

SOI Attachment 1



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VIII

999 18th STREET - SUITE 500
DENVER, COLORADO 80202-2466

May 21, 1998

Ref: 8P2-A

Lynn Menlove, Manager
New Source Review Section
Utah Division of Air Quality
P.O. Box 144820
Salt Lake City, UT 84114-4820

Re: Response to Request for Guidance in
Defining Adjacent with Respect to Source
Aggregation

Dear Mr. Menlove:

This is in response to your letter of January 15, 1998, to Mike Owens of my staff, requesting guidance and/or specific recommendations in the matter of Utility Trailer Manufacturing Company. For the purpose of determining if two Utility Trailer facilities should or should not be aggregated into a single source under Clean Air Act Title V and New Source Review permitting programs, you asked what is the specific physical distance associated with the definition of "adjacent." The word "adjacent" is part of the definition of "source" in the Utah SIP regulations, at R307-1-1. The SIP definition follows the Federal definition found in 40 CFR 51.166.

In brief, our answer is that the distance associated with "adjacent" must be considered on a case-by-case basis. This is explained in the preamble to the August 7, 1980 PSD rules, which says "EPA is unable to say precisely at this point how far apart activities must be in order to be treated separately. The Agency can answer that question only through case-by-case determinations." After searching the New Source Review Guidance Notebook, and after querying the other Regions and EPA's Office of Air Quality Planning and Standards, we have found no evidence that any EPA office has ever attempted to indicate a specific distance for "adjacent" on anything other than a case-by-case basis. We could not find any previous EPA determination for any case that is precisely like Utility Trailer, i.e., two facilities under common control, with the same primary 2-digit SIC code, located about a mile apart, both producing very similar products, but claimed by the company to be independent production lines.

Utah SIP regulations do not define "adjacent." The definition in the 1995 edition of Webster's New College Dictionary is: 1. Close to; nearby, or 2. Next to; adjoining. We realize this leaves considerable gray area for interpretation; however, since the term "adjacent" appears in the Utah SIP as part of the definition of "source," any evaluation of what is "adjacent" must relate to the guiding principle of a common sense notion of "source." (The phrase "common

sense notion" appears on page 52695 of the August 7, 1980 PSD preamble, with regard to how to define "source.") Hence, a determination of "adjacent" should include an evaluation of whether the distance between two facilities is sufficiently small that it enables them to operate as a single "source." Below are some types of questions that might be posed in this evaluation, as it pertains to Utility Trailer. Not all the answers to these questions need be positive for two facilities to be considered adjacent.

- Was the location of the new facility chosen primarily because of its proximity to the existing facility, to enable the operation of the two facilities to be integrated? In other words, if the two facilities were sited much further apart, would that significantly affect the degree to which they may be dependent on each other?
- Will materials be routinely transferred between the facilities? Supporting evidence for this could include a physical link or transportation link between the facilities, such as a pipeline, railway, special-purpose or public road, channel or conduit.
- Will managers or other workers frequently shuttle back and forth to be involved actively in both facilities? Besides production line staff, this might include maintenance and repair crews, or security or administrative personnel.
- Will the production process itself be split in any way between the facilities, i.e., will one facility produce an intermediate product that requires further processing at the other facility, with associated air pollutant emissions? For example, will components be assembled at one facility but painted at the other?

One illustration of this type of evaluation involved Great Salt Lake Minerals in Utah, which we wrote to you about on August 8, 1997, in response to your inquiry. (See enclosure #1.) We recommended, as EPA guidance, that you treat the two GSLM facilities as a single source (i.e., "adjacent"), despite the fact that they are a considerable distance apart (21.5 miles). We based that advice on the functional inter-relationship of the facilities, evidenced in part by a dedicated channel between them. We wrote that the lengthy distance between the facilities "is not an overriding factor that would prevent them from being considered a single source."

Another illustration is ESCO Corporation in Portland, Oregon, which operates two metal casting foundries (a "Main Plant" and a "Plant 3"), a couple of blocks apart. All castings produced by foundries at both facilities are coated, packaged and shipped at the "Main Plant". EPA Region 10 wrote to the State of Oregon on August 7, 1997 (see enclosure #2), that the guiding principle in evaluating whether the two facilities are "adjacent" is "the common sense notion of a plant. That is, pollutant emitting activities that comprise or support the primary product or activity of a company or operation must be considered part of the same stationary source." EPA determined that the two ESCO facilities must be considered a single major stationary source, since they function together in that manner, even though the Plant 3 foundry operates independently from the Main Plant foundry.

Another illustration is Anheuser-Busch in Fort Collins, Colorado, which operates a brewery and landfarm about six miles apart. A memo from OAQPS to our Regional Office, dated August 27, 1996 (see enclosure #3), stated that with regard to "contiguous or adjacent," the facilities should be treated as one source, due to their functional inter-relationship (landfarm as an integral part of the brewery operations), evidenced in part by a disposal pipeline between them. The fact that they are a considerable distance apart "does not support a PSD determination that the brewery proper and the landfarm constitute separate sources for PSD purposes."

Another illustration is Acme Steel Company, which operates an integrated steel mill consisting of coke ovens and blast furnaces at a site in Chicago, Illinois, along with basic oxygen furnaces, casting and hot strip mill operations at a site in Riverdale, Illinois, about 3.7 miles away. The blast furnace in Chicago produces hot metal that is transported via commercial rail to the BOF shop in Riverdale for further processing into steel. EPA Region 5 wrote to the State of Illinois on March 13, 1998 (see enclosure #4), that "Although the two sites are separated by Lake Calumet, landfills, I-94, and the Little Calumet River, USEPA considers that the close proximity of the sites, along with the interdependency of the operations and their historical operation as one source, as sufficient reasons to group these two facilities as one."

Therefore, in the matter of Utility Trailer, we recommend you evaluate, using questions such as those we posed above, whether the two facilities (one existing and one proposed for construction) will, in fact, operate independently of each other, as the company has claimed. Although Utility Trailer writes that "The present facility is not capable of conversion to the new trailer manufacturing process," they also write that the existing facility is "an inefficient manufacturing process which has made this facility less cost-competitive." This suggests to us the possibility that the existing facility could become a support facility for the new one. The company should be advised that if the two facilities are later discovered by the State and/or EPA to be actually operating as a single major source, and no Title V or PSD permit applications have been submitted where required by regulation, the company could become subject to State or EPA enforcement action or citizen suit.

Finally, please be aware that if the facilities are treated as two separate sources, no emission netting between them can be allowed, to avoid major source NSR permitting at either facility, in the event of future facility modifications.

We hope this letter will be helpful. It has been written only as guidance, as it remains the State's responsibility to make source aggregation determinations under EPA-approved State programs and regulations. This letter has been reviewed by specialists at OAQPS, by our Office of Regional Counsel, and by Office of General Counsel at EPA Headquarters. We apologize for the delay in getting our response to you.

SOI Attachment 2

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

May 19, 1999

4APT-ARB

Mr. Randy C. Poole
Air Hygienist II
Mecklenburg County Department of Environmental Protection
700 N. Tryon Street, Suite 205
Charlotte, North Carolina 28202-2236

SUBJ: Applicability of Title V Permitting Requirements to Gasoline Bulk Terminals
Owned by Williams Energy Ventures, Inc.

Dear Mr. Poole:

Thank you for your letter of April 15, 1999 requesting an opinion on the applicability of Title V major source operating permit requirements to two bulk gasoline terminals owned by Williams Energy Ventures, Inc. (WEV) in the Paw Creek area of Mecklenburg County. The specific question is whether emissions from the two terminals should be aggregated for Title V applicability purposes. Our determination is that the terminals can be considered as separate sources without aggregation of emissions, subject to certain qualifications.

Background

Under the Title V permit program, a major source is defined in 40 CFR 70.2 as follows:

"Major source means any stationary source (or any group of sources that are located on one or more contiguous or adjacent properties, and are under common control of the same person (or persons under common control)) belonging to a single major industrial grouping and that are described in paragraph (1), (2), or (3) of this definition. For the purposes of defining 'major source,' a stationary source or group of stationary sources shall be considered part of a single industrial grouping if all of the pollutant emitting activities at such source or group of sources on contiguous or adjacent properties belong to the same Major Group (i.e., all have the same two-digit code) as described in the Standard Industrial Classification Manual, 1987."

Paragraph (1) referred to in this definition pertains to major source classification based on potential emissions of hazardous air pollutants; paragraph (2) pertains to major source classification based on

potential emissions of any air pollutant in amounts of 100 tons per year or more; and paragraph (3) pertains to major source classification based on emissions of regulated pollutants in ozone, carbon monoxide, and particulate matter nonattainment areas.

The Environmental Protection Agency (EPA) Region 4 understands that Mecklenburg County Department of Environmental Protection (MCDEP) has determined conclusively that the two WEV terminals are under "common control of the same person" and belong "to a single major industrial grouping." The remaining question is whether they should be considered as "located on one or more contiguous or adjacent properties." In developing our determination, we have taken note of the following information presented in your letter, in the letter from Williams Energy Services attached to your letter, and during telephone calls to you to obtain additional information.

- The two terminals are approximately nine-tenths of a mile apart "by public road." (The quoted phrase is from your April 15, 1999 letter.) We assume that this is the approximate straight-line separation distance as well.
- The only operating relationship between the two terminals currently is that some WEV employees have responsibilities at both terminals and the terminals are served by common delivery pipelines. The two terminals are not connected by pipelines or other utilities that allow the terminals to exchange liquid fuels or utilities such as water and electric power. Therefore, neither terminal is a support facility for the other, and each terminal can be operated independently.
- Other terminals occupy most of the land area between the two WEV terminals.
- If the two WEV terminals were combined as one source, the combination would be a major Title V source for volatile organic compounds but not for hazardous air pollutants.

Further, although not specifically stated in either your letter or the Williams Energy letter, we assume that WEV does not own, lease, or otherwise control the properties between the two terminals.

Regulatory and Policy Guidance

EPA has never specifically defined by regulation an exact separation distance that would cause two facilities to be considered as located on adjacent or contiguous properties. Case-by-case variations preclude a "one size fits all" definition that would be reasonable in every instance. Nevertheless, regulatory and policy guidance exists to help us develop a determination in response to your request. The following discussion summarizes some of the numerous EPA documents that are available as guidance. The ordering of these documents is chronological and not degree of importance. We can provide copies of any or all of these documents at your request. Also, please note that some

of these documents refer to prevention of significant deterioration (PSD) and to nonattainment area determinations and not to Title V determinations specifically. Use of documents not directly related to Title V is appropriate because the Title V definition of major source is an outgrowth of the definitions used for PSD and nonattainment area new source review purposes.

The Williams Energy letter included with your request letter refers to a discussion with a representative of the Georgia Environmental Protection Division (GA EPD) concerning decisions that the agency might make in the future. Since GA EPD has no jurisdiction over terminals in Charlotte, North Carolina, the comments Williams Energy may have received during this discussion with GA EPD are neither persuasive nor relevant.

Summary of documents:

1. Preamble to the August 7, 1980 final PSD regulations.

The preamble language at 45 FR 52695 is often cited as confirmation that "contiguous and adjacent" assessments are case-by-case and that two facilities separated by a distance of 20 miles would be too far apart to treat as one source. Relevant language in the preamble includes the following: "EPA is unable to say precisely at this point how far apart activities must be in order to be treated separately. The Agency can answer that question only through case-by-case determinations."

2. Memo dated June 30, 1981 from EPA Division of Stationary Source Enforcement to EPA Region 5 concerning treatment of two separated facilities as one source. (This is document No. 3.18 in the New Source Review (NSR) Guidance Notebook series.)

The situation addressed in this memo consisted of two General Motors plants separated by a distance of approximately 4,500 feet. One plant made auto bodies that were transported to the other plant by truck for use in final assembly. Additionally, the two plants were the only facilities served by a rail spur for materials delivery. The Division concurred that the two General Motors plants should be considered as one source "Based on the unique set up of these facilities," namely, that they "are approximately one mile apart, have a dedicated railroad line between them and are programmed together to produce one line of automobiles."

3. Letter dated May 18, 1995 from EPA Region 4 to the GA EPD regarding two separated fuel terminals in the context of Title V (part 70) applicability.

The two terminals in question were under common ownership and located approximately one-half mile apart. In addition, diesel fuel and water pipelines linked the two terminals. EPA concluded that the two facilities should be treated as one source based on the following

some similar distance).¹⁶ Once the stationary source is identified, the permitting authority should consider the emissions from all equipment located either temporarily or permanently on the surface site(s) collectively to determine whether the surface site(s) qualifies as a major stationary source for NSR and Title V.^{17,18}

In a great majority of cases, we expect that permitting authorities will find that a single surface site is the most-suitable industrial grouping because it correlates best with the definition of a stationary source. Accordingly, permitting authorities could treat each surface site as a separate stationary source and generally would not need to aggregate activities located on different oil and gas properties (oil and gas lease, mineral fee tract, subsurface unit area, surface fee trace or surface lease tract) or located on the same lease, when the sites are not located in close proximity to each other.

Whether or not a permitting authority should aggregate two or more pollutant-emitting activities into a single major stationary source for purposes of NSR and Title V remains a case-by-case decision considering the factors relevant to the specific circumstances. Nonetheless, today's guidance provides permitting authorities a reasonable analytical approach that simplifies the determination process and assures greater uniformity in permitting decisions. Unless unique factors (such as proximity or interdependence) indicate otherwise, permitting authorities can consider oil and gas exploration and production activity located on a single surface site to be an individual stationary source.

¹⁶ In making major stationary source determinations for this industry, some southern States apply a rule that generally results in separating pollutant-emitting activities located outside a ¼ mile radius.

¹⁷ This approach differs from the Section 112 approach for these industries. The Section 112 approach exempts activities at the well and its associated equipment from the regulations. 64 FR 32610. Congress' based its direction to disaggregate these emission points for purposes of Section 112 on a finding that these emissions points generally have low HAP emissions.¹⁷ 136 Cong.Rec H12848-01. This is not necessarily the case for criteria pollutants. Drilling sites can contribute high levels of CO, NO_x, and SO₂ emissions from internal combustion engines. Accordingly, a potential to impact ambient air quality exists if these pollutant-emitting activities are closely located, and we believe it appropriate to consider these emissions points in defining the major stationary source for the NSR and Title V permitting programs.

¹⁸ Temporary emissions include emissions from a portable stationary source that would be less than two years in duration, unless the Administrator determines that a longer period would be appropriate. 45 FR 52728. Temporary emissions, however, do not include emissions from non-road engines.

SOI Attachment 4

INTRODUCTION

This document sets forth the statement of basis for the terms and conditions of Operating/Construction Permit No. 182TVP01.

NOTE: During the Spring of 2003 House Bill 160 was passed which modified Alaska Statute 46.14 Air Quality Control. One of the modifications was to change terminology in the statute to make it identical to that used in the Federal Clean Air Act. In the following discussion GATHERING CENTER #1 STATIONARY SOURCE IDENTIFICATION this new terminology has been used so that the US EPA clearly understands ADEC's decision. The new terminology used is "stationary source" which replaces "facility" and "emission unit" which replaces "source". For purposes of this issue of aggregation alone, the terms "facility", "source", and "emission unit" have the meaning given by the federal definition and the new state statutory definition.

