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	)	
Title V Permit Number: V-SU-0022-05.00	)	

EPA REGION 8'S RESPONSE TO AMICUS CURIAE BRIEF FILED BY AMERICAN PETROLEUM INSTITUTE

Pursuant to the Board's Order dated March 11, 2011, EPA Region 8 submits this response to the *amicus curiae* brief filed by the American Petroleum Institute ("API") [attachment to Doc. No. 11]. While API's *amicus* brief asks the Board to deny the petition for review, the analysis presented therein also contains a critique of the record in this case. API appears to be implicitly asking the Board to uphold the Title V permit at issue but reject the reasoning upon which Region 8 relied in issuing that permit. As explained below, to the extent the API's *amicus* brief is trying to argue that Region 8 applied an inappropriate standard in deciding not to aggregate other emission points with the Florida River station, the Board need not, and should not, adopt the position in API's brief.

In its brief, API does not argue that the actual stationary source determination in this case – that Florida River, Wolf Point, and all other BP-controlled wells in the field should not be aggregated into a single stationary source – was wrong. API first argues that the Board should not grant review of the Petition filed by WEG and the source determination arguments contained in it. This is the usual role of an *amicus curiae*, or "friend of the court," – a person that is not a party providing additional information to the court regarding matters of interest that arise in the case. *See* EAB Practice Manual (Sept. 2010) at 47, n.52. But API also goes further, arguing that in making that source determination, EPA Region 8 improperly included an examination of interrelatedness between the various emissions producing activities at issue. However, it is not clear what API expects the Board to do with its arguments since it does not ask that the permit be remanded to correct this supposed error. In fact, it is not even clear that an *amicus* in an EAB action can request such an outcome from the Board. *See id.* at 45-46 and cases cited therein (discussing non-party participation in EAB cases, and distinguishing between intervenors, including permittees or permitting authorities with a direct interest in the permit at issue, and *amici*, which generally provide information to the Board regarding issues of interest). In this case, there is no reason to apply the rationale asserted by API when the administrative record shows that EPA Region 8 did not err in its source determination, as explained in the Response to Petition For Review [Doc. No. 9; filed Feb. 23, 2011] ("Response Brief") and the Sur-reply Brief [Doc. No. 21; filed March 18, 2011] ("Sur-reply Brief"), and the permit applicant has intervened in this case and submitted briefs in support of Region 8's source determination analysis, *see generally* BP America Production Company's Response to Wildearth Guardians' Petition for Review [Doc. No. 10; filed Feb. 24, 2011] at 16-22.

Moreover, even if *amici* can make such a request of the Board, API cannot in this case because the argument presented in their brief – i.e., that interrelatedness cannot be considered in the contiguous or adjacent analysis – has not been preserved for review. At the outset, API did not present the arguments made in its *amicus* brief – and in fact did not submit *any* comments – to Region 8 when the Region was considering the source determination in this permitting action. *See generally* EPA-FL-0036 (responding to two sets of public comments submitted on the permit – one from the applicant and one from the Petitioner).[1] In seeking to file its *amicus* brief with the Board, API asserted that its members have a great interest in EPA's interpretation of the "major source" and "stationary source" for PSD and Title V permitting purposes. Motion for Leave to File Amicus Curiae Brief in Opposition to the Petition for Review [Doc. No. 11] at 2-3. However, API made no attempt to address these interests in public comments to Region 8. Further, API does not attempt to assert that it could not have raised these issues during the public comment period; nor could it, as explained below. *Cf.* 40 C.F.R. § 71.11(l) (requiring petitioners that raise issues on appeal that were not addressed in public comments to demonstrate that it was impracticable to raise such objections during the public comment period). Accordingly, this issue is not preserved for review. *See In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 229 (EAB 2000) (finding that the "issue, as framed in the petitions *and in the Amici's briefs*, was not preserved for review" because the arguments and references addressed in those briefs were "nowhere presented in the comments on the proposed decision" (emphasis added)); *id.* at 231 n.72 (declining to address *Amici*'s concerns regarding practical enforceability raised for the first time on appeal).

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[1] The arguments presented in API's brief were also not made in the two sets of comments that were submitted to EPA Region 8. *See generally* EPA-FL-0036.

At the time of the April 2008 public comment period in this action,[2] the public had been aware that EPA had been including interrelatedness in the contiguous or adjacent analysis for more than 20 years. *See* Response Brief at 31-34 (summarizing previous Agency source determinations and guidance that examined the interrelatedness in the contiguous or adjacent analysis, including the General Motors Fisher Auto Body determination in 1981 (#8) and the Utility Trailer determination in 1998 (#3)) ; *see also* Memorandum from Gina McCarthy, Assistant Administrator, Office of Air and Radiation, entitled, *Withdrawal of Source Determination for Oil and Gas Industries* (Sept. 22, 2009) ("McCarthy Memo") at 2 (emphasizing the availability of more than "two decades" of guidance for applying the regulatory criteria in making source determinations). In fact, that history included prior source determinations in the oil and gas industry that included interrelatedness as part of contiguous or adjacent analysis. *See* Response Brief at 31-34 (discussing the determinations for Valero Transmission Company in 1986 (#1), the Forest Oil/Kustatan Oil Production Facility in 2001 (#5), and the Shell Oil Company's Wilmington Refinery Complex in 1980 (#6)).

