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

In re:	
Shell Gulf of Mexico, Inc. Shell Offshore, Inc. Frontier Discovery Drilling Unit	OCS Appeal Nos. 10-01 through 10-04
OCS Permit No. R10OCS/PSD-AK-09-01 OCS Permit No. R10OCS/PSD-AK-2010-01	

ORDER ON MOTIONS FOR RECONSIDERATION AND/OR CLARIFICATION

On December 30, 2010, the Environmental Appeals Board ("Board") issued an Order Denying Review in Part and Remanding Permits ("Remand Order") concerning two Outer Continental Shelf ("OCS") Prevention of Significant Deterioration ("PSD") permits ("Permits") that the U.S. Environmental Protection Agency ("EPA" or "Agency") Region 10 ("Region") issued to Shell Gulf of Mexico Inc. and Shell Offshore Inc. (collectively, "Shell"). The Board received motions for reconsideration and/or clarification of the Remand Order from both the Region and Shell on January 21, 2011.[1] Petitioners[2] filed a joint response opposing both the Region's and Shell's requests for reconsideration and/or clarification and the Region filed a partial opposition to Shell's request for partial reconsideration on February 7, 2011.

[1] The original deadline for filing a motion for reconsideration and/or clarification was January 12, 2011. The Region filed a motion for an extension of time on January 7, 2011. The Board granted the Region's motion for extension of time to file a motion for reconsideration and/or clarification on January 11, 2011, setting January 21, 2011, as the deadline for all parties requesting reconsideration or clarification, and February 7, 2011, as the deadline for filing responses to any such motions for reconsideration or clarification. *See* Order Granting Extension of Time to File Motion for Reconsideration or Clarification and Setting Reply Deadline (Jan. 11, 2011).

[2] *See infra* note 5.

As explained in more detail below, pursuant to the Region's request the Board will decide in a forthcoming order four issues not addressed in the Remand Order. *See* EPA Region 10 Motion for Reconsideration and/or Clarification at 23-30 (Jan. 21, 2011) ("Region's Motion"). The Board will decide these unresolved issues based on the merits briefs previously submitted in these appeals. *See* Region's Motion at 24-25.

Further, the Board denies Shell's request for reconsideration of the Board's remand on the OCS source definition. The Board denies both the Region's and Shell's request for reconsideration of the Remand Order's direction to "apply all applicable standards in effect at the time of issuance of the new permits on remand," and instead provides below clarification of that statement in the context of the Remand Order. The Board denies Shell's request that the Board set a deadline for the Region to complete remand proceedings, and the Board also denies the Region's and Shell's request that the Board not require further appeal to the Board to exhaust administrative remedies.

A. *Factual & Procedural Background*

The Remand Order and current motions before the Board requesting reconsideration and clarification represent the culmination of several months of permitting activity regarding the proposed operation of the Frontier Discoverer drillship in the Chukchi and Beaufort Seas. The two Permits before the Board in the Remand Order were issued on March 31, 2010, and April 9, 2010. The Region deemed the applications for those Permits complete in July 2009 and February 2010, respectively. Shell mischaracterizes the duration of these proceedings by reference to Shell's prior permit applications, which are distinct from the present proceeding, one of which was the subject of a remand for insufficient record justification and one of which Shell

terminated after a federal appeals court remanded Shell's exploration plan.

More specifically, in proceedings separate from the above-captioned matters, Shell Offshore, Inc. ("SOI")[3] initially sought two OCS minor source permits to operate in the Beaufort Sea, which the Region issued in June 2007, and which triggered petitions for review to this Board in July 2007. To accommodate SOI's urgency, the Board placed the petitions on a very accelerated briefing and oral argument schedule and issued its decision on September 14, 2007. *See In re Shell Offshore Inc.*, 13 E.A.D. 357, 362 (EAB 2007) (deciding OCS Appeal Nos. 07-01 and 07-02). In *Shell Offshore*, the Board noted that the petitions raised issues of first impression. Most significant was the question of whether the Region accurately characterized the ships' operations as separate OCS sources, rather than a single stationary source for purposes of the PSD regulations. This was a fundamental issue that "affects whether SOI may obtain minor source permits, as the Region has issued here, or must obtain major source PSD permits, which would subject the company to a more rigorous set of application criteria and permit requirements." *Id.* at 359. The Board remanded the permits in *Shell Offshore* to the Region based on the lack of record evidence supporting the Region's establishment of a 500-meter perimeter around the OCS source to define the "stationary source." 13 E.A.D. at 391.

In June 2008, approximately nine months after the *Shell Offshore* remand, the Region issued to SOI a single OCS minor source permit for the Kulluk drilling unit to operate in the

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[3] In the prior permit appeals described below, SOI was the only permittee because both prior permit applications sought to conduct operations only in the Beaufort Sea, where SOI owns the leases. Shell Gulf of Mexico Inc. ("SGOMI") is a permittee in the current proceeding because as the owner of the Chukchi leases, SGOMI is the only entity that can conduct operations on them. *See* Remand Order at 4 & n.1 (noting that the record demonstrates that the same personnel represented SGOMI's and SOI's interests throughout the permitting process).

Beaufort Sea, which was also subsequently appealed to the Board in July 2008. Upon completion of briefing, again on an accelerated schedule, but prior to oral argument, a federal appeals court vacated the Minerals Management Service's ("MMS")[4] approval of SOI's Beaufort Sea exploration plan, remanding the plan and requiring MMS to prepare a revised environmental assessment or an environmental impact statement, as necessary, pursuant to requirements of the National Environmental Policy Act. *See In re Shell Offshore Inc.*, OCS Appeal Nos. 08-01, 08-02 & 08-03, at 1 (EAB Nov. 21, 2008) (Cancellation of Oral Argument and Order to Show Cause); *see also Alaska Wilderness League v. Kempthorne*, 548 F.3d 815, 825-832 (9th Cir. 2008), *withdrawn and vacated*, 559 F.3d 916 (9th Cir. 2009), *and superceded sub nom. Alaska Wilderness League v. Salazar*, 571 F.3d 859 (9th Cir. 2009) (dismissing petitions requesting review of SOI's Beaufort Sea exploration plan as moot based on SOI's withdrawal of the exploration plan and on MMS rescinding its prior approval of the exploration plan). On April 27, 2009, Shell filed a notice indicating that it had "decided to withdraw the *Kulluk* permit so that Region 10 could focus its resources on completing, as expeditiously as possible, major source PSD permitting for [Shell's] planned exploration activities utilizing a different drill ship in the Chukchi and Beaufort Seas." Shell Offshore Inc.'s Notiice [Sic] of Non-Opposition to EPA Motion to Dismiss Appeal at 2 (Apr. 27, 2009), OCS Appeal Nos. 08-01, 08-02 & 08-03, Dkt. No. 93.