The remainder of the Permit and Statement of Basis was written before the Spring of 2003 and therefore uses the old terminology for "facility" and "source". The relevant definitions are:

"Facility" means one or more structures, buildings, installations, or properties that are contiguous or adjacent and are owned or operated by the same person or by persons under common control and upon which a source or sources are located....

"Source" means a device, process, activity, or equipment that causes, or could cause, a release of an air contaminant.

GATHERING CENTER #1 STATIONARY SOURCE IDENTIFICATION

Decision

Gathering Center #1 is located within the Prudhoe Bay Unit (PBU) on the North Slope of Alaska. The Department has determined the Gathering Center #1 (GC#1) stationary source is the surface structures with their associated emission units located on the GC#1 production pad and emissions units located on PBU well pads D, E, F, G, Y, and P. This determination applies to both the State's Title I and Title V air quality permitting programs.

Currently, the significant emission units on these pads for Title V purposes are those identified in Table 1 of permit no. 182TVP01. Additional insignificant emission units are located on the GC#1 production pad and the well pads, for instance the drill site manifold and wellhead enclosures are considered insignificant emission units in accordance with state regulation 18 AAC 50.335(s)(93).

Drill rigs and other temporary emission units will periodically operate at the well pads. Operation of such emission units will be considered temporary activities as long as they are not located and operated (continuously or intermittently) at the same well pad for more than 24 consecutive months. The 24-month clock is reset each time these emission units are moved from well pad to well pad, even if the new physical location is at a well pad governed by the same permit as the previous well pad location.

Discussion

In reaching this decision the Department relied on the definition of stationary source and the concept of common sense notion of plant as discussed in the preamble to the Federal PSD regulations, 45 Fed. Reg. 52693.

The following Federal definitions from 40 C.F.R. §51.166(b) have been adopted by the State statute and are relevant to this discussion.

Stationary source means any building, structure, facility, or installation, which emits or may emit a regulated NSR pollutant.

Building, structure, facility, or installation means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control)... Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same *Major Group* (i.e., which have the same two-digit code) as described in the *Standard Industrial classification Manual, 1972*....

Emission unit means any part of a stationary source that emits or would have the potential to emit any regulated NSR pollutant....

Based on these definitions, the pollutant-emitting activities must meet three criteria to be included in the stationary source:

- 1) They must “belong to the same industrial grouping” as described by their SIC code. On the North Slope all the oilfield facilities have the same SIC code (1311 - Crude Petroleum and Natural Gas Production).
- 2) They must be “located on one or more contiguous or adjacent properties”. This is a location based physical proximity requirement, as discussed in the preamble to the Federal PSD regulations, 45 Fed. Reg. 52676.
- 3) They must be “under the control of the same person”. Within the PBU, BP Exploration (Alaska) Inc. (BPXA) is the operator and implements the decisions of the leaseholders via the Unit Operating Agreement.

Since items #1 and #3 above are self-evident no further discussion is needed.

Item #2 is the proximity criterion. To determine if the “property” or “properties” are located in close proximity, the relevant “property” must first be identified. The ADEC has determined that within the North Slope oilfields “property” is considered to be the improved surface areas (pads) because: 1) oil and gas production activities occur over vast areas in which there is limited surface disturbance, 2) land use permits must be obtained from the state for any surface disturbances, 3) the unique permafrost environment limits the extent of any surface disturbances, and 4) the pollutant emitting activities are located on the pads.

The PBU production centers and production wells are located on separate pads that are not contiguous (i.e., not touching). Thus the adjacency (i.e., the nearness or closeness) must be evaluated. To evaluate the adjacency of facilities, ADEC has used the concept of the common

sense notion of a plant to inform proximity. In its analysis, ADEC has developed what is referred to as the "wagon wheel" model based on the production centers (hubs) and well pads (spokes). In this model of the plant, the well pads deliver raw materials (wellhead fluids consisting of crude oil, water, and hydrocarbon gases) to the production center for processing into finished product (sales oil) for delivery and custody transfer at Pump Station #1 of the Alyeska Pipeline Service Co.

The wagon wheel model for determining the stationary source for PSD and Title V applicability is currently used at other operating units on the North Slope such as Lisburne, Endicott, Kuparuk, and Alpine. The physical proximity (miles) varies widely at these sources and ADEC does not propose to establish a fixed value for this parameter. For instance, the longest spoke at Lisburne is drill site DS-L5, which is 6 miles from the production center (hub), at Endicott is drill site SDI, which is 3 miles from the production center (hub), at Kuparuk is drill site 3R, which is 3 miles from the CPF-3 production center (hub), and at Alpine is drill site DS2, which is 3 miles from the production center (hub). Within the Prudhoe Bay Unit, Z-Pad is 9 miles from the GC-2 production center (hub) and for the GC-1 stationary source Y-Pad is 4 miles from the production center (hub).

Which spokes will be attached to which hubs are, of course, determined by the flow of wellhead fluids (raw materials) and sales oil (finished crude). Whether a production well pad is part of a larger stationary source centered at a production center (hub) will be determined on a case-by-case basis taking into consideration site-specific factors such as the common sense notion of a plant, air impact overlaps/airshed, predictable emission impacts on hub, different operating units/control, service contracts with other operating units, ease of permit administration, and other case-specific factors deemed relevant. For instance, for a new unitized development the presumptive maximum radius of the spokes would be based on the original development project. Under the wagon wheel model, the associated infrastructure is considered a separate stationary source, unless co-located on the same pad or primarily associated with a hub or another stationary source.

Rationale for Hub and Spoke Aggregation Model

In the context of the Prudhoe Bay Unit, the relevant units of property are the pads on which the sources are situated, as distinguished from the surrounding tundra. Guidance developed by the State of Texas (Definition of Site, March 2002) for determining stationary sources located within producing oilfields states "For leased properties, 'property' is considered the surface area on which a stationary source has been placed, including any immediate area graded or cleared for stationary sources."

Why consider the production centers (hubs) along with their associated production well pads (spokes) as the basic stationary source or production plant for the PBU?

1) *Proximity.* The primary function of the production centers at the PBU (GC-1, GC-2, GC-3, FS-1, FS-2, FS-3, and Lisburne) is separation and processing of three-phase well fluids (oil, gas, and water) into sales-quality crude oil for delivery to the Trans-Alaska Pipeline System at Pump Station #1. Each production center is capable of performing this function independently of the other production centers. For example, if FS-2 were shutdown for maintenance, FS-1, FS-3, GC-1, GC-2, GC-3, and Lisburne would continue to process oil, gas, and water without adverse impact. Grouping the well pads with their

respective production centers maintains the important role of proximity in aggregation decisions.

2) *Common Sense Notion of Plant.* In the preamble to the PSD regulations of 1980 EPA (45 Fed. Reg. 52693) emphasized the importance of a "common sense" notion of source for the PSD program as follows:

In EPA's view, the December opinion of the court in Alabama Power sets the following boundaries on the definition for PSD purposes of the component terms of "source"; 1) it must carry out reasonably the purposes of PSD, 2) it must approximate a common sense notion of "plant", and 3) it must avoid aggregating pollutant-emitting activities that as a group would not fit within the ordinary meaning of "building," "structure," "facility," or "installation."

Due to the nature of the oil and gas extraction business, facilities must be scattered across the resource area creating duplicate facilities performing identical functions. Well production pads must be dispersed evenly across the unit so that all the leases can be accessed. Likewise, production centers must be scattered since they act as collection points of the raw materials brought to the surface at the well pads. The hub and spoke production model develops naturally from the logistics of the business.

Within this conceptual framework, ADEC determines the plant to be the well production pads that extract the raw materials (wellhead fluids) from the subsurface and deliver them to the factory (production center) for processing into finished product (crude oil for sales) and waste products (water and gas for underground disposal). Wellhead facilities and separation facilities cannot exist without each other and constitute a complete production plant.

3) *Reasonable Permit Administration.* This approach allows ADEC more feasible permit administration with comparable environmental benefits. The benefit of going beyond the reasonably scaled wagon wheel approach for evaluating emission effects on other facilities is not apparent. Finally, previous permitting actions by ADEC at Kuparuk, Lisburne, Endicott, and Alpine support the determined stationary sources using the hub and spoke model. The facilities within the PBU would then be treated the same as these other operating units.

Other Models of Aggregation Discussed

There were two other questions considered to determine the appropriate stationary sources for permitting purposes at the PBU. First, should the entire PBU be the stationary source? Second, should each individual pad with its emitting units be considered a separate stationary source? Both of these potential permitting approaches were evaluated and rejected for reasons discussed below and the wagon wheel approach was accepted as being reasonable decision making.

1) *Prudhoe Bay Unit ≠ Stationary Source.* The PBU is made up of the oil leases that overlie the Prudhoe Bay Permo-Triassic Reservoir and covers roughly 300 square miles. To consider all the facilities located therein as a single stationary source severely stretches the concept of proximity. The ADEC does not believe that the leases and operating units constructed from these leases is the proper focus of a regulatory program

concerned with air emissions. The leases and unit agreement pertain to subsurface development and long-term reservoir management to maximize economic gain for the leaseholders and lessor. If the Prudhoe Bay operating unit were to be determined the relevant facility for aggregation, then there is no logical reason to stop at the boundaries of the PBU since contiguous operating units (i.e. Lisburne, Endicott, Milne, Northstar, and Pt. McIntyre) are also under the common control of BPXA.

Should pipeline connections be used to determine the appropriate stationary source? The ADEC does not believe this is a deciding factor because in the oil and gas industry pipelines connect everything. Pipelines are used throughout the operating unit as the preferred method for transferring fluids between facilities. To only consider the connectivity of operations via pipelines to determine proximity and to not also consider the concept of a common sense notion of a plant would result in one stationary source extending from the North Slope oil fields all the way to the Valdez Marine Terminal.

The complexity of administering (government) and operating (industry) a stationary source as large as the PBU without clear corresponding environmental benefit argues against this approach. Some of the identified problems are:

- a) Netting analyses conducted over such a large stationary source could lead to avoiding all PSD reviews.
- b) De-bottlenecking analyses would be more difficult; judgment calls about how far out from the equipment modification would become more complicated.
- c) Tracking cause and effect of activities within the unit would be difficult; calculation of associated emission effects would become more complicated.
- d) Permit maintenance burden would be greater; both Title I and Title V permits would be in a constant state of revision.
- e) Scope of review and analysis could discourage discrete facility upgrades. If ADEC were required to evaluate all air-related issues across the entire PBU at the same time, agency resources could be overwhelmed resulting in permitting delays.

Finally, there is no precedent for defining such a large stationary source, either the size of the PBU, the size of the contiguous North Slope oil fields operated by BPXA, or the size of all the current and future North Slope facilities and the transportation corridor to the deep water port of Valdez.

2) *Individual Pad ≠ Stationary Source*. Treating each individual pad and the emission units located on it as a stationary source is the current permitting practice for PBU. This practice does not conform to the court decision in the Alabama Power case concerning the definition of source and its component terms for PSD purposes.

- a) *It must carry out reasonably the purposes of PSD*. Permitting individual sources does not adequately serve the purposes of PSD when major projects that contribute to the production process and emissions can be located on well pads

but avoid PSD review. The primary purpose of PSD review being to maintain air quality within the applicable increments.

b) *It must approximate a common sense notion of plant.* The complete production process defining the plant that starts at the wellhead and ends at the sales oil line outlet from the production center is ignored.

c) *It must avoid aggregating pollutant-emitting activities that as a group would not fit within the ordinary meaning of "building", "structure", "facility", or "installation".* Permitting individual pollutant-emitting activities does completely avoid aggregating those activities that do not fit the ordinary meaning of "facility".

Finally, using the wagon wheel approach for determining the appropriate stationary sources at PBU will ensure permitting consistency with the other operating units on the North Slope.

Status of Support Facilities at PBU

The services that support facilities provide (e.g., Seawater Treatment Plant, Grind & Inject, Base Operations Center, Central Power Station, etc.) are spread over the entire PBU (with six hubs) and other operating units such as Kuparuk, Lisburne, and Endicott with no one hub receiving a majority of the support provided. When these services have been co-located on a pad with another stationary source, they have been aggregated as in the case of the Crude Oil Topping Unit with PBOC/MCC and the Seawater Injection Plant West with Gathering Center #1. The purposes the support facilities serve are secondary to the function of the production hubs. In addition, some of the support facilities (Base Operations Center, Central Power Station, and Prudhoe Bay Operations Center/Main Construction Camp) only exist because of the remote location of the North Slope oilfields and are not inherent to oil and gas production. The service infrastructure has different purposes and, therefore, these activities are considered separate stationary sources.

The ADEC does propose combining two of the separate support facilities as part of this review of stationary sources operating at PBU. The ADEC has determined the Central Gas Facility (CGF) and the Central Compressor Plant (CCP) to be a single stationary source (the Gas Plant) for purpose of Title I and Title V permitting for the following reasons:

- 1) Physical proximity - the two facilities are located $\frac{1}{4}$ of a mile from each other.
- 2) Common sense notion of a plant - these two facilities constitute the gas handling plant. The raw material (low pressure high molecular weight gas) is delivered to CGF from the hubs for removal of miscible inject/natural gas liquids and pressurization (to intermediate pressure) for distribution, the vast majority of which is delivered to the Central Compressor Plant for additional pressurization. This final product (high pressure low molecular weight gas) is then distributed to injection wells nearby CCP for ultimate disposal/storage underground.
- 3) These two facilities were originally permitted as a single stationary source but were disaggregated during the late 1980s.

SOI Attachment 5

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)	
BP Exploration (Alaska), Inc.)	
GATHERING CENTER #1)	ORDER RESPONDING TO PETITIONER'S
)	REQUEST THAT THE ADMINISTRATOR
Permit No. 182TVP01)	OBJECT TO ISSUANCE OF A STATE
(Revision 1))	OPERATING PERMIT
Issued by the Alaska Department)	
of Environmental Conservation)	
_____)	

ORDER DENYING PETITION
FOR OBJECTION TO PERMIT

On February 17, 2004, the State of Alaska Department of Environmental Conservation (ADEC) issued Revision 1 to the State operating permit to BP Exploration (Alaska), Inc. - Gathering Center #1 (GC1) at Prudhoe Bay, Alaska (Revision 1 to the GC1 Permit or Revision 1), pursuant to title V of the Clean Air Act (CAA), 42 U.S.C. §§ 7661-7661f, CAA §§ 501-507. On April 14, 2004, the Environmental Protection Agency (EPA) received a petition from Public Employees for Environmental Responsibility on behalf of Bill MacClarence (Petitioner) requesting that EPA object to the issuance of this permit pursuant to section 502(b)(2) of the CAA, the federal implementing regulations, 40 C.F.R. part 70, and the State of Alaska implementing regulations, 18 Alaska Administrative Code (AAC) Ch. 50.

