

BEFORE THE ENVIRONMENTAL APPEALS BOARD

US ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C.

ORAL ARGUMENT

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ENVIR. APPEALS BOARD

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IN THE MATTER OF: :

SHELL GULF OF MEXICO, INC., : OCS Appeal Nos.

SHELL OFFSHORE, INC., : 10-01 - 10-04

OCS Permit No. :

R10OCS/PSD-AK-09-01 . :

OCS Permit No. :

R10OCS/PSD-AK-2010-01 :

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ORIGINAL

Friday,  
June 18, 2010

Administrative Courtroom  
Room 1152  
EPA East Building  
1201 Constitution Avenue, NW  
Washington, DC

The above-entitled matter came on  
for hearing, pursuant to notice, at 1:00 a.m.

BEFORE:

THE HONORABLE KATHIE A. STEIN,  
Environmental Appeals Judge  
THE HONORABLE ANNA I. WOLGAST,  
Environmental Appeals Judge  
THE HONORABLE EDWARD E. REICH,  
Environmental Appeals Judge

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## P R O C E E D I N G S

1:01 p.m.

MS. DURR: On the record. The Environmental Appeals Board of the United States Environmental Protection Agency is now in session for oral argument in Re: Shell Gulf of Mexico, Inc., Shell Offshore, Inc., OCS Permit Nos. R10OCS/PSD-AK-09-01, R10OCS/PSD-AK-2010-01; OCS Appeal Nos. 10-01 through 10-04. The Honorable Judges are Ed Reich, Anna Wolgast, Kathie Stein, presiding.

Please turn off all cell phones and no recording device is allowed. Please be seated.

JUDGE WOLGAST: Good afternoon and good morning. We're here today pursuant to the Court's order of June 2nd to hear arguments as to Petitioner's motion to vacate and in the alternative to hold an abeyance, EPA's motion to hold an abeyance and Shell's opposition to EPA's motion.

How I'd like to proceed is to

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1 begin with Petitioner's motions. And this  
2 won't be hard and fast, but if you could  
3 collectively try to limit your three arguments  
4 to a total of 30 minutes if possible. Next,  
5 we'll move onto EPA for approximately 30  
6 minutes and then to Shell for approximately 20  
7 minutes.

8 If Counsel could please identify  
9 themselves for the record when you stand to  
10 speak. One other housekeeping matter,  
11 Petitioners request to file their motion  
12 requesting to file a reply in support of their  
13 motion to vacate is granted and will be  
14 considered by the Board.

15 Ms. Sanerib.

16 MS. SANERIB: First of all, thank  
17 you very much for granting that motion and  
18 good afternoon. My name is Tanya Sanerib and  
19 I represent AEWG and ICAS in their petitions  
20 for review. It's Petitioners' intent this  
21 afternoon that I'll take the lead in arguing  
22 Petitioner's motion to vacate and remand the

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1 permits to Region X.

2 I'm also joined by my co-counsel,  
3 Chris Winter, by telephone as well as counsel  
4 for the other Petitioners, the NRDC  
5 Petitioners and the CBD Petitioner. They may  
6 chime in at some point particularly if we have  
7 questions that get into the merits of the  
8 petitions at all. But otherwise our intent is  
9 to have me be the primary presenter here today  
10 for these proceedings.

11 I'm not sure if it's possible, but  
12 I would like to reserve ten minutes of our  
13 time for rebuttal to respond to any arguments  
14 presented by Shell and by Region X in  
15 opposition to our motion.

16 JUDGE WOLGAST: Why don't we say  
17 five but.

18 MS. SANERIB: Five okay. All  
19 right. That's fine.

20 This hearing and the underlying  
21 motions currently before the Board were  
22 triggered by one of the greatest environmental

1 disasters in the history of our country. And  
2 while tragic, the catastrophe that's on going  
3 in the Gulf of Mexico is bringing about review  
4 and wholesale proposed changes to how offshore  
5 oil and gas drilling activities are conducted  
6 in the Outer Continental Shelf. As part and  
7 parcel of these changes and in light of the  
8 fact that Shell will not be exploring in the  
9 Arctic this year, Petitioners respectfully  
10 request that the Board remand the two  
11 challenged air permits that are the subject of  
12 these proceedings to Region X. Alternatively,  
13 we join EPA in asking the Board to hold these  
14 matters in abeyance pending the completion of  
15 review by the Department of Interior, DOI, of  
16 Shell's Arctic plans.

17 JUDGE WOLGAST: And to just be  
18 clear about your first position on the motion  
19 to vacate, is it your position that the Board  
20 should vacate and remand without addressing or  
21 reaching the substantive challenges by  
22 Petitioners?

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1           JUDGE WOLGAST: That's correct,  
2 Your Honor. We believe that that would be  
3 appropriate here under these very unique  
4 circumstances for several reasons. The first  
5 reason is the great likelihood of changes to  
6 how offshore oil and gas drilling is  
7 regulated.

8           As you know and as is evidenced in  
9 Exhibits 1 and 2 to Petitioners' motion to  
10 vacate, the Administration is currently  
11 gathering information about offshore oil and  
12 gas drilling, reviewing that. The Department  
13 of Interior has indicated they intend to  
14 promulgate new regulations pertaining to  
15 offshore oil and gas drilling and that this  
16 has direct ramifications for the permits  
17 currently before the Board.

18           JUDGE REICH: How does it really  
19 advance things by making a decision on  
20 vacating now? Presumably if we vacated and  
21 remanded the Region isn't going to do anything  
22 by way of modifying the permit until it's

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1 clear what changes need to be made. So how  
2 does it really advance things vacating it now  
3 when any potential changes are speculative  
4 versus making a decision on vacating later on  
5 where we have a better of understanding of  
6 what's likely to happen with the permits?

7 MS. SANERIB: Your Honor, I think  
8 it makes sense to vacate these permits now for  
9 two reasons. The first reason is as the  
10 Administration is reviewing offshore oil and  
11 gas operations and how we're going to regulate  
12 those activities in the future in light of  
13 what's ongoing in the Gulf of Mexico, we think  
14 it's critical that EPA not be in defensive  
15 posture with respect to these air permits.  
16 That instead it have a clean slate with the  
17 opportunity to rethink the air permitting  
18 program.

19 They are obviously intimately  
20 involved in clean-up operations in the Gulf.  
21 They're learning a lot from that experience.  
22 And we want them to have the opportunity to

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1 rethink how they do air permitting on the OCS.

2 Now the answer to your question is  
3 that these changes are not speculative. Shell  
4 has already indicated changes to its  
5 operations that were not presented to EPA.  
6 They're not in the record currently before the  
7 Board. And we think it's critical that these  
8 changes go back to Region X and be a part of  
9 whatever may occur in the future with respect  
10 to air permitting for Shell's operations.

11 I also think ---

12 JUDGE REICH: I would assume you  
13 would not expect to do that until they knew  
14 what the full range of changes were. You  
15 would not expect them to continually go  
16 through iterative processes. Even if arguably  
17 some changes may seem apparent now, until they  
18 know the full scope of the changes I don't  
19 really see how that changes the dynamic.

20 MS. SANERIB: I actually think  
21 that the cleanest way forward is vacating or  
22 remanding the permits to EPA so that they can

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1 consider not only the changes that Shell has  
2 presented already to its operations, but the  
3 changes to the Department of Interior and any  
4 other changes that might be called for by the  
5 Administration, changes that might result from  
6 legislation that Congress is considering.

7 And I agree with you. It could be  
8 a lengthy process. But I also don't think it  
9 makes sense for EPA to be wed to these permits  
10 that are from the era of the catastrophe in  
11 the Gulf when they should be instead thinking  
12 about the future and how they're going to do  
13 air permitting in the future.

14 Essentially what Shell is asking  
15 this Board for right now is an advisory  
16 opinion because you have scenarios defining  
17 what the OCS source. You have questions about  
18 compliance with emerging new legal standards  
19 that may never be presented again. And I  
20 think we all acknowledge these permits raise  
21 some very unique issues. And I think ruling  
22 on those issues may not be precedential. It

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1 may be ruling on an era that comes and goes in  
2 the near future. And so it doesn't make sense  
3 to reach those issues.

4 And we have no qualms about the  
5 merits. We think they're strong. We're happy  
6 to have the Board address them. But you spend  
7 a lot of time and energy issuing very detailed  
8 decisions and we have no way of knowing at  
9 this point in time if a decision rendered on  
10 these permits would ever be precedential for  
11 anyone because we could have major sea  
12 changes. And we know already we already have  
13 changes to the underlying activities that  
14 would be covered by these air permits. And we  
15 also have an administration that says that  
16 they're going to be issuing new regulations  
17 for offshore oil and gas drilling.

18 JUDGE WOLGAST: At the moment, we  
19 have no indication that EPA is undertaking any  
20 review until MMS has completed its process.

21 MS. SANERIB: That's correct.  
22 Although I think if you look at the Agency's

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1 response to Petitioner's motion to vacate and  
2 some of the statements that are made in their  
3 answering brief on the merits, they do  
4 indicate in certain instances that they think  
5 things might change. And obviously the Agency  
6 is not at a point yet to say what those  
7 changes may be.

8 We understand that this is  
9 obviously one of the greatest political  
10 questions before this Administration. The  
11 agencies cannot speak too soon about what  
12 their intentions are. But I think EPA  
13 certainly hints at the fact that changes are  
14 going to be coming. And in light of that and  
15 in light of the fact that Shell has said  
16 they're changing their operations already, it  
17 make sense to vacate these permits and send  
18 them back to EPA.

19 And I think Shell talks a lot in  
20 their opposition to our motion about the fact  
21 that they don't believe the Board actually has  
22 authority to undertake what we're asking you

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1 to do. And I think that the Court's decision  
2 in Desert Rock is incredibly helpful at laying  
3 out rationale as to why the permits here  
4 should be vacated and sent back to the Agency.  
5 In that decision --

6 JUDGE STEIN: Excuse me, but in  
7 that Desert Rock case which I'm quite familiar  
8 with.

9 MS. SANERIB: Yes.

10 JUDGE STEIN: The Agency sought a  
11 voluntary remand.

12 MS. SANERIB: Yes.

13 JUDGE STEIN: And in this case for  
14 whatever reason, the Agency has chosen to seek  
15 a voluntary remand. Following up on what  
16 Judge Wolgast was asking, I mean as I  
17 understand the Government's position and I'll  
18 have plenty of opportunity to ask them they  
19 have no plans to reconsider anything involving  
20 this permit until DOI does something.

21 So while there may be rationales  
22 since that decision I do think that this is

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1 different. You know perhaps you could explain  
2 to me why that difference is not so  
3 significant. But I do see it as a major  
4 difference.

5 MS. SANERIB: It certainly is and  
6 I don't mean to say that Desert Rock is  
7 binding on the Board because we certainly  
8 acknowledge that there is a difference between  
9 Region X asking for the permits to be remanded  
10 back to them and the Petitioners making that  
11 request. But I do think there's a lot of  
12 policy rationales that were put forward in the  
13 Desert Rock decision that are helpful here to  
14 guide the Board in deciding how to handle  
15 these very unique circumstances.

16 And, for example, in the Desert  
17 Rock decision, you talk about the standard for  
18 sending a permit back to EPA. And that's if  
19 there's good cause or if it's in the interest  
20 of judicial or administrative efficiency. And  
21 again, it's Petitioners' position here that  
22 the most efficient thing to do in light of the

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1 change circumstances is to remand and vacate  
2 the permits to EPA so that they can decide how  
3 to deal with the situation in the future.

4 And you've acknowledged this  
5 afternoon already there are a lot of different  
6 pieces in motion. We have Shell saying  
7 they're changing their operations. DOI is  
8 undertaking a review. We don't know what the  
9 outcome of that will be aside from likely new  
10 regulations. And then EPA will have to  
11 respond to that. And we think it makes sense  
12 in light of all those circumstances to send  
13 everything back to EPA so they can take a  
14 fresh look at the first instance.