Thus, several factors including changes in the type of air permit Shell sought, changes in

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[4] *See* Remand Order at 11 n.7 (discussing separation and reassignment of the responsibilities of the former Minerals Management Service and the creation of the Bureau of Ocean Energy Management, Regulation and Enforcement ["BOEMRE"] to assume the duties of MMS until the full implementation of BOEMRE's reorganization into three distinct bureaus is complete).

the equipment Shell planned to use in each permit application, and a separate action in federal court have contributed to the cumulative length of time required to address Shell's evolving requests for air permits to conduct exploratory drilling activities on the Arctic OCS.

In the current proceedings, three groups[5] petitioned for review of the Permits ("Petitioners"), which authorized Shell, subject to conditions, "to construct and operate the Frontier Discoverer drillship and its air emissions units and to conduct other air pollutant emitting activities" in the Chukchi and Beaufort Seas off the North Slope of Alaska for the purpose of oil exploration. *See* Remand Order at 4 (citing Chukchi Permit at 1; Beaufort Permit at 1).[6] Less than one month after the groups filed their petitions, the President and the Department of the Interior ("DOI") announced the suspension of drilling activities in the Arctic

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[5] The Center for Biological Diversity ("CBD") requested review of the Permits simultaneously in a single Petition for Review designated as OCS Appeal No. 10-01. *See* Petition for Review (Apr. 30, 2010) ("CBD Petition").

Earthjustice, representing several conservation groups including Natural Resources Defense Council, Native Village of Point Hope, Resisting Environmental Destruction of Indigenous Lands ("REDOIL"), Alaska Wilderness League, Audubon Alaska, Center for Biological Diversity, Northern Alaska Environmental Center, Ocean Conservancy, Oceana, Pacific Environment, and Sierra Club (collectively, "EJ Petitioners"), requested review of the Permits simultaneously in a single Petition for Review designated as OCS Appeal No. 10-02. *See* Petition for Review (May 3, 2010) ("EJ Petition").

The Alaska Eskimo Whaling Commission and Inupiat Community of the Arctic Slope ("AEWC") filed a Petition for Review of the Chukchi Permit, designated as OCS Appeal No. 10-03. *See* Petition for Review (May 3, 2010). AEWC later filed a Petition for Review of the Beaufort Permit, which was originally designated as OCS Appeal No. 10-12 and then later redesignated as OCS Appeal No. 10-04. *See* Petition for Review (May 12, 2010); *see also* Letter from Eurika Durr, Clerk, Environmental Appeals Board, U.S. Environmental Protection Agency, to Counsels in the Matter of Shell Gulf of Mexico Inc. and Shell Offshore Inc. (June 4, 2010).

[6] Record documents referenced in this Order are cited consistent with their previous definition in the Remand Order.

for 2010. *See* Remand Order at 17-19 & n.14 (describing procedural history). Prompted by the change in circumstances surrounding these appeals, Petitioners jointly filed a motion requesting that the Board vacate and remand the Permits back to the Region, and the Region filed a motion to hold matters in abeyance.[7] *See* Remand Order at 19. The Board held oral argument on the competing motions on June 18, 2010, in lieu of argument on the merits. After several subsequent

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[7] The Board notes the Region's evolving position regarding the extent to which the Board should decide the issues raised in these appeals. While at first the Region requested that the Board hold the petitions in their entirety in abeyance, the Region later sought a Board decision on the three issues identified in the oral argument scheduling order, and most recently, after the Board issued its order remanding the Permits, the Region asks the Board to resolve additional issues beyond the three addressed in the Remand Order.

In its motion to hold matters in abeyance, the Region averred that given the unknown outcome of the moratorium and the unknown effects it would have on Shell's proposed exploratory drilling operations in the Chukchi and Beaufort Seas, the Region could not determine whether a remand or withdrawal of the Permits would be necessary to address the outcome of the moratorium. Motion to Hold Matters in Abeyance at 4; *see also* EPA Region 10's Opposition to Petitioner's Motion to Vacate and Remand and Reply to Shell's Opposition to Motion to Hold Matters in Abeyance at 5 (June 10, 2010) (stating that the Region's request to hold these matters in abeyance "best carries out the policy expressed in the President's announcement - to put decisions regarding OCS drilling activities on hold while the government as a whole figures out the best path forward"); *id.* at 10. However, in a subsequent motion to reschedule oral argument on the merits, the Region expressed support for the Board to decide the three issues outlined in the Board's prior order scheduling oral argument. *See* EPA Region 10 Unopposed Motion to Reschedule Oral Argument at 3-4 (July 28, 2010) ("Counsel for Shell indicated that they would support the request to reschedule if EPA would express its support to the Board for deciding these three issues instead of continuing to hold a decision on these issues in abeyance. * * * [W]e note our position that after hearing argument on the three issues identified in the Board's Order, the Board should issue its decision on those issues instead of holding them in abeyance or remanding them * * * "); *see also* Remand Order at 19 & n.15. Most recently, the Region explains that due to changed circumstances it now requests a Board decision on at least some of the remaining unresolved issues. Region's Motion at 30-31. It cites as support the fact that all issues raised in the petitions for review are fully briefed, that given the amount of time that has passed the Permits should undergo review as they now stand despite the possibility of future requirements imposed at the conclusion of DOI's review of offshore drilling, and most importantly, that a ruling on the merits for the four issues requested would provide clarity and reduce the likelihood of future remands as the Region contemplates completing the permits on remand. *Id.*

attempts to schedule oral argument on the merits, and after the Region expressed its support for the Board to decide the three issues the Board previously identified in its order scheduling argument on the merits, the Board held oral argument on those three issues on October 7, 2010. *See* Remand Order at 19. As noted above, the Board issued the Remand Order on December 30, 2010, and the Region and Shell filed their motions for reconsideration and/or clarification on January 21, 2011. Petitioners filed a joint response opposing the Region's and Shell's motions for reconsideration and/or clarification and the Region filed a partial opposition to Shell's request for partial reconsideration on February 7, 2011.[8]

