Peter Van Tuyn
Bessenyey & Van Tuyn, L.L.C.
310 K. St #200
Anchorage, AK 99507
Ph: (907) 278-2000
Fax: (907) 278-2004

Eric Jorgensen
EARTHJUSTICE
325 Fourth Street
Juneau, AK 99801
Ph: (907) 586-2751
Fax: (907) 463-5891

Attorneys for Petitioners

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

In re:	)	
Shell Offshore, Inc.	)	OCS Appeal Nos. 08-01 thru 08-03
Permit No. R10OCS-AK-07-01 (Revised)	)	

REPLY BRIEF ON PETITION FOR REVIEW

OF

ALASKA WILDERNESS LEAGUE, CENTER FOR BIOLOGICAL DIVERSITY, NATURAL RESOURCES DEFENSE COUNCIL, NORTHERN ALASKA ENVIRONMENTAL CENTER, PACIFIC ENVIRONMENT, RESISTING ENVIRONMENTAL DESTRUCTION ON INDIGENOUS LANDS, A PROJECT OF THE INDIGENOUS ENVIRONMENTAL NETWORK ("REDOIL")

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I. INTRODUCTION

The Environmental Protection Agency (EPA), Shell Offshore, Inc. (Shell) and *Amicus Curiae* American Petroleum Institute all urge the Environmental Appeals Board (Board) to uphold EPA's determination that the Shell exploration project can be broken down into numerous separate pollution sources so that Shell can avoid a designation of its exploration project as a "major emitting facility." In doing so, Shell then avoids the need for a permit under EPA's Prevention of Significant Deterioration (PSD) Program, and the attendant requirement that Shell use the "best available control technology" for air pollution from its exploration project. As a result, the public does not receive the benefit of the protections afforded by such technology to the environment and public health.

EPA has issued to Shell a minor source permit for Shell's plans to use a mobile exploration facility to drill various planned wells to delineate the boundaries of a known reservoir, possibly drill new discovery wells and planned wells to delineate new discoveries, and have the facility available to drill relief or replacement wells should either become necessary. The mobile exploration facility moves from one location to the next with the same crew, the same equipment, the same components (drilling rig, supply and support vessels), all in the same season. *See* Outer Continental Shelf Pre-Construction Air Permit Application, Shell Kulluk 2007-2009 Beaufort Sea Exploratory Drilling Program (December 29, 2006) (Shell Kulluk Air Permit Application).

Within this context, Alaska Wilderness League, *et al.*, (AWL), challenge the EPA's Air Quality Control Minor Permit for the Shell Exploration Project, asserting that EPA's conclusion is erroneous that each planned drill site authorized under that permit is a separate emission source. None of the arguments in the response briefs or *amicus* brief

change the conclusion that EPA's decision to break the project down into components that each fall below the PSD threshold is not rationally grounded in the law as applied to the facts of the Shell exploration project, and should be rejected.[1]

II. EPA'S SOLE SOURCE DETERMINATION IS ERRONEOUS

The law provides that "OCS source activities that share all of the following characteristics shall be considered one 'stationary source' for the purpose of determining PSD applicability: (1) common owner or operator, (2) the same SIC code, and (3) located on contiguous or adjacent property." Supplemental Statement of Basis (SSOB) at 4-5, referencing 40 C.F.R. 51.166(b)(6); 18 AAC 50.040(h)(4)(B)(iii); Alaska Stat. 46.421.990(4). All parties agree that the first two of these conditions are met in this case, and that the dispute focuses on whether the drilling and associated activities that emit air pollution authorized by the permit are "located on contiguous or adjacent" properties. *See* EPA Brief at 17-18; Shell Brief at 14.

