

# **ATTACHMENT**

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

---

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

---

**PETITIONERS' JOINT REPLY IN SUPPORT OF THEIR MOTION TO VACATE**

On June 1, 2010, Petitioners Natural Resources Defense Council, et. al (NRDC), Alaska Eskimo Whaling Commission and Inupiat Community of the Arctic Slope (AEWC), and Center for Biological Diversity (CBD, and together with NRDC and AEWC, Petitioners) filed a motion to vacate and remand the permits at issue in these petitions. The motion explained that the Administration's suspension of the Shell Gulf of Mexico Inc. and Shell Offshore Inc.'s (Shell) 2010 exploration drilling pending further review in light of the ongoing BP oil spill in the Gulf of Mexico undermined the finality and viability of the permits at issue in these petitions. The Environmental Protection Agency (EPA) opposes vacatur and remand of the petitions—despite acknowledging that the Administration's review may result in fundamental changes to the permits and reserving the right to revisit the permits depending on the outcome of the review—asking instead that the Board hold these proceedings in abeyance. Shell opposes any alteration whatsoever of the dramatically expedited schedule for adjudication of these petitions—despite the fact that any urgency has abated, Shell cannot demonstrate prejudice arising from a disposition of this matter on a regular timeframe, and Shell has already proposed changes to its operations—arguing that its plan is not likely to change as a result of the review. Because it will assure the broadest and most complete reevaluation in light of new information, is well within the Board's authority, and will best conserve the Board's and parties' resources, Petitioners respectfully request the Board to vacate and remand the permits now. In the alternative, should the Board decide not to vacate and remand the permits now, Petitioners support EPA's request to hold the petitions in abeyance pending the Administration's completion of its review.

EPA has admitted that, in light of the suspension of Arctic Ocean exploration drilling and ongoing and far-ranging review by the Administration of offshore drilling, “future actions could make consideration of [issues in the petitions] moot to the extent underlying facts no longer give

rise to Petitioners' claims and/or no longer provide support for the Agency's permitting decision as required by the regulations at issue." Docket No. 49 at 10; *see also id.* at 8-12. Further, EPA admits that "new requirements imposed on [Shell's] operations as a result of the Administration's review could change the nature of [Shell's] operations, which could in turn change the nature, amount, and location of the air emissions associated with their exploratory operations and, as a result, would also change Region 10's analysis of the emissions underlying these permits." *Id.* at 8. But, rather than seeking a voluntary remand of these permits so that EPA can fulfill its duty to determine whether, and under what conditions, it should issue a permit to Shell that complies with all newly applicable requirements, EPA instead requests that these review proceedings should be held in abeyance. Petitioners contend the appropriate course is for the Board to vacate and remand the permits now. Doing so would assure the broadest and most complete reevaluation of emissions from Shell's operations, should they be permitted to proceed, in light of new information. It is well within the Board's authority to vacate and remand the permits now, and it would most effectively conserve the Board's and parties' resources.

In opposing Petitioners' request, Shell claims that the Board lacks the authority to vacate and remand the permits now. Shell's Opposition to Motion to Vacate and Remand at 4-5 (Docket No. 50) (Shell Response). Shell argues that because 40 C.F.R. § 124.19(c) states that the Board shall grant or deny petitions for review, the regulation *precludes* the Board from exercising its discretion to do anything else. *Id.* at 4. However, the Board does not interpret its regulations so restrictively; to the contrary, it has repeatedly held that remand of permits where changed conditions call into question EPA's original permitting decision is an entirely appropriate course of action. *See In re Desert Rock Energy Company, LLC*, PSD Appeal Nos. 08-03, 08-04, 08-05 & 08-06 (Slip Op.), 14 E.A.D. \_\_\_ (EAB Sept. 24, 2009) at 12-13 (*Desert*

*Rock*) (remanding to allow EPA to reconsider a permit due to changed circumstances and rejecting petitioners' argument that "the Board's hands are tied" once it decides to adjudicate a petition); *In re Multitrade Ltd. P'ship*, 3 E.A.D. 773, 777 (Adm'r 1992) (remanding where it was unclear what the "import of the prospective permit revisions" would be); *see also In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 563- 64 (EAB 1998); *In re City of Hollywood*, 5 E.A.D. 157, 170, 180 (EAB 1994). As the Board has stated, remand in light of changed circumstances "makes sense in light of the purpose of the administrative appeals process, which is to ensure that the agency fully considers the relevant issues and makes a sound, reasoned final decision." *Desert Rock* at 17. While the Board has to date exercised its discretion to remand in light of changed circumstances in the context of a permitting agency's voluntary remand request, the fact that EPA here, for whatever reason,<sup>1</sup> chose not to make such a request does not strip the Board of its authority to vacate and remand.<sup>2</sup>

