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 SUR-REPLY BRIEF

EPA Region 8 submits this sur-reply brief pursuant to the Board's Order dated March 2, 2011, to address the allegations and new arguments presented in Petitioner's Reply Brief [Dkt. No. 18]("WEG Reply Brief"). Petitioner's Motion for Leave to File a Reply Brief suggested "that the EAB would benefit from further briefing in this matter," and that the Petitioner be provided an opportunity to address "new issues." Dkt. No. 13 at 2. Petitioner's Reply Brief provides no additional information to demonstrate that the Region committed clear error in its source determination and has failed to raise any important policy considerations that warrant review of that determination. Petitioner's Reply Brief also fails to show that Region 8 abused its discretion in deciding not to reopen the public comment period. Therefore, EPA respectfully

requests that the Board to deny the Petition for Review and uphold the BP Florida River Permit in its entirety.

1. **Petitioner has not demonstrated that the Region abused its discretion by deciding not to reopen the comment period.**

On the issue of reopening the comment period, WEG's Reply fails to show that the Board should grant review of this matter. As discussed below, WEG fails to argue to the standard of review, fails to provide authority for its assertions, fails to distinguish the authorities cited by the Region in its Response, and fails to reply to the Region's argument that it worked appropriately with BP and did not *de facto* reopen the comment period. The arguments that WEG does make in its Reply are refuted below. As a result, WEG has not met its heavy burden of showing that the Region abused its discretion by deciding to not reopen the comment period, particularly in light of the substantial deference due to that decision.

First, with respect to the standard of review, WEG in its reply does not dispute the authorities cited by the Region, which clearly establish that the Region's decision is to be reviewed under an abuse of discretion standard, with substantial deference to the Region. *See* Reply; Resp. at 8-9. Instead, WEG incorrectly asserts, without supporting authority that the "question for the [Board] … is whether [the Region] appropriately exercised its discretion," and not, as WEG alleges the Region argued, whether the Region "demonstrate[d] a reasonable exercise of discretion." Reply at 4. WEG argues that "*the operative question* is whether public comments 'appear to raise substantial new questions.'" Reply at 4 (emphasis added). As to the first assertion, the question is whether the Region abused its discretion, not whether it was "appropriately exercised." Resp. at 8-9 (and cases cited therein). As to the second, the Region correctly argued to the proper standard of review: abuse of discretion, with substantial deference. Resp. at 8-9, 40-45 (and cases cited therein). And in the third assertion, WEG completely

ignores the discretion granted to the Region. *See* 40 C.F.R. § 71.11(h)(5) ("[T]he permitting authority *may* … reopen or extend the comment period.") (emphasis added); *In re Dominion Energy Brayton Point, LLC*, 13 E.A.D. 407, 416 (EAB 2007) ("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 abuse of discretion standard* and afford[s] the region *substantial deference*.") (emphasis added).

WEG makes several other assertions without providing authority for them.[1] WEG asserts, "the regulations clearly contemplate that at some point, issues raised during the public comment period become *so substantial*" that the permitting authority must reopen the comment period. Reply at 3 (emphasis added). But 71.11(h)(5) does not provide for, nor does WEG cite authority for, a second, enhanced level of substantiality that completely negates the permitting authority's discretion.[2] To the contrary, the factors the Region discussed in its Response show that the magnitude of the question is not the sole consideration; expeditious review also matters. *See* Resp. at 41-43, 50-51. WEG also asserts that the factors the Board has considered, as identified in the Region's Response, "are not set in stone," Reply at 4, and continues to argue the Board should base its decision on other factors: that the Region added information to the record,

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[1] In addition to the unsupported assertions discussed above, WEG also asserts, without supporting authority, that the Region "seems to be waiving its ability to challenge [WEG]'s standing in future pleadings related to this appeal." Reply at 2. If this is meant to refer to standing under Article III in subsequent litigation in federal court, then it is incorrect. The requirements for standing in an administrative appeal to the Board and under Article III are different. *Compare In re Russell Energy Ctr.*, 14 E.A.D. __, slip op. at 19-20 (EAB 2008) *with Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Furthermore, "Article III standing is a jurisdictional requirement that cannot be waived." *Zurich Ins. Inst. v. Logitrans, Inc.*, 297 F.3d 528, 531 (6th Cir. 2002).

