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

In re:	)	
	)	OCS Appeal Nos.
Shell Gulf of Mexico Inc.	)	11-02, 11-03 & 11-04
Permit No. R10OCS/PSD-AK-09-01	)	
	)	
and	)	
	)	
Shell Offshore Inc.	)	
Permit No. R10OCS/PSD-AK-2010-01	)	
	)	
	)	

REPLY TO RESPONSES TO PETITION FOR REVIEW SUBMITTED BY NATIVE VILLAGE OF POINT HOPE, RESISTING ENVIRONMENTAL DESTRUCTION OF INDIGENOUS LANDS, ALASKA WILDERNESS LEAGUE, CENTER FOR BIOLOGICAL DIVERSITY, NATURAL RESOURCES DEFENSE COUNCIL, NORTHERN ALASKA ENVIRONMENTAL CENTER, OCEAN CONSERVANCY, OCEANA, PACIFIC ENVIRONMENT, SIERRA CLUB, and THE WILDERNESS SOCIETY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

FEDERAL REGISTER NOTICES

INTRODUCTION

Petitioners Native Village of Point Hope, Resisting Environmental Destruction of Indigenous Lands, Alaska Wilderness League, Center for Biological Diversity, Natural Resources Defense Council, Northern Alaska Environmental Center, Ocean Conservancy, Oceana, Pacific Environment, Sierra Club, and The Wilderness Society ("NVPH Petitioners") reaffirm that, based upon the objections raised in their petition for review, Region 10 of the United States Environmental Protection Agency ("the Region") clearly erred when it issued Prevention of Significant Deterioration ("PSD") air permits to Shell Offshore Inc. and Shell Gulf of Mexico Inc. (together "Shell") for operation of the *Discoverer* drillship on the Beaufort and Chukchi seas.[1] For the most part, the arguments raised by the Region and Shell in response are already addressed in NVPH Petitioners' petition for review. This reply is submitted to address new arguments not previously presented.

First, NVPH Petitioners submit this reply to address a new rationale and new authorities first offered by the Region in its response brief in defense of its determination that the area within a 500 meter radius of the *Discoverer* should be excluded from the "ambient air." This new rationale should be rejected by the Board because the agency is barred from relying on a

[1] The Region issued two air permits to Shell: Outer Continental Shelf Prevention of Significant Deterioration Permit to Construct No. R10OCS/PSD-AK-2010-01, Shell Offshore Inc. (Sep. 19, 2011) ("Beaufort Permit"), AR-EPA-SSS-2; and Outer Continental Shelf Prevention of Significant Deterioration Permit to Construct No. R10OCS/PSD-AK-09-01, Shell Gulf of Mexico Inc. (Sep. 19, 2011) ("Chukchi Permit"), AR-EPA-SSS-3.

rationale never supplied during the permitting process.[2] In any event, the Region's new authorities only support a conclusion that the ambient air boundary established for the *Discoverer* departs from longstanding agency policy. Second, this reply also addresses the Region's assertion that two of NVPH Petitioners' objections were not completely developed in public comments and therefore not preserved for review by the Board. The Region is mistaken: in both instances, the substance of NVPH Petitioners' objection was made clear, the Region acknowledged NVPH Petitioners' objection, and the Region provided a meaningful response.

ARGUMENT

I. THE REGION OFFERS AN IMPROPER *POST HOC* RATIONALIZATION TO JUSTIFY THE 500 METER AMBIENT AIR BOUNDARY.

In its response brief, the Region asserts a new rationale and cites new authority to support its determination to exclude from "ambient air" the area within a radius of 500 meters from the *Discoverer* drillship. Because these arguments were not articulated in the administrative record, they are improper on appeal. To the extent the Region intends to rely on this new rationale, the Beaufort and Chukchi Permits must be remanded so that the record may be reopened, updated, and made subject to public comment.