B. *Standard of Review for Motions for Reconsideration and/or Clarification*

Motions to reconsider a final order "must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." 40 C.F.R. § 124.19(g). As the Board

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[8] On February 9, 2011, the American Petroleum Institute ("API") filed a motion for leave to file an amicus curiae brief in support of Shell's motion for reconsideration and clarification of the Remand Order. *See* Motion for Leave to File an Amicus Brief in Support of Shell's Motions for Reconsideration and/or Clarification (Feb. 9, 20100) ("API Brief"). API supports Shell's motion for reconsideration on two issues: (1) the Board's instruction to the Region to apply all applicable standards in effect at the time of issuance of the revised permits on remand; and (2) the Board's decision to remand the permits to the Region without addressing all issues raised by Petitioners. API Brief at 1. The Board hereby grants API's motion to file an amicus curiae brief. The Board has considered API's arguments in reaching its decision set forth in this order.

Also on February 9, 2011, Shell notified the Board that on January 31, 2011, EPA submitted a declaration from Assistant Administrator of the Office and Radiation Regina McCarthy to the U.S. District Court for the District of Columbia in *Avenal Energy Ctr. LLC v. U.S. Envt'l Protection Agency*, Case No. 1:10-cv-0083-RJL ("McCarthy Declaration"). Shell argues that the McCarthy Declaration changed official Agency policy in that it reflects a decision not to apply certain air quality requirements to pending PSD permit applications, including the permit for Avenal Power Center. *See* Notice of Related Authority at 2 (Feb. 9, 2011) ("Shell Notice"). The Board notes that the facts in *Avenal* are distinct from those before the Board in these proceedings, and that Assistant Administrator McCarthy stated that, to be effective, the policy must be subject to a public comment process.

has explained before, "[r]econsideration is generally reserved for cases in which the Board is shown to have made a demonstrable error, such as a mistake of law or fact." *In re Russell City Energy Ctr.*, PSD Appeal Nos. 10-01 through 10-05, at 2 (EAB Dec. 17, 2010) (Order Denying Motion and Supplemental Motion for Reconsideration and/or Clarification and Stay) (quoting *In re Knauf Fiber Glass, GmbH*, PSD Appeal Nos. 98-3 through 98-20, at 3 (EAB Feb. 4, 1999) (Order on Motions for Consideration)); *In re Steel Dynamics, Inc.*, PSD Appeal Nos. 99-4 & 99-5, at 5 (EAB July 13, 2000) (Order Denying IDEM's Motion for Reconsideration or Clarification and SDI's Motion for Reconsideration) (same). The reconsideration process should not be used "as an opportunity to reargue the case in a more convincing fashion." *Knauf*, at 2-3 (quoting *In re S. Timber Prods., Inc.*, 3 E.A.D. 880, 889 (JO 1992)); *Russell City*, at 2; *accord Steel Dynamics*, at 5; *In re Haw. Elec. Light Co., Inc.*, PSD Appeal Nos. 97-15 through 97-22, at 6 (EAB Mar. 3, 1999) (Order Denying Motion for Reconsideration). "A party's failure to present its strongest case in the first instance does not entitle it to a second chance in the form of a motion to reconsider." *Haw. Elec. Light*, at 6; *see also Russell City*, at 2-3; *Steel Dynamics*, at 5.

The Board has stated previously that it will entertain motions for clarification "where the moving party can demonstrate that an aspect of the EAB's decision is ambiguous." EAB Practice Manual at 49 (Sept. 2010); *see also Russell City*, at 3. Where a motion requests modification of some aspect of the Board's decision, however, the Board has treated it as a motion for reconsideration. *In re Adcom Wire Co.*, RCRA Appeal No. 92-2, at 2 (EAB July 22, 1994) (Order on Adcom's Motion for Clarification).

C. *Region's Request for the Board to Reconsider and Rule on Four Previously Briefed Issues*

In its motion, the Region identifies four unresolved issues not addressed in the Remand

Order and requests that the Board now consider those issues and deny review of each issue. *See* Region's Motion at 23-30; *see also id.* at 24-25 & n.10 (requesting the Board deny review of four unresolved issues, but also stating that "in the event the Board disagrees, Region 10 still requests a decision on the merits of these issues, given the certainty that such a ruling would provide going forward"). The Region describes these four unresolved issues as follows: (1) whether Icebreaker #2 is an OCS source during the anchoring process; (2) the appropriate technical approach considering secondary formation of $PM_{2.5}$ (particulate matter with a diameter of 2.5 micrometers or less) in connection with the $PM_{2.5}$ NAAQS demonstration; (3) BACT analysis for $PM_{2.5}$ and PM_{10} (particulate matter with a diameter of ten micrometers or less), and; (4) inclusion of spill clean-up and certain other activities in the potential to emit analysis. *See* Region's Motion at 24. The Region further states that because these four issues are fully briefed and ripe for review, the Board should reconsider its decision to remand these issues to the Region and instead decide them. *Id.* at 24-25. As noted above, *see supra* note 7, until its motion for reconsideration, the Region never requested that the Board decide anything but the three issues subsequently addressed in the Remand Order, or wavered from its contention that DOI's decision may impact the analysis of the issues.

