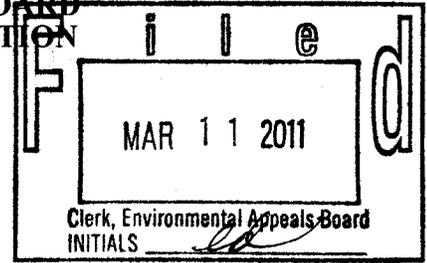


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:

BP America Production Company,
Florida River Compression Facility

Permit No. V-SU-0022-5.00

CAA Appeal No. 10-04

ORDER GRANTING OUTSTANDING MOTIONS

By motion dated February 24, 2011, American Petroleum Institute (“API”) sought leave to file an *amicus curiae* brief in opposition to the petition for review in the above-captioned matter. Motion for Leave to File Amicus Curiae Brief in Opposition to the Petition for Review (“API Motion”). Petitioner WildEarth Guardians opposed the API Motion on March 1, 2011. On March 4, 2011, API moved for leave to file a reply in support of the API Motion. In a motion dated March 7, 2011, the U.S. Environmental Protection Agency (“Agency”), Region 8 (“Region”) requested the opportunity to respond to the merits of the *amicus curiae* brief, should the Environmental Appeals Board (“Board”) accept the brief for filing.

The Board has broad discretionary authority to manage the permit appeal proceedings that arise from Part 71. *In re Peabody Western Coal Co.*, CAA Appeal No. 10-01, slip op. at 8, 14 E.A.D. ____ (EAB Aug. 13, 2010). Under this authority, the Board may grant and deny motions.¹ *Id.* Part 71

¹ In this case, API’s reply may assist the Board in its consideration of API’s request for leave to file an *amicus curiae* brief. Accordingly, the Board grants API’s March 4, 2011 motion for leave to reply
(continued...)

does not specifically address whether the Board may grant a motion to file an *amicus curiae* brief prior to the grant of review, although once review is granted, the Agency's public notice shall state that "any interested person may file an amicus brief." 40 C.F.R. § 71.11(I)(3). The Part 124.19 permit appeal rules, upon which Part 71(I) is closely predicated, contain similar language. In proceedings governed by Part 124, the Board has frequently accepted *amicus curiae* briefs for filing without having first granted review. See *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 142 n.48 (EAB 2006) (Order Denying Review in Part and Remanding in Part) (denying City of Chicago's request to file an *amicus curiae* brief and granting Openlands' request to file an *amicus curiae* brief); *In re Three Mountain Power, LLC*, 10 E.A.D. 39, 45 n.6 (EAB 2001) (Order Denying Review) (discussing order granting California Energy Commission's motion for leave to participate as *amicus curiae*). Nothing in Part 71 precludes the Board from accepting an *amicus curiae* brief prior to the grant of review. Moreover, as API points out, it would make no sense for the Board to be precluded from exercising its discretion to consider an *amicus curiae* brief in appropriate cases at an earlier stage of the process. See API Motion for Leave to File a Reply Brief in Support of API's Motion for Leave to File an Amicus Curiae Brief (Mar. 4, 2011). Consistent with the Board's Part 124 practice, the Board's authority to manage its Part 71 permit proceedings includes the discretion to allow non-parties to participate as *amicus curiae* prior to the grant of review.

Contrary to WildEarth Guardians' arguments, accepting an *amicus curiae* brief before the Board has granted review does not contravene the regulatory directive to invite interested persons to file *amicus curiae* briefs after review has been granted. See Petitioner's Opposition to Motion for

¹(...continued)
and accepts for filing the Reply in Support of API's Motion for Leave to file an Amicus Curiae Brief in Opposition to the Petition for Review.

Leave to File Amicus Curiae Brief in Opposition 1-2 (Mar. 1, 2011). Should the Board grant review, 40 C.F.R. § 71.11(l)(3) provides for mandatory acceptance of any *amicus curiae* brief that may be filed. In contrast, prior to the grant of review, the Board retains discretion to grant or deny *amicus curiae* briefs as it deems appropriate. WildEarth Guardians' unsupported contention that such discretion is somehow prejudicial to unidentified non-parties that may wish to participate as *amicus curiae* is unpersuasive; any such non-parties are not precluded from seeking leave to timely file an *amicus curiae* brief.

In support of its motion for leave to file an *amicus curiae* brief, API states that it is a national trade association comprised of nearly 400 members, many of whom are companies subject to regulation under the Clean Air Act and Title V in particular. API Motion at 1. API further states that many of its "members have an interest in how EPA interprets the regulations at issue in this matter." *Id.* at 2.

Upon consideration, the Board **GRANTS** API's motion for leave to file an *amicus curiae* brief and accepts the brief for filing. The Board also **GRANTS** the Region's request to file a response to the *amicus curiae* brief. The Region's response shall be filed on or before April 1, 2011.

No further briefing will be allowed except at the request of the Environmental Appeals Board.

So ordered.

Dated:

March 11, 2001

ENVIRONMENTAL APPEALS BOARD

By:

[Handwritten signature]
Kathie A. Stein
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Granting Outstanding Motions in the matter of *BP America Production Company, Florida River Compression Facility*, CAA Appeal No. 10-04, were sent to the following persons in the manner indicated:

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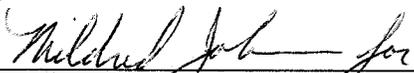
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MAR 11 2011



Annette Duncan
Secretary