EPA determines whether such activities are "located on contiguous or adjacent" properties based on "a common sense notion of 'plant.'" 45 Fed. Reg. 52,676, 52,694-95 (Aug. 7, 1980). As part of this "common sense" analysis, EPA's practice has been to look at whether the activities are "proximate" or "interdependent," either one of which

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[1] Shell objects to AWL's preservation of claims from the initial permit appeal in 2007. Shell Brief at 9, n. 8. This appeal is limited in scope, *In re Shell Offshore*, 13 E.A.D. __, Nos. 07-01 & 07-02, slip. op. at 69 (September 14, 2007) (In re Shell, slip. op.), as even Shell must admit, Shell Brief at 7. For this reason, AWL does not raise again the issues already resolved by the Board and not altered by the new permit decision. AWL merely noted that it was not now waiving its right to raise such issues in a future legal challenge to the final permit, assuming such a challenge is necessary or occurs. Shell's objection is apparently based on a misperception of AWL's statement and is irrelevant to the Board's decision here.

would compel the conclusion that the activities should be considered as one for PSD purposes.[2]

AWL argued in its Petition, with supplemental argument provided in a filing subsequent to EPA's finalization of the administrative record, that EPA's proximity and interdependence analyses were erroneous, and that its constantly shifting rationale, provided without clear explanation as to the specific factors relevant to its final decision, also renders its decision erroneous. EPA and Shell challenge these arguments, yet in doing so mischaracterize or misunderstand AWL's arguments, avoid key points in those arguments, or otherwise are unpersuasive in their responses. These points are discussed, in turn, below.

As a contextual preface, however, it is worth noting that EPA does not focus the start of its analysis on Shells' exploration project as a whole. Rather, asserting that it has no discretion to do otherwise, EPA Brief at 16, *citing* 40 C.F.R. 51.166(b)(5) and (6), EPA focused on discrete "pollution emitting activit[ies]" within that project, which it then defined to mean "drilling a planned exploratory well at a particular drill site." EPA Brief at 18. The regulatory subsections cited for this approach by EPA are, however,

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[2] Shell asserts, without citation, that EPA must find both "proximity" and "interdependence" to support a conclusion that multiple emission polluting activities are to be considered a single source. Shell Brief at 14. EPA makes no similar argument. Contrary to Shell's assertion, EPA's decision on these points is not reliant on a positive finding on both "proximity" and "interdependence." *See* AWL Petition at 10, *citing* Letter from R. Douglas Neely, EPA Region 4, to C.H. Fancy, Florida Department of Environmental Protection (January 28, 2000) (Exh. 7) (noting that separate facilities can be considered a single source under the PSD program "strictly on the basis of proximity without regard to whether the facilities are dependent on each other or physically connected in some way"); *see also* Letter from Douglas M. Skie, EPA Region 6, to Cathy Rhodes, Air Pollution Control Division (Aug. 22, 1991) (Exh. 3) (same).

only the definitions of "stationary source," 40 C.F.R. 51.166(b)(5) and "building, structure, facility, or installation," 40 C.F.R. 51.166(b)(6). Whether the Shell exploration project meets those definitions is the question to be resolved and therefore should be the focal point of EPA's analysis. To begin that analysis by assuming that it has no discretion to treat the entire project -- which is the focus of the permit application after all, Shell Kulluk Air Permit Application -- as a "stationary source" under 40 C.F.R. 51.166(b)(5) or a distinct "building, structure, facility, or installation" under 40 C.F.R. 51.166(b)(6) results in circular reasoning.[3] Had EPA started with a more appropriate focus on the mobile exploration project as a whole, it may have avoided the pitfalls that led to the irrational and arbitrary decisionmaking addressed below.

A. EPA's proximity analysis is erroneous

EPA's decision that the planned wells are not proximate "was [] informed by" the 1,000 meter separation and "relied on" the guidance from the Wehrum Memo. *See* RTC at 61; SSOB at 15 (addressing only those points in proximity analysis). The issues are thus whether EPA properly considered the 1,000 meter separation requirement of condition 16.1, and whether EPA's reliance on the Wehrum Memo, SSOB, Att. 23, was proper. If neither of these factors properly support EPA's conclusion that the planned

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[3] API recognizes this when it states that "[i]n this circumstance, it makes sense, as the Wehrum Memorandum suggests, to start with the working assumption that an individual surface site is the source...." Brief of *Amicus Curiae* at 8-9 (Amicus Brief). While, as discussed, below AWL disagrees with API's conclusions, API appears to agree that EPA is not *mandated* by law to start its analysis with a focus on an individual surface site.

well sites that make up Shell's exploration project lack proximity, that conclusion is erroneous. These issues are addressed here.