15 JUDGE REICH: Given all the  
16 uncertainties, I would think that the Board  
17 should be looking for a route that does not  
18 prejudice anybody in the interim. The  
19 position of the Agency today based on the  
20 permits that are out there now is that the  
21 one-hour NO<sub>2</sub> standard does not apply.

22 I assume if we vacated the permits

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1 and even if for some reason the Agency adopted  
2 the identical permit you would now be arguing  
3 that there's no longer an issue and that the  
4 one hour NO<sub>2</sub> standard applies which seems to  
5 me somewhat prejudicial to Shell  
6 unnecessarily. Why is that not the case?

7 MS. SANERIB: I don't think that  
8 that's prejudicial to Shell because Shell has  
9 already decided to alter its operations in  
10 light of what's ongoing with the Gulf.

11 JUDGE REICH: But I don't know  
12 that they've said they're going to alter it in  
13 a way that necessarily would change the  
14 permit.

15 MS. SANERIB: And I think that  
16 Petitioners staunchly disagree with that.

17 JUDGE REICH: I understand that,  
18 but I'm not sure that they can see that the  
19 permit necessarily will change. They  
20 certainly recognize the possibility of it.

21 MS. SANERIB: They recognize the  
22 possibility of it and they've also indicated

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1 that they're changing operations and the  
2 configuration of their fleet. And we think  
3 that that has significant ramifications for  
4 the existing permits and it's a matter that  
5 needs to be considered by Region X because  
6 it's not currently a part of the  
7 Administrative record.

8 And I think it's crucial to  
9 understand why. I mean if Shell is talking  
10 about bringing in additional vessels, if  
11 Department of Interior ends up requiring  
12 additional oil spill response vessels, that  
13 the location of those vessels be in the  
14 immediate vicinity of a drill ship.

15 We're already dealing with an  
16 entity who has consumed 83 percent of the 24  
17 hour particulate matter 2.5 NAAQS. So they're  
18 going to have an incredibly difficult time  
19 bringing in any of their vessels, calculating  
20 that potential to a minute and demonstrating  
21 compliance with NAAQS. And so we're going to  
22 see a different permit. But in that instance

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1 --

2 JUDGE REICH: What that's still  
3 having "if" in your premise. I mean adding  
4 the ship and necessarily assuming it's going  
5 to be required to be located within 25 miles  
6 are two different issues.

7 MS. SANERIB: Well, Shell has  
8 already indicated that they're bringing in a  
9 second drill ship.

10 JUDGE REICH: But they haven't  
11 indicated its necessarily going to be within  
12 25 miles which at least in the Agency's view  
13 makes a difference.

14 MS. SANERIB: That's true,  
15 although I think again that's another reason  
16 why these permits should be remanded to EPA  
17 because we have a lot of questions, exactly  
18 your question and many others, that need to be  
19 answered in the first instance by the Agency.  
20 They need the opportunity to ask Shell "You're  
21 bringing a second drill ship. Where is that  
22 ship going to be? What are the emissions from

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1 that drill ship going to be?"

2 I mean that drill ship was part of  
3 the first and the second challenges to Shell  
4 air permits in 2007 and 2008. And there were  
5 significant concerns about that vessel in  
6 particular raised before this Board.

7 JUDGE REICH: But you don't need  
8 to vacate the permit for the Agency to ask  
9 that question.

10 MS. SANERIB: That's correct. You  
11 don't. We could do a limited remand. And at  
12 the end of the day Petitioners' concern is you  
13 do a limited remand on the question of a  
14 second drill ship. And how does that change  
15 Shell's operations?

16 And then we get new regulations  
17 from Department of Interior. So then do we do  
18 a limited remand to address those? And then  
19 in light of that at what point do we need to  
20 consider the fact now that we've had, as you  
21 pointed out, new NO<sub>2</sub> NAAQS standards in place  
22 since April 12th and Shell is not being forced

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1 to comply with those.

2 I mean if the Department of  
3 Interior's review of Shell's operation does  
4 take six months, then under EPA's theory of  
5 the case on January 12, 2011 Shell will  
6 absolutely have to prepare a CO<sub>2</sub>-based  
7 analysis. And so there are definitely things  
8 that will change in these underlying permits  
9 that are currently before the Board that we  
10 think warrants sending the entire permits back  
11 to the Agency so it can address these issues  
12 in the first instance and also still has the  
13 liberty to decide how it wants to handle the  
14 Department of Interior's changes to offshore  
15 oil and gas drilling without having to go  
16 through several different piecemeal remands of  
17 these permits.

18 I think that was one of the  
19 rationales in the Desert Rock decision for  
20 sending those permits back to the Agency. The  
21 Agency indicated that there would be changes.  
22 We're not quite there yet. We might be in the

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1 future. But Shell has already indicated that  
2 there are changes and we think for that reason  
3 it warrants a clean clear record by sending  
4 the entire permits back to the Agency so they  
5 can address all these issues at once.

6 JUDGE STEIN: Are there any issues  
7 in the case currently before the Board that  
8 are not likely to change or for which the  
9 parties and the Agency would benefit from the  
10 Board ruling on a limited set of issues?

11 For example, let's take the  
12 definition of OCS source. Yes, under your  
13 scenario, everything would go back to the  
14 Agency. The Agency at this point in time has  
15 told us that they don't see anything wrong  
16 with the particular permits that they've  
17 issued. If the Board were to have a different  
18 view, would that not be in the party's  
19 interest for the Board to at least in some  
20 subset of areas identify where it sees this  
21 permit as problematic if, in fact, it does?

22 MS. SANERIB: Your Honor, I think

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1 you hit on the one issue that could change the  
2 most in light of what happens with DOI's  
3 review of offshore oil and the gas operations.  
4 That's the one issue that could not change the  
5 most.

6 But if you look at the record for  
7 these air permits, EPA certainly changed their  
8 position on how they conceptualize the OCS  
9 source. They originally thought that the  
10 Discoverer when it dropped one anchor at that  
11 point in time became the OCS source. It later  
12 made a different conclusion in the record.

13 And so I think in this instance it  
14 makes sense to send the permits back to the  
15 Agency. So in light of changes that are made  
16 to offshore oil and gas drilling, they can  
17 again re-envision how they define the OCS  
18 source in the first instance. I mean as this  
19 part said and the Desert Rock decision overall  
20 policy favors agencies rather than the Board  
21 making these types of permitting decisions.

22 And obviously the oil spill

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1 response fleet and how we deal with oil spill  
2 clean-up technologies are at the heart of the  
3 review being undertaken by Department of  
4 Interior. And those changes could  
5 significantly impact how EPA envisions the  
6 definition of OCS source if those vessels  
7 become very critical to the operations and  
8 they're mandated at a different level than  
9 they are now.

10 So you ruling on the current  
11 configuration of vessels and how we define an  
12 OCS source I think unfortunately it will  
13 likely be an advisory opinion. And I don't  
14 think it will have much benefit for the  
15 Agency, for Shell, for the Petitioners because  
16 we're very likely to see a very different  
17 configuration of vessels and Shell's already  
18 indicated that they're contemplating a  
19 different configuration of vessels for  
20 drilling.

21 So for the reason I think that in  
22 the first instance we should send this back to

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1 EPA, allow them to deal with all of the  
2 changes that were their consideration and then  
3 have a clean record in the future if Shell is  
4 allowed to operate again in the Arctic.

5 JUDGE WOLGAST: Well, let me ask  
6 the question a different way. If the Board  
7 were to conclude that we are choosing to send  
8 the permit back to vacate and remand without  
9 any discussion of the substance or any  
10 conclusion that there's any error in the  
11 permit, then what is under that scenario,  
12 under that hypothetical, what's your position?  
13 Should it just be held in abeyance with  
14 everyone doing nothing waiting on MMS or  
15 should the Board decide some or all of these  
16 issues?

17 MS. SANERIB: I think at that  
18 point we join with EPA in asking the Board to  
19 hold these matters in abeyance. As important  
20 as the merits are of these petitions and as  
21 strongly as we feel about them, we just don't  
22 think it's a good use of Bureau resources to

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1 ruin issues that are now going to amount to an  
2 advisory opinion.

3 And I can't imagine them providing  
4 a lot of guidance in the future. A lot of  
5 these issues are at the time. A lot of them  
6 are very specific issues to these permits  
7 which undoubtedly will change if they sent  
8 back to EPA.

9 And for that reason I think it  
10 makes sense for EPA to understand what changes  
11 are going to happen to the regulation of  
12 offshore oil and gas drilling, have time to  
13 give that consideration and make changes to  
14 its air probing process and then come back to  
15 the Board and let you know what's going to  
16 happen with these permits rather than you  
17 spending your time and resources writing  
18 opinions on issues that may never be brought  
19 to the Board again that may serve no use of  
20 precedential value in the future.

21 JUDGE REICH: Picking up on the  
22 point that Judge Stein raised, I mean we have

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1 a wide range of issues. Some of them seem  
2 very fact specific and arguably those are the  
3 ones that are most likely to change. Some of  
4 them seem more like legal issues and the  
5 parties don't always agree in their  
6 characterization of whether a particular issue  
7 is a factual issue or a legal issue. But  
8 there are some elements certainly of the OCS  
9 definition that to me is a legal issue and may  
10 lead you to then establish a test that's a  
11 factual test.

12 It seems to me unlikely that that  
13 definition, that legal issue, is likely to  
14 change significantly. And yet it really does  
15 in many ways go to the heart of the other  
16 issues. Because if you don't know what the  
17 OCS source is, you don't even begin to know  
18 how to calculate potential to emit. So why is  
19 it not in people's interest to the extent that  
20 there are issues that are primarily legal that  
21 are now likely to change to understand that  
22 now rather than arguably go through a process

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1 where there's an elaborate recalculation of  
2 potential to emit based on what the Board then  
3 finds to be a faulty definition of what an OCS  
4 source is.

5 MS. SANERIB: Well, I think, first  
6 of all, just to be clear the potential to emit  
7 calculation influences far more than what is  
8 the actual part of the OCS source. So it's  
9 the OCS source and the vessels within 25 miles  
10 of the OCS source. So I don't think that  
11 there's -- There are some disputes about the  
12 potential to emit calculation, but that's a  
13 distinct issue from --

14 JUDGE REICH: Well, except that  
15 you need to look at when it becomes an OCS  
16 source for purposes and making that  
17 determination.

18 MS. SANERIB: Yes.

19 JUDGE REICH: So in that sense if  
20 you don't know when it becomes an OCS source  
21 you can't really calculate potential to emit  
22 properly. That was the nexus I was looking

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1 at.

2 MS. SANERIB: I understand that.  
3 I apologize. I understand what you're saying  
4 now.

5 And while, yes, I think that there  
6 are legal issues that arise around the current  
7 definition of OCS source in light of the  
8 changes that the Department of Administration  
9 are talking about new regulations I just -- I  
10 want EPA in the first instance to have the  
11 opportunity to redefine an OCS source if it's  
12 called for in light of the changes that  
13 happen. And I think if this Board issues a  
14 ruling, then EPA's hands will be tied as it's  
15 envisioning the future of air permitting. And  
16 I think we could be seeing a very different  
17 configuration of vessels. We could see very  
18 different requirements.

19 I mean for all we know there could  
20 be a requirement that when you go out to drill  
21 you have to immediately start drilling to  
22 really -- And so we're talking about having

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1 three drill ships dropping anchors and  
2 drilling at the same time. And I think that  
3 that might calls for the Agency to completely  
4 re-envisioning what the OCS source is and how  
5 that is defined in that instance.