The petition alleges that:

(1) Revision 1 to the GC1 Permit violates title V of the CAA because Revision 1 does not explain the departure from ADEC's March 7, 2003 draft permit and because the provisions of Prevention of Significant Deterioration (PSD), National Emission Standards for Hazardous Air Pollutants (NESHAP), and New Source Performance Standards

(NSPS) are all based on the aggregated impact of air emissions and this permit did not aggregate all facilities within the Prudhoe Bay Unit (PBU);

(2) The pollution consequences of this violation are significant because elevated levels of nitrogen oxide on the North Slope of Alaska present a serious health problem for workers and native communities in the region and have been created by not aggregating facilities within the PBU; and

(3) ADEC and EPA failed to exercise proper regulatory oversight in this matter by issuing the final permit with no public notice or discussion.

The Petitioner has requested that EPA object to the issuance of Revision 1 to the GC1 permit pursuant to section 505(b)(2) of the CAA for the reasons identified above.

Based on a review of available information, including Revision 1 to the GC1 Permit; the statement of basis for Revision 1; the original GC1 Permit and statement of basis; the permit application; and information provided by the Petitioner in his petition, EPA denies the petition.

I. STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the CAA requires each state to develop and submit to EPA an operating permit program to meet the requirements of title V. EPA granted interim approval to the title V operating permit program submitted by the State of Alaska effective December 5, 1996, 61 FR 64463 (December 5, 1996), and full approval effective November 30, 2001, 66 FR 63184 (December 5, 2001). See 40 C.F.R. part 70, appendix A. Major sources of air pollution and other sources covered by title V are required to obtain an operating permit that includes emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the CAA. See CAA §§ 502(a) and 504(a).

The title V operating permit program does not generally impose new substantive air quality control requirements (which are referred to as "applicable requirements"), but does require that permits contain monitoring, recordkeeping, reporting, and other compliance requirements when not adequately required by existing applicable requirements to assure compliance by sources with existing applicable emission control requirements. 57 FR 32250, 32251 (July 21, 1992). One purpose of the title V program is to enable the source, the permitting authority, EPA, and the public to better understand the applicable requirements to which the

source is subject and whether the source is meeting those requirements. Thus, the title V operating permits program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is better assured.

Under section 505(a) of the CAA, permitting authorities are required to submit all proposed title V operating permits to EPA for review. Section 505(b)(1) of the CAA authorizes EPA to object if a permit contains provisions not in compliance with applicable requirements. Section 505(b)(2) of the CAA states that if EPA does not object to a permit, any person may petition the Administrator, within 60 days of the expiration of EPA's 45-day review period, to object to the permit. To justify exercise of an objection by EPA to a title V permit pursuant to section 505(b)(2), a petitioner must demonstrate that the permit is not in compliance with the requirements of the CAA. See 40 C.F.R. § 70.8(c)(1); NYPIRG v. Whitman, 321 F.3d 316, 333 n.11 (2d Cir. 2003).

Petitions must be based "only on objections to the permit that were raised with reasonable specificity during the public comment period...unless the petitioner demonstrates that it was impracticable to raise such objections within such period, or unless the grounds for the objection arose after the public comment period." 40 C.F.R. § 70.8(d); see also CAA § 505(b)(2). A public petition for administrative review does not stay the effectiveness of the permit or its requirements if the permit was issued after the expiration of EPA's 45-day review period and before receipt of the objection. 40 C.F.R. § 70.8(d). If EPA objects to a permit in response to a petition and the permit has been issued, the permitting authority or EPA will modify, terminate, or revoke and reissue such a permit using the procedures in 40 C.F.R. § 70.7(g) for reopening a permit for cause. The permitting authority has 90 days from receipt of EPA's objection letter to propose a determination of termination, modification, or revocation and reissuance, as appropriate, in accordance with EPA's objection. 40 C.F.R. § 70.7(g)(4). If the permitting authority fails to resolve EPA's objection, EPA will terminate, modify, or revoke and reissue the permit after providing at least 30 days' notice to the permittee. 40 C.F.R. § 70.7(g)(5)(i).

II. BACKGROUND

BP Exploration (Alaska), Inc. - Gathering Center #1 (GC1) is an existing oil and gas production facility within the PBU on the North Slope of Alaska. GC1 processes crude oil production fluids from various crude oil accumulations on the North Slope, primarily well pads D, E, F, G, K, Y, and P. Since April 2002, BP Exploration (Alaska), Inc. (BPX) has operated the entire PBU on behalf of the other owners in accordance with a mutual agreement. According to Alaska's Department of Natural Resources, BPX currently has a 26.35% ownership interest in the PBU; the other owners are: ExxonMobil (36.40 %), ConocoPhillips Alaska (36.07%), ChevronTexaco (1.16%), and Forest Oil (0.02%).¹

Three-phase crude oil is extracted from the ground at 38 individual drill sites and pumped to one of six dedicated production centers within the PBU (GC1, GC2, GC3, FC1, FC2, and FC3). At the production centers, the three-phase crude oil is separated into crude oil, produced water, and hydrocarbon gases. The crude oil is distributed to the Trans-Alaska Pipeline for sale; the produced water is pumped into disposal wells or injected back into the production reservoir on the well pads, and the hydrocarbon gases are dispatched to both the central gas facility and central compressor plant for further processing prior to reinjection. Other facilities located within the PBU include a central power station that generates electricity for the entire PBU; seawater treatment and injection plants to enhance oil recovery; a crude oil topping unit that supplies diesel fuel throughout the PBU and greater North Slope; an operations center that includes administrative offices, water and waste-water treatment plants, emergency power generation, health and safety facilities, repair and storage facilities, and dining and recreational facilities for up to 450 camp residents; and a main camp that provides dining, health, recreational, and other facilities for up to 675 camp residents.

ARCO, then the owner/operator of GC1, submitted a title V permit application to ADEC in November 1997. ADEC issued a draft permit for public comment on February 22, 2002, and the Petitioner submitted comments on March 23, 2002. In the initial draft permit, ADEC did not aggregate GC1 with any other facilities in the PBU for purposes of title V or for other CAA programs. ADEC issued a revised draft permit on March 6, 2003, in which ADEC aggregated

¹http://www.dog.dnr.state.ak.us/oil/products/maps/northslope/images/NS_%20Pool_Ownership.pdf

GC1 with the other oil production facilities in the PBU operated by BPX for purposes of determining the applicability of the modification requirements of ADEC's new source review regulations, including the PSD program. The public comment period on the revised draft permit closed on May 7, 2003, and Petitioner did not submit comments during that time.

After responding to comments received on the revised draft CG1 permit, ADEC further revised the draft permit and submitted to EPA a proposed title V permit dated July 2, 2003, which EPA received on July 9, 2003. In that July 2003 proposed permit, ADEC did not aggregate GC1 with any other facilities in the PBU. After discussions with EPA regarding the proposed permit and other title V permits for North Slope operations, ADEC issued the final permit for GC1 on October 20, 2003, which EPA received on October 23, 2003. In the final GC1 Permit, ADEC made revisions to the statement of basis for the GC1 Permit to clarify that ADEC considered the stationary source for purposes of the title V permit to be GC1 and all surface structures with their associated emission units located on the GC1 production pad, as well as well pads D, E, F, G, Y, and P, and to explain its approach to aggregating facilities within the PBU.² However, ADEC did not make any changes to the terms and conditions contained in the July 2003 proposed permit when issuing the October 2003 GC1 Permit, because ADEC determined that emission units on the well pads, if any, were not subject to any emission unit-specific applicable requirements.

In response to an inquiry from the Petitioner, Region 10 advised the Petitioner that, because of changes ADEC made to the statement of basis between the proposed permit sent to EPA on July 9, 2003, and the final permit issued on October 20, 2003, EPA considered the permit issued by ADEC on October 20, 2003, and received by EPA on October 23, 2003, to be the proposed permit for purposes of filing a petition under section 505(b) of the CAA. Region 10 further advised the Petitioner that it would consider the Petitioner's petition to be timely if received by EPA within 105 days (45 days for EPA review plus the 60 day petition period) of EPA's receipt of the final GC1 Permit on October 23, 2003. On February 5, 2004, EPA received

² On August 26, 2005, ADEC again revised the title V permit for GC1 to add well pad K to the GC1 "major source"/"major stationary source" after BPX and ADEC realized that BPX's title V application and the GC1 permit mistakenly omitted well pad K. ADEC stated that there was no need to modify any permit conditions because no significant emission units are located on well pad K. According to ADEC, the only changes to the permit and

Petitioner's request that EPA object to the October 20, 2003 GC1 Permit (February 2004 Petition). The February 2004 Petition alleged that:

- (1) The GC1 Permit violates title V of the CAA because the provisions of PSD, NESHAPS, and NSPS are all based on the aggregated impact of air emissions and this permit did not aggregate all facilities within the PBU;
- (2) The pollution consequences of the violation are significant because elevated levels of nitrogen oxide on the North Slope of Alaska present a serious health problem for workers and native communities in the region and have been created by not aggregating facilities within the PBU; and
- (3) ADEC and EPA failed to exercise proper regulatory oversight in this matter by issuing the final permit with no public notice or discussion.

On December 31, 2003, ADEC forwarded to EPA a proposed Revision 1 to the GC1 Permit for EPA's 45 day review period. The proposed Revision 1 added to the permit itself the definition of the title V source, which was previously only in the statement of basis; added language to the permit and to the statement of basis stating that the permit did not apply to temporary emission units and facilities, such as drill rigs and associated activities and equipment that periodically operates at the well pads covered by the permit; made minor changes to the aggregation discussion in the statement of basis; and made revisions to three permit terms to make them consistent with other permits issued to BPX sources. ADEC stated that it was revising the permit under its informal agency review provisions of 18 AAC 15.185. ADEC issued the final Revision 1 to GC1 Permit on February 17, 2004, and the Petitioner filed the instant petition on April 14, 2004 (April 2004 Petition). The April 2004 Petition stated that, because Revision 1 did not explain the departure from ADEC's March 7, 2003 draft permit for GC1 that proposed to aggregate all facilities within the PBU and did not address the Petitioner's original objections to the October 2003 GC1 final permit, the Petitioner was resubmitting the objections raised in his February 2004 Petition.

statement of basis were the listing of well pad K as within the group of well pads associated with GC1, and an updated website reference in Condition 66 regarding the location of forms

EPA's 45-day review period for Revision 1 ended on February 14, 2004. The 60th day following that date was April 14, 2004. Accordingly, EPA finds that the April Petition was timely filed.³

III. ISSUES RAISED BY THE PETITIONER

A. Aggregation of Oil and Gas Facilities in the PBU

The Petitioner alleges that Revision 1 violates title V because, as explained in his comments on the initial draft permit, the permit did not aggregate all facilities within the PBU. The Petitioner argues this failure is important because the provisions of PSD, NESHAP, and NSPS are all based on the aggregated impact of air emissions at the source. February 2004 Petition, p. 2 (incorporated by reference in the April 2004 Petition). According to the Petitioner, the analysis ADEC included with the draft permit ADEC proposed on March 7, 2003, which called for the aggregation of all facilities in the BPU, complies with federal requirements for aggregation and is based on EPA directives, whereas the permit decisions referenced by ADEC in the final permit are at variance with EPA guidance on aggregation. February 2004 Petition, p. 2 (incorporated by reference in the April 2004 Petition). In his comments on the initial February 2002 draft permit during the State public comment process, which Petitioner refers to in the February 2004 Petition, the Petitioner stated that all of the facilities within the PBU are under common control, are interdependent, and share the same SIC code and pointed to language from the Statement of Basis for the draft February 22, 2002 permit stating that GC1 processes fluids received from other well pads and other production centers within the PBU. Thus, the Petitioner asserts, "Gathering Center 1 should not be identified as the 'facility,' but rather, as a unit of the Prudhoe Bay Facility." E-Mail from Bill MacClarence to John Kuterbach and Kathy Stringham, dated March 23, 2002.

After consideration of all available information, EPA concludes that the Petitioner has failed to provide adequate information to support his claim that the entire PBU should be

³ In EPA's April 23, 2004 letter to Petitioner acknowledging receipt of the April 2004 Petition, EPA stated that it did not intend to take further action on the February 2004 Petition, since the April 2004 Petition resubmitted, in full, the February 2004 Petition.

aggregated and has also failed to demonstrate that the failure to aggregate all facilities within the PBU has led to a deficiency in the content of the permit. As discussed above, ADEC initially took public comment on a draft permit which did not aggregate GC1 with any other facilities within the PBU and then took public comment on a draft permit that aggregated GC1 with most other facilities within the PBU for PSD purposes. In issuing the final permit in October 2003 and Revision 1 in February 2004, ADEC aggregated GC1 with its associated well pads, but not with any other facilities within the PBU. Statement of Basis, p. 2; Revision 1 Statement of Basis, p. 2. ADEC provided a detailed explanation of its aggregation decision in the statement of basis for the final permit for GC1 issued in October 2003, as well as in the statement of basis for Revision 1 issued in February 2004. ADEC discussed in great detail why it decided, based on the applicable statutes, regulations, and EPA guidance and the specific facts before ADEC, that it was not appropriate to aggregate all facilities within the entire PBU.

The April 2004 Petition, as well as the February 2004 Petition and Petitioner's March 2002 comments on the February 2002 initial draft permit, make only generalized statements that all facilities in the PBU must be aggregated and do not provide adequate references, legal analysis, or evidence in support of these general assertions. In arguing that such aggregation is necessary, the February and April 2004 Petitions generally point to the Statement of Basis provided in support of the March 2003 revised draft permit, but Petitioner does not provide any argument as to why ADEC's decision not to aggregate, which is described in great detail in the Statement of Basis for the final Revision 1 permit, is unreasonable. Moreover, neither Petition identifies any flaw under the Clean Air Act in the Revision 1 permit that resulted from the allegedly deficient decision not to aggregate all facilities in the PBU.

As discussed above, Section 502(b)(2) of the CAA places the burden on the petitioner to "demonstrate[] to the Administrator that the permit is not in compliance" with the applicable requirements of the CAA or the requirements of part 70. See also 40 C.F.R. § 70.8(c)(1); *NYPIRG*, 321 F.3d at 333 n.11. I find that the general allegations of the Petitioner in the April 2004 Petition, which incorporates the February 2004 Petition and his March 2002 comments, fail to demonstrate a basis for Petitioner's claim that Revision 1 to the GC1 Permit violates the CAA, because the permit fails to aggregate all facilities within the PBU for purposes of PSD, NESHAPS, and NSPS. Therefore, EPA denies the Petition on this issue. See Tesoro Refining

and Marketing Co., Petition No. IX-2004-6, at 11 (March 15, 2005) (denying title V petition where petitioner failed to substantiate its “generalized contention” that the permit was flawed and the permit’s statement of basis provided an explanation of the allegedly flawed permit requirement).

B. Pollution Consequences of Not Aggregating All Facilities Within the PBU

The Petitioner asserts that the pollution consequences of not aggregating all facilities within the PBU are significant because elevated levels of nitrogen oxide and other pollutants on the North Slope of Alaska present a serious health problem for workers and native communities in the region and have been created by not aggregating facilities within the PBU. February 2004 Petition, pp. 2-3 (incorporated by reference in the April 2004 Petition).

