BEFORE THE ENVIRONMENTAL APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C.

In re:	)	
BP America Production Co.,	)	Appeal Number: CAA 10-04
Florida River Compression Facility	)	
	)	EPA REGION 8'S RESPONSE TO
Title V Permit Number: V-SU-0022-05.00	)	PETITION FOR REVIEW

I. INTRODUCTION

On October 18, 2010, the Director of the Air Program for the U.S. Environmental Protection Agency ("EPA"), Region 8 issued an Air Pollution Control Title V Renewal Permit to Operate ("Permit")—in accordance with the provisions of Title V of the Clean Air Act ("CAA") and 40 C.F.R. Part 71—to the BP America Production Company's ("BP") Florida River Compression Station Facility ("Florida River"). The Permit authorized BP to operate air emission units and to conduct other air pollutant emitting activities in accordance with the conditions listed in the Permit. The Permit covers the Florida River facility that is located within the exterior boundaries of the Southern Ute Indian Reservation, and thus, within Indian country as defined at 18 U.S.C. § 1151. The Reservation is located in Southwestern Colorado adjacent to the New Mexico boundary. The Southern Ute Tribe does not have a federally approved CAA Title V operating permit program; therefore, EPA is the government entity that issues Title V permits within the exterior boundaries of the Reservation. On November 17, 2010, WildEarth Guardians ("WEG" or "Petitioner") filed a Petition for Review of the Permit ("WEG Petition" or "Petition") with the Environmental Appeals Board ("EAB" or "Board"). The regulations that apply to this proceeding are those under 40 C.F.R. § 71.11(l).

As will be explained below, the Board should deny the Petition. WEG has not demonstrated that Region 8's source determination—that the definitions of the PSD and Title V stationary source do not require aggregation of Florida River with the Wolf Point Compressor Station ("Wolf Point") and all other BP-controlled wells in the field as a single source—involves a clearly erroneous finding of fact or conclusion of law, or that the decision involves an important policy consideration that the Board, in its discretion, should review. As shown below, the Region fully and adequately responded to the comments WEG provided, and the Region's

source determination reasonably applied the relevant regulatory criteria to the specific facts of this case in a manner that was consistent with past Agency statements regarding source determinations. The Board should also not consider WEG's arguments asserting matters that were not preserved for review; those matters were not raised with reasonable specificity during the public comment permit, and therefore the opportunity to advance those matters has not been preserved. Finally, the Board should deny WEG's request to reopen the public comment period. The Region's decision not to reopen the comment period was well within its discretion and is consistent with prior Board decisions. The Region's actions in responding to public comment were appropriate and consistent with the Part 71 regulations and did not *de facto* reopen the public comment period. Furthermore, WEG had an opportunity to comment on the source determination issue during the public comment period and has also had an adequate opportunity in this Petition to address the Region's analysis and the materials submitted by BP; therefore, reopening the public comment period would not serve the purposes of Part 71.

II. FACTUAL AND PROCEDURAL BACKGROUND

On December 1, 2005, BP submitted its permit renewal application to EPA, requesting that Region 8 issue a Part 71 renewal permit for the BP Florida River facility. EPA-FL-0005.[1] EPA determined that the application was complete on January 31, 2006. EPA-FL-0011. In accordance with 40 C.F.R. § 71.11(d), Region 8 issued the public notice on April 18, 2008, providing an opportunity for the applicant, the public and affected states to submit written

[1] This response brief uses the following conventions when citing to the administrative record for the Permit. This Response refers to each of the Region 8 documents in the record by the same number assigned to it in the Certified Index to the Record that Region 8 filed earlier ("EPA-FL-__"). If the document is one that WEG filed with its Petition for Review, it is identified by the exhibit number assigned to it by WEG ("WEG Ex. __").

comments on the draft Part 71 renewal Permit.[2] *See* EPA-FL-0017, -0018, -0019, -0020, -0021. Public comments were received from BP and Rocky Mountain Clean Air Action ("RMCAA").[3] EPA-FL-0022, -0023. BP submitted supplemental information to the permit record on November 2, 2009, December 17 and 21, 2009, January 5, 2010, February 17, 2010, and March 3, 2010. EPA-FL-0028, -0029, -0030, -0032, -0033, -0034, -0039, -0040, -0041.[4] Some of the supplemental materials submitted by BP were a response to EPA's requests to BP for factual information so that EPA could respond to specific comments received from RMCAA. EPA-FL-0024, -0028, -0031. EPA responded to the public comments and issued the Permit and Statement of Basis on October 18, 2010. EPA-FL-0036, -0037, -0038, -0042. Permit Number V-SU-0022-05.00 authorizes BP to operate air emission units and conduct other air pollutant emitting activities in accordance with the permit conditions listed in the Permit for the Florida River facility.

The Florida River facility was first permitted for construction in 1987 to process coal bed methane ("CBM") gas, which was produced in the Northern San Juan Basin ("NSJB") by reducing the CO_2 and water content to within pipeline specifications.[5] By 1991, Florida River handled 60 million standard cubic feet per day ("mmscfd") of gas, and by 1998, that volume had

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[2] As explained in the draft Statement of Basis ("Draft SOB") for the Florida River Compression Facility, the Region reviewed the BP's renewal application for the Florida River, which included information on the source subject to the part 71 permit requirements. That information showed that only NOx emissions from Florida River had a potential to be more than the 250 tpy PSD major source threshold. EPA-FL-0017 at 13. The Draft SOB further explained that while the "facility has never been required to receive a PSD permit to construct, significant emission increases due to modifications at the facility could trigger the PSD permitting requirements." EPA-FL-0017 at 13.

[3] Rocky Mountain Clean Air Action merged with petitioner WildEarth Guardians. *See infra* at 5-6.

[4] BP's Supplemental Comments contained CBI assertions for three Exhibits (Exhibits T, U, V). EPA-FL-0033. BP subsequently submitted redacted versions of these three Exhibits (EPA-FL-0039, -0040, -0041).

[5] "Natural gas received and transported by the major intrastate and interstate mainline transmission systems must meet the quality standards specified by pipeline companies in the "General Terms and Conditions ("GTC")" section of their tariffs. These quality standards vary from pipeline to pipeline and are usually a function of a pipeline system's design, its downstream interconnecting pipelines, and its customer base." EPA-FL-0036 at 6 n.7.

been increased to 200 mmscfd. Florida River currently processes 380 mmscfd, with a plant capacity of 400 mmscfd.[6]

Wolf Point is a compressor station that first went online in May of 2001. Wolf Point is a central delivery point ("CDP")[7] for CBM gas produced by BP-operated as well as third party-operated well sites. Gas handled by Wolf Point is compressed and dehydrated, and then flows via medium-pressure pipelines (operated by BP and third-parties) to Florida River or to other third-party-operated CDPs. Wolf Point is physically separate from Florida River. It is located approximately 4.5 miles away from Florida River and separated by rugged terrain. *See* EPA-FL-0033 at 12, 13, 14, Exhibit H.

The NSJB gas field is approximately 20 miles (north to south) by 30 miles (east to west) and contains thousands of well sites operated and controlled by several different companies.[8] As of the time of the Region' permitting action, the BP-operated well sites are spread throughout the entire basin and range in distance from Florida River from as far away as 18 miles to within eyesight of the facility. While some of these wells are close to Florida River, they are not physically contiguous with it. EPA-FL-0033 at 8, Exhibit H.

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[6] *See* EPA-FL-0005, *Florida River Compression Facility Title V Renewal Application Permit No. V-SU-0022-00.04*, received by U.S. EPA Region 8 Air Program on December 1, 2005 at 1; EPA-FL-0033, *Supplemental Comments on Florida River Plant Renewal Title V Operating Permit*, received by U.S. EPA Region 8 Air Program on February 18, 2010 at 4, 5.

[7] "A CDP is a gathering point in the field to which the raw natural gas from a number of wells can flow. The gas from the CDP is then sent to other gathering points, a processing plant, or a treating facility in the field, or it can be sent directly to interstate or intrastate gas transportation pipelines." EPA-FL-0036 at 7 n.9.

[8] As the Region's Response to Comments explained, the companies include Big Run Production Company, BP America Production Company, Enervest Operating LLC, Red Mesa Holdings/O&G LLC, Chevron Midcontinent LP, Chevron USA Inc, Coleman Oil & Gas Inc, Conoco Phillips Company, Dugan Production Corp, Burlington Resources Oil & Gas LP, Elm Ridge Exploration Co LLC, Energen Resources, Corporation, Four Star Oil & Gas Company, Gosney & Sons Inc, Holcomb Oil & Gas Inc, Hubbs III, LLC, Huntington Energy LLC, Maralex Resources, Inc, Mcelvain Oil & Gas Properties, Merrion Oil & Gas Corp, Murchison Oil & Gas Inc, Pablo Operating Company, Petrogulf Corporation, San Marco Petroleum Inc, Samson Resources Company, SG Interests I Ltd, Red Willow Production Company, Synergy Operating LLC, Thompson Engineering & Production, Black Hills Exploration and Production Inc, Williams Production Company LLC, Williford Resources, LLC, Simmons, Inc, XTO Energy Inc. *See* the database at *Colorado Oil and Gas Conservation Commission (COGCC) website at http://cogcc.state.co.us ;* search on Production/Operators/Year Range 2010 to 2010/La Plata County. EPA-FL-0036 at 7 n.11.

As explained in the Response to Comments, ". . . the flow of gas in the NSJB field is complex and dynamic, with several different companies operating within the production and transportation system under various business agreements to ensure the continued flow of gas regardless of 'issues' at any one facility, providing flexibility and reliability of the system." EPA-FL-0036 at 11. The Region went to explain that:

> [G]as from the BP owned and operated well sites flows to low pressure pipeline systems (which can be owned and/or operated by either BP or third parties), to central points of delivery for compression (which can also be owned and/or operated by either BP or third parties), then to medium pressure pipeline systems (once again, which can be owned and/or operated by either BP or third parties) and then to the Florida Facility OR to third party owned and operated plants.

EPA-FL-0036 at 11. The Region's Response to Comments noted that these facts were based on information provided by BP during the course of the permitting process. *See* EPA-FL-0005, -0029, -0030, -0033. "There are dozens of points across the field where BP-gathered gas can be offloaded to other companies' pipelines, compressors, or gas plants or where BP may accept gas from non-BP operated wells and systems." EPA-FL-0036. Companies that operate in the NSJB field, that have points in the field where BP gas can be offloaded include: "Red Cedar Gathering Company, El Paso Natural Gas Company, Northwest Pipeline GP, Transwestern Pipeline Company, [and] Williams Four Corners, LLC." EPA-FL-0036 at 11 n.26 (citing EPA-FL-0029 at Attachment B at 2).

III. STANDING

Review of a part 71 permit is available to "any person who filed comments on the draft permit" or to any other person "only to the extent of the changes from the draft to the final permit decision or other new grounds that were not reasonably foreseeable during the public comment period on the draft permit." 40 C.F.R. § 71.11(l)(1). Here, the person that filed

comments was a corporation, RMCAA, that no longer exists as the result of a merger with the Petitioner and surviving corporation, WEG. *See* Dkt. No. 1, Ex. 9. WEG argues that the terms of the merger provide that all rights of RMCAA were transferred to WEG and that WEG therefore now holds a "right to review" previously held by RMCAA. Pet. at 8. As far as the Region has been able to discover, the Act, Part 71 regulations, Board decisions, and federal court opinions are all silent as to whether a third party's "right to review" is transferable. An unlimited ability to transfer a "right to review" through private agreement would allow parties who failed to timely comment to obtain review through negotiations and transactions with those who did timely comment. The Region therefore suggests that the Board limit transfer of a third party's "right to review" to the unusual circumstance in this Petition.

