

**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-022-05.00	)	
	)	

**MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF AMERICAN  
PETROLEUM INSTITUTE’S MOTION FOR LEAVE TO FILE AN AMICUS CURIAE  
BRIEF IN OPPOSITION TO THE PETITION FOR REVIEW**

The American Petroleum Institute (“API”) respectfully moves this Board for leave to file the attached reply in support of its motion for leave to file an *amicus curiae* brief. See API’s Motion for Leave to File *Amicus Curiae* Brief in Opposition to the Petition for Review and attached proposed *Amicus Curiae* brief, CAA Appeal No. 10-04, Dkt No. 11 (filed Feb. 24, 2011). On March 1, 2011, Petitioner filed an opposition to API’s motion for leave. See Petitioner’s Opposition to Motion for Leave to File *Amicus Curiae* Brief in Opposition, CAA Appeal No. 10-04, Dkt No. 12.

The regulations governing Part 71 permit appeals do not specifically provide for motions practice. See 40 C.F.R. § 71.11(l). Nor does this Board’s Practice Manual include provisions for motion practice during Part 71 permit appeals. See The Environmental Appeals Board Practice Manual (“EAB Practice Manual”) at V.C.1. Although this Board has found Part 124 regulations to be helpful in conducting appeals of Part 71 permits, *In re: Peabody Western Coal Co.*, 14 E.A.D. \_\_\_, Slip Op. at 5 (EAB Aug. 13, 2010), the Part 124 regulations are silent regarding whether a party may file a reply in support of a motion. See generally 40 C.F.R. §124.19; EAB Practice Manual at IV.D.3. This Board has previously held, however, that “[i]n the part 124

context, despite the lack of detailed procedures in the regulations, the Board has exercised broad discretion to manage its permit appeal docket by ruling on motions presented to it for various purposes....” *In re: Peabody Western Coal Co.*, Slip op. at 7. Therefore, API submits this motion for leave to file the attached reply in response to Petitioner’s Opposition to Motion for Leave to File Amicus Curiae Brief in Opposition.

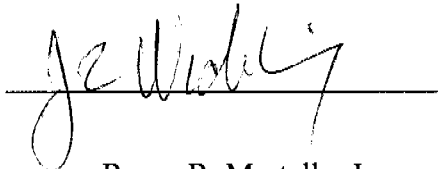
The attached reply is limited to addressing two points raised by Petitioner in its opposition to API’s motion for leave to file an *amicus curiae* brief. First, it rebuts the Petitioner’s claim that filing an *amicus curiae* brief at this point in the proceedings is premature. Second, it addresses the Petitioner’s fear that filing an *amicus curiae* brief will prejudice unknown third parties who may wish to file their own *amici* briefs some time in the future. API submits that the attached reply will aid the Board in ruling on its motion for leave to file an *amicus curiae* brief.

### CONCLUSION

For the foregoing reasons, API requests that the Board grant this motion and direct the clerk to file the attached reply in support of API’s motion for leave to file an *amicus curiae* brief in opposition to the petition for review.

Respectfully submitted,

March 4, 2011



Roger R. Martella, Jr.  
[rmartella@sidley.com](mailto:rmartella@sidley.com)  
James R. Wedeking  
[jwedeking@sidley.com](mailto:jwedeking@sidley.com)  
SIDLEY AUSTIN, LLP  
1501 K Street, N.W.  
Washington, D.C. 20005  
Phone: (202) 736-8000  
Facsimile: (202) 736-8711

Byron F. Taylor  
[bftaylor@sidley.com](mailto:bftaylor@sidley.com)  
SIDLEY AUSTIN LLP  
One South Dearborn  
Chicago, Ill. 60603  
Phone: (312) 853-7000  
Facsimile: (312) 853-7036

Michelle M. Schoeppe  
[schoepem@api.org](mailto:schoepem@api.org)  
AMERICAN PETROLEUM INSTITUTE  
1220 L Street, N.W.  
Washington, D.C. 20005  
Phone: (202) 682-8251  
Facsimile: (202) 682-8033