[2] The only authorities the Region is aware of that could arguably support WEG's proposition speak to the magnitude of changes in permit conditions, not the magnitude of the issues raised. *See, e.g., 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)."); *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."). These authorities, though, provide no support for (and in fact, undercut) WEG's position, as WEG does not dispute that there was no significant change to the source determination, much less any change to a permit condition.

that the Region did not provide the source determination analysis in the statement of basis, and that the additional information was extensive. Reply at 3-4 ("extensive new information from BP … and a new rationale for [the Region's] source determination"); *id.* at 8 ("extensive new information and new rationale subsequent to a public comment period").[3] WEG provides no authority for use of these alternative factors (nor is the Region aware of any).

On the other hand, the Region provided authority for the four factors the Region discussed in its Response: whether permit conditions have changed, whether additional information was developed in response to comments, whether the record is adequate, and the significance of delay. Resp. at 40 (citing *Dominion Energy*, 13 E.A.D. at 416 n. 10). And for each of these four *Dominion Energy* factors, the Region provided additional authority demonstrating application of the factor (the relevance of which, with one exception, WEG does not dispute). Resp. at 40-41 (citing *In re Indeck-Elwood LLC*, 13 E.A.D. 126, 146-47 (EAB 2006); *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); Resp. at 41 (citing *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 General Elec. Prods., Inc.*, 8 E.A.D. 696, 705 n. 19 (EAB 2000)); Resp. at 42 (citing *Indeck-Elwood*, 13 E.A.D. at 147; *In re Prairie State Generating Co.*, 13 E.A.D. 1, 50 (EAB 2006));[4] Resp. at 42 n.25 (citing *Prairie State*, 13 E.A.D. at 50). The Region also provided authority (the

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[3] WEG also misunderstands the nature of these factors by viewing them as independent "arguments." *See* Reply at 4 ("EPA provides four arguments"); *id.* at 6 ("EPA's narrow view that reopening is only necessary to correct explicit errors in the record"). Instead, the four factors, when evaluated together—as factors should be—show the Region did not abuse its discretion by not reopening the comment period. Resp. at 40-44.

[4] WEG attempts to distinguish *Prairie State Generating* on the basis that the petitioners there did not establish that there was a substantial new question, while "[h]ere, there is no dispute that [WEG]'s comments raised 'substantial new questions.'" Reply at 6. However, as discussed below, *supra* at 8, the Region disputed in the Response and continues to dispute in this Reply that there was a substantial new question. Moreover, WEG's distinction is not determinative of the issue, as the factors for which the Region cited *Prairie State Generating*—the adequacy of the record and the significance of delay, Resp. at 42, 42 n.26—do not relate to whether there is a substantial new question, but to whether it is more expeditious for the Board to review the substance of a petition or for the public comment period to be reopened.

relevance of which is not disputed by WEG) showing why the first two alternative factors WEG suggests—that the source determination analysis was not presented in the statement of basis and that the Region added information to the record—should be rejected.[5] Resp. at 43 (citing *In re Russell Energy Ctr.*, 15 E.A.D. __, slip op. at 95 n. 86 (EAB 2010)); Resp. at 44 (citing *Am. Soda*, 9 E.A.D. at 297-99). As to the extent of the information added to the record, even if this was a factor for consideration in general, the extent of the information added in this case is directly due to the breadth of WEG's comments and the thoroughness of the Region's response to those comments, for which the Region should not be penalized.