IV. SCOPE AND STANDARD OF REVIEW

In *In re Peabody W. Coal Co.*, 12 E.A.D. 22 (EAB 2005), the Board extensively set out the standard of review for petitions under 40 C.F.R. § 71.11(l)(1):

> In general, the Board will only grant petitions for review if it appears from the petition that the permitting authority's decision involved a clearly erroneous finding of fact or conclusion of law, or that the decision involves an important policy consideration which the Board, in its discretion, should review. *See* 40C.F.R. § 71.11(l)(1); *see In re Teck Cominco Alaska Inc.*, 11 E.A.D. 457, 472 (EAB 2004) (applying similar language under 40 C.F.R. § 124.19(a)); *In re City of Moscow*, 10 E.A.D. 135, 140-41 (EAB 2001) (same). It is clear from the history of the applicable regulatory language that the Administrator intended for the Board to exercise its broad powers of review "only sparingly," and that "most permit conditions should be finally determined at the Regional level." 45 Fed. Reg. 33,290, 33,412 (May 19, 1980) (preamble to rulemaking that established 40 C.F.R. pt. 124); *see Teck Cominco*, 11 E.A.D. at 472; *In re Rohm & Hass Co.*, 9 E.A.D. 499, 504 (EAB 2000). Moreover, the burden of demonstrating that review is warranted rests squarely with the petitioner. 40 C.F.R. § 71.11(l)(1); *see Rohm & Hass*, 9 E.A.D. at 504; *In re Wash. Aqueduct Water Supply Sys.*,11 E.A.D. 565, 573 (EAB 2004).
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> To obtain review, a petitioner must clearly and specifically identify the basis for its objection(s) to the permit, and explain why, in light of the permit issuer's

> rationale, the permit is clearly erroneous or otherwise deserving of review. *See Zion Energy, LLC*, 9 E.A.D. 701, 705 (EAB 2001). In order to carry this burden, the petitioner must address the permit issuer's responses to relevant comments made during the process of permit development; the petitioner may not simply reiterate comments made during the public comment period, but must substantively confront the permit issuer's subsequent explanations. *Id.*; *see* also *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000) ("Petitions for review may not simply repeat objections made during the comment period; instead they must demonstrate why the permitting authority's response to those objections warrants review."); *In re City of Irving, Tex. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 111, 129-30 (EAB 2001).
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> Additionally, when a petitioner seeks review of a permit based on issues that are fundamentally technical in nature, the Board assigns a particularly heavy burden to the petitioner. *See In re Carlota Copper Co.*, 11 E.A.D. 692, 708 (EAB 2004) (explaining that "a petitioner seeking review of issues that are technical in nature bears a heavy burden because the Board generally defers to the Region on questions of technical judgment."); *Teck Cominco*, 11 E.A.D. at 473 (same); *City of Moscow*, 10 E.A.D. at 142 (same). This demanding standard serves an important function within the framework of the Agency's administrative process; it ensures that the locus of responsibility for important technical decisionmaking rests primarily with the permitting authority, which has the relevant specialized expertise and experience. *See In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567-68 (EAB 1998), rev. denied sub nom. *Penn Fuel Gas, Inc. v. EPA*, 185 F.3d 862 (3d Cir. 1999). Thus, as the Board explained in *NE Hub*, the Board typically will not grant review where the record demonstrates merely "a difference of opinion or an alternative theory regarding a technical matter." *Id.* at 567. Instead, where "the views of the Region and the petitioner indicate bona fide differences of expert opinion or judgment on a technical issue," deference to the Region's decision is generally appropriate if "the record demonstrates that the Region duly considered the issues raised in the comments and if the approach ultimately selected by the Region is rational in light of all of the information in the record." *Id.* at 567-68.

Id. at 32-34. In citing its precedent under part 124, the Board explained, "[T]he applicable regulatory language is nearly identical to the regulatory language governing the review of other types of permits (such as PSD and NPDES permits). Accordingly, we believe that our prior discussions of the standard of review under these other permit programs serve as valuable precedent in this context." *Id.* at 33 n. 26.

Issues raised by a petitioner that are not raised during the public comment period will not be considered preserved for review "unless the petitioner demonstrates that it was impracticable

to raise such objections within such period or unless the grounds for such objection arose after such period." 40 C.F.R. § 71.11(l)(1); *see also In re Florida Pulp & Paper Ass'n*, 6 E.A.D. 49, 56-57 (EAB 1995) (petitioner's comment on one section of a draft permit was insufficient to preserve for review a challenge to another permit provision); Preamble to Federal Operating Permits Program, Final Rule, 61 Fed. Reg. 34,202, 34,226 (July 1, 1996) ("It is a far more efficient use of resources to resolve permitting issues in the administrative issuance process, rather than to allow applicants to raise issues on draft permits for the first time on appeal."). "This burden rests squarely with petitioner." *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 143 (EAB 2006).

Finally, the Board has not considered a petition challenging a permitting authority's decision not to reopen the comment period for a part 71 permit. As mentioned above, though, the Board views prior discussions of the standard of review under part 124 as "valuable precedent" for determining the standard of review for part 71 permits. *Peabody W. Coal*, 12 E.A.D. at 33 n. 26. As WEG agrees, Pet. at 10 n. 1, the language of 71.11(h)(5)[9] is almost identical to that in the provisions in part 124 for reopening the comment period. *Compare* 40 C.F.R. § 71.11(h)(5) *with* 40 C.F.R. § 124.14(b). The standard of review for the Region's decision not to reopen the comment period for a part 71 permit should therefore be the same as for a part 124 permit.

In the part 124 context, the Board has stated the standard of review for a Region's decision not to reopen the comment period as follows: "The critical elements are that new questions *must* be 'substantial' and that the Regional Administrator '*may*' take action. As a result, [the Board] review[s] a region's decision not to reopen the comment period under an

[9] In relevant part, 71.11(h)(5) provides: "If any data, information, or arguments submitted during the public comment period appear to raise substantial new questions concerning a permit, the permitting authority *may* . . . [p]repare a revised statement of basis, and reopen the comment period." (emphasis added).

abuse of discretion standard and afford[s] the region substantial deference."[10] *In re Dominion Energy Brayton Point, LLC*, 13 E.A.D. 407, 416 (EAB 2007) (emphasis added). "The determination of whether the comment period should be reopened … is generally left to the sound discretion of the permit issuer." *Indeck-Elwood*, 13 E.A.D. at 146. "The Board has long acknowledged the deferential nature of this standard." *In re NE Hub Partners, LP*, 7 E.A.D. 561, 585 (EAB 1998).

V. ARGUMENT

Petitioner raises two primary issues on appeal. First, Petitioner argues that the Title V Permit fails to assure compliance with Prevention of Significant Deterioration and Title V permitting requirements. Second, Petitioner asserts that Region 8 should have reopened the public comment period. Petitioner has failed to show the Region's permit decision was based on either a clearly erroneous finding of fact or conclusion of law, or that it involved an important policy or exercise of discretion that warrants review.[11] Petitioner has also failed to show the Region abused its discretion in deciding not to reopen the comment period. Accordingly, the Board should deny the Petition for Review.

A. Petitioner has not demonstrated that Region 8's source determination for the Florida River Compressor Station warrants review.

Congress enacted the PSD permitting provisions of the CAA in 1977 for the purpose of, among other things, "insur[ing] that economic growth will occur in a manner consistent with the

[10] The Board has not articulated the degree to which "substantial deference" in this context differs from that granted under the "clearly erroneous" standard. To that end, the Region notes that, if 71.11(h)(5) were read to mean "shall" instead of "may," the Region's decision would be reviewed under the "clearly erroneous" standard. The use of "may" therefore implies that the Region's exercise of discretion should be granted even greater deference than that under the "clearly erroneous" standard.

[11] Petitioner appears to attempt to apply the standard of review for a Title V objection under 40 C.F.R. § 70.8(c) ("…EPA failed to appropriately define the source subject to permitting, and therefore failed to ensure that the Title V Permit assures compliance with EPA's PSD and Title regulations…"). Pet. at 17. However, 40 C.F.R. § 71.11(l)(1) governs the standard of review to be applied by this Board on appeal.

preservation of existing clean air resources." CAA § 160(3), 42 U.S.C. § 7470(3). The statute requires EPA approval in the form of a PSD permit before a "major emitting facility" may be constructed in any area EPA has classified as either in "attainment" or "unclassifiable" for attainment of the national ambient air quality standards ("NAAQS"). CAA §§ 107, 160-169B, 42 U.S.C. §§ 7407, 7470-7492. A "major emitting facility" is any of certain listed stationary sources (including electric generating units) that emit, or have the potential to emit, 100 tons per year ("tpy") or more of any air pollutant, or any other stationary source with the potential to emit at least 250 tpy of any air pollutant. CAA § 169(1), 42 U.S.C. § 7479(1). Congress intended the PSD permit program goals to be achieved by requiring that major emitting facilities obtain PSD permits. Consistent with Congress' intent, and as we explained in the Response to Comments, "[t]he federal PSD requirements apply to the construction of major stationary sources and major modifications at a major stationary source." EPA-FL-0036 at 7, 40 CFR 52.21(i).

EPA regulations, in turn, implement and interpret the statute's text. The current regulatory definition of stationary source for purposes of major New Source Review ("NSR") applicability was promulgated in 1980. 45 FR 52676 (August 7, 1980). In its June 1979 opinion in *Alabama Power*, the D.C. Circuit Court of Appeals rejected the definition of a source in our 1978 regulations. *Alabama Power Company v. Costle*, 636 F.2d 323 (D.C. Circuit 1980). Hereafter referred to as *Alabama Power*. As we noted in the preamble to our 1980 final rules:

> [T]he December opinion of the court in Alabama Power sets the following boundaries on the definition for PSD purposes of the component terms of "source": (1) it must carry out reasonably the purposes of PSD; (2) it must approximate a common sense notion of a "plant;" and (3) it must avoid aggregating pollutant-emitting activities that as a group would not fit within the ordinary meaning of "building," structure, "facility," or "installation."

45 FR 52694-5 (August 7, 1980).

We used these guiding principles from the Court's opinion, including the common sense notion of a plant, to develop the three regulatory criteria for determining when permitting authorities should consider two or more pollutant-emitting activities to be a single stationary source for purposes of the major NSR programs. A stationary source is any building, structure, facility, or installation, which emits, or may emit a regulated NSR pollutant. 40 C.F.R. §§ 51.165(a)(1)(i), 52.21(b)(5). A building, structure, facility, or installation is all of the pollutant-emitting activities which belong to the same industrial grouping (i.e., have the same primary two-digit SIC code), are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). *See* 40 CFR 51.165(a)(1)(ii), 51.166(b)(6), 52.21(b)(6), and Section II.A.2 of Appendix S of 40 CFR Part 51. To be considered a stationary source for purposes of major NSR, the pollutant emitting activities must meet all three of the regulatory criteria.

In general, Title V of the CAA requires creation and implementation of an operating permit program for major sources and certain other sources of air pollutants. For purposes of Title V, "major source" means any stationary source (or any group of stationary sources located within a contiguous area and under common control) that is a major source under CAA § 112 of the Act (the hazardous air pollutant provisions), a major stationary source as defined in CAA § 302 of the Act (the CAA general definitions), or a major stationary source under Part D of title I of the Act (criteria air pollutant provisions). *See* CAA § 501(2), 42 U.S.C. § 7661(2); 40 C.F.R. § 71.2. The three regulatory criteria promulgated for determining a stationary source for purposes of major NSR are the same criteria EPA later adopted into the definition of stationary source in 40 C.F.R. Sections 70.2 and 71.2 for purposes of determining when two or more pollutant-emitting activities are considered a stationary source for purposes of the Title V

permitting program. In promulgating the Title V source definition, EPA was clear that the language and application of the definition was to be consistent with the NSR definition contained in section 52.21. *See* 61 Fed. Reg. 34202, 34210 (July 1, 1996).

As discussed more fully below, the Region's determination not to aggregate the emissions from Florida River with all other emission-producing activities in the NSJB owned and operated by BP (either Wolf Point or the wells sites) represents a full response to the specific comment submitted by WEG and is a reasonable application of the three regulatory criteria found in the Title V regulatory definition of stationary source, which are based on the CAA's foundational concepts. Moreover, the determination is not inconsistent with prior Agency statements regarding source determinations, but in fact followed long-standing EPA policy regarding the case-by-case nature of such determinations. While Petitioner argues that the Region should have reached a different decision, Petitioner has not shown that the Region's determination was inconsistent with the relevant regulatory requirements or existing Agency guidance on the issue, nor does Petitioner identify any misapplication of the facts in this case. Therefore, the Board should deny review because the Petitioner has failed to demonstrate that Region 8's stationary source determination in this case is based on either a clearly erroneous finding of fact or conclusion of law or that it involves an important policy matter or exercise of discretion that warrants review.