Petitioner’s second claim is in essence an extension of the first issue raised by the Petitioner: that the Clean Air Act requires aggregation of all facilities within the PBU. As discussed above, Petitioner has failed to provide adequate information to support his claim that the entire PBU should be aggregated and has also failed to demonstrate that failure to aggregate all facilities within the PBU has led to a deficiency in the content of the permit, i.e. that a CAA applicable requirement is missing from the Revision 1 permit.

Moreover, title V does not authorize a permitting authority to impose substantive new requirements on a permittee, see 40 C.F.R. § 70.1(b), and Petitioner again fails to provide support for his claim that the alleged pollution consequences arising from ADEC’s failure to aggregate all facilities within the PBU are significant and result in a permit that is not in compliance with the requirements of the CAA. Therefore, to the extent that Petitioner’s pollution consequences allegation could be read to raise an issue separate and apart from his first claim, EPA denies the Petition on this issue. See generally Shintech, Inc., Permit Nos. 2466-VO, 2467-VO, 2468-VO (Sept. 10, 1997) (denying petitioners’ claims with regard to various alleged permit deficiencies, including those resulting in negative health consequences, because

petitioners had failed to provide specific information demonstrating how the permits' provisions did not comply with the Clean Air Act).⁴

C. Alleged Lack of Public Notice or Discussion

The Petitioner alleges that the proposed permit issued on July 3, 2003,⁵ was issued without public notice and with no public discussion of the pollution consequences of the permit or the decision not to aggregate all facilities within the PBU. The Petitioner contends that ADEC's decision not to aggregate all facilities within the PBU and EPA's acquiescence in that decision occurred behind closed doors in consultation with the oil and gas industry. The Petitioner further asserts that EPA reversed its position on this permit due to aggressive lobbying of the Alaska oil and gas industry, because an August 14, 2003, letter from EPA to ADEC expressed reservations about ADEC's decision not to aggregate all facilities within the PBU. The Petitioner concludes that proper regulatory oversight was lost because EPA did not object to issuance of the permit. February 2004 Petition, pp. 3-4 (incorporated by reference in the April 2004 Petition).

At the outset, it is important to note that the procedural concerns raised by the Petitioner in his petition relate to the process of issuing the initial GC1 Permit on October 23, 2003, and not to the issuance of Revision 1 of the GC1 Permit on February 17, 2004. As discussed above, ADEC issued an initial draft permit for public comment in February 2002 in which ADEC proposed to consider GC1 as a separate title V and PSD source and not to aggregate GC1 with any other facilities in the PBU. In response to public comment on the initial draft permit, including those made by Petitioner, ADEC issued for public comment a revised draft permit in March 2003 in which ADEC proposed to aggregate GC1 with essentially all facilities within the PBU. After considering public comment on the second draft permit, including comments from the permit applicant arguing that aggregation of all facilities within the PBU was inconsistent with the Clean Air Act as well as impractical, ADEC submitted a proposed title V permit to EPA

⁴ EPA also notes that the North Slope of Alaska is currently designated attainment with the National Ambient Air Quality Standards (NAAQS) for all criteria pollutants, including nitrogen dioxide.

⁵ The petition states that the proposed permit was issued on July 3, 2002. The proposed permit was in fact issued on July 3, 2003 and received by EPA on July 9, 2003

for review in July 2003 in which ADEC aggregated GC1 with well pads D, E, F, G, Y, and P, but not with any other facilities in the PBU.

Thereafter, in response to further discussions with EPA, ADEC issued a final permit for GC1 on October 20, 2003, which EPA received on October 23, 2003. In the final GC1 Permit, ADEC made revisions to the Statement of Basis for the GC1 Permit to clarify that ADEC considered the stationary source for purposes of title V and PSD to be GC1 and all surface structures with their associated emission units located on the GC1 production pad, as well as well pads D, E, F, G, Y, and P, and to explain its approach to aggregating facilities within the PBU. However, ADEC did not make any changes to the terms and conditions contained in the July 2003 proposed permit when issuing the October 2003 GC1 Permit, because ADEC determined that emission units on the well pads, if any, were not subject to any emission unit-specific applicable requirements.

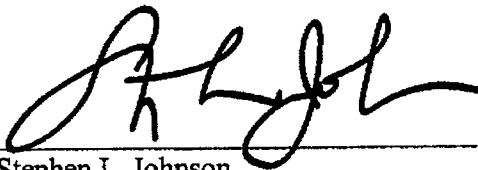
EPA believes that, in issuing the final GC1 Permit in October 2003, ADEC complied with the public notice and comment requirements of title V and ADEC's title V regulations. Part 70 requires that issuance of a title V permit be subject to adequate procedures for public notice, including offering an opportunity for public comments and a hearing on the draft permit. ADEC's approved title V program requires public notice and a 30 day public comment period on draft permits as do the new title V regulations recently adopted by Alaska. See 18 AAC 50.340(e)(2000); 18 AAC 50.040(2005); 18 AAC 50.326(k)(2005). The Alaska Supreme Court has held that a final agency decision subject to public notice and comment requirements can vary from the original proposal if the subject matter remains the same and the public has been reasonably notified that the proposed action might affect its interests. Trustees for Alaska v. State Department of Natural Resources, 795 P.2d 805, 808 (Alaska 1990). The court specifically noted that Alaska law on this point is similar to the approach followed by federal courts in reviewing the actions of federal agencies, which is referred to as the "logical outgrowth" test. The question under the "logical outgrowth" test is whether the final action is in character with the original proposal and a logical outgrowth of the notice and comments. Environmental Defense Center, Inc. v. U.S. E.P.A., 344 F.3d 832, 837 (9th Cir. 2003); Hodge v. Dalton, 107 F.3d 705, 712 (9th Cir. 1997). Accordingly, a new opportunity for public comment is not generated every time the agency reacts to public comments that it receives. Id.

In this case, ADEC provided two opportunities for public comment on two different versions of the permit: one version considering GC1 a source in and of itself and another version aggregating GC1 with essentially all other facilities within the PBU. In the end, the final permit issued by ADEC fell between the two alternative proposals: the final permit aggregated GC1 with well pads D, E, F, G, Y, and P, but not with any other facilities within the PBU. During both opportunities for public comment, the issue of how GC1 should be aggregated under the various CAA programs was clearly an issue ripe for comment. In fact, ADEC considered all public comments it received regarding aggregation and, in issuing the final permit, explained why the final permit did not aggregate all facilities within the PBU into a single facility. Because the aggregation decision contained in the October 2003 GC1 Permit was a logical outgrowth of the prior draft permits and related public comments, EPA believes that ADEC satisfied the public notice and comment requirements of title V and ADEC's approved title V program in issuing the final GC1 Permit in October 2003. Accordingly, EPA denies the Petition on this issue.⁶

III. CONCLUSION

For the reasons set forth above and pursuant to section 505(b)(2) of the Clean Air Act, EPA is denying the Petitioner's petition requesting the Administrator to object to the issuance of Revision 1 of the GC1 Permit.

APR 20 2007
Dated



Stephen L. Johnson
Administrator

⁶ Furthermore, EPA disagrees that it altered its position on aggregation on the North Slope because of aggressive lobbying by the Alaska oil and gas industry or failed to exercise proper regulatory oversight because it did not object to the October 2003 GC1 Permit. EPA did meet with the applicant, at the applicant's request, on two occasions to discuss aggregation of facilities within the PBU. Notes of the meetings are in the record for this petition response. On each occasion, EPA advised the applicant that because of the procedural posture of the permitting decisions and pending title V petitions raising aggregation issues, EPA would listen to the applicant's concerns and would take notes of the meeting, but EPA could not respond to the merits of the applicant's presentation as it related to aggregation of sources.

SOI Attachment 6

1/25/95

MEMORANDUM

SUBJECT: Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act (Act)

FROM: John S. Seitz, Director
Office of Air Quality Planning and Standards (MD-10)

Robert I. Van Heuvelen, Director
Office of Regulatory Enforcement (2241)

TO: Director, Air, Pesticides and Toxics
Management Division, Regions I and IV
Director, Air and Waste Management Division,
Region II
Director, Air, Radiation and Toxics Division,
Region III
Director, Air and Radiation Division,
Region V
Director, Air, Pesticides and Toxics Division,
Region VI
Director, Air and Toxics Division,
Regions VII, VIII, IX, and X

Many stationary source requirements of the Act apply only to "major" sources. Major sources are those sources whose emissions of air pollutants exceed threshold emissions levels specified in the Act. For instance, section 112 requirements such as MACT and section 112(g) and title V operating permit requirements largely apply only to sources with emissions that exceed specified levels and are thus major. To determine whether a source is major, the Act focuses not only on a source's actual emissions, but also on its potential emissions. Thus, a source that has maintained actual emissions at levels below the major source threshold could still be subject to major source requirements if it has the potential to emit major amounts of air pollutants. However, in situations where unrestricted operation of a source would result in a potential to emit above major-source levels, such sources may legally avoid program requirements by taking federally-

enforceable permit conditions which limit emissions to levels below the applicable major source threshold. Federally-enforceable permit conditions, if violated, are subject to enforcement by the Environmental Protection Agency (EPA) or by citizens in addition to the State or Local agency.

As the deadlines for complying with MACT standards and title V operating permits approach, industry and State and local air pollution agencies have become increasingly focused on the need to adopt and implement federally-enforceable mechanisms to limit emissions from sources that desire to limit potential emissions to below major source levels. In fact, there are numerous options available which can be tailored by the States to provide such sources with simple and effective ways to qualify as minor sources. Because there appears to be some confusion and questions regarding how potential to emit limits may be established, EPA has decided to: (1) outline the available approaches to establishing potential to emit limitations, (2) describe developments related to the implementation of these various approaches, and (3) implement a transition policy that will allow certain sources to be treated as minor for a period of time sufficient for these sources to obtain a federally-enforceable limit.

Federal enforceability is an essential element of establishing limitations on a source's potential to emit. Federal enforceability ensures the conditions placed on emissions to limit a source's potential to emit are enforceable by EPA and citizens as a legal and practical matter, thereby providing the public with credible assurances that otherwise major sources are not avoiding applicable requirements of the Act. In order to ensure compliance with the Act, any approaches developed to allow sources to avoid the major source requirements must be supported by the Federal authorities granted to citizens and EPA. In addition, Federal enforceability provides source owners and operators with assurances that limitations they have obtained from a State or local agency will be recognized by EPA.

The concept of federal enforceability incorporates two separate fundamental elements that must be present in all limitations on a source's potential to emit. First, EPA must have a direct right to enforce restrictions and limitations imposed on a source to limit its exposure to Act programs. This requirement is based both on EPA's general interest in having the power to enforce "all relevant features of SIP's that are necessary for attainment and maintenance of NAAQS and PSD increments" (see 54 FR 27275, citing 48 FR 38748, August 25, 1983) as well as the specific goal of using national enforcement to ensure that the requirements of the Act are uniformly

implemented throughout the nation (see 54 FR 27277). Second, limitations must be enforceable as a practical matter.

It is important to recognize that there are shared responsibilities on the part of EPA, State, and local agencies, and on source owners to create and implement approaches to creating acceptable limitations on potential emissions. The lead responsibility for developing limitations on potential emissions rests primarily with source owners and State and local agencies. At the same time, EPA must work together with interested parties, including industry and States to ensure that clear guidance is established and that timely Federal input, including Federal approval actions, is provided where appropriate. The guidance in this memorandum is aimed towards continuing and improving this partnership.

Available Approaches for Creating Federally-enforceable Limitations on the Potential to Emit

There is no single "one size fits all" mechanism that would be appropriate for creating federally-enforceable limitations on potential emissions for all sources in all situations. The spectrum of available mechanisms should, however, ensure that State and local agencies can create federally-enforceable limitations without undue administrative burden to sources or the agency. With this in mind, EPA views the following types of programs, if submitted to and approved by EPA, as available to agencies seeking to establish federally-enforceable potential to emit limits:¹

1. Federally-enforceable State operating permit programs (FESOPs) (non-title V). For complex sources with numerous and varying emission points, case-by-case permitting is generally needed for the establishment of limitations on the source's potential to emit. Such case-by-case permitting is often accomplished through a non-title V federally-enforceable State operating permit program. This type of permit program, and its basic elements, are described in guidance published in the Federal Register on June 28, 1989 (54 FR 27274). In short, the program must: (a) be approved into the SIP, (b) impose legal obligations to conform to the permit limitations, (c) provide for limits that are enforceable as a practical matter, (d) be issued in a process that provides for review and an opportunity for

¹This is not an exhaustive list of considerations affecting potential to emit. Other federally-enforceable limits can be used, for example, source-specific SIP revisions. For brevity, we have included those which have the widest applicability.

comment by the public and by EPA, and (e) ensure that there is no relaxation of otherwise applicable Federal requirements. The EPA believes that these type of programs can be used for both criteria pollutants and hazardous air pollutants, as described in the memorandum, "Approaches to Creating Federally-Enforceable Emissions Limits," November 3, 1993. This memorandum (referred to below as the November 1993 memorandum) is included for your information as Attachment 1. There are a number of important clarifications with respect to hazardous air pollutants subsequent to the November 1993 memorandum which are discussed below (see section entitled "Limitations on Hazardous Air Pollutants").

2. Limitations established by rules. For less complex plant sites, and for source categories involving relatively few operations that are relatively similar in nature, case-by-case permitting may not be the most administratively efficient approach to establishing federally-enforceable restrictions. One approach that has been used is to establish a general rule which creates federally-enforceable restrictions at one time for many sources (these rules have been referred to as "exclusionary" rules and by some permitting agencies as "prohibitory" rules). A specific suggested approach for volatile organic compounds (VOC) limits by rule was described in EPA's memorandum dated October 15, 1993 entitled "Guidance for State Rules for Optional Federally-Enforceable Emissions Limits Based Upon Volatile Organic Compound (VOC) Use." An example of such an exclusionary rule is a model rule developed for use in California. (The California model rule is attached, along with a discussion of its applicability to other situations--see Attachment 2). Exclusionary rules are included in a State's SIP and generally become effective upon approval by EPA.

3. General permits. A concept similar to the exclusionary rule is the establishment of a general permit for a given source type. A general permit is a single permit that establishes terms and conditions that must be complied with by all sources subject to that permit. The establishment of a general permit provides for conditions limiting potential to emit in a one-time permitting process, and thus avoids the need to issue separate permits for each source within the covered source type or category. Although this concept is generally thought of as an element of a title V permit program, there is no reason that a State or local agency could not submit a general permit program as a SIP submittal aimed at creating potential to emit limits for groups of sources. Additionally, general permits can be issued under the auspices of a SIP-approved FESOP. The advantage of a general permit, when compared to an exclusionary rule, is that upon approval by EPA of the State's permit program, a

general permit could be written for one or more additional source types without triggering the need for the formal SIP revision process.

4. Construction permits. Another type of case-by-case permit is a construction permit. These permits generally cover new and modified sources, and States have developed such permit programs as an element of their SIP's. As described in the November 1993 memorandum, these State major and minor new source review (NSR) construction permits can provide for federally-enforceable limitations on a source's potential to emit. Further discussion of the use of minor source NSR programs is contained in EPA's letter to Jason Grumet, NESCAUM, dated November 2, 1994, which is contained in Attachment 3. As noted in this letter, the usefulness of minor NSR programs for the creation of potential to emit limitations can vary from State to State, and is somewhat dependent on the scope of a State's program.