1. Condition 16.1 – 1,000 meter separation

EPA and Shell argue that the air quality rationale for the 1,000 meters does not disqualify EPA from using that separation as an initial fact. EPA Brief at 30-31; Shell Brief at 19-20. In EPA's view the 1,000 meter separation is simply a "relevant fact" and "starting point" for EPA's decision. EPA Brief at 30-31.

Without an analysis providing a permissible justification for the 1,000 meter separation, this separation cannot be relied on to support a determination that separate drill sites farther than 1,000 meters are not proximate. To permit its use undercuts the purpose of not allowing, as EPA states, "NAAQS [to be] a basis for setting a geographic limitation for the proximity determination...." SSOB at 15, n. 13. This is so because evaluating emission impacts in aggregation decisions is not in line with the law requiring the "source" decision to be focused on the common sense notion of a plant. 45 Fed. Reg. 52,694-95; *Alabama Power Co. v. Costle*, 636 F.2d 323, 397 (D.C. Cir. 1979); *In re Shell,* slip. op. at 38. To hold otherwise would allow industry to artificially distance different elements of the same "plant" so as to help avoid the aggregation of pollution sources from their operation.

Consequently, while the 1,000 meter separation may permissibly exist to avoid cumulative air quality impacts as reflected in NAAQS, unless EPA provides an independent and justifiable reason for its relevance to the proximity analysis, EPA simply cannot rely on it in any way in its proximity analysis. EPA did not do so, and thus this factor is simply irrelevant as a basis for EPA's decision. *In re Shell*, slip. op. at 42

(finding that EPA had not provided sufficient rationale to support its reliance on 500 meter separation).

2. The Wehrum Memo and the proximity factor

EPA's defense of its use of the Wehrum Memo is non-responsive to the argument raised by AWL. EPA merely states that its heavy reliance on the Memo was not unreasonable given that it is the only guidance focused on the oil and gas industry. EPA Brief at 33. Nowhere does EPA address the central facts of the Shell exploration project in relation to the Wehrum Memo. Shell states that the Wehrum Memo is "the most relevant" guidance because it is the only one that addresses "the unique circumstances of the oil and gas industry." Shell Brief at 15; *see also id.* at 23-24 (discussion of Wehrum Memo).[4]

As AWL points out, the Shell exploration project involves planned wells that are stepped out from a discovery well to delineate the extent of the discovery. AWL Petition at 27, *quoting* SSOB at 6. The documents petitioners presented in the Supplement to Petitions for Review further demonstrate that Shell's plans tie tightly together the planned wells because, among other things they "delineate geologic areas and drilling targets." Petitioners' Supplement to Petitions for Review Based on New Record Documents (filed

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[4] *Amicus curiae* focus almost entirely on the legitimacy of the Wehrum Memo as a guidance tool. *See* Brief of Amicus Curiae at 2-8. It is AWL's position that the Wehrum Memo addresses situations unlike, and therefore has no direct applicability to, the Shell exploration project. Thus AWL need not reach the issue of whether the Wehrum Memo in general is legitimate guidance. To the extent *amicus* goes beyond defending the Wehrum Memo in general, *id.* at 9-10, like EPA and Shell it does not confront the central facts discussed in this section concerning the distinction between the Shell exploration project and the types of oil and gas activities analyzed in the Memo. Consequently, the *amicus* brief offers no support for EPA's decision on this point.

September 4, 2008) at 4, *quoting* AR HH-4 Att. at 1 (Supplemental Petition). Planned wells thus have a key relationship to each other in terms of space and the information they generate.[5]

The Wehrum Memo analyzes no similar factual situation – coming only so close as discussing production wells and their relationship to downstream plants. SSOB, Att. 23 at 3-4. It includes a mere conclusory statement, not based on any analysis of factual circumstances like those here, that exploration activity "located on a single surface site" can be considered an "individual stationary source." SSOB, Att. 23 at 5. Consequently, whatever the validity or correctness of the Wehrum memo for other aspects of the oil and gas industry, it is not on point for this situation. Indeed, as the Wehrum Memo itself states that source determinations are to be made on a case-by-case basis. *Id.* at 5; *see also id.* at 2 ("the unique geographical attributes of the oil and gas industry necessitate a detailed evaluation of whether the activities are contiguous and adjacent.").

