CASE NO. 07-72756

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BILL MACCLARENCE,

Petitioner

V.

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

Respondents

PETITION FOR REVIEW OF AN ENVIRONMENTAL PROTECTION AGENCY ORDER

REPLY BRIEF OF PETITIONER BILL MACCLARENCE

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I. INTRODUCTION

In its Response Brief, EPA makes clear that it is trying to impose an indefensible, *post hoc* procedural requirement on Title V petitioners that is contrary to the statute and does not appear in EPA's relevant regulations. The imposition of this new procedural requirement would allow EPA to avoid (or at least put off for another day) making a decision on the merits of Petitioner Bill MacClarence, P.E.'s petition. The Court should reject EPA's claim that MacClarence's highly detailed explanation of the necessity of aggregation of all of the pollutant emitting activities at the Prudhoe Bay Unit was "too generalized." The Court should also decide that MacClarence's highly detailed explanation establishes that all of the pollutant emitting activities at the Prudhoe Bay Unit must be aggregated for Clean Air Act purposes and thus order EPA to object to BP Exploration (Alaska) Inc.'s ("BP") Gathering Center #1 Title V permit.

II. MACCLARENCE HAS MET HIS BURDEN TO REQUIRE EPA TO GRANT HIS TITLE V PETITION.

A. MACCLARENCE PROVIDED A VERY DETAILED EXPLANATION FOR WHY ALL POLLUTING EMITTING ACTIVITIES AT THE PRUDHOE BAY UNIT MUST BE AGGREGATED INTO ONE STATIONARY SOURCE FOR CLEAN AIR ACT TITLE V AND PREVENTION OF SIGNIFICANT DETERIORATION PURPOSES

The parties are in agreement that a person seeking an objection from the EPA to a Title V permit has the burden of demonstrating that the Title V permit does not comply with the Clean Air Act. EPA also claims that it can reject a petition as failing to meet its burden if "petitioner's own or incorporated assertions of CAA noncompliance are too 'generalized.'" EPA Br. at 34. Assuming for the sake of argument that this is the correct legal standard, MacClarence has met that standard.

EPA acknowledges in its brief that MacClarence's petition incorporated by reference the Alaska Department of Environmental Conservation's ("ADEC") March 2003 statement of basis explaining why the Clean Air Act required aggregation of all pollutant-emitting activities at the Prudhoe Bay Unit into one major source for Title V and Prevention of Significant Deterioration purposes. EPA Br. at 33. EPA's claim that this explanation was too generalized is arbitrary.

The March 2003 ADEC Draft Statement of Basis Discussion for Aggregation ("March 2003 Statement of Basis") is found as Attachment 2 to MacClarence's petition. See R. B-6-00084 – 00094. The 11 page, single-spaced document starts by laying out the legal standard pursuant to which aggregation decisions are made. This standard is whether pollutant-emitting activities are contiguous or adjacent, under common control, and are in the same Major Group codes in the Standard Industrial Classification Manual. Id. at 00084. The March 2003 Statement of Basis then provides a narrative explanation of the "Factual Basis" for aggregation at the Prudhoe Bay Unit. Id. at 00084 – 00086. The March 2003 Statement of Basis goes on to provide graphical representations of the interlocking relationship of every pollutant-emitting activity at the Prudhoe Bay Unit, which establishes that they are contiguous or adjacent. Id. at 00086 – 00088. The March 2003 Statement of Basis then provides further narrative analysis of the application of the facts at the Prudhoe Bay Unit to both the state and federal definitions of major stationary source. Id. at 00090. The March 2003 Statement of Basis continues with a discussion of various EPA guidance documents regarding the aggregation issue and how those EPA guidance documents apply to the Prudhoe Bay Unit. Id. at 00090 – 00094. Finally, the March 2003 Statement of Basis explains that the function of the Prudhoe Bay Unit is to deliver sales oil to Pump Station 1 for custody transfer, thus providing a rational for why the Prudhoe

Bay Unit and the Trans-Alaska Pipeline can be considered separate major stationary sources. Id. at 00094.[1] EPA's order is thus arbitrary for claiming that the very detailed analysis in the March 2003 Statement of Basis Discussion for Aggregation is too generalized to support a claim that BP's permit does not comply with the Clean Air Act.