The Region contends "the Board erred in failing to provide a clear justification for remanding the permits in their entirety." Region's Motion 13-14; *see also id.* at 7-8, 10-15. The Board concludes that the Region has failed to meet the standard for reconsideration with respect to the Board's decision to remand the Permits in their entirety. As Petitioners point out, there is no clear mistake of law or fact in remanding the Permits in their entirety, and to the contrary, there is ample precedent for such action. *See* Petitioner's Joint Response and Opposition to the

Motions for Reconsideration and/or Clarification of the Board's December 30th Decision in this Matter at 12-16 (Feb. 7, 2011) (cataloging Board decisions where permits were remanded in their entirety for further consideration). The Board originally decided to remand the Permits and, therewith, all issues not resolved by the Board's Remand Order because "[t]he administrative record pertaining to each of these [unresolved] issues will likely be significantly altered by the remand of the Permits to the Region." Remand Order at 9. In deciding to remand all issues other than the three addressed in the Remand Order, the Board was also mindful of the fact that the Department of the Interior ("DOI") has not yet issued its decision on Shell's proposed changes to its exploration plan and that the Region previously represented to the Board that the Region could not yet determine whether the unresolved issues would be impacted by DOI's decision. The Region explained that DOI's decision may require drilling plan changes that "EPA Region 10 would need to analyze in light of CAA permitting requirements" and that even "to the extent that some issues presented are 'primarily legal,' resolution of those issues may still not be necessary" because of changes in the underlying facts. EPA Region 10's Opposition to Petitioners' Motion to Vacate and Remand and Reply to Shell's Opposition to Motion to Hold Matters in Abeyance at 8-9 (June 10, 2010) ("Region's June 2010 Opposition"). In addition to changes in the administrative record required to address the issues the Board has remanded, it appears likely the Region will need to develop a record explaining its decisions regarding whether and/or to what extent DOI's decision on Shell's revised exploration plan necessitates changes to the Region's previous permit decisions.

Now, although DOI still has not yet issued its decision, the Region argues that a Board decision on each of the four issues the Region identifies would provide "further clarity" and

would "reduce potential issues to be considered in any appeals after remand." Region's Motion at 31. While the current posture of the case is largely reflective of the Region's continually changing position as to whether the Board should address the issues in the petitions,[9] the Board agrees that the interests of judicial economy and finality in this permitting process now augur in favor of the Board resolving the four specific issues the Region identifies in its motion. In a forthcoming order, the Board will decide the four unresolved issues the Region identifies[10] based on the merits briefs previously submitted in these appeals.

The four specific issues the Region identifies and requests that the Board decide at this time do not encompass all issues raised in the petitions for review and left unresolved by the Board's Remand Order. For example, AEWC raised certain additional issues regarding whether the $PM_{2.5}$ background ambient air quality data were collected in compliance with the applicable regulations. *See* AEWC Petition at 32-40. In response to the petitions, the Region did not argue that the $PM_{2.5}$ data fully complied with the regulatory requirements, but instead argued that the data met the requirements "during some portions of the data collection period" and that the

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[9] The Board was guided by the Region's statement that, until DOI issues its decision, the Region could not determine whether resolution of these issues would be necessary. Region's June 2010 Opposition at 8-9.

[10] Shell requests that the Board clarify the scope of the remand proceedings on the undecided issues, although Shell characterizes all $PM_{2.5}$ emissions issues together as one, whereas the Region distinguishes between the $PM_{2.5}$ NAAQS demonstration and the BACT analysis for particulate matter. *See* Request of Shell Gulf of Mexico Inc. and Shell Offshore Inc. for Partial Reconsideration and for Clarification of Order Denying Review in Part and Remanding Permits at 20-22 (Jan. 21, 2011) ("Shell's Motion"). Shell asks the Board to clarify that the only two issues not effectively resolved by the Remand Order are issues pertaining to $PM_{2.5}$ and whether to include emergency response activities in the emissions profile for Frontier Discoverer. *Id.* at 21. Shell also requests clearer guidance on the Region's scope of work with respect to these two unresolved issues. *Id.* In light of other actions taken in this order, Shell's request for clarification of the unresolved issues is denied.

Region "took additional steps to verify the quality of the entire data set." Region's Response at 47. Because the Region has not requested the Board decide this and any other issues aside from the four issues it identifies, the Board leaves undisturbed its general remand of the Permits, including its remand of the $PM_{2.5}$ ambient air quality data. Presumably, on remand, the $PM_{2.5}$ background data will be impacted by the passage of time and the availability of additional data and/or additional modeling that will cure the ambient air quality data deficiencies.

The Board also denies Shell's request that the Board establish a deadline by which the Region must complete the remand proceedings.[11] Not only would it be unprecedented for the Board to issue an order constraining the time within which a permitting authority must act, a matter that is quintessentially in the permitting authority's expertise, but also it would be particularly inappropriate in the context of this case where the extent of changes DOI will require to Shell's exploration plan and the extent of the resulting changes the Region must make to its analysis are unknown. Furthermore, given the highly contested and complex issues that remain for resolution, it is in the interest of all parties for the Region to take the necessary time to develop, solicit public comment as appropriate, and render a fully defensible decision.

D. *Shell's Request for Reconsideration of the Ruling on the Definition of OCS Source*

Shell argues that the Board made clear errors of fact and law in the Remand Order because, according to Shell, "no material inconsistency exists in the record between Region 10's and Shell's positions concerning the point during the process of anchoring (or de-anchoring) at which the Frontier Discoverer should be deemed to be an OCS source" and the Region did not

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[11] *See* Request of Shell Gulf of Mexico Inc. And Shell Offshore, Inc. For Partial Reconsideration and for Clarification of Order Denying Review in Part and Remanding Permits at 19 (requesting an April 15, 2011 deadline).

