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

In re:	)	
Shell Offshore, Inc. Kulluk Drilling Unit	)	OCS Appeal Nos. 08-01, 08-02 & 08-03
OCS Permit No. R10OCS-AK-07-01 (Revised)	)	

MOTION OF THE AMERICAN PETROLEUM INSTITUTE FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The American Petroleum Institute ("API") hereby respectfully moves the Board to grant API leave to file a brief *amicus curiae* in this matter. Concurrently with this motion, API is lodging with the Clerk of the Board the brief that API desires to file.

Counsel for API have contacted counsel for the other parties respecting this motion. Petitioners Alaska Wilderness League, *et al.,* and North Slope Borough, *et al.* do not oppose API's being granted leave to file an *amicus* brief. Petitioner Bill MacClarence opposes API's being granted leave to file an *amicus* brief. Respondent Environmental Protection Agency Region 10 does not oppose API's participation, provided that API's participation does not necessitate a change to the

briefing schedule. The permittee, Shell Offshore, Inc., consents to API's participation.

API Has An Interest In This Matter.

The American Petroleum Institute is a non-profit, nationwide trade association representing more than 400 member companies engaged in all aspects of the petroleum and natural gas industry. API's members explore for, develop and produce petroleum and natural gas both onshore and offshore, including on the outer continental shelf ("OCS").

API's members are interested in ensuring that the Clean Air Act's Prevention of Significant Deterioration ("PSD") program is implemented in a manner that is reasonable and consistent with duly promulgated PSD regulations. As reflected in API's proposed brief, API maintains that the Wehrum memorandum[1], upon which EPA Region 10 partially relied in addressing the issue on remand in the present permit proceeding and which is under challenge here, is a valid interpretation of the PSD regulations and correctly accounts for the distinct nature of oil and gas exploration and production operations.

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[1] Memorandum from W. Wehrum, EPA Acting Assistant Administrator, to Regional Administrators, *Source Determinations for Oil and Gas Industries* (Jan. 12, 2007) ("Wehrum Memorandum").

API's Participation At This Stage Is Supported By Precedent And By Applicable Rules Of Procedure.

The rules applicable to this proceeding do not expressly authorize the filing of *amicus* briefs where the Board has not yet granted review. 40 C.F.R. § 124.19. However, the Board previously has permitted a party offering a pertinent argument to file an *amicus* brief at the pre-review stage. *In re: Indeck-Elwood, LLC*, PSD Appeal No. 03-04, slip op. at 22-23 n.48 (EAB, Sept. 27, 2006).

Moreover, the rules provide that permission to file an *amicus* brief is *automatic* at the stage where the Board has granted review and merits briefing has begun. 40 C.F.R.§ 124.19(c) ("Public notice [of grant of review] shall state that any interested person may file an amicus brief."). In light of this, and in light of the Board's practice "to resolve as many cases as possible during the first stage of the appeals process by obtaining more information than contemplated by the regulations," The Environmental Appeals Board Manual at 30 (June 2004), it would seem appropriate for the Board to grant *amicus* status liberally at the petition for review stage.

API's Participation Will Not Prejudice Any Party.

API's brief is being lodged and served upon all parties only one day after the responses to the petitions were filed. Accordingly, the filing of API's brief should

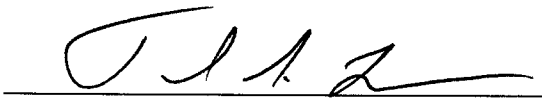
cause no disruption to the existing briefing schedule, nor will API's participation prejudice any party in any other way.

Conclusion

WHEREFORE, API respectfully requests that the Board grant API leave to file its lodged *amicus* brief and direct the Clerk of the Board to enter the brief into the docket and record of this proceeding.