*Counsel for the American Petroleum  
Institute*

**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-022-05.00	)	
	)	

**REPLY IN SUPPORT OF AMERICAN PETROLEUM INSTITUTE’S MOTION FOR  
LEAVE TO FILE AN AMICUS CURIAE BRIEF IN OPPOSITION TO THE PETITION  
FOR REVIEW**

The American Petroleum Institute (“API”) submits this reply in support of its Motion for Leave to File an *Amicus Curiae* Brief in Opposition to the Petition for Review, CAA Appeal No. 10-04, Dkt. No. 11 (filed Feb. 24, 2011). Petitioner filed an opposition to API’s motion for leave, CAA Appeal No. 10-04, Dkt. No. 13 (filed Mar. 1, 2011) (“Opp.”) where it erroneously argued that allowing API to file an *amicus curiae* brief at this time (1) is premature, and (2) prejudices hypothetical third parties who may wish to file their own *amici* briefs in the future. As explained below, this Board should reject these arguments and grant API’s motion for leave to file an *amicus curiae* brief.

**I. API’s Motion for Leave to File an *Amicus Curiae* Brief is Timely**

API submitted its motion for leave to file an *amicus curiae* brief at the only time it practically could: before this Board decides to grant or deny review. This Board “frequently issues a decision that is dispositive of the matter based on the petitioner’s brief and the responses thereto,” either denying review or granting review and remanding the permit without further proceedings. The Environmental Appeals Board Practice Manual at IV.D.1 (“EAB Practice

Manual”) (governing Part 124 permit appeals).<sup>1</sup> In other cases, the Board has granted motions for leave to file *amicus curiae* briefs before granting or denying review. *See, e.g., In re Desert Rock Energy Co.*, PSD Appeal Nos. 08-03 to 08-06 (EAB Oct. 14, 2008) (Order Granting Motion to Participate, Motion to File Amicus Curiae Brief, and Motion for Extension of Time to File Responses); *In re Deseret Power Elec. Coop.*, PSD Appeal No. 07-03 at 2 (Mar. 31, 2008) (Order Scheduling Oral Argument); *In re West Suburban Recycling and Energy Center, L.P.*, 6 E.A.D. 692, 693 n.2 (EAB 1996) (Remand Order). Allowing API to file an *amicus curiae* brief before this Board issues a decision on the Petition’s merits is in keeping with both the Board’s past practices and its “broad discretion to manage its permit appeal docket by ruling on motions presented to it for various purposes....” *In re Peabody Coal Co.*, CAA Appeal No. 10-01, Slip op. at 7. API seeks to file an *amicus curiae* brief to assist this Board with a question involving a complex regulatory history going back over three decades. In all likelihood, this will be API’s only opportunity to do so.

Contrary to Petitioner’s claim, nothing precludes this Board from accepting API’s *amicus curiae* brief. Although regulations governing Title V permit appeals allow for *amicus curiae* briefs after the Board grants a petition for review, 40 C.F.R. § 71.1(l)(3), they are silent regarding whether an interested party may file an *amicus curiae* brief in support of or in opposition to a petition for review. *See also* 40 C.F.R. § 124.19 The Board’s Practice Manual is also silent. *See* EAB Practice Manual at V.C.1. Given the absence of any prohibition against accepting *amicus curiae* briefs at this stage, Petitioner’s claim that this Board should suddenly

---

<sup>1</sup> This Board has previously found the Part 124 regulations governing other permit appeals to be helpful when interpreting procedural matters in Part 71 permit appeals. *See In re: Peabody Western Coal Co.*, 14 E.A.D. \_\_\_, Slip Op. at 5 (EAB Aug. 13, 2010).

invalidate the precedent from its prior rulings by limiting the exercise of its discretion in managing its appellate docket is meritless.