A "remand is generally available where the permitting authority . . . wishes to reconsider some element of the permit decision before reissuing the permit." *Desert Rock* at 13 (quotation and citation omitted); *id.* (stating "the regulations do not in any way prohibit the Board from granting a voluntary remand at any time"). Here, as in the contexts in which the Board has granted voluntary remands, EPA seeks—appropriately—to reserve the right to reconsider

---

<sup>1</sup> Although the reasons for EPA's failure to request vacatur and remand in light of the Administration's review remain opaque, the decision has the clear effect of maximizing EPA's chances to avoid applying improved pollution control standards for NO<sub>2</sub> to Shell's drilling, which EPA avoided in the current permits by, in the case of the Beaufort Sea, issuing the permit one business day, Friday, April 9, before the standards went into effect, Monday, April 12. Petitions for Review at 85 (Docket No. 44).

<sup>2</sup> The Board's authority and jurisdiction to order remands of permits without having either "granted" or "denied" them has been upheld not only against challenges based on 40 C.F.R. § 124.19, but also against due process and equal protection claims, statutorily-based claims under Clean Air Act § 165(c), and claims of trust responsibility violations. *See Desert Rock* at 22-33.

elements of the permits in light of fast-evolving events and the ongoing Presidential, Congressional, and administrative reviews. At the conclusion of those reviews, EPA may issue a different permit or no permit at all—but as is the case in the voluntary remand context, the outcome of that review is not relevant to the decision of the Board here. *See, e.g., Sierra Club v. Van Antwerp*, 560 F. Supp. 2d 21, 24 (D.D.C. 2008) (noting that after voluntary remand, the agency “will ultimately decide to affirm, modify, or revoke the permit”); *Desert Rock* at 46-47 (granting remand when the agency’s reconsideration of certain issues “may” result in substantive changes to the permit). As in the context in which the Board has vacated and remanded at the request of the permitting agency, vacatur and remand here is consistent with the Board’s own practice of considering new information—like the drastically changed events here—in maintaining its docket. *See* EAB Practice Manual at 30 (“the Board, in practice, endeavors to resolve as many cases as possible during the first stage of the appeals process by obtaining more information than contemplated in the regulations”).

Vacatur and remand would also further general principles of judicial efficiency and practices. *See, e.g., Sierra Club*, 560 F. Supp. 2d at 23 (“In the case where an intervening event may affect the validity of the agency action at issue, a remand is generally required.”); *Desert Rock* at 18 (“it would be highly inefficient for the Board to issue a final ruling on a permit when the Agency is contemplating changes to that permit”). Vacatur and remand would conserve the Board’s resources in light of the changing circumstances directly affecting the permits at issue here. Shell argues that the lessons of the ongoing Gulf oil spill—already the largest in U.S. history, with tens of thousands of barrels of oil a day fouling the Gulf of Mexico and the oil industry unable to control a well blowout under circumstances previously declared too remote to analyze—will not result in changes to its Arctic Ocean exploration operations. It asserts that its

own “well designs are sound and its oil spill prevention and response plans are exemplary” such that the Department of Interior will both allow its operations to go forward next year and will not require changes in those operations. Shell Response at 5; *see also* EPA’s Opposition to Petitioners’ Motion to Vacate and Remand and Reply to Shell’s Opposition to Motion to Hold Matters in Abeyance (Docket No. 49) at 10-11 n.4 (EPA Response). However, the fact is that Shell is *already* changing its operations in light of the Gulf spill. In a May 14 letter to the Department of Interior, Shell stated that it plans to use a second drill-ship, the *Kulluk*, to respond to certain oil spill emergencies. *See* Petitioners’ Joint Motion to Vacate and Remand and Response to Motion to Hold Matters in Abeyance, Ex. 3 at 4 (Docket No. 31) (Petitioners’ Motion). EPA has not considered these changes in its permits or the administrative records underlying them. Indeed, EPA’s attempt in its brief to explain its consideration of *Kulluk* emissions demonstrates remand is appropriate—none of these rationales are in the administrative record for the pending petitions. *See In Re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03, Slip. Op. (Nov. 13, 2008), 14 E.A.D. \_\_\_, at 19 (“where the permit issuer has sought to introduce . . . a new or additional rationale for its permitting decision or additional information supporting it permitting decision . . . typically, the Board has remanded the permit”) (citation and punctuation omitted). EPA’s further assertion that there remains uncertainty as to whether Shell now includes the *Kulluk* in its drilling plan, EPA Response at 7 n.3, is undermined by Shell’s representation in its letter that it “would mobilize” the *Kulluk* in the event of an emergency. Petitioners’ Motion, Ex. 3 at 4. These changes already being implemented by Shell are enough on their own to justify vacatur and remand of the permits now. *See Desert Rock* at 8 (“remanding [the] matter to the permit issuer rather than reviewing petitions . . . [is] the ‘more

