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 10-04
Permit No. V-SU-0022-05.00	)	

PETITIONER'S REPLY

Petitioner, WildEarth Guardians (hereafter "Guardians") hereby files this reply to the Response Briefs of Respondents U.S. Environmental Protection Agency ("EPA") and BP America Production Company (hereafter "BP"), which were filed on February 23 and 24, 2011, respectively (*see* Docs. 9 and 10). Guardians' Petition for Review challenges EPA's issuance of a 40 C.F.R. Part 71 Title V Permit (hereafter "Title V Permit") issued to BP America Production Company for the operation of the Florida River Compression Facility (hereafter "Florida River facility"). Guardians' Petition for Review challenges two issues:

1. Whether EPA Region 8 erred in not reopening the public comment period for the Title V Permit in response to substantial new questions concerning the permit raised during the public comment period; and

2. Whether EPA Region 8 failed to appropriately define the major source subject to permitting such that the Title V Permit assures compliance with Prevention of Significant Deterioration ("PSD") and Title V Permitting requirements.

Guardians Pet. for Rev. at 3. As will be explained in further detail, EPA's Response to Guardians' Petition with regards to these issues misses the mark. BP's Response fares no better.

Fundamentally, both Responses continue to fail to demonstrate that EPA's decision not to reopen the public comment period was an appropriate exercise of discretion and that the

Agency's source determination was consistent with the definition of a stationary source under PSD and Title V, thereby failing to ensure compliance with both PSD and Title V. Guardians' Petition for Review clearly shows that the conditions of the Title V Permit are based on findings of fact or conclusions of law that are clearly erroneous or based on an exercise of discretion or an important policy consideration which the Environmental Appeals Board ("EAB") should, in its discretion. Thus, review should be granted in accordance with 40 C.F.R. §§ 71.11(l)(1)(i) and (ii). Guardians replies as follows:

I. Standing

Guardians would first like to address the EPA's statements regarding standing. *See* EPA Response at 5-6. The Agency does not challenge Guardians' standing in this appeal, but appears to plant doubt as to the validity of Guardians' ability to assume the rights and liabilities of Rocky Mountain Clean Air Action, the organization that originally commented on the Title V Permit and that has since merged with WildEarth Guardians, with Guardians remaining the sole surviving corporation. It is unclear how the merger of two organizations would adversely affect Guardians' ability to seek a remedy from the EAB. Nevertheless, EPA suggests that the EAB should limit acceptance of Guardians' standing to the "unusual circumstance" in this Petition. We agree with EPA's suggestion, but also submit that, absent a direct challenge to Guardians' standing to file this appeal, that the Agency seems to be waiving its ability to challenge Guardians' standing in future pleadings related to this appeal.

II. Reopening of the Public Comment Period

The thrust of EPA's response to Guardians' arguments regarding reopening the public comment period is that its substantive source determination analysis for the Florida River facility, which was conducted subsequent to the public comment period and only in response to comments presented by Petitioner, is simply part of the normal permitting process. *See e.g.* EPA Response at 43. EPA however, mischaracterizes the nature of Petitioner's arguments and the nature of the "substantial new questions" that give rise to Guardians' claim.

Contrary to EPA's assertion otherwise, the issue here is not a "misunderstanding" of the permitting process, but rather, an issue over whether the EPA responded appropriately to "substantial new questions" in accordance with 40 C.F.R. § 71.11(h)(5). Although Guardians agrees that significant new issues are often raised for the first time in comments on a draft permit, and that when this occurs, a permit issuer is expected to address those issues in response to comments, the regulations clearly contemplate that at some point, issues raised during the public comment period become so substantial as to warrant the Agency to undertake one of three actions, including "[r]eopen[ing] or extend[ing] the comment period to give interested persons an opportunity to comment on the information or arguments submitted." 40 C.F.R. § 71.11(h)(5)(iii).

