

**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 REPLY IN SUPPORT OF AMERICAN PETROLEUM
INSTITUTE’S AMICUS CURIAE BRIEF**

The American Petroleum Institute (“API”) respectfully moves this Board for leave to reply to EPA Region 8’s response to API’s *amicus curiae* brief. See EPA Region 8’s Response to Amicus Curiae Brief Filed by American Petroleum Institute, CAA Appeal No. 10-04, Dkt No. 23 (filed April 1, 2011) (“EPA Resp.”). Neither the regulations governing Part 71 permit appeals nor this Board’s Practice Manual specifically provide for reply briefs. See 40 C.F.R. § 71.11(l); The Environmental Appeals Board Practice Manual (“EAB Practice Manual”) at V.C.1. As the Board recently held, however, it has “broad discretionary authority to manage the permit appeal proceedings that arise from Part 71.” *In re: BP Amer. Prod. Co.*, CAA Appeal No. 10-04 (EAB Mar. 11, 2011) at 1 (Order Granting Outstanding Motions) (citing *In re Peabody Western Coal Co.*, CAA Appeal No. 10-01, slip op. at 8, 14 E.A.D. ___ (EAB Aug. 13, 2010)).

EPA Region 8 failed to respond in any significant way to the substance of API’s *amicus curiae* brief. Instead, the Region raised questions regarding the grounds on which this Board may affirm decisions by permitting authorities and the role of *amicus* parties before the Board. Given the Board’s discretion to manage the appeals process, API seeks leave for the Board to consider the following brief points in reply.

1. EPA Region 8 is correct in that API asks this Board to uphold the Title V permit at issue in this appeal but on different grounds. *See* EPA Resp. at 1. As explained in its *amicus curiae* brief, API argues that, when determining whether two or more emission points are “contiguous or adjacent” for purposes of aggregation, EPA must consider the proximity between those points in accordance with the plain meaning of 40 C.F.R. § 52.21(b)(6). API also argues in its *amicus curiae* brief that the “interrelatedness” test relied upon by the Region is inconsistent with the plain meaning of the governing regulations and EPA rejected such a test in promulgating those regulations. *See* 45 Fed. Reg. 52,676, 52,695 (Aug. 7, 1980).
2. In its response, the Region confuses the role of *amici* with the role of petitioners, errantly arguing that an *amicus curiae* must file comments during the permitting process. EPA Resp. at 3-6. Only those filing a petition for review must show that they “filed comments on the draft permit or participated in the public hearing....” 40 C.F.R. § 71.1(l); *id.* § 124.19(a) (same). The regulations contain no similar restrictions for *amici* even though they contemplate their participation in appeals to the Board. *See id.* § 124.19(c).¹ In any event, the issue of “interrelatedness” is central to this appeal as it is the crux of WildEarth Guardians’ arguments on aggregation. As long as the issue has been raised in the comments, the issue can be addressed on appeal even by persons who did not originally raise the issue. *In re Core Energy, LLC*, UIC Appeal No. 07-02, Slip op. at 6 (EAB Dec. 19, 2007).

¹ This is consistent with Federal Rule of Appellate Procedure 29(b), which requires *amici* to show only that they have an “interest” in the litigation, why their participation is “desirable” and that their arguments are “relevant to the disposition of the case.”

3. The Region clearly misunderstands the role of *amici*, asking this Board to restrict their participation in a manner that is internally inconsistent and incorrect. First, the Region argues that “the usual role of an *amicus curiae*” is to “provid[e] additional information to the court regarding matters of interest that arise in the case.” EPA Resp. at 2.² The Region then argues that *amici* are strictly limited to the administrative record. *Id.* at 3-6. Thus, the Region contradicts itself in claiming that API may only present “additional information” while asserting that the presentation of any “additional information” is improper. Under this view, there is no place for *amici* in permit appeals even though the governing regulations allow for their participation and this Board has granted their participation on numerous occasions. *See, e.g., In re Desert Rock Energy Co., LLC*, PSD Appeal Nos. 08-03 through 08-06 (order granting motion to file *amicus curiae* brief).
4. API has properly fulfilled the role of an *amicus curiae* in advising the Board of legal arguments and the potential consequences of this appeal that are not addressed by the parties. As a “friend of the court,” an *amicus curiae* provides “a resource that might [be] of assistance” to the Board. *Neonatology Assocs., P.A. v. Comm. Of Internal Revenue*, 293 F.3d 128, 133 (3d Cir. 2002). It does this by providing “background or factual references” and “particular expertise not possessed by any party ... argu[ing] points deemed too far-reaching for emphasis by a party intent on winning a particular case” or “explain[ing] the impact a potential holding might have on an industry or other group.” *Id.* at 132 (internal quotations omitted). Here, API’s *amicus curiae* brief provided the Board with an extensive analysis of the governing regulations’ language and regulatory

² The Region’s citation to the EAB Practice Manual (Sept. 2010) at 47, n.52 only acknowledges that non-parties may participate as *amici* pursuant to 40 C.F.R. § 124.19(c). Nothing in either the EAB Practice Manual or the regulations governing permit appeals to this Board define the role of an *amicus curiae*, much less limit *amici* to “providing additional information.”

history, prior EPA source determinations on aggregating “contiguous or adjacent” emission points and how the Region’s “interrelatedness” analysis can lead to unintended and absurd results. The Region urges this Board to ignore API because the permit applicant supports the Region’s interpretation. EPA Resp. at 2. This only underscores the value of *amici*. BP seeks to defend its Title V permit, but presumably does so from the perspective of a permittee. As a friend of the court, API advises the Board as to the broader ramifications of the “interrelatedness” test, such as its inconsistency with Clean Air Act regulations and the absurdity of its application.

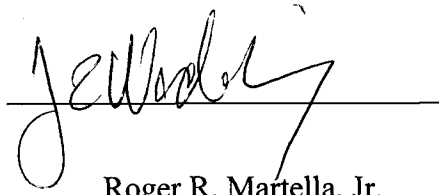
5. The Region wonders “what API expects the Board to do with its arguments” and incorrectly assumes that any consideration of API’s *amicus curiae* brief would require “that the permit be remanded to correct [any] supposed error.” EPA Resp. at 2. API’s arguments do not implicate remanding the permit and re-opening the record below. Appellate bodies may affirm decisions under review on alternate grounds so long as they are supported by the record. *See e.g. Carney v. Amer. Univ.*, 151 F.3d 1090, 1096 (D.C. Cir. 1998). In this case, API argued that the Region made the correct decision in declining to aggregate BP America Production Company’s compressor stations and gas wells but did so under the wrong legal rationale. As detailed in API’s *amicus curiae* brief, the existing facts in the record – facts that are not disputed by any party – clearly support API’s legal argument that the permit be upheld as BP’s compressor stations and gas wells are not “contiguous or adjacent” to each other under 40 C.F.R. § 52.21(b)(6).

CONCLUSION

For the foregoing reasons, API requests that the Board consider the foregoing brief reply in support of its *amicus curiae* brief in opposition to the petition for review.

Respectfully submitted,

April 8, 2011

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CERTIFICATE OF SERVICE

I certify that on the 8th day of April 2011, I caused a copy of the preceding to be served

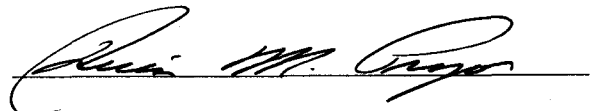
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