"improperly delegate this determination to Shell." Shell's Motion at 6-7. Shell's request for reconsideration on these grounds must be rejected because it does not meet the standards for reconsideration of a Board order. Notably, Shell does not address the Board's rationale for concluding that the Region failed to articulate with reasonable clarity how the Region's definition of when the Frontier Discoverer becomes and ceases to be an OCS source is a reasonable application of the regulatory definition of OCS source interpreted in light of the relevant statutes. Instead, Shell puts forward a legal rationale to explain the Region's decision; a rationale that the Region did not adopt when making that decision. As explained more fully below, because the Board measures the adequacy of *the Region's* decision and supporting rationale, not alternatives *the permittee* advocates, Shell's motion fails to present grounds for the Board to reconsider its decision.

In the Chukchi and Beaufort Permits, the Region defined the Frontier Discoverer as an OCS source "between the time the Discoverer is declared by the Discoverer's on-site company representative to be secure and stable in a position to commence exploratory activity at the drill site until the Discoverer's on-site company representative declares that, due to retrieval of anchors or disconnection of its anchors, it is no longer sufficiently stable to conduct exploratory activity at the drill site, as documented by the records maintained pursuant to Condition B.2.2." Chukchi Permit at 5. Permit condition B.2.2 merely requires the records to identify the drill site location and "the date and hour" that the Frontier Discoverer becomes and ceases to be an OCS source at that drill site. *Id.* at 10. It provides no further instructions.

As more fully stated in the Board's Remand Order, the Board found two fundamental errors in the Region's rationale for its definition of the OCS source in these Permits. First, the

Board concluded that neither the Permits, nor the underlying administrative record, set forth "a concise, coherent explanation" for the Region's conclusion that the Permits' language complies with 40 C.F.R. § 55.2 (which defines OCS source) as interpreted in light of the governing statute, CAA § 328, and in light of the related statute, OCSLA § 4(a)(1). Remand Order at 49; *see also id.* at 44-51 (discussing Region's analysis in the statements of basis and responses to comments), 51-55 (explaining that the legislative and regulatory history do not fill the gap in the Region's analysis). In other words, the Board concluded that "[n]owhere in the administrative record before the Board is there a clear statement of how the Region interpreted" the statutory and regulatory criteria to mean the "secure and stable" standard the Region included in the Permits. *Id.* at 51. The Board found particularly problematic the Region's conclusion that the Permits' "secure and stable in a position to commence exploratory activity" language shall be implemented by reference to log entries Shell's on-site representative makes for "other operational purposes." *Id.* at 57-58. At bottom, not only is the record devoid of a coherent explanation for the Region's legal interpretation that the statutory and regulatory criteria mean "secure and stable in a position to commence exploratory activity," but the record is also devoid of a coherent legal interpretation showing how Shell's on-site representative's determination as evidenced in the log entries complies with the statutory and regulatory criteria defining OCS source. *Id.* at 57-58. Second, the Board found that it was fundamental error for the Region to turn the OCS source decision over to Shell's on-site representative where "there is seemingly no way for the Region, or anyone else besides Shell's on-site representative, to determine when the Frontier Discoverer becomes an OCS source." *Id* at 59. The Board found that "as it is currently written, the Region's definition of OCS source is a subjective decision," which improperly

delegates to the regulated entity the Region's statutory responsibility to determine when to commence regulating emissions. *Id.* at 61-62.

Shell's motion for reconsideration does not provide grounds for the Board to reconsider its conclusion that the Region failed to adequately explain its decision and improperly delegated regulatory decisionmaking to Shell. Shell first argues that the Board erred by focusing on the Region's difficulty articulating how "secure and stable in a position to commence exploratory activity" implements the three criteria of 40 C.F.R. § 55.2. Shell's Motion at 7-8. Shell argues that instead of three criteria, section 55.2 should be viewed as consisting of only two criteria: "while the regulations include 'erected' as one of three criteria for an OCS source, that criterion is subsumed in the 'attached' and 'used for exploration' criteria." *Id.* at 8.

Shell's argument must be rejected, first, because Shell has not shown that its newly-proffered interpretation was utilized by the Region when articulating the rationale for its permitting decisions. To the contrary, the Region repeatedly referred to three regulatory criteria. For example, the Region in summarizing its responses to comments explained that it "considered *the three required aspects* of the OCS source definition and rejected the option that attachment of the Discoverer to the seabed by a single anchor was sufficient to consider the Discoverer to be an OCS source because such a position focused only *on one of the three criteria* for when a vessel is an OCS source – attachment to the seabed – and did not address whether the vessel was 'erected on the seabed' and 'used for the purpose of exploring, developing or producing resources therefrom * * *.'" Region's Resp. at 18 (emphasis added); *see also* Chukchi RTC at 16 (quoting the regulations as requiring vessels to be "[p]ermanently or temporarily attached to the seabed *and* erected thereon *and* used for the purpose of exploring." (emphasis added)); Modified

Chukchi Statement of Basis at 20 (discussing erected thereon criterion); Beaufort Statement of Basis at 23 (same). And, the Region certainly never adopted Shell's new legal theory, even at oral argument when responding to the Board's numerous questions on the meaning of the regulation's three criteria. *See* Oral Arg. Tr. at 42-62. Indeed, Shell appears to offer this new theory for the first time now, in its motion for reconsideration. Earlier, in its initial brief responding to the petitions for review, Shell stated that "the regulatory definition of OCS source identifies three specific events: a vessel must be (1) attached to the seabed, (2) erected on the seabed, (3) and used for exploration, development, or production of OCS resources." Shell's Resp. at 38.

The Board will not sustain a permitting decision based on a rationale articulated for the first time by the permit issuer's counsel on appeal, much less one articulated for the first time in a motion for reconsideration by a party other than the permit issuer.[12] *See In re Hawaii Elec. Light Co.*, PSD Appeal Nos. 97-15 through 97-22, at 11 (EAB Mar. 3, 1999) (Order Denying Motions for Reconsideration) ("This argument must be rejected because it does not appear to have been made anywhere in the record of this proceeding and, in particular, this argument was not part of DOH's basis for its decision as expressed in its responses to comments.");[13] *see also In re Conocophillips Co.*, 13 E.A.D. 768, 785 (EAB 2008) (explaining that "allowing the permit issuer to supply its rationale after the fact, during the briefing for an appeal, does nothing to ensure that

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[12] The Board does not address here whether Shell's new legal theory, which seemingly subsumes one criterion into the other two criteria, effectively renders the subsumed criterion into mere surplusage, which is generally prohibited under the canons of statutory and regulatory interpretation. *See, e.g., In re Vidiksis,* TSCA-03-2005-0266, slip op. at 16 (EAB Apr. 22, 2009), 14 E.A.D. __; *In re Beckman Prod. Servs.*, 8 E.A.D. 302, 310 (EAB 1999).