By not explaining how the unrefuted facts of the Shell exploration plan, which are not similar to the production well situation discussed in the Wehrum Memo, *see* AWL Petition for Review at 29-30, align with the guidance in the Wehrum Memo, EPA provides no reasoning on which to judge whether its heavy reliance on that Memo is

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[5] EPA and Shell discount this information as irrelevant, saying that it was presented and EPA looked at it only to make a decision whether to withhold information from the public as confidential business information (CBI). EPA Brief at 35; Shell Brief at 27, note 23. As discussed in detail below, *see infra* section IIB, this response avoids the central issue: that the unrefuted facts underlying the CBI request and approval directly apply and are relevant to the source determination, including the proximity analysis.

justified.[6] Therefore, it is not. *Sierra Club v. EPA*, 346 F.3d 955, 961 (9th Cir. 2003) *opinion amended on denial of reh'g* 352 F.3d 1186 (9th Cir. 2003), *cert. denied* 542 U.S. 919 (2004); *see also In re City of Moscow, Idaho*, 10 E.A.D. 135, 142 (EAB 2001) (rationale for conclusions must be adequately explained and supported in the record"); *In re Shell*, Slip Op. at 41 (citing *In re Dominion Energy Brayton Point, L.L.C.*, NPDES Appeal No. 03-12, slip op. at 133-34 (EAB Feb. 1, 2006), 12 E.A.D. __ (remanding for failure to explain in the record why five days, rather than some other number of days, was selected as a permissible temperature exceedence frequency)).

The bottom line is that "stepped out" planned wells delineating a reservoir are not "collect[ing] distinct exploratory information," EPA Brief at 33, but rather information about the same oil reservoir. They are deliberately sited and placed due to their relationship to each other and the reservoir. EPA's reliance on the Wehrum Memo to come to a contrary conclusion is misplaced. As EPA has no other basis on which to rest its determination that the planned wells are not proximate, its determination is invalid. *In re Shell*, slip. op. at 41 (citing *In re City of Moscow, Idaho*, 10 E.A.D. 135, 142 (EAB 2001); *In re NE Hub Partners*, L.P., 7 E.A.D. 561, 567-68 (EAB 1998)).

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[6] Neither does EPA or Shell respond to AWL's point that Congress itself required that emissions from vessels up to 25 miles from a drill ship be included with the drill ship's emissions, *see* AWL Petition at 26, n. 7, citing 42 U.S.C. 7627(a)(4)(C), despite the potentially great distance between the two. That the ship be included makes sense as its only reason for being is to support the drill operation. The same can be said of planned wells in relation to each other; their only reason for being is to inform Shell's decision whether and how to produce oil from prospect, and no one well can act in isolation to meet this purpose.

B. EPA's interdependence conclusion is erroneous

EPA and Shell argue that there is sufficient support in the record to support EPA's determination that planned well sites are not interdependent. EPA Brief at 34-38; Shell Brief at 26-36. As EPA states, AWL's arguments are rejected because there is not "sufficient operational reliance between locations to support an operational dependence relationship." EPA Brief at 34, *quoting* RTC at 62.

As is more fully discussed below, without explaining why or providing a basis for a new approach, EPA switched its rationale on this issue after the public comment period and its decision is arbitrary for that reason alone. *See infra* section IIC. But even reviewed based on the rationale provided in its final decision, EPA's conclusion is arbitrary. EPA focused on three factors in its final decision on the interdependence determination--whether there is: 1) a "tangible product" produced by one well that is then used by another; 2) "simultaneous or integrated operations" between well sites; and 3) physical connections between drill sites. EPA Brief at 34, citing RTC at 62. EPA found that the planned well sites lacked a tangible product exchange, were not accomplished simultaneously or integrated, and had no physical connection. Id. EPA's determinations on these points are arbitrary or insufficient.