5. Title V permits. Operating permits issued under the Federal title V operating permits program can, in some cases, provide a convenient and readily available mechanism to create federally-enforceable limits. Although the applicability date for part 70 permit programs is generally the driving force for most of the current concerns with respect to potential to emit, there are other programs, such as the section 112 air toxics program, for which title V permits may themselves be a useful mechanism for creating potential to emit limits. For example, many sources will be considered to be major by virtue of combustion emissions of nitrogen oxides or sulfur dioxide, and will be required to obtain part 70 permits. Such permits could be used to establish federally-enforceable limitations that could ensure that the source is not considered a major source of hazardous air pollutants.

Practicable Enforceability

If limitations--whether imposed by SIP rules or through individual or general permits--are incomplete or vague or unsupported by appropriate compliance records, enforcement by the States, citizens and EPA would not be effective. Consequently, in all cases, limitations and restrictions must be of sufficient quality and quantity to ensure accountability (see 54 FR 27283).

The EPA has issued several guidance documents explaining the requirements of practicable enforceability (e.g., "Guidance on Limiting Potential to Emit in New Source Permitting," June 13, 1989; memorandum from John Rasnic entitled "Policy Determination on Limiting Potential to Emit for Koch Refining Company's Clean Fuels Project," March 13, 1992). In general, practicable

enforceability for a source-specific permit means that the permit's provisions must specify: (1) A technically-accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation (hourly, daily, monthly, and annual limits such as rolling annual limits); and (3) the method to determine compliance including appropriate monitoring, recordkeeping, and reporting. For rules and general permits that apply to categories of sources, practicable enforceability additionally requires that the provisions: (1) identify the types or categories of sources that are covered by the rule; (2) where coverage is optional, provide for notice to the permitting authority of the source's election to be covered by the rule; and (3) specify the enforcement consequences relevant to the rule. More specific guidance on these enforceability principles as they apply to rules and general permits is provided in Attachment 4.

Limitations on Hazardous Air Pollutants (HAP)

There are a number of important points to recognize with respect to the ability of existing State and local programs to create limitations for the 189 HAP listed in (or pursuant to) section 112(b) of the Act, consistent with the definitions of "potential to emit" and "federally-enforceable" in 40 CFR 63.2 (promulgated March 16, 1994, 59 FR 12408 in the part 63 General Provisions). The EPA believes that most State and local programs should have broad capabilities to handle the great majority of situations for which a potential to emit limitation on HAP is needed.

First, it is useful to note that the definition of potential to emit for the Federal air toxics program (see the subpart A "general provisions," section 63.2) considers, for purposes of controlling HAP emissions, federally-enforceable limitations on criteria pollutant emissions if "the effect such limitations would have on "[hazardous air pollutant] . . . emissions" is federally-enforceable (emphasis added). There are many examples of such criteria pollutant emission limits that are present in federally-enforceable State and local permits and rules. Examples would include a limitation constraining an operation to one (time limit specified) shift per day or limitations that effectively limit operations to 2000 hours per year. Other examples would include limitations on the amount of material used, for example a permit limitation constraining an operation to using no more than 100 gallons of paint per month. Additionally, federally-enforceable permit terms that, for example, required an incinerator to be operated and maintained at no less than 1600 degrees would have an obvious "effect" on the HAP present in the inlet stream.

Another federally-enforceable way criteria pollutant limitations affect HAP can be described as a "nested" HAP limit within a permit containing conditions limiting criteria pollutants. For example, the particular VOC's within a given operation may include toluene and xylene, which are also HAP. If the VOC-limiting permit has established limitations on the amount of toluene and xylene used as the means to reduce VOC, those limitations would have an obvious "effect" on HAP as well.

In cases as described above, the "effect" of criteria pollutant limits will be straightforward. In other cases, information may be needed on the nature of the HAP stream present. For example, a limit on VOC that ensured total VOC's of 20 tons per year may not ensure that each HAP present is less than 10 tons per year without further investigation. While the EPA intends to develop further technical guidance on situations for which additional permit terms and conditions may be needed to ensure that the "effect" is enforceable as a practical matter, the EPA intends to rely on State and local agencies to employ care in drafting enforceable requirements which recognize obvious environmental and health concerns.

There are, of course, a few important pollutants which are HAP but are not criteria pollutants. Example of these would include methylene chloride and other pollutants which are considered nonreactive and therefore exempt from coverage as VOC's. Especially in cases where such pollutants are the only pollutants present, criteria pollutant emission limitations may not be sufficient to limit HAP. For such cases, the State or local agency will need to seek program approval under section 112(1) of the Act.

Section 112(1) provides a clear mechanism for approval of State and local air toxics programs for purposes of establishing HAP-specific PTE limits. The EPA intends, where appropriate, that in approving permitting programs into the SIP, to add appropriate language citing approval pursuant to section 112(1) as well. An example illustrating section 112(1) approval is the approval of the State of Ohio's program for limiting potential to emit (see 59 FR 53587, October 25, 1994). In this notice, EPA granted approval under section 112(1) for hazardous air pollutants aspects of a State program for limiting potential to emit. Such language can be added to any federally-enforceable State operating permit program, exclusionary rule, or NSR program update SIP approval notice so long as the State or local program has the authority to regulate HAP and meets other section 112(1) approval criteria. Transition issues related to such section 112(1) approvals are discussed below.

Determination of Maximum Capacity

While EPA and States have been calculating potential to emit for a number of years, EPA believes that it is important at this time to provide some clarification on what is meant in the definition of potential to emit by the "maximum capacity of a stationary source to emit under its physical and operational design." Clearly, there are sources for which inherent physical limitations for the operation restrict the potential emissions of individual emission units. Where such inherent limitations can be documented by a source and confirmed by the permitting agency, EPA believes that States have the authority to make such judgements and factor them into estimates of a stationary source's potential to emit.

The EPA believes that the most straightforward examples of such inherent limitations is for single-emission unit type operations. For example, EPA does not believe that the "maximum capacity" language requires that owner of a paint spray booth at a small auto body shop must assume that (even if the source could be in operation year-round) spray equipment is operated 8760 hours per year in cases where there are inherent physical limitations on the number of cars that can be painted within any given period of time. For larger sources involving multiple emissions units and complex operations, EPA believes it can be more problematic to identify the inherent limitations that may exist.

The EPA intends, within its resource constraints, to issue technical assistance in this area by providing information on the type of operational limits that may be considered acceptable to limit the potential to emit for certain individual small source categories.

Transition Guidance for Section 112 and Title V Applicability

Most, if not all, States have recognized the need to develop options for limiting the potential emissions of sources and are moving forward with one or more of the strategies described in the preceding sections in conjunction with the submission and implementation of their part 70 permit programs. However, EPA is aware of the concern of States and sources that title V or section 112 implementation will move ahead of the development and implementation of these options, leaving sources with actual emissions clearly below the major source thresholds potentially subject to part 70 and other major source requirements. Gaps could theoretically occur during the time period it takes for a State program to be designed and administratively adopted by the State, approved into the SIP by EPA, and implemented as needed to

cover individual sources.

The EPA is committed to aiding all States in developing and implementing adequate, streamlined, and cost-effective vehicles for creating federally-enforceable limits on a source's potential emissions by the time that section 112 or title V requirements become effective. To help bridge any gaps, EPA will expedite its reviews of State exclusionary rules and operating permit rules by, among other things, coordinating the approval of these rules with the approval of the State's part 70 program and by using expeditious approval approaches such as "direct final" Federal Register notices to ensure that approval of these programs does not lag behind approval of the part 70 program.

In addition, in such approval notices EPA will affirm any limits established under the State's program since its adoption by the State but prior to Federal approval if such limits were established in accordance with the procedures and requirements of the approved program. An example of language affirming such limits was recently used in approving an Illinois SIP revision (see 57 FR 59931, included as Attachment 5).

The EPA remains concerned that even with expedited approvals and other strategies, sources may face gaps in the ability to acquire federally-enforceable potential to emit limits due to delays in State adoption or EPA approval of programs or in their implementation. In order to ensure that such gaps do not create adverse consequences for States or for sources, EPA is announcing a transition policy for a period up to two years from the date of this memorandum. The EPA intends to make this transition policy available at the discretion of the State or local agency to the extent there are sources which the State believes can benefit from such a transition policy. The transition period will extend from now until the gaps in program implementation are filled, but no later than January 1997. Today's guidance, which EPA intends to codify through a notice and comment rulemaking, provides States discretion to use the following options for satisfying potential to emit requirements during this transition period.

1. Sources maintaining emissions below 50 percent of all applicable major source requirements. For sources that typically and consistently maintain emissions significantly below major source levels, relatively few benefits would be gained by making such sources subject to major source requirements under the Act. For this reason, many States are developing exclusionary rules and general permits to create simple, streamlined means to ensure that these sources are not considered major sources. To ease the burden on States' implementation of title V, and to ensure that delays in EPA's approval of these types of programs will not

cause an administrative burden on the States, EPA is providing a 2-year transition period for sources that maintain their actual emissions, for every consecutive 12-month period (beginning with the 12 months immediately preceding the date of this memorandum), at levels that do not exceed 50 percent of any and all of the major stationary source thresholds applicable to that source. A source that exceeds the 50 percent threshold, without complying with major source requirements of the Act (or without otherwise limiting its potential to emit), could be subject to enforcement. For this 2-year period, such sources would not be treated as major sources and would not be required to obtain a permit that limits their potential to emit. To qualify under this transition policy, sources must maintain adequate records on site to demonstrate that emissions are maintained below these thresholds for the entire 2-year period as major sources and would not be required to obtain a permit that limits their potential to emit that would be considered to be adequate during this transition period. Consistent with the California approach, EPA believes it is appropriate for the amount of recordkeeping to vary according to the level of emissions (see paragraphs 1.2 and 4.2 of the attached rule).

2. Larger sources with State limits. For the 2-year transition period, restrictions contained in State permits issued to sources above the 50 percent threshold would be treated by EPA as acceptable limits on potential to emit, provided: (a) the permit is enforceable as a practical matter; (b) the source owner submits a written certification to EPA that it will comply with the limits as a restriction on its potential to emit; and (c) the source owner, in the certification, accepts Federal and citizen enforcement of the limits (this is appropriate given that the limits are being taken to avoid otherwise applicable Federal requirements). Such limits will be valid for purposes of limiting potential to emit from the date the certification is received by EPA until the end of the transition period. States interested in making use of this portion of the transition policy should work with their Regional Office to develop an appropriate certification process.

3. Limits for noncriteria HAP. For noncriteria HAP for which no existing federally-approved program is available for the creation of federally-enforceable limits, the 2-year transition period provides for sufficient time to gain approval pursuant to section 112(1). For the 2-year transition period, State restrictions on such noncriteria pollutants issued to sources with emissions above the 50 percent threshold would be treated by EPA as limiting a source's potential to emit, provided that:

- (a) the restrictions are enforceable as a practical matter;
- (b) the source owner submits a written certification to EPA that

it will comply with the limits as a restriction on its potential to emit; and (c) the source owner, in the certification, accepts Federal and citizen enforcement of the limits. Such limits will be valid for purposes of limiting potential to emit from the date the certification is received by EPA until the end of the transition period.

The Regional Offices should send this memorandum, including the attachments, to States within their jurisdiction. Questions concerning specific issues and cases should be directed to the appropriate Regional Office. Regional Office staff may contact Timothy Smith of the Integrated Implementation Group at 919-541-4718, or Clara Poffenberger with the Air Enforcement Division at 202-564-8709.

Attachments

cc: Air Branch Chief, Region I-X
Regional Counsels

SOI Attachment 7

LIMITING POTENTIAL TO EMIT IN NEW SOURCE PERMITTING

JUNE 13, 1989

AIR ENFORCEMENT DIVISION
OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

STATIONARY SOURCE COMPLIANCE DIVISION
OFFICE OF AIR QUALITY PLANNING AND STANDARDS

Limiting Potential to Emit in New Source Permitting

- I. Introduction
- II. The Louisiana-Pacific Case
- III. Types of Limitations that will Limit Potential to Emit
- IV. Time Periods for Limiting Production and Operation
- V. Sham Operational Limits
 - A. Permits with conditions that do not reflect a source's planned mode of operation are void ab initio and cannot act to shield the source from the requirement to undergo preconstruction review.
 1. Sham permits are not allowed by 40 CFR 52.21(r) (4)
 2. Sham permits are not allowed by the definition of potential to emit: 40 CFR 52.21(b) (4), 51.165(a) (1) (iii), 51.166(b) (4)
 3. Sham permits are not allowed by the Clean Air Act
 - B. Guidelines for determining when minor source construction permits are shams.
 1. Filing a PSD or nonattainment NSR application
 2. Applications for funding
 3. Reports on consumer demand and projected productions levels
 4. Statements of authorized representatives of the source regarding plans for operation
- VI. Enforcement Procedures
- VII. Examples
- VIII. Conclusion

Limiting Potential to Emit in New Source Permitting

I. Introduction

Whether a new source or modification is major and subject to new source review under Parts C and D of the Clean Air Act is dependent on whether that source or modification has or will have the potential to emit major or significant amounts of a regulated pollutant. Therefore, the definition of "potential to emit" under the new source regulations is extremely important in determining the applicability of new source review to a particular source. The federal regulations define "potential to emit" as:

the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of fuel combusted, stored or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable.

40 C.F.R Sections 52.21(b) (4), 51.165(a) (1) (iii), 51.166(b) (4).

Permit limitations are very significant in determining whether a source is subject to major new source review. This is because they are the easiest and most common way for a source to obtain restrictions on its potential to emit. A permit does not

have to be a major source permit to legally restrict potential emissions. A minor source construction permit issued pursuant to a state program approved by EPA as meeting the requirements of 40 C.F.R. Section 51.160 is federally enforceable. In fact, any permit limitation can legally restrict potential to emit if it meets two criteria: 1) it is federally enforceable as defined by 40 C.F.R. Sections 52.21(b) (17), 51.165(a) (1) (xiv), 51.166(b) (17), i.e., contained in a permit issued pursuant to an EPA-approved permitting program or a permit directly issued by EPA, or has been submitted to EPA as a revision to a State Implementation Plan and approved as such by EPA; and 2) it is enforceable as a practical matter. The second criterion is an implied requirement of the first criterion. A permit requirement may purport to be federally enforceable, but, in reality cannot be federally enforceable if it cannot be enforced as a practical matter.

Non-permit limitations can also legally restrict potential to emit. These limitations include New Source Performance Standards codified at 40 C.F.R. Part 60 and National Emission Standards for Hazardous Air Pollutants codified at 40 C.F.R. Part 61.

The appropriate means of restricting potential to emit through permit conditions has been an issue in recent enforcement cases. Through these cases and through guidance issued by EPA, the Agency has addressed three questions: what types of permit

limitations can legally limit potential to emit; whether long averaging times for production limitations are enforceable as a practical matter; and whether sources may limit potential to emit to minor source levels as a means of circumventing the preconstruction review requirements of major source review.