6 And so I agree with you. While it  
7 is a legal issue that's presented now, I think  
8 that in light of the changes that are coming  
9 down the pike resolving that issue may or may  
10 not be helpful down the road. And we may end  
11 up in a position where we have a ruling from  
12 the Board and then EPA trying to re-envision  
13 how it does air permitting with a ruling that  
14 came from essentially the deep water horizon  
15 era. And it ties their authority in the  
16 future to figure out the best way forward for  
17 regulating these air emissions.

18 JUDGE STEIN: But doesn't EPA have  
19 the keys to that solution on its pocket that  
20 if EPA doesn't want the Board to rule on the  
21 matter before it, it can ask for and has a  
22 right to a voluntary remand? I mean you're

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1 asking to give the Agency authority to do  
2 something that it has not expressed to this  
3 Board that it wants to do. So the unusual  
4 posture that we're all in revolves from the  
5 fact that EPA has not told us that it seeks to  
6 undertake that review.

7 MS. SANERIB: Right.

8 JUDGE WOLGAST: And while there  
9 may or may not regulations in the future part  
10 of this we're talking about efficiency and an  
11 economy. If the Board were to determine that  
12 the base analysis of OCS source is wrong, MMS  
13 can say we're bringing in six more ships and  
14 then you can get the base analysis wrong again  
15 and then just add on other emissions or not  
16 for those additional six ships. That doesn't  
17 seem to really advance getting to the  
18 resolution.

19 MS. SANERIB: I think to respond  
20 to your question first and your question  
21 second I think EPA has to be cautious at this  
22 point because they don't know what DOI is

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1 contemplating in terms of changes. And they  
2 need to understand those changes to be able to  
3 then understand how they're going to deal with  
4 that in the air permitting context.

5 And I think Petitioners are in a  
6 unique situation of having a lot of  
7 familiarity with the DOI process and  
8 understanding changes that need to be made to  
9 that. You know the President highlighted in  
10 his remarks "We need to change the review for  
11 the entire offshore process" and that's in  
12 Exhibit 1.

13 And there are changes that we can  
14 envision, changes we're going to advocate for,  
15 and we can see the ramifications for the air  
16 permitting process already while EPA is still  
17 awaiting acknowledgment and direction from DOI  
18 in terms of where they're headed. So I think  
19 that's the first answer to your question and  
20 that's why we're asking that the permits be  
21 vacated and remanded so that EPA has a blank  
22 slate to work on while it envisions what to do

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1 with air permitting in light of what happened  
2 in the Gulf.

3 Now in response to your question,  
4 if the Board is interested in reaching these  
5 issues, you can do so and we think that  
6 they're really strong merits issues. And we  
7 frankly think that Region X got it wrong.

8 But I hate for you to waste your  
9 resources on issuing a decision that then ends  
10 up in a situation that's entirely different in  
11 future. And we could end up with agencies  
12 with really different regulations and really  
13 different interpretations.

14 JUDGE STEIN: How would that  
15 really affect the definition of OCS source?  
16 I mean if the Board were to agree with  
17 Petitioners in your brief that there's a  
18 fundamental problem with the way the Agency  
19 has gone about looking at OCS source, why  
20 wouldn't that issue crop up again?

21 MS. SANERIB: WE don't know and  
22 that's why in some ways what Shell is already

1 asking for in terms of resolving the issue of  
2 OCS source is an advisory opinion because  
3 they've already indicated that their  
4 operations are going to change. We don't know  
5 what changes MMS will require. We don't know  
6 then as a result of that how EPA will change  
7 that. And I think it's critical as we  
8 indicated in our reply brief on the merits EPA  
9 did acknowledge when it wrote the regulatory  
10 definition of OCS source that its intent was  
11 if marine vessel emissions were regulated in  
12 the future under the Act to incorporate that  
13 into the definition of OCS source. So it may  
14 be that the Agency decides it's time to update  
15 that definition.

16 JUDGE WOLGAST: I think one of the  
17 things we're struggling with is how would the  
18 scenario that Judge Stein posed in any way tie  
19 the Agency's hand if in fact hypothetically  
20 speaking we found that the base analysis of  
21 what constitutes an OCS source in this permit  
22 was in error. It goes back to EPA. How are

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1 their hands tied in that instance from  
2 incorporating whatever comes from an MMS  
3 review or any other review?

4 MS. SANERIB: I think it's -- I  
5 don't know exactly what you're thinking. But  
6 if there were, for example, indications in  
7 that ruling that it's fine to leave out the  
8 landing vessel which is never going to be  
9 within 25 miles of a drill ship. What if in  
10 the future EPA realizes landing vessels are  
11 critical? We can't get employees to the drill  
12 ship unless we have them and we think that  
13 should be part of the OCS source. But the  
14 Environmental Appeals Board has already ruled  
15 that we don't have to include that as part of  
16 the OCS source. What are we going to do in  
17 this scenario?

18 I mean I guess it's things like  
19 that. And that's I think the rationale in the  
20 Desert Rock decision was. In the first  
21 instance, we want the Agency to make these  
22 decisions in the permitting context and the

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1       permitting context is right. It's actually  
2       going to happen. And we have no idea if this  
3       permitting context will ever arise. We have  
4       no idea if Shell will receive authorization  
5       next year or the year after to go into the  
6       Arctic. Cleaning up oil in the Arctic is very  
7       difficult, and there's a lot of concerns now  
8       in the Administration about letting people  
9       drill for oil and gas offshore when there's  
10      not a proven clean-up technology.

11               And so I think hurrying up to  
12      resolve the factual issues as presented to the  
13      Board now in the context of what defines the  
14      OCS sources is problematic because it just may  
15      not be helpful in the end. We just don't  
16      know what the changes will be and I think  
17      that's why EPA is leery to take a position  
18      now. And that's why we think these matters  
19      should be before the Agency in the first  
20      instance with a blank slate to rethink how to  
21      do the air permitting process.

22               I would like to give my co-counsel

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1 for the other Petitioners an opportunity if  
2 they have anything to add very briefly before  
3 I reserve the rest of my time.

4 MR. GRAFE: Yes, this is Eric  
5 Grafe for the NRDC Petitioners.

6 MS. SANERIB: All right. Unless  
7 there are any further questions. Thank you.

8 MR. GRAFE: I would just like to  
9 add that it's important to keep in mind at  
10 issue here the changes are --

11 MS. SMITH: My name is Kristi  
12 Smith. I'm from EPA's Office of General  
13 Counsel and I'm here to represent Region X in  
14 this matter. I'm here with Julie Vergerant  
15 and Juliane Matthews who are from the Office  
16 of Regional Counsel, Region X.

17 Region X in coordination with EPA  
18 Headquarters' offices believes that holding  
19 these cases in abeyance represents the most  
20 appropriate and efficient path forward given  
21 the intervening events that the President has  
22 made and the DOI is planning to take because

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1 there is a great level of uncertainty as to  
2 exactly what DOI actions will have on our  
3 permits.

4 As you've heard and as you  
5 identified, Petitioners seem very sure that  
6 the actions DOI takes are going to have  
7 fundamental changes to our permit. That's a  
8 possibility. But we simply do not know that  
9 at this time. It could be that DOI puts into  
10 place changes that have no emission  
11 consequences at all.

12 I think one thing that underlies  
13 that I want to emphasize here is that we  
14 permit emissions from operations, not  
15 operations themselves. While our emissions  
16 requirements could have some effect on  
17 operations DOI would be the one saying what  
18 the operations are. And to the extent that  
19 they change operations in a way that do not  
20 affect emissions -- and emission can be simply  
21 the emissions from a ship, it can be emissions  
22 from a placement points from one point to

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1 another -- it could be that there are no  
2 required changes in our permit. And that's  
3 why we put forward that it's best to hold to  
4 see if we are going to need to make changes.

5 JUDGE WOLGAST: Picking up on our  
6 last discussion, would your position on  
7 holding the matter in abeyance change if the  
8 Board determined that in fact the Region had  
9 erred in adopting any of the terms, the  
10 numerous terms, that have been challenged here  
11 including as Judge Stein posited the initial  
12 calculation of when something becomes an OCS  
13 source?

14 MS. SMITH: We acknowledge that  
15 the legal interpretation we took in this  
16 permitting action in interpreting our  
17 regulations about when something becomes an  
18 OCS source we looked at the regulations that  
19 were before us and the facts that were before  
20 us and made a determination. However, we  
21 still do believe it's a mixed question of law,  
22 in fact, and we would like to see what DOI's

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1 requirements are. Because if DOI's  
2 requirements are such that we may need to  
3 rethink our interpretation, if they put  
4 requirements on board that would make it  
5 difficult for us to take the same position or  
6 would lead to a mission consequence so that  
7 that position no longer makes sense, I think  
8 we agree with Petitioners that while there are  
9 primarily legal issues on some of the points  
10 raised in the Petitions. If the Board were to  
11 act on them right now, it would basically  
12 amount to an advisory opinion because it's not  
13 clear that we will take the same stance in a  
14 later permit.

15 JUDGE WOLGAST: If you think that  
16 your fundamental positions on these matters,  
17 on these issues, that have faced stiff  
18 opposition in this case are going to change,  
19 why wouldn't you be asking for a voluntary  
20 remand instead of a completely open-ended  
21 stay?

22 MS. SMITH: And I didn't say that

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1 they were going to change. I said that we  
2 need to see what DOI is going to do to know  
3 whether or not we even need to consider that.

4 I also think that it's just as  
5 likely that we could get down with DOI and  
6 they say, "Okay, you're going to add four new  
7 ships, but they all have to stay at least 50  
8 miles away." It wouldn't be within the 25  
9 mile order of the OCS source regulations. And  
10 we would say that there's no effect on the  
11 emissions permitting that we have to do.

12 JUDGE WOLGAST: Right.

13 MS. SMITH: But we simply don't  
14 know what the requirements --

15 JUDGE WOLGAST: But let's stay  
16 with that scenario that MMS comes up with  
17 additional ships, but by your calculation  
18 their emissions aren't going to affect the  
19 full analysis of potential to emit for this  
20 OCS source. If we thought the point you  
21 started from is wrong, if we were to determine  
22 that the Region erred by saying it becomes an

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1 OCS source when it's so-called stable and  
2 secure as defined by Shell, then under that  
3 scenario you've just set up seriatim review  
4 processes, one by MMS, then another remand and  
5 a whole other permitting process by EPA.

6 MS. SMITH: And I am conceding  
7 that if that's how it happened, if DOI did  
8 something that didn't affect at all our  
9 interpretation of stabilization, our  
10 interpretation of being ready to commence with  
11 exploratory activity, then, yes, it would be  
12 appropriate for the Board. The Board could  
13 have answered the question now, but we simply  
14 don't know that.

15 It could be that DOI as part of  
16 their review and part of their new requirement  
17 puts in place requirements that deal with  
18 stabilization, deal with being prepared to  
19 drill. Those are parts of our definition and  
20 the parts of the definition we relied on in  
21 coming to the OCS source definition.

22 If the Board wanted to take it

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1 upon themselves to rule on these things, we  
2 think it would be an advisory opinion and you  
3 have not. You've declined to issue such  
4 rulings in the past. If we did a third  
5 review, I'm sure you know your case law. But  
6 in almost all instances when the outcome of  
7 intervening events, when the effect of those  
8 events was uncertain as to the consequences on  
9 the permit, the Board has in the vast majority  
10 of cases chosen to stay so that both --

11 JUDGE STEIN: But we're also  
12 dealing with a PSD permit.

13 MS. SMITH: Yes.

14 JUDGE STEIN: Which are the types  
15 of permits that we typically put to the front  
16 of our line.

17 MS. SMITH: Yes.

18 JUDGE STEIN: It's a new source  
19 permit. Shell has vociferously argued to us  
20 that they want the Board to move forward.  
21 Because in the event that there are remand  
22 issues, they want to be working on them.