DATED: October 7, 2008

Respectfully submitted,



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BRIEF *AMICUS CURIAE* OF THE AMERICAN PETROLEUM INSTITUTE

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INTEREST OF THE *AMICUS CURIAE*

The American Petroleum Institute ("API") is a non-profit, nationwide trade association representing more than 400 member companies engaged in all aspects of the petroleum and natural gas industry. API regularly represents the petroleum and natural gas industry in administrative rulemaking proceedings in the various state and federal agencies, including the Environmental Protection Agency ("EPA" or "Agency"), and in litigation in state and federal courts.

API's members explore for, develop and produce petroleum and natural gas both onshore and offshore, including on the outer continental shelf ("OCS"). API's members are interested in ensuring that the Clean Air Act's Prevention of Significant Deterioration ("PSD") program is implemented in a manner that is reasonable and consistent with duly promulgated PSD regulations.

API maintains that the Wehrum Memorandum[1], upon which EPA Region 10 partially relied in addressing the issue on remand in the present permitting proceeding, is entirely consistent with the PSD regulations and appropriately recognizes the distinct nature of oil and gas exploration and production operations. API submits this brief in the interests of defending the Wehrum memorandum from specific challenges advanced in this consolidated appeal and of supporting

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[1] Memorandum from W. Wehrum, EPA Acting Assistant Administrator, to Regional Administrators, *Source Determinations for Oil and Gas Industries* (Jan. 12, 2007) ("Wehrum Memorandum").

Region 10's reasonable application of the guidance contained in that memorandum to the present proceeding.

ARGUMENT

THE REGION REASONABLY DETERMINED THAT EACH PLANNED WELL SITE IS A SEPARATE "SOURCE."

I. The Wehrum Memorandum – Upon Which EPA Region 10 Relied In Part – Is Consistent With The Agency's PSD Regulations.

Petitioner Bill MacClarence ("MacClarence") asserts that the Wehrum Memorandum is unlawful, primarily because that memorandum identifies "proximity" as the most important factor in determining whether one or more oil and natural gas exploration or production surface sites are "located on one or more contiguous or adjacent properties," as that phrase is used in EPA's PSD regulations at 40 C.F.R. § 51.166(b)(6). MacClarence Pet. at 2 (July 15, 2008). To the contrary, the guidance contained in the Wehrum memorandum faithfully implements the PSD regulations.

Section 111(a)(3) of the Clean Air Act ("CAA") defines a "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant." 42 U.S.C. § 7411(a)(3). In *Alabama Power Co. v. Costle*, the D.C. Circuit held that this definition should be applied to the PSD program. *Alabama Power Co. v. Costle*, 636 F.2d 323, 395-96 (D.C. Cir. 1979).

The court also rejected EPA's attempt to enlarge the definition for purposes of the PSD program such that it would read as follows: "any structure, building, facility, *equipment*, installation *or operation (or combination thereof)* . . . ." 636 F.3d at 395-96 (emphasis added). The court's rejection of the italicized language made clear that EPA does not have (and in issuing the *Kulluk* permit properly did not assert) unlimited discretion to "combine" or aggregate pollutant-emitting activities for purposes of determining whether PSD permitting thresholds are met.

Although the court disallowed expansion of the statutory definition, the court held that EPA had reasonable discretion to define each of the statutory terms – "building," "structure," "facility," and "installation" – so as to aggregate the emissions of individual units within an industrial plant into a single source. *Id.* at 397. The court explicitly sanctioned the consideration of factors such as proximity and common ownership in defining the statutory terms so as to cover an entire plant. *Id.*

In response to *Alabama Power*,[2] EPA promulgated revised PSD regulations. 45 Fed. Reg. 52676 (Aug. 7, 1980). EPA noted in the preamble that:

> *Alabama Power* sets the following boundaries on the definition for PSD purposes of the component terms of "source": (1) it must carry out reasonably the purposes of PSD; (2) it must approximate a

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[2] The D.C. Circuit issued two opinions concerning EPA's 1978 PSD regulations in the *Alabama Power* case. The first, issued in June 1979 and amended in December 1979, was reported at 606 F.2d 1068. The second, issued in December 1979 and amended in April 1980, was reported at 636 F.2d 323.

