

**CASE NO. 07-72756**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**BILL MACCLARENCE,**

**Petitioner**

**V.**

**UNITED STATES ENVIRONMENTAL PROTECTION  
AGENCY, and STEPHEN L. JOHNSON, Administrator,  
United States Environmental Protection Agency,**

**Respondents**

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**PETITION FOR REVIEW OF AN ENVIRONMENTAL PROTECTION  
AGENCY ORDER**

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**OPENING BRIEF OF PETITIONER BILL MACCLARENCE**

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## **STATEMENT REGARDING ORAL ARGUMENT**

Petitioner respectfully requests oral argument, as this appears to be an issue of first impression in this Court. Petitioner believes that 15 minutes per side is sufficient.



## **I. STATEMENT OF JURISDICTION**

### **A. SUBJECT MATTER AND APPELLATE JURISDICTION**

Petitioner, Bill MacClarence, P.E. (“MacClarence”), seeks review of a final order of Stephen L. Johnson, Administrator of the United States Environmental Protection Agency (“EPA”), denying MacClarence’s petition requesting that EPA object to a Title V operating permit issued by the Alaska Department of Environmental Conservation (“ADEC”). EPA’s denial of this petition constitutes final agency action subject to judicial review. 42 U.S.C. § 7661d(b)(2).

EPA published notice in the May 11, 2007 Federal Register of its decision to deny MacClarence’s petition. See 72 Fed. Reg. 26813 (May 11, 2007). MacClarence filed his Petition for Review in this Court on July 10, 2007, which was within 60 days of the May 11, 2007 notice in the Federal Register. Thus, this Court has jurisdiction over this petition for review pursuant to 42 U.S.C. § 7607(b)(1). See 42 U.S.C. § 7661d(b)(2). Venue is proper in this Court pursuant to 42 U.S.C. § 7607(b)(1) because the subject of this case is the denial of a petition to object to a Title V permit for a facility in Alaska.

### **B. PETITIONER HAS STANDING**

As set forth in his declaration submitted with this brief in the excerpts of record, Petitioner Bill MacClarence has standing to challenge EPA's final Order in

this case. The challenged action injures petitioner by, *inter alia*, failing to address the substantive merit of his petition under Title V of the Clean Air Act, and by failing to ensure the lawful control of air pollution pursuant to the requirements of the Clean Air Act from a major source of pollution in Alaska.

To demonstrate standing, a petitioner must normally show that he has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant and that a favorable decision will likely redress the injury. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); See also Hall v. Norton, 266 F.3d 969, 975 (9th Cir. 2001). A “particularized” injury is one that affects the plaintiff in a personal and individual manner. However, allegations that a plaintiff will sustain harm are enough to satisfy the injury-in-fact requirement. Covington v. Jefferson County, 358 F.3d 628, 638 (9th Cir. 2004).

A plaintiff has standing to sue for the mere threat or fear that harm will be caused by a facility’s anticipated discharges. Northwest Env’tl. Def. Ctr. v. Owens Corning Corp., 434 F. Supp.2d 957, 963 (D.Or. 2006) citing Covington, 358 F.3d at 639; Central Delta Water Agency v. United States, 306 F.3d 938, 948 (9th Cir. 2002)(“to require actual evidence of environmental harm, rather than an increased risk based on violation of the statute, misunderstands the nature of environmental harm’ . . . a credible threat of harm is sufficient to constitute actual injury for

standing purposes.”) The court in Northwest Env'tl. Def. Ctr. held that plaintiffs had standing to bring suit against a manufacturer, who was constructing a facility without having obtained a preconstruction permit required under Clean Air Act, even though there had not yet been any emissions from the facility. Id.

In the Title V context, the mere risk of exposure to illegal pollution is enough to establish standing. See New York Pub. Interest Research Group v. Whitman, 321 F.3d 316, 325 (2nd Cir. 2003). That court held that injury-in-fact was sufficiently established by plaintiff's members' allegations about the health effects of air pollution and their uncertainty as to whether EPA's rejection of their petition to object to a Title V permit would expose them to excess air pollution. The court noted, “the distinction between an alleged exposure to excess air pollution and uncertainty about exposure is one largely without a difference since both cause personal and economic harm. To the extent that this distinction is meaningful, it affects the extent, not the existence of the injury.” Id. at 326.

The Second Circuit concluded that such allegations, in the context of a rejected petition to object to a Title V permit, satisfied the causation and redressability requirements of standing as well. New York Pub. Int. Research Group, 321 F.3d at 326. As members of the plaintiff organization alleged that their procedural rights had been violated, a lesser standard applied in evaluating their standing. “The person who has been accorded a procedural right to protect his

concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.” Id., quoting Lujan, 504 U.S. at 573 n.7.

Here, Mr. MacClarence visits, and will continue to visit in the future, the area near the major source of air pollution that is subject of this case, that is the BP Exploration (Alaska) Inc. Gathering Center #1 and the other sources of air pollution in the Prudhoe Bay Unit, which is a unit designated by the Alaska Oil and Gas Commission. Affidavit of Bill MacClarence at 1, paragraph 2, 3 in the Excerpt of Record, Volume 1, at Tab “Decl.”. While visiting this area, Mr. MacClarence is exposed to air pollution from these sources of pollution. This air pollution forms a regional haze that injures Mr. MacClarence’s aesthetic interests. Id. at 3, para. 14. This air pollution also endangers Mr. MacClarence’s health through direct exposure to the areas where he works, lives and recreates. Id. at 3, para. 12. Mr. MacClarence is concerned that EPA’s failure to object to the Title V operating permit for BP Exploration (Alaska) Gathering Center #1 will exposed him to illegal amounts of air pollution in the future, when he is at the North Slope and particularly when he is in or near the Prudhoe Bay Unit. Id. at 4, para. 16, 17.

In addition, the air pollution from these sources in the Prudhoe Bay Unit contributes to the “hole” in the stratospheric ozone layer. Id. at 3, para. 14. This decrease in the stratospheric ozone layer is particularly threatening for Mr. MacClarence, because he has development ocular choroidal melanoma on his left

eye. Id. at 2, para. 6.

Petitioner is harmed by EPA's decision not to object to the Title V permit to BP Exploration (Alaska), Inc. Gathering Center #1, because this permit violates the Clean Air Act by failing to aggregate all contiguous and adjacent sources of pollution under common control for Title V and New Source Review purposes. The requested relief would redress MacClarence's injuries by curtailing the impact of air pollution in and near the Prudhoe Bay Unit, or at the very least reducing the risk of illegal pollution in and near the Prudhoe Bay Unit. Accordingly, Mr. MacClarence has standing.

## **II. STATEMENT OF ISSUES FOR REVIEW**

I. Whether EPA erred when it failed to object to the Title V operating permit for the BP Exploration (Alaska) Inc.'s Gathering Center # 1 because the permit fails to aggregate all of the emissions sources in the Prudhoe Bay Oil and Gas Commission Unit into one "major stationary source" for purposes of the Clean Air Act's Title V and New Source Review provisions. EPA will likely argue that in deciding this issue, the Court must decide what burden a petitioner requesting an EPA objection to a Title V permit must meet.

### **III. STATEMENT OF THE CASE**

#### **A. NATURE OF THE CASE**

This case is a Clean Air Act challenge to EPA's final Order denying a petition by Bill MacClarence for an objection from EPA to a Title V permit issued by the Alaska Department of Environmental Conservation for the BP Exploration (Alaska), Inc. Gathering Center #1, which is part of an oil and gas production facility on the North Slope of Alaska (the "Petition").

The central issue in this appeal is whether EPA erred in not requiring BP Exploration (Alaska), Inc. Gathering Center #1 and the other sources of air pollution operated by BP in the Prudhoe Bay Unit to be considered a single major stationary source of air pollution. In Clean Air Act jargon, this issue is known as "aggregation."

There is a three-part test for determining if various pieces of equipment that emit air pollution, or "pollutant emitting activities" must be aggregated under the Clean Air Act ("Act"). The test is whether the pollutant emitting activities: (1) belong to the same industrial grouping; (2) are located on one or more contiguous or adjacent properties; (3) and are under the control of the same person (or persons under common control). See e.g. Alaska Stat. § 46.14.990(4), incorporating by reference 40 C.F.R. § 51.166(b)(6). Further, if one pollutant emitting activity serves as a support facility to other pollutant emitting activities, those sources

should be aggregated, even if the sources do not, when viewed in isolation, belong to the same industrial grouping.