II. The Louisiana-Pacific Case

In United States v. Louisiana-Pacific Corporation, 682 F. Supp. 1122 (D. Colo. Oct. 30, 1987) and 682 F. Supp. 1141 (D. Colo. March 22, 1988), Judge Alfred Arraj discussed the type of permit restrictions which can be used to limit a source's potential to emit. The Judge concluded that:

... not all federally enforceable restrictions are properly considered in the calculation of a source's potential to emit. While restrictions on hours of operation and on the amount of materials combusted or produced are properly included, blanket restrictions on actual emissions are not.

682 F. Supp. at 1133.

The Court held that Louisiana-Pacific's permit conditions which limited carbon monoxide emissions to 78 tons per year and volatile organic compounds to 101.5 tons per year should not be considered in determining "potential to emit" because these blanket emission limits did not reflect the type of permit conditions which restricted operations or production such as limits on hours of operation, fuel consumption, or final product.

The Louisiana-Pacific court was guided in its reasoning by the D.C. Circuit's holding in Alabama Power v. Costle, 636 F. 2d 323 (D.C. Circuit 1979). Before Alabama Power, EPA regulations required potential to emit to be calculated according to a source's maximum uncontrolled emissions. In Alabama Power, the D. C. Circuit remanded those regulations to EPA with instructions that the Agency include the effect of in-place control equipment in defining potential to emit. EPA went beyond the minimum dictates of the D.C. Circuit in promulgating revised regulations in 1980 to include, in addition to control equipment, any federally enforceable physical or operational limitation. The Louisiana-Pacific court found that blanket limits on emissions did not fit within the concept of proper restrictions on potential to emit as set forth by Alabama Power.

Moreover, Judge Arraj found that:

...a fundamental distinction can be drawn between the federally enforceable limitations which are expressly included in the definition of potential to emit and (emission) limitations.... Restrictions on hours of operation or on the amount of material which may be combusted or produced ... are, relatively speaking, much easier to "federally enforce." Compliance with such conditions could be easily verified through the testimony of officers, all manner of internal correspondence and accounting, purchasing and production records. In contrast, compliance with blanket restrictions on actual emissions would be virtually impossible to verify or enforce.

Id. Thus, Judge Arraj found that blanket emission limits were not enforceable as a practical matter.

Finally, the Court reasoned that allowing blanket emission limitation to restrict potential to emit would violate the intent of Congress in establishing the Prevention of Significant Deterioration (PSD) program.

III. Types of Limitations that will Restrict Potential to Emit

As an initial matter in this discussion, a few important terms should be defined. Emission limits are restrictions over a given period of time on the amount of a pollutant which may be emitted from a source into the outside air. Production limits are restrictions on the amount of final product which can be manufactured or otherwise produced at a source. Operational limits are all other restrictions on the manner in which a source is run, including hours of operation, amount of raw material consumed, fuel combusted, or conditions which specify that the source must install and maintain add-on controls that operate at a specified emission rate or efficiency. All production and operational limits except for hours of operation are limits on a source's capacity utilization. Potential emissions are defined as the product of a source's emission rate at maximum operating capacity, capacity utilization, and hours of operation.

To appropriately limit potential to emit consistent with the opinion in Louisiana-Pacific, all permits issued pursuant to 40 C.F.R. Sections 51.160, 51.166, 52.21 and 51.165 must contain a

production or operational limitation in addition to the emission limitation in cases where the emission limitation does not reflect the maximum emissions of the source operating at full design capacity without pollution control equipment. Restrictions on production or operation that will limit potential to emit include limitations on quantities of raw materials consumed, fuel combusted, hours of operation, or conditions which specify that the source must install and maintain controls that reduce emissions to a specified emission rate or to a specified efficiency level. Production and operational limits must be stated as conditions that can be enforced independently of one another. For example, restrictions on fuel which relates to both type and amount of fuel combusted should state each as an independent condition in the permit. This is necessary for purposes of practical enforcement so that, if one of the conditions is found to be difficult to monitor for any reason, the other may still be enforced.

When permits contain production or operational limits, they should also have recordkeeping requirements that allow a permitting agency to verify a source's compliance with its limits. For example, permits with limits on hours of operation or amount of final product should require an operating log to be kept in which the hours of operation and the amount of final product produced are recorded. These logs should be available

for inspection should staff of a permitting agency wish to check a source's compliance with the terms of its permit.

When permits require add-on controls operated at a specified efficiency level, permit writers should include, so that the operating efficiency condition is enforceable as a practical matter, those operating parameters and assumptions which the permitting agency depended upon to determine that the control equipment would have a given efficiency.

An emission limitation alone would limit potential to emit only when it reflects the absolute maximum that the source could emit without controls or other operational restrictions. When a permit contains no limits on capacity utilization or hours of operation, the potential to emit calculation should assume operation at maximum design or achievable capacity (whichever is higher) and continuous operation (8760 hours per year).

The particular circumstances of some individual sources make it difficult to state operating parameters for control equipment limits in a manner that is easily enforceable as a practical matter. Therefore, there are two exceptions to the absolute prohibition on using blanket emission limits to restrict potential to emit. If the permitting agency determines that setting operating parameters for control equipment is infeasible in a particular situation, a federally enforceable permit

containing short term emission limits (e.g. lbs per hour) would be sufficient to limit potential to emit, provided that such limits reflect the operation of the control equipment, and the permit includes requirements to install, maintain, and operate a continuous emission monitoring (CEM) system and to retain CEM data, and specifies that CEM data may be used to determine compliance with the emission limit.

Likewise, for volatile organic compound (VOC) surface coating operations where no add-on control is employed but emissions are restricted through limiting VOC contents and quantities of coatings used, emission limits may be used to restrict potential to emit under the following limited circumstances. If the permitting agency determines for a particular surface coating operation that operating and production parameters (e.g. gallons of coating, quantities produced) are not readily limited due to the wide variety of coatings and products and due to the unpredictable nature of the operation, emission limits coupled with a requirement to calculate daily emissions may be used to restrict potential to emit. The source must be required to keep the records necessary for this calculation, including daily quantities and the VOC content of each coating used. Emission limits may be used in this limited circumstance to restrict potential to emit since, in this case, emission limits are more easily enforceable than operating or production limits.

IV. Time Periods For Limiting Production and Operation

As discussed above, a limitation specifically recognized by the regulations as reducing potential to emit is a limitation on production or operation. However, for these limitations to be enforceable as a practical matter, the time over which they extend should be as short term as possible and should generally not exceed one month. This policy was explained in a March 13, 1987 memorandum from John Seitz to Bruce Miller, Region IV. The requirement for a monthly limit prevents the enforcing agency from having to wait for long periods of time to establish a continuing violation before initiating an enforcement action.

EPA recognizes that in some rare situations, it is not reasonable to hold a source to a one month limit. In these cases, a limit spanning a longer time is appropriate if it is a rolling limit. However, the limit should not exceed an annual limit rolled on a monthly basis. EPA cannot now set out all inclusive categories of sources where a production limit longer than a month will be acceptable because every situation that may arise in the future cannot now be anticipated. However, permits where longer rolling limits are used to restrict production should be issued only to sources with substantial and unpredictable annual variation in production, such as emergency

boilers. Rolling limits could be used as well for sources which shut down or curtail operation during part of a year on a regular seasonal cycle, but the permitting authority should first explore the possibility of imposing a month-by-month limit. For example, if a pulp drier is periodically shut down from December to April, the permit could contain a zero hours of operation limit for each of those months, and then the appropriate hourly operation limit for each of the remaining months. Under no circumstances would a production or operation limit expressed on a calendar year annual basis be considered capable of legally restricting potential to emit.

V. Sham Operational Limits

In the past year, several sources have obtained purportedly federally enforceable permits with operating restrictions limiting their potential to emit to minor or de minimis levels for the purpose of allowing them to commence construction prior to receipt of a major source permit. In such cases where EPA can demonstrate an intent to operate the source at major source levels, EPA considers the minor source construction permit void ab initio and will take appropriate enforcement action to prevent the source from constructing or operating without a major source permit.

The following example illustrates the kind of situation addressed in this section: An existing major stationary source proposes to add a 12.5 megawatt electric utility steam generating unit, and applies for a federally enforceable minor source permit which restricts operation at the unit to 240 hours per year. Because the project is designed as a baseload facility, EPA does not believe that the source intends to operate the facility for only 240 hours a year. Further investigation would probably uncover documentation of the source's intent to operate at higher levels than those for which it is permitted.

This situation raises the question of whether a source can lawfully bypass the preconstruction or premodification review requirements of Prevention of Significant Deterioration (PSD) and nonattainment New Source Review by committing to permit conditions which restrict production to a level at which the source does not intend to operate for any extensive time. If, after constructing and commencing operation, the source obtains a relaxation of its original permit conditions prior to exceeding them, does this constitute a violation of the preconstruction review requirements? This section discusses why it is improper to construct a source with a minor source permit when there is intent to operate as a major source, and provides guidelines for identifying these "sham" permits.

A. Permits with conditions that do not reflect a source's planned mode of operation are void ab initio and cannot act to shield the source from the requirement to undergo preconstruction review.

1. Sham permits are not allowed by 40 CFR Section 52.21(r) (4) Section

52.21(r) (4) states:

At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980 on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then (PSD) shall apply to the source or modification as though construction had not yet commenced on the source or modification.

When a source that is minor because of operating restrictions in a construction permit later applies for a relaxation of that construction permit which would make the source major, Section 52.21(r) (4) prescribes the methodology for determining best available control technology (BACT). However, it does not foreclose EPA's ability, in addition to the retroactive application of BACT and other requirements of the PSD program, to pursue enforcement where the Agency believes that the initial minor source permit was a sham. EPA will limit its activity to requiring application of 40 CFR 52.21(r) (4) only for the cases where a source legitimately changes a project after finding that the operating restrictions which were taken in good faith cannot be complied with. Whether a source has acted in good faith is a factual question which is answered by available evidence in the particular case.

2. Sham permits are not allowed by the definition of potential to emit:

40 C.F.R. Sections 52.21(b) (4), 51.165(a) (1) (iii), 51.166(b) (4).

The definition of potential to emit enables sources to obtain federally enforceable permits with operational restrictions as a means of limiting emissions to minor source levels. However, implicit in the application of these limitations is the understanding that they comport with the true design and intended operation of the project.

3. Sham permits are not allowed by the Clean Air Act

Parts C and D of the Clean Air Act exhibit Congress's clear intent that new major sources of air pollution be subject to preconstruction review. The purposes for these programs cannot be served without this essential element. Therefore, attempts to expedite construction by securing minor source status through the receipt of operational restrictions from which the source intends to free itself shortly after operation are to be treated as circumvention of the preconstruction review requirements.

B. Guidelines for determining when minor source construction permits are shams.

EPA's determination that a purportedly federally enforceable construction permit is a sham is made based on an evaluation of specific facts and evidence in each individual case. The following are criteria which should be scrutinized when making such a determination:

1. Filing a PSD or nonattainment NSR permit application

If a major source or major modification permit application is filed simultaneously with or at approximately the same time as the minor source construction permit, this is strong evidence of an intent to circumvent the requirements of preconstruction review. Even a major source application filed after the minor source application, but either before operation has commenced or after less than a year of operation should be looked at closely.

2. Applications for funding

Applications for commercial loans or, for public utilities, bond issues, should be scrutinized to see if the source has guaranteed a certain level of operation which is higher than that in its construction permit. If the project would not be funded or if it would not be economically viable if operated on an extended basis

(at least a year) at the permitted level of production, this should be considered as evidence of circumvention.

3. Reports on consumer demand and projected production levels.

Stockholder reports, reports to the Securities and Exchange Commission, utility board reports, or business permit applications should be reviewed for projected operation or production levels. If reported levels are necessary to meet projected consumer demand but are higher than permitted levels, this is additional evidence of circumvention.

4. Statements of authorized representatives of the source regarding plans for operation.

Statements by representatives of the source to EPA or to state or local permitting agencies about the source's plans for operation can be evidence to show intent to circumvent preconstruction review requirements.

Note that if a determination is made that a permit is a "sham" for one pollutant and, therefore, the source is a major source or major modification, the permit may possibly still contain valid limits on potential to emit for other pollutants.

In such cases, the entire source must still go through new source review, during which, for PSD review, all pollutants for which there is a net significant increase must be analyzed for BACT. In nonattainment new source review, new sources must have LAER determinations only for pollutants for which they are major. Major modifications, however, must have LAER determinations for all nonattainment pollutants emitted in significant amounts. If the valid limits in a partially void minor source construction permit keep certain pollutants below significance levels, then those pollutants would not have to be analyzed for BACT or LAER. However, if a source or modification is determined to be major for PSD or NSR because part of its minor permit is deemed void, it would have to undergo BACT or LAER analysis for all significant pollutants.

VI. Enforcement Procedures

This guidance has discussed permit conditions which will legally restrict potential to emit, shielding a source from the requirement to comply with major new source permitting regulation. Failure by a permitting agency to adhere to these guidelines may result in a permit that does not legally restrict potential to emit, thereby subjecting a source to major new source review. If that source has not gone through preconstruction review, it is a significant violator of the Clean Air Act and is subject to enforcement for constructing or

modifying without a major new source permit.

The enforcement options available to EPA in these situations include administrative action under Sections 167 or 113 (a) (5) of the Act or federal judicial action under Sections 113 (b) (2), 113 (b) (5), 113(c), or 167. Which enforcement option is selected depends on the facts of the particular situation. (See July 15, 1988 guidance on EPA Procedures for Addressing Deficient New Source Permits.)

VII. Examples

The following examples are provided to illustrate the type of permit restrictions which would and would not legally limit potential to emit to less than major source thresholds. These examples are provided for purposes of clarifying the potential to emit and averaging time guidance only. They are not intended to reflect all the permit conditions necessary for a valid permit. Specific test methods, compliance monitoring and recordkeeping and reporting requirements are necessary to make permit limitations enforceable as a practical matter. The use of examples where averaging times are the longest times allowed under EPA policies is not intended to necessarily condone the selection of the longest averaging times; averaging times should in practice be as short as possible.

1. The minor source construction permit for a boiler contains the following restrictions:
250,000 gal fuel/month; 0.8% S fuel; 8000 hours/year.

These conditions are federally enforceable production and operation limits, but do not limit potential to emit because one of them does not meet EPA policies on enforceability as a practical matter. The averaging time for hours of operation, one of the operational limits necessary to restrict emissions to less than 250 tpy, exceeds a monthly or rolling yearly limit. If, instead of 8000 hours/year, the hourly restriction were stated as 666 hours/month, the permit would serve to keep the source a minor source, assuming the permit contains appropriate recordkeeping provisions.

2. A waferboard plant which has the physical capacity to emit over 300 tpy of carbon monoxide in the absence of using specific combustion techniques has the following permit restriction as the sole emission limitation: 249 tpy.

This does not limit potential to emit since an operational or production restriction is necessary for the source to be restricted to 249 tpy. The permit must contain a restriction on hours of operation or capacity utilization which, when multiplied by the maximum emission rate for the CO sources at the plant, results in emissions of 249 tpy. Additionally, while the

emission limit alone cannot restrict potential to emit, the emission limit is unenforceable as a practical matter since it is limited on an annual basis. The permit should contain a short term emission limit (in addition to the annual emission limit), consistent with the compliance period or parameter in the applicable test method for determining compliance.