Turning to the first of the four *Dominion Energy* factors, WEG does not dispute that there were no significant changes to the source determination, but states that this factor is not dispositive. Reply at 4. For the second *Dominion Energy* factor, WEG also does not dispute that the additional information and source determination analysis were developed directly in response to WEG's comments, but asserts that reopening "is about whether EPA appropriately afforded the public an opportunity to respond to 'substantial new questions' raised during the public comment period." Reply at 5. However, WEG makes no reply to the Region's explanation in the Response that reopening balances two concerns—expeditious review and opportunity to comment—and that, where, as here, information has been added to the record in response to a petitioner's comments, the balance favors expeditious review. Resp. at 50-51. Instead, WEG merely repeats its argument from its Petition regarding its alleged lost opportunity to comment, Pet. at 15, which the Response noted was contrary to numerous statements by the Board and

[5] WEG simply repeats its statement from the Petition that the Region "provide[d] a new rationale for its source determination" in its Response to Comments. Reply at 3; *accord id.* at 8. As noted in the Region's Response, the Region was not required to address every issue in detail in the statement of basis. Resp. at 43 (citing *In re Russell Energy Ctr.*, 15 E.A.D. __, slip op. at 95 n. 86 (EAB 2010)). Moreover, the draft permit did identify the emissions units subject to the permit, and that, as evidenced by the scope of WEG's comments, gave WEG sufficient opportunity to comment on the issue.

displayed a misunderstanding of "the permitting process as a whole, including the purpose of ... the review process." Resp. at 49 (quoting *Russell Energy Ctr.*, 15 E.A.D. __, slip op. at 95 n.86).

As to the third *Dominion Energy* factor, the adequacy of the record, WEG makes two arguments.[6] WEG first argues that application of this factor ignores "the purpose and intent of reopening, which is to ensure a record is adequate in the face of 'substantial new questions.'" Reply at 6. But WEG fails (as it did in its Petition) to identify any actual inadequacy in the record. That WEG raised an issue in comments and that the Region responded to it with additional information and analysis, by itself, simply does not mean that the record is inadequate. While WEG states that requiring it to identify inadequacies in the record "would frustrate the purpose and intent" of 71.11(h)(5), Reply at 7, that provision actually strikes a balance between opportunity to comment and expeditious review, as discussed above and explained in the Response. Resp. at 50-51. Where, as here, a petitioner can identify no inadequacy in the record that would be addressed by reopening the comment period, the balance expressed by this factor favors expeditious review and disfavors reopening.

With regard to the adequacy of the record, WEG's Reply also argues that the Region's Response, by demonstrating that certain issues raised in WEG's Petition were not preserved for review, "indicates agreement that [WEG] was not provided an adequate opportunity to fully comment." Reply at 4-5 (citing Resp. at 37); *see also* Reply at 6, 8. WEG ignores the obvious and simple explanation: WEG failed to discern these issues at the time it commented.[7] In effect, WEG seeks—without any evidence except WEG's own failure to comment on the issues—to shift responsibility to the Region for the shortcomings in WEG's comments. But WEG cannot

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[6] As discussed above, *supra* at 4 n.3, another WEG argument, that the Region's application of this factor is overly narrow, Reply at 6, is based in WEG's misunderstanding of how factors are applied.

[7] WEG makes no argument and provides no evidence that the issues—gas flows, gas pressure, and percentage of gas produced by BP—were not reasonably ascertainable. *See generally* Reply. Indeed, the fact that WEG was able to comment on natural gas wells owned by BP in the area of the Florida River Compression Facility actually shows that these related issues were reasonably ascertainable.

bootstrap its failure to raise these issues into a second bite at the apple: an opportunity to raise the issues in a reopened comment period. To hold otherwise would effectively nullify the requirement that review is available only for issues raised during the comment period, or for those that were not reasonably ascertainable. 40 C.F.R. § 71.11(g), (l)(1).