EPA's argument that the March 2003 Statement of Basis is too generalized to support the need for aggregation is actually undercut by EPA's own statements. In its final order, EPA claimed that the statement of basis supporting Revision 1 of the permit issued in February 2004 provides "great detail" on the aggregation issue. R. A-1-00008. The February 2004 Statement of Basis' discussion on aggregation is found at R. C-15-01120 – 01125 in Respondents' Supplemental Excerpts of Record.[2] The February 2004 Statement of Basis' discussion is a little more than half as long as the March 2003 Statement of Basis. Unlike the March 2003

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[1] It is also worth noting that the Trans Alaska Pipeline is owned and operated by Alyeska Pipeline Services Company. R. C-15-01127 in Respondents' Supplemental Excerpts of Record. Thus, the pipeline and the Prudhoe Bay Unit would not be aggregated into one stationary source because they are not "under control of the same person (or persons under common control)[.]" See Alaska Statute § 46.14.990 incorporating 40 C.F.R. § 51.166(b); 18 AAC § 50.040(h)(4)(B)(iii).

[2] EPA's Brief occasionally refers to the Statement of Basis regarding the August 26, 2005 Revision 2 to the BP Permit. See e.g. EPA Br. at 37. Reference to this Statement of Basis is not appropriate because MacClarence's petition is seeking an objection to Revision 1, not Revision 2, to the permit. Alaska Department of Environmental Conservation prepared the Revision 2 document after MacClarence had submitted his petition.

Statement of Basis, the February 2004 Statement of Basis' discussion does not provide any graphical evaluation of the interrelatedness of the various pollutant-emitting activities at the Prudhoe Bay Unit. It also does not provide any discussion of the applicability of EPA guidance documents on aggregation to the Prudhoe Bay Unit. Thus, it was arbitrary and capricious for EPA to determine that the March 2003 Statement of Basis was too generalized to support the need for aggregation yet determine that the February 2004 Statement of Basis discussion on aggregation provides "great detail." Therefore EPA's order must be overturned.

EPA also claims that MacClarence's reliance on the March 2003 Statement of Basis is insufficient as a matter of law. EPA Br. at 40. EPA's argument misconstrues MacClarence's petition. MacClarence never asked EPA or this Court to review Alaska Department of Environmental Conservation's draft decision. Rather, MacClarence used an analysis, which happened to be prepared by ADEC in support of a draft permit, to support his conclusion that BP's final Title V permit, and subsequently Revision 1 of the final Title V permit, was not in compliance with the Clean Air Act, thus warranting an objection for EPA. See R. C-6-00078, 00075 – 00076. There is no basis to conclude that EPA can ignore this analysis, which EPA now admits was timely submitted as part of MacClarence's Title V

petition, simply because it came from Alaska Department of Environmental Conservation in the context of a draft permit.[3]

B. EPA CANNOT IMPOSE NEW, *POST HOC* REQUIREMENTS ON TITLE V PETITIONERS

EPA goes on to argue that MacClarence petition was deficient because the petition failed to meet a heretofore never applied requirement on Title V petitioners. EPA's brief claims that MacClarence's petition was inadequate because it did "not 'provide any argument as to why ADEC's (final) decision not to aggregate. . . is unreasonable.' R. 8 (PIER, Vol. I, Tab A-I)." EPA Br. at 41. This argument fails on two levels. First, there is no requirement for Title V petitioners to address the final decision of the state agency in their petition. Second, the correct standard is that EPA must object to a Title V petition when the permit does not comply with the Clean Air Act, not when the state agency's analysis was unreasonable.

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[3] Furthermore, EPA did not include this rationale in its order. See R. A-1. Thus, EPA should not be allowed to rely upon it now. See Anaheim Memorial Hosp. v. Shalala, 130 F.3d 845, 849 (9th Cir. 1997), citing Vista Hill Found., Inc. v. Heckler, 767 F.2d 556, 559 (9th Cir.1985). However, the Court need not rely on this basis, as explained above.