## **B. DISPOSITION AND COURSE OF PROCEEDINGS BELOW**

On February 17, 2004, Alaska Department of Environmental Conservation (“ADEC”) issued Revision 1 to the Title V operating permit for the BP Exploration (Alaska), Inc. Gathering Center #1 at Prudhoe Bay, Alaska (Revision 1 to Gathering Center # 1 Permit.). On April 14, 2004, MacClarence timely filed a Petition for an objection to that Revision 1 to Gather Center #1 permit, Alaska Permit No. 182TVP01R1 (“the Petition”). R. B-6-75. EPA issued an order denying the petition for objection on April 20, 2007 and published notice of its decision in the Federal Register on May 11, 2007. R. A-1-0001; 72 Fed. Reg. 26813 (May 11, 2007). MacClarence is now appealing EPA’s denial.

## **IV. STATEMENT OF FACTS**

### **A. CLEAN AIR ACT AND TITLE V PERMITS**

The Clean Air Act (“Act”) seeks to ensure that air pollution in all areas of the country meet National Ambient Air Quality Standards (“NAAQS”) – standards established by EPA to protect human health and public welfare. 42 U.S.C. § 7408-7409. The Act then requires air pollution control agencies to develop programs to

achieve and maintain the NAAQS. 42 U.S.C. § 7410(a).

The Clean Air Act Amendments of 1990 established Title V which is a federal operating permit program for major stationary sources of air pollution. Title V requires major stationary source of air pollution, such as oil and gas facility, to obtain an operating permits known as a “Title V permit.” See 42 U.S.C. § 7661a(a). The Title V permit consolidates in a single document all of the requirements imposed upon a major stationary source of air pollution. The permit must include all enforceable emission limitations and standards, including Prevention of Significant Deterioration (“PSD”) requirements. 42 U.S.C. § 7661c(a).

EPA granted full approval to the Title V operating permit program submitted by the State of Alaska effective November 30, 2001, 66 FR 63184 (December 5, 2001). See 40 C.F.R. part 70, appendix A. The Alaska Department of Environmental Conservation is the permitting authority for the State of Alaska.

Congress also established the right of the public to participate in critical phases of the permit process, including the opportunity to comment on draft Title V permits, to petition the EPA to object to Title V permits purposed by state agencies, and to challenge EPA’s failure to object in federal court. See 40 C.F.R. 70.7(h), 42 U.S.C. § 7661d(b)(2). Along with EPA and the States, members of the public are also empowered to enforce violations of a Title V permit in the federal



courts. 42 U.S.C. § 7604(a)(1) and (f)(4). Public involvement is a vital facet of the Title V program. See 40 C.F.R. § 70.7(a)(1)(ii)(permits may be issued only if “the permitting authority has complied with the requirements for public participation under paragraph (h) of [40 C.F.R. § 70.7].”)

Section 505(d) of the Act requires permitting authorities to submit all proposed Title V operating permits to EPA for review. 42 U.S.C. § 7661d(a). Section 505(d) of the Act also requires EPA to object if a permit contains provisions not in compliance with applicable requirements of the Act. 42 U.S.C. § 7661d(b)(1). If EPA does not object within 45 days, any person may petition the Administrator within 60 days thereafter. 42 U.S.C. § 7661d(b)(2). EPA “shall issue an objection . . . if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of the [Clean Air Act.]” Id.

**B. BP EXPLORATION (ALASKA), INC.’S OPERATIONS AT THE PRUDHOE BAY UNIT**

The Prudhoe Bay Unit is an oil and gas production facility on the North Slope of Alaska in between the Arctic National Wildlife Refuge and the National Petroleum Reserve – Alaska. There are various “units” on state lands on Alaska’s North Slope. The Prudhoe Bay Unit is one, for the Prudhoe Bay field. There are others as well, such as Kuparuk and Colville River.

Regulations governing unitization are in 11 AAC 83.301 – 83.397. The Alaska Division of Natural Resources, Division of Oil and Gas is the overseer, in cooperation with the Alaska Oil and Gas Conservation Commission. Pooling or unitization refers to the voluntary or compulsory joining together of different lessees in order to exploit the same oil field with the minimal amount of wells and other equipment so as to prevent excess expense and waste. The State of Alaska has an interest in encouraging, approving, and sometimes requiring, unitization since it owns the oil and gas and does not want to see it wasted, and drilling and other expenses are subtracted before assessment of its taxes and royalties. The unit owners share expenses and agree on who performs what tasks.

The Alaska Oil and Gas Conservation Commission designated the Prudhoe Bay Unit to be one a single unit. BP Exploration (Alaska), Inc. has a controlling ownership position in all facilities at the Prudhoe Bay Unit, approximately 50.7 %. R. C-8-00289. But see R. I-90-02362 (stating BP Exploration (AK) Inc.'s ownership interest is only 26.35%). In any event, it is undisputed that BP Exploration (Alaska), Inc. is the operator for all the individual pollutant emitting activities at the Prudhoe Bay Unit. R. C-15-02212. The primary purpose of the Prudhoe Bay Unit is to deliver crude oil to the Trans-Alaska Pipeline System at Pump Station 1. R. C-8-00290. The Flow Stations and Gathering Stations are directly engaged in this activity. Id.

BP Exploration (Alaska), Inc. Gathering Center #1 (Gathering Center # 1) is an emission unit within the Prudhoe Bay Unit. Gathering Center # 1 processes crude oil and consists of nine natural gas fired turbines, nine natural gas fired heaters, five diesel fired engines, one diesel turbine used for emergency purposes, and eleven safety flares that burn natural gas. R. C-9-00348. Oil processed at Gathering Center 1 is produced from any of approximately 105 production wells located on six well pads. R. C-8-00284. In addition Gathering Center 1 receives high pressure gas from well pads originally serviced by Gathering Centers 2 and 3. Id. Three-phase crude oil is extracted from the ground at 38 individual drill sites and pumped to one of six dedicated production centers within the Prudhoe Bay, Gathering Center #1, Gathering Center #2, Gathering Center #3, Flow Station 1, Flow Station 2 and Flow Station 3. R. C-15-1122

The Main Operations Center generally controls the well production rate and other oil processing activities at the well pads. R. C-8-00284. The flow rate, gas/oil ration, and water content of the produced fluids vary from well to well and also vary in a given well over time. Id. At the production centers, the three-phase crude oil is separated into crude oil, produced water, and hydrocarbon gases. R. A-1-00005. The crude oil is then distributed to the Trans-Alaska Pipeline for sale. Id. The produced water is pumped into disposal wells or injected back into the production reservoir on the well pads, and the hydrocarbon gases are dispatched to

both the central gas facility and central compressor plant for further processing prior to reinjection. Id.

Other facilities located within the Prudhoe Bay Unit include a central power station that generates electricity for the entire Prudhoe Bay Unit; seawater treatment and injection plants to enhance oil recovery; a crude oil topping unit that supplies diesel fuel throughout the Prudhoe Bay Unit and greater North Slope and an operations center that includes administrative offices, water and waste-water treatment plants, emergency power generation, health and safety facilities, repair and storage facilities. R. A-1-00004. These facilities conduct operations in support of the crude oil production and delivery, without which that purpose could not be performed, either operationally or economically. R. C-8-00290. Each pollution emitting activity in the Prudhoe Bay Unit lists its two-digit SIC code as 13. Id. at 00289.

The pollution emitting activities are on one contiguous property within the Prudhoe Bay Unit. See R. I-83-02263; I-90-02362. The shortest distance between neighboring individual facilities is 0.3 miles between Prudhoe Bay Operations Center and Main Construction Camp, the longest distance between neighboring individual facilities is 6 miles between Central Compressor Plant and Seawater Treatment Plant, and almost all other facilities are within 1 or 2 miles of their nearest neighbor. R. C-8-00289.

All individual facilities located in the Prudhoe Bay Unit act as an integrated facility. Id. at 292. This integrated unit performs all the functions necessary to accomplish the task of delivering crude oil to Pump Station 1. Id. These functions are: bring production fluids to the surface (Well Pads); separate produced fluids into components, *i.e.* crude oil, hydrocarbon gases, and water (Flow Stations and Gathering Centers); condition gas for either use as fuel or for underground storage (Central Gas Facility and Central Compressor Plant); production of electrical power for individual facilities (Central Power Station); production and distribution of water for enhanced oil recovery (Seawater Treatment Plant, Seawater Injection Plant East, and Flow Station 2); disposal of solid waste by injection (Grind & Inject and Construction Camp 2); hot water for drilling operations (Hot Water Plant); diesel fuel for individual facilities (primarily emergency backup), drilling rigs, and mobile personal transportation (Crude Oil Topping Plant). Id.