The relevant regulation states that "ambient air" is "that portion of the atmosphere, external to buildings, to which the general public has access." 40 C.F.R. § 50.1(e). The parties

[2] The Region's decision on remand is embodied in the Beaufort and Chukchi Permits and the Supplemental Statement of Basis and Supplemental Response to Comments that accompanied the revised permits. *See generally* EPA Region 10, Supplemental Statement of Basis for Proposed Outer Continental Shelf Prevention of Significant Deterioration Permits Noble Discoverer Drillship (July 6, 2011) ("Supp. Statement of Basis"), AR-EPA-QQQ-3 (excerpts attached as Ex. 4); EPA Region 10, Supplemental Response to Comments for Outer Continental Shelf Prevention of Significant Deterioration Permits Noble Discoverer Drillship (Sep. 19, 2011) ("Supp. Response to Comments"), AR-EPA-SSS-4 (excerpts attached as Ex. 1). This reply brief cites to the "Supplemental Response to Comments;" references in NVPH Petitioners' petition for review to "Response to Comments" are also references to the Supplemental Response to Comments, AR-EPA-SSS-4.

agree that EPA's "longstanding interpretation" of this regulation affords an "exemption from ambient air . . . only for the atmosphere over land owned or controlled by the source and to which public access is precluded by a fence or physical barrier." EPA Response at 18 (citing Letter from Douglas M. Costle, EPA Administrator, to The Honorable Jennings Randolf, Chairman, Committee on Environment and Public Works, Re: Ambient Air (Dec. 19, 1980), AR-EPA-BBB-1[3]); *see also* Shell Response at 15.

As explained in both the Supplemental Statement of Basis and the agency's Supplemental Response to Comments, the Region based its ambient air boundary determination exclusively on the establishment of a safety zone by the United States Coast Guard and permit conditions requiring Shell to develop and implement a program to control access within the safety zone. AR-EPA-QQQ-3 (Ex. 4) at QQQ000208 ("Shell will develop in writing and implement a public access control program to locate, identify and intercept the general public by . . . reasonable measures to inform the public that they are prohibited by Coast Guard regulations from entering the area within 500 meters of the Discoverer."); AR-EPA-SSS-4 (Ex. 1) at SSS000307 ("[B]ecause . . . a safety zone combined with Shell's public access control program has the effect of restricting the general public's access to the relevant area, . . . Region 10 believes the presence of a safety zone supports excluding the area inside the zone from ambient air for air quality purposes consistent with prior EPA interpretations of its regulations.").

On appeal, the Region now newly asserts that an area may be exempted from "ambient air" based, in part, on "natural physical features such as rivers or rugged terrain" that may "preclude public access." EPA Response at 20. According to the Region, the area within 500 meters of the *Discoverer* drillship does not constitute ambient air because "the remote location

[3] The "Costle Letter," AR-EPA-BBB-1, is attached to this brief as Exhibit 8.

[and] hostile environment" of the Beaufort and Chukchi seas, coupled with Shell's program to locate and intercept members of the public, "ensures (sic) that public access is precluded." *Id*. at 18. The Region also cites three previously unacknowledged authorities in support of its new argument. *Id*. at 20. Although the Region noted that its ambient air boundary decision pertained to "overwater locations in the arctic environment," Supp. Response to Comments, AR-EPA-SSS-4 (Ex. 1) at SSS000305, nowhere in its decision did the Region suggest that the overwater conditions, themselves, limit public access. *See generally id*. at SSS000303-08; Supp. Statement of Basis, AR-EPA-QQQ-3 (Ex. 4) at QQQ000193, QQQ000208-09.[4]

The Board should disallow the Region's new argument and citations because an agency decision "[must] be upheld, if at all, on the same basis articulated in the [decision] by the agency itself." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962). The Board frequently has refused to accept arguments offered by Regions for "the first time on appeal" because an agency only may rely on arguments and authority "asserted and explained in the record." *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 424 (EAB 1997); *see also id*. at 418 n.25 (refusing to credit argument included in Region's response to petition for review that "d[id] not appear to be included in the administrative record"); *In re Chem. Waste Mgmt. of Ind., Inc.*, 6 E.A.D. 144, 154 (EAB 1995) (same); *In re Amoco Oil Co.*, 4 E.A.D. 954, 964 (EAB 1993) (same). Significantly, "even where an argument involves no new facts, but only a new theory," such a new argument is still disallowed. *In re Port Auth. of N.Y. and N.J.*, 10 E.A.D. 61, 94 (EAB 2001) (summarizing *Ondine Shipping Corp. v. Cataldo*, 24 F.3d 353, 355 (1st Cir. 1994)).

