BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC

In re:	)	
	)	
Shell Offshore Inc.	)	
Kulluk Drilling Unit	)	
	)	OCS Appeal No. 08-01
	)	
Permit No. Rl0OCS-AK-07-01 (Revised	)	
	)	

REPLY BRIEF

BILL MacCLARENCE, P.E.

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INTRODUCTION

This case turns on the legitimacy of the January 2, 2007 Oil and Gas Memorandum from EPA Acting Assistant Administrator William Wehrum which EPA adopted in January 2007. EPA adopted the Wehrum memo in response to a challenge I brought to a State of Alaska air permit[1] for a major BP oil and gas facility in a portion of Alaska's North Slope onshore oil and gas fields.[2] The permit the State granted BP did not include all the interconnected and interdependent pollutant emitting oil and gas facilities which are located on adjacent and contiguous lands and which BP operated as a unit. The effect of the failure of the State to include certain of these facilities under the umbrella of the permit is that BP may escape Prevention of Significant Deterioration (PSD) requirements when the uncovered facilities are modified or have a change in operations that cause emission increases. And, the smaller BP facilities (e.g., a small drill site with relatively minimal emissions) excluded from the permit may escape permitting entirely.

"Disaggregation" of interconnected and interdependent oil and gas facilities so that some are not included under the coverage of a single PSD (or a Title V) permit is a serious problem that nullifies the point of many of EPA's air quality rules concerning *de minimis* emission levels, PSD, Best Available Control Technology, and New Source Performance Standards. Since emission or discharge limits are established on a "per facility" basis, many of EPA's other regulatory programs are affected as well. Additionally, because the air quality permit program was designed to be self-supported by polluter user fees [Clean Air Act Sec. 502(b)(3)(C)(iii)], disaggregation makes it impossible to allocate a fair share of the costs to uncovered facilities; operators like BP are required to pay less fees than they should. Similarly, the disaggregation of oil and gas facilities permitted under the Wehrum memo will make it impossible for EPA to reduce greenhouse gas emissions from oil and gas stationary sources in an effective manner as required by the U.S. Supreme Court's decision in Massachusetts v. EPA.

My pending challenge to the BP permit is not just about the integrity of the Clean Air Act's many programs, however. The adverse environmental effect of the PB permit arises from the fact that the emissions of BP's uncovered facilities are not only not regulated under the (PSD) program; they may in fact escape any regulation at all. This is a serious environmental problem. North Slope oil and gas fields emit huge amounts of air pollutants. For example, I calculated from natural gas consumption rates obtained from the State of Alaska that the nitrogen oxide emissions from the fields exceed 50,000 tons annually, more than the entire metropolitan Washington, D.C. area. Making sure that all such

[1] The State of Alaska operates its own PSD permitting program subject to EPA's oversight.

[2] That challenge is still pending; I give its procedural history after this Introduction.

emissions are properly regulated, therefore, should be of great concern to EPA. But the Wehrum memo in effect states that it is okay for the State and EPA to ignore entirely many emission sources.

In short, applied to onshore or offshore oil and gas facilities, following the Wehrum memo undermines the very goals of the Clean Air Act and should not be countenanced by the Board.

THE HISTORY OF MY BP PERMIT CASE

I am currently challenging the validity of the disaggregations in Appeal No. 07-72756 filed on July 10, 2007 before the United States Court of Appeals for the Ninth Circuit. My original challenge of a proposed State of Alaska Air Quality permit for a unit of the BP Exploration Prudhoe Bay facility began in March 23, 2002 with a public comment stating that this unit, Gathering Center #1, was improperly disaggregated from the entire facility and treated as a stand-alone facility. The State first accepted my contention and issued a new proposed permit aggregating the entire Prudhoe Bay facility. Subsequently, without further public notice, the State reversed course and issued a permit for the unit disaggregated from the entire facility. Under the provision of 40 CFR § 70.8(d), I then filed a petition appealing the permit with Region X of the Environmental Protection Agency (EPA Region X) on February 5, 2004 and re-filed on April 14, 2004.

Title V of the Clean Air Act, 42 U.S.C. § 7661d(b)(2) requires Region X to grant or deny a petition within sixty days. When no action had been taken by EPA in nearly three years, I filed Appeal No. 1:07-cv-0055(RWR) before the United States District Court for the District of Columbia on January 10, 2007. Two days later, on January 12, 2007, EPA issued a policy memorandum entitled, "*Source Determinations for Oil and Gas Industries*" (Wehrum Oil and Gas Memo). It is my belief that the Wehrum Oil and Gas Memo was published in an attempt to obstruct my case, since this is the sole disaggregation case ever to come before a Federal Court that confronts EPA's PSD decisions for Alaska North Slope Oil and Gas facilities. Finally, on April 20, 2007, EPA issued the order denying my Title V petition, which led to the filing of Appeal No. 07-72756 before the United States Court of Appeals for the Ninth Circuit.

ANALYSIS

The legal definition of facility for the air quality program is at 40 CFR § 52.21(b)(5) and 52.21(b)(6). I repeat this definition here for clarification:

(5) *Stationary source* means any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant.

(6) *Building, structure, facility, or installation* means all of the pollutant emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same ''Major Group'' (i.e., which have the same first

two digit code) as described in the *Standard Industrial Classification Manual, 1972,* as amended by the 1977 Supplement (U. S. Government Printing Office stock numbers 4101–0066 and 003–005–00176–0, respectively).