**C. ISSUANCE OF REVISION 1 TO GATHERING CENTER #1 TITLE V PERMIT AT ISSUE IN THIS CASE**

On February 22, 2002, Alaska Department of Environmental Conservation (“ADEC”) issued the first draft Title V Operating Permit for the BP Exploration (Alaska), Inc. for Gathering Center #1. R. C-7-00097. In this original draft permit, ADEC failed to aggregate Gathering Center # 1 with any other pollutant emitting activities in the Prudhoe Bay Unit. R. C-7-00104.

Petitioner Bill MacClarence is a professional engineer and a retired ADEC employee and former head of the Title V Operating Permitting section of ADEC with 20 years of experience. On March 23, 2002, Mr. MacClarence submitted public comments on the draft permit. R. E-19-01594 - 01595. The basis of his comments was that the owner and operator of Gathering Center #1, namely BP, also owns, operates and controls multiple facilities on contiguous properties within the Prudhoe Bay Unit, which are interdependent and all fall under the same oil and gas extraction SIC code, but they were not being aggregated for Clean Air Act permitting purposes. R. E-19-01594.

On April 22, 2002, EPA's Region 10, which has responsibility for oversight in Alaska, submitted a similar comment. R. E-20-01600-01601. Specifically, EPA states "absent a contrary rationale, it is EPA's position that the BP GC [Gathering center] 1 facility is part of the larger source consisting of all BP units within the Prudhoe Bay facility." Id.

On March 6, 2003, ADEC issued a revised draft permit that aggregated the emission sources at Gathering Center # 1 with the other BP Exploration (Alaska), Inc. operated oil production facilities in the Prudhoe Bay Unit. R. C-8-00199, 00231. In the Statement of Basis for this March 2003 permit, ADEC explained that the Prudhoe Bay Unit facilities should be aggregated under the state and federal definitions of "major stationary source," since the pollutant-emitting

activities were adjacent and under common control. R. C-8-00283. ADEC explained that the “ BPXA [BP Exploration, Alaska] facilities are interdependent, located on adjacent properties, and are owned or operated by the same person under common control.” Id. ADEC further explained:

Oil processed at Gathering Center 1 is produced from any of approximately 105 production wells located on six well pads. In addition GC-1 receives high pressure gas from well pads originally serviced by Gathering Centers 2 and 3. The flow rate, gas/oil ration, and water content of the produced fluids vary from well to well and also vary in a given well overtime. Wells are frequently put in and taken out of service to balance the flow and composition of feed to the Gathering Center. Changes in the well production rate are also frequently made to meet the long term objective of maximizing the quantity of oil recovered from the reservoir. The Main Operations Center (MOC) generally controls the well production rate and other oil processing activities at the well pads. It develops and maintains updated well test data generated from test separators located at the well pads and gathering centers, and coordinates with reservoir engineering to set well pad production parameters.

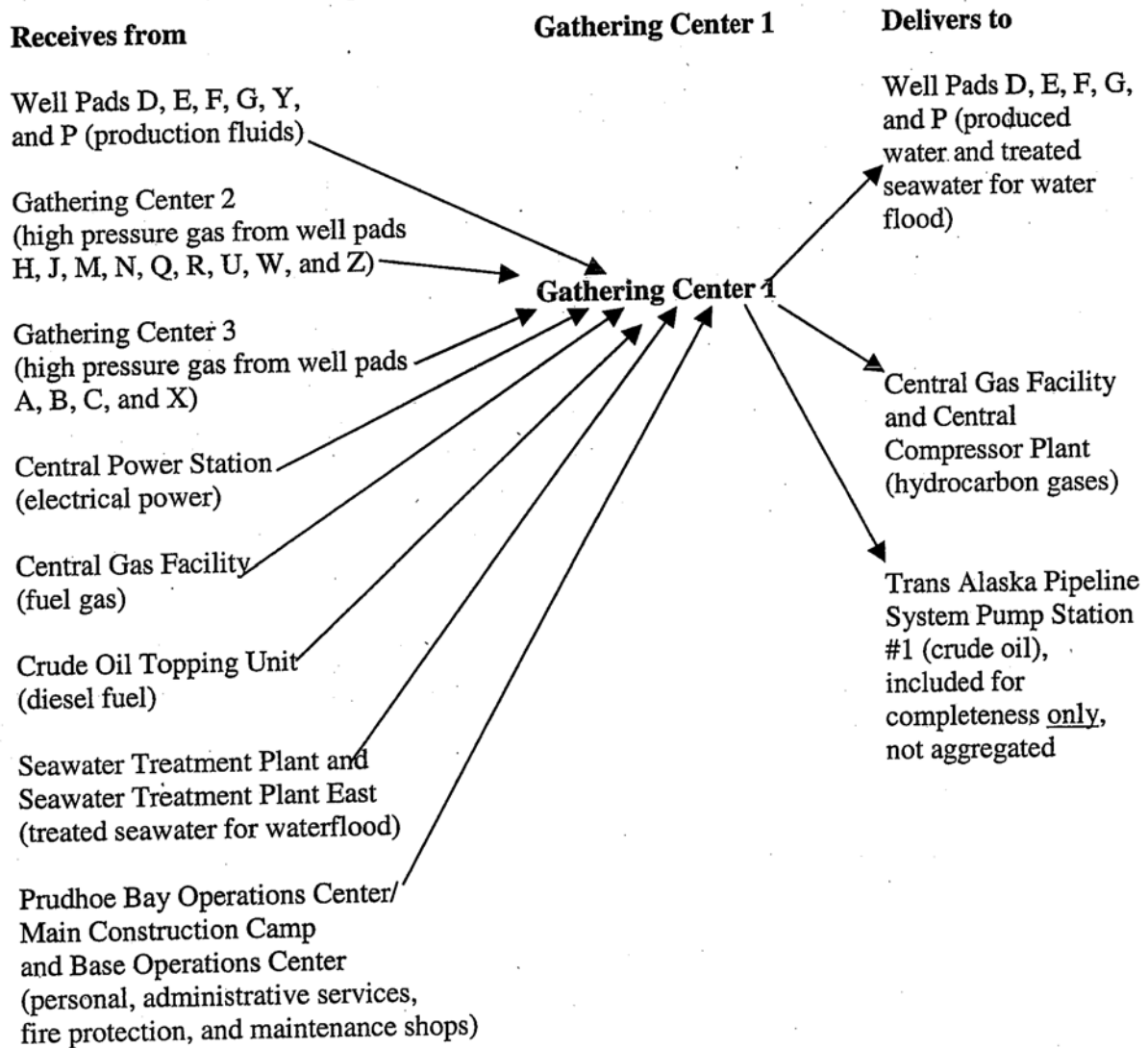
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The primary purpose of the gas compression and treatment facilities at the Gathering Center is to compress and dehydrate the produced gas recovered from the oil system to allow shipment via the gas transit line to the Central Compressor Plant (CCP). The gas is dehydrated to prevent the formation of hydrates in the gas transit line, and to minimize corrosion in downstream equipment caused by the combination-of water and carbon dioxide which is present in the gas. The CCP, located in the Eastern Operating Area, further compresses the gas and injects it into the gas cap of the Sadlerochit oil bearing formation. This injection serves the dual purpose of sustaining downhole reservoir pressure and providing storage for produced gas until gas sales facilities are installed.

R. C-8-00283 - 00284.

In support of its conclusion that all of the emission units in the Prudhoe Bay Unit should be aggregated into one major stationary source for Title V and New Source Review permitting, ADEC also provided a graphical representation of the inter-relationship of all of the emission units in the Prudhoe Bay Unit. The graphical representation is reproduced below.

**Figure 1 - Gathering Center 1 Integration**





R. C-8-00285; See also R. B-6-00086 (MacClarence petition containing same diagram). ADEC also provided three other graphical representations of the inter-relationship between the support facilities and the rest of the Prudhoe Bay Unit. See R. C-8-00286 – 00288. ADEC further provided five pages of detailed narrative analysis on “Why Aggregate Individual Facilities of the Prudhoe Bay Unit?.” See C-8-00289 – 00293.

