

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

In re:)	
)	
BP America Production Company,)	
Florida River Compression Facility)	Appeal No. CAA 1-04
)	
Permit No. V-SU-022-05.00)	
)	

**MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN OPPOSITION TO THE
PETITION FOR REVIEW**

Pursuant to 40 C.F.R. § 124.19(c), the American Petroleum Institute (“API”) respectfully moves this Board for leave to file the attached *amicus curiae* brief in opposition to the Petition for Review. The brief is limited to discrete issues relating to EPA’s interpretation of a “stationary source” under its regulations which are of significance to API’s members.

API is a national trade association representing all aspects of America’s oil and natural gas industry. API is comprised of nearly 400 members, ranging from the largest oil conglomerates to the smallest independent oil companies. These members include oil and natural gas producers, oil refiners, pipeline operators and marine transporters as well as service and supply companies that support all segments of the oil and gas industry. API speaks on behalf of its members to the public, Congress, the Executive Branch, state governments and the media and represents their interests in legal proceedings. Many of its member companies are regulated under the Clean Air Act and require, or may in the future require Title V permits governing air emissions from their operations. API has long been active in the regulation of the oil and gas industry. For example, it established the “API number,” a unique 14-digit numeric identifier for oil and gas wells recognized by all federal, state and tribal regulators.

ARGUMENT

API hereby moves for leave to file the attached *amicus curiae* brief in opposition to the petition for review to further the interests of their members in the lawful interpretation of EPA regulations promulgated pursuant to the Clean Air Act. API believes that this motion is timely filed despite the absence of a deadline for interested parties to participate as *amici*. Appeals of Title V permits are governed by 40 C.F.R. Part 71. Generally, the Board “set[s] forth a briefing schedule for the appeal and shall state that any interested person may file an amicus brief.” 40 C.F.R. § 71.11(1)(3). In this case the Board did not set a date for *amici* to file briefs in its scheduling order. API is thus moving in good faith to participate in these proceedings before they have advanced so far along as to inconvenience the Board or the other parties.

Petitioner WildEarth Guardians (“Petitioner”) raises several arguments regarding the proper interpretation of “major source” and “stationary source” under EPA’s regulations. API’s members have a significant interest in how EPA interprets the regulations at issue in this matter. Although API is moving to file an *amicus curiae* brief in opposition to the petition for review, the arguments and interests forwarded by API may differ significantly from the arguments and interests of EPA Region VIII.

API and its members have a clear, direct and immediate interest in this litigation. API has members with stationary sources similar to BP America Production Company’s Florida River Compression Facility. These members’ facilities are subject to, or potentially subject to the Clean Air Act’s Title V and Prevention of Significant Deterioration (“PSD”) provisions. In this case, Petitioner urges this Board to adopt an interpretation of “major source” and “stationary source” in ways that could significantly expand the number and type of sources subject to PSD

and Title V. If Petitioner prevails in its petition for review, API's members would be subject to increased regulatory and financial burdens.

Should Petitioner prevail before this Board, the resulting opinion could be cited by permitting agencies throughout the country in source determinations requiring API's members with similar operations to aggregate well field emission points and obtain a Title V permit. API's members could also face potential enforcement actions for operating without a Title V permit because their emission points were not aggregated in the manner that Petitioner advocates here. Such an event could expose API's members to civil penalties up to \$37,500 per day. 40 C.F.R. § 19.4 (Table 1).

The interests of API's members are magnified by EPA's inconsistent interpretation of regulations defining "stationary source." Although EPA Region VIII determined that the Florida River Compression Facility did not have to be aggregated with other emission points in the well field, an EPA Region V source determination came to the opposite conclusion when interpreting these same regulations under similar circumstances. *See* Pet. Exh. 10, Letter from Cheryl L. Newton, EPA Region V, Dir., Air & Radiation Div. to Scott Huber, Summit Petroleum Corp. (Oct. 18, 2010) (requiring gas sweetening plant to be aggregated with flares and gas wells located throughout the well field). Summit Petroleum Corporation petitioned for a review of EPA's source determination and API has moved to intervene in that matter in order to protect its members' interests. *See* API Exh. A.

API's members have an interest in legal clarity and consistency in EPA's interpretation of its regulations. Where EPA inconsistently interprets, and inconsistently applies, its regulations under similar circumstances, API's members face uncertainty in the investment decisions and in predicting their exposure to potential liability. API's members must know what

the law is *before* they act. Therefore, API has a substantial interest in making sure that EPA's interpretation of its regulations are not just correct, but consistently applied. Otherwise, API's members will be subject to arbitrary decision-making by EPA.

API has significant experience representing its members and it could substantially aid the Board in resolving the issues raised by Petitioner regarding EPA's interpretation of "major source" and "stationary source" under its regulations. Specifically, API will demonstrate that Petitioner's interpretation is precluded by the text and regulatory history of EPA's regulations, as well as this Board's own precedent, is impractical when applied to oil and natural gas facilities throughout the country and will result in little, if any, environmental benefit.

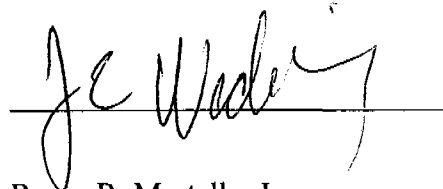
API requests that its brief be considered at the same time the Board considers the parties' briefs on the merits. The Board has not yet scheduled a time for Petitioner to file a reply brief in support of its petition; nor has the Board scheduled oral argument on the merits of the Petition. Thus, any prejudice to the Petitioner from the granting of this motion is obviated by the fact that it will have ample time to respond to API's arguments during future briefing or oral argument. Denial of this motion for leave, however, will preclude any possibility for API to represent the views of its members and to aid the Board in its consideration of the Petition.

CONCLUSION

For the foregoing reasons, API requests that the Board grant this motion and direct the clerk to file the enclosed *amicus curiae* brief.

Respectfully submitted,

February 24, 2011

A handwritten signature in black ink, appearing to read "J.R. Wedeking", is written over a horizontal line.

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BRIEF OF AMICUS CURIAE THE AMERICAN PETROLEUM INSTITUTE IN
OPPOSITION TO THE PETITION FOR REVIEW

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INTRODUCTION AND SUMMARY

Petitioner asks this Board to sanction an interpretation of “major source” and “stationary source” that defies the language of EPA’s governing regulations and the regulatory history while creating a significant expansion of Clean Air Act regulation that is neither necessary nor administratively practicable. According to Petitioner, EPA Region VIII must utilize an “interrelatedness” test that would deem a processing facility, such as the Florida River Compression Facility, to be “contiguous or adjacent” to over 1,000 separate emission points spread throughout an entire county and located as far away as 18 miles. This Board must reject the petition for review for at least two reasons.

First, neither EPA regulations defining “major source” and “stationary source,” nor official EPA guidance interpreting those regulations, makes mention of “interrelatedness” as a factor in delineating what facilities are aggregated into a single “major source” or “stationary source.” In fact, EPA explicitly rejected the use of an “interrelatedness” test when it promulgated its regulations, and the use of any such test contradicts the plain meaning of those regulations.