[4] The Region did decline to require Shell to conduct air monitoring at the ambient air boundary based, in part, on the agency's assertion that "harsh, remote arctic conditions" would present monitoring challenges. Supp. Response to Comments, AR-EPA-SSS-4 (Ex. 1) at SSS000307-08. But the Region never suggested that these conditions would limit public access.

Even if the Board considers the Region's new argument that "natural physical factors" may function as barriers sufficient to justify exclusion of an area from ambient air requirements, the new authority cited by the agency undermines its rationale and establishes that the exemption from ambient air is extremely narrow. The Region has failed to demonstrate on the record that the requirements for exemption are met here.

The Region's response brief cites a 1987 memorandum issued by EPA's Office of Air Quality Planning and Standards ("OAQPS") interpreting the definition of ambient air. EPA Response at 20 (citing AR-EPA-BBB-152). Although the OAQPS memorandum acknowledged that a river potentially could constitute a barrier comparable to fencing, it emphasized that "some conditions must be met," most notably the condition that fencing must be installed for "any areas where there is any question" of potential public access, "even if there is a very remote possibility that the public would attempt to use th[e] property." AR-EPA-BBB-152 (Ex. 7) at BBB011643-44. Critically, although the OAQPS memorandum indicated that a riverbank might be regarded as an ambient air boundary, the memorandum also concluded that the area over a river itself constitutes ambient air because it is "a public waterway, not controlled by the sources." *Id*. at BBB011643; *see also id*. at BBB011644 (stating that air over three canals "is ambient air, since none of the companies owns them or controls public access to them"). Similarly, the Kennecott Minerals Company decision cited by EPA, *see* EPA Response at 20 (citing 50 Fed. Reg. 7,056, 7,057 (Feb. 20, 1985)), recognizes that geographical barriers are not sufficient if they do not preclude access. Terrain and an access control program at Kennecott were considered but those factors were not sufficient: "man-made barriers" were also installed, 50 Fed. Reg. at 7,057,

including "locked gates and fences placed across roads and trails leading" to company property. 49 Fed. Reg. 10,946, 10,947 (Mar. 23, 1984). [5]

In this case, the record does not anywhere reflect that the Region applied these exacting standards to the facts of the present dispute. The Region has not addressed whether there is "a very remote possibility that the public would attempt" to access the area within 500 meters of the *Discoverer* nor has it confronted, let alone overcome, the presumption that the air over public waterways like the Beaufort and Chukchi seas constitutes ambient air. AR-EPA-BBB-152 (Ex. 7) at BBB011643-44. Before the Region may rely on a new-found rationale of "natural physical features" for its delineation of an ambient air boundary, the Region must make factual findings, on the record, establishing that the rationale is relevant here. Having failed to do so, the Region must "reopen the permit proceedings to supplement the administrative record with such information." *In re Amoco Oil Co.*, 4 E.A.D. at 964.

To the extent it already contains some relevant information, the Administrative Record contradicts the Region's assertion that geography establishes a barrier here. The record makes plain that Alaska Natives traditionally use areas in the vicinity of, and beyond, some of Shell's planned operations for subsistence activities. For example, Shell's lease blocks in the Beaufort Sea are located less than 60 miles away from the nearest onshore communities, with the nearest

[5] The Region also cites the 2011 Alaska Department of Environmental Conservation's ("ADEC") "Modeling Review Procedures Manual." EPA Response at 20 (citing AR-EPA-BBB-150). These guidelines do not reflect an EPA interpretation, are non-binding generally, and do not apply to Shell's operations on the Outer OCS. *See* Supp. Response to Comments, AR-EPA-SSS-4 (Ex. 1) at SSS000338 n.18; *see also* ADEC Modeling Review Procedures Manual (2011), AR-EPA-BBB-150 (Ex. 2) at BBB011526, BBB011529. Moreover, the ADEC guidelines state that "geographical barriers such as a cliff or river" may be used in conjunction with "an access control plan" to define the ambient air boundary, so long as a source can "show that they have a legal right to preclude public access at the proposed ambient air boundary," *id.* at BBB011549 n.11, a condition the Region concedes is not met here. EPA Response at 19 ("no private entity owns or controls the sea below its operations . . .").