1. Region 8's determination that the definitions of PSD and Title V source do not require aggregation of Florida River with the other BP emitting units in the entire field as a single source does not involve a clearly erroneous finding of fact or conclusion of law, or an important policy consideration which the Board, in its discretion, should review.

The legal framework governing stationary source determinations is comprised of several elements. As the Region explained in its Response to Comments, "[s]tationary source

determinations are made on a case-by-case basis considering the foundational concepts provided in the CAA and EPA's implementing regulations." EPA-FL-0036 at 6. As discussed in detail above, the current regulatory definition of stationary source for purposes of major NSR applicability was promulgated in 1980. *See supra* Section A.1. The definition contains three regulatory criteria for determining when permitting authorities should consider two or more pollutant-emitting activities to be a single stationary source for purposes of the major NSR programs. The same three criteria were adopted into the definition of stationary source in of the Title V permitting program.

In addition to describing the three regulatory criteria, Region 8's Response to Comments explained that it had acted consistently with guidance on source aggregation determinations under PSD and Title V as provided in the September 22, 2009, Memorandum from Gina McCarthy, Assistant Administrator, Office of Air and Radiation, entitled, *Withdrawal of Source Determination for Oil and Gas Industries (McCarthy Memo).* EPA-FL-0027. The Region explained in detail that:

> For purposes of determining applicability of the PSD, nonattainment New Source Review (NSR), and title V programs of the Clean Air Act (CAA or the Act), the McCarthy Memo states that permitting authorities should rely foremost on the three regulatory criteria for identifying emissions activities that belong to the same "building," "structure," "facility," or "installation." These are: (1) whether the activities are under the control of the same person (or person under common control); (2) whether the activities are located on one or more contiguous or adjacent properties; and (3) whether the activities belong to the same industrial grouping. [*See* 40 C.F.R. Sections 70.2, 71.2, 63.2, 51.165(a)(1)(i) and(ii), and 51.166(b)((5) and (6); and 40 C.F .R. 52.21 (b)(6).] *The McCarthy Memo emphasized that whether to aggregate sources for purposes of PSD, NSR, and title V applicability is a case-by-case determination that represents highly fact specific decisions, and that no single determination can serve as an adequate justification for how to treat any other source determination for pollutant-emitting activities with different fact-specific circumstances.*

EPA-FL-0036 at 5-6 (emphasis added). Therefore, the Agency recognized that not only should permitting authorities follow the three regulatory criteria, but also that the source aggregation

determinations are "highly fact specific" and prior determinations do not serve as a determinative justification for future decisions where the facts are different.

The Administrator's Title V Orders provide further instruction on the legal framework for source determinations. Title V requires the Administrator to object to the issuance of a Title V permit if a petitioner demonstrates that the permit is "not in compliance with the applicable requirements" of the Act. 42 U.S.C. § 7661d(b). A recent Title V petition submitted by WEG regarding a permit the State of Colorado issued to the Anadarko Frederick compressor station made allegations very similar to those raised in the pending Petition for Review. *See* Order Denying Petition for Objection to Permit (Adm'r, Feb. 2, 2011), *available at* http://www.epa.gov/region7/air/title5/petitiondb/petitions/anadarko_response2010.pdf (hereinafter, *Anadarko)*. The Administrator denied the Title V petition. With regard to the allegations made in the petition related to the aggregation issues, the Administrator determined that the petition did not demonstrate that the State's source determination was fundamentally flawed or contrary to the relevant regulations. *Anadarko* at 16. The Administrator also determined that the petitioner had not demonstrated that the manner in which the State "considered and weighed" the relationship between the various emission-producing activities was "fundamentally flawed or contrary to the relevant regulations." *Anadarko* at 19-20.

The Administrator's recent Anadarko Title V Order also reiterated the point that source determinations are made on case-by-case basis, and further made clear that EPA letters on this topic fall into two broad categories. The first category includes "recommendation letters," which are letters "from EPA to states, which provide EPA's assessment of how the specific facts in a particular permitting action could be evaluated in light of the regulatory criteria for the source determination, but leave the state permitting authority with the discretion to make the final

source determination." *Anadarko* at 6. The second category of EPA letters includes EPA determinations. The Administrator's Order also echoed the Region's Response to Comments and explained that since source determinations are made on a case-by-case basis "reliance on prior determinations alone does not provide an adequate justification for determining the source in a later permitting process with different facts." *Anadarko* at 6-7. Finally, the Administrator's Order indicated, "while the prior agency statements and determinations related to oil and gas activities and other similar sources may be instructive, they are not determinative . . . ." *Anadarko* at 8.

Consistent with standards the EPA has applied in both the *McCarthy Memo* and the Administrator's *Anadarko* Order, the Region performed a case-by-case analysis of the facts of the Florida River permitting situation, applying the required regulatory criteria. While the Response to Comments also examined prior agency source determinations and statements, the Region recognized that "whether to aggregate sources for purposes of PSD, NSR, and Title V applicability is a case-by-case determination that represents highly fact specific decisions, and that no single determination can serve as an adequate justification for how to treat any other source determination for pollutant-emitting activities with different fact-specific circumstances." EPA-FL- 0036 at 5-6.

a) Region 8 did not err in finding the emission units were in the same industrial grouping and did not need to conduct a support facility analysis to do so.

The first regulatory criteria analyzed in the source determination analysis for Region 8's permitting decision involved deciding whether the activities belong to the same industrial grouping. Petitioner's comments on the draft permit suggested that "BP's natural gas wells are part of the same major industrial grouping as the Florida River Compression Facility." EPA-FL-

0022 at 4. EPA agreed with the commenter that the BP Florida River Compression Station, Wolf Point Compressor Station, and the well sites all "belong to the same industrial grouping (i.e., they have the same SIC code)." EPA-FL-0036 at 8. The Region's determination was based on information submitted by BP. EPA-FL-0029, Attachment B at 2.

Petitioner wrongly suggests that the "support facility" analysis should be applied to the source determination analysis as a general matter. Pet. at 26. As the Region explained in the Response to Comments: "WEG suggested in their comments to EPA Region 8 that EPA should aggregate Florida River with Wolf Point and numerous BP-operated wells across the NSJB as support facilities to Florida River since they are interrelated." EPA-FL-0036 at 8. Petitioner also suggests there is a "disconnect" between the "regular support analysis" and the "complete and exclusive interdependence theory." Pet. at 28. However, as the Region explained in the Response to Comments, WEG misapplied the support facility approach because that analysis has been confined to determinations of whether two emission points shared a common SIC and the Agency has not generally applied this analysis to the other two regulatory factors. EPA-FL-0036 at 8.

Where facilities have different industrial code classifications, permitting authorities may apply the support facility test; analyzing whether facilities with *different* SIC codes have some form of functional interdependence such that they should be considered to be in the *same* SIC code as the primary function. In this case the industrial code classifications for the various pollutant emitting activities *are* the same, therefore, there was no need for the Region to consider whether one facility supports another.

Further, WEG's assertions to apply the support facility test in this instance are inconsistent with EPA's 1980 PSD regulations preamble. As the Region's response to comments explained:

> WEG refers to the terms "support facility" and "interrelated;" however, WEG does not evaluate how these terms are discussed in the 1980 PSD regulations preamble. The term "interrelated" arises from the discussion of "support facility." EPA's only reference to interrelationship in the preamble is specific to how SIC codes may be applied when considering sources with different major SIC codes, but that appear to have some form of functional interdependence.

EPA-FL-0036 at 8 (citing 45 Fed. Reg. 52696). The Region went on to explain that:

> The preamble clarifies that 'support facilities' that 'convey, store, or otherwise assist in the production of the principal product or group of products produced or distributed, or services rendered' should be considered under one source classification, even when the support facility has a different two-digit SIC code." Thus one source classification encompasses both primary and support facilities, even when the latter includes units with a different two digit SIC code.

EPA-FL-0036 at 9 (citing 45 Fed. Reg. 52696). Therefore, whether there is a "support facility" relationship between these various emission points is irrelevant to the regulatory analysis for the Florida River permitting decision, since EPA and Petitioner agree that all three emitting units have the same SIC code.

While Petitioner's comments were confused about the applicability of the support facility analysis (and asserts in its Petition that the Region did not address the allegations in the Response to Comments), the Region did in fact address the interrelatedness allegations contained in Petitioner's support facility comments in its Response to Comments. The Region did not assess the facts in a support facility analysis under the first regulatory criteria—the SIC code analysis—because the Region reasonably determined that the analysis did not appropriately fall under that criteria. Rather, the Region assessed and responded to Petitioner's interrelatedness arguments to the extent they should be considered in the contiguous and adjacent portion of the source analysis. There, the Region explained in detail that "[w]hile the entire NSJB gas field is

highly integrated, the record shows that individual well site operations, compression, and gas processing are conducted by completely separate and distinct equipment, that such gas metered at one well head can flow to several low-pressure gathering lines which may owned and operated by BP or other companies." EPA-FL-0036 at 13. Furthermore, "Florida River can continue to operate regardless of whether Wolf Point or one, two, three, four or all of the BP operated wells sites were to shut down – and vice-versa." EPA-FL-0036 at 13, citing EPA-FL-0033 at 11, 12. Therefore, the Region did consider the interrelatedness allegations contained in Petitioner's support facility comments, but found the interrelationship was not enough to make the various emission points contiguous and adjacent.

To the extent that Petitioner is arguing that the general tenets of the support facility analysis are not confined to the SIC-code analysis, but instead must be applied generally to the source determination analysis, including the contiguous or adjacent analysis, the Petition does not provide any evidence that such an analysis is required by the relevant regulations. *See generally* Pet. at 26-31. Moreover, the Petition does not identify any past Agency statements regarding source determinations that have said such an analysis should be done. While Petitioner may argue that "there is nothing to indicate that the support facility principle…cannot equally, or at least substantively, in an assessment of adjacency or contiguousness from the standpoint of interrelatedness" Pet. at 31, it is also undisputed that there is nothing requiring that the support facility principle must be applied in this way. Accordingly, the fact that Region 8 did not apply a support facility analysis in its contiguous and adjacent analysis also does not provide a basis for granting review.

WEG's reliance on EPA's *draft* preamble language for Parts 51 and 70 is also misplaced. The Petitioner suggests that:

> ...EPA has generally made clear that, where an activity provides 50% or more of its output (in terms of material and/or services) to a primary activity, "it expects permitting authorities to conclude that a support facility exists, and expects these activities to be aggregated with the primary activity," regardless of SIC code.

Pet. at 30. Petitioner's assertion suggests the support facility analysis is applicable here, but as shown above, no support facility relationship needed to be addressed because all the emission-producing activities *shared* the same SIC code. Accordingly, the Region responded appropriately and fully to the comments on the SIC code portion of the source determination analysis.[12]

b) Region 8 did not err in finding the other BP-owned emission units in the NSJB were not contiguous or adjacent with the Florida River Station.

The second part of the regulatory criteria involves making a determination as to whether the activities are located on one or more contiguous or adjacent properties. While WEG asserts that the Region's source determination was "novel," Pet. at 7, and suggests that it is inconsistent with prior EPA determinations, *id.*, the Region responded to WEG's comments on this issue and the approach follows the approach used in numerous prior Agency statements, as well as Agency guidance, regarding source determinations. WEG's comments asserted that "...EPA is required to issue a Title V permit for the [Florida River] Compression facility together with BP's coalbed methane wells and the Wolf Point Compressor Station as a single source to ensure compliance with 40 C.F.R. § 71.6". EPA-FL-0022 at 7. The Region looked at the specific facts of this permitting action and determined that the various emission-producing activities in the entire

[12] For the first time in its Petition, Petitioner contends that Agency guidance on support facilities at "military installations" is also applicable in this case. Pet. at 30. Petitioner's contention that a statement in the 1996 Seitz Guidance regarding aggregation of military support facilities—"a support facility usually would be aggregated with the primary activity to which it contributes 50 per cent or more of its output" (Pet. Ex. 14 at 1)—applies to this determination, is inconsistent with EPA's regulatory interpretations and statements regarding support facilities and aggregation, as discussed above. Moreover, given the different case-specific facts that are present in an oil and gas industry, EPA's guidance—which applies to military facilities—is not determinative here.