Second, because the test is not based in the law, it results in the conduct of extensive fact-based inquiries with inconsistent and conflicting outcomes. Such a test requires an extraordinarily burdensome effort by permit applicants and permitting agencies that EPA originally found to be inappropriate for aggregation decisions, would fail to yield an objectively accurate understanding of well field connections, and would be unworkable in practice. Given their complexity, the “interrelatedness” test is particularly ill-suited for natural gas well fields, potentially resulting in absurd results where sources are aggregated across permitting jurisdictions or air quality management districts.

BACKGROUND

BP America Production Company (“BP”) owns and operates the Florida River Compression Facility (“Florida River”). Pet. Exh. 2 at 1. Florida River operates in the Northern San Juan Basin gas field within the Southern Ute Indian Reservation, La Plata County, Colorado. Pet. Exh. 2 at 1; Pet. Exh. 3 at 4. Originally constructed in 1987, Florida River operated as a minor source until BP obtained both the Florida River compression facility and a nearby compressor station. Pet. Exh. 2 at 2-3. EPA Region VIII asserted jurisdiction over the two units because of their location within the Southern Ute Indian Reservation, treated them as a single major source for purposes of Title V, and issued a Part 71 operating permit on June 5, 2001. *Id.* at 3. BP filed an application to renew the Florida River Part 71 permit in December 2005. *Id.*

Petitioner WildEarth Guardians¹ submitted comments in response to the draft renewal permit arguing that EPA Region VIII should have aggregated “adjacent and interrelated pollutant emitting activities.” Pet. Exh. 8 at 2-7. Specifically, Petitioner asserted that Florida River should be aggregated with the Wolf Point Compression Station (“Wolf Point”), also owned by BP, and over 1,000 BP owned or operated coalbed methane gas wells within La Plata County. *Id.* at 3. In order to respond to Petitioner’s comments, the Region analyzed a map of BP’s well sites in the Northern San Juan Basin, a description of how gas moves from the wells through pipelines to central delivery points and how BP interacts with third-parties within the Northern San Juan Basin to produce and process gas. Pet. Exh. 3 at 6, 11.

EPA Region VIII’s technical analysis concluded that Florida River, Wolf Point and the Northern San Juan Basin gas wells are all separate sources. *Id.* Among the facts supporting this determination were the disparate locations of the emission points at issue. BP-operated gas wells

¹ Rocky Mountain Clean Air Action filed comments on the draft renewal permit. Pet. Exh. 3 at 4, n.1. This group subsequently merged with WildEarth Guardians. *Id.*

are scattered throughout the 600 square mile Northern San Juan Basin. *Id.* at 7, 12. Some of these gas wells lie up to 18 miles away from Florida River. *Id.* at 7. Wolf Point is 4½ miles away from Florida River. *Id.* Due, in part, to these distances, EPA Region VIII concluded that the gas wells are neither contiguous nor adjacent to Florida River. *Id.* at 9.

The Region also rejected the Petitioner's arguments that Florida River, Wolf Point and the gas wells are adjacent to each other "based on their interrelatedness," and it is this "interrelatedness" discussion that consumed the majority of EPA Region VIII's analysis. *Id.* The Northern San Juan Basin gas flow "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" *Id.* at 11. Once BP's gas enters the system, it commingles in the gathering lines with gas owned by other companies and flows to various compressor stations. *Id.* at 13. "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." *Id.* at 11. The various companies operating in the gas field have agreements to accept, compress and treat gas from each other. *Id.* at 11-12.

According to EPA Region VIII, the Petitioner made "general statements about the interrelatedness of the various BP emission units" but did "not identify anything in the record showing that the co-location in [the] same field affects the degree to which the various emission points may be dependent on each other." *Id.* at 12. Nor could EPA Region VIII presume that co-location of wells and emission points in the same well field established a relationship. Their placement was influenced by "optimal geology, engineering, topography, access, power, and

surface owner compatibility” as well as federal, state and local laws and a memorandum of understanding between BP and La Plata County. *Id.* at 12-13.

After an extensive review of prior EPA source determinations, the Region found the relationship between BP’s compressor stations and gas wells lacked “interdependent relationship[s].” *Id.* at 9. Because the BP wells can supply gas to pipelines and compressors owned by third-parties, and because the Florida River and Wolf Point compressors can receive gas from non-BP wells, there is no “unique or dedicated interdependent relationship” justifying aggregation. *Id.* at 9, 11. This “lack of a uniquely integrated operation between the various emission points in the field” distinguished the Northern San Juan Basin well field from other situations where EPA aggregated multiple emission points. *Id.* at 11. In summary, after a detailed technical review of the well field’s operation, EPA Region VIII rejected Petitioner’s theory that Florida River, Wolf Point and the BP gas wells were “interrelated” as “inconsistent with EPA’s past statements interpreting the ‘contiguous and adjacent’ part of the source definition.” *Id.* at 9.

STANDARD OF REVIEW

This Board will only grant petitions for review if they raise “a clearly erroneous finding of fact or conclusion of law,” or where petitions raise “an important policy consideration which the Board, in its discretion, should review.” *In re Peabody Western Coal Co.*, 12 E.A.D. 22, 32 (E.A.B. 2005) (citing 40 C.F.R. § 71.11(l)(1)). The burden of demonstrating that a federal operating permit contains such clear errors of fact or law falls on the petitioner. *Id.* at 33. Where a petition raises “issues that are technical in nature,” the petitioner “bears a heavy burden because the Board generally defers to the Region on questions of technical judgment.” *In re Carlota Copper Co.*, 11 E.A.D. 692, 708 (E.A.B. 2004); *see also In re Envotech, L.P.*, 6 E.A.D.

260, 284 (E.A.B. 1996) (“absent compelling circumstances, the Board will defer to a Region’s determination of issues that depend heavily upon the Region’s technical expertise and experience”). In meeting this burden, the petitioner may not simply re-state to the Board its prior comments on the permit, but must affirmatively confront the permitting authority’s responses to those comments. *In re City of Irving, Texas Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 111, 129-130 (E.A.B. 2001). Where the petitioner’s arguments merely raise “a difference of opinion or an alternative theory regarding a technical matter” on issues “the Region duly considered,” then this Board will defer to the Region so long as its approach “is rational in light of all of the information in the record.” *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567-568 (E.A.B. 1998).

ARGUMENT

I. AN “INTERRELATEDNESS” TEST CONTRADICTS EPA REGULATIONS DEFINING A “STATIONARY SOURCE”

A. Definition of a “Stationary Source” Under the Act

PSD regulations define a “stationary source” as “any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.” 40 C.F.R. § 52.21(b)(5). The PSD regulations then define the term “[b]uilding, structure, facility, or installation” as “all of the pollutant-emitting activities” that meet all three of the following criteria: (1) they “belong to the same industrial grouping;” (2) they “are located on one or more contiguous or adjacent properties;” and (3) they “are under the control of the same person (or persons under common control).” 40 C.F.R. § 52.21(b)(6). In publishing these criteria, EPA stated that their application should “approximate a common sense notion of ‘plant’” and avoid “group[ing] activities that ordinarily would be considered separate.” 45 Fed. Reg. 52,676, 52,695 (Aug. 7, 1980).