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1                   And I have to confess that I don't  
2                   fully understand the Government's position in  
3                   this case in that if you don't want the Board  
4                   to rule all you have to do is to seek a  
5                   voluntary remand. But when the rest of the  
6                   Federal Government is purporting to undertake  
7                   a review of their permitting regulations, what  
8                   I see you telling us is that "No, we have no  
9                   work to do. We're just going to sit here and  
10                  wait until we hear from DOI."

11                  Now whether in light of the spill  
12                  has any effect on what the Agency has done, I  
13                  don't know. But I think what you're hearing  
14                  from this Board is that we think that there  
15                  are very substantial challenges in this case.

16                  MS. SMITH: And I'm acknowledging  
17                  that there were very strong petitions brought  
18                  regarding the circumstances and decisions that  
19                  were made by Region X when they issued these  
20                  permits in late March and early April. And  
21                  they were based on factual scenarios that were  
22                  in place at that time, based on applications

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1 that Shell submitted about their operations.

2 Permits are based on operating  
3 scenarios and decisions about applying our  
4 regulations to those scenarios. To the extent  
5 that there are changes in those operating  
6 scenarios going forward that are going to be  
7 required of Shell and thus required of us to  
8 analyze we just do not think the most  
9 efficient course of action is to go.

10 The Board could issue a decision  
11 right now on issues and let's say they remand  
12 back a couple of issues to us for  
13 consideration. Shell, as you said, would want  
14 us to immediately start work on that. As you  
15 know, they really -- They want to get  
16 finalization of their permits and start  
17 drilling. And Region X has already put vast  
18 resources, years of resources, into this  
19 permitting process.

20 We want to avoid the circumstance  
21 where we get a remand, we have to start work,  
22 we are working, we've done, let's say, air

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1 quality modeling analysis. We are at 99  
2 percent finished with the air quality modeling  
3 analysis, ready to put out our proposed permit  
4 and then DOI issues regulations that are going  
5 to change all of that.

6 JUDGE WOLGAST: Could you give us  
7 an example of something that DOI might require  
8 that would necessitate a change in how you got  
9 to your analysis of the starting point for an  
10 OCS source?

11 MS. SMITH: So in our permit we  
12 said that the -- And you're going to have to --  
13 - I'm going to apologize in advance because I  
14 am not the expert on the OCS source issue.  
15 There were many people involved in this  
16 permitting. But we came to the conclusion  
17 that it was an OCS source when it was attached  
18 to the seabed, erected on the seabed and  
19 stabilized and prepared to begin exploratory  
20 operations.

21 JUDGE WOLGAST: The third thing  
22 though wasn't regulatory. That was your

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1 interpretation of the reg.

2 MS. SMITH: Right. It was about  
3 when. And so we said it's when Shell  
4 determines that they are stabilized and ready  
5 to begin drilling and that's in our permit.  
6 That's in our permit as a point that they have  
7 to make.

8 It could be that DOI says, "Shell  
9 doesn't get to make that determination  
10 anymore. We make the determination about when  
11 a specific drill rig is stable. We put in  
12 requirements about what stability is and we  
13 are the ones that will make the determination.  
14 We're going to have people out there checking.

15 JUDGE WOLGAST: We DOI?

16 MS. SMITH: What?

17 JUDGE WOLGAST: We meaning DOI?

18 MS. SMITH: I'm sorry. DOI. The  
19 DOI would make that determination, yes. We,  
20 DOI, make that determination.

21 JUDGE WOLGAST: Just to stop you  
22 there and I don't want to get too far into the

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1 merits. But I think that's part of the  
2 underlying problem that's really confusing two  
3 things. One is what is the interpretation of  
4 the three-pronged test, both the statutory  
5 test and the three-pronged regulatory test.  
6 That's one thing.

7 I doubt very seriously that DOI is  
8 going to say "We're going to let you know  
9 exactly when we've met an OCSLA and Part 55  
10 regulatory determination." I can't imagine  
11 them usurping that authority from EPA. I can  
12 imagine they might impose some requirements,  
13 but that's a different thing than how the  
14 Agency has already interpreted the statutory  
15 and regulatory requirements.

16 So I'm not understanding your  
17 example to be an example of why that wouldn't  
18 have to be rethought fundamentally if the  
19 Board disagreed with that interpretation.

20 MS. SMITH: And I guess I'm  
21 conceding that, yes, the Board could look at  
22 our present interpretation and decide that we

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1 have to do something differently for that.  
2 And I guess my -- I hate to answer a question  
3 with a question. So is the Board considering  
4 bifurcating the various issues that are before  
5 it and deciding on only a couple issues and  
6 sending those back on remand?

7 JUDGE WOLGAST: Well, the Board  
8 hasn't determined any of that at this point.

9 MS. SMITH: I guess we feel that  
10 the most efficient course forward is to decide  
11 to first know the facts that are actually  
12 going to underline Shell's operations,  
13 determine if those facts have any effect on  
14 the permits that we issued. If they do, we  
15 can ask, we could withdraw the permits, we  
16 could ask for voluntary remand of the permits.  
17 We have a number of options going forward and  
18 we would make our decisions there.

19 I can't say this point whether or  
20 no our interpretation of what is an OCS source  
21 would change if we had to withdraw or ask for  
22 voluntary remand of the permits because we

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1 just simply don't know the factual scenario  
2 that's going to be in place there. But we  
3 feel that it's also possible that, yes, it  
4 could be that there are no facts that chance  
5 from DOI's review. And we would determine  
6 that we need to make no emissions changes and  
7 no changes to our permits.

8 If the Board wanted to rule then  
9 on these legal issues that intertwine with the  
10 factual issues, we think that would be  
11 completely appropriate. We just think the  
12 most efficient course of action is to hold  
13 everything until we know exactly what is going  
14 forward instead of having a bifurcated, multi-  
15 linear aspect of what is before the Board,  
16 what's not before the Board, what's being  
17 decided, what's not being decided, actual  
18 legal.

19 The simple fact of the matter is  
20 there is just so much uncertainty at this  
21 point that we don't know what effect, if any,  
22 it's going to have on our permitting decisions

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1 and our permitting rationale.

2 I also do not -- One of the things  
3 that seemed to be presented by Petitioners, as  
4 far as I know, there is no decision within EPA  
5 to do a rule revision for our regulations.  
6 But that could -- I don't know. I don't know  
7 if that's something that's going to fall out  
8 of the DOI review process and the President's  
9 overall Administration direction that he's  
10 given on this.

11 All we know is that the President  
12 has said that we should suspend Arctic  
13 drilling and our consideration of it for this  
14 year so that they can do an overall review to  
15 see what additional safety measures might be  
16 needed. And we feel that asking to hold this  
17 case in abeyance until that happens is the  
18 most appropriate course of action for us.

19 JUDGE REICH: If any changes are  
20 made to the permit for any purpose, would that  
21 new NO<sub>2</sub> standard now come into play?

22 MS. SMITH: If we concede that if

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1 there was any need to withdraw or voluntary  
2 remand a permit and issue a new final permit,  
3 then the new NO<sub>2</sub> standard would come into  
4 effect.

5 JUDGE REICH: If we remanded an  
6 issue because of the inadequacy of the record  
7 and based on the review of the record the  
8 Region comes to conclusion that they do not  
9 need to change the permit, what would happen  
10 with the NO<sub>2</sub> standard? Would you have to  
11 revalidate that permit and again bring in the  
12 NO<sub>2</sub> standard?

13 MS. SMITH: I have to say I don't  
14 know. I don't know if we've ever spoken  
15 either as an Agency or you as the Board have  
16 spoken to simple record changes whether those  
17 represent a new permit or whether they just  
18 represent going back and looking at the permit  
19 that was issued in late March and early April  
20 and just justifying. I simply do not know and  
21 I don't feel that I'm in the position to make  
22 the Agency's call right now.

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1 JUDGE REICH: That's fine.

2 JUDGE STEIN: If the Agency takes  
3 a voluntary remand to reconsider certain  
4 issues and after reconsideration decides not  
5 to change any issues, must it reissue the  
6 permit or can it simply stand on the permit  
7 that it had issued before?

8 MS. SMITH: That also is something  
9 that I'm not sure that the Agency has spoken  
10 on or the EAB directly has spoken to. But in  
11 speaking with some of my colleagues in our  
12 review of Section 124 if we ask for -- if we  
13 withdraw a permit, we have to say what changes  
14 we are making. Or in the Desert Rock case we  
15 said specifically "Here are the things we are  
16 going to reconsider and we will reissue and go  
17 through that process."

18 I simply don't know. If we said -  
19 - I should pause and back up. This is all  
20 hypothetical. So I'm very much speaking off  
21 the cuff here. But my opinion is that if we  
22 asked for voluntary remand it would much have

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1 to be a situation like Desert Rock where we  
2 knew there were specific things that we needed  
3 to reconsider and reevaluate and most likely  
4 change in our permit.

5 JUDGE STEIN: In the Desert Rock  
6 case, you were seeking a voluntary remand  
7 after the Board had granted the review.

8 MS. SMITH: Right.

9 JUDGE STEIN: And so the burden on  
10 the Agency in that case in which it needs the  
11 Board's approval for that is different than in  
12 the circumstances as we currently have here  
13 where the Board has not determined whether or  
14 not to grant review of one or more issues.

15 MS. SMITH: Right. So I actually  
16 think that wouldn't be voluntary remand in  
17 that case. It would be a request for  
18 withdrawal of the permit because before you  
19 have granted review we actually -- the  
20 regional administrator actually has the  
21 authority to withdraw the present permit but  
22 in so doing has to specifically say what

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1 permit changes need to go into place from that  
2 withdraw. They withdraw indicating the  
3 portions of the permit that they are  
4 reconsidering and changing.

5 And we believe in that provision -  
6 - I'm sorry I don't have the provision in  
7 front of me -- it says that you go through the  
8 process for permitting to make those changes.  
9 So I think in that circumstance you would have  
10 a public comment period.

11 What we're saying is and I think  
12 this is where we differ from Petitioners if  
13 there is no need for any change in these  
14 permits we don't think the whole permitting  
15 process needs to be reopened because of what  
16 DOI is doing. DOI's actions in and of  
17 themselves don't necessary have any effect on  
18 our Clean Air Act requirements that Region X  
19 is required to undertake in issuing these  
20 permits. They could. We simply don't know at  
21 this point.

22 And we don't think that it's so

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1 likely that we're going to ask for remand  
2 right now. But we also don't think that it's  
3 so unlikely that there would be changes that  
4 would affect emissions that it's the best  
5 course to go forward.

6 JUDGE WOLGAST: What's the  
7 Agency's position on the Petitioners' request  
8 that the Board vacate the permit without  
9 reaching any of the substantive issues?

10 MS. SMITH: We feel that there is  
11 -- We feel that the Board's ability to remand  
12 a permit is defined by 124.19 which says that  
13 you have to find clear error in a permitting  
14 condition. We just do not believe that there  
15 is any clear error that's been shown at this  
16 point right now.

17 I know that the Petitioners bring  
18 up the fact that Shell has told DOI that they  
19 are preparing the Kulluk drill rig for use if  
20 necessary to build an emergency relief well.  
21 There is no indication I think as Judge Reich  
22 noted that that drill rig will have to be

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1 within 25 miles at all times in a way that we  
2 would consider it under our permit.

3 And as we put forward in our  
4 motion on the merits, emergency responses in  
5 and of themselves are generally not considered  
6 in the normal course of permitting. Now there  
7 is also something as we noted the line between  
8 emergency and non emergency is also something  
9 that could change in light of DOI's review if  
10 DOI puts requirements in that look something  
11 like normal course of action instead of  
12 emergency actions. That could change our  
13 review.

14 But we believe that right now  
15 there's anything that indicates that we have  
16 an error in our permit and that there were  
17 Clear Air Act requirements that we did not  
18 meet in the permit stage.

