer any hardship that is cognizable for the purposes of a variance. Furthermore, ExxonMobil has not presented any evidence supporting the hardships it does allege. Finally, even taken at face value, the hardships alleged by ExxonMobil do not outweigh the injury to the public or the environment that will result from allowing ExxonMobil to comply with a law more than a decade after it was adopted.

A. ExxonMobil Has Not Identified Any Hardships Which May Be Considered in Determining Whether a Variance Is Justified

First, ExxonMobil's compliance with the Rule in the face of regulatory uncertainty is not a hardship for which a variance can be granted. Second, temporarily shutting down the Joliet Refinery to install the necessary NO_x controls is not a hardship which may be considered because such injury would be self-inflicted.

1. Regulatory Uncertainty Is Not A Hardship Which May Be Considered

Uncertainty regarding whether USEPA will update the NAAQS in 2013 and whether Illinois will change its RACT requirements is not a hardship for which a variance may be granted. Illinois courts have concluded that the granting of a variance based on speculative change in the law creates a slippery slope which undercuts the intended function of the law. "If the speculative prospect of future changes in the law were to constitute an arbitrary and unreasonable hardship, the law itself would be emasculated with variances, as there is always the prospect for future change." *Citizens Utilities Co. of Illinois v. IPCB*, 134 Ill.App.3d 111, 115 (Ill. App. Ct. 1985) [hereinafter *Citizens*]; *See also American Energy Generating Company, et. al. v. IEPA*, 2009 WL 174980, *10-*11 (PCB 09-21). In *Citizens*, the petitioners operated a wastewater treatment plant that was subject to general use water quality standards. *Citizens*, 134 Ill.App.3d at, 113. At the same time, Illinois was evaluating whether the water quality standards should be amended. *Id*. at 114. The petitioner argued that complying with the existing standards was an arbitrary and unreasonable hardship because 1) "that law may be modified in the future," and 2) "the expenditure to comply with the current law may become unnecessary." *Id*. 114 -115. The Board denied the variance and the Court affirmed the Board's denial, holding that the requirement to comply with a law that may change is not a hardship. *Id*.

ExxonMobil's petition attempts to advance the same two arguments that failed in *Citizens*. ExxonMobil correctly explains that the federal government is currently reviewing the NAAQS for ozone, and Illinois is currently revising its RACT requirements, which could eventually require a different type of NO_x emission control technology for Petitioner. Based on this possibility, ExxonMobil claims that complying with the NO_x RACT Rule at the Joliet Refinery by 2015 would impose an arbitrary and unreasonable hardship. ExxonMobil states that "the variance will allow ExxonMobil to delay its approximately $28 million investment in control technology until a time when Illinois EPA and ExxonMobil have a better understanding of applicable and federally required NO_x RACT requirements." *Initial Petition*, at 3. In *Citizens*, the petitioner sought a variance from a rule which was immediately applicable. Unlike in *Citizens*, ExxonMobil seeks this variance more than three years before the Rule will come into effect. Thus, ExxonMobil asks for more than did the petitioner in *Citizens*: a variance based a on speculative change in a law which, additionally, will not be applicable for years to come. If the Court in *Citizens* found that a variance based on speculative change in an immediately applicable law offered a slippery slope, then the Board should now find that ExxonMobil's three-year-plus compliance buffer only serves to grease and steepen the hypothetical slippery slope. That is, a variance should not be issued based on the speculative prospect for future change in the law described in *Citizens*, and a variance is even less valid when the law from which the variance is sought is itself a speculative future prospect. A variance born from these conditions would further undermine the effect and function of the law by permitting additional and increasingly speculative circumvention of the law. As explained above, the requirement to comply with a law that may change is not a hardship for which a variance can be granted. Furthermore, any expenditures associated with such compliance are part and parcel of the compliance, and likewise do not represent a hardship for which a variance can be granted.

2. Self-Imposed Injuries Are Not Hardships Which May Be Considered

If ExxonMobil must temporarily shut down the Joiliet Refinery to install NO_x controls required by the Rule, the economic losses it will suffer will be self-imposed and should not be considered by the Board. "The board has articulated that a petitioner's hardship must not be self-

imposed by the petitioner's inactivity or decision making." *Marathon Oil Company v. IEPA*, 1996 WL 271684, *7 (PCB 94-27); *see also Ekco Glaco Corp. v. IEPA*, 134 Ill.Dec. 147 (Ill. App. Ct. 1989). In *Ekco Glaco* the appeals court affirmed the Board's denial of a variance because "Ekco Glaco's problems [arose] from the delay caused by decisions it has made in attempting to secure compliance and its failure to commit to a particular compliance option." *Ecko Glaco Corp.* 134 Ill.Dec. at 153-154.