Here, EPA does not refute that Petitioner's comments on the draft Title V Permit raised "substantial new questions." Furthermore, EPA does not appear to reject Petitioner's arguments that the comments related to an issue of significant central relevance to the Title V Permit. Indeed, Petitioner's comments prompted EPA to solicit extensive new information from BP that was not otherwise included in the recorded and that was not otherwise relied upon to justify its permitting decision, and prompted to the Agency to provide a new rationale for its source

determination. The question for the EAB to answer then, is whether EPA appropriately exercised its discretion in refusing to reopen the public comment period in response.

In this case, EPA provides four arguments that it claims demonstrate a reasonable exercise of discretion. First, the Agency argues that the "substantial new questions" did not lead to any "changes" to the source determination. EPA Response at 41. Yet, a reopening does not solely hinge on whether "changes," whether to the permit or to the underlying source determination, occur. Rather, the operative question is whether public comments "appear to raise substantial new questions." 40 C.F.R. § 71.11(h)(5).

EPA cites this Board's holding in *Dominion Energy* as dispositive of an appropriate exercise of discretion (EPA Response at 40), yet that ruling simply illustrated four factors that could be considered in determining whether to reopen a public comment period. And, while these factors are not set in stone, nor is it apparent that the EAB intended that a claim regarding comment reopening could only be sustained if those four factors together could be met, the EAB's ruling is informative.

As the EPA notes, among the four factors is "whether the record adequately explains the agency's reasoning so that a dissatisfied party can develop a permit appeal[.]" *In re Dominion Energy Brayton Point, LLC*, 13 E.A.D. 407, 416 n. 10 (EAB 2007). This factor underscores the primary thrust of Petitioner's argument, which is that, based on the information originally provided to the public, Guardians ability to submit adequate comments was hindered. EPA's response admits as much. Indeed, EPA now argues that a number of material issues raised by Petitioner should not be reviewed by the EAB because "Petitioner did not raise [] objections in its comments on the draft permit." EPA Response at 37. EPA specifically attacks as unpreserved for review Guardians' arguments that the Agency failed to consider gas flows from

wells to the Florida River facility, failed to consider the percent of gas produced by BP wells and processed by the Florida River facility, and failed to assess pressure to identify the BP wells producing gas processed by the Florida River facility—all key issues with significant bearing on the question of whether the permitting decision assures compliance with PSD and Title V Permitting requirements. *Id*. Although Petitioner adamantly disagrees with the assertion that these issues have not been preserved for review (and argues accordingly, *infra*.), the Agency's argument nevertheless indicates agreement that Guardians was not provided an adequate opportunity to fully comment on the extensive new information relied upon in making the source determination.

EPA's second argument regarding its exercise of discretion is an assertion that its response to Petitioner's comments was sufficient. EPA Response at 41-42. However, while Guardians takes issue with this assertion, the matter of public comment reopening is, first and foremost, not about the sufficiency of EPA's response to comments. Rather, this issue is about whether EPA appropriately afforded the public an opportunity to respond to "substantial new questions" raised during the public comment period. Here, EPA asserts that the issue of the adequacy of the source determination has "already been raised" and "adequately addressed." EPA Response at 42. Yet the issue was not previously raised, nor was it adequately addressed. As the record shows, prior to the May 19, 2008 comments from Petitioner, the issue of the adequacy of the source determination for the Florida River facility was not even mentioned, let alone substantively questioned or addressed. The EPA's own actions subsequent to the public comment period—soliciting and gathering extensive new information from the permittee that was never before introduced or made available to the public, and developing a new rationale to support its source determination—clearly indicate that the issue of the source determination was

not adequately addressed, nor was the public given sufficient opportunity to comment on the issue.

One need only again consider the implications of EPA's arguments against Petitioner with regards to issues related to the flow and pressure of gas flowing from wells to the Florida River facility. As noted, EPA argues that such issues were not preserved for review. While Petitioner disagrees with this assertion, the reality is, EPA's arguments infer that the public was not given an opportunity to provide adequate comments. That the EPA now claims its response to comments is sufficient overlooks this fact.