This “stationary source” definition arose from the D.C. Circuit’s decision in *Alabama Power v. Costle*, 636 F.2d 323 (D.C. Cir 1979). In *Alabama Power*, the court struck down the Agency’s prior regulatory definition of a PSD “source,” 45 Fed. Reg. at 52,693, stating that “EPA should devise regulatory definitions of the terms ‘structure,’ ‘building,’ ‘facility,’ and ‘installation’ to provide for the aggregation, where appropriate, of industrial activities according to considerations such as *proximity* and *ownership*.” 636 F.2d at 397 (emphases added); *see also* 45 Fed. Reg. 52,693 (EPA acknowledged that “[t]he court held that the approach... of grouping pollutant-emitting activities solely on the basis of proximity and control is generally acceptable.”).

During the rulemaking in response to the *Alabama Power* decision, EPA “asked for comment on whether factors other than proximity and control, such as the functional relationship of one activity to another, should be used.” *Id.* at 52,694. After reviewing the comments, EPA determined that, in addition to considerations of proximity (“contiguous or adjacent properties”) and ownership (“under the control of the same person”), EPA would require that all pollutant emitting activities be of the same industrial grouping before they could be aggregated. *Id.* To implement this “industrial grouping” prong of the “stationary source” test, EPA’s regulations require the permit agency to determine whether the operations fall within the first 2-digit Standard Industrial Classification (“SIC”) code as described in the SIC Code Manual for 1972, as amended. *See, e.g.*, 40 C.F.R. § 52.21(b)(6).

In adopting this SIC Code industrial grouping prong, EPA explicitly rejected a consideration of “functional interrelationships” as it “would be highly subjective,” and would “have made administration of the definition substantially more difficult, since any attempt to assess those interrelationships would have embroiled the Agency in numerous, fine-grained

analyses.” *Id.* at 52,695. Additionally, EPA determined that looking to the “function” of other pollutant-emitting activities would “severely strain the boundaries of even the most elastic of the four terms, ‘building,’ ‘structure,’ ‘facility,’ and ‘installation.’” *Id.*; see also *Alabama Power*, 636 F.2d at 397 (“EPA cannot treat contiguous and commonly owned units as a single source unless they fit within the four permissible statutory terms ... ‘structure,’ ‘building,’ ‘facility,’ and ‘installation’....”). Thus, in making a source determination, EPA’s analysis is confined to the three criteria listed in the regulations – industrial grouping, location on contiguous or adjacent properties and common control – and compliance with the definition of a “structure, building, facility and installation.” Not only is “interrelatedness” absent from the regulations, EPA expressly rejected such a test and excluded it from the regulatory definition of “structure, building, facility and installation.”

This background on the PSD definition of “major source” is critical to understanding the Title V issues in this case because the Title V definition of “major source” was added to the Clean Air Act with the 1990 Amendments and is the same as the PSD definition. See 42 U.S.C. § 7476; 40 C.F.R. § 70.2. Title V applies to any “major source,” defined as a “stationary source.” 40 C.F.R. § 70.2. The Title V definition of “major source” repeats the three criteria from the PSD rules. *Id.*

B. Evolution of the “Interrelatedness” Consideration

Around the time that EPA promulgated its regulatory definition of “stationary source,” EPA issued two source determinations interpreting the “contiguous or adjacent” criterion of the regulations. In the first source determination, EPA found that two sections of a single Shell Oil refinery, located 1.8 miles apart, joined by twenty pipelines and managed as a single unit were “contiguous or adjacent” for PSD permitting purposes. Letter from Edward E. Reich, EPA to

Clyde Eller, EPA Region IX (May 16, 1980), *available at* <http://www.epa.gov/region7/air/nsr/nsrmemos/shell.pdf>. Notably, Shell Oil owned, leased or had rights-of-way in the land between the sections. *Id.* In the second source determination, EPA found that two sections of a General Motors plant, 4,500 feet apart and connected by a railroad spur and a covered conveyor belt, were also “contiguous or adjacent” for PSD permitting purposes. Exh. 12 to Pet. Exh. 8, Memorandum from Edward E. Reich, EPA to Steve Rothblatt, EPA Region V (June 30, 1981). Both of these source determinations involved operations of a single owner, falling under the same industrial classification, and within close proximities. In other words, one may conclude that they satisfied each of the three prongs of the “stationary source” definition including the requirement that the operations be on “contiguous or adjacent” properties as those words are commonly understood.

During the 1990s, however, other source determinations began to evolve, straying from the statute, the regulations, and official EPA guidance documents listing the three factors of the stationary source test and advancing a new “interrelatedness” factor that EPA at times has selectively used to dramatically strain the terms “contiguous or adjacent.” For example, EPA Region VIII determined that a minerals processing facility was “contiguous or adjacent” to a pump station 20 miles away and separated by the Great Salt Lake due to their supposed “interrelatedness.” Exh. 9 to Pet. Exh. 8, Letter from Richard Long, EPA Region VIII to Lynn R. Menlove, Utah Dept. of Env’tl. Quality (Aug. 8, 1997).² Other source determinations that

² Although EPA published this determination on its website and cited it in other source determinations, this determination was explicitly rejected by the permitting authority for the minerals processing facility, the Utah Department of Environmental Quality, as inconsistent with the regulatory definitions of “stationary source” and “[b]uilding, structure, installation and facility.” See Exh. 1, Letter from Reginald D. Olsen, Utah Dep’t of Air Quality, Permitting Branch Manager, to Jim M. Wolfe, P.E., IMC Global, Inc., Sr. Env’tl Engineer (Feb. 14, 2001).

unjustifiably stretch the definition of “stationary source” using an *ad hoc* “interrelatedness” consideration include decisions to aggregate (1) a soda processing plant with a mine 44 miles away,³ (2) a brewery with a farm six miles away,⁴ (3) a steel mill with a coke plant 3.7 miles away, which was separated by Lake Calumet, a landfill and the Little Calumet River,⁵ and (4) a wood recycling center with a boiler three miles away because the recycling center shipped biomass fuel to the boiler by truck over public roads.⁶

Each of these determinations purported to rely on some physical connection or business relationship to find them to be “interrelated” despite the significant distances between them and intervening properties owned by third parties. Over time, the “interrelatedness” factor has utterly eclipsed the regulatory definition of “stationary source” and became a prime consideration in determining whether certain properties are “contiguous and adjacent.” In the practical application of the three prong source test, as opposed to in its official guidance, EPA essentially and illegally has rejected proximity as any serious consideration in source determinations. *See, e.g.,* Pet. Exh. 12, Letter from Winston A. Smith, EPA Region IV to Randy C. Poole, Mecklenburg County of Env’tl Prot. (May 19, 1999) at 6 (“In most of the EPA documents we

Even EPA has backed away from this determination because of the practical, unforeseen consequences. *See infra* for further discussion.