> common sense notion of "plant"; and (3) it must avoid aggregating pollutant-emitting activities that as a group would not fit within the ordinary meaning of "building," "structure," "facility," or "installation."

Id. at 52694-95.

Consistent with the CAA and *Alabama Power*, the revised PSD regulations defined "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act." 40 C.F.R. § 51.166(b)(5). To allow for aggregation of emissions from an entire plant, the revised regulations defined "building, structure, facility, or installation" as:

> [A]ll of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same *Major Group* (i.e., which have the same two-digit code) as described in the *Standard Industrial Classification Manual, 1972*, as amended by the 1977 Supplement
> . . . .

40 C.F.R. § 51.166(b)(6) (italics in the original).

In the preamble to the 1980 regulations, EPA explained that it had included the first criterion ("same industrial grouping") for the purpose of "distinguishing between sets of activities on the basis of their functional interrelationships." 45 Fed. Reg. 52695. At the same time, EPA considered adopting "function" as an additional abstract criterion, but declined to do so. *Id.* EPA explained that in adopting the "same industrial grouping" ("SIC code") criterion, EPA had "sought

to maximize the predictability of aggregating activities and to minimize the difficulty of administering the definition." *Id.* EPA further explained:

> To have merely added function to the proposed definition as another abstract factor would have reduced the predictability of aggregating activities under that definition dramatically, since any assessment of functional interrelationships would be highly subjective. To have merely added function would also have made administration of the definition substantially more difficult, since any attempt to assess those interrelationships would have embroiled the Agency in numerous, fine-grained analyses. A classification code, by contrast, offers objectivity and relative simplicity.

Id.

So it was the "same industrial grouping" criterion that EPA intended to cover the matter of functional relationships between several pollutant-emitting activities. EPA cannot have intended the second criterion ("located on one or more contiguous or adjacent properties") to be governed significantly by functional relationships, because EPA went out of its way to explain that it wanted to avoid the "numerous, fine-grained analyses" that consideration of such relationships would entail. In fact, considering EPA's words in their ordinary sense, it is difficult to understand how two properties may be more or less "contiguous or adjacent" depending upon the functional relationship of the activities occurring on those properties.

This is not to say that the CAA would prevent EPA from placing greater emphasis on functional relationships in arriving at a common sense understanding

of a "plant." Nor would such an approach necessarily represent unsound policy. But it cannot be ignored that EPA deliberately *chose* to de-emphasize functional relationships, manifesting that choice in the regulation.

The Wehrum Memorandum recognizes this choice. It notes, "in 1980, we declined to add a specific 'functionality' criteria [*sic*] to the definition of source." Wehrum Memorandum at 3. It concludes:

> [F]or the [oil and natural gas] industry, we do not believe determining whether two activities are operationally dependent drives the determination as to whether two properties are contiguous or adjacent, because it would embroil the Agency in precisely the fine-grained analysis we intended to avoid, and it would potentially lead to results which do not adhere to the common sense notion of a plant.
>
> . . .
>
> Given the diverse nature of the oil and gas activities, we believe that proximity is the most informative factor in making source determinations for these industries.

Id.

It is true, as Petitioner MacClarence points out,[3] that over many years the Agency has issued guidance in which the question of "co-dependency" or the like figured prominently in determining the extent of a source – in particular, in determining whether activities were located on contiguous or adjacent properties.[4]

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[3] MacClarence Pet. at 2, 3-5.

[4] *See, e.g.*, Letter from Richard Long, Director Air & Radiation Program, EPA Region 8, to Dennis Myers, Colorado Department of Public Health and Environment, *8P-AR* (Apr. 20, 1999); Letter from Richard Long, Director Air Program, EPA Region 8, to Lynn Menlove, Utah

But other than the Wehrum Memorandum, no guidance has ever focused on the distinct nature of the oil and natural gas industry.