ExxonMobil argues that the variance is necessary because the compliance delay would allow compliance-based shutdowns to coincide with planned maintenance turnarounds, thus mitigating economic losses. *Initial Petition,* at 3. However, the current 2015 deadline was selected for exactly this reason. Post-Hearing Comments of the Illinois EPA, *In the Matter of*: *Nitrogen Oxides Emissions From Various Source Categories, Amendments to 35 Ill. Adm. Code Parts 211 and 21,* R08-19 (IPCB Mar. 23, 2009). ExxonMobil has not pointed to any information, new or old, beyond regulatory uncertainty, to explain why the 2015 date should now be changed. *See IEPA Recommendation,* at 15. Additionally, Illinois EPA worked with ExxonMobil and other affected facilities to provide flexibility with the Rule's compliance deadlines. *Initial Petition,* at 4. If the 2015 deadline has always imposed a hardship because of Petitioner's calendar for scheduled shutdown and turnaround events, then ExxonMobil should have petitioned for a variance in 2009 when the Rule was adopted. In any event, this particular hardship is self-imposed by Petitioner's own inaction, and thus should not be considered by the Board.

B. ExxonMobil Has Not Provided Any Reliable Evidence Supporting Their Claim that Compliance Will Impose an Arbitrary or Unreasonable Hardship

Petitioner, by omitting reliable evidence necessary for a comparison between ExxonMobil's hardship from compliance and the injury to the environment from noncompliance, has failed to make a prima facie case. In a request for a variance, the petitioner bears the burden of proof to demonstrate that "the hardship it will encounter from the denial of the variance will outweigh any injury to the public or the environment from the grant of the variance." *Marathon Oil Company v. Environmental Protection Agency* (1993), 242 Ill.App.3d. 200, 206; 415 ILCS 5/35(a). The statutory language requires evidence of a) petitioner's hardship from the denial of the variance, and b) the impact on the environment if the variance is granted, as well as a comparison of the petitioner's and the environment's injury that is sufficient to demonstrate that Petitioner's burden outweighs that of the public and the environment. ExxonMobil has not presented any reliable evidence to demonstrate these criteria.

1. Petitioner Has Failed to Submit Reliable Evidence of Its Hardship

Petitioner has not provided evidence sufficient to carry out the arbitrary and unreasonable balancing test. As IEPA has stated, "Petitioner provides no evidence of its inability to comply with [the Rule]." *IEPA Recommendation* at 15. Rather, Petitioner only provides rough estimates of the costs it has already incurred, and the costs it could hypothetically incur if required to comply with the Rule. *See Initial Petition* at 30-31. However, these estimates are left unsubstantiated: "ExxonMobil provides estimates of cost, but offers no calculations or supporting data as to those estimates; therefore, IEPA is not able to substantiate the estimates of cost." *IEPA Recommendation* at 16-17. As is stated in the Illinois statutory language, the certainty of cost is not specific enough evidence to satisfy the arbitrary or unreasonable hardship test: "the Board is not required to find that an arbitrary or unreasonable hardship exists

exclusively because the regulatory standard is under review and the costs of compliance are substantial and certain." 415 ILCS 5/35(a). Petitioner must provide specific evidence for the comparison of burdens pursuant to the balancing test. Furthermore, since the Illinois RACT requirements are currently being revised, it would be extremely difficult if not impossible for ExxonMobil to provide an exact numerical figure of costs associated with compliance. However, this difficulty does not excuse Petitioner. Instead, this difficulty is evidence that this request for variance is not yet ripe. It is still too early to know with a high degree of precision what the cost of compliance will be for ExxonMobil. Thus, the Board may reasonably find that the requisite comparison of burdens is infeasible, since the Rule is still more than three years away from enforceability, and evidence to satisfy the requirements of the arbitrary and unreasonable hardship test are not sufficiently available. In any case, Petitioner has failed to offer reliable evidence of its own hardship, and has thus failed to meet its burden of proof.

2. Petitioner Has Failed to Submit Reliable Evidence of the Impact on the Environment

ExxonMobil has failed to produce reliable evidence analyzing the impact on the environment if the variance were granted. This Board has previously found that the omission of reliable analysis on the effect of compliance on the environment constitutes a failure to make a prima facie case. *See Marathon Oil Company v. Illinois Environmental protection Agency.* 1996 WL 271684, at *13 (Ill.Pol.Control.Bd.) (May 16, 1996); *see also City of Mendota v. Pollution Control Board and Illinois Environmental Protection Agency 11 Ill.App.3d 203(3d Dist. 1987*)(where petitioner failed to meet its burden of showing an arbitrary or unreasonable hardship because it failed to submit evidence regarding the impact that granting the variance would have on the environment). Petitioners assert that "there will be little or no impact on human health and the environment . . . because the Chicago area has attained the 1997 standard [of 0.08 ppm]." *Initial Petition*, at 33. This statement does not constitute a reliable analysis, not only because it is misleading. While air monitoring data has found that air quality in the region is in compliance with the 1997 standard, "a finding of attainment is not the same as a redesignation to attainment. Redesignation cannot occur unless the State demonstrates that the air quality improvements are due to permanent and enforceable control measures." *IEPA Recommendation*, at 8.