Of the three factors EPA relied on in its decision, the critical factor, and the one on which both EPA and Shell focus in their response, is the evidence of the integrated nature of the planned exploration wells. As first noted above, *see supra* note 5, EPA and Shell sidestep a response to the information presented in North Slope Borough and AWL's supplemental petition. That supplement highlighted further record evidence from Shell of the integrated relationship between planned wells delineating a single prospect:

> Proprietary geologic models and reservoir models are developed for regional interpretation as well as individual area evaluations. New seismic and well data inputs refine these proprietary models that influence lease acquisition strategies, delineate geologic areas and drilling targets, influence resource estimates, reservoir development analyses, and field development plans.

Supplemental Petition at 4, *quoting* Administrative Record Document HH-4, Att. 1. As this evidence discloses, the planned wells do not just share some tangential attributes of a common business plan like nearly any two businesses might; they are the business plan. This is not a generic information sharing situation, but rather one where the combined planned wells make the exploration project possible; without all of the necessary step out planned wells, there simply is no exploration project.[7] The planned wells are therefore "integrated." RTC at 62. One "step out" planned well simply would have no reason to exist without the others, and its location and goals are set based on information from previous step out wells and the prospect as a whole. *See, e.g.*, SSOB at 6, 8; Administrative Record Document HH-4, Att. 1.[8]

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[7] Shell argues that AWL is wrong, and that "[a]t this point, there is no unified production scenario." Shell Brief at 32, n.25. This just confuses the issue with an irrelevancy. The point of the exploration project is to determine whether the prospect can viably be produced and a production strategy developed. *See* Administrative Record Document HH-4, *see also* Administrative Record Document II-1 at 1 ("Shell gathers info from the exploration wells to create a development plan, and also trying to determine if [the prospect is] economic ...[The] [p]urpose of [Shell's] activities [is] to gather info to make assessment"). So, of course there is no production strategy yet. Shell's point is thus wholly irrelevant.

[8] This same "common purpose" point rebuts Shell's argument that there is no "functional" relationship between planned wells such as exists in other situations. *See* Shell Brief at 33-34 & n. 27. Just as these wells share a common purpose they share a common function: delineating an oil prospect so Shell can determine whether and how to exploit it.

EPA and Shell discount the information referenced in the Supplemental Petition as irrelevant, saying that it was presented and EPA looked at it only to make a decision whether to withhold information from the public as confidential business information. EPA Brief at 35; Shell Brief at 27, n.23. Yet, neither EPA nor Shell can dispute the facts presented in the Shell document regarding the tight relationship between planned wells. And EPA is not free to ignore those facts in its decision on interdependence. EPA's confidential business information determination is simply irrelevant to whether EPA rationally applied the law to the unrefuted facts of the Shell exploration project, wherever in the record those facts may reside. *Tenneco Gas v. Federal Energy Regulatory Commission*, 969 F.2d 1187, 1214 (D.C. Cir. 1992) (Agency decision "neglectful of pertinent facts on the record must crumble for want of substantial evidence"); *In re Shell*, slip. op. at 41 (quoting *In Re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 342 (EAB 2002)) (agency must have a rational connection between the facts found and conclusions made).[9]

Similarly, EPA misses the point with its statement in the Response to Comments that "each individual well site can still be drilled regardless of whether it receives information shared from another site." RTC at 62, *quoted in* Shell Brief at 28. The question is not whether Shell *can* drill the well without the information, but rather whether Shell *would* drill the well without that information. The record demonstrates that

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[9] Moreover, nowhere does EPA rebut AWL's points about the insufficiency of support for EPA's reliance for its conclusions on previous delineation wells in the Beaufort Sea. AWL Brief at 28, n.8. This reliance should receive no deference as it is based on an erroneous finding of fact. *In re Shell*, slip. op. at 17, *citing, inter alia,* 40 C.F.R. 124.19(a).

there is no point to doing so. In the end, EPA cannot support its conclusion that planned exploration wells cannot have an integrated purpose.