[13] Available at www.epa.gov/eab/orders/helrecon.pdf.

the original decision was based on the permit issuer's 'considered judgment' at the time the decision was made" (citing *In re Indeck-Elwood LLC*, 13 E.A.D. 126, 147 (EAB 2006)); *In re Prairie State Generation Station*, 12 E.A.D. 176, 180 (EAB 2005); *In re Gov't of D.C. Mun. Separate Sewer Syst.*, 10 E.A.D. 323, 342-43 (EAB 2002) ("Without an articulation by the permit writer of his analysis, we cannot properly perform any review whatsoever of that analysis * * *."); *In re Hawaii Elec. Light Co.,* 8 E.A.D. 66, 102-03 (EAB 1998) (declining to consider new data and analysis presented by the permit issuer for the first time on appeal to support its decision); *In re Chem. Waste Mgmt*, 6 E.A.D. 144, 151-52 (EAB 1995); *In re Amoco Oil Co.*, 4 E.A.D. 954, 964 (EAB 1993); *In re Waste Techs. Indus.*, 4 E.A.D. 106, 114 (EAB 1992).

In addition, Shell proffers its new legal theory as to only one of the defects associated with the OCS source determination identified in the Board's decision; the lack of a connection between the regulatory and statutory criteria and the Permits' "secure and stable in a position to commence exploratory activity" language. In finding the Region's decision unsupported by the administrative record, the Board noted the Region had no coherent legal explanation both for the "secure and stable in a position to commence exploratory activity" language and also for the Region's decision to use Shell's on-site representative's decision and log entries as the ultimate determining criterion. *Compare* Remand Order at 44-51, 57-58. The Board explained further that when the Region adopts a case-specific application of the regulatory OCS source definition for Shell's permits, the Region's rationale must be based on the regulatory criteria, interpreted in light of the relevant statutory provisions. *Id.* at 58, 61. As such, the Region's rationale must reflect the CAA's objectives, not Shell's operational purposes or business objectives. *Id.* Shell's motion for reconsideration fails to demonstrate how *the Region's* rationale, as documented in the

administrative record, addresses these defects.

For similar reasons, the Board rejects Shell's arguments that the "Board has misconstrued the nature of the process whereby the Shell company representative would declare and document that the Frontier Discoverer is stable and ready for transfer to the control of the drilling contractor," and that "the permits' use of the declaration of transfer of control of the *Discoverer* by the Shell representative, as documented by standard International Association of Drilling Contractors records, as a trigger for regulatory requirements does not give Shell improper control over its own regulation." Shell's Motion at 11. First, these contentions do not substitute for an analysis by the Region explaining how Shell's documentation process serves the CAA's policies and requirements as set forth in the OCS source definition promulgated in the regulations. Second, although there is some resemblance between these arguments and Shell's comments submitted during public comment,[14] there is no evidence that the Region determined these assertions to be true.

Lastly, Shell's argument that there is "no material inconsistency" between the Region and Shell "concerning the point during the process of anchoring (or de-anchoring) at which the Frontier Discoverer should be deemed to be an OCS source" because "[b]oth focus on when drilling would or could commence" does not establish grounds for the Board to reconsider its conclusions. Shell's Motion at 6-7. By referring to "material inconsistency," Shell implicitly acknowledges that there is an inconsistency, although Shell believes that it is not material. The

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[14] *See* Letter from Susan Childs, Shell Gulf of Mexico, Inc., to EPA Region 10, Attached Comments at 8-10 (Feb. 1, 2010) (A.R. K-4); *see also* Letter from Susan Childs, Regulatory Affairs Manager, Alaska Venture, Shell Gulf of Mexico, Inc., to Rick Albright Director, Office of Air, Water and Toxics Environmental Protection Agency Region 10, attachment I (Dec. 13, 2009) (A.R. A-66).

Board's discussion of the inconsistency that does exist illustrates how the Permits' language cedes the Region's regulatory decisionmaking responsibility to Shell. To summarize, there is an inconsistency between, on the one hand, the Region's conclusion that the Frontier Discoverer may be an OCS source in circumstances when less than eight anchors are fully deployed and, on the other hand, Shell's repeated statements that, for its business purposes, Shell will not make the requisite log entries transferring the Frontier Discoverer into OCS source status until all eight anchors are fully deployed. *See* Remand Order at 59-61. From the Board's perspective, this is a material inconsistency demonstrating that the Permits' language does not conform to the Region's regulatory determination. As the Board noted, and the Region confirmed, under the Permits' current language, it would be "very difficult" for the Region to challenge Shell's log-entry decision if that decision were different from the Region's judgment regarding what is required to serve the CAA's goals and objectives. Remand Order at 59. Thus, it is simply not sufficient for, as Shell contends, both Shell and the Region to "focus on when drilling would or could commence" since they disagree as to when that would be.

Accordingly, for all of the foregoing reasons, the Board denies Shell's motion requesting the Board reconsider its decision to remand the Permits' conditions defining when the Frontier Discoverer becomes and ceases to be an OCS source.

E. *Shell's and the Region's Request for Reconsideration and/or Clarification of the Board's Statement that the Region Must Apply All Applicable Standards in Effect at the Time of Permit Issuance*

The Region and Shell request that the Board reconsider or clarify the Board's Remand Order stating that the Region must "apply all applicable standards in effect at the time of issuance of the new permits on remand." Remand Order at 82. Because both the Region's and Shell's

concerns appear to arise from an overly broad reading of the Board's Remand Order, the Board declines to reconsider this issue but provides the following clarification.

