

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

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In re:	)	
	)	
BP America Production Company,	)	Appeal No. CAA 10-04
Florida River Compression Facility,	)	
	)	
Permit No. V-SU-0022-05.00	)	
_____	)	

**PARTIAL OPPOSITION FOR EXTENSION OF TIME**

U.S. Environmental Protection Agency (“EPA”) Region 8 delayed taking legally required final action on the Title V Permit at issue in this case for three and a half years. Even after receiving comments from Petitioner, EPA Region 8 delayed responding to those comments and finally taking action on the permit for two and a half years. Now, EPA Region 8 requests even more delay. *See* EPA Region 8 Mot. for Ext. of Time (Dec. 15, 2010) (Doc. 4). All the while, Petitioner—who has met their burden of timeliness at every step of the way—bears the burden of waiting for its issues to be resolved while the facility at issue—the Florida River Compression Facility—continues to pollute the air.

WildEarth Guardians (hereafter “Guardians”) simply requests a fair and timely review. Guardians has raised significant concerns calling into question the legal validity of the Title V Permit at issue in this case, raising substantial questions as to whether the Florida River Compression Facility is operating in compliance with the Clean Air Act. Guardians has graciously agreed to allowing 30 days for EPA Region 8 to respond and to file an administrative record, but opposes further delay for the reasons below.

## BACKGROUND

On December 1, 2005, EPA received an application for renewal of the Part 71 Title V Operating Permit (hereafter “Title V Permit”) for BP America Production Company’s Florida River Compression Facility (hereafter “Florida River”). *See* Guardians’ Pet. for Rev., Exh. 2 at 3 (Doc. 1.02). On January 19, 2006, the application was deemed complete. *Id.*

The Clean Air Act requires the EPA to issue or deny a Title V Permit within 18 months of receiving a complete application. *See* 42 U.S.C. § 7661b(c); *see also* 40 C.F.R. § 71.7(a)(2). Thus, EPA was required to issue or deny the Title V Permit for Florida River by June 19, 2007.

In April of 2008, the EPA proposed to issue the Title V Permit for Florida River and circulated a draft permit for public review and comment. On May 19, 2008, Guardians submitted timely comments on the draft Title V Permit. *See* Guardians’ Pet. for Rev., Exh. 8 (Docs. 1.11-1.16).

On September 23, 2010, Guardians filed suit against the EPA over its failure to timely issue or deny the Title V Permit for Florida River, a nondiscretionary duty under the Clean Air Act. *See* Case 1:10-cv-02336-RPM, Complaint (D. Colo. 2010). After Guardians filed suit, on October 18, 2010, EPA finally issued the Title V Permit for Florida River and responded to Guardians’ comments. *See* Guardians’ Pet. for Rev., Exhs. 1 and 3 (Doc. 1.01 and 1.03).

At least by November 3, 2010, Guardians had notified EPA Region 8 of its intent to file a Petition for Review over the Florida River Title V Permit with the EAB. *See* EPA Region 8 Mot. for Ext. of Time (Dec. 15, 2010) at Exh. 1 at 19, Fn. 8 (Doc. 4).

On November 18, 2010, Guardians filed a Petition for Review of the Title V Permit with the EAB in accordance with 40 C.F.R. § 71.11(l). *See* Guardians’ Pet. for Rev. (Doc. 1). The Petition for Review challenged the Title V Permit on two grounds: 1) That EPA inappropriately

failed to reopen the public comment period in response to substantial questions raised over the Title V Permit during the public comment period; and 2) That EPA failed to appropriately define the source subject to permitting, and therefore failed to issue a Title V Permit in accordance with the Clean Air Act. *Id.*

On December 15, 2010, EPA Region 8 filed a motion with the EAB requesting a 60-day extension to both respond to Guardians' Petition for Review and to prepare an administrative record. *See* EPA Region 8 Mot. for Ext. of Time (Dec. 15, 2010) (Doc. 4).

### **REASON FOR PARTIAL OPPOSITION**

EPA Region 8 seeks an extension because of its workload, because of scheduled staff leave over the Holidays, and because of the need to coordinate with EPA headquarters. Guardians agrees that scheduled staff leave over the Holidays warrants an extension. That is why Guardians has agreed to 30 extra days, or by February 9, 2010. However, an extension beyond 30 days appears unwarranted in light of the circumstances.

To begin with, with regards to providing the administrative record, EPA Region 8 should not need any additional time. Regulations at 40 C.F.R. § 71.11(k)(3) state that “[t]he record shall be complete on the date the final permit is issued.” In other words, Region 8 should have the record already prepared and completed, and should easily be able to index this record and provide copies of relevant portions to the EAB and to Guardians. This is particularly true given that Guardians has already provided, as exhibits to their Petition for Review, copies of a large majority of the relevant documents included in the administrative record, including the final Title V Permit, the final Statement of Basis, Region 8's Response to Guardians' comments, Guardians' comments, and BP's supplemental comments. The only other relevant documents

that were not provided by Guardians are BP's application for a renewed Title V Permit, BP's comments on the draft Title V Permit submitted during the public comment period, and the draft Title V Permit and Statement of Basis.