³ Exh. 11 to Pet. Exh. 8, Letter from Richard Long, EPA Region VIII to Dennis Myers, Colorado Air Pollution Control Div. (Apr. 20, 1999).

⁴ Exh. 14 to Pet. Exh. 8, Memorandum from Robert G. Kellam, EPA to Richard R. Long, EPA Region VIII (Aug. 27, 1996).

⁵ Letter from Cheryl L. Newton, EPA Region V to Donald Sutton, Illinois EPA (Mar. 13, 1998), available at <http://www.epa.gov/region7/air/nsr/nsrmemos/acme.pdf>.

⁶ Letter from Pamela Blakley, EPA Region 5 to Don Smith, Minn. Pollution Control Agency (Mar. 23, 2010), available at <http://www.epa.gov/region7/air/nsr/nsrmemos/single.pdf>.

reviewed, the key factor in deciding that separate facilities should be considered as one source was that the facilities were interdependent or linked in some sense.”); Exh. 9 to Pet. Exh. 8 at 1-2 (“Distance between the operations is not nearly as important in determining if the operations are part of the same source as the possible support that one operation provides for another.”). Thus, in practice, EPA has effectively substituted the “interrelatedness” test for the actual regulatory criterion requiring two or more pollutant-emitting activities to be on “contiguous or adjacent properties.”

C. The “Interrelatedness” Test Directly Conflicts With EPA Regulations, Guidance and This Board’s Precedent

In this matter, Petitioner cites the source determinations discussed above, and others like them, to advocate for an “interrelatedness” test that would aggregate Florida River with Wolf Point and coal bed methane gas wells located miles away. Pet. at 20-21. Petitioner’s view of the “interrelatedness” test is boundless and would exceed even the EPA’s flawed use of it. While Petitioner and EPA reach different conclusions on aggregation in this case, they both use the wrong legal standard. Consideration of whether two pollutant-emitting activities are “interrelated” has no place in permitting decisions under the Act because it conflicts with the plain language of EPA regulations and EPA’s guidance on the subject.

1. “Contiguous and Adjacent” Denotes Proximity Not “Interrelatedness”

As stated above, EPA Region VIII, although reaching the correct outcome in this matter, did so for the wrong reasons. It determined that the “lack of a uniquely integrated operation between the various emission points in the Northern San Juan Basin field” equated to “a lack of ‘adjacency’” Pet. Exh. 3 at 11. Per this Board’s precedent, the terms “contiguous” and “adjacent” connote objects in close proximity to one another. *See In re Shell Offshore, Inc.*,

Kulluk Drilling Unit and Frontier Discoverer Drilling Unit, 13 E.A.D. 357, 385 (EAB 2007) (“The phrase ‘contiguous or adjacent properties’ must be understood as connoting a more substantial connectedness, proximity, or continuity that would correspond to a common understanding of a building, structure, facility, installation, or plant.”). Yet, the “interrelatedness” test utilized by EPA Region VIII excludes proximity from the aggregation analysis.

As indicated above, both the PSD and Title V definitions of “stationary source” require emission points to be “located on one or more contiguous or adjacent properties....” among other factors. 40 C.F.R. §§ 52.21(b)(6), 70.2. The dictionary defines “contiguous” as “1. in physical contact; touching along all or most of one side. 2. near, next, or adjacent.” Webster’s New World Dictionary of the American Language (2d. Ed. 1984) 307. It defines “adjacent” to mean “near or close (*to* something); adjoining.” *Id.* at 17. Here, Wolf Point is 4½ miles from Florida River. Pet. Exh. 7 at 13. The coalbed methane wells at issue are up to 18 miles away. *Id.* at 17-18. Neither Wolf Point nor BP’s gas wells are “contiguous or adjacent” to Florida River in any plausible way.

2. The Regulatory History Interpreted “Contiguous and Adjacent” as Proximity

Even when looking past the plain language of the definition, the regulatory history makes it clear that an analysis of “contiguous or adjacent” pollutant-emitting activities is a matter of proximity, not “interrelatedness.” Aside from rejecting any consideration of “functional interrelationships,” EPA “confirm[ed] that it d[id] not intend ‘source’ to encompass activities that would be many miles apart along a long-line operation.” 45 Fed. Reg. 52,695. Pipeline compressor stations are spaced along pipelines that can stretch through a number of states. Under an extreme view, these facilities could be seen in some limited context as “interrelated.” Similarly, electric power generating sources connected to the electrical grid and owned by the

same company could be considered “interrelated” in some respects. Yet, aggregating such separate sources is also clearly absurd and utterly defeats the definition of stationary source set forth by EPA’s regulations and the Alabama Power decision. It is necessary to properly give effect to the “continuous or adjacent property” prong of the “stationary source” definition in a manner that prevents a potentially limitless expansion of the definition.

Although EPA declined “to say precisely . . . how far apart activities must be in order to be treated separately,” *id.*, this reservation of flexibility is not a license to ignore either the regulation’s plain language or the need to create a definition consistent with *Alabama Power*’s holding that aggregation was a matter of “proximity.” *Alabama Power*, 636 F.2d at 397. As the source determinations discussed above illustrate, the “interrelatedness” test runs afoul of the boundaries on the definition that EPA described in its 1980 rulemaking: (1) a “stationary source” “must approximate a common sense notion of ‘plant’;” and (2) “it must avoid aggregating pollutant-emitting activities that as a group would not fit within the ordinary meaning of ‘building,’ ‘structure,’ ‘facility,’ or ‘installation.’” *In re: Shell Offshore, Inc.*, 13 E.A.D. at 384 (quoting 45 Fed. Reg. at 52,694-95). Petitioner’s application of the “interrelatedness” test in this case would breach those “boundaries” and should be rejected.

3. EPA Guidance on Oil and Gas Aggregation Does Not Use “Interrelatedness”

The most recent EPA guidance document on aggregation also conflicts with Petitioner’s interpretation of “contiguous or adjacent properties.” Pet. Exh. 4, Memorandum from Gina McCarthy, EPA, Asst. Admin., to Regional Administrators, “Withdrawal of Source Determinations for Oil and Gas Industries” (Sept. 22, 2009) (the “McCarthy Memo”). Despite the source determinations cited by Petitioner, the McCarthy Memo does not mention the use of an “interrelatedness” test in determining whether pollutant-emitting activities are located on

“contiguous or adjacent properties.” Although the McCarthy Memo rejected EPA’s previous approach, which it described as relying too heavily on the single factor of proximity, it merely stated that source determinations must perform “a closer examination of all three criteria identified in those regulations....” *Id.* at 2. Even then, “in some cases, ‘proximity’ may serve as the overwhelming factor in a permitting authority’s source determination decision.” *Id.* The McCarthy Memo never endorsed the “interrelatedness” test that Petitioner seeks to apply here, but instead stays faithful to the *Alabama Power* decision holding that the question of whether two or more pollutant-emitting activities are “contiguous or adjacent” is a matter of proximity. This omission constitutes a meaningful rejection of Petitioner’s argument as EPA is clearly aware of its prior “interrelatedness” source determinations, aggregating facilities many miles apart, but declined to authorize such an approach in the McCarthy Memo.