community, Kaktovik, located only 8 miles away. Supplemental Environmental Justice Analysis, AR-EPA-FFF-8 (Ex. 6) at FFF000550. Some coastal residents, however, "have reported traveling up to 96 kilometers (60 miles) offshore" to hunt for bowhead whale. *Id*. at FFF000551. Indeed, a map included in the Region's Supplemental Environmental Justice Analysis indicates that Shell's planned drilling sites in the Beaufort Sea lie within traditional subsistence areas. *Id*. at FFF000552. Based on the foregoing, there is no support for the Region's suggestion that the Beaufort and Chukchi seas constitute a "barrier" that renders it "a very remote possibility that the public would attempt" to access the area the Region has excluded from ambient air requirements. [6]

II. ALL OF NVPH PETITIONERS' CLAIMS WERE RAISED ADEQUATELY DURING THE PUBLIC COMMENT PERIOD.

The Region also asserts in its response brief that NVPH Petitioners failed to raise two claims with sufficient clarity, or to support them with readily ascertainable arguments, in public comments. EPA Response at 21-23, 29-30. The Board, however, typically will address the merits of any issue presented to the Region "during the public comment period with sufficient clarity to enable a meaningful response." *In re Steel Dynamics, Inc*., 9 E.A.D. 165, 230 (EAB 2000). The NVPH Petitioners' claims meet this standard.

[6] The Region also reiterates that it cited in the record the "Broadwater Letter" as support for its original position that a Coast Guard safety zone is itself sufficient. EPA Response at 18 (citing AR-EPA-BBB-25). The fact that the Region can cite one instance where an ambient air boundary was based, in part, upon establishment of a Coast Guard safety zone does not demonstrate that it has met the requirements of its own regulation here. EPA recognizes that ambient air decisions are made "on a case-by-case basis," EPA Response at 17, and the Region does not assert here that the Broadwater decision articulates a general policy like the Costle Letter, AR-EPA-BBB-1 (Ex. 8), that all parties agree is authoritative. The Administrative Record contains insufficient information on the Broadwater Project to address distinctions between it and the *Discoverer*, but to the extent the facts may be similar, one unlawful ambient air decision does not justify another. *See New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008) (an unlawful interpretation does not become reasonable because it is applied more than once).

A. NVPH Petitioners' public comments provided notice of their claim that the *Discoverer* permits, with respect to 1-hour concentrations of nitrogen dioxide, violate section 165 of the Clean Air Act.

In timely submitted comments, NVPH Petitioners made plain their objection that the Region—in violation of the preconstruction requirements of section 165(a)(3) of the Clean Air Act—failed to require Shell to demonstrate compliance with "the absolute value of the [national ambient air quality standard]" for 1-hour concentrations of nitrogen dioxide (NO_2). AR-EPA-RRR-30 (Ex. 3) at RRR000183 n.5. The comments tied this violation to the Region's acceptance of "data handling conventions for NO_2" that were used to demonstrate compliance "based on the three-year average of the 98th percentile of the yearly distribution of 1-hour daily maximum concentrations." *Id*. These comments plainly provided the Region with notice of NVPH Petitioners' claim in their petition for review: that the Region, in contravention of criterion (A) listed in section 165(a)(3), has unlawfully relied exclusively upon the "form" of the 1-hour national ambient air quality standard for NO_2 (*i.e.*, the "data handling conventions" for NO_2 referenced in the comments) while ignoring the 1-hour "maximum allowable concentration" for NO_2 (*i.e.*, the "absolute value" or "level" of the 1-hour NO_2 standard described in the comments). *See* NVPH Petition for Review at 10-23.[7] Although the version of the objection presented in the petition for review is more fully developed, the applicable regulations do not, and should never, require that comments include a full legal brief of each objection raised. Instead, such briefing happens during the review process, where the Board demands that a petitioner "explain why the permit decisionmaker's previous response to those objections . . . is

[7] The Region highlights that NVPH Petitioners cited section 165(a)(3) of the Clean Air Act in their comments, instead of specifying section 165(a)(3)(A). EPA Response at 22. This proves too much. Section 165(a)(3) of course encompasses and subsumes each of the three compliance criteria identified therein, (A) through (C), which are listed in a single 89-word clause. 42 U.S.C. § 7475(a)(3).