MacClarence did not submit comments on the March 6, 2003 draft permit, as he observed that ADEC’s analysis was based on EPA’s directives and complied with all federal requirements for source aggregation. R. B-3-00017. ADEC explicitly acknowledged that it had accepted MacClarence’s March 23, 2002 comments in the March 6, 2003 response to comments so there was no reason for MacClarence to comment. See R. C-8-00326. Only BP Exploration (Alaska), Inc. submitted comments to this draft permit, requesting that the aggregation conditions be deleted in its entirety. R. C-10-00608.

On July 3, 2003, ADEC suddenly reversed its decision and issued a proposed permit, striking all aggregation requirements. R. C-10-00348. There was no public notice or comment period for this proposed permit. ADEC published a final permit on October 20, 2003, which identified the Gathering Center #1 stationary source as the surface structures with their associated emission units located on the Gathering Center # 1 production pad and emission units located on

well pads E, E, F, G, Y and P. R. C-12-00645. EPA did not object to the July 3, 2003 proposed permit or the October 20, 2003 permit within its 45 day review period.

EPA advised MacClarence that EPA considered the October 20, 2003 permit issued by ADEC to be the proposed permit for purposes of filing a Title V petition under section 505(b) of the Clean Air Act. R. A-1-0005. On February 5, 2004, MacClarence timely filed his petition to EPA to make an objection to the issuance of Air Quality Control Permit No. 182TVP01 for the BP Exploration (Alaska), Inc. Gathering Center #1 (“February petition”). R. B-3-00015. The petition was prepared by Public Employees for Environmental Responsibility on MacClarence’s behalf. Id. at 00016.

In his original petition, MacClarence requested that EPA object to the issuance of the November 2003 final permit on the grounds that: the permit violates the Clean Air Act; the pollution consequences of this violation are significant; and both the US EPA and ADEC failed to exercise proper regulatory oversight in this matter. R. B-4-00036 - 00037. MacClarence’s petition explained that the permit violated the Clean Air Act because it failed to aggregate all of the pollution emitting activities in the Prudhoe Bay Unit into one major stationary source. Id. at 00037. MacClarence’s petition incorporated by reference and attached the permit condition out of the March 6, 2003 draft permit that aggregated

all of the pollution emitting activities at the Prudhoe Bay Unit into one major stationary source as well as the section of the Statement of Basis for the March 6, 2003 draft permit which explained ADEC's rational for the decision to aggregate. Id. at 00039.

In the meantime, on February 17, 2004, ADEC issued a revision to the final permit, which changed some language in the Statement of Basis, added well pad K because of a claimed previous administrative error, and made some minor revisions to the permit terms ("Revision 1"). R. C-15-00955. ADEC stated that it revised the permit under its informal agency review provisions of 18 AAC 15.185. R. C-15-01058. Again, there was no public notice or opportunity for public comment. The permit still had an effective date of November 20, 2003. R. C-15-00955.

On March 29, 2004, MacClarence was informed by e-mail from the EPA Region X office that the permit had been revised and that his petition must be resubmitted by April 19, 2004. R. B-6-00075. Thus, on April 14, 2004, MacClarence re-filed his Petition for an objection to the Title V Air Quality Permit, Alaska Permit No. 182TVP01R1 ("the petition"). R. B-6-00075.

The April 2004 Petition stated that, because Revision 1 did not explain the departure from ADEC's March 7, 2003 decision to aggregate all facilities within the Prudhoe Bay Unit and did not address the Petitioner's original objections to the

October 2003 Gathering Center # 1 final permit, MacClarence was resubmitting the objections raised in his February 2004 Petition. R. B-6-00076. Thus, the Petition requested that EPA object to the issuance of the Revision 1 final permit for failing to aggregate all of the polluting emitting activities in the Prudhoe Bay Unit into one major stationary source. Id.

Specifically, MacClarence's petition demonstrated that the final permit violated the Act and that ADEC's decisions regarding aggregation were at variance with EPA's guidance on the issue. MacClarence's arguments were based on ADEC's own rationale set forth in its March 6, 2003 Statement of Basis, which was incorporated by reference into the petition and included as Attachment 2. R. B-6-00079, 00084. The petition stated:

As reinforced by ADEC's original analysis, shown at Attachment 2, the March 7, 2003 version of this permit complies with all federal requirements for source aggregation. ADEC's rationale for requiring aggregation is based on EPA directives. By contrast, the permit decisions referenced in the final permit are at variance with your agency's own guidance.

Id. at 00079. Further, MacClarence stated that "the permit violates Section 504 of the Clean Air Act," since the Prevention of Significant Deterioration provisions are "based on aggregated impact of air emissions." Id. In short, the petition explained that ADEC did it right the first time by requiring the Prudhoe Bay Unit pollutant emitting activities to be aggregated, and the final permit, which did not require aggregation, violated the Act. Id.

After MacClarence forced EPA to respond to his petition via a “deadline” suit, on April 20, 2007, the EPA Administrator signed an order denying MacClarence’s petition to object to the Title V permit issued by the Alaska Department of Environmental Conservation to BP Exploration (Alaska) Inc.’s Gathering Center 1 (Revision 1 to Gathering Center # 1 permit), Prudhoe Bay, Alaska. R. A-1-00012. This appeal followed.

## **V. SUMMARY OF THE ARGUMENT**

Bill MacClarence appeals EPA’s denial of his petition seeking the agency’s objection to a Clean Air Act Title V operating permit issued by the Alaska Department of Environmental Conservation for the BP Exploration (Alaska), Inc. Gathering Center #1. MacClarence demonstrated in his petition that the Title V operating permit is not in compliance with the requirements of the Clean Air Act because it fails to treat all of the pollution emitting activities in the Prudhoe Bay Oil and Gas Commission Unit as one “major stationary source” for purposes of the Clean Air Act’s Title V and New Source Review provisions.

There is a three-step test to decide if pollution emitting activities should be “aggregated” to comprise one major stationary source for Title v and New Source Review purposes. A stationary source includes all pollution emitting activities which: (1) belong to the same industrial grouping; (2) are located on one or more

contiguous or adjacent properties; (3) and are under the control of the same person (or persons under common control). See e.g. Alaska Stat. § 46.14.990(4), incorporating by reference 40 C.F.R. § 51.166(b)(6). As all pollution emitting activities within the Prudhoe Bay Unit have the same SIC industrial grouping code and are all under common control by BP Exploration (Alaska, Inc), there is no question that prongs one and three of this test are satisfied. As to prong two, under the plain meaning of contiguous, all polluting emitting activities within the Prudhoe Bay Unit are on one contiguous property, and therefore Prudhoe Bay Unit is one major stationary source.

Moreover, the Prudhoe Bay Unit is also one stationary source under EPA's "common sense" notion of a major source. See R. F-57-01723 (EPA uses "common sense" notion of a facility to determine what is a major stationary source). The emission units are functionally interrelated and physically connected. Support facilities serve all the gathering centers and the integrated facility performs all the functions necessary to accomplish the task of delivering crude oil to the pipeline. R. C-8-00283. The Alaska Oil and Gas Conservation Commission made Prudhoe Bay Unit into one unit, with one unit code, which embodies the common sense notion of one source.

In his petition, MacClarence demonstrated why the permit violates state and federal requirements for source aggregation by incorporating by reference ADEC's

rationale for the March 2003 draft permit. B-6-00079, 00084. By failing to address or acknowledge any of these arguments, EPA arbitrarily prohibited MacClarence from incorporating arguments by reference from exhibits attached to his petition. The petition process is specifically designed to allow the public to participate and there is no rule or reason behind EPA's rejection of MacClarence's incorporated arguments.

EPA also based its decision to deny MacClarence's petition on MacClarence's alleged failure to show why ADEC's final decision not to aggregate was unreasonable. See A-1-00008. EPA is applying an arbitrary and capricious review of ADEC's actions to the petition process, when the statute clearly states that the petitioner must only demonstrate that the permit does not comply with applicable requirements. See 42 U.S.C. § 7661d(b)(2). If EPA wants to impose this requirement on public petitions under § 7661d(b)(2), it must attempt to do so by promulgating a regulation through notice and comment rulemaking, such as it did for the Environmental Appeals Board's review of petitions to challenge permit decisions pursuant to 40 C.F.R. §124.15. MacClarence demonstrated in his petition that the permit is not in compliance with applicable requirements because it fails to aggregate all pollutant emitting activities in Prudhoe Bay Unit, which is all that is required for an objection by EPA under 42 U.S.C. § 7661d(b)(2).

