

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:)
)
BP America Production Company)
Florida River Compression Facility)
)
Permit No. V-SV-0022-05.00)

Appeal No. CAA 10-04

BP AMERICA PRODUCTION COMPANY’S SUR-REPLY

BP America Production Company (“BP”) respectfully submits its sur-reply to Wildearth Guardians’ (“WEG”) reply. WEG sought leave to reply to BP’s response brief in this matter in order to address BP’s (i) reliance on Administrator Jackson’s order in In re Anadarko Petroleum Corp., Pet. No. VIII-2010-4 (Feb. 2, 2011) (“Jackson Order”) and (ii) argument that WEG failed to meet its burden of proof by failing to challenge Region 8’s analysis of the facts. See WEG Motion to File Reply at 1-2. The Board granted WEG’s motion based on those grounds. Order Granting Leave to File Reply at 1-2. WEG’s 15-page reply brief (i) does not address BP’s reliance on the Jackson Order, (ii) addresses WEG’s failure to contest Region 8’s factual analysis in a single paragraph, and (iii) otherwise ignores BP’s response brief. WEG’s reply, like its petition, does not provide any basis for the Board to accept review.

A. WEG’s Reply Never Addresses BP’s Reliance On Administrator Jackson’s Order.

BP’s response shows that WEG drafted its petition challenging BP’s Florida River Title V renewal permit largely by inserting block quotes of its identical arguments raised in the Anadarko matter which Administrator Jackson rejected on February 2, 2011. BP Response at 1-2, 24-26, and Exhibit 2. WEG does not contest the fact that its arguments are identical to those it

raised before Administrator Jackson in Anadarko. Notwithstanding the obvious significance of the Jackson Order given the identical arguments, WEG makes only a single passing reference to the Order in its 15-page brief. WEG Reply at 8-9. WEG never seeks to distinguish the facts at issue in the Jackson Order and never addresses those portions of the Jackson Order rejecting WEG's (i) identical arguments based on regional Environmental Protection Agency ("EPA") source aggregation letters, (ii) reliance on "connecting pipelines" as supporting aggregation, and (iii) other claims for aggregating oil and gas compressors, wells, and equipment. Id.; BP Response at 24-26. WEG's silence is significant. The Board should reject WEG's claims addressed in the Jackson Order when WEG requested leave to file a reply brief addressing those issues, the Board granted WEG's request, and WEG has now submitted a reply which does not contest or directly address Administrator Jackson's analysis.

B. WEG Did Not Satisfy Its Burden Of Proof Because It Failed To Address Region 8's Analysis Of The Facts.

BP showed in its response brief that WEG failed to meet its burden of proof because WEG did not contest either the accuracy of the facts relied upon by Region 8 or Region 8's analysis of those facts in its Response to Comments. BP Response at 23-24. After seeking leave to file a reply to specifically address this issue, WEG's reply consists of a single paragraph at the end of its reply brief. WEG Reply at 15. WEG's only response is that "[s]uch a standard is nowhere expressed in Title V regulations or in EAB precedent." WEG Reply at 15. WEG is wrong. There absolutely is "such a standard" and WEG has failed to meet that standard.

First, BP showed in its response brief that EPA and Region 8 repeatedly have held that "whether to aggregate sources for purposes of PSD, NSR, and Title V applicability is a case-by-case determination that represents highly fact specific decisions." BP Response at 15-16, 23-24;

Florida River RTC at 5 (citing Memorandum of EPA Assistant Administrator Gina McCarthy dated September 22, 2009); Jackson Order at 8 (same).

Second, Region 8 determined that Florida River and “BP’s numerous well sites within the NSJB are not adjacent” for purposes of determining whether they are a single source by “considering the facts specific to this permitting scenario.” RTC at 13-14 (emphasis added). Region 8 concluded that BP’s La Plata County wells and Florida River should not be aggregated as a single source based on many facts including, among others, (i) the vast size of the area in which WEG sought to aggregate wells and other equipment; (ii) the independent jurisdictional, factual, and other bases upon which the location of wells, compressors and other equipment is determined; and (iii) the highly dynamic and variable flow of the gas. RTC at 12.