4. The Board Owes No Deference to EPA’s “Interrelatedness” Test

Although EPA Region VIII came to the correct conclusion, that Wolf Point and BP’s gas wells were not “adjacent” to Florida River, it did so for the wrong reasons. The Region performed an “interrelatedness” analysis, *see* Pet. Exh. 3 at 5-14, instead of relying upon the text of the regulation defining “stationary source.” In other words, once the Region determined that Wolf Point and BP’s gas wells were located on properties “that are not actually touching” the Florida River property, *id.* at 10, its analysis should have stopped and resulted in a conclusion that they should not be aggregated. Instead, the Region continued into an extensive technical “interrelatedness” analysis of the entire Northern San Juan Basin well field. Although the Region concluded that BP’s compressor stations and wells were not “interrelated” in this instance, the fact-intensive, amorphous “interrelatedness” analysis provides no way to predict what EPA will determine in similar situations.

EPA's substitution of "interrelatedness" for proximity is impermissible even under judicial doctrines affording agencies deference when interpreting their own regulations. Since EPA is not purporting to interpret ambiguities in a statute it administers, *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) is not applicable here. Instead, courts apply a separate standard for when an agency interprets its own regulations. See *Auer v. Robbins*, 519 U.S. 452, 461 (1997). *Auer* deference has at least four limitations. First, the agency must be interpreting some ambiguity in the regulation. *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). Second, the interpretation may not be "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (internal quotations omitted). Third, agencies may not "under the guise of interpreting a regulation ... create a *de facto* ... new regulation." *Christensen*, 529 U.S. at 588. Fourth, where the agency's interpretation is not subject to the notice-and-comment rulemaking process, deference to the agency interpretation is substantially reduced, *Reno v. Koray*, 515 U.S. 50, 61 (1995), and is influential only in its ability to persuade. *Christensen*, 529 U.S. at 587. Under these guidelines, the Board should reject the "interrelatedness" test.

The "interrelatedness" test is not a permissible interpretation of the term "contiguous and adjacent" as the test leads to absurd results that aggregate sources that are neither "contiguous" or "adjacent" in any plausible way. EPA over time has effectively replaced the requirement that pollutant-emitting activities be located on "contiguous or adjacent properties" for a wholly new and unrelated test that examines whether "separate facilities ... were interdependent or linked in some sense." Pet. Exh. 12. As detailed above, this approach leads to results that are "plainly erroneous" and "inconsistent with the regulation." *Auer*, 519 U.S. at 461. A finding that facilities separated by several miles are a single source simply cannot be reconciled through any

reasonable definition of “contiguous” or “adjacent,” and therefore, the letters outlining the “interrelatedness” test lack any power to persuade.

In stark contrast to Petitioner’s and the Region’s application of the “interrelatedness” test in this matter, other state agencies with substantial natural gas production interpret “contiguous and adjacent” to only include facilities within one-quarter mile of the stationary source. *See* Oklahoma Department of Environmental Quality, Air Permitting Collocated Facilities, *available at* <http://www.deq.state.ok.us/factsheets/air/PermittingCollocated.pdf>; Louisiana Department of Environmental Quality, Interpretation of Contiguous for Oil and Gas Production Facilities, *available at* <http://www.deq.louisiana.gov/portal/tabid/2347/Default.aspx>. Although EPA is not bound to adopt state agency interpretations, it must construe “contiguous or adjacent” as proximity in order to avoid being “plainly erroneous” or “inconsistent with the regulation.” *Seminole Rock*, 325 U.S. at 414. It also is telling that these state agencies are interpreting the same definition of “stationary source” and have full access to EPA’s guidance and prior determinations.

EPA’s implementation of the “interrelatedness” test through a series of letters and internal memoranda has “create[d] a *de facto* ... new regulation.” *Christensen*, 529 U.S. at 588. As discussed above, the “interrelatedness” test conflicts with both the language of the regulation and EPA’s interpretation of it in the 1980 rulemaking’s preamble. In that sense, EPA, while not discussing “interrelatedness” in its official guidance such as the McCarthy Memo, seeks through applicability determinations to impermissibly replace its published interpretation of “contiguous or adjacent,” formulated through the notice-and-comment rulemaking process, with a contrary interpretation promulgated through informal opinion letters that were never subject to the Administrative Procedure Act. Therefore, the Board should reject the letters and memoranda

establishing the “interrelatedness” test as both less authoritative than the 1980 rulemaking preamble and as unpersuasive due to their contradictory nature. If EPA seeks to utilize an “interrelatedness” test in defining a “stationary source,” it must go through the notice and comment rulemaking procedures required by the Administrative Procedure Act.

5. The “Interrelatedness” Test Conflicts With This Board’s Own Interpretation of “Contiguous and Adjacent”

In a similar case, this Board rejected an expansive view of the “contiguous and adjacent” criterion in *In re Shell Offshore, Inc.*, 13 E.A.D. 357. There, the petitioners asserted that all activities by exploratory drill ships that take place within Shell Offshore’s Beaufort Sea lease block constituted a “single source.” This Board held that the vast distances between the pollutant-emitting activities mattered and that the lease block, which “span[ned] hundreds of miles” of ocean, was not a single “property” under EPA regulations. *Id.* at 384. “Applying the phrase ‘contiguous or adjacent properties’ as requiring aggregation of emissions producing activities spanning hundreds of miles interspersed with vast swaths of open water that is accessible to the public would distort the ordinary meaning of ‘building, structure, facility, or installation’....” *Id.*

Petitioner’s position that Florida River, Wolf Point and over 1,000 gas wells must be aggregated based on some ill-defined “interrelationship” between them, regardless of whether they are actually located on “contiguous or adjacent properties,” is simply untenable. Such an approach would not only violate the concept of a “common sense notion of a ‘plant,’” 45 Fed. Reg. at 52,695, but would also render the plain language of the regulation meaningless. It is uncontested that Wolf Point is 4½ miles away from Florida River and that travelling between the two compressor stations is a 20 minute drive over rough terrain. Pet. Exh. 7 at 13. It is also

uncontested that the gas wells at issue are scattered throughout La Plata's 1,692 square miles and are located up to 18 miles away from Florida River. *Id.* at 16-17. Petitioner relies on gathering lines connecting the various wells and compressors, but this Board already determined that such connections do not make widely interspersed emission sources "contiguous or adjacent." Citing to the 1980 preamble, this Board explained that "where the emission units are separated by many miles, a contiguous pipeline and rail line are not sufficient connections to be 'contiguous or adjacent properties' within the regulation's meaning, notwithstanding a real estate ownership or leasehold interest in the rail line or pipeline." 13 E.A.D. 385. In this instance, the only difference is that the emission units are separated by miles of land instead of ocean. Granting WildEarth Guardians' petition in this case would sanction an informal and subjective "interrelatedness" test that violates the regulation, was rejected explicitly through the notice-and-comment rulemaking process, conflicts with EPA guidance and defies this Board's prior holding in *In re Shell Offshore, Inc.* Petitioner's interpretation must be rejected.