EPA's reliance on the other two factors fares no better. EPA and Shell do not attempt to defend the analysis from the agency decision indicating that the informational product generated by exploration wells is not a "tangible product" like those produced in other EPA decisions or guidance. Instead, they return to the original EPA analysis and assert that information generated by exploration wells together is not enough to find interdependence. EPA Brief at 34-37; Shell Brief 44-45. As discussed above, however, this conclusion is not supportable. Finally, though Shell emphasizes the lack of physical connection between planned wells as supportive of EPA's decision to treat them as separate sources, Shell Brief at 46-47, notably neither EPA nor Shell argue in their response briefs that this factor alone is sufficient to break any link between planned wells. Moreover, neither addresses the physical connection between planned wells resulting from their connection to the same targeted underground structure.

A revealing manner in which to demonstrate the arbitrary nature of EPA's interdependence analysis is to compare how it treated the relationship between planned, relief and replacement wells – which it found to be one "source" – with its treatment of separate planned wells – which it found to be separate sources. First, with respect to the "tangible product" factor, EPA nowhere claims that planned, relief and replacement wells have a tangible product exchange, or at least none that is different from that between planned wells. See e.g., SSOB at 10-12 (EPA stationary source analysis for planned, relief and replacement wells).

Second, EPA had already discounted the "sequential" rationale as a factor in determining that planned and associated relief and replacement wells are part of the same source. *Compare* SSOB at 10-12 (determination that planned, relief and replacement wells are one source despite sequential nature of activities) *with* RTC at 62 ("the planned drill sites are sequential – there are no simultaneous or integrated operations between the locations as one location does not exist at the same time of operation of another" and thus they are not one source). As logic should have it, the Response to Comment finding from EPA that the sequential nature of the planned wells precludes their treatment as a sole source means that no separate drill sites could ever be the same source, which is in direct contradiction to the Supplemental Statement of Basis finding that planned, relief and replacement wells can be one source despite their sequential nature. EPA's reasoning thus turns logic squarely on its head and makes its differing determinations arbitrary.[10]

As to the integrated component of the analysis, EPA states that planned and replacement wells "share the common purpose of collecting the same discrete information about the same location-specific area of a prospect." EPA brief at 21 *quoting* SSOB at 11. A similar conclusion can be drawn for two or more planned wells--their very purpose is to delineate the same oil reservoir and thus help Shell make a decision whether and how to produce oil from that prospect. SSOB at 6, 8. To make a distinction between a replacement well which targets the same "location-specific area" of a prospect

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[10] Shell argues that associated planned, relief and replacement wells are within one "exploratory operation," while two or more planned wells are not, and thus the sequential nature of the associated planned, relief and replacement wells does not matter in the former circumstance, while it does in the latter. Shell Brief at 45-46. Shell's argument is premised on a finding that EPA's separate source determination is legitimate, which is the focus of this appeal. Its argument is thus circular and holds no weight.

and a planned well which targets a different location in that exact same prospect is to split too fine a hair.

Third, as to a physical connection, EPA appears to have found that a replacement well can be considered to have a physical connection simply because it must be drilled to the same underground structure as the abandoned planned well. SSOB at 11. Yet the same is true for planned wells--they do not physically touch other planned wells, but their purpose and effect is to access the same underground structure to aid in the delineation of the prospect. SSOB at 6, 8.

This disparate analysis between the planned and replacement or relief well situations demonstrates that EPA's determination that separate planned wells are not interdependent is arbitrary. *In re Austin Powder Co.*, 6 E.A.D. 713, 719-20 (EAB 1997) (citing *In re GSX Servs. of S.C., Inc.*, 4 E.A.D. 451, 454 (EAB 1992) (administrative record must reflect the "considered judgment" necessary to the support the permit determination)).

In the end, and at its essence, what EPA is permitting here is a mobile exploration facility that is being used to delineate the boundaries of a reservoir following a wildcat strike. The facts show that the drill ship moves from one location to the next with the same crew, the same equipment, and the same supply and support vessels in the same season. The information generated by the ship in its various locations is used together for the purpose of making decisions about future development and production. It is, in every "common sense" notion, the same "plant." *In Re Shell*, slip. op. at 38. The strained factors and logic that EPA has provided to date has not rationally explained away this core reality.