Even the key source determination guidance in effect during the public comment period in this action acknowledged the relevance of interrelatedness in the contiguous or adjacent analysis. *See* Memorandum from William Wehrum, Acting Assistant Administrator, Office of Air and Radiation, *Source Determinations for Oil and Gas Industries* (January 12, 2007) at 2 (while stating that proximity was the key factor in making source determination in the oil and gas industry, also noted that "operational dependence" was used to inform the analysis) and 5 (noting that source determinations required a case-by-case analysis of the specific factors in the permitting action and stating that permitting authorities could consider "unique factors (such as

[2] The public comment period in this action began with a public notice on April 18, 2008, and lasted for 30 days. Response Brief at 2-3; EPA FL-0021

proximity or interdependence)" in making source determinations); *later withdrawn by* the McCarthy Memo. In fact, just two months before the public comment period began for the TitleV permit at issue, then-Administrator Stephen Johnson had issued an order objecting to a Title V permit issued to a natural gas compressor station because the permitting authority had failed to adequately respond to comments regarding the source determination. *See In the matter of Kerr-McGee Gathering, LLC*, Order Granting Petition for Objection to Permit (Feb. 7, 2008), *available at* http:// www.epa.gov/region7/air/title5/petitiondb/petitions/ kerrmcgee_frederick_ decision2007.pdf. That order noted the petitioner's claims regarding "interrelatedness" and directed the permitting authority respond to petitioner's comments, but it did not state that interrelatedness should not be addressed in answering the objection. *Id.* at 5

Thus, API was aware that Region 8 could include interrelatedness in its source determination for Florida River and could have presented the arguments now provided in its *amicus* brief as to why such an analysis is allegedly improper. However, API chose not to do so at that time and should not be allowed to do so here. *See Steel Dynamics*, 9 E.A.D. at 229 (finding the *amicus* briefs did not preserve an issue for review where commenters had generally raised concerns regarding consideration of continuous emissions monitors ("CEMs"), but those comments did not address the specific authority that the *Amici* argued required CEMs, because the permitting authority had "no opportunity to grapple with it during the permit decision making process"); *see also id.* at 231 n.72 (declining to reach another CEMs-related issue raised only by the *Amici* but not contained in any comments on the draft permit).

To the extent that API was, and is, interested in EPA's interpretation of "contiguous or adjacent" for source determinations in the oil and gas industry, it was possible for API to present comments to that effect during the Florida River public comment period, but it chose not to do

so. While API tries to fashion its current brief as an *amicus* brief in opposition to the Petition, the arguments contained in that brief also argue that EPA Region 8 applied the wrong rationale in making the source determination in this case. As API did not raise these issues in comments in the underlying matter, API's *amicus* brief does not provide a basis for remanding the underlying permit (and the allegedly wrong analysis) to Region 8.

Moreover, the administrative record that is before in the Board in this case shows that Region 8 did not commit clear error in relying on a lack of unique interdependence in deciding that emissions from Florida River should not be aggregated with emissions from Wolf Point and all other BP-controlled wells in the field as a single source. While API makes a number of specific claims to argue that Region 8 wrongly applied an interrelatedness analysis in determining whether these emissions were contiguous or adjacent,[3] the Administrator has recently confirmed that an interrelatedness analysis can be properly be included in the contiguous or adjacent analysis. As explained in Region 8's Response Brief, the Administrator recently denied a Title V petition which alleged that the State's source determination was fundamentally flawed. *See* Response Brief at 14-15 and 38-39, discussing *In the matter of Anadarko Petroleum Corporation*, 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*). In that case, the State's source

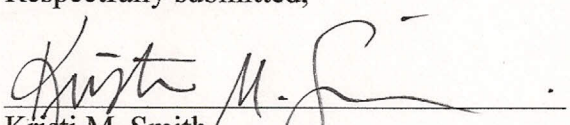
[3] API also asserts that Region 8's source determination analysis is wrong because the Region did not consider proximity in its analysis. API fails to recognize that the analysis was in response to specific comments by the Petitioner, which did not differentiate between different points in the field or contain assertions regarding proximity but simply asserted that all BP-owned emission units in the entire field had to be aggregated. *See* Response Brief at 25. Moreover, the record shows that in making its determination, Region 8 requested from the applicant and considered a "proximity map" of emission sources. *See* EPA FL-0030 (Dec. 21, 2009 letter from BP with non-CBI proximity map).

determination had examined the interrelationship between the various emission-producing activities in the field at issue, and the Administrator found that the petitioner had not demonstrated that the manner in which the State "considered and weighed" the relationship between was "fundamentally flawed or contrary to the relevant regulations." *Anadarko* at 19-20. The Administrator relied on the preamble to our 1980 rules to emphasize that stationary source determinations "are made on a case-by-case basis considering the foundational concepts provided in the Clean Air Act and EPA and state implementing regulations," *id.* at 7, and nowhere in the *Anadarko* Order did the Administrator find that an interrelatedness analysis was improper under those concepts. In fact, the Administrator examined a variety of prior EPA source determinations and guidance and found that "sources were considered contiguous or adjacent where a unique or dedicated relationship existed between the two pollutant emitting activities." *Id.* at 14. There is simply no reason to find that a similar analysis by Region 8 in this case resulted in a flawed source determination.

Accordingly, for the foregoing reasons, as well as those outlined in the Region's Response and Reply briefs, EPA Region 8 respectfully requests that the Board deny the Petition for Review and uphold the BP Florida River Permit in its entirety, but decline to rely on API's arguments in doing so.

Dated this 1st day of April, 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of **EPA REGION 8'S RESPONSE TO AMICUS CURIAE BRIEF FILED BY AMERICAN PETROLEUM INSTITUTE** to be served by electronic mail and U.S. Postal Service mail upon the counsel listed below.

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