Third, EPA asserts that the record "adequately contains the factual information on which the Region relied and adequately explains the Region's reasoning." EPA Response at 42. As it relates to reopening, this argument makes no sense. While reopening may be necessary to correct errors in the record, reopening does not hinge upon a finding that a record is inadequate. Indeed, the point of reopening is not limited solely to correcting errors in the record, but rather also extends to "give interested persons an opportunity to comment on the information or arguments submitted." 40 C.F.R. § 71.11(h)(5)(iii). EPA's narrow view that reopening is only necessary to correct explicit errors in the record ignores not only a portion of its own regulations, but also the purpose and intent of reopening, which is to ensure a record is adequate in the face of "substantial new questions."

EPA cites the EAB's holding in *Prairie State Generating Co*. in claiming that Guardians' argument should fail, but that ruling made clear that Petitioners in that case failed to establish that new information "raised a 'substantial' question regarding the Permit." *See In re Prairie State Generating Co*., 13 E.A.D. 1, 50 (EAB 2006). Here, there is no dispute that Petitioner's comments raised "substantial new questions." To the extent that EPA argues that Petitioner is

further obligated to identify the specific information that would be submitted in response to any public comment period reopening, and to demonstrate further how such information would establish grounds for altering the permit, in order for its reopening argument to be sustained would frustrate the purpose and intent of 40 C.F.R. § 71.11(h)(5).

Fourth, EPA argues that any delay would not justify a public comment period reopening. EPA is no position to pass judgment with regards to delay. *See* Pet. Partial Opposition to Extension of Time (Doc. 5). Still, Guardians submits that in this case, the benefits of reopening the public comment period outweigh any delay.

EPA further seems to argue that if the Agency were required to reopen the public comment period in response to "substantial new questions," that it would create "a *per se* rule counter to Board precedent" and is therefore inappropriate. EPA Response at 44. In essence, EPA seems to be arguing that, even though its regulations at 40 C.F.R. § 71.11(h)(5)(iii) provide for reopening the public comment period where "substantial new questions" arise during the public comment period, that such a reopening should never be allowed. While we sympathize with EPA's concerns over establishing *per se* rules regarding reopening, such concerns cannot come at the expense of compliance with ***actual rules***. In this case, Guardians is cognizant that requesting new information from permittees is within the EPA's authority and should not automatically trigger a public comment period reopening (*see* Pet. for Rev. at 16), but where substantial new questions are raised, EPA cannot summarily assume that reopening is never appropriate.

EPA also mischaracterizes Guardians' arguments as challenging the "special" role that permittees play in the permitting process. Guardians does not challenge the "special" role that BP plays in influencing its own permit and certainly, EPA is allowed to request additional

information from a permittee that may be "necessary to evaluate or take final action" on a Title V Permit application. *See* 40 C.F.R. § 71.5(a)(2). However, BP's "special" role and EPA's authority to request necessary information is not a limitless invitation to simply fill the record with extensive new information and new rationale subsequent to a public comment period. Where substantial new questions are raised in response to public comments, EPA may have authority to request additional information, but this authority does not come at the expense of determining whether reopening the public comment period is appropriate.

Finally, EPA argues that, in lieu of a public comment period reopening, Guardians now has sufficient opportunity to address the adequacy of EPA's source determination through its Petition for Review. This argument puts Guardians in an untenable position. While EPA indicates that Guardians now has an opportunity to address through its Petition for Review the extensive new information submitted by BP, as well as EPA's source determination, the Agency is also attacking Guardians Petition for Review on the basis that certain issues were not preserved for review. *See* EPA Response at 37. EPA cannot have it both ways. Either the public comment period should be reopened or Guardians should be given an opportunity to fully challenge EPA's source determination.