As to the final *Dominion Energy* factor, the significance of delay, WEG states that the Region "is in no position to pass judgment with regards to delay." Reply at 7. But it is the Board that is to "pass judgment" on this factor, and WEG cites no authority that the time the Region took to respond to WEG's comments somehow bars the Region from asking the Board to consider this factor. Instead, WEG simply asserts that "the benefits of reopening the public comment period outweigh any delay," but fails to identify any specific benefits of reopening beyond giving WEG a second chance to raise the issues it failed to raise the first time. Reply at 7, 8.[8]

WEG makes only one reply to the Region's argument that review by the Board gives WEG the opportunity to address the additional information and source determination analysis. Resp. at 49-51. WEG states that, despite this opportunity, WEG is left in an "untenable position" with regards to the issues that the Region argues WEG failed to preserve. Reply at 8. However, had WEG presented *any* argument that the issues were not reasonably ascertainable—which, as discussed above, *supra* at 7 n.8, it did not and could not do—then WEG might have had the opportunity for review of them. 40 C.F.R. § 71.11(l)(1). By failing to raise these reasonably ascertainable issues in its comments, WEG is itself responsible for its "untenable position."[9]

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[8] WEG also fails to acknowledge that WEG itself claimed substantial prejudice from a delay of merely thirty days for briefing in this case. *See* Petitioner's Partial Opposition for Extension of Time, Dkt. No. 5 (agreeing to a thirty day extension but opposing a sixty day extension). Although a reopened comment period would necessarily delay the final permit much more than thirty days, WEG's Reply implies that any additional delay that would result from reopening the public comment period is unimportant.

[9] It should be noted that, despite WEG's failure to raise these issues, the Region was able to independently ascertain and address them in the response to comments. Resp. at 38-39.

Finally, while WEG complains that the Region mischaracterized WEG's arguments regarding reopening of the comment period, Reply at 3, WEG's Reply actually mischaracterizes or misunderstands two aspects of the Region's Response. First, WEG states that the Region did not refute that there was a "substantial new question." Reply at 3. However, the Region specifically refuted WEG's arguments that there was a substantial new question. Resp. at 43-44. Furthermore, two of the factors discussed by the Region—whether significant permit conditions changed and whether additional information added to the record was in response to comments, Resp. at 41-42—go directly to whether there is a substantial new question. *Indeck-Elwood*, 13 E.A.D. at 148; *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 696 (EAB 2006) ("The information contained in the revised analyses did not raise substantial new questions; rather, it responded to comments on an issue that had already been a part of the permit proceedings."); *id.* at 698 n.336 ("The Region's analyses were conducted in response to comments and did not raise substantial new questions."). Second, WEG misunderstands the Region's arguments against *per se* rules for reopening, Resp. at 43-44, as arguments for *per se* rules against reopening. Reply at 7.

WEG's Reply fails to show that the Region abused its discretion in deciding not to reopen the public comment period, particularly in light of the substantial deference due to that decision. WEG also makes no reply to the Region's arguments that the Region worked appropriately with BP and did not *de facto* reopen the public comment period. The Petition to reopen the public comment period should be denied.

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

Petitioner makes several unsupported and unclear allegations in its Reply, which continues to fail to demonstrate that review of the Region's source determination for Florida River Station is warranted. First, while Petitioner alleged in its Motion for Leave to File a Reply Brief, that it did not have an opportunity to address "new information" regarding EPA's reliance on the Administrator's recently issued *Anadarko* Title V Order, Dkt. No. 13 at 1, Petitioner's Reply merely mentions the Region's citation to that Order – it provides no specific concerns it has with the Region citing to the Order in its Reply Brief, much less provide new information regarding that reliance. WEG Reply Brief at 8-9, citing Order Denying Petition for Objection to Permit (Adm'r, Feb. 2, 2011) (hereinafter *Anadarko*). Petitioner's concerns regarding the Region's citation to *Anadarko*, if any, are unclear, and do not provide a basis for finding that the Region's source determination warrants review.

Second, Petitioner – for the first time – applies the proper standard of review for this EAB appeal by stating that the Region's source determination decision was "based on a clearly erroneous conclusion of law." Reply at 10. However, Petitioner provides no justification for this conclusory suggestion. Petitioner suggests the Region created a "bright line standard" for the source determination analysis it performed in this case. Reply at 9. However, that is not what the Region did. As the Region's Response Brief explained, "[c]onsistent 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 also examining prior agency source determinations and statements. Resp. at 15. Based on that analysis, the Region provided a Response to Comments that answered the scope of WEG's source determination comment and was "consistent with the

approach used in numerous prior Agency statements [and] guidance." Response at 25. However, the Region's Response to Comments did not establish a "bright line standard" for the application of source determinations in the Title V and PSD programs as a whole. *See id.* at 31-37 (explaining how the Region's analysis was not inconsistent with, and was actually supported by, relevant Agency statements and guidance, including the recent *Anadarko* Order issued by the EPA Administrator). Therefore, Petitioner's assertion that the Region has created a new standard is simply unfounded. Furthermore, contrary to Petitioner's blanket assertions, the Region's determination was clearly based on the facts in the record. Resp. at 2-4, 9-38.