3. A small scale rock crushing plant that cannot emit more than 240 tpy under maximum operation without controls (including plant-wide particulate emissions from transfer and storage operations) has the following permit restriction as the sole emission limitation: 240 tpy particulate matter.

Since no operational limitations are necessary for the source to emit below 250 tpy, no operational restrictions need be in the permit to limit potential to emit. However, although this is not a major source, the state agency should express the emission limit in this permit as a lb/hour measure or gr/dscf so that it will be enforceable as a practical matter.

4. A plant consisting solely of a small rock crusher has the following permit restrictions: 0.05 lb gr PM/dscf; fabric filter must be employed and maintained at 99% efficiency.

Assuming that maintaining the fabric filter at 99% efficiency will result in emissions of less than 250 tpy, this permit would limit

potential to emit if it also contained either 1) parameters that allowed the permitting agency to verify the fabric filter's operating efficiency or 2) a requirement to install and operate continuous opacity monitors (COMs) and a specification that COM data may be used to verify compliance with emission limits. Note that if this second alternative were adopted, it would not be necessary to require that the fabric filter be maintained at 99% efficiency.

To determine potential to emit, the efficiency rate of the fabric filter would be multiplied by the maximum uncontrolled emission rate, the maximum number of operating hours and maximum throughput capacity since there are no other operating or production limits. However, the efficiency rate of the fabric filter would not be enforceable as a practical matter unless there were an enforceable means to monitor ESP performance on a short term basis. The two alternatives mentioned above would satisfy this requirement.

5. A surface coating operation has the capability of utilizing 15,000 gal coating/month, with the following permit restrictions: 3.0 lb VOC/gal coating minus water; 20.5 tons VOC/month; monthly VOC emissions to be determined from records of the daily volumes of coatings used times the manufacturers specified VOC content.

This does not limit potential to emit since the source has the physical capacity to exceed 250 tpy of VOC, and the permit does not contain a production or an operational limitation. A monthly limit on gallons of coating used which when multiplied by 3.0 lb/gal equates to less than the 250 tpy threshold (13,500 gallons/month), with appropriate recordkeeping, would generally be necessary to limit potential to emit. If, however, the permitting agency determines, due to the wide variety of coatings employed and products produced, that restrictions on operation or production are not practically enforceable, then the above emission limits could restrict potential to emit if there are requirements that the source calculate emissions daily, and keep the appropriate records.

If the source was alternatively to meet the 20.5 ton/month limit by employing add-on controls, the permit would need to contain an operational limit, such as the requirement to install and operate an incinerator at 99% efficiency. A requirement to monitor incinerator efficiency (either directly or indirectly via temperature monitoring for example), and appropriate recordkeeping requirements to verify compliance with each of the permit conditions would also be necessary to make the permit conditions enforceable as a practical matter. Note, however, that in the case where add-on controls are employed, the source may be able to meet a shorter term emission limit than the ton per month figure.

VIII. Conclusion

We hope this guidance will help EPA Regions identify sources which have the potential to emit major amounts of an air pollutant which will subject those sources to the requirements of preconstruction new source review. Every source which is subject to these requirements but has not obtained a major new source permit should be seriously considered for enforcement action.

SOI Attachment 8

Attachment No.1
NSB's Detailed Air Quality Comments

Shell Offshore Inc. 2007-2009 Exploration Plan
OCS Operation in the Beaufort Sea

Clean Air Act

Shell's air permit application for its 2007-2009 Exploration Plan does not comply with the Clean Air Act (CAA).

Clean Air Act Section 328(a)(4)(C); [42 USC 7627(a)(4)(C)] The OCS Source Definition has been Wrongly Applied

Shell's air permit application for its 2007-2009 Exploration Plan does not comply with Section 328(a)(4)(C) of the Clean Air Act (CAA), because Shell proposes to define an OCS source as a single drill site, whereas the CAA defines an OCS source as the drill ship itself. The drill ship is the OCS source, including the support vessels for the drill ship within 25 miles of the exploration site.

Nothing in Section 328(a)(4)(C) of the Clean Air Act (CAA) defines an OCS source as a single exploration well site. The law is clear that the OCS source is the drill ship itself not the drill site:

"...any equipment, activity, or facility which- (i) emits or has the potential to emit any air pollutant, (ii) is regulated or authorized under the Outer Continental Shelf Lands Act, and (iii) is located on the Outer Continental Shelf or in or on waters above the Outer Continental Shelf. Such activities include, but are not limited to, platform and drill ship exploration, construction, development, production, processing, and transportation. For purposes of this subsection, emissions from any vessel servicing or associated with an OCS source, including emissions while at the OCS source or enroute to or from the OCS source within 25 miles of the OCS source, shall be considered direct emissions from the OCS source." (Emphasis added.)

Attempting to define an OCS source as a single drill site, clearly contradicts the statute.

Clean Air Act Section 328(a)(1); [42 U.S.C. 7627] Compliance with the PSD Program is Required

Shell's air permit application for its 2007-2009 Exploration Plan does not comply with Section 328(a)(1) because Shell's permit application does not comply with the provisions of the CAA at Title I, Part C, Prevention of Significant Deterioration (PSD).

Section 328(a)(1) of the CAA requires Shell's OCS exploration operations to attain and maintain Federal and State ambient air quality standards, and to comply with the provisions of the CAA at Title I, Part C, Prevention of Significant Deterioration (PSD). The CAA at Title I, Part C, PSD was established by Congress to protect the quality of an airshed, like the Beaufort Sea region, from becoming polluted. Congress established certain criteria to prevent "significant deterioration" of these healthy, clean airsheds.

More specifically, at Section 101 of the CAA, Congress found that the growth in the amount and complexity of air pollution brought about by industrial development has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, among other adverse affects. In the Arctic, EPA should consider that subsistence resources such as wild herds, and wild plant resources are the equivalent to the term used by EPA to describe domesticated crops and livestock found in the

Lower 48 states. Congress established the PSD program to protect and enhance the quality of the nation's air resources to promote the public health and welfare and the productive capacity of its population; to achieve the prevention and control of air pollution, among other goals. Furthermore the CAA at Title I, Part C, states that a primary goal of the act is pollution prevention:

"A primary goal of this Act is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention." 42 USC 7401(c).

Shell's applications, by evading the rigors of the PSD review process, does not ensure pollution is prevented and human health, food sources, and the environment are adequately protected.

Shell proposes to avoid PSD review by applying for a minor air permit to be issued at each drill site. Shell incorrectly asserts that an OCS source is defined by drill site. This is incorrect, because the Clean Air Act defines the OCS source as the drill ship itself not the drill site.

By proposing to permit each individual drill site, rather than the drill ship or the collective Exploration Plan, Shell seeks to avoid Best Available Control Technology (BACT) review required for major sources of air pollution.

By avoiding a major source review, Shell achieves a cost and application time savings. Shell's proposal seeks to avoid baseline data collection, comprehensive site-specific air pollution modeling, best available technology review, among other standards that apply to a major source of air pollution, and not to a minor one.

Furthermore, Congress also required under Section 328(a)(1) of the CAA that OCS air emission sources located within 25 miles of the State of Alaska seaward boundary meet federal and state air pollution control and permitting requirements. Therefore, this letter is addressed to the State of Alaska to ensure that all state requirements are also met for this OCS source.

CAA Section 302; [42 U.S.C. 7602]

CAA Section 501; [42 U.S.C. 7661a]

Shell's OCS Operation Meets Major Source Definition

Shell's air permit application, for its 2007-2009 Exploration Plan, does not comply with Sections 302 and 501 of the CAA because Shell proposes to define its Exploration Plan as a series of concurrently operating "minor sources" of air pollution rather than a single group of stationary sources located within a contiguous area and under common control.

Under Section 302 and 501 of the Clean Air Act, a major source of air pollution means: "...any stationary source (or any group of stationary sources located within a contiguous area and under common control)... "major stationary source" and "major emitting facility" mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant."

CAA Section 504(e); [42 USC 7661c]

Compliance with the Title V Permit Program is Required

Section 504(e) of the Clean Air Act allows the EPA to issue a single Title V operating permit to an OCS Source authorizing emissions from similar operations at multiple temporary locations. The Title V Operating Permit must be issued to the OCS Source, which is the drill ship. Nothing in Section 504(e) of the CAA specifies a Title V operating permit should be issued for a single drill site. Furthermore, nothing in Section 504(e) supports Shell's proposal to permit each drill site as a separate OCS Source to avoid major source classification.

EPA OCS Regulations (40 CFR 55)

Shell's air permit application for its 2007-2009 Exploration Plan does not comply with the EPA's OCS Regulations at 40 CFR 55.

40 CFR 55.2

EPA Regulations Define the OCS Source as the Vessel, Not the Drill Site

40 CFR 55.2 defines an OCS source as any equipment, activity, or facility which (1) emits or has the potential to emit any air pollutant, (2) is regulated or authorized under the OCS Lands Act, and (3) is located on the OCS or in or on waters above the OCS. Vessels are included in this definition when they are permanently or temporarily attached to the seabed during exploration. The regulations clearly define the OCS source as the drill ship, not the drill site. It is the vessel that is included in the definition. The vessel is subject to the OCS source definition. Nothing in 40 CFR 55.2 speaks to a drill site as being a relevant factor in defining an OCS source.

Based on the CAA at Section 328(a)(4)(C) the OCS source is the drill ship:

"...any equipment, activity, or facility which- (i) emits or has the potential to emit any air pollutant, (ii) is regulated or authorized under the Outer Continental Shelf Lands Act, and (iii) is located on the Outer Continental Shelf or in or on waters above the Outer Continental Shelf. Such activities include, but are not limited to, platform and drill ship exploration, construction, development, production, processing, and transportation. For purposes of this subsection, emissions from any vessel servicing or associated with an OCS source, including emissions while at the OCS source or enroute to or from the OCS source within 25 miles of the OCS source, shall be considered direct emissions from the OCS source." (Emphasis added.)

EPA's regulations require OCS drill ships to compute their potential to emit air pollution from the drill ship, itself, and all its support vessels within 25 miles when the vessel is actively conducting exploration drilling.

40 CFR 55.2

Potential Emissions for Each Drill Ship are not Computed Correctly

40 CFR 55.2 requires Shell's air permit application to provide the OCS source's "potential emissions," which are defined as the maximum emissions of a pollutant from an OCS source operating at its design capacity. Shell's application for each drill ship does not provide potential

emission estimates for the OCS source, that is, drill ship. Instead, Shell has only provided emission estimates for each drill site.

Shell has requested the EPA look at the amount of emissions that are emitted while drilling a single well, ignoring the fact that the OCS source is the drill ship, rather than the drill site. And, even at the drill site level Shell has not correctly computed the “potential emissions.” Instead, Shell proposes to only operate some of the drill ship emission sources some of the time, to avoid triggering major permit status even at a drill site level. Shell’s application fails to meet the EPA regulatory requirement to estimate potential emissions from the OCS Source (the drill ship) at its design capacity. EPA requires the applicant to compute the “potential to emit” or PTE.

While, the EPA’s regulations do allow for Shell to propose to reduce its air pollution by reducing the number of combustion sources and times they operate, Shell must first calculate a PTE without operating restrictions and place that information in the permit applications, and as a second step, provide specific information on how it proposes to restrict the OCS source operations. Shell has not met this regulatory standard.

**40 CFR 55.13 and 40 CFR 52.21
Prevention of Significant Deterioration (PSD) of the Beaufort Sea Air Shed Must be Achieved**

40 CFR 55.13 requires OCS sources to comply with EPA’s PSD regulations at 40 CFR 52.21 for major stationary sources of air pollution. At 40 CFR 52.21(b)(5) a stationary source is defined as a structure or installation, among other things, that meets three criteria:

- (1) Belongs to the same industrial grouping (the same Standard Industrial Classification (SIC) Code);
- (2) Is located on one or more contiguous or adjacent properties; and
- (3) Is under the control of the same person.

Shell’s drill ships meet all three criteria. All of Shell’s proposed operations are under the same SIC code. Shell’s exploration activities are located on one or more of their contiguous or adjacent OCS leases; and Shell’s operations are under the control of the same company (Shell).

EPA’s regulations clearly require Shell’s exploration project to be permitted as a single major stationary source of air pollution. The regulations do not provide that a stationary source can be defined at a single drill site level. Nor do the regulations allow an applicant to carve up an OCS source into individual drill sites to evade the rigors of major air pollution source review.

500 meter vs. 25 mile Aggregation

Nothing in federal or state air pollution law or regulation establishes a 500 meter distance for aggregating or not aggregating pollution from OCS sources. In fact, just the opposite: the Clean Air Act is very clear that all sources within a 25 mile radius of the OCS Source must be included in the emission calculation. By reducing the aggregation distance from 25 miles to 500 meters (0.31 miles), the Clean Air Act is ignored.

Using a 500 meter distance in determining whether air pollution must be aggregated for the purpose of major source classification is arbitrary and capricious. The Clean Air Act defines an OCS source as a drill ship and all other OCS support activities within a 25 mile radius. EPA

cannot redefine Congressional intent through a single permitting action. This is a substantive standard, which is elsewhere addressed by regulation; EPA should conduct a formal rulemaking process to implement such an interpretation.

EPA Memo Regarding Source Determinations for Oil and Gas Industries dated January 12, 2007)

The NSB has reviewed the January 12, 2007, EPA Guidance Memo referenced by Shell in the air permit applications. This memo is not applicable to Shell's proposed operation.

The memo starts by directing air permitting authorities to begin their analysis of by evaluating whether each individual surface site qualified as a separate stationary source. In Shell's case, each individual surface site does not qualify as a separate source, because the OCS source is the drill ship.

EPA's memo reinforces the requirement to aggregate industrial activities according to proximity and ownership, which indicates that each Shell OCS source (Kulluk drill ship and Discoverer drill ship) should be aggregated into one single permit since both ships are required to complete Shell's 2007-2009 Exploration Plan, will be operated by Shell and will be drilling exploration wells close to each other.

EPA confirmed a major source determination for oil and gas operations must (1) reasonably carry out the purposes of PSD, (2) approximate a common sense notion of a plant, and (3) avoid aggregating pollutant-emitting activities that as a group would not fit in the ordinary meaning of building, structure, facility, or installation. As a result: Shell should revise its air permit applications to include all of the drill ship emissions (and associated support vessels and equipment) into a single major source permit application to reasonably carry out the purposes of PSD, and ensure best available pollution control equipment is installed when operating in the Beaufort Sea. A drill site does not approximate a common sense notion of a plant. A plant is the combustion source, which is the drill ship. A drill site itself is not a "plant," it is a location. The emissions from a drill ship fit in the ordinary meaning of structure, facility, or installation. A drill site does not. A drill site is a location on a lease. A drill site is not a structure, it is not a facility, it is not an installation.