II. AN ANALYSIS OF "INTERRELATEDNESS" IS ILL-SUITED FOR THE NATURAL GAS INDUSTRY

Even setting aside the problems with the interrelatedness test described above, the type of "interrelatedness" test proposed by Petitioner, and undertaken in prior EPA source determinations, is simply ill-suited for the natural gas industry due to the dynamic and complex relationships involved. Accurately undertaking such a review would be extremely burdensome on both permitting agencies and stationary source owners and operators and the resulting analysis will be both highly subjective and quickly outdated. The "interrelatedness" factors examined in EPA source determinations are factors that constantly change in the natural gas industry. Imposing such a requirement on natural gas well field source determinations would

require that stationary source owners frequently apply for permit amendments and would make the permit's terms virtually unenforceable.

A. Natural Gas Well Fields are Uniquely Complex Systems

A single natural gas well field often involves a complex network of pipelines, ancillary equipment, processing stations, ownership interests and contract services involving a multitude of companies. Exploration companies search for the location of natural gas and drill exploratory wells. EPA, Profile of the Oil and Gas Extraction Industry (Oct. 2000) at 15, *available at* <http://www.epa.gov/compliance/resources/publications/assistance/sectors/notebooks/oilgas.pdf> (last visited Feb. 21, 2011) (hereinafter "EPA Profile"). Once the exploration company discovers a commercially viable natural gas deposit, it may sell its interest to another company to take over natural gas production from the well. Related pollutant-emitting equipment, such as pumps, dehydrators, storage tanks, line heaters and tank batteries are constructed near the wells and may be shared by multiple wells, with multiple owners. API Exh. B, Colorado Dep't of Public Health & Env't, Response of Colorado Department of Public Health and Environment, Air Pollution Control Division, to Order Granting Petition for Objection to Permit (July 2010) at 16, 35.⁷ Once production begins, gas flows through a system of low pressure gathering pipelines to central delivery points, which process the natural gas to remove impurities such as water or

⁷ This extensive review by the Colorado Department of Public Health and the Environment regarding the technical and legal complications of aggregating a compressor station with natural gas wells was recently the subject of a petition by WildEarth Guardians' to the EPA Administrator to object to a State operating permit. The Administrator recently issued an order denying WildEarth Guardians' petition and credited the Colorado Department of Public Health and Environment's analysis of gas well fields. *See In the Matter of Anadarko Petroleum Corporation, Frederick Compressor Station*, Pet. No. VIII-2010-4, Order Denying Petition for Objection to Permit (Feb. 2, 2011) at 8-11, 18-20, *available at* http://www.epa.gov/region07/air/title5/petitiondb/petitions/anadarko_response2010.pdf (last visited Feb. 24, 2011).

hydrogen sulfide. EPA Profile at 31. Once processed, the gas must be compressed for delivery to the pipeline transmission system where it ships throughout the nation to local distribution companies. *See generally*, EIA, About U.S. Natural Gas Pipelines, *available at*, http://www.eia.doe.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/index.html.

Natural gas well fields are complex and dynamic systems involving multiple companies. Once production gas reaches the gathering lines, it is commingled with gas from other production wells. API Exh. B at 26. It is typically impossible to separate gas based on its origin or the company that produced it. *Id.* Once gas reaches the gathering lines, flow is based on the path of least resistance and several different processing or compressor stations may receive gas from production wells. *Id.* at 6-7. Some of the receiving processing and compressor stations may be owned by the same production companies; others are not. *Id.* at 25. Gas flow can change on a daily basis based on well maintenance and repair, well stimulation, the connection of new wells, maintenance at processing and compressor stations or pressure changes in individual wells and gathering lines. *Id.* at 26-27.

Mapping an individual well field's system is a daunting and somewhat subjective task. Since gas flow is not stable, an analysis of "interdependence" will often be unreliable or based on tenuous assumptions. Understanding ownership interests and service contracts for a particular well field is also a difficult undertaking. A single well can have multiple royalty owners, a separate surface owner and a separate mineral rights owner. *Id.* at 7-8. One production company may have the right to produce gas down to a certain depth with a second production company possessing the rights below that depth. *Id.* at 25. Several different exploration, production and gathering companies may be operating in the same well field, often requiring joint operating agreements between the multitude of rights owners and service

providers to coordinate the production, gathering and treatment of gas. *Id.* at 7. Further complicating matters, ownership, leaseholds and service contracts can change frequently as gas fields mature. *Id.* at 8. Thus, understanding how a gas field works – where gas goes and who is in charge of the various segments – is burdensome, difficult and requires nearly constant readjustment to ensure accuracy.

The record here shows that the Northern San Juan Basin gas field involves many of these complications. Surface and mineral estates “are highly fractured and owned by a mix of entities, including the Southern Utes, many federal agencies, State and local governments, and private parties....” Pet. Exh. 7 at 7, Exhs. G, H. “BP has over 60 surface use agreements, pipeline agreements and rights-of-way near Florida River....” *Id.* at 8, Exh. I. The Northern San Juan Basin gas flow “is a dynamic process” with several different companies handling gathering and compression. *Id.* at 11. Over one-third of the gas from BP’s own production wells flow to third-party compressor stations and Florida River accepts gas from wells owned by still other companies pursuant to agreements with Red Cedar Gathering Company and Williams Four Corners LLC. *Id.* at 11-12. Gas also flows between compressors owned by different companies. *Id.* at 21 (“Wolf Point gas can flow back and forth with Red Cedar’s Bondad station, and Wolf Point gas can flow to Red Cedar’s Outlaw station. Wolf Point is also interconnected with the Williams facility.”). As with most fields, gas flow is dependant on “gas pressure at any particular time” and that flow will change with the development of new wells, the decline of old wells or if an old well is re-completed. *Id.* at 12. The varied interests, intricate relationships and changing gas flow in the Northern San Juan Basin, and in other gas fields, should not be underestimated.

B. Aggregation is Inappropriate for Gas Well Fields

**1. EPA's Rulemaking Sought to Avoid the Extensive Burdens Required by an
"Interrelatedness" Analysis**

The wide array and ever-changing assortment of interests, owners, operators and gas flow, in both this case and many gas fields throughout the nation, make the Petitioner's approach to aggregation through an "interrelatedness" test inappropriate for several reasons. First, in performing an aggregation analysis, permitting authorities would need their own engineers to review large and complex well systems and gas flow permutations from various connections to processing facilities, including intermittent connections that do not consistently flow to a particular facility. Attorneys for the permitting agency would be required to analyze exploration, production, gathering and royalty contracts, as well as the surface and mineral right ownership interests to determine how the gas is owned, controlled and generally "interrelated."