## **VI. ARGUMENT**

Section 502(b)(2) of the Clean Air Act requires that EPA “shall issue an objection ... if the petitioner demonstrates to [the EPA] that the permit is not in compliance with the requirements of the chapter, including the requirements of the applicable implementation plan.” 42 U.S.C. § 7661d(b)(2). As demonstrated in MacClarence’s Petition, the Title V operating permit issue by ADEC to BP Exploration (Alaska, Inc.) Gathering Center #1 violates the Clean Air Act and Alaska’s State Implementation Plan because it fails to aggregate all contiguous and adjacent pollution emitting activities under common control for Title V and New Source Review purposes. Therefore, EPA must object to the permit.

### **A. STANDARD OF REVIEW**

The judicial review provisions of the Clean Air Act do not set forth a standard of review for challenges to Title V permits. See 42 U.S.C. § 7607(b). Therefore, the Court should apply the Administrative Procedure Act standard and reverse EPA’s Order if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). See Western States Petroleum Ass’n v. E.P.A., 87 F.3d 280, 283 (9th. Cir. 1996).



**B. EPA UNLAWFULLY DETERMINED THAT THE PETITION DID NOT DEMONSTRATE A VIOLATION OF THE CLEAN AIR ACT**

**1. EPA'S DECISION TO REJECT PETITIONER'S USE OF INCORPORATION BY REFERENCE TO PROVIDE A DETAILED EXPLANATION OF THE BASIS FOR AGGREGATION IS UNLAWFUL.**

The Clean Air Act requires that the EPA “shall ... object” to the permit if the petition demonstrates that the permit does not comply with the Clean Air Act, including the requirements of the applicable implementation plan. 42 U.S.C. § 7661d(b)(2). EPA basis for its refusal to object to the Revision 1 permit was that the Administrator felt MacClarence’s arguments as to why the permit violated the Clean Air Act were too “generalized.” R. A-1-8. On the contrary, MacClarence cited to specific analysis regarding aggregation in exhibits, which were attached to, and incorporated by reference, in his petition. B-6-00079, 00084.

Specifically, in March 2003, ADEC published a revised draft permit that aggregated Gathering Center 1 with BP’s other pollution emitting activities in the Prudhoe Bay Unit. In its Statement of Basis Discussion for Aggregation, ADEC stated: “Based on state and federal definitions of ‘facility,’ Gathering Center 1 should be aggregated with the other Prudhoe Bay Unit facilities... They all contain pollutant-emitting activities that are under common control, are adjacent, and Caribou Crossing supports the major industrial group...” R. C-8-283. ADEC explained its decision in support of aggregation and its determination that the

emission units are adjacent and contiguous, citing four particularly relevant EPA guidance documents that applied to the Prudhoe Bay Unit facilities. R. C-8-00283 - 00293.

This Statement of Basis included schematic diagrams, showing the functional relationships and thus interconnectedness of each pollution emitting activity at the Prudhoe Bay Unit. R. C-8-00285 - 00288. The Statement of Basis also contains a narrative explanation of the functional relationship of the various pollution emitting activities at the Prudhoe Bay Unit. R. C-8-00283 - 00285.

ADEC then applied these facts to the state definition of “facility” (and thus major stationary source), and the federal definition of major stationary source. R. C-8-00289. ADEC continued with a discussion of why the Prudhoe Bay Unit should be aggregated into one major stationary source in light of various EPA guidance documents and previous decisions. R. C-8-00289 – C-8-00293. ADEC’s analysis even included taking a list of the types of questions EPA usually asks in making aggregation determinations and answering them in favor of aggregation with regard to the factual situation present at the Prudhoe Bay Unit. R. C-8-00292 – 00293. The Statement of Basis went on to include a Table that “summarizes the functional relationship between the individual facilities and the overall goal of the Prudhoe Bay Unit, which is delivery of sales oil to Pump Station 1 [of the Trans-Alaska Pipeline] for custody transfer.” R. C-8-00293, 00303 – 00304. Finally, the

Statement of Basis included a Table that “goes into additional for each individual facility again demonstrating functional relationships. The example of field-wide integration uses industry project applications to show how a major production enhancement project (GHX-1 and GHK-2) results in modifications to nearly every facility in the Prudhoe Bay Unit.” R. C-8-00293, 00304 – 00317.

The key point is that MacClarence’s Petition, which EPA rejected as being only generalized complaints, incorporated by reference and actually physically attached all of the above described analysis in the Statement of Basis, with the exceptions of two Tables. See R. B-6-00079, 00084 – 00094.

However, EPA’s Order now being appealed did not address ADEC’s change in position or its March 2003 Statement of Basis Discussion for Aggregation, which clearly explains why aggregation is required, even though those arguments were incorporated by reference. Essentially, EPA arbitrarily decided that a Petition cannot incorporate arguments by reference from exhibits attached to the petition.

EPA arbitrarily ignores MacClarence’s arguments based upon ADEC’s Statement of Basis Discussion for Aggregation, presumably because those arguments were incorporated by reference instead of pasted into the body of the petition itself. However, EPA admits that its Order denying the petition was based on a “review of available information,” including the statement of basis for the original permit and the revised permit. R. A-1-00002. EPA does not explain why

the various pollution emitting activities at the Prudhoe Bay Unit do not need to be aggregated. Rather, EPA simply explains that “ADEC provided a detailed explanation of its aggregation decision in the statement of basis for the final permit for [Gathering Center] 1 issued in October 2003, as well as in the statement of basis for Revision 1 issued in February 2004.” R. A-1-00008. It is quintessential arbitrary government action for EPA to rely on documents and arguments in its final Order that are incorporated by reference and then ignore Petitioner’s documents and arguments that are incorporated by reference.

**2. EPA CANNOT IMPOSE A BURDEN ON PETITIONER BEYOND THE BURDEN TO DEMONSTRATE THAT THE PERMIT IS NOT IN COMPLIANCE WITH THE REQUIREMENTS OF THE CLEAN AIR ACT.**

EPA also complains that the Petition does not explain why ADEC’s final decision not to aggregate is unreasonable. R. A-1-00008. However, EPA does not have authority to require such an explanation. First, whether or not ADEC’s decision to aggregate was unreasonable is not relevant to EPA’s decision on MacClarence’s petition. MacClarence is petitioning the Administrator to object to a permit that violates the Clean Air Act, not challenging ADEC’s decision to issue the permit. Section 502(b)(2) of the Clean Air Act requires that EPA “shall issue an objection ... if the petitioner demonstrates to [the EPA] that the permit is not in compliance with the requirements of the chapter.” 42 U.S.C. § 7661d(b)(2). The

standard is whether the petition demonstrates that the permit is not in compliance with the Clean Air Act, not whether the state agency's decision was unreasonable.

Furthermore, EPA is applying an arbitrary and capricious standard in its review of petitions to object to Title V operating permits under the Clean Air Act. MacClarence is not required to make any showing as to why ADEC's decision was arbitrary and capricious; only that the permit is not in compliance Clean Air Act.

Id. If EPA wants to impose this requirement on public petitions under § 7661d(b)(2), it would have to attempt to do so by promulgating a regulation through notice and comment rulemaking, such as it did for the Environmental Appeals Board's review of petitions to challenge permit decisions pursuant to 40 C.F.R. §124.15. Indeed, an interpretation of a legislative rule "cannot be modified without the notice and comment procedure that would be required to change the underlying regulation—otherwise, an agency could easily evade notice and comment requirements by amending a rule under the guise of reinterpreting it." Molycorp, Inc. v. EPA, 197 F.3d 543, 546 (D.C. Cir. 1999).

Nevertheless, as discussed below in Section VI.B, below, MacClarence demonstrated that ADEC's March 2003 revised draft permit was consistent with EPA guidance, whereas its October 2003 final permit was not in compliance with the applicable requirements of the Clean Air Act.