C. EPA's overall "sole source" rationale is arbitrary

The shift in rationale that EPA makes between the Supplemental Statement of Basis and the Response to Comments creates a tautological maze. This greatly confuses and undercuts the clear reasoning EPA must provide to support its decision. *In re Shell*, slip. op. at 41.

To summarize EPA's path here, in the Supplemental Statement of Basis EPA quoted previous EPA documents stating that interdependence of well sites is the "key factor." SSOB at 15, quoting SSOB Att. 20 at 6. Within this analysis EPA focused on whether separate planned wells were interdependent based on well locations and the information product that would be collected from the wells; concluding that they are not interdependent because of a lack of informational relationship between the planned wells. SSOB at 6, 13-16. EPA's "proximity" analysis in the Supplemental Statement of Basis focused on guidance from the Wehrum Memo and the 1,000 meter separation to support a lack of proximity conclusion, though it finished this analysis with the bald statement that lack of proximity is "particularly the case where, as here, there is no operational interdependence." SSOB at 15.

The public then commented on the SSOB and permit, pointing out that there is a physical relationship between planned wells that seek to delineate a single oil reservoir, and an exchange of information that sits at the heart of well location decisions and final work product goals. *See* AWL Brief at 32-33; Supplemental Petitions at 4 and references therein. Indeed, Shell chooses the well locations precisely because of their

relationship to each other and the reservoir itself. Supplemental Petitions at 4; SSOB at 6; Administrative Record Doc. HH-4, Att. 1.

In its Response to Comments, EPA then discounted its focus on information gathered from exploration activities as the "product" and introduced a fundamentally different analysis than that used in the Supplemental Statement of Basis. It emphasized that some previous EPA source determinations "dealt with manufacturing operations that produced tangible products," and that Shell here had "no tangible product produced by one well and then used by another." RTC at 62. This effectively eliminated EPA's prior emphasis on "information" as the relevant product of the wells. SSOB at 6, 13-16.

EPA also looked to whether the planned wells are sequential, and whether the wells are physically connected. RTC at 61-62, EPA Brief at 26. Because it found that the wells are sequential in nature, and that no physical connection exists between the wells, EPA then concluded that they are not one source. RTC at 61-62.

EPA argues in essence that there was no change in rationale between the Supplemental Statement of Basis and Response to Comments, and that the change in the analysis was simply a practical and permissible result caused by the relative timing of the Supplemental Statement of Basis and Response to Comments. EPA Brief at 23. Shell, on the other hand, argues that there is no limitation on EPA changing its rationale between the Supplemental Statement of Basis and Response to Comments, as the Response to Comments is the final EPA "statement of position." Shell Brief at 37; *see also* Amicus Brief at 11 (shifts in rationale are appropriate).

Its assertions in the briefing notwithstanding, EPA did in fact shift its focus. At first EPA found that the exchange of information is relevant to its analysis, and then later

distanced itself from this reasoning to focus instead on whether there is an exchange of a tangible product between well sites. RTC at 62. Yet it does not explain the basis for this shift, launching instead directly into the new factors. *Id.* This lack of coherent reasoning is the import of the authority cited by AWL. *See In re Austin Powder Co.*, 6 E.A.D. 713, 719-20 (EAB 1997) ("because the Region has given two different reasons for refusing to include action levels in the permit without explaining how these reasons are related (if at all), we can not determine with sufficient certainty the actual basis for the Region's determination"). EPA and Shell's characterization of AWL's argument on this point as focused on whether EPA's moving target was illegal *post hoc* rationale, EPA at 26, Shell at 37, is thus off the mark.[11] EPA's strained and shifting rationale violates the requirement that EPA "describe [in the Statement of Basis] the derivation of the conditions of the draft permit and the reasons for them," 40 C.F.R. 124.7, and reflects arbitrary decisionmaking. *In re Austin Powder Co.*, 6 E.A.D. 713, 719-20 (EAB 1997).

As EPA also acknowledges, "there may be times when a revised permit differs so greatly from the draft version that additional public comment is required," EPA Brief at 27 n.12, *quoting In re Old Dominion Power*, 3 E.A.D. 779, 797-98 (EAB 1992), and notes the relevance of the "logical outgrowth" test in helping make this determination. Id., *citing In re District of Columbia Water and Sewer Authority*, 13 E.A.D. __ (March 19, 2008), slip. op. at 65 and *NRDC v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002).