Accepting Petitioner's claim that *amicus curiae* briefs may only be filed after this Board has granted review would effectively prohibit interested parties from participating in many appeals without any justification. Decisions to deny review are published as "formal decisions" and constitute precedent in future appeals before the Board. EAB Practice Manual at II.E. and II.E.1. It would be absurd to conclude that a decision by this Board to deny a petition for review, and the grounds for doing so, is of less importance than a decision to grant a petition for review. Yet this is exactly what the Petitioner's argument infers – that *amici* may only assist the Board after it has already decided to grant review and only when it schedules further proceedings. The Board should avoid an interpretation of its procedural regulations and Practice Manual that limits the ability of *amici* to participate in such an absurd and arbitrary way.

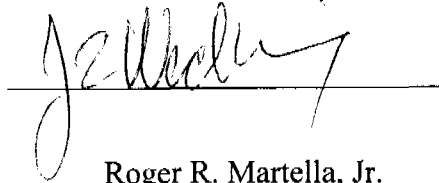
## **II. Granting API's Motion for Leave Will Not Prejudice Anyone**

Granting API's motion for leave to file an *amicus curiae* brief does not prejudice any other non-party, as Petitioner contends. Opp. at 2. First, Petitioner is not in a position to make a claim of prejudice on behalf of unknown and hypothetical non-parties to these proceedings. Second, Petitioner presents no explanation of how allowing API to participate as *amicus curiae* will either preclude unidentified non-parties from filing their own *amicus curiae* briefs or diminish their influence. If this Board grants the Petition for review and orders further proceedings afterwards, non-parties will still be able to file *amicus curiae* briefs in accordance with 40 C.F.R. § 71.1(l). To date, no other person has moved for leave to file an *amicus curiae* brief. This hardly constitutes grounds to deny API's own motion for leave in this case.

## CONCLUSION

For the foregoing reasons, API respectfully requests that the Board grant its motion and direct the Clerk to file its *amicus curiae* brief.

March 4, 2011



Roger R. Martella, Jr.  
[rmartella@sidley.com](mailto:rmartella@sidley.com)  
James R. Wedeking  
[jwedeking@sidley.com](mailto:jwedeking@sidley.com)  
SIDLEY AUSTIN, LLP  
1501 K Street, N.W.  
Washington, D.C. 20005  
Phone: (202) 736-8000  
Facsimile: (202) 736-8711

Byron F. Taylor  
[bftaylor@sidley.com](mailto:bftaylor@sidley.com)  
SIDLEY AUSTIN LLP  
One South Dearborn  
Chicago, Ill. 60603  
Phone: (312) 853-7000  
Facsimile: (312) 853-7036

Michelle M. Schoeppe  
[schoeppem@api.org](mailto:schoeppem@api.org)  
AMERICAN PETROLEUM INSTITUTE  
1220 L Street, N.W.  
Washington, D.C. 20005  
Phone: (202) 682-8251  
Facsimile: (202) 682-8033

*Counsel for the American Petroleum  
Institute*

**CERTIFICATE OF SERVICE**

I certify that on the 4<sup>th</sup> day of March, 2011, I caused a copy of the preceding to be served

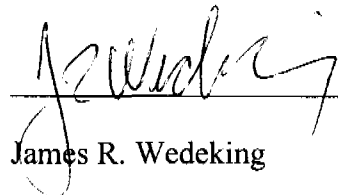
by U.S. Mail on the following:

Jeremy Nichols  
WildEarth Guardians  
1537 Wynkoop, Suite 301  
Denver, CO 80202

Stephen S. Tuber  
Sara Laumann  
U.S. EPA, Region VIII  
1595 Wynkoop  
Denver, CO 80202

Kristi Smith  
Air and Radiation Law Office  
EPA Office of General Counsel  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Mail Code 2344A  
Washington, D.C. 20460

Charles L. Kaiser  
John R. Jacus  
Charles A. Breer  
Davis, Graham & Stubbs LLP  
1550 Seventh Street, Suite 500  
Denver, CO 80202

  
\_\_\_\_\_  
James R. Wedeking