### **3. EPA LACKS THE AUTHORITY TO DECLARE THE FAILURE TO AGGREGATE HARMLESS ERROR**

EPA also appears to invoke a harmless error rule by stating that the petition fails to identify flaws in the permit due to the alleged deficient decision not to aggregate all of the pollutant emitting activities in the Prudhoe Bay Unit. R. A-1-00008. The Clean Air Act and the EPA's own regulations do not allow EPA the discretion to ignore violations of Title V permit program requirements. Rather, EPA's obligation to object is mandatory if a petition demonstrates that the permit is not in compliance with the requirements of the Clean Air Act. See 42 U.S.C. § 7661d(b)(2) (Administrator shall object if permit is defective). Accord New York Pub. Int. Research Group v. Whitman, 321 F.3d 316, 334 (2d Cir. 2002); Sierra Club v. Johnson, 436 F.3d 1269, 1280 (11<sup>th</sup> Cir. 2006) (“EPA is not a board of pardons. Its duty is to enforce requirements, not to grant absolution to state agencies that have violated them.”)

Congress clearly intended that the EPA's duty to object to non-compliant permits is nondiscretionary. In the conference report accompanying the final version of the Title V bill, Congress explained:

This section sets out clearly the procedures required of EPA in reviewing permits. Simply put, the Administrator is required to object to permits that violate the Clean Air Act. This duty to object to such permits is a nondiscretionary duty. Therefore, in the event a petitioner demonstrates that a permit violates the Act, the Administrator must object to that permit.

136 Cong. Rec. S16,895, S16,944 (1990). See also New York Pub. Int. Research Group v. Whitman, 321 F.3d at 333; . Thus, what consequences flow from an illegal failure to aggregate all of pollution emitting activities in the Prudhoe Bay Unit is not germane to EPA’s decision to grant or deny the Title V petition.

**C. THE CLEAN AIR ACT, ITS IMPLEMENTING REGULATIONS, AND ALASKA STATUTE 46.14 (AIR QUALITY CONTROL) and REQUIRE AGGREGATION OF ALL POLLUTANT EMITTING ACTIVITIES WITHIN THE PRUDHOE BAY UNIT**

Revision 1 to the Title V operating permit issued by ADEC for the BP Exploration (Alaska), Inc. Gathering Center #1 violates the Clean Air Act because it fails to aggregate all contiguous and adjacent pollution emitting activities in the Prudhoe Bay Unit into one major stationary source for Title V and New Source Review Purposes.

For the Court’s review of EPA’s final orders, issues of statutory and regulatory interpretation are governed by familiar two level analysis in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), and its progeny. When reviewing an agency's construction of a statute administered by that agency, the Court first determines “whether Congress has directly spoken to the precise question at issue.” Chevron, 467 U.S. at 842. If so, that ends the inquiry. Id. Should the statute be silent or ambiguous on the question posed, the

Court must then decide whether the “agency's answer is based on a permissible construction of the statute.” Id.

An agency’s interpretation of its own regulations is not given deference if “plainly erroneous or inconsistent with the regulation.” Bay Area Addiction Research and Treatment, Inc. v. City of Antioch, 179 F.3d 725, 732 n.11 (9<sup>th</sup> Cir. 1999), citing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994). Moreover, the interpretation of a statutory provision must begin with the plain meaning of its language. In re Bonner Mall Partnership, 2 F.3d 899, 908 (9<sup>th</sup> Cir.1993). Once an agency issues a determination or ruling, it “must either follow its own precedents or explain why it departs from them.” Puerto Rican Cement Co. v. United States EPA, 889 F.2d 292, 298 (1st Cir.1989) (quoting Shaw's Supermarkets, Inc. v. NLRB, 884 F.2d 34, 36 (1st Cir.1989)).

**1. THE PLAIN LANGUAGE OF 40 C.F.R. § 51.166(b) REQUIRES AGGREGATION**

Under the plain meaning of ‘contiguous or adjacent properties,’ BP Exploration (Alaska), Inc.’s pollutant emitting activities within the Prudhoe Bay Unit are a single major source for Title V and PSD permitting purposes. Based on state and federal definitions of “stationary source,” Gathering Center 1 should be aggregated with the other Prudhoe Bay Unit facilities, as they all contain pollutant-emitting activities that are under common control, are contiguous, and are part of



the same major industrial group (as determined by the Major Group codes in the Standard Industrial Classification (“SIC”) Manual).

40 C.F.R. § 51.166(b) defines “source,” and “facility,” as follows:

(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 two-digit code) as described in the *Standard Industrial Classification Manual*...

Alaska Statute § 46.14.990(4) incorporates C.F.R. 51.166(b) by reference, giving "building, structure, facility, or installation" the same meanings given in 40 C.F.R. 51.166(b). 18 AAC § 50.040(h)(4)(B)(iii) then incorporates the definitions in AS 46.14.990 into its Title V program.<sup>1</sup> Based on these definitions, the pollutant-emitting activities must meet three criteria to be aggregated into one stationary source for Title V and New Source Review purposes.

First, the pollutant-emitting activities must “belong to the same industrial grouping” as described by their SIC code. 40 C.F.R. § 51.166(b)(6). As explained

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<sup>1</sup> Because these regulatory definitions essentially parrot the statutory definition of major source under Title V, EPA’s interpretation is entitled to no deference. See 42 U.S.C. § 7661(2)(Major source “any group of stationary sources located within a contiguous area and under common control”).

by ADEC, all the oilfield facilities on the North Slope have the same SIC code (1311 – Crude Petroleum and Natural Gas Production). R. C-15-01121. There does not appear to be any controversy over this factor.

Second, the pollutant-emitting activities must be “under the control of the same person.” 40 C.F.R. § 51.166(b)(6). ADEC admitted that this requirement is satisfied, as BP Exploration (Alaska), Inc. “is the operator and implements the decisions of the leaseholders via the Unit Operating Agreement” within the Prudhoe Bay Unit. R. C-15-01121.

Third, and really the only factor at issue in this case, the pollutant-emitting activities must be “located on one or more contiguous or adjacent properties.” 40 C.F.R. § 51.166(b)(6). The Merriam-Webster dictionary defines contiguous<sup>2</sup> as “being in actual contact, touching along a boundary or at a point.” This boundary requirement is satisfied, as Prudhoe Bay Unit is one continuous property. The Court need not go further than the map to conclude that aggregation is required for all BP Exploration (Alaska), Inc. emission units in the Prudhoe Bay Unit. See Maps of Prudhoe Bay Unit Processing Facilities and Associated Drill Pads and

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<sup>2</sup> Merriam-Webster dictionary defines adjacent as “not distant, nearby; having a common endpoint or border; immediately preceding or following,” synonymous with “contiguous.” Merriam-Webster Online ([www.Merriam-Webster.com](http://www.Merriam-Webster.com)) copyright 2005 by Merriam-Webster, Incorporated. Although “contiguous” shall be used hereinafter to describe the continuousness of the units within Prudhoe Bay Unit, MacClarence also contends that these properties are adjacent, given the plain meaning of “contiguous or adjacent.”

Map of Prudhoe Bay Unit Air Permitted Facilities. R I-83-02263, R I-84- 2264.

See also R. I-90 Map of Prudhoe Bay Unit and other oil and gas units in the North Slope. As shown on these maps, the Prudhoe Bay Unit is clearly defined and “located on one or more contiguous or adjacent properties” within the plain meaning of these terms.

The Court’s inquiry can end here. The plain language of the applicable regulations establishes that all of the pollutant emitting activities in the Prudhoe Bay Unit must be aggregated into one major stationary source for Title V and New Source Review permitting.

There is, however, further textual evidence to support aggregation. Congress specifically said not to aggregate emission units for determining whether oil and gas facilities are “major sources” under maximum achievable control technology provisions of the Clean Air Act, but was silent under Title V and New Source Review. Section 112 Clean Air Act specifically provides that emissions from oil or gas exploration or production wells (with associated equipment) and emissions from any pipeline compressors or pump stations will not be aggregated with emissions from similar facilities for purposes of determining whether the facilities are “major sources” for purposes of the maximum achievable control technology provisions of the Act. 42 USC § 7412(n)(4)(A). However, Congress did not include this type of exception for oil and gas facilities under the Title V and

New Source Review programs. Therefore, under the “negative pregnant” rule of statutory construction, Congress must have meant to require aggregation of pollution emitting activities under the New Source Review and Title V provisions of the Clean Air Act. See Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003) (the canon “expressio unius est exclusio alterius” - the expression of one thing implies the exclusion of another - may apply when the items expressed are members of an ‘associated group or series,’ justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.)