EPA has issued a copious amount of guidance documents, primarily to define the term "adjacent properties." In general, all of these guidance documents are consistent with the exception of the Wehrum Oil and Gas Memo. The specific difference is that the Wehrum Oil and Gas Memo for the first time introduced "proximity" as a stand-alone factor for the disaggregation of a facility. I wish to stress that "proximity" is not mentioned in the legal definition of facility.

In Region X's June 18, 2008 *Response to Public Comments*, they state, "EPA evaluated proximity as "the most informative factor" consistent with the Wehrum Oil and Gas Memorandum." They further state, "EPA relied on the Wehrum Oil and Gas Memorandum in determining that proximity was the key factor in making this source determination" (to disaggregate the Shell facility). In their October 6, 2008 *Response of EPA Region 10 to the Petitions for Review*, they reiterate, "The Region recognized that the proximity-focused analysis in the Wehrum Oil and Gas Memo 'also provides guidance for evaluating whether the Kulluk's activities at separate Drill Sites should be aggregated' and thus examined the proximity-related facts present in the Shell permitting." Although they now say they "examined relevant Agency guidance" in their decision to disaggregate, the "relevant agency guidance" with the exception of the Wehrum Oil and Gas Memo is left unspecified, and this substantiates my original assertion that they relied entirely on this memo in their decision to disaggregate, as set out in Region X's *Response to Public Comments* document for this permit.

Shell's October 6, 2008 *Response to Petitions for Review*, goes to great length to justify EPA's disaggregation decision process based on 1) the Wehrum Oil and Gas Memo (termed by Shell as the "Source Determinations Memorandum") and 2) a letter from Richard Long, Director Air Program, EPA Region 8 to Lynn Menlove, Utah Division of Air Quality, May 21, 1998 (termed by Shell as the "Four Questions Guidance"). The latter document was included in my reference list of policy memorandums showing the irrelevance of "proximity" in all disaggregation determinations prior to publication of the Wehrum Oil and Gas Memo and its first-time use in the disaggregation determination for the Shell permit. Shell uses the four "some type of questions that might be used" in this document as an attempt to disprove an "operational interdependence" between the various operations in the permit. I wish to emphasize that the definition of "operational interdependence" is very clear in 40 CFR § 52.21(b)(6) – the same first two digits of the Standard Industrial Classification Code.

The October 7, 2008 *Brief Amicus Curiae* of the American Petroleum Institute provides an argument as to why they feel the legal criteria for determining the extent of a facility in 40 CFR § 52.21(b)(6) is only "discretionary" rather than a legal requirement, based on their interpretation of wording in the "preamble" of the 1980 Clean Air Act. They acknowledge that "EPA

has reasonable discretion to define each of the statutory terms – 'building,' 'structure,' 'facility,' and 'installation' – so as to aggregate the emissions of individual units within an industrial plant into a single source.

RECOMMENDATION

As set out in 40 CFR § 124.19(a), a petition to the Environmental Appeals Board is required to include a showing that the condition in question (the disaggregation of the Shell facility) is based on:

(1) A finding of fact or conclusion of law which is clearly erroneous, or

(2) An exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review.

I believe that I have adequately demonstrated that "proximity" is not a lawful factor to be considered in the definition of "facility," based both on the legal definition set out in 40 CFR §52.21(b)(5) and 52.21(b)(6) as well as the numerous Policy Memorandums (with the single exception of the Wehrum Oil and Gas Memo) published since enactment of the 1980 Clean Air Act. Additionally, using "proximity" as their decision basis for disaggregation is particularly egregious for a facility on the North Slope of Alaska. Because of the lack of terrain features, extremely cold temperatures and extended periods of snow cover, pollutants from sources on the North Slope do not disperse at the same rate as they do in more temperate regions and instead persist for thousands of miles and migrate much more readily to the stratosphere contributing to ozone depletion.

Having said this, I would like to close by stressing the "discretion" that the Environmental Appeals Board has in this matter, as set out in 40 CFR § 124.19(a)(2) above. EPA is arguing that the Board's "discretion" is limited "to the issues being remanded and issues arising as a result of any modification the Region made to its permitting decisions on remand. However, my original comment from March 27, 2008 stated, "It appears that EPA is disaggregating the Shell OCS lease in this permit thus allowing concurrent exploratory activities within separate portions of the lease without considering impacts in total. This is not in accordance with the Clean Air Act, which defines 'facility' or 'stationary source' as 'all contiguous or adjacent activities occurring under common control or ownership.'" Based on my original comment, I believe that the Board has the full power to review the disaggregation issue as an important policy consideration at their discretion.

As discussed in the opening to this Petition Response, it is essential that a uniform definition of "facility" be established that does not allow for disaggregation. The vast majority of stationary source control programs, both current and proposed, depend on enforcing established de minimis emissions from facilities. If facilities can be disaggregated, it renders these programs unenforceable.

For all of the reasons discussed, I am requesting that the Environmental Appeals Board decide that all of Shell's exploration operations for this lease be considered a single facility.

I thank you for allowing me the opportunity to participate in this appeal.

DATED this 27th day of October, 2008

Respectfully Submitted

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TABLE OF EXHIBITS

CERTIFICATE OF SERVICE

I hereby certify that copies of the October 27, 2008 Reply Brief was electronically filed with the Environmental Appeals Board and sent via Electronic Mail and First Class Mail on the twenty-seventh day of October, 2008, to the following:

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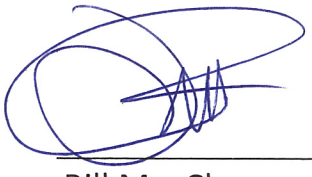

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