NSJB field were not contiguous or adjacent – a determination that fully responded to the comments on this issue and was reasonable and consistent with EPA's regulations, statements made when promulgating the regulations, and EPA guidance, as explained below. While WEG asserts that the Region could have made a different decision regarding whether the various emission units were contiguous or adjacent with the Florida River station, the Petition does not demonstrate that the Region erred in making its determination that they were not. Accordingly, Petitioner has not satisfied its burden of demonstrating that the source determination for Florida River involved a clearly erroneous finding of fact or conclusion of law, or that the decision involves an important policy consideration which the Board, in its discretion, should review.

> (1) Region 8 fully responded to WEG's comment that all BP-controlled emission-producing activities in the NSJB field should be aggregated with Florida River.

Petitioner asserted in the comments on the proposed permit that Florida River, Wolf Point, and all the BP-controlled wells in the entire NSJB field are "adjacent" and "interrelated" to one another, and further contended they should be considered a single source under both PSD and Title V. EPA-FL-0022 at 2-7. WEG based its allegations on only two facts: (1) the co-location of the various emission points within the NSJB field; and (2) the ability of those points to supply gas to the Florida River facility. However, these two facts are simply not enough to make all of the various emission points a single source. As the Region explained in the Response to Comments:

> WEG's argument is inconsistent with EPA's past statements interpreting the "contiguous and [sic] adjacent" part of the source definition. While it is true that EPA found that non-contiguous emissions points separated by significant distances *can* be "adjacent" (and thus a single source) based on their interrelatedness, such determinations were only made in circumstances in which those emission points had a unique or dedicated interdependent relationship with one another. That is not the case here.

EPA-FL-0036 at 9 (emphasis added). As explained in detail in the Response to Comments (and summarized above in the Factual Background), while gas from Wolf Point and the various wells *can* supply gas to Florida River, they can also supply gas to other non-BP facilities in the field, and thus, do not have the type of "dedicated interrelatedness" that was determinative in other EPA statements on this issue. EPA-FL-0036 at 9, 11.

The Region made clear in its Response to Comments that a bright line rule is not instructive or valuable in the case of source determinations:

> [I]n the initial promulgation of the 3-part major source definition, EPA explained that we could not "say precisely how far apart activities must be in order to be treated separately" and directed that such determinations be made on a case-by-case basis. 45 Fed. Reg. 52676, 52695 (August 7, 1980). Since that time, EPA has indicated that source determinations should be made on "case-by-case" and "highly fact-specific" basis, where "no single determination can serve as an adequate justification for how to treat any other source determination for pollutant-emitting activities with different fact-specific circumstances" and where a fact-specific inquiry is necessary to establish whether emissions sources should be grouped together.

EPA-FL-0036 at 10 (footnotes omitted). Furthermore, as the Region explained in the Response to Comments:

> [T]he McCarthy Memo recognized that while proximity of disparate emissions units is important, it is not necessarily the deciding factor in making an aggregation determination. In addition, other EPA guidance has noted that the [sic] while EPA had never established "a specific distance between pollutant emitting activities" for determining whether two facilities are adjacent, the analysis must be "determined on a case-by-case basis, based on the relationship between the facilities."

EPA-FL-0036 at 10 (quoting Memo from Robert G. Kellam, EPA OAQPS, to Richard R. Long, Director of EPA Region 8 Air Program (Aug. 27, 1996), at 3; and citing Letter from Joan Cabreza, Permits Team Leader for EPA Region 10 Office of Air Quality, to Andy Ginsburg, Oregon Department of Environmental Quality (Aug. 7, 1997) (stating that the "common sense

notion of a plant" is the "guiding principle" in determining how "near" facilities need to be in order to be found "adjacent" and thus a single source, such that "pollutant emitting activities that comprise or support the primary product or activity of a company or operation must be considered part of the same stationary source")).

Moreover, the Response to Comments explained that "[i]n examining whether two stationary sources that are not actually touching (i.e., non-contiguous) should be considered 'adjacent,' the determination has been made on a case-by-case basis, considering the extent to which two sources are functionally interrelated." EPA-FL-0036 at 10. The Response to Comments included discussions of EPA analysis and guidance for several prior source determinations, where EPA has repeatedly interpreted the contiguous or adjacent prong of the regulation to analyze the functional interrelationship between facilities. EPA-FL-0036 at 10-11.

Since Petitioner's comment asserted that all BP-owned emission-producing activities in the entire NSJB field should be combined with Florida River, the Response to Comments explained that "the flow of gas in the NSJB field is complex and dynamic, with several different companies operating within the production and transportation system under various business agreements to ensure the continued flow of gas regardless of 'issues' at any one facility, providing flexibility and reliability of the system." EPA-FL-0036 at 11. The Region went on to provide the following example and explained:

> Gas from the BP owned and operated well sites flows to low pressure pipeline systems (which can be owned and/or operated by either BP or third parties), to central points of delivery for compression (which can also be owned and/or operated by either BP or third parties), then to medium pressure pipeline systems (once again, which can be owned and/or operated by either BP or third parties) and then to the Florida Facility OR to third party owned and operated plants.

EPA-FL-0036 at 11.

In addition to the complex flow of gas, the Region's response to comments explained that there is a lack of uniquely integrated operations in the field. That lack of integrated operations in the NSJB field is evidenced by the fact that the oil and gas production process is split among different facilities. In fact, the Region noted that "[t]here are dozens of points across the field where BP-gathered gas can be offloaded to *other* companies' pipelines, compressors, or gas plants or where BP may accept gas from non-BP-operated wells and systems." EPA-FL-0036 at 11 (citing EPA-FL-0033 at 11) (emphasis added). Furthermore, "BP has agreements with other third-party oil and gas gathering companies to accept, compress, and treat BP's gas and vice versa." EPA-FL-0036 at 11 (citing EPA-FL-33 at 11). Additionally, "[i]n each instance where "BP gas" is transferred to third parties or vice versa, the gatherer takes custody of and assumes liability for the gas while in the gatherer's possession, the gas is measured by the gatherer, and the shipper verifies those volumes with its own check meter." EPA-FL-0036 at 11, 12 (citing EPA-FL-0033 at 12). The Region's Response to Comments included a detailed process flow diagram that illustrates the flow of gas in the field, which clearly demonstrates the lack of a unique connection between BP facilities. EPA-FL-0036 at 12 (citing EPA-FL-0033 Ex. S).

As the Region described in its case-by-case analysis, "the placement of oil and gas well sites, compressor stations and gas plants in this area is driven by several complex factors."[13] Furthermore, "any assertion of 'adjacency' based simply on the fact that Florida River, Wolf Point, and the various BP-owned well sites are located in the same county or same field fails to

[13] EPA-FL-0036 at 12 (citing EPA-FL-0033 at 9) (stating factors include: the spacing area established by relevant jurisdictional authorities: the Colorado Oil and Gas Commission (COGCC); the Bureau of Land Management (BLM); and the Southern Ute Tribe. Additional factors such as company-specific assessments of optimal geology, engineering, topography, access, power, and surface owner compatibility also play a significant role).

take" into account "important spatial, temporal, and regulatory attributes" outlined in the Response to Comments.[14]

Finally, with regard to the well sites, the Region's Response to Comments explained that while the NSJB gas field is highly integrated, the record demonstrates

> [T]hat the individual well site operations, compression, and gas processing are conducted by completely separate and distinct equipment, such that gas metered at one well head can flow to several low-pressure gathering lines which may be owned or operated by BP or by other companies. Therefore, regardless of where the well site is located in relation to other emission points and regardless of who owns or operates those emission points, once the gas is pumped, it enters these intermediate pipelines, mixes with gas from several other companies, and is sent to various compressor stations and gas plants. Gas handled by Wolf Point is compressed and dehydrated, and then flows—via medium-pressure pipelines operated by BP or third parties—to Florida River or to other third-party-operated CDPs. Thus, Florida River can continue to operate regardless of whether Wolf Point or one, two, three, four, or all of the BP operated well sites were to shut down – and vice-versa.

EPA-FL-0036 at 13. Therefore, "[t]he nature of movement and mixture of the gas product pumped from the wells in this field means that no one well site (or compressor station) is more interrelated to or dependent on Florida River than any other well site, such that operations at Florida River do not have an exclusive or dedicated interrelatedness with Wolf Point or the BP operated well sites." EPA-FL-0036 at 13. Accordingly, the Region concluded that the Wolf Point and the BP-operated well sites in the entire NSJB field were not "adjacent" to Florida River, and thus their emissions did not have to be combined into a single stationary source for either Title V or PSD purposes.

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[14] EPA-FL-0036 at 12-13 (citing EPA-FL-0033 at 9-11) (noting that the well sites located closest to Florida River were drilled/constructed at various times over the past 25 years – many well sites existed before Florida River was constructed and some were constructed after Florida River was constructed. The locations of the older well sites were driven in part by surface owner preferences and in part by local jurisdiction spacing orders. The locations of the newest well sites were based on COGCC 80-acre spacing orders (agreed to by the BLM and the Southern Ute Tribe), and other factors, including BP's La Plata County MOU, which requires new wells to use existing infrastructure in order to reduce surface disturbances).

In the current Petition, WEG alleges that EPA erred in not aggregating "nearby" emission units with the Florida River station. Pet. at 22. However, there was nothing in WEG's comments differentiating between different points in the field or asserting that emissions from specific individual wells should be aggregated with Florida River – they simply asserted that all BP-owned emission units in the entire field had to be aggregated. EPA-FL-0022 at 2-7. As shown above, Region 8 fully and adequately responded to those comments, and any assertion that WEG may now make about the Region's alleged failure to address nearby wells was not preserved for review because that issue was not raised in the public comments. Moreover, the Region's source determination analysis considered Wolf Point and the BP- operated wells sites in the NSJB field. Accordingly, Region 8 fully responded to WEG's source determination comments and there is no basis for granting review on this issue.

(2) Region 8's contiguous or adjacent analysis was consistent with the regulatory requirements and past agency statements.

Petitioner asserts that the Region's source determination was "novel" and suggests that the source determination was inconsistent with prior EPA determinations. Contrary to Petitioner's assertions, the Region did consider the prior EPA determinations and statements, and its application of the contiguous or adjacent analysis is consistent with the approach used in numerous prior Agency statements (both recommendation and determination letters), as well as Agency guidance. [15] As discussed above, the Region's source determination analysis considered the complex "ownership and operational" facts in analyzing the "adjacent or contiguous"

[15] Petitioner suggests the discussion in the 1980 Preamble about the boiler support facility is applicable here. It is not. That example was provided for instances where a boiler unit "supports" two otherwise distinct sets of activities *on the same site*. Since the activities were "contiguous" on their face, the interrelatedness was addressed in order to determine whether the boiler should be considered to "support" one of the other activities in order to satisfy the SIC-code portion of the source determination, not as part of the contiguous or adjacent analysis. Since all three unit types (Florida River, Wolf Point, and the BP-owned wells), have the same SIC code, as discussed above, it is inappropriate to apply the "support facility" test in this circumstance.

regulatory criteria. *McCarthy Memo* at 1. The Region's reasoned decision-making – applying the numerous facts regarding Florida River, Wolf Point and the BP-owned wells sites to find that they were not so interrelated as to be considered "adjacent" – supports the Region's decision as to this second factor of the relevant regulatory criteria. The Petitioner has failed to demonstrate how the Region's determination erroneously applied the relevant regulatory criteria for determining whether these emissions-producing activities were "contiguous or adjacent."

In addition to arguments regarding the relevant regulatory criteria, Petitioner further contends, citing to the 1980 PSD Preamble, that the Region's determination undermines EPA's duty to aggregate based on the "common sense notion of a plant;" and that the preamble suggests that an oil field could be aggregated. Pet. at 7-8, 19. While the Preamble provides examples of different fact scenarios that could be aggregated, EPA was clear that such determinations are made on a "case-by-case" basis. 45 FR 52695. Accordingly, Region 8 looked at the specific facts of its source determination analysis and applied the regulatory factors and provided a well-reasoned explanation for its decision that the emission units in *this* field should not be aggregated. Therefore, Petitioner's assertion that the Region's source determination is somehow inconsistent with the Preamble is misplaced.