With regards to EPA Region 8's ability to provide a response to Guardians' Petition by February 9, 2010, their excuses ring hollow. For one thing, Guardians put EPA Region 8 on notice of its intent to file a Petition for Review with the EAB even before filing its appeal. Guardians submits that EPA Region 8 was aware that a Petition for Review would be filed at least two weeks prior to the filing deadline, and that this Petition would challenge the EPA's source determination in the matter.

Additionally, the deadlines that EPA Region 8 complains are interfering with its ability to file a response to Guardians' Petition for Review are a product of the Agency's own creation. Each and every deadline that EPA Region 8 is currently under court-order or pending court-order to complete stem from the failure of EPA Region 8 to meet nondiscretionary deadlines or duties to protect air quality under the Clean Air Act. In many cases, these deadlines have long-passed, raising significant concerns over whether the Agency has been adequately protecting air quality. This is exactly why Guardians filed suit over the failure of EPA to meet these nondiscretionary deadlines and duties. That the Agency is now faced with any "burden" in following through with these nondiscretionary duties and deadlines, Guardians' submits the EPA has only itself to blame.

For EPA Region 8 to now argue that Guardians should shoulder the burden of additional delay in this matter because Guardians enforced nondiscretionary duties that the Agency had illegally failed to meet in the first place is misplaced at best. If EPA Region 8 had been meeting its statutorily required deadlines and duties, we would not be faced with this situation.

That Guardians' efforts to right wrongs under the Clean Air Act may be resulting in an increased workload at EPA Region 8 should not be considered an exceptional circumstance, nor should it be considered a valid reason to grant further delay. This is particularly true in this case, where, not only has EPA delayed at every step of the way in taking action on the Florida River Title V Permit, but it was Guardians' lawsuit that finally prompted EPA to fulfill its mandatory duty to issue or deny the Title V Permit. Once again, if EPA had issued the Title V Permit for Florida River in accordance with its statutory deadline, a Petition for Review would have been filed in 2007. EPA's own footdragging has put them in the current situation and this is no reason to impose further delay upon Guardians.

As expressed earlier, Guardians has been prejudiced by the fact that Florida River continues to operate under a Title V Permit that is contrary to the Clean Air Act. EPA's delay has only exacerbated this prejudice, and further delay will only further prejudice Guardians. Yet what prejudice would the Agency endure? More work. On the balance, it is hard to believe that EPA's workload is of greater importance than ensuring a major source of air pollution fully complies with laws and regulations meant to safeguard public health and welfare.

It is notable that under the Clean Air Act, Petitions for Objection filed with the Administrator of the EPA over Title V Permits issued by States must be granted or denied within **60 days**. See 42 U.S.C. § 7661d(b)(2) ("Administrator shall grant or deny such petition within 60 days after the petition is filed."). In this case, the requested extension would extend the EPA's response to more than 105 days after Guardians filed its Petition for Review, and even then it would not constitute a resolution of the Petition. Guardians understands that the EAB is not held to the same statutory deadline as the EPA Administrator, but urges the Board to be

cognizant that speedy resolution of Title V Petitions is critical in light of the fact that such sources of air pollution are already in operation.

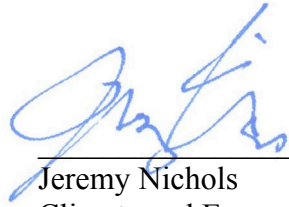
Finally, it is unclear how additional delay is necessary in light of the need for Region 8 to coordinate its response with EPA Headquarters. If anything, this argument shows that EPA Region 8 is sharing the responsibility of responding to Guardians' Petition for Review with EPA Headquarters, which indicates that the burden of responding is not solely on Region 8's shoulders.

In light of the fact that EPA Region 8 is coordinating with EPA Headquarters specifically with regards to its response on the issue of source aggregation, which is not only raised in Section II of Guardians' Petition for Review (*see* Pet. for Rev. at 17), but also in another Title V Petition filed by Guardians with the Administrator of the EPA, it appears that such coordination would actually enhance, rather than hinder, a timely response in this matter. As EPA Region 8 notes, Guardians' Title V Petition "raises source determination issues similar to those raised in this matter." EPA Region 8 Mot. for Ext. of Time (Dec. 15, 2010) at 1 (Doc. 4).

Perhaps, in light of the apparently prominent role that EPA Headquarters is playing in responding to Guardians' Petition for Review, it would be more beneficial if the EAB would require the Office of General Counsel and the Office of Air and Radiation, rather than EPA Region 8, to respond to the Petition. Regardless, coordination among EPA offices is no reason for further delay, but rather a sign that EPA is efficiently, rather than disparately, responding to the central issue in Guardians' Petition.

For the aforementioned reasons, Guardians respectfully requests the EAB allow EPA Region 8 a 30-day extension, rather than the Agency's requested 60 days.

Respectfully submitted this 16<sup>th</sup> day of December 2010



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## CERTIFICATE OF SERVICE

I certify that on December 16, 2010, I served this Partial Opposition to Motion for Extension of Time by electronic mail and First Class Mail, as appropriate, upon the following parties:

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