The Region argues that the applicability of newly issued standards or requirements to a remanded permit depends on the scope of the remand. Region's Motion at 18-19. Thus, the Region requests that the Board clarify "the extent to which new standards apply and the administrative record must be supplemented on remand will depend on the extent to which the Region re-opens the Permits on remand." *Id.* at 22-23. Shell argues that the Board's statement here is in direct conflict with the Board's decision in *In re Russell City Energy, LLC,* PSD Appeal No. ___, slip op. at 111 (EAB Nov. 18, 2010), 15 E.A.D. __, where the Board decided not to remand the permit to require compliance with the new 1-hour NO_2 NAAQS. Shell observes that in *Russell City*, the Board explained both that the new NO_2 standard "was not intended to require permit decisions already issued to be reopened" and that the Board recognized that the permit issuer had spent years and significant resources "'considering the permit application in light of the existing rules and standards'" and "cautioned against an 'endless loop of permit issuances, appeals, and remands' driven by changes in regulatory standards." Shell's Motion at 16. Shell requests that the Board's statement that the Region must apply all applicable standards on remand be stricken from the Remand Order because there is "no explanation for why [the Board] exercised its 'discretion' to impose new legal standards on these permits, nor any rationale for treating Shell's permits differently from the *Russell City* permit." *Id.* at 16-17.

First, contrary to Shell's argument, the question whether the new NO_2 NAAQS applies on remand here is not governed by the Board's decision in *Russell City*. In that case, the issue

presented to the Board was whether, as a policy matter, the Board should require the permittee to comply with the new NO_2 NAAQS notwithstanding the fact that the new NO_2 NAAQS was both published in the Federal Register and became effective after the date on which the permitting authority issued its permit decision. Thus, the NO_2 NAAQS standard clearly was not applicable at the time of permit issuance, and thus *Russell City* is inapposite.

The question at issue here is more accurately framed by the Region when it asks whether the Board intended to hold that "new requirements apply in any circumstances where a permit is remanded on one or more issues, no matter how narrow those issues may be[?]" *See* Region's Motion at 18. First, the Board's decision reflects a case-specific determination. The Board did not intend to and did not establish a sweeping precedent that would apply to any and all remands, no matter how narrow. However, the remand at issue in the present case is not narrow; quite the opposite.

Here, the Board directed the Region to re-examine a foundational determination the Region made in initially issuing the permit. Specifically, the Region applied the determination of when the Frontier Discoverer becomes and ceases to be an OCS source as predicate to almost every other decision it made in this OCS PSD permit proceeding. Thus, for example, the Region's application of CAA § 328(a)(1) – which mandates that OCS source permits "control air pollution from Outer Continental Shelf sources * * * to attain and maintain Federal and State ambient air quality standards and to comply with the provisions of part C of subchapter I of [the CAA]" – was entirely dependent on the Region first determining what the OCS source is and when it exists. Thus, the Region applied this predicate determination of when the OCS source exists to demarcate which emissions from the Associated Fleet must be included in the air quality

impacts analysis[15] and which emissions are wholly unregulated by the OCS PSD permits. *See* Chukchi RTC at 7 n.3 (defining the "Associated Fleet" as limited to when the Frontier Discoverer is an OCS source); *see also id.* at 23, 25-27. Similarly, the Region did not apply BACT to, or account for the emissions from, the Frontier Discoverer's propulsion engine because there "will * * * be no emissions from the propulsion engine while the Discoverer is an OCS source." Chukchi RTC at 25-26.

When the Board held that the Permits must be remanded because the Region had failed to articulate a coherent explanation for how the Permits' language defining the OCS source comports with the statutory and regulatory criteria – an explanation for which the Region was still searching at the time of oral argument[16] – the Board did not merely remand the Permits to allow the Region to finish its search and provide a coherent rationale *for a decision already made.*[17] Instead, the Board held invalid the Region's previous permit decision issued under

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[15] The Board notes that no party has argued that any of the icebreaker or anchor handler emissions must be included within the air quality impacts analysis pursuant to CAA § 165(a)(3), 42 U.S.C. § 7475(a)(3), as "emissions from construction" of the stationary source. *See In re Hadson Power 14 - Buena Vista*, 4 E.A.D. 258 (EAB 1992) (holding that construction emissions "generally must be considered" in the source impacts analysis); *see also Save the Valley, Inc. v. Ruckelshaus*, 565 F. Supp. 709, 710 (D.D.C. 1983) ("Pursuant to the plain language of the statute and its obvious intent to regulate pollution attendant to construction * * *."). Accordingly, the Board considers the issues related to the air quality impacts analysis as framed by the parties in this case.

[16] Remand Order at 50-51 ("The Board expects the Region to have settled upon a coherent and reasoned legal analysis, fully responsive to the comments raised, by the time the Region issues a final permit, and not be in search of its legal analysis at the time of oral argument.").

[17] The Board's scope of the remand and the extent of judgment that must be exercised by the Region on remand in this case is significantly greater than in cases where the Board has remanded for the Region to make a minor technical correction to the Permit's language based

(continued...)

40 C.F.R. § 124.15(a) because that decision was not supported by the administrative record defined by 40 C.F.R. § 124.18, which "shall be complete on the date the final permit is issued." 40 C.F.R. § 124.18(c). Thus, on remand here, the Region must supplement the administrative record and make a final permit decision under 40 C.F.R. § 124.15(a) that is supported by the record established under 40 C.F.R. § 124.18 as of the date of that permit decision.[18] The Region must make its decision "with a truly open mind, rather than with a view to defending a decision he or she already has made." *In re Weber #4-8*, 11 E.A.D. 241, 245 (EAB 2003); *see also In re Prairie State Generation Station,* 12 E.A.D. 176, 179-80 (EAB 2005). The breadth of the

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[17](...continued)
fully on the record already established and with all decisionmaking already made either in the initial permit decision issued under section 124.15(a) or by the Board on appeal. *See, e.g., In re Sunoco Partners Mktg. & Terminals, LP*, UIC Appeal No. 05-01 (EAB June 2, 2006) (Order Denying Review in Part and Remanding in Part); *In re Beazer East, Inc.*, 4 E.A.D. 536 (EAB 1993).