1. There is no requirement for Title V petitioners to address the final decision of the state agency in their petition

EPA claims that MacClarence's petition fails because the petition does not explain how the Alaska Department of Environmental Conservation's final decision was unreasonable. EPA cites no statute, regulation or other authority for the requirement that a Title V petition must address the state permitting agency's final decision in any manner. This is because there is no such authority. Therefore, EPA erred as a matter of law by denying MacClarence's petition for failure to comply with a requirement that does not exist.

The Clean Air Act provides that the petitioners' sole burden is to demonstrate "that the permit is not in compliance with the requirements of the" Clean Air Act. 42 U.S.C. § 7661d(b)(2). The Clean Air Act does not say that the petitioner must demonstrate why the state permitting agency's decision was unreasonable and EPA is not authorized to add that requirement into the Clean Air Act. Furthermore, as explained in MacClarence's Opening Brief, if EPA attempted to add that requirement, EPA would have to do so through notice and comment rule making. See Opening Brief of Petitioner Bill MacClarence ("Opening Br.") at 29. EPA's current Title V regulations make absolutely no mention of such a requirement. See 40 C.F.R. § 70.8(d). The D.C. Circuit, and not this Court, would have exclusive jurisdiction to review a rule adding any such additional requirement. 42 U.S.C. § 7607(b)(1).

A requirement that petitioners must refute the state permitting agency's final decision would be especially inappropriate in this case. MacClarence never had the opportunity to comment on the dis-aggregation approach that ended up in the final permit. The public, including MacClarence, was never given the opportunity to comment on a permit that included Gathering Center #1 with well pads D, E, F, G, K, Y, and P, but not the other individual pollutant emitting activities within the Prudhoe Bay Unit. See EPA Br. at 14-17.

2. EPA must object to a Title V petition when the permit does not comply with the Clean Air Act, not when the state agency's analysis was unreasonable.

EPA claims that not only must a Title V petitioner address the state permitting agency's final decision in a Title V petition, but that the Title V petition must also demonstrate that the state permitting agency's decision was unreasonable. As explained above, because this places a requirement on Title V petitioners that is beyond the statutory requirement and does not appear in EPA's Title V regulations, EPA is wrong as a matter of law. See 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

EPA tries to use Alaska Department of Environmental Conservation v. EPA, 540 U.S. 461 (2004) ("ADEC"), a case in which EPA was taking an enforcement action against ADEC for its abysmal implementation of the Clean Air Act, to

support “by analogy,” EPA’s imposition of a new requirement on Title V petitioners. See EPA Br. at 41 – 44. The analogy quickly breaks down.

As EPA points out, ADEC was a “PSD enforcement action” by EPA. EPA Br. at 41, 42 (“The case at bar does not involve . . . exercise of EPA’s enforcement authority.”). See also ADEC, 540 U.S. at 468. Therefore, the ADEC decision can be of no help in determining whether EPA can impose a new obligation on members of the public, which does not appear in the statute or regulations, when those members of the public are submitting Title V petitions to EPA.

EPA goes on to claim that both a state agency Best Available Control Technology (“BACT”) determination in a Prevention of Significant Deterioration (“PSD”) permitting process and a stationary source aggregation determination require application of law to facts on a case-by-case basis and require the state permitting authority’s “exercise of discretion in the first instance.” EPA Br. at 42-43. To the extent that one defines the application of the law to a set of facts on a case-by-case basis as an exercise of discretion, this is a true enough statement in the context of this case and in the ADEC case. However to be complete, one must note that there are situations when EPA is the permitting authority making the first determination on BACT and aggregation issues.

EPA then notes that the Clean Air Act’s provision giving EPA enforcement discretion to take action against States that are not in compliance with PSD

includes the words “not acting in compliance with” the PSD program. EPA Br. at 43 citing 42 U.S.C. § 7413(a)(5). EPA further notes that the Clean Air Act’s provision mandating that EPA object to Title V petitions when a member of the public demonstrates that the Title V permit does not comply with the Clean Air Act includes the words “not in compliance” with the Clean Air Act. EPA Br. at 43. True enough; those words do exist in both provisions of the Clean Air Act.