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[11] Indeed, Shell's reference to *In re Weber #4-8*, 11 E.A.D. 241, 245 (EAB 2003), Shell Brief at 38, supports AWL's general point – the decision maker cannot have "the benefit of the comments" in making its final decision unless the public is able to comment on the salient issues. *Id.* Such was not the case here.

As applied here, the public could not anticipate that EPA would change fundamental factors supporting its decision between the Supplemental Statement of Basis and the Response to Comments such that it should comment on whether the specific "informational" product criteria used by EPA also requires the public to comment on whether there is a "tangible" product. To require the public to make these leaps in logic is not reasonable. Had EPA taken comment on its new analysis, the public, including AWL, could have offered such comments to EPA in an effort to "persuade the agency to modify its" sole source determination. *NRDC v. EPA*, 279 F.3d at 1186;[12] *see also Home Box Office, Inc. v. Federal Communications Commission*, 567 F.2d 9, 35-36 (D.C. Cir. 1977) ("there must be an exchange of views, information, and criticism between interested persons and the agency.") (citations omitted).

III. ESA CONSULTATION

In response to the Board's request for clarity on the status of the Endangered Species Act (ESA) consultation, EPA states that it contacted the Minerals Management Service and Fish and Wildlife Service (FWS), and that such consultation is done. EPA Brief at 11-12; *see also* Shell Brief at 11-12. To support this point EPA references a

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[12] This is also what distinguishes the cases cited by *amicus*: *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637 (1st Cir. 1979), *cert. denied sub nom. Eli Lilly & Co. v. Costle*, 444 U.S. 1096 (1980), and *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973). In *BASF*, the court stated that it "cannot think how the[] comments would have differed fundamentally if they had known what EPA would do." 598 F.2d at 644; *see also International Harvester*, 478 F.2 at 632 (noting that the circumstances of that case did not justify re-opening a comment period). As explained above, the circumstances here could have resulted in significantly different comments on a key issue, perhaps affecting the final decision.

letter from EPA to FWS which includes the statement that EPA got "oral confirmation" from FWS that the Clean Air Act permit is compliant with ESA. *See* EPA Brief, Exhibit 2. In that same letter EPA requests from FWS "written confirmation that EPA's understanding of the ESA section 7 consultation process for this project, including for EPA's issuance of the CAA permit, is accurate." *Id.* No such written confirmation is provided, and thus some ambiguity remains.

IV. CONCLUSION

The record demonstrates that EPA performed mental gymnastics to support its conclusion that the Shell exploration project is actually a series of separate activities, each of which is a minor source of air pollution. EPA's analysis has no logical integrity, however, and cannot support a conclusion that the exploration project should be treated for Clean Air Act purposes as anything but what it is: a single mobile exploratory drilling project.

Respectfully submitted,

Peter Van Tuyn by/DD

Peter Van Tuyn
Bessenyey & Van Tuyn, L.L.C.

Eric Jorgensen
Earthjustice

Attorneys for Petitioners Alaska Wilderness League, Center for Biological Diversity, Natural Resources Defense Council, Northern Alaska Environmental Center, Pacific Environment, and Resisting Environmental Destruction On Indigenous Lands, a project of the Indigenous Environmental Network ("REDOIL")

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply Brief on Petition for Review was sent via first class mail on the 28th of October, 2008 to the following:

Juliane Matthews
Edward Kowalski, Regional Counsel
Office of Regional Counsel
U.S. EPA Region 10
1200 6th Ave.
Seattle, WA 98101

Janis Hastings
Director
Office of Air Quality
U.S. EPA Region 10
1200 6th Ave.
Seattle, WA, 98101

Bill MacClarence, P.E.
10840 Glazanof Drive
Anchorage, AK 99507

Chris Winter
CRAG LAW CENTER
917 SW Oak St.
Portland, OR 97205

Duane Siler
Susan Mathiascheck
Sarah Bordelon
PATTON BOGS, LLP
2550 M St. NW
Washington, DC 20037

Dated this 28th day of October, 2008

Jessica Christy