Likewise, Petitioner suggests that in "appropriate cases," aggregating oil and gas sources into one source determination also fit the common sense notion of a plant. Pet. at 19 (citing *Alabama Power*). As the Region's Response to Comment analysis articulated, "[t]aking into consideration the complex and diverse gas movement among the facilities, as well as the lack of unique interdependence among the facilities" the Region "determined that the Florida River Compression Facility, Wolf Point Compression Station, and BP's numerous wells sites within the NSJB" field "are not adjacent." EPA-FL-0036 at 13. Petitioner presents no specific facts

from this permitting record to effectively rebut the Region's analysis and conclusion.[16] As explained above, the common sense notion of a plant is embodied in the three regulatory criteria contained in the definition of stationary source that EPA promulgated at 40 C.F.R. § 71.2, so Petitioner's suggestion that the Region's decision is inconsistent with *Alabama Power* is unsupported since the specific pollutant emitting activities at issue in this case were found to be neither contiguous nor adjacent, which is one of the required criteria.

Petitioner contends that, "while EPA expressly rejected a *per se* rule against aggregating multiple facilities that are connected by a multistate pipeline or similar connection in adopting the regulatory definition of stationary source, this was not a complete bar to appropriate aggregation of oil and gas emitting activities." Pet. at 20. Petitioner provides no factual or legal basis for this assertion, and fails to demonstrate how a statement of such broad scope is grounded in the facts at hand. Moreover, the rejection of a *per se* rule does not mean that the Region must aggregate when there is nothing to show the approach the Region did take *is* barred by the CAA or EPA's implementing regulations. While the Petition asserts that a different approach might be taken, it simply does not demonstrate that the Region's determination involved a clearly erroneous finding of fact or conclusion of law, or that the Region's decision involves an important policy consideration.

Petitioner, without citing to facts in the record, makes several unsupported allegations in support of the claim that the Region's "contiguous or adjacent" analysis was flawed . First, suggesting that "an inherent interrelationship exists between the Florida River Compression Facility and the coalbed methane wells that feed the compressor station . . . ." Pet. at 24. Second, alleging that the Region's analysis should have looked at whether one facility produces

[16] Petitioner's related suggestion – "[i]f the two plant buildings operate different emissions units, all responsible for different phases of producing the plant's end product, it is indisputable that the emission units should be aggregated, as the court in *Alabama Power* noted" – is unsupported by any facts in its analysis . Pet. at 27.

an intermediate product for the other. Pet. at 27. And, third, "the wells produce an intermediate product that is processed into pipeline-quality natural gas." Pet. at 27. However, in each of these three instances the Petitioner cites no facts from the record to support these allegations. WEG also suggests that "[w]here an energy company routinely transfers natural gas from a set of wells that are intended to supply a particular processing facility, the operation fits within the ordinary meaning of 'installation' and 'plant,'" Pet. at 27, but WEG cites neither EPA regulation nor guidance to support their suggestion.[17] Therefore, the Petitioner has not demonstrated that the Region's source determination involved a clearly erroneous finding or fact or conclusion of law, or that the decision involves in important policy consideration.

Finally, WEG tries to rely on numerous prior Agency statements (recommendations and determinations) to argue that the Region's contiguous or adjacent analysis is inconsistent with past Agency actions. However, as discussed in detail below, WEG mischaracterizes the relevance and applicability of these prior Agency statements. WEG appears to suggest that the Region's "phrases" in the Response to Comments ("dedicated interrelatedness," "exclusive dependency," "exclusive or dedicated interrelatedness," and "unique interdependence") apply a new standard. Pet. at 24-25 (citing EPA-FL-0036 at 11, 13). The Region did not apply a new standard. Rather, as demonstrated below, the Region looked at these prior Agency statements and found that the facts here do not show the kind of relationship that existed in other cases where the Agency had determined aggregation to be appropriate. These statements, and WEG's reliance on them, fail to demonstrate that the Region's determination involved a clearly erroneous finding of fact or conclusion of law, or that the decision involves an important policy consideration.

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[17] Moreover, since Petitioner's comment generally addressed all the BP-owned wells in the field, *see discussion infra*, and not a particular "set of wells" that were particularly intended to supply gas to Florida River, it's not clear that this suggestion, even if it were valid, would demonstrate an error in the Region's analysis in this case

Overall, WEG's Petition simply asserts that the Region could have made a different decision regarding whether the various emission units were contiguous or adjacent with the Florida River station, not that the Region erred in making its determination that they were not. In this case, the Region looked at the specific facts of this permitting action and applied them to the relevant regulatory criteria and agency guidance to determine whether the emission-producing activities are contiguous and adjacent. Therefore, the Petitioner fails to demonstrate clear error in the Region's facts or application of the law, and the Board should not grant review based on the "contiguous or adjacent" prong of the regulatory definition.[18]

c) Region 8 correctly determined that the various emission units were under common control.

Finally, the third regulatory criteria involves making a determination as to whether the activities are under the control of the same person. EPA and Petitioner agree that the activities (Florida River, BP CBM wells, and BP's Wolf Point Compressor Station) are under the control of the same person. Petitioner's comments on the draft permit suggested that "[t]he natural gas wells . . . are under common control and ownership by BP." EPA-FL-0022 at 5. EPA agrees that Florida River, Wolf Point, and the BP well sites are under control of the same person; "EPA has determined that Florida River, Wolf Point, and the BP-operated well sites in the NSJB are under the common control of BP as of the time of this permitting action." EPA-FL-0036 at 9. Accordingly, there is no basis for granting review on the basis of the common control analysis.

In conclusion, WEG has not demonstrated that Region 8's source determination—which found that the PSD and Title V source definitions do not require aggregation of Florida River with the other emitting units as a single source—clearly involve an erroneous finding of fact or

[18] Given the underlying technical nature of such an analysis, it would be inappropriate and unfounded for the Board to substitute its judgment for the technical expertise of the Region. *See In re Carlota Copper Co.*, 11 E.A.D. 692, 708 (EAB 2004); *Teck Cominco*, 11 E.A.D. at 473 (same).

conclusion of law, or that the decision involves an important policy consideration that the Board, in its discretion, should review. Therefore, the Petition should be denied.

d) None of the prior agency statements addressed in the Petition are determinative of this action and thus do not provided a basis for granting review.

Additionally, Petitioner contends in its Petition to the Board that in addition to the three regulatory factors, several prior Agency statements "provide insight" and are "particularly instructive." Pet. at 22. While Region 8 did examine many prior Agency statements in the Response to Comments in this case, none of these prior Agency statements are determinative in this appeal, as explained below.

While prior Agency statements may be insightful and instructive, they are not controlling. EPA has consistently followed the reasonable approach that no single EPA recommendation or determination can serve as an adequate justification for how to treat any other source determination for pollutant-emitting activities with different fact-specific circumstances.[19] Therefore, where none of the prior recommendations and determinations contain facts that are identical to the facts presented in this appeal, EPA is not bound by the same result. Furthermore, as the Region's Response to Comments explained, "no single determination can serve as an adequate justification for how to treat any other source determination for pollutant-emitting activities with different fact-specific circumstances." EPA-FL-0036 at 5-6.

In seeking review of the Region's source determination in this case, Petitioner mischaracterizes the relevance and applicability of numerous prior Agency statements

[19] *McCarthy Memo* at 2 ("whether or not a permitting authority should aggregate two or more pollutant-emitting activities into a single major stationary source for purposes of NSR and Title V remains a case-by-case decision in which permitting authorities retain the discretion to consider the factors relevant to the specific circumstances of the permitting activities"), and *Anadarko* at 6 ("applicability determinations are made on a case-by-case basis"); *see* also EPA-FL-0036 at 5 (recognizing this standard).

(recommendations and determinations). The Petition contends that in addition to the three regulatory factors, several prior Agency statements "provide insight" and are "instructive" to an evaluation of the present permitting action. Pet. at 22. While we agree that prior Agency statements may be insightful and instructive, and as explained below, such statements are *not* controlling to any other source determination and none of the statements identified by Petitioner show that Region 8 erred in its source determination in this case.

Source determinations are made on a base-by-case basis, and where the prior recommendations and determinations contain facts that are not identical to the facts at issue in the Florida River permitting action, Region 8 is not bound by the same result. The Petitioner points to eleven prior EPA statements where EPA found aggregation "to be appropriate," Pet. at 20, seeming to suggest that aggregation is not only "appropriate" but required in this case, *see id.* at 17 ("EPA refused to aggregate these pollutant emitting activities with the Florida River Compression Facility as a single source, as appropriate"). The Region's Response to comments referenced several prior EPA statements. EPA-FL-0036 at 9-11. Specifically, the Region looked at the Forest Oil determination made by Region 10. EPA-FL-0036 at 10-11. Moreover, the EPA Administrator has considered many of these same Agency statements in a recent Title V order and found that they were not determinative of the source determination for the specific gas facility under review, much less for the oil and gas industry generally. *See, generally, Anadarko* at 11-18.

Likewise, as explained below, each of the eleven prior EPA statements identified by Petitioner are neither determinative of the Region's source determination in this case nor do they indicate that the Region clearly erred in the current determination.

(1) The analysis in Valero Transmission Company recommendation letter addressed a situation in which the pollutant-emitting activities were both under

common control and located on contiguous property but did not share a common two-digit SIC code. As the Administrator's *Anadarko* order explained, "the Valero determination focused only on whether the Transmission Company was considered to be a support facility to the Gathering Company, and thus treated as if they were under the same SIC code. It did not address interrelatedness of the activities as it related to the contiguous or adjacent element of the source determination." *Anadarko* at 15. The Administrator also noted that the Valero letter did not indicate whether there was a unique and dedicated relationship between the pollutant-emitting activities. As the SIC code analysis is not relevant to the Florida River source determination and Region 8's analysis turned on whether a unique and dedicated relationship existed between the various pollutant-emitting activities, the Valero recommendation letter is not determinative here.

(2) The fact-specific circumstances in EPA Region 5's determination for Summit Petroleum are substantially different from those for Florida River. As the Administrator has already explained, the Summit determination "found that all the sour gas produced from wells in the field flows to the one gas sweetening plant owned by Summit Petroleum through a pipeline collection system. In Summit, there was no evidence that any of the gas from the wells could flow to sweetening plants owned by other companies." As the Region's Response to Comments explained, "the flow of gas in the NSJB gas field is complex and dynamic, with several companies operating within the production and transportation system under various business agreements to ensure the continued flow of gas regardless of 'issues' at any one facility, providing flexibility and reliability of the system. EPA-FL-0036 at 11. Therefore, because the wells flow in multiple directions there is not one pipeline collection system as there was in Summit. Accordingly, the Summit determination is not controlling.

(3) EPA Region 8's recommendation letter to the State of Utah regarding "Utility Trailer" is also not determinative. Pet. at 22-23. In discussing the Utility Trailer Manufacturing Company letter, the Administrator recently explained that "EPA did not make a final applicability determination in this letter. Instead, EPA maintained that the distance associated with 'adjacent' must be considered on a case-by-case basis and suggested a list of questions that the state *could* consider in making that determination." *Anadarko* at 15 (emphasis added). However, the Administrator recognized that nothing in the letter suggests that these questions "are either required or determinative of the source aggregation issue, especially in the context of a different industry." *Anadarko* at 15-16. Accordingly, Region 8 did not err in failing to apply the specific questions addressed in the letter, especially when the Utility Trailer recommendation letter addressed a completely different industry (utility trailer manufacturer) from oil and gas industry under consideration in Florida River.

(4) In the American Soda/Commercial Mine and Soda Ash Processing Plant letter, EPA recommended that the two plants be considered adjacent because "the two will clearly be functionally interdependent, as evidenced by the dedicated slurry pipeline and the spent brine return pipeline which will connect the two facilities." *Anadarko* at 14. These fact-specific circumstances are substantially different from the Florida River Station determination, where there is no dedicated relationship between Florida River and the Wolf Point Station, and BP owned wells, as is explained above and in the Region's response to comments.