Third, to satisfy its burden of proof, WEG must “address the permit issuer’s responses to relevant comments.” In re: Peabody Western Coal Company, 12 E.A.D. 22, 33 (EAB 2005); BP Response at 23. BP cited several cases in its response brief and there are dozens more holding that the petitioner must address the Region’s response to comments. BP Response at 23; City of Pittsfield, Massachusetts, No. 08-19, Slip Op. at 7 (EAB March 4, 2009) (“a long and consistent line of Board authority has required that petitioners ... explain why the Region’s response to comments is clearly erroneous or otherwise warrants review) (emphasis in original). When, as here, the Region’s analysis in the response to comments is based on the particular facts of the permit at issue, a challenging party must contest that factual analysis. Id. (“Petitioner ... must substantively confront the permit issuer’s subsequent explanations”).

Region 8 determined in its Response to Comments that WEG’s claims fail under these facts, and WEG failed in its reply to contest the facts articulated by Region 8 in the Response to Comments or Region 8’s analysis of those facts. This is no small matter. When, for example,

Region 8 determined in the Response to Comments that La Plata County's nearly 1700 square miles is too vast an area to support WEG's claim that BP's wells located in the County are "adjacent," then WEG needs to show why Region 8 was wrong. Or when Region 8 found that BP located wells and other equipment based on factors unrelated to the Florida River facility, WEG needed to respond. It is and should be dispositive of this appeal that WEG had nothing to say either in its response or on reply with respect to Region 8's factual analysis in the Response to Comments.

C. WEG's Remaining Claims Fail.

In its many other claims on reply, WEG addresses only Region 8's response, not BP's. WEG Reply at 2-15. However, because BP and Region 8 made many of the same arguments, BP will address some of the most significant errors in WEG's reply.

1. WEG Cannot Avoid On Appeal The Extreme Position It Took Before Region 8.

WEG takes issue with Region 8's characterization of WEG's position below as seeking to aggregate as a single source the Florida River facility and BP owned and operated wells across the Northern San Juan Basin. WEG Reply at 10-12. WEG quotes several statements from its comments to Region 8 which, according to WEG, "clearly indicate that [WEG] did not request such an absurd outcome as EPA suggests." Id. at 11. WEG cannot now avoid on appeal the position it pursued below before Region 8. WEG did in fact seek before Region 8 an outcome which WEG now describes in its reply as "an absurd outcome."

In its comments before Region 8, WEG repeatedly argued that BP's wells in La Plata County were "adjacent" and should therefore be aggregated with Florida River as a single source.

- “The fact that BP’s producing coalbed methane wells are all located primarily within La Plata County strongly indicates that these pollutant emitting activities are adjacent to the Florida River Compression Facility for PSD purposes.” EPA-FL-0022 at 5 (WEG Comments).
- “BP’s natural gas wells are considered adjacent for PSD purposes. These pollutant emitting activities are located entirely within La Plata County, Colorado.” EPA-FL-0022 at 4.
- “As noted, BP operates more than 1,000 coalbed methane wells in La Plata County, all or some of which have a functional interrelationship with the Florida River Compression Facility.” EPA-FL-0022 at 4.
- “The best information we have available to us shows that there are hundreds, if not more than 1,000, coalbed methane wells in close proximity to the Florida River Compression Facility, and that most, if not all, of these wells, or pollutant emitting activities, are interrelated with the Florida River Compression Facility in that they support operations of the Compression Facility.” EPA-FL-0022 at 4.