clearly erroneous or otherwise warrants review." *In re Teck Cominco Alaska Inc., Red Dog Mine*, 11 E.A.D. 457, 472-73 (EAB 2004).[8]

In its decisions on the sufficiency of public comments, a key threshold employed by the Board is whether a particular issue was acknowledged by the permitting authority in its response to comments. *See In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 250 (EAB 1999); *In re Essex Cnty. (NJ) Res. Recovery Facility*, 5 E.A.D. 218, 224 n.13 (EAB 1994). Here, there is no dispute that the Region provided a response. EPA Response at 22 ("Region 10 responded to those comments."); Supp. Response to Comments, AR-EPA-SSS-4 (Ex. 1) at SSS000333-34.

While acknowledging that it responded to NVPH Petitioners' comments, the Region nonetheless maintains that NVPH Petitioners' 1-hour NO_2 maximum allowable concentration argument was not raised "with sufficient clarity in public comments." EPA Response at 21. In previous decisions, the Board has determined that an issue is preserved for appeal if it was presented in public comments "with sufficient clarity to enable a meaningful response." *In re Steel Dynamics, Inc*. 9 E.A.D. at 230. The Region does not and cannot assert that it was unable to provide a meaningful response. The arguments that EPA offers in its response to comments—that NVPH Petitioners raise a time-barred challenge to 40 C.F.R. § 52.21(k); that the statute contains no requirement for a PSD applicant to demonstrate "that they will not cause or contribute to ambient concentrations that exceed the level of the NAAQS;" and that the Region's

[8] Under a provision that parallels the threshold for Board review established in 40 C.F.R. § 124.19(a), section 307(d)(7)(B) of the Clean Air Act allows parties to seek judicial review of an administrative rulemaking if an objection was raised with "reasonable specificity" during the period for public comment. 42 U.S.C. § 7607(d)(7)(B). In applying section 307(d)(7)(B), the D.C. Circuit has cautioned against "a hair-splitting approach," *Appalachian Power Co. v. EPA*, 135 F.3d 791, 817-18 (D.C. Cir. 1998); *Nat'l. Petrochemical & Refiners Ass'n v. EPA*, 287 F.3d 1130, 1139-40 (D.C. Cir. 2002) (same), and emphasized that "commenters must be given some leeway in developing their argument before this court, so long as the comment to the agency was adequate notification of the general substance of the complaint." *S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 891 (D.C. Cir. 2006).

approach is not "inconsistent with the form of the NAAQS"—hew very closely to the three substantive arguments presented in EPA's response brief. *Compare* AR-EPA-SSS-4 (Ex. 1) at SSS000333-34 *with* EPA Response at 23 ("there is no such prong in section 52.21(k), and the time for challenging its absence has long since passed");[9] at 27 ("EPA has consistently stated that the NAAQS – rather than just the level of the NAAQS . . . form the upper bound" for PSD applicants); at 29 ("the level of the standard cannot be divorced from other elements" including "the form of the standard") (internal quotation and citation omitted). That the Region was able to provide a meaningful response to NVPH Petitioners' public comments presaging its response brief thus demonstrates that Petitioners raised the issue with sufficient clarity.

The purpose of the rule requiring that Petitioners raise issues in their comments is also served here. Parties seeking Board review are first required to raise issues in public comments so that "the permit issuer [may] be given the opportunity to address potential problems with draft permits before they become final." *In re Encogen Cogeneration Facility*, 8 E.A.D. at 249-50. "In this manner, the permit issuer can make timely and appropriate adjustments to the permit determination." *In re Essex County (N.J.) Res. Recovery Facility*, 5 E.A.D. at 224 (citing *In re Union City Res. Recovery Facility*, PSD Appeal No. 90-1, 2-3 (Adm'r, Nov. 28, 1991)). Here,