(5) EPA's Forest Oil/ Kustatan Oil Production Facility and Osprey Oil Platform determination found that two pollutant-emitting activities should be considered adjacent based on their high degree of interrelatedness. Specifically, EPA Region 10 found that the platform and production unit operate as one facility as each is "exclusively dependent" upon the other, with the Osprey Oil Platform relying upon the Kustatan Oil Production Facility to process all of the platform's produced oil into marketable oil and gas and with the Kustatan facility providing power generation to Osprey.[20] The Forest Oil facts are substantially different from the Florida River, where there is no dedicated relationship between Florida River and other the activities under common control, as thoroughly explained by the Region in the Response to Comments. *See* EPA-FL-0036 at 11-12. (describing in detail multiple owner/operators control the movement of gas, and BP's gas gathering agreements do not specify that collected gas will be moved through any specific compression station, including the Florida River Compressor Station, and the gas from the wells (including BP's wells) can flow to any number of locations other than Florida River).

(6) The determination to aggregate the Wilmington Section and a Dominguez Section of Shell Oil Company's Wilmington Refinery Complex was also based on their functional interdependence. The two sections were considered by EPA to be adjacent because they had a dedicated relationship to each other and functioned together as one refinery, connected by a network of pipelines that were used to transport intermediary products from one site to the other. *Anadarko* at 13. These fact-specific circumstances are substantially different from the Region's Florida River Compressor Station determination, where there is no dedicated relationship between Florida River and other BP-owned activities in the field.

(7) Petitioner's reliance on the Anheuser-Busch Brewery determination is also improper. As the Administrator recently explained, the brewery and landfarm under consideration were considered to be adjacent, based on the interrelatedness of the two sites, wherein the "landfarm is an integral part of the brewery operations" and "brewery operation is dependent on landfarm

[20] Forest Oil Kustatan Facility and Osprey Platform Construction Permitting Applicability Determination, Memorandum from Douglas E. Hardesty to Robert R. Robichaud, August 21, 2001, pg. 5. WEG Ex. 14.

operations." *Anadarko* at 14. Those fact-specific circumstances are substantially different from the Florida River Compressor Station determination, where there is no dedicated relationship between Florida River Compressor Station and other activities under common control, as explained above and in the Region's Response to Comments.

(8) The source determination for General Motors General Motors Corporation also found that the Fisher Auto Body Plant and Oldsmobile Plant were adjacent based on their unique relationship. WEG Ex. 8 at 12. That case involved a two-step assembly process that was connected by a special railroad spur for transport between facilities, and where two plants were the only facilities served by the railroad spur. *Anadarko* at 13. Again, these fact-specific circumstances are substantially different from the Florida River Compressor Station determination, where there is no dedicated relationship between Florida River Compressor Station and other activities under common control and where the pipeline in the field can flow to multiple emissions points, including points not under BP's control.

(9) With regard to the ESCO Corporation's Main Metal Casting and Coating Plant and its Plant 3 Metal Casting operations (WEG Ex. 8 at 15), Petitioner suggests that EPA Region 8 should make a similar determination for Florida River. In ESCO, EPA's analysis of the facts indicated that the two pollutant emitting activities could be found to be adjacent because Plant 3 was entirely dependent on facilities at the main Plant for production of the company's finished product. All of the castings produced by the foundries at both the Main Plant and Plant 3 are coated at the coating facility located at the Main Plant, and all final production, packaging, shipping, etc. of the finished product is done at the Main Plant. *Anadarko* at 13. These fact-specific circumstances are substantially different from the Florida River Compressor Station determination, where there is no dedicated relationship between Florida River Compressor Station and other activities under common control.

(10) and (11) The EnerVest San Juan Operating Company and Walker Hollow Unit letters (WEG Ex. 8 at 8, WEG Ex. 8 at 17) contain "no detailed analysis of the relevant regulatory criteria for the source determination as applied to the specific facts of the emission points under review." *Anadarko* at 15 n.12. Rather, the letters "simply make conclusory statements regarding groups of emission points that 'would be considered a single stationary source' and then discuss information necessary to determine whether they were *major* stationary sources for permitting purposes." *Id.* Clearly, given the lack of detailed analysis of the source determination, these letters cannot serve as an adequate justification for how the Region should treat the source determination for Florida River.

While Petitioner suggests that these eleven prior Agency statements must apply to the Florida River source determination, that is simply not the case. As the Region explained in the Response to Comments since 1980, "EPA has indicated that source determinations should be made on "case-by-case" and "highly fact-specific" basis, where "no single determination can serve as an adequate justification for how to treat any other source determination for pollutant-emitting activities with different fact-specific circumstances" and "where a fact-specific inquiry is necessary to establish whether emissions sources should be grouped together." EPA-FL0036 at 10 (citing *McCarthy Memo* at 2). As shown above, while EPA did suggest aggregation was appropriate in the Agency statements identified in the Petition, it's clear that each of the permitting situations had very different factual situations than the permitting situation in this case.

In addition, not one of the prior Agency statements identified by Petitioner involved a situation in which EPA determined or recommended aggregating multiple pollutant-emitting activities in an open oil or gas field. In fact, when looking specifically at those related to the oil and gas industry (i.e., Summit, Valero, Forest Oil), it is clear that aggregation of multiple emission points across an entire field was only found to appropriate when there was an exclusively dependent relationship between those units. Looking specifically at the Summit determination, it is relevant to note that EPA determined that aggregation of multiple points across an entire field was appropriate because "the information provided by Summit shows that the source gas wells are truly interdependent on the sweetening plants—the wells provide all their sour gas to the sweetening plant, the sour gas cannot flow anywhere else, and Summit owns and operates the sweetening plant and well sites." WEG Ex. 10 at 6. Accordingly, Petitioner has not demonstrated that Region 8's decision not to arrive at the same outcome of these prior

determinations, and instead to determine that the various emission points in the NSJB should not be combined with the Florida River station, provides any basis for review of this action.

Moreover, the Administrator's recent Title V order in the *Anadarko* case adds further support for the reasonableness of Region 8's source determination in this case. In *Anadarko*, petitioners had asked the Administrator to object to a renewed Title V permit issued by the Colorado Department of Public Health and Environment, Air Pollution Control Division (CDPHE), arguing that CDPHE "failed to appropriately assess whether oil and gas wells and other pollutant emitting activities connected with the Frederick Compressor Station should be aggregated together as a single stationary source for PSD and Title V permitting purposes, to ensure compliance with applicable Clean Air Act requirements." *Anadarko* at 1. In fact, just like in the case at hand, the petitioner has specifically alleged that this failure to aggregate was "unsupported and contrary to regulation and EPA guidance," and had cited many of the same prior Agency determinations to support those claims. *Id.* at 2, 6. In the Order, the Administrator undertook an in-depth examination of CDPHE's analysis in light of both the petition's arguments (including the Agency documents it cited) and the relevant regulations. The Administrator denied the petition to object, finding that:

> Petitioner has not demonstrated that CPDHE incorrectly applied the three relevant regulatory criteria in determining whether to aggregate pollutant emitting activities into a single stationary source for purposes of PSD and title V applicability. The record shows that CPDHE determined that the Frederick Compressor Station and the other emission sources in the Wattenberg Field were under common control and in the same two-digit SIC code, but were not contiguous or adjacent. As explained below, CDPHE determined that Frederick Compressor Station and the other emission sources did not have a unique or dedicated interdependent relationship and were not proximate and therefore were not contiguous or adjacent, and Petitioner has not demonstrated that CDPHE's determination was fundamentally flawed or contrary to the relevant regulations, including the Colorado SIP.

Id. at 11.

The Administrator has already determined – in a factual situation *very* similar to that described in the present case – that a petitioner had not demonstrated that aggregation was required by the Act, the Title V implementing regulations, Agency guidance, or these past Agency statements, and there is nothing in the current Petition showing that it is necessary for the Board to require aggregation in this case. Therefore, Petitioner has not demonstrated that Region 8's source determination in this case involved a clearly erroneous finding of fact or conclusion of law, or that the decision involves an important policy consideration that the Board, in its discretion, should review.

2. The Board should not consider Petitioner's arguments asserting matters not preserved for review.

WEG suggests that the Region should have considered "how much gas actually flows" to Florida River "from particular wells under regular operations." Pet. at 28. WEG also asserts in its Petition that the Region should have considered the percent of gas processed by Florida River and assessed the gas pressure to identify the wells producing this gas. Pet. at 28-29. Petitioner did not raise these objections in its comments on the draft permit. The burden of demonstrating that it was impracticable to raise such objections during the public comment period rests with petitioner. 40 C.F.R. § 71.11(l)(1); *see also* Preamble to Federal Operating Permits Program, Final Rule, 61 Fed. Reg. 34,202, 34,226 (July 1, 1996) ("It is a far more efficient use of resources to resolve permitting issues in the administrative issuance process, rather than to allow applicants to raise issues on draft permits for the first time on appeal."). WEG has not demonstrated that it was impracticable to raise these objections regarding how much gas actually flows to Florida River during the public comment period. Therefore, assertions that the Region should have taken into account how much gas flows to Florida River were not preserved for review.

Furthermore, given the scope of Petitioner's comments on the draft permit—to aggregate all the BP-owned emissions producing activities in the entire field[21]—Petitioner's assertion on appeal that the Region should have considered gas flow and gas pressure to and from individual wells is irrelevant.

Petitioner's claim is also unfounded because the record shows that the Region did consider gas flow and gas pressure in its interdependence analysis. The Region explained that flow of gas in the NSJB field is complex and dynamic. EPA-FL-0036 at 11; *see also supra* at 22.

In addition, the information presented in BP's supplemental information materials regarding gas flow did not demonstrate that all emission points in the field were adjacent and should be aggregated. As the Petition points out, BP's supplemental information explained that 63% of the gas processed by Florida River comes from BP-operated production. Pet. at 28 (citing EPA-FL-0033 at 11 (noting that "[f]or BP-operated productions, 63% flows to Florida River…")).[22] While a certain percentage of gas may flow from BP wells to Florida River, the supplemental information also explains that the flow of gas in the NSJB field is a "dynamic process," *id.,* therefore there are not dedicated wells that flow to Florida River.

The Region also considered gas pressure within the pipeline systems, and found that given the dynamic nature of the flow of gas, "…BP-owned wells sites do not exhibit the exclusive dependency" or "the dedicated interrelatedness that was determinative in other EPA source guidance in which distant facilities were aggregated into a single source." EPA-FL-0036 at 11 (explaining that "…gas from the BP owned and operated well sites flows to low pressure

[21] EPA-FL-0022 at 3-4.

[22] Petitioner's assertion that there may be interdependence based on a common control relationship between Florida River and third-party wells, Pet. at 29 n.8, is also misplaced; given the complex and dynamic nature of the flow of gas in the field there are not dedicated wells that flow to Florida River. Furthermore, Petitioner neither raised this objection in its comments on the draft permit nor did it demonstrate that it was impracticable to do so. Therefore, assertions that the Region should have taken into account common control relationships should be denied.

pipeline systems (which can be owned and/or operated by either BP or third parties), to central points of delivery for compression (which can also be owned and/or operated by either BP or third parties), then to medium pressure pipeline systems (once again, which can be owned and/or operated by either BP or third parties) and then to the Florida River OR to third party owned and operated plants" (citing EPA-FL-0029 at Attachment A)). Accordingly, as Petitioner's assertions regarding gas flow and pressure were not preserved for review and the Region did consider such information in the Response to Comments, the Board should deny review.

B. The Petition to reopen the public comment period should be denied.

WEG makes three arguments for reopening the comment period. WEG first argues that the Region should have reopened the comment period because the Region requested additional information from BP and addressed the source determination issue for the first time in the response to comments. Pet. at 9, 11, 15. Second, WEG argues that the Region inappropriately worked with BP and therefore *de facto* reopened the comment period without inviting comment from the public. Pet. at 11-14. Finally, WEG argues that the purposes of Part 71 are best served by reopening the comment period so that WEG has an opportunity to comment on the Region's source determination analysis and the additional information submitted by BP. Pet. at 10, 15.

As explained in detail below, all three arguments should be rejected. First, WEG's arguments regarding BP's additional information and the Region's response to comments would create *per se* rules that are counter to Board precedent.[23] Furthermore, that precedent, when applied to the circumstances here, shows the Region did not abuse its discretion in not reopening the comment period. Second, the Region's work with BP was appropriately within the limits of

[23] In this section, all references to Board precedent are made with the understanding that such precedent has been made in the part 124 context. Since the Board has already determined that precedent under Part 124 is valuable in proceedings under Part 71, the Region does not prefix this part 124 precedent with "cf." *See In re Peabody W. Coal Co.*, 12 E.A.D. 22, 33 n. 26 (EAB 2005); *supra* at 7.