In its 1980 preamble to the final rulemaking, EPA explicitly disclaimed the need to undertake such a detailed aggregation analysis, finding that attempts "to assess those interrelationships would have embroiled the Agency in numerous, fine-grained analyses." 45 Fed. Reg. at 52,695. As with this case, such an "interrelatedness" analysis could not be accomplished with a single submission but would often entail multiple submissions and meetings with permitting agency personnel, not to mention supplemental submissions to correct for the ever-changing ownership and operational dynamic of gas fields. The record in this case includes extensive correspondence and meetings between the parties in an attempt to understand the ownership interests and gas flow in the Northern San Juan Basin. Pet. Exhs. 5, 6, 7; *see also* Pet. Exh. 10 (EPA Region V's analysis of the well field in which Summit Petroleum operates required two separate source determinations and extensive correspondence spanning nearly five years). Analyzing the "interrelatedness" of hundreds, if not thousands of wells, pipeline

segments and processing facilities in every well field throughout America would severely burden both the permitting agencies and the permit applicants, and such an exercise was never intended by the rules, as EPA explained in the 1980 preamble.

Requiring permit applicants and permitting agencies to analyze the flow of every well owned or operated by the applicant, as well as the gathering system's interaction with other wells not owned or operated by the applicant, is unworkable in practice. There are two main problems that would likely result from the types of reviews Petitioner would require. First, it would impose an enormous administrative burden on applicants and permitting agencies. In 2009, there were 493,100 producing gas wells in the United States with 27,021 wells in Colorado alone. EIA, Number of Producing Gas Wells, *available at* http://www.eia.gov/dnav/ng/ng_prod_wells_sl_a.htm. This burden would not be evenly spread throughout the country as Energy Information Administration statistics show that the bulk of these complicated "interrelatedness" well field analyses would fall on just a handful of States. *See* EIA, Natural Gas Gross Withdrawals and Production, *available at* http://tonto.eia.doe.gov/dnav/ng/ng_prod_sum_a_EPG0_FPD_mmcf_a.htm (identifying the Gulf of Mexico, Texas, Wyoming, Oklahoma, Louisiana, Colorado and New Mexico as the top producing areas for natural gas); EIA, Where Our Natural Gas Comes From – Basics, *available at* http://www.eia.doe.gov/energyexplained/index.cfm?page=natural_gas_where (68% of domestic natural gas production is based in four states and the Gulf of Mexico). Permitting agencies in these states would either have to dramatically increase their staffs or cope with lengthy delays in processing source determinations, permit applications and permit renewals.

Second, these "interrelatedness" analyses would be inherently subjective and deprive stationary source owners and operators of the type of predictability that EPA desired when it

promulgated the regulations and that the D.C. Circuit required of the Agency. *See* Fed. Reg. at 52,695 (“To have merely added function to the proposed definition as another abstract factor would have reduced the predictability of aggregating activities under that definition dramatically, since any assessment of functional interrelationships would be highly subjective.”); *see also Alabama Power*, 636 F.2d at 397 (EPA’s definition of “stationary source” “should also provide explicit notice as to whether (and on what statutory authority) EPA construes the term source” including “long-line operations such as pipelines, railroads, and transmission lines.”). Given that aggregation decisions are “case-by-case” and “highly fact-specific decisions,” Pet. Exh. 4 at 2, no owner or operator of a processing facility would have a clear understanding of their permitting requirements until they submit to the burdensome “interrelatedness” process and await the permitting agency’s decision. Under the Petitioner’s approach, stationary source owners and operators would experience a marked decrease in the certainty desired by EPA, with a substantial increase in paperwork and permit appeals.

Lastly, the complexity and dynamism of gas well fields would result in permits that become quickly outdated, must be constantly amended and would be difficult to enforce. As noted above, ownership interests, leaseholds, service contracts and gas flow can change frequently. *See* Pet. Exh. 7 at 19 (“Wells which flow to Florida River or other plants in the area are routinely bought and sold....”); API Exh. B at 30 (“the changing conditions and participants in oil and gas field production and distribution, including changes in ownership, contracts, gas production and engineering, would cause the Division’s permitting process to be in a constant state of flux and uncertainty.”). If supposedly “interrelated” gas wells were aggregated with a processing facility, each of these changes could require a permit amendment to either include or exclude wells and their associated equipment. These amendments would only increase already

elevated levels of burden and uncertainty. The Colorado Department of Public Health and Environment concluded that, by the time a company receives its permit for aggregated compressors and production wells, the owners, engineering and production conditions would be different than when it submitted its permit application. *Id.*

In many cases, stationary source owners may not be able to identify the necessary additions or subtractions of gas wells from their permits. The stationary source owner may not be able to track the ownership, lease or contractual changes due to a lack of actual control over aggregated wells, the frequency of these changes and their private nature. In theory, every failure to detect when a well goes off-line or a change in gathering system pressure (which could re-route additional production gas from a non-aggregated well and its associated emitting equipment to a compressor station) could arguably be viewed as a permit violation. Independent enforcement of these aggregation decisions would present the same difficulties, as permitting agencies would also have to track the multitude of changes inherent in a gas field production.

2. Aggregation of Sources Throughout Well Fields Can Create Jurisdictional Disputes and Have Other Absurd Results

Petitioner's demand for an "interrelatedness" test also would lead to the potential for wells and production facilities to be aggregated in a well field that crosses jurisdictions. At least a dozen well fields are located in more than one state. *See* EIA, Top 100 Oil and Gas Fields of 2009, Tables 1 and 2, *available at* http://www.eia.doe.gov/pub/oil_gas/natural_gas/data/publications/crude_oil_natural_gas_reserves/current/pdf/top100fields.pdf (identifying 12 of the top producing fields being located in multiple states). Such an approach could lead to, for example, Colorado requiring a compressor station within its borders to aggregate the emissions of "interrelated" gas wells in New Mexico. Although states have worked together, with varying

degrees of success, to deal with cross-border environmental issues, the “case-by-case” and “highly fact-specific” nature of aggregation decisions can lead to disputes between permitting agencies and would make enforcement for alleged violations regarding out-of-state wells problematic.

Even where a well field is wholly intra-state, Petitioner’s approach could require aggregation of a compressor facility in one air quality management district with gas wells in another air quality management district because distance is no longer a factor. Where two or more aggregated facilities are located in different districts, where one district is an attainment area for a single pollutant and the other is non-attainment, the aggregated facilities could use netting credits from the attainment area to net out of New Source Review in the non-attainment area.

EPA Region IX confronted such a situation, requiring it to rescind its initial determination that two Newmont Gold Company operations, separated by eleven miles and a mountain range, were a single source. *See* Exh. 1, Letter from Kenneth F. Bigos, EPA Region IX, Chief, Stationary Sources Branch, to Tom Fronapsel, Nevada Div. of Env’tl Protection, Chief, Bureau of Air Quality (Aug. 3, 1993). In that letter, EPA Region IX noted that prior application of the “interrelatedness” test caused “concern[] about how this netting error may have been applied to projects in the past which might have been mistakenly allowed to net out of PSD review.” *Id.* at 2. Nothing about the “interrelatedness” test allowed for EPA Region IX’s rescission of its Newmont Gold Company source determination. Only after understanding the absurd ramifications of aggregating two separate operations across two different airsheds did Region IX fall back to the regulatory definition of “[b]uilding, structure, facility, or installation”

to conclude that the “large distances separating the two operations” made them separate stationary sources.