EPA’s analogy falls apart, however, because 42 U.S.C. § 7413(a)(5) grants EPA enforcement discretion; it provides that the EPA may take an enforcement action. See 42 U.S.C. § 7413(a)(5) (“the Administrator may . . .”). EPA is free to decide when it will exercise that discretion. In contrast, 42 U.S.C. § 7661d(b)(2) mandates that the Administrator object to a Title V permit that does not comply with the Clean Air Act. See 42 U.S.C. § 7661d(b)(2) (emphasis added) (“The Administrator shall issue an objection . . .”). Ironically, EPA prevailed against this same argument in the ADEC case that EPA is now making to this Court. In the ADEC case, the Supreme Court held:

> ADEC's argument overlooks the obvious difference between a statutory *requirement, e.g.*, § 7475(a)(8), and a statutory *authorization.* Sections 113(a)(5) [] sensibly do not require EPA approval of all state BACT determinations, they simply authorize EPA to act in the unusual case in which a state permitting authority has determined BACT arbitrarily. EPA recognizes that its authorization to issue a stop order may be exercised only when a state permitting authority's decision is unreasonable; in contrast, a required approval may be withheld if EPA would come to a different determination on the merits. See, *e.g.*, 57 Fed. Reg. 28095 (1992) ("EPA acknowledges that

states have the primary role in administering and enforcing the various components of the PSD program. States have been largely successful in this effort, and EPA's involvement in interpretative and enforcement issues is limited to only a small number of cases.").

ADEC, 540 U.S. at 490. 42 U.S.C. § 7475(a)(8), discussed in the ADEC case, and 42 U.S.C. § 7661d(b)(2), at issue in this case, are both statutory requirements, not authorizations, on EPA. Thus, the only burden that the Title V petitioner must meet is demonstrating that the Title V "permit is not in compliance with the requirements of" the Clean Air Act. See 42 U.S.C. § 7661d(b)(2). When a Title V petitioner has met this one burden, EPA must object to the Title V permit. See also 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 (11th Cir. 2006).

C. MACCLARENCE DEMONSTRATED THAT THE PERMIT IS DEFECTIVE BECAUSE IT DOES NOT AGGREGATE ALL OF THE POLLUTION EMITTING ACTIVITES IN THE PRUDHOE BAY UNIT INTO ONE TITLE V AND PREVENTION OF SIGNIFICANT DETERIORATION SOURCE

EPA now clarifies in its brief that EPA is literally claiming it denied MacClarence's petition because MacClarence did not identify any defect in BP's final Permit. This argument is specious.

In his petition, MacClarence explained that the basis of his comments and thus the basis of his petition "was that the owner and operator of this facility also

owns, operates and controls multiple contiguous and adjacent facilities to the one permitted, but yet the aggregate impact o the air emissions from the entire operation in combination was not being considered." R. B-6-00079 (in Vol. II of Petitioner's initial Excerpts of Record). MacClarence's petition went on to state:

> 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. The painfully obvious inference from these statements is that the permit does not aggregate all of the pollution-emitting sources into one source in this permit. EPA understood this inference. See EPA Br. at 24. The petition makes this point again by continuing to refer to the "current disaggregated permit." Id. at 00081.

Thus, the deficiency in the permit appears on the first page of the permit which states that it is a permit for "the operation of the Gathering Center #1 (GC#1) stationary source, defined by this permit as the surface structures and their associated permanent emission units located on the GC#1 production pad and the Prudhoe Bay Unit well pads D, E, F, G, Y, and P." R. C-15-01060. Rather, the stationary source defined in the permit should have been defined as all of the pollutant-emitting activities in the Prudhoe Bay Unit which are listed in attachment 2 to MacClarence's petition. See R. B-6-00084. This deficiency manifests itself

again on pages 4, 5 and 6 of 59 of the permit where the permit lists and refers to the Facility name as solely "Gathering Center #1." See R. C-15-01063 - 01065.[4] Thus, although not citing to specific pages, MacClarence did identify the deficiency in BP's Title V permit, which he was petitioning to correct.