[9] The Region expands this argument in its response brief, alleging that NVPH Petitioners' objection is inconsistent with longstanding interpretations of the statute and 40 C.F.R. § 52.21(k). EPA Response at 23-25. This argument misses the point. As NVPH Petitioners pointed out, *see* NVPH Petition for Review at 18-20, unless the plain language of the statute or 40 C.F.R. § 52.21(k) foreclose NVPH Petitioners' objection—it does not, and neither the Region nor Shell contend that it does—NVPH Petitioners are entitled to raise an applied challenge. *See Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 573 (2007); *1000 Friends of Md. v. Browner*, 265 F.3d 216, 223-24 (4th Cir. 2001). The Region also cites one aspect of legislative history which indicates that Congress considered adopting a "maximum allowable concentration" set at a level below the level established in the NAAQS. *See* EPA Response at 27. That Congress considered but did not adopt an even more stringent standard underscores, rather than undercuts, the importance of using the lowest concentration level of a NAAQS—rather than the form—as the "maximum allowable concentration" that limits emissions from a PSD source.

the Region was notified by the NVPH Petitioners of the problem with the permits before they became final, with time to make adjustments. The Region elected not to make adjustments, however, based on its consistent disagreement with NVPH Petitioner's position that "as applied in PSD permitting, a source must demonstrate that the impact of its emissions does not exceed the level of the NAAQS." Supp. Response to Comments, AR-EPA-SSS-4 (Ex. 1) at SSS000333 (characterizing and disagreeing with NVPH Petitioners' position). The Region's response brief indicates that further clarification in the comments would not have altered EPA's legal position to any degree. In other words, neither the Region nor the permitting process itself have been prejudiced by the more general presentation in NVPH Petitioners' comments. Accordingly, the Board should address the merits of NVPH Petitioners' 1-hour NO_2 maximum allowable concentration claim.

B. NVPH Petitioners' public comments provided notice of their claim that the Region erred by accepting air modeling that unlawfully understates Shell's maximum 1-hour NO_2 impacts.

The Region also challenges the sufficiency of notice for NVPH Petitioners' objection to the Region's decision to allow Shell to use an inappropriate modeling approach to demonstrate compliance with 1-hour NO_2 national ambient air quality standard. EPA Response at 29-30. The Region's objection is without merit.

NVPH's Petitioners' public comments and petition for review state the same substantive objection to Shell's 1-hour NO_2 compliance demonstration: EPA acted arbitrarily and failed to ensure compliance with the national ambient air quality standard when it allowed Shell to use adjusted (98th percentile) background measurements. *Compare* NVPH Comments, AR-EPA-RRR-30 (Ex. 3) at RRR000185-86 ("Shell has not demonstrated compliance with the 1-hour NO_2 NAAQS" because "Shell has neglected to use the highest background pollution levels . . . [i]nstead . . . using multiyear 98th percentile background concentrations") *with* NVPH

Petitioners' Petition for Review at 24 ("Shell used background values that were already adjusted to the 98th percentile, instead of basing its calculations on the full distribution of background values. . . . [T]his method fails to demonstrate compliance with the form of the 1-hour standard."). NVPH Petitioners, properly, more fully articulated the legal structure of this claim in their petition for review, citing to EPA guidance, issued on June 29, 2010, which concluded that the approach accepted by the Region here would "not be protective of the [national ambient air quality standard]." *Id*. at 24 (citing Memorandum from Stephen D. Page, EPA, to Regional Air Division Directors, EPA, Re: Guidance Concerning the Implementation of the 1-hour NO_2 NAAQS (June 29, 2010) ("June 2010 Guidance"), AR-EPA-BBB-153 (Ex. 5) at BBB011663). The underlying issue, however, is the same.

The Region claims that NVPH Petitioners failed specifically to identify the unaddressed discrepancy between the June 2010 Guidance and the subsequent guidance of March 1, 2011 ("March 2011 Guidance") relied upon by the Region. But the Region acknowledges that it was able to respond to the substance of NVPH Petitioners' objection, stating in its brief that "Region 10 responded at length to all of the technical and legal comments challenging Shell's 1-hour NO_2 NAAQS demonstration, <u>including the approach for combining modeled and background data that underlies the issue raised by Petitioners</u> . . . ." EPA Response at 32 (emphasis added); *see also* Supp. Response to Comments, AR-EPA-SSS-4 (Ex. 1) at SSS000340-42. Further, the Region cited both the June 2010 Guidance and March 2011 Guidance in the Supplemental Response to Comments, *see* AR-EPA-SSS-4 (Ex. 1) at SSS000333, and asserted that its approach to combining modeled impacts and background concentrations "is consistent with EPA guidance." *Id*. at SSS000342; *see also id*. at SSS000336. Having not only acknowledged NVPH Petitioners' objection regarding Shell's use of background data, but also having offered a

response relating to the consistency of its position with the relevant guidance, the Region cannot now credibly complain that the issue was not preserved for appeal. *See, e.g., In re Steel Dynamics, Inc*., 9 E.A.D. at 230; *In re Encogen Cogeneration Facility*, 8 E.A.D. at 250.