ExxonMobil makes no effort to address other important environmental impact considerations. For example, the strengthened 2008 federal health-based standard of 0.075 ppm, the CASAC advocated health-based range of 0.060 to 0.070 ppm, and the 2010 proposed federal health-based standard of 0.060 to 0.070 all indicate that the health-based standard is trending toward a more stringent limit. 73 *Fed. Reg.* 16436 (Mar. 27, 2008); *Letter from CASAC to Administrator Johnson*, April 7, 2008; 75 *Fed. Reg.* 2938 (Jan. 19, 2010). Petitioner does not provide detail as to whether these health-based standards would place the Chicago area in attainment or nonattainment, what the human health and environmental effects would be if the safe limit is in line with what these proposals have described, or what the effect on downwind states would be from continued emissions of NO_x at potentially unsafe levels in Illinois. Notably, Petitioner finds the uncertainty of speculative change in the law a useful tool when attempting to demonstrate its own potential hardship. But Petitioner does not, on the other hand, employ the uncertainty of pending health-based standards in kind; ExxonMobil does not consider or analyze the human health and environmental impact of hundreds of tons of additional annual

NO_x emissions which would be released into an area which may be designated nonattainment for NO_x under the new standard, and may already carry unhealthy levels of NOx in its atmosphere. *Initial Petition,* at 33; *IEPA Recommendation*, at 5 (indicating that IEPA collected "measured violations of the revised [2008] standard during 2006 through 2008"); *Letter from CASAC to Administrator Johnson*, at 2 ("It is the Committee's consensus scientific opinion that [setting the] primary ozone standard above the [0.060-0.070 ppm] range fails to satisfy the explicit stipulations of the Clean Air Act [to] ensure an adequate margin of safety for all individuals, including sensitive populations). The Board should deny ExxonMobil's request for this variance because it provides neither reliable evidence of the impact on the environment, nor sufficient evidence to draw a comparison between the Petitioner's hardship from the denial of the variance and the injury to the environment from noncompliance with the law.

C. The Environmental Cost of Noncompliance Is Not Outweighed by Any Hardship ExxonMobil Has Presented in Its Petition

Even if ExxonMobil's alleged hardships are taken at face value, the environmental cost of noncompliance is not outweighed by any hardship which ExxonMobil has presented in their Petition. In the past, this Board has typically found that a hardship outweighed the environmental impact when either a) granting the variance would cause no significant environmental impact, as agreed upon by IEPA and the Board, or b) when immediate compliance would cause extreme hardship that clearly outweighed the environmental impact. *See, Sanitary District of Decator vs. Illinois E.P.A.*, 2010 WL 2132092 (Jan. 2010)(where negative impact on the environment was not insignificant, but was outweighed by prohibitive expenditures and a long-term shut down of the Sanitary District to the extreme detriment of public services and the economy); *see also City of Charleston v. Illinois E.P.A.*, 2001 WL 1598276 (Dec 2001)(where compliance with the law required that a new plant be built, which outweighed no significant risk to the environment); *Central Illinois Public Service Company v. Illinois E.P.A.*, 1997 WL 342155 (June 1997)(where substantial costs and decreased marketability from operational constraints outweighed no significant environmental impact).

1. The Impact on the Environment from Noncompliance with the Rule Would be Certain and Serious

As discussed *infra*, and in particular under Section III.B. above, the impact on the public and the environment from Petitioner's noncompliance with the RACT Rule would be certain and serious. The environmental impact in this case rises above the level of insignificant, as discussed in the *IEPA Recommendation*. If the variance is granted, Petitioner will emit approximately 370 tons of NO_x into the atmosphere in a region where the air quality is already compromised and classifiable as nonattainment under the 2008 federal ozone standard of 0.075 ppm. *Initial Petition,* at 33; *IEPA Recommendation*, at 5; *see also, IEPA Recommendation*, at 9 (referring to Illinois' adverse impact on the air quality of downwind states' nonattainment areas, such as in Wisconsin). Furthermore, both the CASAC recommendation and USEPA's 2010 proposed ozone standard suggest that air quality which is nonattainment under the 2008 standard is outside of the "adequate margin of safety for all individuals." *Letter from CASAC to Administrator Johnson*, at 2; 75 *Fed. Reg.* 2938 (Jan. 19, 2010)(stating that the federal ozone standard should be lowered from 0.075 "to provide increased protection for children and other 'at risk' populations against an array of O3-related adverse health effects that range from decreased lung function and increased respiratory symptoms to serious indicators of respiratory morbidity . . .