19 JUDGE STEIN: I think one of the  
20 Board's concerns relates to the fact that this  
21 is not the first time that we've seen these  
22 OCS permits. And typically when we see them,

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1 there's always an emergency and everything  
2 always has to be done yesterday. And so  
3 because of the short drilling season and the  
4 time it takes the Region to get through the  
5 permitting process, the Board's time to review  
6 these things has also -- We're requested to  
7 shorten that time as other parties are.

8 And to the extent that there are  
9 issues that may not go away, one of, I think,  
10 the questions that the Board is considering is  
11 if we decline to give guidance on those issues  
12 at this time, if we were to give guidance, are  
13 other productive things that could be done  
14 that would then be beneficial to the process  
15 overall. So the next time this comes back to  
16 us it doesn't has to be decided yesterday.

17 And I think that's one of the  
18 issues that we're struggling with. I don't  
19 think anyone is suggesting that sequential  
20 review is an idea place for anybody to be.  
21 But I think it's fair to say that at the end  
22 of the DOI process there's going to be,

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1 whatever that process is, an interest if we  
2 were to grant a stay or hold these in  
3 abeyance. There's going to be a strong  
4 interest in moving forward at that time on a  
5 very fast track whereby there might be an  
6 opportunity this summer or this fall while the  
7 DOI review is ongoing to at least caught on  
8 those issues that might not be likely to  
9 change.

10 MS. SMITH: In response to that, I  
11 can't speak as to what the Board feels given  
12 the circumstances as to the most efficient  
13 course of action for them.

14 JUDGE WOLGAST: Well, just assume  
15 for purposes of this question that the Board  
16 did not agree with you that there is no error  
17 contained in the permit that goes to the  
18 challenges that are before us now as the  
19 permit sits now.

20 MS. SMITH: I still think that we  
21 should hold an abeyance because it is not  
22 clear that the permit that sits before you now

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1 will be the permit that Shell will need in  
2 order to drill in 2011. Simply until we know  
3 what DOI is going to require of Shell's  
4 operations and ways in which they could change  
5 those operations, we won't know what emissions  
6 from the operations we have to consider and  
7 what requirements may be placed upon them. We  
8 simply don't feel that now is the time to go  
9 forward and have multiple issues on multiple  
10 tracks in this case.

11 We understand your concerns about  
12 the timing that's happened over the past  
13 iterations and the current iteration of this  
14 permitting action. We understand Shell's  
15 concerns with the timing issues. But looking  
16 at all the factors that we see before us and  
17 wanting to be most prudent and in all honesty  
18 taking direction from President Obama about  
19 what he said to do, he said he wanted to  
20 essentially take a step back and look at  
21 operations and figure out how best to go  
22 forward. And that's what we are trying to do

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1 here.

2 Our request came very soon after  
3 the President's announcement in light and  
4 said, "We are going to step back and ask the  
5 Board to step back and just stay pending the  
6 outcome of that review."

7 JUDGE WOLGAST: What about the  
8 environmental justice in NO<sub>2</sub> intersection? I  
9 mean obviously the Agency determined that it  
10 didn't have to reach the NO<sub>2</sub> standard, didn't  
11 have to analyze that, because even though it  
12 was final it wasn't effective at the time of  
13 permit issuance. That was in light of the  
14 fact that there was an outstanding  
15 environmental justice claim and the claim was  
16 premised at least in part in NO<sub>2</sub>.

17 Part of the Board's former  
18 rationale of when you would take up or not  
19 take up a new regulatory requirement goes to  
20 the interest of finality. Here what you're  
21 asking for is the opposite of finality. It's  
22 "Let's extend this into the future to some

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1 point in time in 2011 or 2012." Given the  
2 fact that there is no finality, why shouldn't  
3 we take it back and analyze the environmental  
4 justice claim in light of the new NO<sub>2</sub>  
5 standard?

6 MS. SMITH: I guess at the premise  
7 of this is we simply don't know. I don't want  
8 to say that there is no finality. Finality is  
9 uncertain. It could be that there is finality  
10 in what we did, what Region X did, in issuing  
11 its permits that the DOI actions don't at all  
12 affect those and we have to go back to that.

13 But there's a possibility that  
14 those decisions were final insofar as the  
15 facts laid at that time. But the facts that  
16 will actually happen when Shell is drilling,  
17 when Shell is producing the emissions which we  
18 permit, that they could change.

19 JUDGE REICH: Yes, but there's  
20 finality and there's finality. I mean it may  
21 be finality from the standpoint of the  
22 position the Region is taking. But in terms

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1 of the status of the permits it's clearly not  
2 final until the Board acts on it.

3 And I think the point that Judge  
4 Wolgast was getting at is you have argued in  
5 essence that you don't have to look at in the  
6 environmental justice context the short-term  
7 NO<sub>2</sub> standard because it was not yet effective.  
8 And now we're talking about permits themselves  
9 that if we put everything on hold are not  
10 going to become effective for some substantial  
11 period of time.

12 And the rationale for allowing the  
13 Agency to ignore the environmental justice  
14 context the effects of the short-term NO<sub>2</sub>  
15 study, I'm not saying they'd necessarily drive  
16 something. But whether you can ignore even  
17 doing an on-the-record analysis, that to me is  
18 arguably a less sustainable position if we're  
19 talking about permits that may not become  
20 final for Agency purposes for six months, nine  
21 months or more.

22 MS. SMITH: But I guess I would

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1 also say I think it would be an inefficient  
2 use of the Board's resources to go through and  
3 decide that issue and then it ends up that we  
4 actually have to because of DOI's action  
5 withdraw our permit and do an overall new  
6 permitting process at which time the new NO<sub>2</sub>  
7 standard would be in effective under which the  
8 standard that we put before the Board we would  
9 be doing such an analysis.

10 JUDGE WOLGAST: I don't quite  
11 follow that in the sense that that assumes  
12 that you couldn't pick your time as to how  
13 you're going to proceed through your  
14 reevaluation and what you're going to take  
15 into account. That's all within the Agency's  
16 purview. There are things no doubt that could  
17 be looked at anew irrespective of what MMS is  
18 doing and there are things that you would need  
19 MMS's final determination to make a final  
20 calculation.

21 MS. SMITH: Right. And I guess at  
22 this time we are saying we have not asked for

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1 voluntary remand or withdrawing the permits at  
2 this time because we haven't make any  
3 assessment that we should be looking at things  
4 anew, decisions anew, in the absence of any  
5 DOI changes.

6 JUDGE STEIN: So it that fair to  
7 say that there is at EPA no effort to review  
8 current permits in light of what is going on  
9 in the Gulf that the Agency's stance is that  
10 they're going to wait until DOI does their  
11 review, that there is nothing that EPA is  
12 doing with respect to either this permit or  
13 permits in general?

14 MS. SMITH: I have to say that I  
15 cannot speak as to what the Agency is doing  
16 overall on OCS issues. As an important point,  
17 almost all of the offshore drilling that is  
18 happening in the Gulf is not permitted by EPA  
19 because of an exclusive statutory exemption  
20 that all aspects of the permit including the  
21 air emission monitoring and analysis are  
22 covered by MMS.

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1 I know that there are some  
2 applications pending before EPA for some  
3 drilling to go on in the Gulf. But I do not  
4 know the status of those. And I know there  
5 are discussions at a very high level about how  
6 the Agency overall is going to go forward with  
7 these actions.

8 I am presenting the view that the  
9 Agency took with regard to these actions. And  
10 if the position of the Agency were to change  
11 we would definitely inform the Board of that.  
12 As we noted in our merits brief, our merits  
13 brief was argued because of the position we  
14 were in at that time. This is how EPA is  
15 arguing the case based on the permits that  
16 were issued at that time. But we acknowledge  
17 that things may change and our views may  
18 change as we assess what's going on and as we  
19 find out what other agencies in the  
20 Administration are doing that may change, I  
21 can't say that those views or the actions will  
22 change.

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1           JUDGE REICH: Let me ask how you  
2 see this process playing out. What if we go  
3 ahead and we stay action and hold it in  
4 abeyance? MMS does whatever MMS does. The  
5 Region identifies the fact that based on that  
6 it's probably going to have to reopen the  
7 permit and make some changes.

8           But it appears to us at least that  
9 some of the concerns that we have aren't ones  
10 likely to be touched by what the Region is  
11 doing because they don't relate to the changes  
12 that seem to flow from what MMS wants. Are we  
13 then supposed to sit around and wait for you  
14 to go through and make those MMS changes  
15 before we can tell you that we still have a  
16 problem and you've got to do it yet again?  
17 That doesn't seem like a very fair or  
18 efficient process either.

19           MS. SMITH: And I guess what I  
20 would say is that while there are legal  
21 issues they're tied to permit condition  
22 issues. And, as we explained in our reply

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1 brief, the underlying foundation of our permit  
2 conditions overall and what we achieve to do  
3 through the PSD program is protect the NAAQS.  
4 So to the extent that any additional emissions  
5 are out of this project, that affects the  
6 NAAQS process which could in turn affect our  
7 permit in multiple ways.

8 So I understand that there may be  
9 this feeling that we can decide on the OCS  
10 source issue at this point in time. But would  
11 the Board's decision still have any merit if  
12 the underlying permit conditions that are tied  
13 to that decision change later?

14 JUDGE STEIN: But in any permit  
15 you've got legal issues and you've got factual  
16 issues and you've got mixed issues. And in  
17 this particular case in the original permit  
18 EPA took one position on OCS source. It then  
19 got comments from Shell, a letter from MMS and  
20 then ended up with this Shell decides approach  
21 to the regulations.

22 There's a set of regulations there

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1 as to which I think Judge Wolgast alluded that  
2 the Agency has the legal authority to analyze.  
3 And I don't see how that legal analysis,  
4 perhaps the application of that legal analysis  
5 to a particular set of facts, may change based  
6 on the facts. But if we think the fundamental  
7 flaw is in the basic legal analysis, how is  
8 that going to change and how is the process  
9 you're asking us for to be efficient along the  
10 lines of what Judge Reich is saying?

11 MS. SMITH: And I guess as I  
12 understand it -- and I haven't seen anything  
13 in the EAB opinion although I have not read  
14 every opinion, I'll acknowledge that -- when  
15 you are reviewing permits you are reviewing  
16 permit conditions and the basis for those  
17 conditions. To the extent that there are  
18 legal issues, purely legal issues, that are  
19 tied to permit conditions and if those permit  
20 conditions may change later on, I guess I'm  
21 just -- I don't know. I feel very much as  
22 Petitioners purport you are issuing decisions

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1 about the purely legal basis that underlies a  
2 permit condition without getting into the  
3 facts that go into that permit condition.  
4 It's an advisory opinion. I don't know if  
5 there is jurisdiction to do that under 124.19.

6 JUDGE STEIN: You haven't  
7 withdrawn the permit.

8 MS. SMITH: No, we haven't.

9 JUDGE STEIN: And we have a permit  
10 appeal. And that permit has been challenged.  
11 And Shell has not agreed to a stay. So I  
12 don't see what's advisory about ruling on the  
13 permit that's before us.

14 Now I do understand the points  
15 that you're making. But we do have a permit.  
16 Of course, if the Agency withdrew the permit,  
17 I understand you may have your reasons that  
18 you don't want to do that.

19 MS. SMITH: Right.

20 JUDGE STEIN: But we do have  
21 something that we've been asked to decide.

22 MS. SMITH: Right. And as I said

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1 I can't concede and it's not my position to  
2 say what the Board feels is the most efficient  
3 path forward. We as the Agency have decided  
4 that we do not think that is the most  
5 efficient path forward. We would like to have  
6 one process instead of a multi-tiered process  
7 for this permit.

8 But if the Board makes the  
9 decision to go another way, we will certainly  
10 go by the Board's decision to the end and  
11 follow that to the extent that there aren't  
12 changes in the facts that would lead us to  
13 change our interpretation.