Part 71 and did not *de facto* reopen the comment period. Finally, WEG had the opportunity to raise the source determination issue and related arguments in comments, and now has the opportunity to address the Region's source determination and the additional BP material in this Petition for review; reopening the comment period would be counter to Part 71's purpose of expeditious review of permit applications.

1. The Region's decision not to reopen the comment period was well within its discretion and consistent with Board precedent.

As discussed above, the Board reviews a Region's decision not to reopen the comment period for a Part 71 permit under an abuse of discretion standard and affords the Region substantial deference. When considered in light of factors the Board has suggested (discussed below) for assessing the decision whether to reopen a comment period, the circumstances here show that the Region did not abuse its discretion in deciding not to reopen the comment period. WEG does not discuss these factors or other relevant Board precedent, but instead makes two arguments that would create *per se* rules requiring reopening. Both arguments are counter to Board precedent and ignore the discretion granted to the Region by 71.11(h)(5).

In considering the equivalent discretion granted by 124.14(b), the Board has noted four factors a Region may consider in deciding whether to reopen a public comment period:

> [W]hether permit conditions have changed, whether new information or new permit conditions were developed in response to comments received during prior proceedings for the permit, whether the record adequately explains the agency's reasoning so that a dissatisfied party can develop a permit appeal, and the significance of adding delay to the particular permit proceedings.

In re Dominion Energy Brayton Point, LLC ("*Dominion Energy II*"), 13 E.A.D. 407, 416 n. 10 (EAB 2007). Each of these factors, when evaluated in the circumstances of this permit, supports the Region's decision not to reopen the comment period.

First, the permit provision at issue here—the source determination—was not changed in relevant respect between the draft and final permits. *Compare* EPA-FL-0017, Title V Permit to Operate, at 9-10 *with* EPA-FL-0037 at 3-4. The Board has focused on this factor on several occasions and, in doing so, often considers not just whether a permit condition changed but also the significance of the change. *In re Indeck-Elwood LLC*, 13 E.A.D. 126, 146-47 (EAB 2006) ("While the Board often defers to the permit issuer's discretion in these matters, the Board nonetheless will look at the change in the draft permit and, *based on the significance of the change*, will determine whether reopening the public comment period is warranted in a given circumstance.") (emphasis added); *In re Amoco Oil Co.*, 4 E.A.D. 954, 981 (EAB 1993); *In re GSX Services of South Carolina, Inc.*, 4 E.A.D. 451, 467 (EAB 1992); *see also In re Old Dominion Elec. Coop.*, 3 E.A.D. 779, 797 (Adm'r 1992) ("[T]here may be times when a revised permit *differs so greatly* from the draft version that additional public comment is required (the discretionary wording of 40 C.F.R. § 124.14(b) notwithstanding).") (emphasis added). Here, not only was there no significant change to the source determination, there was no relevant change to it at all.[24] While WEG states that this is not dispositive, Pet. at 10, WEG does not discuss the remaining three factors, which all support the Region's decision to not reopen the comment period.

Second, the additional information and the source determination analysis were developed directly in response to WEG's comments. The Board has also often focused on this factor in deciding whether a public comment period should be reopened. *In re NE Hub Partners, LP*, 7 E.A.D. 561, 587 (EAB 1998); *In re Am. Soda, LLP*, 9 E.A.D. 280, 299 (EAB 2000); *In re Caribe*

[24] As a result of information submitted by BP during the comment period, EPA-FL-0023, two insignificant emissions units, an emergency generator and a diesel tank, were added to the permit. *Compare* EPA-FL-0017, Title V Permit to Operate, at 10 *with* EPA-FL-0037 at 4. This change was not relevant to the aggregation issue raised by WEG and, in any case, WEG does not argue that the change gave rise to a substantial new question.

General Elec. Prods., Inc., 8 E.A.D. 696, 705 n. 19 (EAB 2000). The Part 71 regulations specifically contemplate that, in responding to comments, the Region may gather additional information, include it in the record, and use it in the response. 40 C.F.R. § 71.11(j)(2), (k)(2)(iv); *see also Caribe General Elec.*, 8 E.A.D. at 705 n. 19. When, as here, an issue has already been raised by a commenter and adequately addressed in response to comments, reopening the comment period is unnecessary.

Third, the record adequately contains the factual information on which the Region relied and adequately explains the Region's reasoning. *See Indeck-Elwood*, 13 E.A.D. at 147 (discussing this factor). In its Petition, WEG has not taken issue with any factual information. *See generally* Pet. And, as confirmed by WEG's substantial discussion in the Petition of the Region's source determination, Pet. at 22-25, the Region's reasoning has been sufficiently explained for WEG to develop its permit appeal. *See* EPA-FL-0036 at 5-14. Furthermore, WEG has not noted any inadequacy in the record that would be remedied by reopening the comment period.[25] *See In re Prairie State Generating Co.*, 13 E.A.D. 1, 50 (EAB 2006) ("Petitioners have not identified on appeal any information that they would submit into the record, if it were reopened, to establish grounds for changing the Permit's terms."). The record is more than sufficient for the Board to decide the source determination issue, and additional public comment is unnecessary towards that end.

For the final factor—the significance of adding delay[26]—WEG itself claims prejudice from any delay in deciding the Petition's other issue, the challenge to the Region's source

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[25] To the extent that WEG can be understood to allege that the response to comments is inadequate because certain issues WEG raised were unaddressed by the Region, those issues were either not raised in WEG's comments, *supra* at 37-39, and/or were in fact addressed by the Region, *supra* at 17, 37-39.

[26] Although this factor has been mentioned by the Board in the context of NPDES and PSD permits, *Dominion Energy II*, 13 E.A.D. at 416 n. 10, *Prairie State*, 13 E.A.D. at 50, the Region notes that Part 71 procedures should provide "expeditious review of permit applications." CAA § 502(b)(6), 42 U.S.C. § 7661a(b)(6). The Region therefore believes it applicable in the part 71 context as well. *See also In re Thermalkem, Inc.*, 3 E.A.D. 355, 357

determination. *See* Petitioner's Partial Opposition for Extension of Time, Dkt. No. 5, at 5 ("[WEG] has been prejudiced by the fact that Florida River continues to operate under a Title V Permit that is contrary to the Clean Air Act. . . . [F]urther delay will only further prejudice [WEG]."). The Region presumes that BP would, like WEG, prefer to have the substance of that issue decided without procedural delay that would not assist the Board in addressing the merits. Given the futility of reopening the public comment period in the circumstances here, as explained below, *infra* at 51, the significance of delay far outweighs WEG's abstract, generalized interest in opportunity for public comment.

Instead of addressing how relevant Board precedent applies to the facts in this permitting action, WEG makes two arguments that amount to *per se* rules requiring opening. WEG first argues that application of the source determination analysis was necessarily a substantial new question because it was not presented in the statement of basis. Pet. at 11, 16. However, the statement of basis for a draft permit is not required to discuss all permit issues in detail. *See* 71.11(b); *cf.* Final Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,408-09 (May 19, 1980) ("[T]he statement of basis is supposed to be a brief summary that meets minimum requirements."). Consequently, it is not clear error for a Region to address an issue for the first time in its response to comments. *In re Russell Energy Ctr.*, 15 E.A.D. __, slip op. at 95 n. 86 (EAB 2010). In rejecting a petitioner's argument to the contrary, the Board explained:

> [Petitioner's] statements show a misunderstanding of the part 124 permitting process, including the purpose of the . . . review process. Significant issues are often raised for the first time in comments on a draft permit. When that occurs, the permit issuer is expected to address those newly raised, significant issues in its responses to comments. Those commenters not satisfied with the response may petition the Board for review of the issue or issues.

(Adm'r 1990) (including whether reopening "could expedite the decision-making process," 40 C.F.R. § 124.14(a)(1), as a "factor[] to be considered").

Id. (citations omitted). Here, too, WEG's argument shows a misunderstanding of the Part 71 permitting process that should be rejected.

WEG also argues that the source determination was necessarily a "substantial new question" because the Region supplemented the record with factual information it requested from BP. Pet. at 14-15. In WEG's view, such supplementation must imply a deficiency in the draft permit or statement of basis that requires the additional information to be subject to public comment. This argument would also create a *per se* rule counter to Board precedent. For example, the Board has held that a Region did not err by adding a report submitted by a permit applicant after the comment period closed—nor by referencing the report in the Region's response to comments—without reopening the comment period. *See Am. Soda*, 9 E.A.D. at 297-99. Furthermore, as noted in the preamble to the part 124 regulations, "if all new material in a response to comments required reproposal, the agency would be put to the unacceptable choice of either providing an inadequate response or embarking on the same kind of endless cycle of reproposals which the courts have already rejected." Preamble to Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980). That is exactly the outcome that WEG is suggesting should happen here. Finally, as discussed in the second factor above, the fact that the Region requested the information in order to respond to detailed comments WEG was already able to submit in the public comment period actually supports the Region's decision not to reopen the comment period.

Both of WEG's arguments for *per se* rules are based in its misunderstanding of the Part 71 process and are contrary to Board precedent. Furthermore, all four factors previously considered by the Board for assessing whether to reopen a comment period confirm that the Region did not abuse its discretion. In this case, WEG has not met its burden and review on

these grounds should be denied, particularly in light of the substantial deference that is due to the Region's decision. *See Dominion Energy II,* 13 E.A.D. at 416; *NE Hub Partners*, 7 E.A.D. at 585.

2. Because the Part 71 regulations contemplate that the Region would work with BP to develop a permit and record, the Region's actions were appropriate and did not *de facto* reopen the public comment period.

WEG argues that the Region *de facto* reopened the public comment period (after it was closed) by soliciting, accepting, and relying on comments from BP. *See* Pet. at 11-15. In WEG's view, the Region may only request purely factual information from the permit applicant, and, after the comment period is closed, the permit applicant may submit nothing else. WEG's argument, which misunderstands the role of the permit applicant, is incorrect in all respects. The Region asked for and relied on *only* factual information, and even if the Region had requested and relied on legal arguments from BP—which the Region did *not* do—part 71 and Board precedent allow this.

First and foremost, WEG's argument is counter to Board precedent. For example, the Board has held that a Region did not err when it added to the record a permit applicant's supplemental best available control technology ("BACT") analysis—submitted after the comment period closed—without reopening the comment period. *In re Metcalf Energy*, PSD Appeal Nos. 01-07, -08, slip op. at 26-27 (EAB 2001). A BACT analysis is not purely factual, but instead (if properly done) "reflects considered judgment" in applying law and policy to facts. *See Russell Energy Ctr.*, 15 E.A.D. __, slip op. at 58. Thus, the entire legal premise of WEG's argument—that only factual information may be requested of and submitted by a permit applicant after the comment period is closed—is erroneous.

WEG also errs in its interpretation of the record. WEG states that the Region requested and received "comments" from BP, presumably outside the Region's authority under 71.5(a)(2),[27] and therefore *de facto* reopened the comment period. *See* Pet. at 11-13.[28] WEG's only evidence for the supposed request for "comments" is that BP submitted legal arguments and opinions, from which WEG mistakenly infers the Region requested them. Nonetheless, WEG's own exhibits show that the Region requested *only* factual information; the legal arguments and opinions were voluntarily submitted by BP without request. As the cover letter for exhibit 5 shows, in BP's initial response to the Region's request BP provided factual information, such as "a description of direct and indirect gas flow from BP's owned and operated wells to the Facility"; in addition, BP provided its "initial response to [Petitioner's] comments"—the legal arguments of which WEG complains—voluntarily and without a corresponding request from the Region. WEG Ex. 5 at 1. Similarly, the cover letter for exhibit 6 shows only that BP provided a "proximity map" of emission sources, inarguably factual information, in response to the Region's request. WEG Ex. 6 at 1. Finally, no request for comments can be inferred from the cover letter to exhibit 7, BP's supplemental comments. *See* WEG Ex. 7 at 1. The other communications between the Region and BP in the record confirm that the Region requested only factual information. *See* EPA-FL-0024, -0028, -0031 (Region's emails discussing requests for information from BP).

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[27] This portion of WEG's argument is also suspect. Despite the wording of section 71.5(a)(2), its context and operation make clear that it is a source of authority to *require* an applicant to submit additional information before a permit is issued. It is not a prohibition on a *request* for anything else.