The Region asserts that its position is consistent with the June 2010 Guidance by arguing that NVPH Petitioners misconstrue the June 2010 Guidance. EPA Response at 30-32. The Region—whose reading hinges on altering the text, *see id*. at 30 (inserting "[$PM_{2.5}$]" where it is not otherwise implied)—is wrong. Citing previous guidance on $PM_{2.5}$ as a general example, the June 2010 Guidance notes that "combining the 98th percentile monitored value with the 98th percentile modeled concentrations . . . could result in a value that is . . . not . . . protective of the NAAQS." AR-EPA-BBB-153 (Ex. 5) at BBB0011663. The Memo then states that "unlike the recommendations presented for $PM_{2.5}$," which disallow the use of both 98th percentile background values and 98th percentile modeled values, "the modeled contribution . . . for the 1-hour NO_2 standard should . . . [be] based on the 98th percentile" impact. *Id*. Although the June 2010 Guidance allows use of 98th percentile modeled impacts, it still advised use of "the highest hourly background NO_2 concentration" to maintain full protection of the NAAQS. *Id*. It is the Region, and not the NVPH Petitioners, that misread the June 2010 Guidance.

C. Even if NVPH Petitioners' public comments do not meet the Board's usual standard for issue preservation, the Board nonetheless should exercise its well-established authority to review NVPH Petitioners' claims.

As set forth above, NVPH Petitioners met their obligation to raise the 1-hour NO_2 maximum allowable concentration and arbitrary use of background data arguments "during the public comment period with sufficient clarity to enable a meaningful response." *In re Steel Dynamics, Inc*. 9 E.A.D. at 230. However, even if this obligation had not been met, "[i]t is well established that . . . the board may relax its procedural rules if the ends of justice so require," particularly where "the Region suffered no prejudice," *see In re Amoco Oil Co.*, 4 E.A.D. at 957-

58 n.2. In fact, the Board previously has "considered the merits of an issue not specifically raised in comments below where the specific issue raised in the petition is very closely related to challenges raised during the comment period, and the Region had the opportunity to address the concerns in its response to comments." *In re New England Plating Co*, 9 E.A.D. 726, 732-33 (EAB 2001) (citing *In re EcoEl´ectrica, L.P.*, 7 E.A.D. 56, 64 n.9 (EAB 1997) & *In re P.R. Elec. Power Auth.*, 6 E.A.D. 253, 257 n.5 (EAB 1995)). Here, the NVPH Petitioners, at the very least, made a sufficient and good faith effort to preserve their objections for appeal, and the Region suffered no prejudice, having offered similar defenses in both the response to comments and its response brief. Under these circumstances, justice is best served by foregoing a "hypertechnical approach to issue preservation" and instead addressing the merits of NVPH Petitioners' important, substantive objections. *In re New England Plating Co*, 9 E.A.D. at 733.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Petition for Review, NVPH Petitioners respectfully request that the Board grant review of the Beaufort and Chukchi Permits and remand the decisions to the Region.

Respectfully submitted,

/s/ Colin O'Brien

Colin O'Brien
Eric Jorgensen
EARTHJUSTICE
325 Fourth Street
Juneau, AK 99801
T: 907-500-7134
F: 907-463-5891

Erik Grafe
EARTHJUSTICE
441 W. 5th Avenue, Suite 301
Anchorage, AK 99501
T: 907-277-2500
F: 907-277-1390

Attorneys for Appellants

DATED: November 23, 2011

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

Pursuant to the Environmental Appeals Board's Order Denying Requests for Status Conference and Oral Argument and Establishing Filing Deadline, dated November 4, 2011, I certify that the foregoing REPLY TO RESPONSES TO PETITION FOR REVIEW does not exceed 7,000 words. As calculated by Petitioners' word processing software, this reply contains 4,709 words, excluding the parts of the reply exempted by the Board's standing Order Governing Petitions for Review of Clean Air Act New Source Review Permits dated April 19, 2011.