14 JUDGE WOLGAST: Under your  
15 scenario, you wouldn't have a multi-tiered  
16 process. Shell would. Isn't that correct?

17 MS. SMITH: I'm not understanding.

18 JUDGE WOLGAST: Under your  
19 scenario you wouldn't have a multi-tiered  
20 process because you do nothing. We wait on  
21 MMS and you either reissue or stand on the  
22 permit that you've issued. And if we feel

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1 that you've committed clear error in some of  
2 those determinations and it goes back, then in  
3 essence Shell has now a multi-tier permitting  
4 process.

5 MS. SMITH: But I think that Shell  
6 could have a multi-tier permitting process  
7 even if we went forward in the way that you're  
8 alluding to. You could decide on the legal  
9 issues right now and there are a number of  
10 legal issues and remand it back to us. We  
11 could apply those but then also make other  
12 changes based on DOI's changes. Changes we  
13 make with respect to what DOI has done could  
14 be further petitioned that would then have to  
15 be decided and that could also be remanded.  
16 And petitions that relate to those permitting  
17 conditions could impact other parts of the  
18 permit.

19 JUDGE WOLGAST: I guess from just  
20 speaking for myself it sounds unlikely that  
21 MMS is going to come up with a scenario that  
22 requires you to rethink when something begins

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1 to be an OCS source. That seems unlikely to  
2 me.

3 MS. SMITH: It could be unlikely.  
4 I simply don't know what they're going to do.  
5 If they have -- about anchoring of the ships  
6 and how anchoring has to occur in order to  
7 reduce risk of spill or increase the --

8 JUDGE WOLGAST: And they might.  
9 But that doesn't necessarily have anything to  
10 do with whether you met the regulatory  
11 criteria for OCS source. Those can be two  
12 completely different things. Yes, I'm sure  
13 there may be many things that you could have  
14 belts and suspenders for all sorts of safety  
15 reasons.

16 We're talking about the most  
17 fundamental calculation of when something  
18 begins to be an OCS source and when you have  
19 to start counting the emission for your  
20 potential to emit analysis. Safety and the  
21 tests in the regulation are two different  
22 issues.

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1 MS. SMITH: Right. And as I put  
2 forward before, I can envision a situation in  
3 which you would issue an opinion and you would  
4 remand us back on our OCS source determination  
5 which could then cause us to have to do a new  
6 analysis on the potential to emit in our air  
7 quality --

8 JUDGE REICH: Not immediately. I  
9 mean if it would make no sense to do it  
10 immediately, then you don't have to do it.

11 JUDGE WOLGAST: Right. That's  
12 within your purview.

13 MS. SMITH: Yes. And as I said  
14 many times if the Board feels -- We know that  
15 -- I'm not saying that you cannot go the way  
16 the scenario that you're describing here.  
17 We've just said that we would prefer not to do  
18 it that way. We would prefer to have one  
19 decision that covers the facts that there are  
20 and to the fact that that may have to be  
21 remanded later than that is how it is.

22 The Region has spent a mass amount

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1 of resources, R&D permits, this specific  
2 permit, permit actions in the future and the -  
3 -

4 JUDGE WOLGAST: But why should  
5 they have to do it three times if there is  
6 error in this process and then you issue it  
7 again and then it gets remanded and you issue  
8 it again? How is that in the Region's  
9 interest?

10 MS. SMITH: I guess I don't -- We  
11 could wait. I concede that. You could issue  
12 an opinion now and then we could wait and do  
13 it all at one time. There's just a real  
14 hesitancy to want to move forward on these  
15 cases and we don't know what's going to happen  
16 with offshore drilling. And to put everyone's  
17 time and resources into arguing these cases,  
18 getting a remand, putting work into that is  
19 something that could fundamentally change.

20 JUDGE REICH: In terms of timing  
21 even if you don't move forward until you know  
22 what the rest of the changes are, is there not

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1 still a time savings because at least at that  
2 point you know all the changes including  
3 changes that the Board has indicated has to be  
4 made? If you wait until all the MMS changes  
5 are identified, you still have this additional  
6 time for the Board to make its decision and as  
7 you say these are not necessarily easy issues  
8 before you know what changes need to be made.

9 So I think there's a second level  
10 of delay built into the process if we do  
11 nothing. And using the OCS source as an  
12 example and again hypothetically because we  
13 hadn't decided anything, we may not be able to  
14 tell you what it is. We may be able to tell  
15 you that what's there is not acceptable. And  
16 we may say that interpreting it that way is  
17 not consistent with the statute that you may  
18 have different ways of interpreting it and how  
19 you interpret it may reflect what MMS comes up  
20 with.

21 But structured the way it is is  
22 fundamentally inconsistent with our reading of

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1 the law. I would think you would want to know  
2 that because then at least you could begin to  
3 look at our other opinions in that light.

4 MS. SMITH: And if the Board feels  
5 that that is the best path forward for this  
6 case that's the decision that they are going  
7 to make. And it may. It may be a  
8 circumstance where it is good to know that.  
9 But it could also be the circumstance that  
10 something could change factually that would  
11 change other -- The decisions on these permits  
12 are not made at a low level. This has  
13 definitely been a very much -- I'm here. I'm  
14 from EPA Headquarters. This is very much a  
15 concerted effort between the Headquarters and  
16 the Region.

17 And in light of everything that is  
18 going on right now and in light of all the  
19 work that's gone on before, I just can't  
20 simply tell you that we are going to have the  
21 exact same interpretation in place. As  
22 Petitioners point out, we did read the

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1 standard differently a couple of years ago.  
2 I'm not -- I can't say one way or the other  
3 whether we're going to change it.

4 And I concede that in that path  
5 that we were if our plan was after everything  
6 that happened with DOI that we were going to  
7 do that same interpretation it would make  
8 sense right now to know that that  
9 interpretation is wrong.

10 But I guess if the Board wants to  
11 use its resources in that way to issue an  
12 opinion that's completely in your specter of  
13 decision making. I can't tell you what is  
14 efficient for you or not. I argue what I  
15 think is the most efficient path forward. But  
16 if you have a different determination that's  
17 yours.

18 JUDGE STEIN: Shell had I think  
19 something in one of its brief that if the  
20 Board were to hold this matter in abeyance  
21 that it called for periodic status reports.  
22 And I'm wondering whether -- you may not be

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1 able to answer this question -- if there is  
2 anything that the Agency would be aware of  
3 where it might know within a month or within  
4 two months or 45 days kind of what path you're  
5 on.

6 Because to the extent that the  
7 Agency decides that it needs to make at least  
8 one change in this permit it seems to me a  
9 number of things flow from that which is if I  
10 understand you correctly that the NO<sub>2</sub> issue  
11 the Agency takes the permit back to deal with  
12 one issue and this NO<sub>2</sub> issue pretty much goes  
13 away.

14 I guess I'm asking whether there  
15 is anything short of this unconditional, stay  
16 forever process that you are aware of based on  
17 other things that we may not be privy to.

18 MS. SMITH: Well, I'd like to go  
19 to the first point that we don't feel that we  
20 have asked for an indefinite stay of the  
21 process. We have asked for a stay in light of  
22 DOI's review which DOI has indicated from what

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1 we can read in the press releases would  
2 complete this year, within this calendar year.

3 I don't know if I can give you --  
4 No. I can say right now I don't know of any  
5 particular time frames of decision making  
6 either within the Agency, within either EPA,  
7 or any kind of coordination between DOI that  
8 would allow me to give you time frames like  
9 that. But I could find out and let the Board  
10 know.

11 JUDGE WOLGAST: Thank you.

12 MS. SMITH: Thank you.

13 JUDGE WOLGAST: Mr. Siler.

14 MR. SILER: May it please the  
15 Board. My name is Duane Siler and I'm here  
16 today on behalf of Shell Gulf of Mexico, Inc.  
17 and Shell Offshore, Inc. which I'll obviously  
18 refer to as Shell. At counsel table with me  
19 is Susan Mathiascheck and Sarah Bordelon and  
20 seated behind the counsel table is Mr. Lance  
21 Tolson, Senior Environmental Counsel from  
22 Shell, the Company.

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1           Your Honor, you probably don't  
2 remember, but I remember it well. I stood  
3 before you almost exactly three years ago this  
4 summer when the minor source permits for the  
5 Kulluk drill ship were under review for  
6 exploration in the Beaufort Sea. And we were  
7 under the gun. The Board was extremely  
8 accommodating at that time in granting  
9 expedited review because of the conditions  
10 that you've alluded to today, the short  
11 drilling season that exists in the Arctic.

12           I'm here again before you this  
13 year and again Shell is deeply appreciative of  
14 the accommodation that the Board has made in  
15 terms of expedition. We'd like to avoid  
16 having to impose on the Board again. We'd  
17 certainly like to minimize the scope of any  
18 such imposition in the future.

19           And it's for that reason we  
20 respectfully oppose the Agency's motion to  
21 stay this appeal and also, of course, the  
22 Petitioners' motion to vacate and remand these

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1 permits. Our view is that it would be most  
2 practical to decide now the issues that are  
3 ripe. They're fully briefed. There's nothing  
4 more to be done apart from holding a hearing  
5 if the Board sees fit to do so.

6 Shell is not asking for a break  
7 neck solution at this point as we have thought  
8 because obviously we're not going to drill  
9 this summer. But we do believe that for  
10 reasons I'll explain if these issues that are  
11 presented and these appeals could be  
12 determined by the early thaw of, say,  
13 September 1st it would be beneficial to the  
14 parties and to the Board in terms of avoiding  
15 having to decide these issues on an expedited  
16 basis next year.

17 These are not advisory opinions  
18 that are being sought. These have a real  
19 bearing on Shell's permits and on any  
20 potential revision of those permits.

21 You may recall from the  
22 declaration of Mr. Slaiby who is a Shell

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1 executive that Shell was on track this spring  
2 to spend \$300 million to prepare for the  
3 drilling season. As it happens, Shell has  
4 expended in excess of \$100 million before as  
5 a result of the deep water horizon tragedy.  
6 It became clear that we were not going to  
7 drill this summer. This is in addition to the  
8 \$2.2 billion Shell has invested in these  
9 leases and over \$800 million of previous sump  
10 preparation costs that Shell has incurred.

11 My point is that having an  
12 investment of this magnitude Shell certainly  
13 plans to work with the Department of Interior  
14 to make necessary modifications to its  
15 drilling program if any are required following  
16 the evaluation of safety issues. We will do  
17 that in order to continue our efforts to  
18 explore the Chukchi and Beaufort leases in the  
19 summer of 2011.

20 And, of course, we will need these  
21 PSD permits to do that. And that's why we  
22 think it makes sense and with respect we

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1 submit that it will conserve the Board's  
2 resources to decide some or all of the issues  
3 that are presented in these petitions now.

4 We don't deny that it is possible  
5 that following the Administration's evaluation  
6 of offshore drilling issues the Department of  
7 Interior may require some changes in the  
8 operation that Shell had planned for these  
9 activities. It's important to note though  
10 that the moratorium that has been imposed  
11 generally on offshore drilling is not what  
12 we're dealing with here. It is a unique  
13 suspension that is unique to Shell.

14 The terms of that suspension are  
15 completely unclear. Shell has received no  
16 indication from the Department as to the  
17 duration of this suspension. We know what  
18 everyone else has read in the newspaper that  
19 it was indicated that this suspension would  
20 carry us at least into 2011 before we would be  
21 able to drill. But it is completely unclear  
22 what might be required of Shell as distinct

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1 from the broader review of deep water offshore  
2 drilling procedures that's going on in the  
3 Gulf.

4           You've heard today that Shell has  
5 already somehow conceded that it's going to  
6 making changes to its operation. I believe  
7 this is a reference to the May 14 letter that  
8 Mr. Marvin Odom sent to the then Director of -  
9 - Management Service and it is Exhibit 3 to  
10 the motion of the Petitioners' for remand. If  
11 you take a close look at this letter, you'll  
12 see that Mr. Odom is discussing two things,  
13 none of which are necessarily relevant to the  
14 emissions profile of this project.