[28] In making this assertion, WEG attempts to distinguish factual "information" that may be requested from a permit applicant under 71.5(a)(2) from "comments" that contain legal arguments and opinions. *See* Pet. at 11-12. It is by no means clear that the term "information" must be read so narrowly. "Information" includes "knowledge ... obtained from investigation, study, or instruction." Webster's Third New International Dictionary 1160 (1967). In turn, this includes knowledge of relevant legal authority. In practice, suppose for example that a permit applicant makes a legal statement in its application that appears to a Region to be contrary to EPA's interpretation of a regulation. It would be beneficial for the Region, the applicant, and the permitting process if the Region could require the applicant to provide a basis for the statement.

WEG also mistakenly infers from the Response to Comments that the Region "relied" on the legal arguments contained in BP's submissions. WEG bases this inference on similar—but not identical—characterizations by the Region and by BP of WEG's comments as requesting broad aggregation of sources, and on references by the Region to portions of BP's "supplemental comments." Pet. at 13-14. However, the Region fairly characterized WEG's comment, *see supra* at 20, 22, and carried out an in-depth source determination analysis. *See* EPA-FL-0036 at 8-13. Crucially, the Region did not simply reject WEG's suggestion for broad aggregation or follow the approach suggested by BP, which emphasized proximity and "the common sense notion of a facility," but instead focused on interrelatedness. *Compare* EPA-FL-0036 at 9-13 *with* WEG Ex. 7 at 16-23. Furthermore, the record shows (and WEG admits inconsistently, *see* Pet. at 14 n. 4) that the Response to Comments relied *only* on factual information within BP's "supplemental comments" and attached exhibits. *See* EPA-FL-0036 at nn. 6, 8, 10, 12, 24, 27, 29, 31, 32.

Finally, WEG misunderstands the role of the permit applicant in the permitting process. In the Part 124 context, the Board has stated, "[v]iewed as a whole, the permit issuance regulations at 40 C.F.R. part 124 'contemplate that the permit issuer and the permit applicant will work together in developing a permit.'" *In re Arizona NPDES Permits*, 7 E.A.D. 646, 652 (EAB 1998) (quoting *In re Velsicol Chem. Corp.*, 1 E.A.D. 882, 885 (Adm'r 1984)). To that end, "nothing in [the Part 124] regulations bars the Region from scheduling additional meetings with permit applicants . . . prior to issuance of the final permit."[29] *Id.* Similarly, nothing in Part 71 barred the Region from meeting with BP and requesting additional factual information to

[29] Although the circumstances in *Arizona NPDES Permits* involved a meeting during the comment period, the principle as stated by the Board applies as well to meetings after the comment period is closed. *Cf. In re Chemical Waste Mgmt.*, 6 E.A.D. 66, 68-69, 81-82 (EAB 1995) (meeting with interested third parties after comment period closed did not require the public hearing procedures of part 124). And, in the case of gathering information for responding to comments, the Region must necessarily schedule any meeting with the permit applicant after the comment period has closed.

develop the permit record.[30] And nothing in Part 71 prevented BP from submitting factual information or, for that matter, its arguments and opinions after the close of the comment period. Suggestions from WEG that these events were in some way irregular are, therefore, misplaced.[31]

In an attempt to argue to the contrary, WEG notes that the Part 71 regulations require all parties, including permit applicants, to "submit all reasonably ascertainable arguments supporting their position by the close of the public comment period." Pet. at 13 n. 3 (quoting 40 C.F.R. § 71.11(g)). WEG misconstrues the nature of this requirement. It pertains only to the permitting authority's responsibility to respond to comments and to a commenter's preservation of issues for review. *See* 40 C.F.R. § 71.11(j)(1)(ii), (l)(1); 61 Fed. Reg. 34,202, 34,226 (July 1, 1996) ("It is a far more efficient use of resources to resolve permitting issues in the administrative issuance process, rather than to allow applicants to raise issues on draft permits for the first time on appeal."). Furthermore, in applying this argument to BP, WEG appears to believe that a permit applicant is no different than any other commenter. But this again ignores the special role of the applicant in the permitting process. *See Velsicol Chem.*, 1 E.A.D. at 885. The applicant will often be in the best position to provide the information necessary to develop a sound permit and record. And the ability of the permit applicant to work closely with the Region is often necessary to clarify issues, benefiting not only the Region and the applicant, but also the general public. *See Arizona NPDES Permits*, 7 E.A.D. at 652.

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[30] The Board should reject WEG's suggestion that the Region's request for additional information necessarily indicates that the Region determined the original information from BP contained "material mistakes" or "inaccurate statements." Pet. at 16 n. 6 (citing 40 C.F.R. § 71.7(f)(1)(iii), (f)(2)). Even if the provisions for reopening a permit—instead of a comment period—are somehow applicable, WEG's logic is faulty: the request in no way implies the original information was mistaken or inaccurate. And accepting WEG's suggestion would again result in a *per se* rule that all requests for additional information must result in a reopening of the comment period. Such a *per se* rule is counter to Board precedent. *See supra* at 44.

[31] To the extent that WEG can be understood to argue that BP's submissions were actually inappropriate *ex parte* contact, the Board has rejected a similar argument in the Part 124 context. *Arizona NPDES Permits*, 7 E.A.D. at 653. The Board noted that, outside the context of an evidentiary hearing, there is simply no prohibition on *ex parte* contact. *Id.*; *see also In re Upper Blackstone Water Pollution Abatement Dist.*, NPDES Appeal Nos. 08-11 to 08-18 & 09-06, slip op. at 23 n. 21 (EAB 2010) (*ex parte* prohibition of 5 U.S.C. § 557(d)(1) does not apply to NPDES permitting proceedings).

Here, the Region appropriately worked with BP to develop a sound permit and record. WEG's arguments to the contrary—which ignore relevant precedent, misunderstand the role of the permit applicant, and are based on mistaken inferences—should be rejected.

3. Reopening the comment period would not serve the purposes of Part 71, because WEG has an adequate opportunity in this Petition to address the Region's source determination and the materials submitted by BP.

WEG argues that as a result of the Region's decision not to reopen the comment period, WEG has lost the opportunity to comment on the Region's source determination and the additional information submitted by BP. Pet. at 15. This argument has been repeatedly rejected by the Board. *Russell Energy Ctr.*, 15 E.A.D. __, slip op. at 95 n. 86; *Metcalf Energy*, PSD Appeal Nos. 01-07, -08, slip op. at 29; *see also In re City of Attleboro, MA Wastewater Treatment Plant*, 14 E.A.D. __, slip op. at 86 (EAB 2009); *Dominion Energy II*, 13 E.A.D. at 416; *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 695-96 (E.A.D. 2006); *Am. Soda*, 9 E.A.D. at 299; *Caribe General Elec.*, 8 E.A.D. at 705 n. 19.[32] In each case, the Board noted that the petitioner had the opportunity to address material added to the record in the petition for review to the Board. To argue otherwise was to misunderstand "the permitting process as a whole, including the purpose of the . . . review process." *Russell Energy Ctr.*, 15 E.A.D. __, slip op. at 95 n. 86. Here, too, WEG misunderstands the permitting process as a whole.

WEG's related argument on behalf of other unnamed but interested parties' opportunity to comment, *see* Pet. at 15, is similarly misplaced. If, as WEG contends, the Region's source

[32] *But see In re Dist. of Columbia Water & Sewer Auth.*, 13 E.A.D. 714, 762 (EAB 2008) (stating that, as a result of a change in a final permit without a reopened comment period, the petitioners "were denied the opportunity to provide meaningful comments on the issue."). To the extent that *Dist. of Columbia Water & Sewer Auth.* is consistent with the other authorities cited, the Region notes the circumstances there differed from here: a significant permit condition changed as a result of a permitting authority's departure from a series of previous statements on the issue. *See id.* at 760-63.

determination analysis in its response to comments did present a "newly articulated rationale," *id.*, then other interested parties could petition the Board for review on the basis that the analysis constituted new grounds not reasonably foreseeable during the comment period. 40 C.F.R. § 71.11(l)(1); *see also In re Ash Grove Cement Co.*, 7 E.A.D. 387, 431 (EAB 1997) ("The purpose of the response to comments and any supplementation of the administrative record at that time is to ensure that *interested parties* have full notice of the basis for final permit decisions and can address any concerns regarding the final permit in an appeal to the Board.") (emphasis added). Thus, even accepting WEG's premise, other parties have not lost any opportunity to address concerns with the Region's source determination analysis. On the other hand, if, as the Region contends, the source determination analysis was not novel, *supra* at 28, then there is simply no argument that the public comment period should be reopened.

Finally, WEG states that "the overlying intent of reopening under 71.11(h)(5) is to ensure that interested parties have opportunity to comment on substantial new questions." Pet. at 10. WEG misconceives the purposes of Part 71 procedures. The Act requires that a title V permitting program provide "adequate, *streamlined*, and reasonable procedures," both for "public notice, including an opportunity for public comment and a hearing," and for "*expeditious* review of permit applications." CAA § 502(b)(6), 42 U.S.C. § 7661a(b)(6) (emphasis added). Section 71.11(h)(5) strikes a balance between opportunity for comment and expeditious review by allowing—but not requiring—the permitting authority to reopen the public comment period when there appears to be a substantial new question. *See also* 40 C.F.R. § 71.11(h)(1) (permitting authority may reopen the public comment period when it "could expedite the decision making process"). This balance between two competing interests is confirmed by the factors the Board has suggested (in the Part 124 context) for a Region's decision. *See supra* at

40-43. For example, as to the second factor, when information has been added to the record in response to a petitioner's comment, that petitioner has already had one opportunity to comment on the issue and has additional opportunity to address the issue through the review process. The balance then favors expeditious review and disfavors reopening. WEG is therefore in error in stating that the purpose of 71.11(h)(5) is to "ensure" opportunity for public comment.

Here, reopening the comment period would serve no cognizable purpose. Despite WEG's protest that this is "no abstract dispute over proper procedure," Pet. at 15, WEG fails to identify any specific information it would submit if the comment period were reopened. *See Prairie State Generating*, 13 E.A.D. at 50.[33] Instead, WEG expresses only an abstract, generalized interest in public comment. *See* Pet. at 15. Furthermore, despite WEG's opportunity in this Petition to dispute the factual information submitted by BP, WEG has not done so. *See generally* Pet. Instead WEG disputes the Region's application of the well-established three-factor source determination analysis, an application consistent with prior Agency statements, including the Administrator's *Anadarko* order. *See supra* at 31-36. Therefore, reopening the public comment period would serve no purpose. Instead, the purposes of Part 71 would best be served by denying WEG's Petition.

When considered in light of the factors the Board has suggested, and the substantial deference due to the Region, the circumstances here show that the Region did *not* abuse its discretion in declining to reopen the comment period. The Region's work with BP was proper and within the limits contemplated by Part 71, and WEG has sufficient opportunity to contest the

[33] "Petitioners have not identified on appeal any information that they would submit into the record, if it were reopened, to establish grounds for changing the Permit's terms. Instead, Petitioners simply imply that reopening the record might produce some speculative body of evidence. This is simply not a sufficient basis for introducing further delay in issuing the Permit at this late stage in the administrative decisionmaking process." *Id.*

Region's source determination in this Petition. Accordingly, WEG's Petition to reopen the public comment period should be denied.

VI. CONCLUSION

The Petitioner failed to demonstrate that EPA Region 8 committed clear error and has failed to raise any important policy considerations on any of the grounds raised in the Petition for Review. Petitioner also failed to show that Region 8 abused its discretion in deciding not to reopen the public comment period. Accordingly, for the foregoing reasons, EPA respectfully requests the EAB to deny the Petition for Review and uphold the BP Florida River Permit in its entirety.

Dated this 23rd day of February, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I sent via overnight mail a copy of the **EPA REGION 8'S RESPONSE TO PETITION FOR REVIEW** for the **BP AMERICA PRODUCTION COMPANY'S FLORIDA RIVER COMPRESSION FACILITY; APPEAL NO. CAA 10-04** filed by electronic mail (CDX) upon the Clerk of the Board, Environmental Appeals Board on February 23, 2011.

I also served copies of this document via domestic receipt requested and electronically to the following:

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