**2. EVEN IGNORING THE PLAIN LANGUAGE AND USING EPA’S “COMMON SENSE NOTION OF PLANT” TEST RESULTS IN A DETERMINATION THAT THE PRUDHOE BAY UNIT IS ONE MAJOR STATIONARY SOURCE.**

EPA may argue that the plain language of 40 C.F.R. § 51.166(b) does not control, but rather the test is whether the various pollutant emitting activities constitute a common sense notion of a “facility.” Even under this test, the Prudhoe Bay Unit is one major stationary source because BP (Alaska) Inc.’s pollutant emitting activities at Prudhoe Bay Unit make up one stationary source from a “common sense” perspective.

According to EPA, “whether two facilities are ‘adjacent’ is based on the ‘common sense’ notion of a source and the functional interrelationship of the

facilities, and is not simply a matter of the physical distance between two facilities.” F-57-1723. EPA has also issued guidance “as to how ‘near’ properties need to be in order to be required to group them as a single stationary source.” EPA explained that the “guiding principle behind this guidance is the common sense notion of a plant. That is, pollutant-emitting activities that comprise or support the primary product or activity of a company or operation must be considered part of the same stationary source.” R. F-51-01677

This common sense notion of a plant certainly applies to all BP’s pollution emitting activities in the Prudhoe Bay Unit. The most obvious reason is that the Alaska Oil and Gas Conservation Commission has already designated the Prudhoe Bay Unit as one facility when it made it a unit. There are other oil and gas production units on the North Slope. See R. I-90. The Prudhoe Bay Unit has been designated as one unit and BP operates it as one unit, demonstrating that the Prudhoe Bay Unit does indeed constitute one major stationary source under a common sense notion of a facility.

Furthermore, the “individual facilities at the Prudhoe Bay Unit act as a single integrated production facility for the purpose of delivering crude oil to the Trans Alaska Pipeline System at Pump Station 1 for custody transfer.” R. B-3-86. EPA also stated in its 1980 promulgation of PSD regulations that the 2-digit SIC code grouping embodies a common sense notion of a “plant” that is appropriate for

the PSD program. (45 Fed. Reg. at 52694). All the pollution emitting activities within Prudhoe Bay Unit list their two-digit SIC code as 13. R. R. C-8-00290.

Delving deeper into the interrelationship of the pollutant emitting activities within the Prudhoe Bay Unit still results in the conclusion that it is one major stationary source. For example, in its March 2003 Statement of Basis' discussion on aggregation, ADEC included helpful diagrams, showing the functional relationships of the pollutant emitting activities at the Prudhoe Bay Unit. R. C-8-00285 - 00288. ADEC states, "the interlocking relationships demonstrate how each and every individual facility is included in the greater Prudhoe Bay Unit by their functional relationship. Id. at 00285. In that Statement of Basis, ADEC also admits the sites are adjacent due to their close proximity. Id. at 90. Thus, these Prudhoe Bay Unit pollutant emitting activities are contiguous or adjacent by virtue of their proximity and interaction with one another under the plain meaning of "contiguous or adjacent properties" and from a common sense perspective. MacClarence provides further detail on the specific interrelationship below.

### **3. SUPPORT FACILITIES MUST BE AGGREGATED**

Support facilities are typically those which "convey, store or otherwise assist in the production of the principal product" or group of products produced or distributed, or services rendered. 45 Fed. Reg. 52695 (August 7, 1980). See also I-

59-01732. Support facilities must be aggregated if they support the major industrial grouping, are on contiguous or adjacent property and are under common control.

The Permit does not aggregate any support facilities with Gathering Center 1, reasoning that “the purposes the support facilities serve are secondary to the function of the production hubs.” R. C-15-01125. However, support facilities must be aggregated with the Gathering Center 1 and the other Prudhoe Bay Unit facilities, as they are “located on one or more contiguous or adjacent properties” with Gathering Center 1 and the other BP Exploration (Alaska), Inc. oil production facilities in the Prudhoe Bay Unit. 40 C.F.R. § 51.166(b)(6). Furthermore, EPA has stated: “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” R. F-52-01679.

In an August 8, 1997 letter to the Utah Department of Environmental Quality<sup>3</sup>, EPA explained that the pump station and productions facility of the Great Salt Lake Minerals plant should be considered a single source under the PSD regulations, despite the fact that the pump station is on one side of the Great Salt Lake, while the production operations are on the other side of the lake. R. F-52-

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<sup>3</sup> This guidance document was discussed in ADEC’s March 2003 Statement of Basis Discussion for Aggregation, which was attached to MacClarence’s petition and incorporated by reference in his argument. R. B-6-0091.

01679. EPA stated: “The underlying facts indicate that the pump station operates solely as a support facility to the plant” and that “the pump station activity does not have its own primary economic activity but only supports the activity of the main facility.” Also, EPA pointed out “previous determinations, which have been made by EPA and states, have always determined that activities which support the primary activities of a source are considered to be part of the source to which they provide support.” Id.

In another memorandum regarding the analysis of the applicability of PSD to the Anheuser-Busch, Incorporated Brewery and Nutri-Turf, Incorporated Landfarm at Fort Collins, Colorado<sup>4</sup>, EPA advised that “one source classification encompasses both primary and support facilities...” R. F-50-01675. In the case of Anheuser-Busch, EPA considered the brewery (primary facility) and landfarm (support facility) to be a single stationary source for PSD applicability purposes. EPA considered the brewery and landfarm operation to be adjacent and contiguous, “since the landfarm operation is an integral part of the brewery operations, i.e. land application at the landfarm is the means chosen by Anheuser-Busch to dispose” of their waste water. Id. Strengthening EPA’s conclusion was the fact that a pipeline “physically connects the brewery and landfarm.” The

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<sup>4</sup> This guidance document was also discussed in ADEC’s March 2003 Statement of Basis Discussion for Aggregation, which was attached to MacClarence’s petition and incorporated by reference in his argument. R. B-6-00091.



distance between the facilities did not support the state's determination that these were separate sources for PSD purposes. Id.

In the March 2003 Statement of Basis Discussion for Aggregation, ADEC explained that these guidance documents were relevant to the PBU:

The primary purpose (economic activity) of the Prudhoe Bay Unit is to deliver crude oil to the Trans-Alaska Pipeline System at Pump Station No. 1. The Flow Stations and Gathering Stations are directly engaged in this activity. The other individual facilities conduct operations in support of the primary purpose, without which that purpose could not be performed, either operationally or economically.

(R. C-8-00290). ADEC also explained how the facilities were interconnected in their purposes and physically connected by pipelines for transportation of materials, citing the following examples:

Central Gas Facility supplies gas to Central Power Station for electrical production and receives electrical power in return.

The Flow Stations and Gathering Centers supply raw gas to the Central Gas Facility and receive conditioned (dehydrated) gas in return for use as fuel.

The Well Pads supply crude oil, water, and hydrocarbon gases to the Flow Stations and Production Centers and receive water in return for enhanced oil recovery (water flooding). They also receive hydrocarbon gases for gas-lift operations.

The Central Compressor Plant supplies hydrocarbon gas with entrained liquids removed to the Central Gas Facility, which returns a lean gas for pressurization and reinjection.

The Central Power Station supplies electrical power to the Prudhoe Bay Operations Center/Main Construction Camp and Base Operations Center and receives personnel, administrative services, and maintenance services in

return.

Id. Indeed, most of the support facilities would not exist but for the support they provide to the Flow Stations and Gathering Centers, including Gather Center #1.

Id. They all perform a necessary activity for the primary purpose, the production of crude oil. Therefore, a dedicated waste disposal facility, such as Grind & Inject and Construction Camp 2, should be considered as part of the primary Prudhoe Bay Unit facility.

Finally, for some of the service type support facilities, including the Base Operations Center, Central Power Station, and Prudhoe Bay Operations Center/Main Construction Camp, ADEC claims that aggregation is not necessary because they only exist due to “the remote location of the North Slope oilfields and are not inherent to oil and gas production.” R.C-15-01125. ADEC considered these pollution-emitting activities as separate stationary sources in the final permit because the “service infrastructure has different purposes.” Id.

ADEC redefines the definition of support facility for Central Power Station; *i.e.* that it is a separate source only because of its location in Alaska, rather than traditional definition of support facility. Although it is possible, but not established by the record, some of these support facilities may be unique to Alaska and may only exist because of their remote location, that does not somehow change their support role and thus make them exempt from aggregation under the

Clean Air Act.