15           One is that the Kulluk drill ship,  
16 the second drill ship, is in the Arctic  
17 theater and could be mobilized in the event  
18 that it was necessary to drill a relief well.  
19 Mr. Odom goes on to discuss the changes that  
20 Shell is prepared to make. They all relate to  
21 highly technical aspects of well construction,  
22 pressure monitoring and blowout prevention

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1 including testing doorlock preventors, making  
2 sure that they are failsafe and so forth.

3 The point is though that none of  
4 them has any bearing on the emissions profile  
5 from this project. So it is not true as  
6 Petitioners have argued that Shell has already  
7 made concessions that it's going to be  
8 increasing or changing emissions from its  
9 process. We simply don't know. It's possible  
10 that that will happen. But that will have to  
11 be filtered, forced, through a DOI process and  
12 then through EPA's evaluation of whether if  
13 additional emission sources are required such  
14 as additional emergency response vessels, how  
15 those emissions will be --

16 In fact, the overall project  
17 emissions and air quality impact and whether  
18 other sources will have to be even more  
19 tightly constrained in the process in order to  
20 protect ambient air quality standards and  
21 increments. This is possible, but no one  
22 knows at this time what is going to happen and

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1 that's why it seems to us that it makes sense  
2 to proceed and decide these appeals on a  
3 relatively expedited basis.

4 The Board is faced with three  
5 alternatives here. Obviously, one is to  
6 remand and vacate these permits. And for the  
7 reasons that have been discussed by Counsel  
8 for the Agency and the questions that the  
9 Board has raised today we believe that this is  
10 not justified. It would not be consistent  
11 with the Agency's regulations governing how  
12 this Board disposes of petitions for review of  
13 permits. And there's no precedent for it in  
14 your decisions. Voluntary remands have been  
15 taken so late at the instance of EPA.

16 EPA argues that as do Petitioners  
17 in their alternatives support of the stay  
18 motion that that will somehow conserve the  
19 Board's resources as well as the parties. I  
20 think the claim of party resource conservation  
21 is not valid and I will discuss that in a  
22 moment when the question of iterative

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1        permitting. I'd like to address that because  
2        that was raised by several of Your Honors'  
3        questions.

4                    But with respect to conservation  
5        of the Board's resources, these issues that  
6        are raised by Petitioners do include  
7        fundamental legal issues that are not going to  
8        go away in the permitting process. If the --  
9        Let's say that the Board were to stay these  
10       proceedings until whenever DOI has acted and  
11       the Agency has determined how the air permits  
12       should be changed if at all. That would take  
13       us -- It could well take us into early 2011.

14                   And by that time, EPA would either  
15       be undertaking another permitting exercise if  
16       modifications were required, but would not  
17       have the benefit of the Board's guidance on  
18       fundamental legal issues which include whether  
19       best available control technology is required  
20       for associated vessels that do not attach to  
21       the OCS source but operate within 25 miles of  
22       it, whether the OCS source definition here is

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1       flawed as Petitioners say by the Region's in-  
2       graphing of supposed unwarranted third factor  
3       in the test in the form of the vessel being  
4       used for exploration when it's ready to drill  
5       as opposed to merely being in the OCS  
6       somewhere.

7               These are issues that if not  
8       addressed could lead to a flawed permitting  
9       process, again, similar to the question of  
10      whether compliance with the air quality  
11      standards constitutes adequate discharge of  
12      the Agency's environmental justice  
13      obligations. That's clearly a question of law  
14      that if not decided could lead to further  
15      errors, not that the Region would be at fault.  
16      But the Region needs to know what the rules of  
17      the road are as does Shell going forward to  
18      process any modifications that may be required  
19      for these permits.

20             And they could arise out of the  
21      DOI process and changes in the emission  
22      profile of the project. So they could arise

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1 as a result of the Board's determination which  
2 we would not expect but certainly could happen  
3 that there are legal deficiencies in the  
4 permit that require remand on those issues  
5 reconsideration.

6 But if that does not occur until  
7 early next year, we foresee and Counsel for  
8 the Region made the point and we fully agree  
9 with it that this is a very resource intensive  
10 exercise on the part of the Region. It takes  
11 time to write and revise these air permits.  
12 And we just foresee that if this Board holds  
13 off on deciding these issues so that the  
14 ground rules are not clear at the time that  
15 any re-permitting exercise has to begin the  
16 potential is that the permits will be issued  
17 contrary to something that the Board will  
18 ultimately determine was a legal requirement.

19 We will be back here. In any  
20 case, we'll be back here next spring after  
21 that necessarily labor intensive process  
22 occurs and we'll be asking for expedited

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1 review again which we do not want to do.

2 JUDGE REICH: One concern that I  
3 heard the Agency voicing and I want to get  
4 your reaction to it was if we remanded, if we  
5 decided, to consider on the merits the issues  
6 or some subset of issue and remanded as soon  
7 as we remanded they would be under pressure  
8 from Shell to go ahead and make those fixes  
9 even though it was not yet clear from the  
10 analysis and the work that MMS is doing what  
11 other changes would be necessary. And  
12 therefore they would be forced to sequentially  
13 modify the permit first to address our  
14 concerns and then MMS concerns.

15 Would you anticipate that that  
16 would be the case? Or do you think that Shell  
17 would understand if the Agency didn't want to  
18 move forward until it knew the full scope of  
19 the changes it had to make?

20 MR. SILER: I think it would  
21 depend a lot on the circumstances at that  
22 time. This is obviously going to be a very

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1 fluid situation going forward. If it appeared  
2 that significant modifications were going to  
3 be required, it would probably make sense to  
4 do them in one permitting exercise. That  
5 would conserve Shell's resources as much as it  
6 would the Region's and it would be in Shell's  
7 interest to do that.

8 The reason I cannot give you a  
9 specific answer is I think it would depend a  
10 lot on what Shell foresaw as the time line for  
11 getting this done and whether we would again  
12 find ourselves in a crunch like we did this  
13 year in terms of getting those modifications  
14 made and ready for what is almost certain to  
15 be petitions for review again.

16 If you'll allow me to address  
17 briefly the issues that are presented by these  
18 petitions and why in Shell's view these are  
19 issues that do warrant resolution now because  
20 they are not going to be mooted and they're  
21 not going to go away.

22 JUDGE WOLGAST: Well, just to

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1 understand, we aren't interested in going into  
2 the merits. We are interested in how our  
3 deciding any of these motions would impact the  
4 proceedings in which way we should decide.

5 MR. SILER: Yes, I understand  
6 that. Thank you. And I won't get into the  
7 merits. I'll simply try to outline how these  
8 issues will affect future permitting decisions  
9 depending on how they're resolved.

10 Let's consider the question of  
11 whether associated vessels are subject to the  
12 Act. That's one of the Petitioners'  
13 fundamental contentions that the Agency has  
14 missed interpretative Section 328 of Clean Air  
15 Act and that its regulations are wrong in this  
16 respect.

17 This is an issue that needs to be  
18 addressed before permits can be written that  
19 have a reasonable degree of finality and  
20 certainty. If the associated fleet which  
21 comprises ice breakers and oil spill response  
22 vessels is subject to BACT, this will require

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1 an resource intensive BACT analysis that will  
2 require a lot of resources on the part of both  
3 Shell and the Agency. The BACT analysis that  
4 has been conducted so far if Your Honors have  
5 skimmed the response to comments in this case  
6 you'll see that the BACT analysis is extensive  
7 solely for the drill ship and the one vessel  
8 that will attach to it. If this is required  
9 it will fundamentally expand the permitting  
10 effort and it would be beneficial for all  
11 parties, at least for the Agency and for  
12 Shell, to know that now so that we could begin  
13 to do that work in conjunction with the  
14 Region.

15 If the Agency has misinterpreted  
16 its Section 328 and its regulations concerning  
17 the definition of what is an OCS source, it  
18 would be very useful for the Region, for  
19 Shell. And I submit for this Board if we knew  
20 that sooner rather than later.

21 AEWG says that the question, as I  
22 said, of whether the drill ship is in some

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1 fashion ready to drill is not relevant to the  
2 determination of whether it is an OCS source.  
3 They argue that EPA has in-graphed this third  
4 prominent test. Alternatively, they argue  
5 that if a third prong is appropriate that it's  
6 satisfied by the presence of the drill ship in  
7 the OCS because it is there, they argued, for  
8 the purpose of exploring at some location.

9 These are issues which we do need  
10 to have resolved sooner rather than later.  
11 Because if it turns out that the Region is  
12 incorrect, we could be back here raising the  
13 same issue again after another permitting  
14 exercise next spring.

15 Another important issue is whether  
16 the Region has properly concluded that  
17 emissions that are nearly speculative and  
18 potential emissions that could occur in the  
19 event of emergency response if, for example,  
20 a relief well did need to be drilled or if OSR  
21 vessels needed to come within the 25 mile zone  
22 to skim the well or whatever, that these need

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1 to be included in the project's potential to  
2 emit from its inception. And a function  
3 effect of that I think is that it means that  
4 these emissions would be included in the air  
5 quality impact analysis.

6 Now, without getting into the  
7 merits, that's a fundamental issue. Do those  
8 emissions have to be modeled speculative  
9 though they are and other aspects of the  
10 project emissions controlled to accommodate  
11 them? Or do they not have to be so addressed?  
12 It's a fundamental legal issue. And if we  
13 don't have it decided sooner we will in all  
14 probability have it decided later.

15 I mentioned earlier the issue of  
16 whether compliance with the NAAQS is per se,  
17 at least, substantive compliance with the  
18 environmental justice obligations of the  
19 Region in issuing these permits. That is an  
20 important question to have decided sooner  
21 rather than later.

22 So again it's very difficult to

1 put an exact timetable on this and orchestrate  
2 exactly what needs to be done when. As you've  
3 seen now twice, it is all too easy for this  
4 permitting process to get jammed up against an  
5 imminent drilling season and then we have to  
6 appear before you and ask your indulgence for  
7 an expedited review. We would prefer not to  
8 have that happen and we think we know you  
9 would. And we think the best way to guard  
10 against that is to decide these issues that  
11 are fully ripe and ready for adjudication now.

12 I don't know how much time I've  
13 exhausted. But that concludes my remarks.

14 JUDGE WOLGAST: Thank you very  
15 much. Ms. Sanerib and Mr. Grafe, Counsel for  
16 NRDC, was attempting to speak earlier.

17 MS. SANERIB: Okay.

18 JUDGE WOLGAST: So hopefully at  
19 the conclusion of your remarks we could hear  
20 from him briefly.

21 MS. SANERIB: Or actually if you'd  
22 like to, Mr. Grafe, if you want to have the

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1 floor now I'm happy to give it to you.

2 MR. GRAFE: Thank you. Can the  
3 Board hear me?

4 JUDGE WOLGAST: Yes.

5 MS. SANERIB: Yes, we can.

6 MR. GRAFE: Okay. Thank you very  
7 much. My name is Eric Grafe and I represent  
8 NRDC Petitioners. And I just wanted to raise  
9 one important point that I don't think has  
10 been raised yet which is that changed  
11 circumstances raise a fundamental question  
12 about whether Shell will be permitted to  
13 conduct its drilling in the Arctic at all.

14 So even with respect to views that  
15 were characterized as primarily legal issues,  
16 deciding those now may nonetheless be  
17 premature in light of the fact that those  
18 issues may not have to be addressed because I  
19 think the Administration's view and the event  
20 in the Gulf and the suspension of Shell's  
21 drilling notwithstanding its ample April 14  
22 letter trying to convince the Department of

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1 Interior that its plans were safe while also  
2 at the same time committing to change those  
3 plans, notwithstanding all of that, I think  
4 the fundamental question remains about whether  
5 the activity will go forward at all. And for  
6 that reason it may be premature to decide even  
7 issues that could be characterized in the  
8 present permits as primarily legal issues.