/s/ Colin O'Brien

Colin O'Brien
EARTHJUSTICE
325 Fourth Street
Juneau, AK 99801
T: 907-500-7134
F: 907-463-5891

CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2011, copies of the foregoing REPLY TO RESPONSES TO PETITION FOR REVIEW in the matter of *Shell Gulf of Mexico Inc., Permit No. R10OCS/PSD-AK-09-01 and Shell Offshore Inc., Permit No. R10OCS/PSD-AK-2010-01,* OCS Appeal Nos. 11-02 through 11-04, were served by electronic mail on the following persons:

Julie Vergeront Alexander Fidis Office of Regional Counsel U.S. Environmental Protection Agency, Region 10	Vergeront.Julie@epa.gov Fidis.Alexander@epa.gov
David Coursen Office of General Counsel U.S. Environmental Protection Agency	Coursen.David@epa.gov
Duane A. Siler Sarah C. Bordelon Tony G. Mendoza Crowell & Moring LLP	dsiler@crowell.com sbordelon@crowell.com tmendoza@crowell.com
Tanya Sanerib Christopher Winter Crag Law Center	tanya@crag.org chris@crag.org
Daniel Lum	eskimo.whaler@yahoo.com

/s/ Colin O'Brien

Colin O'Brien
EARTHJUSTICE
325 Fourth Street
Juneau, AK 99801
T: 907-500-7134
F: 907-463-5891

Attorneys for Appellants

TABLE OF EXHIBITS

Exhibit No.	Administrative Record No.	Description
1	AR-EPA-SSS-4	U.S. Environmental Protection Agency Region 10, Supplemental Response to Comments for Outer Continental Shelf Prevention of Significant Deterioration Permits, Noble Discoverer Drillship, Shell Offshore Inc., Beaufort Sea Exploration Drilling Program, Permit No. R10OCS/PSD-AK-2010-01, Shell Gulf of Mexico Inc., Chukchi Sea Exploration Drilling Program, Permit No. R10OCS/PSD-AK-09-01 (Sept. 19, 2011) (excerpts)
2	AR-EPA-BBB-150	Alaska Department of Environmental Conservation, Modeling Review Procedures Manual (Sept. 14, 2011) (excerpts)
3	AR-EPA-RRR-30	Alaska Wilderness League, *et al.*'s Comments on Revised Draft Air Permits for Shell's Proposed Oil and Gas Exploration Drilling in the Beaufort Sea and Chukchi Sea, Alaska (Aug. 5, 2011) (excerpts)
4	AR-EPA-QQQ-3	U.S. Environmental Protection Agency Region 10, Supplemental Statement of Basis for Proposed Outer Continental Shelf Prevention of Significant Deterioration Permits Noble Discoverer Drillship, Shell Offshore Inc., Beaufort Sea Exploration Drilling Program, Permit No. R10OCS/PSD-AK-2010-01, Shell Gulf of Mexico Inc., Chukchi Sea Exploration Drilling Program, Permit No. R10OCS/PSD-AK-09-01 (July 6, 2011) (excerpts)
5	AR-EPA-BBB-153	Memorandum from Stephen D. Page, EPA, to Regional Air Division Directors, EPA, Re: Guidance Concerning the Implementation of the 1-hour NO_2 NAAQS for the Prevention of Significant Deterioration Program (June 29, 2010) (excerpts)
6	AR-EPA-FFF-8	U.S. Environmental Protection Agency Region 10, Supplemental Environmental Justice Analysis for proposed Outer Continental Shelf PSD Permit No. R10OCS/PSD-AK-2010-01 & Permit No. R10OCS/PSD-AK-09-01 (undated) (excerpts)

7	AR-EPA-BBB-152	Memorandum from G.T. Helms, Chief, Control Programs Operations Branch, to Steve Rothblatt, Re: Ambient Air (April 30, 1987)
8	AR-EPA-BBB-1	Letter from Douglas M. Costle, EPA Administrator, to The Honorable Jennings Randolf, Re: Ambient Air (Dec. 19, 1980)