Moreover, while Agency guidance may inform or clarify otherwise ambiguous regulations, it may not *contradict* regulations. *Christensen v. Harris County*, 529 U.S. 576, 587-88 (2000). Even if the Wehrum Memorandum were inconsistent with prior Agency *guidance*, the Wehrum Memorandum would be controlling because it is an official statement of EPA's position and, as explained above, it is consistent with the PSD *regulations*. At a minimum, in assigning significantly greater weight to proximity than operational interdependence, the Wehrum Memorandum is truer to the regulations than any guidance to the contrary.

II. The Wehrum Memorandum Correctly Recognizes The Distinct Circumstances Of Oil And Natural Gas Operations And Promotes A "Common Sense" Notion Of A "Plant."

The Wehrum Memorandum points out that applying the "contiguous or adjacent properties" criterion of 40 C.F.R. § 51.166(b)(6) to the exploration and production activities of the petroleum and natural gas industry can be difficult. Wehrum Memorandum at 2-3. As the memorandum explains, this is because

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Division of Air Quality, *Response to Request for Guidance in Defining Adjacent with Respect to Source Aggregation* (May 21, 1998); Memorandum from Robert G. Kellam, Acting Director, Information Transfer & Program Integration Division, OAQPS, EPA, to Richard Long, Director Air Program, EPA Region 8, *Analysis of the Applicability of Prevention of Significant Deterioration (PSD) to the Anheuser-Busch, Incorporated Brewery and Nutri-Turf, Incorporated Landfarm at Fort Collins, Colorado* (Aug. 27, 1996).

> [L]and ownership and control are not easily distinguished in this industry, because subsurface and surface property rights are often owned and leased by different entities . . . . While it is not uncommon for a single company to gain the use of a large area of contiguous property through these lease and mineral rights agreements, owners or operators of production field facilities typically control only the surface area necessary to operate the physical structures used in oil and gas production, and not the land between well drill sites.

Id.

The "contiguous or adjacent properties" criterion may be even more difficult to apply in the context of OCS exploratory operations such as those at issue here. This Board acknowledged the problem in its first opinion in this case:

> Here, the land is "public," and only the mineral exploration rights are privately owned. In addition, because the area is characterized by vast swaths of open water, the area does not readily lend itself to the notion of "property" as connoting a specific location or place identifiable by natural or man-made geographic features.

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Thus, in a great many – and probably the vast majority – of exploration and production cases, the criterion of being "located on one or more contiguous or adjacent properties" will not strictly be met by any two surface sites. If not all three criteria within the definition of "building, structure, facility, or installation" are met, then a combination or aggregation of two or more surface sites cannot be considered a single "stationary source." In this circumstance, it makes sense, as the Wehrum Memorandum suggests, to start with the working assumption that an

individual surface site is the source, and then to determine whether – because of the very close proximity of two or more surface sites – those sites may at least themselves be reasonably considered "contiguous or adjacent" and therefore fit within a common sense understanding of a single plant.

The Wehrum Memorandum suggests that "close proximity" would include being "physically adjacent" or separated by a short distance such as "across a highway" or "a city block." Wehrum Memorandum at 4-5. It notes that some states use a quarter-mile as a benchmark. This scale of distance is likely consistent with EPA's original intent in promulgating the PSD regulations. [5]

It would require very little physical space between ships or platforms on the open sea for the ordinary person to perceive the existence of two or more "plants." And the phrase "common sense," [6] which EPA uses as the ultimate litmus test based on *Alabama Power*, *see* 45 Fed. Reg. 52676, 52695 (Aug. 7, 1980), contemplates what ordinary persons would think, not that which may be conceived by sophisticated CAA practitioners.