D. THE COURT SHOULD REMAND WITH INSTRUCTIONS FOR EPA TO OBJECT TO BP'S PERMIT FOR FAILURE TO INCLUDE ALL OF THE POLLUTANT EMITTING ACTIVITES AGGREGATED INTO ONE TITLE V AND PREVENTION OF SIGNIFICANT DETERIORATION SOURCE.

EPA argues that the Court should not address the merits of this case based on three grounds. EPA says that "as a general matter, appellate courts best serve the law by deciding 'each case on the narrow ground that leads to a decision.'" EPA Br. at 48. While that may be true as a general matter, this is a Clean Air Act case regarding a major source of air pollution. The purpose of the Clean Air Act is "to promote the public health and welfare and the productive capacity of" the United States' population. 42 U.S.C. § 7401(b)(1). The House Report on the 1970 Amendments to the Clean Air Act put it this way: "The purpose of the legislation reported unanimously by your committee is to speed up, expand, and intensify the war against air pollution in the United States with a view to assuring that the air we

[4] Although not relevant to this case, attachment 2 of MacClarence's petition also explains some of the potential consequences of this deficiency in the permit. See R. B-6-00084.

breathe throughout the Nation is wholesome once again." H.Rep.No. 91-1146, 91st Cong., 2d Sess. 1 (1970); 3 U.S.Code Cong. & Admin. News 5356 (1970).

MacClarence had to sue EPA just to get EPA to respond to his petition. In the past, it has taken more than three years between a court remand of a Title V petition denial and final resolution of EPA's order on remand, in addition to the need for a second deadline suit, to get EPA to respond to the remand order. These delays do not serve Congress' purpose of speeding up and intensifying its war against air pollution.

EPA also argues that the court may not supply a reasoned basis for agency action that the agency has not given, citing Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). EPA Br. at 48. Actually, that case holds that the court should not affirm the agency's decision based on a reason the agency did not give. It did not address reversing the agency. Furthermore, the Supreme Court added in that case that it "will, however, 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" Id. Here, it appears that EPA would deny MacClarence's petition on the merits, if at all, only based on the reasons set forth in Alaska Department of Environmental Conservation's statement of basis issued with the final permit. See EPA Br. at 17-21.

EPA's third reason is that EPA should be allowed to "exercise its expertise in the first instance." EPA Br. at 49. EPA has had two opportunities for this. The permit in question was issued over four years ago. See R. C-15-01058. Furthermore, as explained above, it appears that EPA is relying on Alaska Department of Environmental Conservation's analysis. At some point, all involved are best served by resolution of the matter. We are now at that point.[5]

III. ALL OF THE POLLUTION EMITTING ACTIVITIES IN THE PRUDHOE BAY UNIT SHOULD BE AGGREGATED INTO ONE TITLE V AND PREVENTION OF SIGNIFICANT DETERIORATION SOURCE.

EPA appears to rely on the Alaska Department of Environmental Conservation Statement of Basis supporting Revision 1 to BP's Title V permit for Gathering Center #1. The Court can quickly dispense with this justification for failure to aggregate. For example, as explained in MacClarence's Opening Brief, the Prudhoe Bay Unit has been declared one oil and gas production unit by the Alaska Division of Natural Resources, Division of Oil and Gas and Alaska Oil and Gas Conservation Commission. The test for continuous or adjacent prong of the aggregation analysis is whether the facility falls within the "common sense notion" of a plant or facility. Yet, the Alaska Department of Environmental Conservation

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[5] One option is for the Court to ask EPA for a brief on the merits with a chance for MacClarence to respond if the Court feels EPA has not made its position on the merits known.

and EPA have still never provided any rationale for why they rejected the Alaska Division of Natural Resources, Division of Oil and Gas and Alaska Oil and Gas Conservation Commission's decision that the Prudhoe Bay Unit is indeed one facility or plant.

Furthermore, the Statement of Basis supporting Revision 1 relied on inappropriate factors in makings its aggregation determination. Alaska Department of Environmental Conservation blatantly admitted that it took into consideration illegal factors, such as "ease of permit administration," in making its aggregation decision. Respondents' Supplemental Excepts of Record, Tab C-15-01122. Alaska Department of Environmental Conservation cites to no authority for consideration of this factor in making an aggregation determination and indeed there is none. Reliance on irrelevant factors is a well-established basis for reversing an agency's determination. See Motor Vehicles Mfrs., 463 U.S. at 42-43.