III. The Source Determination—EPA's Rejection of Aggregation

EPA's Response makes clearer that the primary reason for rejecting aggregating the oil and gas wells and associated equipment (collectively referred to as the "wells") that feed the Florida River facility is due to a perceived lack of a "unique or dedicated interdependent relationship" between the facility and the wells. In support of its Response, EPA now additionally cites the Administrator's recent *Anadarko* Title V Petition ruling, *In the Matter of*

Anadarko Petroleum, Order Denying Petition for Objection to Permit (Feb. 2, 2011), further arguing that such a lack of "unique or dedicated interdependent relationship" demonstrates that the wells are not adjacent, and therefore not part of the single stationary source that is the BP's Florida River facility. *See* EPA Response at 36 (quoting *Anadarko* and noting "*Anadarko* provides further support for the reasonableness of Region 8's source determination in this case").

EPA's Response continues to strain credibility. In essence, EPA argues that, even though there are wells connected to the Florida River facility via pipelines, and even though, as accepted by EPA, it can be ascertained that 63% of all gas processed by the Florida River facility comes from BP operated wells (*see* EPA Response at 38), that there is no interdependence, and therefore, no adjacency that would warrant aggregation of the pollutant emitting activities. Rationally applied, EPA's "unique or dedicated interdependent relationship" doctrine amounts to this—unless 100% of the gas from a single well feeds the Florida River facility, no well shall be aggregated together with the facility as part of the single source. Put another way, even if 99.99% of the gas from a well feeds the Florida River facility, it would not be considered an interdependent part of the facility.

This is simply not reasonable, and EPA's record fails to provide a rationale basis for applying such a bright line standard. EPA asserts that there is no "dedicated relationship" at all between the Florida River facility and the wells that feed the facility. Yet, as EPA notes, the facility has agreements to "accept, compress, and treat" natural gas at the BP facility. *See* EPA Response at 23. EPA cites the fact that gas from a well may flow to multiple emission points, including the Florida River facility (*see e.g.* EPA Response at 34), yet "but for" the operation of the wells that feed the Florida River facility, the facility would not be able to operate. Put another way, the Florida River facility is 100% dependent on the operation of wells to feed it.

Regardless, even under EPA's extreme "unique or dedicated interdependent relationship" doctrine, the record provides no support that it fully applied it in the context of the Florida River facility. EPA cites to the "dynamic and complex" nature of gas flow in the area (*see e.g.*, EPA Response at 5, 22, 32, and 38) to argue that every single well that feeds the Florida River facility should not be aggregated, yet never assesses how much gas actually flows from individual wells to the facility (WildEarth Guardians addresses EPA's argument that such an issue was not preserved for review, *infra*.). Indeed, although EPA asserts "the Region did consider gas flow and gas pressure in its interdependence analysis," the Agency can only state that, "The Region explained that flow of gas in the NSJB [North San Juan Basin] field is complex and dynamic." EPA Response at 38. This is not a reasoned response, particularly since, based on EPA's own "unique or dedicated interdependent relationship," specifically understanding and assessing the flow of gas from wells to the Florida River facility is critical to justifying the Agency's source determination.

To be certain, source determinations are highly fact-specific, but simply because such determinations require a case-by-case analysis does not shield EPA's permitting decisions from thorough review, nor does it serve as a shield to determining whether such a decision was based on a clearly erroneous conclusion of law. Below, Guardians responds more directly to the arguments advanced by EPA:

A. EPA Misconstrues Petitioners Comments

EPA Response extensively attempts to cast Petitioner's comments on the Title V Permit as requesting one thing and one thing only: that EPA aggregate every conceivable BP oil and gas well that exists in the Northern San Juan Basin ("NSJB") of southwestern Colorado with the Florida River facility as a single stationary source. *See e.g.*, EPA Response at 12 ("the Region's

determination not to aggregate the emissions from Florida River with all other emission-producing activities in the NSJB owned and operated by BP (either Wolf Point or the well sites) represents a full response to the specific comment submitted by WEG") and 22 ("Since Petitioner's comment asserted that all BP-owned emission-producing activities in the entire NSJB field should be combined with Florida River...").