responsible (and hopefully expeditious) course' where permittee planned to request permit amendments").<sup>3</sup>

Furthermore, despite Shell's confidence in its oil spill plans, and its attempt to defend them (while also augmenting them) in its May 14 letter to the Department of Interior, the Department, in suspending Shell's 2010 exploration drilling, apparently disagreed. As EPA describes in its response brief, Shell's argument that the permits will not change "fails to recognize (or drastically underplays) the possibility that new requirements imposed on their operations as a result of the Administration's review could change the nature of the operations" and their emissions. EPA Response at 8. Petitioners, Petitioners' Motion at 2, and EPA, EPA Response at 8-13, detail how changes to Shell's operations may fundamentally alter any future permits. In addition, many of the factual and legal issues raised in the instant petitions will be resolved or otherwise become moot as a result of the remand. These issues certainly include the applicability of the new NO<sub>2</sub> National Ambient Air Quality Standard, 75 Fed. Reg. 6,474 (Feb. 9, 2010), which went into effect on April 12, 2010, because that standard would indisputably now apply to any new permits, and they could well include the applicability of emissions limitations for CO<sub>2</sub>, as EPA itself acknowledges that any permit issued to Shell after January 2, 2011, would have to include such limitations.

---

<sup>3</sup> Shell also claims that even if changes to its permits become necessary, they can be addressed in "potential modification of the air permits." Shell Response at 8. The Board rejected a similar contention in *Desert Rock*, where EPA had included a permit provision that would allow it to "reopen and amend the permit, or request that the Permittee amend its permit application, to address . . . terms and conditions deemed by EPA to be appropriate as a result of the ESA consultation process." *Desert Rock* at 33-34 (quoting permit at issue). The Board, however, responded that "it is far from clear how, or under what authority the Region would accomplish an uncharted and after-the-fact PSD permit modification . . . or, moreover, whether any such permit modification would trigger the need for public comment." *Id.* at 44 n.43. Instead, the Board remanded the matter. *Id.* at 46-47. As to Shell's further claim that any air additional modeling requirements would not be significant, EPA has roundly rejected that claim. EPA Response at 12 n.5.

For the foregoing reasons and the reasons set forth in Petitioner's motion to vacate, Petitioners respectfully request that the Board vacate and remand the permits at issue in these petitions to EPA. In the alternative, in the event the Board does not vacate and remand the permits, Petitioners join in and support EPA's request that these petitions be held in abeyance pending the outcome of the moratorium, suspension, and related activities pertaining to Shell's Arctic Ocean exploratory drilling operations.

s/ Erik Grafe

Erik Grafe  
David R. Hobstetter  
EARTHJUSTICE  
441 W 5<sup>th</sup> Avenue, Suite 301  
Anchorage, AK 99501  
dhobstetter@earthjustice.org  
egrafe@earthjustice.org

Eric P. Jorgensen  
EARTHJUSTICE  
325 Fourth Street  
Juneau, AK 99801  
ejorgensen@earthjustice.org

s/ Tanya Sanerib

Tanya Sanerib  
Christopher Winter  
CRAG LAW CENTER  
917 SW Oak Street, Suite 417  
Portland, OR 97205  
tanya@crag.org  
chris@crag.org

s/ Vera P. Pardee

Vera P. Pardee  
Kevin P. Bundy  
CENTER FOR BIOLOGICAL DIVERSITY  
351 California Street, Suite 600  
San Francisco, CA 94104  
vpardee@biologicaldiversity.org  
kbundy@biologicaldiversity.org

Date: June 16, 2010.