Alaska Department of Environmental Conservation also said that it considers "other case-specific factors deemed relevant." Respondents' Supplemental Excepts of Record, Tab C-15-01122. Alaska Department of Environmental Conservation provides no clue as to what these other case-specific factors are that it would "deem" relevant. Thus, there is no rational basis for Alaska Department of Environmental Conservation's decision; it is unbridled and unexplained and thus arbitrary.

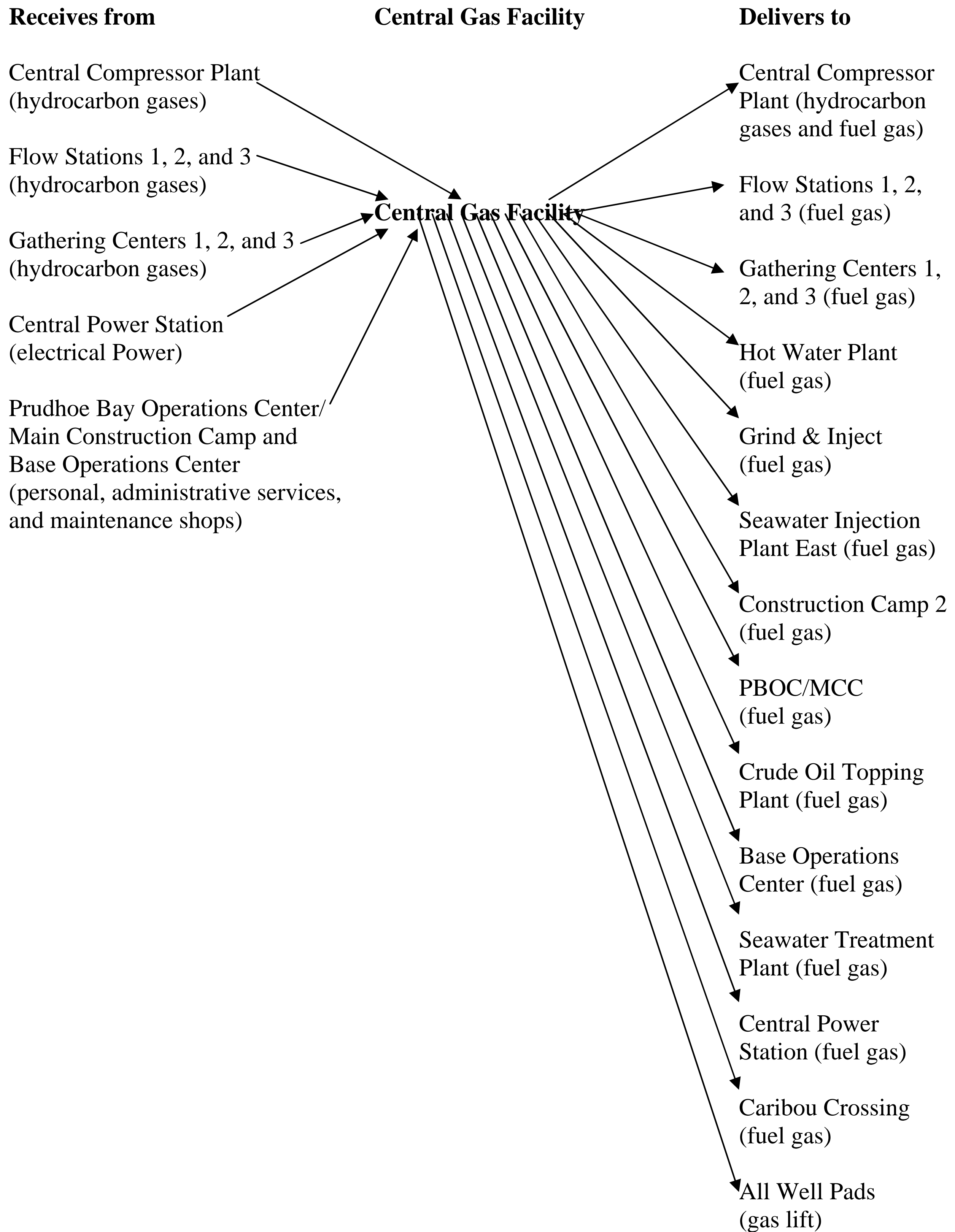
Alaska Department of Environmental Conservation claims that no support facility provides the majority of its product to one source and thus, the support facilities, such as the Central Gas Facility, the Base Operations Center and the Central Power Station, should not be aggregated with Gathering Center #1 and the other pollutant emitting activities in the Prudhoe Bay Unit. See Respondents' Supplemental Excepts of Record, Tab C-15-01125 ("no one hub receiving a majority of the support provided."). This is an illogical, circular argument. The argument is premised on the fact that Alaska Department of Environmental Conservation has already illegally disaggregated the pollutant emitting activities into multiple sources for Clean Air Act purposes. If Alaska Department of Environmental Conservation had correctly identified the Prudhoe Bay Unit as the source for Clean Air Act purposes, then all of the support facilities would mainly or exclusively serve the major source, that is Prudhoe Bay Unit. See R. B-6-00085 – 00093.