WEG’s comments show that it sought to aggregate Florida River and BP’s wells located in La Plata County which WEG characterized as numbering in the “hundreds, if not more than 1,000.” Region 8’s Response to Comments properly found that “contrary to WEG’s assertions, the fact that many of BP’s NSJB wells are located in La Plata County does not mean they are ‘adjacent.’ La Plata County covers 1,692 square miles, or nearly 1.1 million acres. All BP owned and operated wells that happen to be co-located within such a large area cannot reasonably be said to be ‘adjacent’ to one another simply because they are located in the same county.” RTC at 12.

Nobody mischaracterized WEG's claims. The fact that WEG may only now grasp the enormity of its claim below does not allow WEG to assert a new claim on appeal.

2. Region 8 Did Not Abuse Its Discretion By Not Reopening The Comment Period.

WEG devotes much of its reply brief to again claiming that Region 8 was required to reopen the comment period. WEG Reply at 3-8. WEG ignores much of the law cited by BP. The governing regulations permit the Region to include new materials in the record when responding to comments. 40 C.F.R. 71.11(j)(2), 71.11(k); BP Response at 12. Those regulations avoid the “endless cycle” which would be created if every time the agency supplemented the record with materials responding to comments it was required to start the process anew. BP Response at 12. The fact that the Region adds new information to the record does not mean there is a substantial new question requiring the agency to reopen the comment period. BP Response at 13; City of Attleboro, MA Wastewater Treatment Plant, No. 08-08, Slip Op. at 86-87 n.125 (EAB 2009) (“The regulations governing the permitting process do not call for a new comment period simply because the Region adds materials to the administrative record during its review of comments on the draft permit.”).¹ WEG does not address the regulations, the administrative principle driving them, or the implementing case law rejecting similar claims that a region should reopen the comment period merely because it added new materials to the record responding to comments.

WEG argues at length, however, that there is a substantial new question which required Region 8 to reopen the comment period. WEG takes the bold position that “there is no dispute that Petitioner’s comments raised ‘substantial new questions’” and “EPA does not refute that

¹ WEG, however, still claims in reply that it raised a substantial new question because WEG’s “comments prompted EPA to solicit extensive new information from BP that was not otherwise included in the record.” WEG Reply at 3.

Petitioner's comments on the draft Title V Permit raised 'substantial new questions.'" WEG Reply at 3, 6. That is simply not true. BP directly disputed WEG's claim that there is a substantial new question and showed that Region 8 did not abuse its discretion in not reopening the comment period. BP Response at 12-15. There is no substantial new question because "[t]he draft and final Florida River permit terms are virtually the same; no new permit conditions were developed; WEG has a sufficient record to pursue its aggregation claim because Region 8's Response to Comments explained the agency's rationale in detail; WEG has not identified any information that it would submit if the comment period were re-opened; and WEG has already stated it is opposed to additional delay." BP Response at 14.

On reply, WEG still does not show a substantial new question. WEG does not identify any information that it would submit if it had a new comment period and has not otherwise shown Region 8 abused its discretion. WEG claims it has been denied the opportunity to challenge the information relied upon by Region 8. However, the Board has repeatedly held that the proper remedy for responding to information in the agency's response to comments submitted after the comment period is to challenge the agency's response on appeal. E.g., In re: Dominion Energy Brayton Point, L.L.C., 13 E.A.D. 407, 416-417 (EAB 2007) ("We recognize that this is the first time that [Petitioner] has had the opportunity to comment on the Region's rationale ... We have previously observed, however, that the appellate review process affords petitioners the opportunity to question the validity of material added to the administrative record by a region in response to public comments."). If WEG wants to contest any of the information added to the record by Region 8, then it should do so in its appeal to the Board. Although WEG has now had two opportunities before the Board to challenge Region 8, WEG has not provided any data, facts, or other information to show Region 8 was wrong.

CONCLUSION

For the foregoing reasons and those stated in its response, BP requests the Board to reject WEG's petition.

Dated this 21st day of March, 2011.

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CERTIFICATE OF SERVICE

I certify that on the 21st day of March, 2011, I caused a copy of BP AMERICA PRODUCTION COMPANY'S SUR-REPLY to be filed and served as indicated below:

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