[18] The Board's remand orders in other cases have frequently instructed the permitting authority to use procedures applicable before the final permit decision has been issued under 40 C.F.R. § 124.15(a). Thus, for example, the Board has frequently directed that, on remand, the permit issuer should "supplement the record" with new information, and should reopen the public comment period in accordance with 40 C.F.R. § 124.14. *See, e.g., In re: Chukchansi Gold Resort and Casino Waste Water Treatment Plant*, NPDES Appeal Nos. 08-02 to 08-05, slip op. at 31 (EAB Jan. 14, 2009), 14 E.A.D. ___ ("The Region should supplement the record as necessary during the remand process. Additionally, the Region may reopen the record for additional public comment as necessary, in accordance with 40 C.F.R. § 124.14."); *In re Conocophillips Co.*, 13 E.A.D. 768, 769 (EAB 2008) (same); *In re Shell Offshore, Inc.*, 13 E.A.D. 357, 391 (EAB 2007); *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 591 (EAB 2006). Supplementing the record with new information is authorized prior to the permitting office issuing the final permit decision under 40 C.F.R. 124.15(a). 40 C.F.R. §§ 124.17(b), .18(b)(4) & (6). Additionally, reopening public comment under section 124.14 is also an authority applicable to the process prior to a final permit decision under section 124.15(a).

remand in this case[19] underlay the Board's case-specific determination that the Region apply the standards in effect as of the date of issuance of the new permits on remand.

While the permit issued following remand must meet all applicable standards in effect at the time of permit issuance, nothing in the Remand Order precludes the Agency from lawfully exercising, through an appropriate process, any discretion it has to interpret what "all applicable standards in effect" means as to a particular source being permitted.

F. *Shell's and the Region's Request that No Further Appeal to the Board Be Required for Parties to Exhaust Administrative Remedies*

Shell and the Region request that the Board reconsider the Remand Order's direction that anyone dissatisfied with the Region's decision on remand must file a petition seeking Board review in order to exhaust administrative remedies under 40 C.F.R. § 124.19(f). Region's Motion at 32-33; Shell's Motion at 17-20. The Board denies reconsideration of this issue. The Board's precedent demonstrates that it was appropriate for the Board to require further appeal to the Board to exhaust administrative remedies. *See, e.g., In re ConocoPhillips,* 13 E.A.D. 768, 786 (EAB 2008); *In re Prairie State Generation Station,* 12 E.A.D. 176, 180-81 (EAB 2005); *In re Amerada Hess Corp.,* 12 E.A.D. 1, 21 n.39 (EAB 2005); *In re Knauf Fiber Glass, GmbH,* 8 E.A.D. 121, 176 (EAB 1999). As discussed above in Part E, the Board's remand is not for

[19] As discussed in above Part C, the Region has requested the Board decide four specific additional issues, not including the remand of the issues concerning background $PM_{2.5}$ data, which presumably would be impacted by the passage of time and the availability of additional data and/or additional modeling that will cure the deficiencies. These data are part of the ambient air quality analysis, which the regulations require be included in the permit application and made available to the public prior to the public comment period. *See* 40 C.F.R. §§ 52.21(m), 124.9(b)(1), .10(d)(iv), (vi); *In re Hawaii Elec. Light Co., Inc.*, 8 E.A.D. 66, 102 (EAB 1998) ("Congress has determined that the air quality analysis required by the regulations 'shall be available at the time of the public hearing on the application for such permit.'"(quoting CAA § 165(e)(3)(c), 42 U.S.C. § 7475(e)(3)(c)).

purposes of making minor technical corrections, the normal circumstance where the Board will not require a further administrative appeal as a prerequisite to a judicial appeal. Instead, it includes a requirement that the Region re-examine a foundational determination it made in initially issuing the Permits. As noted, the Region has applied its determination of when the Frontier Discoverer becomes and ceases to be an OCS source as predicate to almost every other decision it made in these OCS PSD permit proceedings. In addition, these Permits, when ultimately issued, will be the first ones to make that predicate determination applying the statutory and regulatory OCS source definitions and, thus, will serve as precedent of national significance for all subsequent permits issued for regulated activity on the OCS. Moreover, it is inappropriate to decline review here when the facts and record may change on remand. As noted above in Part C, the Board has remanded, and the Region has not requested the Board now decide, additional issues pertaining to the ambient air quality analysis, among other things. Further, additional changes to the Region's analysis may ultimately be required in response to the DOI's decision on Shell's revised exploration plan. In these circumstances, which may result in significant new or different analysis by the Region, it would be particularly inappropriate to not require administrative appeal as a predicate to final agency action and potential subsequent review by the federal courts.

F. *Conclusion*

As explained above, the Board will issue a forthcoming order that addresses four unresolved issues on which the Region now seeks resolution to aid in the Region's completion of remand proceedings. The Board denies Shell's request for reconsideration of the Board's remand on the OCS source definition. Although the Board also denies both the Region's and Shell's

request for reconsideration of the Remand Order's direction to "apply all applicable standards in effect at the time of issuance of the new permits on remand," the Board instead provides clarification of this language in the context of the Remand Order. The Board denies Shell's request to establish a deadline for the Region to complete remand proceedings, and the Board also denies the Region's and Shell's request that the Board not require further appeal to the Board to exhaust administrative remedies. The Remand Order otherwise stands as issued.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: February 10, 2011

By: _____
Anna L. Wolgast
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order on Motions for Reconsideration and/or Clarification in the matter of Shell Gulf of Mexico Inc., and Shell Offshore Inc., OCS Appeal Nos. 10-01 through 10-04, were sent to the following persons in the manner indicated:

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Dated: FEB 10 2011

Annette Duncan
Secretary