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[5] "Contiguous" usually implies having actual contact on much or all of one side. Webster's Ninth New Collegiate Dictionary at 56 (1988). "Adjacent" can mean "nearby" or it can mean "having a common endpoint or border," as in "adjacent lots." *Id.* But attributing the meaning "nearby" to "adjacent" can easily lead to arbitrary decisions about what is "nearby" – particularly because EPA expressly declined to add "functional relationships" as a separate abstract criterion. *See supra* 4-5. To avoid such arbitrary decisions, if "adjacent" is to be understood as "nearby," then at a minimum it should be considered very nearby indeed – as the Wehrum Memorandum suggests.

[6] "Common sense" is defined as "the unreflective opinions of ordinary men" or "sound and prudent but often unsophisticated judgment." Webster's Ninth New Collegiate Dictionary at 266 (1988).

Given the foregoing analysis, Region 10 could not reasonably have reached any other conclusion in the present case than the one it did, *i.e.*, that each planned well site constitutes a separate source.

III. The Region's "Source" Determination Here Is Unassailable, As It Fully Considers *Both* Proximity And Operational Interdependence.

Even if the Board found that the Wehrum Memorandum were somehow flawed or inapplicable to the present case, and even if the Wehrum Memorandum were read to assign a greater importance to operational interdependence, Region 10's "source" determination here would still be reasonable because it fully evaluates *both* proximity and operational interdependence.

The Region found that proximity did not justify aggregation where well sites are sited more than 1000 meters apart, based on three considerations: 1) the permittee does not control the open waters between the sites; 2) there is no physical connection to bridge the gap between sites (at which drilling takes place at different times); and 3) the permittee chooses drill sites far enough apart so as to have distinct information-gathering value. Response to Comments at 59 (2008). Where well sites are less than 1000 meters apart, the issue of proximity is effectively moot, because the permit prohibits such siting for other reasons. *See id.*

The Region then evaluated the issue of operational interdependence. It found insufficient interdependence to aggregate separate planned well sites, based

on three main factors: 1) the absence of a tangible product produced by one site for use by another; 2) the sequential nature of the drilling operations; and 3) the absence of a physical connection between two sites, such as a pipeline. Response to Comments at 62 (2008). In making this determination, EPA considered existing Agency guidance on operational interdependence. *Id.*

Moreover, contrary to Petitioners' claims, *see* North Slope Borough Pet. at 22, the public had adequate opportunity to comment on the reasoning underlying this determination. The final "source" determination and accompanying rationale was a "logical outgrowth" of the proposed determination and accompanying rationale. *See City of Stoughton v. EPA*, 858 F.2d 747, 753 (D.C. Cir. 1988).

While there may have been subtle shifts in emphasis in the rationale, such shifts in response to comments are appropriate. If an agency could not shape a rulemaking or permit and its rationale in response to comments, there would be no end to the administrative process. *See BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 643-44 (1st Cir. 1979), *cert. denied sub nom. Eli Lilly & Co. v. Costle*, 444 U.S. 1096 (1980); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 & n.51 (D.C. Cir. 1973). In any event, each of the three factors upon which the Region ultimately relied was to one extent or another discussed at the proposal stage. *See* Statement of Basis at 14-16 (Feb. 20, 2008). Accordingly, the Region afforded adequate notice of, and opportunity to comment on, its reasoning.

CONCLUSION

The guidance contained in the Wehrum Memorandum is fully consistent with EPA's PSD regulations. Consideration of that guidance, with its recognition of the distinct nature of oil and natural gas exploration and production operations and its emphasis on proximity, led to a "common sense" determination of "source" in the present case. Additionally, Region 10 fully considered both proximity and operational interdependence, and provided a cogent explanation of its decision following public notice and opportunity to comment.

The petitions for review should be denied.

DATED: October 7, 2008

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion Of The American Petroleum Institute For Leave To File *Amicus* Brief and accompanying Brief *Amicus Curiae* Of The American Petroleum Institute in the matter of *Shell Offshore, Inc. Kulluk Drilling Unit*, OCS Appeal Nos. 08-01, 08-02 & 08-03, were served by United States First Class Mail on the following persons, this 7th day of October, 2008:

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