."). Thus, the issuance of the variance would have a significant adverse impact on the environment and human health.

2. The Hardships Alleged by ExxonMobil Are Too Indeterminate to Clearly Outweigh the Impact on the Environment

None of the burdens raised by Petitioner are sufficient to satisfy the arbitrary and unreasonable hardship test on their own, and each of them is too indeterminate to clearly demonstrate that Petitioner's hardship outweighs the impact that the variance would impose on the environment. Petitioner's alleged hardships are not long-term and do not result in extreme detriment to the public as was the case of inadequate wastewater treatment conditions in *Sanitary District of Decator*. *Sanitary District of Decator vs. Illinois E.P.A.*, 2010 WL 2132092, at *21. (Jan. 2010). Petitioner's alleged hardships also do not arise from immediate compliance as in *Sanitary District of Decator*, but rather over a period of years as the compliance deadline nears. *Id*.

The hardships alleged by ExxonMobil are all hypothetical, vague, or both. ExxonMobil provides estimates of hypothetical cost expenditures without substantiation. *IEPA Recommendation*, at 16-17. Petitioner also refers to the inconvenience and financial burden of a possible unscheduled shutdown for NO_x RACT implementation. These burdens are inadequate to establish an arbitrary or unreasonable hardship. *See, Marathon Oil Company v. Illinois Environmental Protection Agency*, 242 Ill.App.3d 200, at 206 (difficulty and inconvenience alone are inadequate to justify the use of a variance); *see also* 415 ILCS 5/35(a) (the certainty of cost is not specific enough evidence to satisfy the arbitrary or unreasonable hardship test on its own); *see also*, Adopted Rule, Opinion and Order, August 20, 2009, R08-19, *In the Matter of: Nitrogen Oxides Emissions from Various Source Categories: Amendments to 35 Ill. Adm. Code Parts 211 and 217* (where the Board, in promulgating the NOx RACT Rule, determined the Rule to be technically feasible and economically reasonable). Additionally, ExxonMobil offers no detailed evidence as to the extent to which the public would be affected adversely by a temporary shutdown, why a shutdown must occur which would impose a hardship, or why another scheduled shutdown time is or was not a feasible alternative. Even if Petitioner were not able to immediately comply with the Rule, this Board has found that time required to achieve compliance is due limited weight: "the time required to . . . achieve compliance does not itself create an arbitrary or unreasonable hardship associated with immediate compliance." *Marathon Oil Company v. Illinois Environmental Protection Agency*. 1996 WL 271684, *7 (Ill.Pol.Control.Bd.) (May 16, 1996). Petitioner should not be permitted to delay compliance because of cost or inconvenience associated with compliance unless Petitioner clearly demonstrates an arbitrary or unreasonable hardship. Here, Petitioner has not clearly demonstrated an arbitrary or unreasonable hardship. More specifically, ExxonMobil has not demonstrated adequate proof to show that its hardship definitively outweighs the alternative injury that the variance would impose on the public and the environment. Therefore, the Board should deny the requested variance.

Conclusion

Petitioner has offered various arguments as to the difficulty, cost, and inconvenience of complying with the NO_x RACT Rule by 2015, but has provided "no evidence of its inability to

comply with [the Rule]," and no evidence which may be considered by the Board as to why Petitioner's injury from compliance will outweigh the public's injury from noncompliance. *IEPA Recommendation* at 15. Even if the Board chooses to consider ExxonMobil's alleged hardships in assessing the outcome of the balancing test, each of the burdens offered by Petitioner are too indeterminate to clearly outweigh the relatively certain and substantial injury which the environment would endure if the variance is granted. Thus, Petitioner has not satisfied its burden of proof to establish that it would suffer an arbitrary or unreasonable hardship if the variance is not granted. Moreover, a variance would be an improper remedy in this case, regardless of whether an arbitrary or unreasonable hardship exists because the purpose of a variance is to allow time for compliance to be achieved by Petitioner, not to provide an administrative venue for the attempted invalidation of the law, and not to allow a petitioner to avoid compliance pending speculative change in the legal framework. For these reasons, the Board should deny Petitioner's request for a variance from the NOx RACT Rule.