In going to such lengths to cast Guardians' comments in such an extreme light, however, the EPA unfortunately overlooked the fact that the thrust of Guardians' comments was an overarching request that the Agency "consider emissions from adjacent and interrelated pollutant emitting activities." *See e.g.*, EPA-FL-0022 at 2. There are numerous statements in Guardians' comments that clearly indicate that Guardians did not request such an absurd outcome as EPA suggests, for example:

- On p. 2 the comments state, "the EPA has not considered emissions from all interrelated pollutant emitting activities, namely BP's coalbed methane wells and the Wolf Point Compressor Station."

- On p. 4 the comments state, "Some or all of BP's coalbed methane wells clearly provide coalbed methane gas to the Florida River Compression Facility. Thus the facility depends upon the operations of these wells for its function."

- On p. 5 the comments state, "Together with the Florida River Compression Facility, the coalbed methane wells that supply the Facility with natural gas comprise a single source under PSD."

- On p. 5 the comments state, "Under the CAA [Clean Air Act], the Florida River Compression Facility and the coalbed methane wells that supply the Facility must be aggregated together and considered a single source to assure compliance with PSD in order for the Title V permit to be legally valid."

- On p. 6 the comments state, "The failure of the EPA to consider and address emissions from interrelated and adjacent BP coalbed methane wells and the Wolf Point Compressor Station, which all supply coalbed methane gas to the Florida River Compression Facility, further renders the draft Title V permit to be in violation of Title V regulations at 40 CFR § 71.

See EPA-FL-0022. Guardians' comments did not request that EPA only assess whether all BP oil and gas wells in the NSJB be aggregated together with the Florida River facility, but rather, revolved around one simple request: that EPA appropriately aggregate interrelated and adjacent pollutant emitting activities with the Florida River facility.[1]

B. EPA Support Facility Analysis is Relevant

EPA further argues that the concept of a support facility analysis is not instructive or relevant, and that regardless, Guardians "does not provide any evidence that such an analysis is required by the relevant regulations." EPA Response at 18.

To be certain, traditional application of the "support facility analysis" has been with regards to pollutant emitting activities with different standard industrial classification ("SIC") codes. The principle has sought to ensure that, where an activity supports the operation of a primary activity, that it be regulated as a single source together with the primary activity. EPA responds that, unless two activities have different SIC does, the support facility concept need not be addressed. *See* EPA Response at 19. Yet, the logic of EPA's response makes little sense.

Indeed, the guiding principle of the support facility concept is that support activities should be regulated together with the activities they support, ***regardless of their SIC code***. As Guardians noted in its Petition for Review, EPA has noted that where an activity provides 50% or more of its output (in terms of material and/or services) to a primary activity, it "expects permitting authorities to conclude that a support facility exists, and expects these activities to be aggregated with the primary activity," regardless of SIC code. *See* Guardians Pet. for Rev. at 30.

Under the EPA's approach, even where a support facility relationship exists between two pollutant emitting activities, if the activities belong to the same SIC code, they would not be

[1] This issue actually permeates EPA's entire Response to Guardians' Petition for Review, which seriously calls into question the credibility upon which EPA advances all of its arguments.

aggregated together under the support facility concept. This approach would lead to a bizarre outcome where, notwithstanding a finding that a support facility relationship exists, activities would not be aggregated together where they are alike in their industrial characteristics, whereas activities would be aggregated together where they differ in their industrial characteristics.

While a support facility analysis may not be explicitly "required," Guardians only argues that the EPA was required to give due consideration to undertaking such an analysis in light of its own guidance on this matter, and in light of the logical ramifications of the concept. Guardians' comments simply pointed to the principle of support facility, as well as relevant EPA policy regarding the concept and its application, as instructive in considering whether the Agency's source determination was reasonable. For EPA to reject even considering whether it is appropriate to apply the concept of support facility, even though, from a logical extension, its principle is equally applicable to sources that share the same SIC code, is not only reasonable, but further indication that the Agency's source determination was based on a clearly erroneous finding of fact or conclusion of law.