Even if one accepted the "hub and spoke" approach to aggregation determinations which Alaska Department of Environmental Conservation espouses, one must still conclude that the Prudhoe Bay Unit is one major stationary source for Clean Air Act purposes. The problem is that Alaska Department of Environmental Conservation ignores the natural gas and water extraction process

at the Prudhoe Bay Unit and even for oil, ignores the fact that all of the gathering centers and flow stations are spokes to Pump Station 1 of the Trans Alaska pipeline.

For example, for natural gas, the Central Gas Facility is the hub and the gathering centers, flow stations, all well pads, and other polluting emitting activities are the spokes. Below is Alaska Department of Environmental Conservation's own diagram that MacClarence submitted as part of his petition, which demonstrates that the Central Gas Facility is a hub and all of the other pollutant emitting activities are spokes, in terms of natural gas.

Figure 1 – Central Gas Facility Integration



R. B-6-00088. Alaska Department of Environmental Conservation and EPA offer no rationale for ignoring this undisputed fact. Thus, regardless to the analytical method used, the only reasonable conclusion is that all of the pollutant emitting activities at the Prudhoe Bay Unit must be aggregated into one Title V and Prevention of Significant Deterioration source.

EPA appears to imply that the size of the Prudhoe Bay Unit is a factor to consider in making an aggregation determination. EPA points out that the Prudhoe Bay Unit is roughly 300 square miles. EPA Br. at 2. EPA does not point out that this area is a very flat coastal plain compromising a single airshed with one source of air pollution; BP's oil and gas operations. Nor does EPA point out that the area covered by the current BP permit is over 30 square miles. See R. I-84-02264 in Vol. 3, Petitioner's initial Excerpts of Record. In any event, distances between pollutant-emitting activities must not have been a decisive factor for the Alaska Department of Environmental Conservation's decision because that agency included pollutant emitting activities in BP's permit which were further away from Gathering Center #1 than pollutant emitting activities which were not aggregated into the permit. For example, well pad P, which is approximately 6 and a half miles from Gathering Center #1, is included in BP's permit. See R. I-84-02264. On the other hand, the Base Operations Center ("BOC") is less than a mile from

Gathering Center #1 and Well Pad C is a little more than a mile from Gathering Center #1, but neither is included in BP's permit. See Id.

IV. CONCLUSION

Therefore, for the reasons explained above, MacClarence respectfully requests that EPA's order denying his Title V petition be vacated and remanded with instructions for EPA to object to the BP Title V permit for failure to include all of the pollutant emitting activities in the Prudhoe Bay Unit as one major stationary source for Title V and Prevention of Significant Deterioration purposes.

Respectfully submitted,

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Dated: March 20, 2008

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 4,764 words.

____
Robert Ukeiley

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 2008, I caused a copy of the foregoing brief to be served upon the following via first class mail:

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