**4. THE REST OF THE SPOKE AND HUBS, I.E. GATHERING CENTER MUST BE AGGREGATED**

In support of its about-face on the issue of aggregating these facilities in the Prudhoe Bay Unit, ADEC changed its analysis regarding whether the pollutant-emitting activities were “located on one or more contiguous or adjacent properties.” ADEC deviated from EPA guidance and turned to a “hub and spoke aggregation model” as the basis for its decision to aggregate Gathering Center 1 with no other facility, except its associated production well pads. R. C-15-01122.

Under this wagon wheel model, the production centers (hubs) along with their associated well pads (spokes) are considered the basic stationary source or production plant for the PBU, which ADEC asserts “maintains the important role of proximity in aggregation decisions.” *Id.* at 01122 - 01123. ADEC’s rationale was explained in the Statement of Basis for the final permit as follows:

The PBU production centers and production wells are located on separate pads that are not contiguous (i.e., not touching). Thus the adjacency (i.e., the nearness or closeness) must be evaluated. To evaluate the adjacency of facilities, ADEC has used the concept of the common sense notion of a plant to inform proximity. In its analysis, ADEC has developed what is referred to as the “wagon wheel” model based on the production centers (hubs) and well pads (spokes). In this model of the plant, the well pads deliver raw materials (wellhead fluids consisting of crude oil, water, and hydrocarbon gases) to the production center for processing into finished product (sales

oil) for delivery and custody transfer at Pump Station #1 of the Alyeska Pipeline Service Co. R. C-15-1121.

However, “the associated infrastructure is considered a separate stationary source, unless co-located on the same pad or primarily associated with a hub or another stationary source.” *Id.* at 01122. ADEC is grouping these pollution units based on the relationship between the production centers and the well pads, with disregard for the definition of “stationary source,” which encompasses all of the pollutant-emitting activities that are located on one or more contiguous or adjacent properties. *See* 40 C.F.R. § 51.166(b).

In a letter regarding ESCO Corporation plants in Portland, Oregon, EPA discussed its position that two plants must be considered to be one major stationary source, where one plant produced an intermediate product and the other produced the finished product.<sup>5</sup> The question, as in this case, was whether the two plants were a “located on contiguous or adjacent properties.” R. F-51-01676. The plants functioned interdependently, they shared common support facilities, and the primary product of both plants was metal castings. *Id.* at 01677. ESCO argued that a common support facility was not enough to group the two plants. However, EPA explained, “where two sources are on contiguous or adjacent properties, are under common ownership, and are within the same SIC code,” there is “only one

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<sup>5</sup> This guidance document was also discussed in ADEC’s March 2003 Statement of Basis Discussion for Aggregation, which was attached to MacClarence’s petition and incorporated by reference in his argument. R. B-6-00091.

stationary source and there would be no need to assign the support facility to one source or the other.” Id.

In contravention of this guidance from EPA, ADEC tries to justify its spoke and hub model by stating that “each production center at Prudhoe Bay Unit (GC-1, GC-2, GC-3, FS-1, FS-2, FS-3, and Lisburne) is capable of processing oil independently of the other production centers.” R. C-15-01122.. ADEC is disregarding the interlocking relationships of the gathering and production centers. Gathering Center 1 and the other Prudhoe Bay Unit production centers share common support facilities, including the Central Gas Facility and the Central Power Station. In addition, they are really spokes on a larger hub, which is the Prudhoe Bay Unit. See March 2003 Statement of Basis, Figures 1-4, demonstrating of interlocking relationships of Prudhoe Bay Unit emission units. R. C. 8-00285 - 00289. For example, Gathering Center 1 “receives high pressure gas from well pads originally serviced by Gathering Centers 2 and 3.” R. B-6-00085. This includes high pressure gas from well pads H, J, M, N, Q, R, U, W and Z which are originally serviced by Gathering Center 2 and well pads A, B, C, and X which are originally serviced by Gathering Center 3. See R. B-6-00086. In addition, Gathering Center 1, along with Gathering Centers 2 and 3 provides hydrocarbon gases to the Central Gas Facility, which in turn provides fuel gas to the Central Power Station, which in turn provides electric power back to all of the

Gathering Centers as well as almost all of the pollutant emitting activities in the Prudhoe Bay Unit. See R. B-6-00088 – 00089. Thus, the theory that the each Gathering Center is an independent facility is illusory.

Indeed, all of the gathering centers are spokes on a master hub, which is the Prudhoe Bay Unit. All the gathering stations and production centers at the Prudhoe Bay Unit feed into one pump station and they are all served by the same infrastructure. R. C-8-00290. They are interconnected based upon their functional relationships and must be aggregated as one major stationary source under the federal and state definitions, as well as EPA guidance documents.

In a particularly relevant letter regarding proposed PSD construction permits, EPA discussed whether the American Soda Commercial Mine (Piceance facility) and processing plant (Parachute facility) were a single or separate source.<sup>6</sup> Since the mine and the processing plant were 35-40 miles apart, Colorado was treating them as separate sources because of distance, even though they were connected by a pipeline. However, EPA concluded that EPA policy held that the mine and the processing plant need to be considered as a single stationary source. EPA cited the functional interdependence of the plants, as evidenced by a pipeline connecting the facilities. “Given the integral connectedness of these facilities,”

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<sup>6</sup> This guidance document was discussed in ADEC’s March 2003 Statement of Basis Discussion for Aggregation, which was attached to MacClarence’s petition and incorporated by reference in his argument. R. B-6-91.

EPA held that “distance alone does not preclude these two being considered adjacent for PSD permitting purposes. R. F. 57-1723.

In issuing the 2003 draft permit, ADEC believed that the American Soda Piceance and Parachute facility example was particularly relevant to PBU, as the all “individual facilities located in the Prudhoe Bay Unit act as an integrated facility.” R. 8-292. ADEC explained:

This integrated facility performs all the functions necessary to accomplish the task of delivering crude oil to Pump Station 1. These functions are: bring production fluids to the surface (Well Pads); separate produced fluids into components, i.e. crude oil, hydrocarbon gases, and water (Flow Stations and Gathering Centers); condition gas for either use as fuel or for underground storage (Central Gas Facility and Central Compressor Plant); production of electrical power for individual facilities (Central Power Station); production and distribution of water for enhanced oil recovery (Seawater Treatment Plant, Seawater Injection Plant East, and Flow Station 2); disposal of solid waste by injection (Grind & Inject and Construction Camp 2); hot water for drilling operations (Hot Water Plant); diesel fuel for individual facilities (primarily emergency backup), drilling rigs, and mobile personal transportation (Crude Oil Topping Plant)

ADEC pointed out the “use of the word ‘central’ in the names of several of the individual facilities enumerates their function.” Id.

The Alaska Oil and Gas Conservation Commission, an independent, quasi-judicial agency of the State of Alaska, determined that Prudhoe Bay was one unit for purposes of the Alaska Oil and Gas Conservation Act. Alaska Stat. Chapter 31.05. Under the same common sense approach as the Alaska Oil and Gas Conservation Commission, ADEC and EPA must treat the Prudhoe Bay Unit as

one major source in Exploration (Alaska) Inc.'s Title V permit.

Finally, in examining whether BP facilities were in close proximity, ADEC interpreted "property" to be "the area on which a stationary source has been placed, including any immediate area graded or cleared for stationary sources."<sup>7</sup> 1122. However, no statute, regulation or EPA guidance document is cited in support of this interpretation. ADEC is ignoring federal law and the plain meaning of "contiguous or adjacent properties" in this case.

## VII. CONCLUSION

Wherefore, for the reasons stated above, Petitioner respectfully request that the Court vacate EPA's order refusing to object to the Title V permit at issue for the deficiencies identified in this brief, remand the petition to EPA with instructions to object for the same deficiencies and award Petitioners their costs of litigation, including reasonable attorneys' fees pursuant to 42 U.S.C. §7607(f).

Respectfully submitted,

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<sup>7</sup> ADEC cites a guidance document from the State of Texas (Definition of Site, March 2002) for determining stationary sources located within producing oilfields.



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Dated: December 3, 2007

### CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 12,133 words.

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Robert Ukeiley

CERTIFICATE OF SERVICE

I hereby certify that on this 3<sup>rd</sup> day of December, 2007, I caused a copy of the foregoing motion to be served upon the following person via next day delivery:

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Clerk's Office

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