9 Thank you very much.

10 JUDGE WOLGAST: Thank you,

11 MS. SANERIB: And that was exactly  
12 my first point to the Board. Just to be  
13 clear, Petitioners absolutely do not share  
14 Shell's assumption that business as usual will  
15 resume at the end of this year. We think  
16 there are serious questions about drilling in  
17 the Arctic particularly with the ability to  
18 clean up spilled oil in the Arctic that may  
19 lead to a significant delay in any exploratory  
20 activities in the Arctic.

21 You know Shell talked a lot about  
22 the money and resources they have invested in

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1 both exploration activities this year and I  
2 think it's essential the Board understand they  
3 did not have all the approvals necessary to go  
4 out and drill this summer. They did not have  
5 IHA applications which are necessary under the  
6 Marine Animal Protection Act and they didn't  
7 have permits to drill yet from MMS. So I just  
8 want to be clear that they were not ready to  
9 go. They didn't a green light.

10 I wanted to respond briefly to one  
11 question that came up with Counsel for Region  
12 X and that was "What's a scenario MMS could  
13 impose on offshore oil and gas drilling that  
14 would force EPA to reconsider its definition  
15 of OCS source?" And just to provide a  
16 response to that so you can sort of see what  
17 we're thinking about, MMS could require Shell  
18 to employ a drill ship, to start drilling a  
19 relief well 20 days before the primary drill  
20 ship enters the OCS.

21 And we have then on our hands a  
22 very tricky question of how many permits does

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1 that scenario require. Two permits, two  
2 different sources. Is that all one OCS  
3 source? How do we deal with all the different  
4 vessels associated with those two different  
5 drill ships?

6 And I have no idea. Obviously,  
7 this is a hypothetical whether this will come  
8 to pass. But I think it's a very real  
9 possible scenario in light of what happened in  
10 the Gulf that relief well drilling could be a  
11 pre-exemptory or a necessary part of  
12 exploring. I just want to throw that out  
13 there as an example of a change that could  
14 require EPA to rethink how they define OCS  
15 source.

16 I also wanted to point out that  
17 Petitioners absolutely disagree with Shell  
18 that the proposed changes, the use of a second  
19 drill ship, the Kulluk, which will anchor on  
20 the ocean floor in the OCS and drill would not  
21 change its operations and that its indication  
22 it intends to use a second vessel to do just

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1 that has not already altered the underlying  
2 factual scenario of those permits.

3 And my final point is I just want  
4 to go through -- I think we've talked about  
5 several different ways forward today. And the  
6 Board has given an indication that it is  
7 interested in providing some guidance to  
8 Region X here. You've talked a lot about the  
9 definition of OCS source. You've also talked  
10 about the environmental justice analysis.

11 And I think on behalf of  
12 Petitioners I'd just like to ask that if you  
13 do intend to provide that guidance we  
14 obviously would like to have a hearing on the  
15 merits issues. And I also think it's  
16 essential to avoid this piecemeal review that  
17 we've been talking about that if you do that,  
18 if you provide that guidance, remand the  
19 permits back to EPA but also vacate them so  
20 that they have the opportunity not only to  
21 learn from the Board's guidance, take that  
22 into account, but then also respond to what

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1 MMS does and hopefully what the Agency itself  
2 decides to do.

3 In the event that the Board  
4 decides to hold the matter in abeyance and EPA  
5 is advocating for that position and we join  
6 them in that, I think it does make sense to  
7 ask that the Agency provide a status report.  
8 I think 30 day reports such as what Shell  
9 asked for is going to be a waste of both the  
10 Board's resources and the Agency's resources.  
11 I can't imagine they'll have anything to say  
12 in 30 days. I could be wrong.

13 But I would suggest that in three  
14 months we have a status report. I suggest  
15 when the Department of Interior's review is  
16 done that we have an indication of that. But  
17 that we also get an indication from EPA when  
18 it has decided what it wants to do. And at  
19 that point in time we have briefings from the  
20 parties to the Board on what issues we think  
21 remain to be resolved in light of those  
22 changes and which ones we think are definitely

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1 an advisory opinion.

2 Now it's Petitioners' position at  
3 this point in time that we do think Shell is  
4 asking you for an advisory opinion. I think  
5 they've already changed their operations. But  
6 those changes have not been addressed in the  
7 record before the Board. We think that there  
8 are critical changes to the law that Shell  
9 will have to address in the future.

10 And for those reasons we ask the  
11 Board to vacate and remand the permits back to  
12 the Agency. We also do this for policy  
13 reason. We think that a catastrophe in the  
14 Gulf warrants significant changes by the  
15 Federal Government of how we regulate these  
16 operations. We want EPA to be engaged in  
17 those changes. And we think the best way to  
18 do that is to get them out of a defensive  
19 posture out of defending these permits and in  
20 the mode of thinking about how do we go  
21 forward with air permitting in the future.

22 JUDGE WOLGAST: What's your

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1 response to both Shell and EPA's position that  
2 under Part 124 the Board doesn't have  
3 authority to vacate without finding error in  
4 some of the permit conditions?

5 MS. SANERIB: We disagree with  
6 that. We think that the Board has the  
7 authority to do this and I think one of the  
8 things that the Board pointed to in the Desert  
9 Rock decision is the analogy between Board's  
10 review and Federal Court review. And  
11 obviously in Federal Court agencies can go to  
12 a Federal Court and ask the court to  
13 voluntarily remand the permit.

14 I think that analogy holds true  
15 here because in Federal Court any party can go  
16 to the Federal Court and say, "Your Honor,  
17 this issue is moot." And that's what we're  
18 doing here. We're telling you these  
19 circumstances have changed. Shell has changed  
20 its operations. We are about to have  
21 regulatory reform. And for all those reasons  
22 this case is now moot. This factual scenario

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1 will never come to pass in the real world.  
2 And for that reason we ask the Board to set  
3 aside these permits and send them back to EPA.

4 JUDGE REICH: Is that the standard  
5 we have to apply? Do we have to conclude that  
6 the circumstances in the permit can never come  
7 to pass before we decide it's appropriate to  
8 then vacate?

9 MS. SANERIB: You know I think  
10 that your standard for voluntary remand is  
11 good cause and I think that the standard for  
12 demonstrating that this decision would be an  
13 advisory opinion is somewhere between those  
14 two. And I think you should look in this  
15 instance to the fact that EPA has indicated  
16 the permits may change. And that's usually a  
17 strong factor for the Board if the Agency  
18 wishes to change a permit for you to send it  
19 back to them.

20 You have Petitioners here saying  
21 the permit should already change in light of  
22 the fact that Shell is changing their

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1 operations. And you should send it back for  
2 that reason. We also have untold other  
3 changes that will occur. And for all those  
4 reasons I think that we meet the test here for  
5 demonstrating these issues are moot.

6 JUDGE STEIN: I have a question.  
7 In the early days of the Board, there are some  
8 circumstances where the Board I believe  
9 remanded the permits to the Region as an  
10 alternative I believe to a longer term stay  
11 when there were some uncertainties and gave  
12 the parties the option of sort of reinstating  
13 the appeals at some particular point in time.

14 I don't believe in those  
15 circumstances the Board vacated the permits.  
16 But the Board did remand the permits. What  
17 would be your view if the Board were to decide  
18 to undertake such action in this case?

19 MS. SANERIB: I think we would be  
20 happy with that. I mean I think our  
21 preference is to vacate the permits only  
22 because I think the burden is less on the

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1 Agency. At that point if they wish to change  
2 their mind, I mean they obviously have to  
3 provide a reasoned analysis for changes to the  
4 remanded permit at that point if they just  
5 elect to change any of the permit terms and we  
6 expect to see changes to the permit terms in  
7 light of the review, in light of Shell's  
8 change of operations.

9 But I also think that the way  
10 forward you're suggesting would address a lot  
11 of the issues that were raised today in this  
12 hearing. And it might be an efficient way of  
13 resolving these issues. Thank you.

14 JUDGE WOLGAST: Thank you very  
15 much.

16 Counsel for EPA, did you wish to  
17 reply?

18 MS. SMITH: I think you've asked  
19 the questions that you wanted to ask.

20 MR. SILER: May I make one very  
21 brief point?

22 JUDGE WOLGAST: Yes.

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1           MR. SILER: And it is only that I  
2 just heard Counsel for Petitioners endorse the  
3 voluntary remand standard as what should be  
4 applied in this case. And clearly in this  
5 case clearly one element of that is that the  
6 Region has asked for remand and the others  
7 that there is a high degree of probability  
8 that changes will be made by the Region to the  
9 permit which neither of which conditions exist  
10 here. Thank you.

11           JUDGE WOLGAST: Thank you.

12           JUDGE STEIN: I have one question  
13 for the Region or OGC which builds on the  
14 question I just asked Petitioners. Am I  
15 correct in understanding that OGC has taken  
16 the view that the Board doesn't have the  
17 authority to do a remand like we did in the  
18 early days of the Board?

19           MS. SMITH: I'm familiar with the  
20 opinions of which you are speaking. So I  
21 can't speak to that. I mean we looked at this  
22 fairly extensively and as you know there

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1 wasn't a lot said in the preamble promulgating  
2 the Section 124 part that gets to you. But it  
3 really seems in looking at your opinions and  
4 looking at 124.19 that there has to be a  
5 petition that shows clear error and then you  
6 have to find clear error to remand. And so in  
7 the absence for a request for voluntary remand  
8 I don't know. I would have to see the  
9 opinions.

10 JUDGE STEIN: Yes. I believe  
11 there are cases in the early days of the Board  
12 where there was a remand in cases where there  
13 was going to be some degree of uncertainty  
14 without any kind of a ruling on the merits.  
15 But I was more interested in your view of  
16 that. But it sounds like you're not familiar  
17 with the case law.

18 MS. SMITH: No, I'm only familiar  
19 with the more recent cases in which the Board  
20 has said they would not remand when the  
21 circumstances were uncertain and they would  
22 instead stay. Indeck is one of them and there

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1 are a number. I mean Indeck is very similar  
2 to the case.

3 In Indeck you had the permitting  
4 authority saying "We might have to deal with  
5 this one issue, but you should decide all the  
6 other issues and allow it to go forward." You  
7 had the Petitioners as much like Shell is  
8 saying "Look, there might be changes. But  
9 decide on everything else and we'll deal with  
10 whether or not there's changes later." You  
11 have Petitioners here saying, "There could be  
12 changes unless you should remand it all now."  
13 And what we are advocating is exactly what the  
14 Board decided in Indeck which was "Just  
15 because there's the possibility that there  
16 could be no change in the future it doesn't  
17 make it appropriate and the most efficient for  
18 us to decide now. And just because there's  
19 the possibility that it could change in the  
20 future it doesn't make it appropriate to  
21 remand it now. And it's best to hold out  
22 until the consideration that was underlying

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1 that action was done to see what effect, if  
2 any, the new information would have on the  
3 permits."

4 JUDGE STEIN: Thank you.

5 JUDGE WOLGAST: Thank you,  
6 Counsel. Arguments were very helpful. And we  
7 will now take the case under advisement.  
8 Thank you. Off the record.

9 (Whereupon, at 1:48 p.m., the  
10 above-entitled matter was concluded.)

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CERTIFICATE

This is to certify that the foregoing transcript  
in the matter of: Shell Gulf of Mexico, Inc.

Before: Hon. Anna I. Wolgast  
Environmental Appeals Judge

Date: June 18, 2010

Place: Washington, D.C.

represents the full and complete proceedings of the  
aforementioned matter, as reported and reduced to  
typewriting.

*Sam Wojack*  
\_\_\_\_\_  
Sam Wojack