Petitioner also asserts that the Region's analysis of aggregation of all BP-owned emission points in the entire field misconstrued its comments, and provides a list of excerpts from its comments that allegedly show that the comments were broader than that. Reply at 10-11. However, none of the excerpts cited identified specific wells that the Region failed to consider. In fact, this list simply highlights that the comments focused on the general interrelatedness of wells in the field with the Florida River station. *See, e.g.*, Reply at 11 (citing page 4 comment discussing "some or all of the ...wells" and page 5 comment discussing "wells that supply the facility"). Accordingly, the Region's Response to Comments clearly considered the interrelatedness, (and thus adjacency) of wells in the Northern San Juan Basin in a holistic manner consistent with Petitioner's comments. Resp. at 20-25.[10] Petitioner still has not shown that the Region's analysis was flawed in this regard, and thus the Board should not grant review.

Petitioner also continues to argue that the Region should have considered a support facility analysis in determining whether the various pollutant-emitting activities were adjacent. Petitioner's Reply admits that a support facility analysis "may not be explicitly 'required'" in

[10] Additionally, the Region notes that its interpretation of the scope of WEG's comment was clear in its Response to Comments document, and thus is not "new information" which only arose in the Region's Response Brief. *See* Reply at 11 (citing Response at page 11, which actually cites to the Region's Response to Comments document).

such instances. Reply at 12. The Region agrees – a support facility analysis is not explicitly required by the regulations – and the Region is not aware of any prior EPA guidance suggesting that a support facility analysis be done in analyzing whether the activities were located on one or more contiguous or adjacent properties. As Petitioner acknowledges, the "traditional application" of the support facility analysis has been with regard to determining whether pollutant emitting activities should be considered to have the same SIC code, and Petitioner's Reply provides no example of an instance in which EPA applied a support facility analysis to the contiguous or adjacent analysis. Accordingly, there is no basis for finding that the Region erred in failing to conduct such an analysis here. Moreover, while Petitioner insists the Region was "required to give due consideration to undertaking such an analysis," Reply at 12, Petitioner simply fails to recognize that the Region *did* consider the general interrelatedness aspects of the support facility analysis when analyzing adjacency. Resp. at 17-19.

Finally, Petitioner suggests that Region's statements in the Response brief regarding consideration of gas flow and gas pressure issues did not constitute a reasoned response. Reply at 10. However, the basis for Petitioner's allegation is unclear. *See generally* Reply at 13-15. As was made clear in the Response, the Region fully considered gas flow and gas pressure issues as they related to the interrelatedness of various BP-owned emission points throughout the entire Northern San Juan Basin Field. Resp. at 22-25. Consequently, Petitioner's Reply is also unsuccessful in its attempt to make this an issue that warrants the Board's review.

Petitioner's Reply offers no support from the relevant regulations or guidance for its conclusory assertion that the "Agency's source determination was based on a clearly erroneous finding of fact or conclusion of law." Reply at 13. Petitioner's assertion continues to fail for exactly the same reason it failed in its Petition – they fail to demonstrate that the Region

committed clear error and has failed to raise any important policy considerations. Thus, review should be denied on this basis.

3. Conclusion

The Petitioner's Reply Brief and Petition fail 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 and the reasons outlined in the Region's Reply Brief, EPA respectfully requests the EAB to deny the Petition for Review and uphold the BP Florida River Permit in its entirety.

Dated this 18st day of March, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I sent via U.S. mail a copy of the **EPA REGION 8'S SUR-REPLY BRIEF** 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 March 18, 2011.

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