C. Petitioner Fully Preserved its Right to Review on Issues Related to Gas Flow and Pressure

EPA argues that Guardians failed to preserve for review arguments related to whether EPA should have considered the flow of gas from individual wells as well as gas pressure in assessing interdependence between the Florida River facility and the wells. *See* EPA Response at 37. This argument is absurd.

Issues related to gas flow and gas pressure are material to whether EPA appropriately assessed interrelatedness, and thereby completed an adequate source determination in issuing the Title V Permit for the Florida River facility, particularly in light of the extensive new information submitted by BP and rationale provided by EPA in response to comments. This

issue was fully preserved for review by Guardians. Furthermore, these issues are inherent in demonstrating how EPA's response to comments was insufficient with regards to the issue of its source determination and its assessment of interrelatedness, which Guardians' raised with reasonable specificity. They are not independent, stand-alone arguments challenging the EPA's permitting decision, nor do they undermine the efficiency, predictability, and finality of the permitting process.

It could hardly be said that Guardians did not raise issues regarding the need for the EPA to assess the degree to which the wells that feed the Florida River facility are interrelated with the facility, and therefore should be aggregated. Petitioner's comments went to lengths to present information regarding the potential number of wells that supply the Florida River facility (*see* EPA-FL-0022 at 4) and explicitly argued that all wells that supply Florida River should be aggregated with the facility based on a relationship of interrelatedness established by the fact that the wells provide the facility with gas (*id*. at 5). It was only in response to comments that EPA proffered the novel "unique or dedicated interdependent relationship" doctrine, thereby necessitating Guardians respond by pointing out that, even under this misplaced doctrine, EPA failed to assess whether the wells feeding the Florida River facility should be aggregated with the facility as a single source. These issues, if they could reasonably be viewed as distinct from the underlying argument that EPA failed to appropriately aggregate interrelated pollutant emitting activities, have simply been raised in response to EPA's own response to Petitioner's comments.

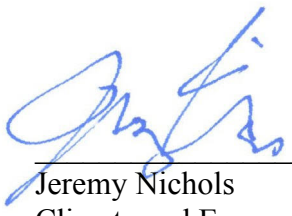
EPA argues that "given the scope of Petitioner's comments on the draft permit—to aggregate all the BP-owned emissions producing activities in the entire field—Petitioner's assertion on appeal that the Region should have considered gas flow and gas pressure to and

from individual wells is irrelevant." EPA Response at 38.[2] As explained, EPA misconstrues the scope of Guardians comments and thus, its argument that issues related to gas flow and gas pressure are "irrelevant" is unfounded.

IV. BP's Argument Regarding Uncontested Facts is Baseless

BP finally argues that Guardians' Petition must fail because it fails to "contest the facts." BP Response at 23. Such a standard is nowhere expressed in Title V regulations or in EAB precedent. According to 40 C.F.R. § 71.11(l)(1)(i) and (ii), the EAB is to rule on whether a Petition for Review demonstrates that a permitting authority's decision involved a clearly erroneous finding of fact or conclusion of law, or that the decision involves an important policy consideration. *See In re Peabody W. Coal*, 12 E.A.D. 22, 32 (EAB 2005). To the extent appropriate, Guardians has contested facts, otherwise Guardians' Petition for Review challenges the application of facts. Accordingly Guardians has met its burden of proof.

Respectfully submitted this 9th day of March 2011



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[2] EPA cites Petitioner's comments at 3-4 as support for its argument. Petitioner's comments on pages 3-4 are illustrative of the number of wells in the NSJB, as well as their likely air quality impacts. *See* EPA-FL-0022 at 3-4. They do not explicitly request that EPA "aggregate all BP-owned emissions producing activities in the entire field.

CERTIFICATE OF SERVICE

I certify that on March 9, 2011, I served this Motion for Leave to File a Reply Brief by electronic mail upon the following parties:

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