For similar reasons, EPA Region VIII backed away from the Great Salt Lake Minerals source determination cited by the Petitioner even though the Agency continues to publish and cite to the determination in other contexts. Exh. 9 to Pet. Exh. 8, Letter from Richard Long, EPA Region VIII to Lynn R. Menlove, Utah Dept. of Env'tl. Quality (Aug. 8, 1997). One EPA official noted that the pumping station and mineral processing facility (which were 30 miles apart, instead of 21.5 miles as EPA Region VIII initially believed) were “separated by a mountain range and are clearly in separate airsheds.” Exh. 2, E-mail from Mike Owens, EPA Region VIII Air Program to Dan Deroeck, EPA, Office of Air Quality Planning & Standards, New Source Review Section (Nov. 18, 1998). Although EPA Region VIII did not withdraw the guidance, the Region stated that the Great Salt Lake Minerals source determination “should not be construed as EPA policy for a range of sources.” As stated above, with EPA’s full knowledge, Utah DEQ, which was the permitting agency in the Great Salt Lake Minerals matter, rejected the EPA determination outright, concluding that it was inconsistent with the definition of “stationary source.” See API Exh. C, Letter from Reginald D. Olsen, Utah Dep’t of Air Quality, Permitting Branch Manager, to Jim M. Wolfe, P.E., IMC Global, Inc., Sr. Env’tl Engineer (Feb. 14, 2001).

Although EPA Region IX reluctantly rejected the “interrelatedness” test and EPA Region VIII diminished the value of its own rejected source determination after it became clear that the decisions had absurd results, these exceptions are not enough. Absent the vetting process found in the notice and comment rulemaking procedures, EPA is largely relying on an “interrelatedness” test that can cause unforeseen difficulties for both permitting agencies and source owners and operators. Because the “interrelatedness” test is not required by statute or

regulation (and, in fact, is contrary to EPA's own regulations), EPA feels free to arbitrarily abandon it whenever its application appears administratively problematic. The Board should prohibit reliance upon the "interrelatedness" test, not only for the jurisdictional difficulties it can create, but because its selective utilization deprives regulated industries of the "notice as to whether (and on what statutory authority) EPA construes the term source," as required by *Alabama Power*. 636 F.2d at 397.

3. There is Little Precedent for Aggregating Gas Well Fields and Processing Facilities

Petitioner claims that "a number of prior EPA permitting determinations have concluded that aggregation is appropriate for oil and gas sources." Pet. at 20. Petitioner lists a series of EPA source determinations that purportedly confirms their assertion. *Id.* at 20-21. Unfortunately for Petitioner, an examination of these documents yields only a single instance where EPA aggregated gas wells with processing facilities (or with multiple processing facilities) in accordance with Petitioner's theory. These source determinations are described briefly below:

- Exh. 8 to Pet. Exh. 8: For the EnerVest San Juan Operating Company, EPA aggregated "each emitting unit at each compressor station" into a single source. This is no different than the current Title V permit for Florida River that Petitioner seeks to remand. *See* Pet. Exh. 2, Statement of Basis for Permit No. V-SU-0022-05.00 at Tables 1 and 2 (listing emission units at Florida River including compressor turbine, amine heaters, diesel generators and storage tanks). EPA did not aggregate EnerVest's five compressor stations together. Instead, EPA listed each of them as a separate stationary source. Exh. 8 to Pet. Exh. 8 at 2.
- Exh. 13 to Pet. Exh. 8: For the Valero Transmission Company source determination, EPA did not perform an "interrelatedness" analysis because Valero's Gohlke Plant and its transmission line were "on contiguous properties." This issue was apparently not disputed.
- Exh. 17 to Pet. Exh. 8: In the Citation Oil and Gas source determination, EPA aggregated emitting units associated with tank batteries into a single source. The four tank batteries present in the well field constituted "four sources (tank batteries with their associated emitting units)." *Id.* at 1. EPA did not aggregate the Walker Hollow Unit's "oil and gas wells, pumps, line heaters, dehydration equipment, combustion equipment, and tank batteries" into a single source as Petitioner claims.

The only example of EPA aggregating process facilities with wells throughout a well field is the Summit Petroleum source determination issued in October 2010. Pet. Exh. 10. As demonstrated by Petitioner's own exhibits, such a determination is unprecedented and the source determination is currently on appeal. *Summit Petroleum Corp. v. U.S. EPA*, Case No. 10-4572 (6th Cir.). Therefore, Petitioner's assertion that EPA routinely aggregates processing facilities with wells dispersed over hundreds or thousands of square miles is questionable, at best.

III. THE "INTERRELATEDNESS" TEST IS NOT REQUIRED TO PROTECT AIR QUALITY

Rejecting the "interrelatedness" test and requiring EPA to faithfully apply its own regulations will not diminish air quality. State permitting agencies can and do regulate air emissions from gas wells and their related ancillary equipment as minor sources. State minor source permitting programs and other State Implementation Plan ("SIP") provisions control emissions. *See, e.g.*, 5 C.C.R. §§ 1001-5, Part B, III.D.2 (construction permit requirements for new or modified minor sources controlling volatile organic compounds, carbon monoxide, nitrogen oxides, sulfur dioxide and PM₁₀), Part D, X (minor permit modification procedures); Part A, I.A. (requiring federally enforceable limits on a source's potential to emit for a synthetic minor permit).

Both EPA and state permitting agencies have the authority to promulgate additional regulations governing minor sources to protect human health or to come into attainment with National Ambient Air Quality Standards, if they believe it is required. *See* C.R.S. § 25-1.5-101(l) (Colorado Department of Public Health and Environment has the power to "establish and enforce standards for exposure to environmental conditions ... that may be deemed necessary for the protection of the public health"); 40 C.F.R. §§ 51.112 (SIPs "must demonstrate that the measures, rules, and regulations contained in it are adequate to provide for the timely attainment and maintenance of the national standard that it implements"); 51.160(b) (SIPs must include

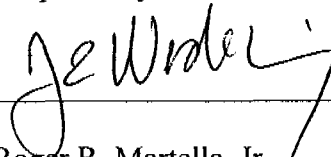
legal authority to bar construction of any source that will result in a NAAQS violation). Therefore, the aggregation debate is not about whether geographically dispersed minor sources of air pollution in gas fields will be unregulated, but how they will be regulated. Petitioner's demand to aggregate minor sources and treat them as major sources for PSD and Title V purposes not only violates EPA regulations defining a "stationary source" but will have no real impact on the reduction of air emissions.

CONCLUSION

For the foregoing reasons, API respectfully requests that the Board deny the petition for review.

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Respectfully submitted,



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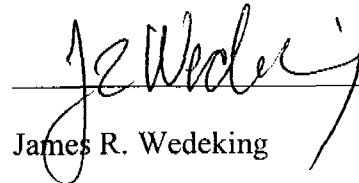
CERTIFICATE OF SERVICE

I certify that on the 24th day of February, 2011, I caused a copy of the preceding to be served by U.S. Mail on the following:

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