EPA's memo points out that the definition of a major source under Section 112 of the Clean Air Act for the Air Toxic Program limits the aggregation of oil exploration well equipment with other wells. However, as EPA points out, Section 112 of the Clean Air Act does not apply to OCS sources for the purposes of making a major source decision under the PSD Construction Permit Program or Title V Operating Permit program. And, while Shell uses the Section 112 argument to defend its permit application, it is not a relevant legal position. Nothing in the EPA memo suggests that a single PSD or Title V air permit should be issued for each OCS drill site

Rulemaking Required

Because the January 12, 2007 memo was not adopted through rulemaking procedures and contradicts the statute, it is arbitrary and not entitled to deference. *See Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (courts will not defer to agency interpretation that is inconsistent with statute); *League of Wilderness Defenders*, 309 F.3d at 1183 (same); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (court will not defer to agency interpretation that contradicts agency's intent at the time it promulgated regulation); *Alaska Trojan P' ship v.*

Gutierrez, 425 F.3d 620, 631 (9th Cir. 2005) (same); *Hillsborough County*, 471 U.S. at 714-16 (agency's clear statement in Federal Register "dispositive" of agency's intent at the time it adopted the rule); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (interpretations not subject to notice-and-comment rulemaking are merely entitled to "some deference" or "respect" and "only to the extent that those interpretations have the power to persuade").

Alaska State Law (Alaska Statutes, Title 46, Chapter 14)

Alaska law, AS 46.14.130, requires a major source of emissions to obtain a PSD Construction Permit and Title V operating permit. Shell's drill ships have the potential to emit air pollution above the PSD threshold while operating in the Beaufort Sea during the 2007-2009 Exploration Plan. The drill ships are major sources of OCS air pollution, requiring major New Source Review (NSR) under the Clean Air Act.

Alaska State Regulations (Alaska Administrative Code, Title 18, Chapter 50)

Alaska regulations, 18 AAC 50.990(55), define a marine vessel as a ship. Shell is proposing to bring a fleet of vessels, including a drill ship to the Beaufort Sea for the purposes of oil and gas exploration. The drill ship is a marine vessel that explores for oil and gas, it is not the same as land based oil and gas exploration rigs used on the North Slope mounted on wheels and driven from one well site to another.

Alaska state regulations at 18 AAC 50.990(124) define a portable oil and gas operation as an operation that moves from site to site to drill or test one or more oil or gas wells, and that uses drill rigs, equipment associated with drill rigs and drill operations, well test flares, equipment associated with well test flares, camps, or equipment associated with camps. The basis for this definition and regulations for portable oil and gas operations was to permit **land based drilling rigs** (oil and gas drilling rigs mounted on wheels) to be driven from one well site to another on the North Slope. Nothing in the background for developing the portable oil and gas operations contemplated applying these regulations to drill ships or major OCS sources of air pollution. (see 18 AAC 50 Rulemaking History and revised State Implementation Plan).

Alaska's rules, specifically developed to address land-based drilling rigs, should not be applied to OCS drill ships. OCS drill ships have different combustion equipment and air pollution sources than a land-based drilling rig. The number and type of engines are different, and land based drilling rigs are not supported by a fleet of ice breakers and support vessels which add a substantial amount of pollution to the drilling process. Such an interpretation would contravene federal and state law, and the federal OCS regulations at 40 CFR 55, and would arbitrarily and capriciously attempt to apply land based drilling rig rules to an OCS exploration drill ship equipped with multiple support vessel emission sources. Application of portable land based drilling rig rules to OCS drill ships is illogical, and clearly was never contemplated in the regulatory record or by the technical support documents for these regulations.

Furthermore, Shell's proposed project is located right in a subsistence use area, where humans will be conducting subsistence activities, and communities downwind of the operations will be exposed to substantial air pollution. It is critical the subsistence hunters and the subsistence resources themselves are not exposed to high levels of air pollution.

EPA's public notice states that Alaska Regulations at 18 AAC 50.502(c)(2) require OCS sources to obtain a minor permit from the EPA before commencing operation. Nothing in 18 AAC 50.502(c)(2) addresses an OCS drill ship or specifically states that an OCS drill ship is required to obtain a minor source permit.

Minerals Management Service Regulations (30 CFR 250)

MMS regulations at 30 CFR 250.218(a)(1) require Shell's Exploration Plan to include the: projected peak hourly emissions; total annual emissions in tons per year; emissions over the duration of the proposed exploration activities; frequency and duration of emissions; and total of all emissions.

MMS regulations, 30 CFR 250.218(2), require the operator to base the projected emissions on the maximum rated capacity of the equipment on the proposed drilling unit under its physical and operational design.

While MMS' approvals and analysis all defer to the EPA's air permit approval process under 40 CFR 55 for an OCS air pollution source, MMS does not explain how its requirements under 30 CFR 250 for OCS Air Pollution are met. Federal regulations at 30 CFR 250 (MMS) and 40 CFR 55 (EPA) are not equivalent. While MMS claims that the EPA's regulations at 40 CFR 55 relieve MMS of its obligation to address air pollution under 30 CFR 250, this assertion is not based on regulation or law. The NSB has discussed this concern with EPA, and EPA confirmed MMS's regulations were not equivalent to EPA's, nor is EPA responsible for meeting the criteria of 30 CFR 250.¹ Thus, the requirements of 30 CFR 250 have not been fully met, and this obligation remains a MMS responsibility that has not been satisfied.

MMS' regulations 30 CFR 250 still exist and apply to OCS sources in the Beaufort Sea. MMS regulations at 30 CFR 250.218 were not repealed when the EPA issued OCS regulations at 40 CFR 55. MMS regulations at 30 CFR 250.218 require different analysis and technical data than required by the EPA; therefore, merely deferring to the EPA's regulations is inadequate. For example, MMS' regulations require the applicant to report total emissions over the duration of the proposed exploration activities, and examine the impacts of small particulate matter, 2.5 microns or less, among other things. The amount of fine particulate matter emitted by this project, for example, is important to the residents because they have noticed a significant increase in respiratory distress in their communities coincident with increased industrial activity. Fine particulate matter is a well-known respiratory aggravant.

Alaska Coastal Management Program Regulations (11 AAC 112, and 11 AAC 110)

Shell incorrectly concludes in their application, at Section 3.2 that ADEC has no direct authority over the review and approval of the Shell project and its air permit. This is incorrect.

Under the Alaska Coastal Management Program (ACMP), the ADNR and ADEC are required to ensure that Shell's Exploration Plan, permits, and authorization meet the ACMP statewide and local standards. Shell's proposed project does not meet the requirements of 11 AAC 110 and 112 because it does not comply with all federal and state air quality laws and regulations.

¹ April 6, 2007 meeting between Dan Meyer EPA and NSB.

Past OCS Air Permitting Precedent

Shell's application does not conform to federal and state requirements, as described above; nor does it conform to previous permitting of the Kulluk drill ship.

In 1993, the Kulluk was determined to be a major OCS source, under the EPA's PSD regulations and MMS' OCS exploration approvals. ARCO was the operator of the Kulluk, and was required to complete a comprehensive major source air permit application, ambient air quality modeling assessment, Best Available Control Technology (BACT) evaluation and human health impact assessment. ARCO's Kulluk application included:

- (1) A best available control technology (BACT) evaluation;
- (2) Dispersion modeling of emissions to determine compliance with PSD increments and state and federal ambient air quality standards;
- (3) Analyses of the project's impact on associated air quality-related values such as regional population growth; and
- (4) A human health risk assessment for the community of Kaktovik (which is the closest community to the exploration location).

ARCO's 1993 application for the Kulluk clearly shows that the Kulluk drill ship was considered the OCS source when estimating emissions for a PSD determination. ARCO's BACT determination proposed spark retardation on the Kulluk's main engines.

EPA's regulations (40 CFR 55) were promulgated September 4, 1992. Arco Alaska, Inc. (ARCO) submitted an air permit application for the Kulluk in February 1993 which requested approval to operate a major source of air pollution under a PSD permit. ARCO stated that drilling a single well would "result in emissions of criteria pollutants above the significant levels specified in the Prevention of Significant Deterioration (PSD) rules." Furthermore, ARCO clarified that this OCS project was subject to review under MMS's OCS air permitting rules and EPA's PSD air permitting rules.

In compliance with MMS and EPA regulations, ARCO provided total project emissions for the entire Exploration Plan period. All major combustion source emission estimates were computed assuming 100% operating time at full operating load. In 1993, ARCO estimated that 120 days of Kulluk operation, along with its support vessels, would produce over 2,300 tons of NO_x and over 260 tons of Carbon Monoxide (CO). Both pollutants exceeded the 250 ton PSD permit threshold for a major source.

Surprisingly, in the current application, Shell only estimates the Kulluk drill ship emissions at 245 tons of NO_x and over 82 tons of carbon monoxide (CO). It is not reasonable for one operator to be required to permit the Kulluk as a major source of air pollution in 1993, and for another to be allowed to permit it as a minor source of air pollution for very similar exploration operations in 2007. If anything, the age of the ship and the quality of the air should support the application of stricter standards now than 14 years ago.

Shell's application for the very same drill ship, the Kulluk, should not warrant a minor air permit for 2007-2009, given the fact that both MMS and the EPA found that the Kulluk met the definition of a major OCS and PSD air pollution source in 1993.

NSB Tribal and Resident Concerns

On April 5-6, 2007, public hearings were held in Nuiqsut and Kaktovik by the State Department of Natural Resources, for the consistency determination on Shell's Exploration Plan. During those hearings many residents expressed grave concern about air quality and the potential impacts to human health and subsistence resources from large industrial sources of air pollution operating in the OCS. The impact of industrial air pollutants on the arctic environment, its residents, and its resources as discussed by those in attendance are outlined below.

While Shell characterizes its operations as being far from resident and tribal impact areas, residents disagree. As one resident said, "They want to start right away... ten miles from Barter Island. Flaxman Island is near our hunting ground."

- Residents expressed concern about air pollution and said air pollution from other countries was already a problem in the Arctic, emphasizing the need for appropriate baseline ambient air pollution data gathering to understand the true background pollutant levels before embarking on adding more pollution to the air shed.
- Residents characterized increased human health and respiratory issues associated with air pollution as a "big problem" (families of asthma victims versus a time of very few asthma cases) and called for human health assessments to protect residents from the human health impacts of industrial air pollution.
- Residents pointed out that marine mammals, especially whales, are very sensitive to smell, and asked what was known about the impact of industrial air pollution in the OCS on subsistence resources.
- Residents expressed concern about the yellow haze west toward Prudhoe Bay, Alpine and other developed areas and wonder if Shell's operations will make that worse.
- One resident stated that "air pollution from Prudhoe Bay was already making Nuiqsut residents sick."
- Many people testified about the psychological effects on residents of stress and loss of cultural identity, as well as health concerns from air, terrestrial and water pollution from discharges and contaminants associated with industry practice.

EPA held one public hearing in Nuiqsut on May 8, 2007. Hearings in Barrow and Kaktovik were not held due to direct conflict with subsistence activities. Although the NSB requested EPA to either prepone the air permit hearings into April to avoid the subsistence conflict. EPA ignored this request. When EPA set the hearings in May 2007, NSB again formally requested the hearings to be deferred until after the traditional spring subsistence activities were concluded in the first week of June. EPA again ignored this request, and it was not until May 8th the date of the Nuiqsut hearing that EPA final provided a written response to NSB's April 18, 2007 letter.

EPA clearly failed to meet its tribal and government-to-government responsibilities on this air permit, and hearing process, thwarting meaningful public participation. While the May 8th hearing was held in Nuiqsut and residents had to stop their spring subsistence activities to

participate. Barrow and Kaktovik residents were unheard because attendance at the hearing would have required them to place a lower priority on subsistence. NSB residents were extremely dissatisfied with the EPA public process for this air permit. MMS and ADEC provided no public process at all for input on the air permit.

The lack of site specific monitoring and meteorologic data requires state and federal agencies to use conservative assumptions in permitting this project to ensure human health and the environment are protected; however, conservative assumptions have not been used introducing risk and concern. A conservative and regulatory sound approach would be to permit this project as a major source of air pollution, adhering to the rigors of the Clean Air Act.

Scope of Air Permit Approval & Application

The scope of Shell's air permit approval and application is not clear. Site-specific data is missing for most years, and it is unclear if Shell is requesting a three (3) or five (5) year permit.

Shell's applications to MMS, ADEC, and ADNOR all state that Shell plans to conduct a three (3)-year drilling program. Shell's application to the EPA states that it may continue drilling for five (5) years. Is Shell requesting a three year permit approval to construct? Or a five year approval?

Shell's application to all agencies provides some site-specific detail on 2007 operations, but no site specific detail for 2008, 2009, or 2010-2011 (assuming Shell is seeking a five year air permit to construct from the EPA).

Shell's applications state that it expects drilling to last for 45 days per well for deeper wells, but under "ideal ice conditions and unanticipated drilling issues the drilling program could possibly continue for up to 75 days." Shell simply does not address the additional time required when "non-ideal" ice conditions are encountered, which could add up to 75 days.

Emission Inventory

There are a number of deficiencies in Shell's emission inventory which are listed below:

1. Shell's emission inventory does not meet MMS' regulations, because it does not include the total emissions over the duration of the proposed exploration activities, examine the impacts of small particulate matter, or examine particulate emissions at 2.5 microns or less (PM_{2.5}). See 30 CFR 250.
2. It is not clear if Shell is proposing to conduct well tests to flow back oil or flare gas.
3. The emission inventory does not address sources of emission that vent directly to atmosphere.
4. Shell has not included the emissions from a potential relief well, which Shell is proposing to drill to aid in well control, should a blowout occur. The time required to drill relief wells varies widely, but may reasonably be assumed to exceed 59 days of drilling time. The 1987 Steelhead platform well blowout in Cook Inlet, Alaska, took 6 months to bring under control.
5. Shell's application requests a minor source permit, based on a maximum of 59 days of operation. The NSB is opposed to the EPA issuing a permit on this basis when the

applicant states that drilling could continue for 75 days or more per well if ice conditions or unanticipated drilling issues arise.

6. Shell has not estimated the potential to emit for the ice breaker combustion sources, even though heavy ice conditions can reasonably be expected during later September, October, and November in the Beaufort Sea. Shell has estimated air emissions for ice breaker operations based on average ice conditions, yet heavier ice conditions will result in higher engine load factors and higher emissions, which could easily exceed the 250 tons per year PSD threshold. Shell, by its own admission, concluded that heavier ice conditions will result in more emissions. Shell's application states: "SOI believed the emissions from the Shell Kulluk drilling vessel will not be as dependent on open water/ice conditions except in the case of very heavy ice that the ice breaker vessels cannot safely and effectively manage and thus forces the drilling vessel off the drill site." Shell's application goes on to say: "...ice management vessel use might be below expectation."

Contrast the representations made by Shell in its revised application to the US Coast Guard for safety zones: "Ice conditions during 2006 were such that the areas of drilling interest were ice covered the majority of the period between July and October. If ice conditions are similar during 2007, then each drill rig will be constantly ice managed within its anchor array." (Emphasis added.) Shell is clearly not acting in good faith when downplaying what is represented to be the reasonably expected use of the ice-breakers

7. Shell did not estimate the potential to emit (PTE) for all OCS source combustion units. The Shell EPA permit application states "...maximum emissions are based on an assemblage of reasonable activity level assumptions, none of which are absolute maxima." This approach is inconsistent with the Clean Air Act (CAA). The CAA requires the applicant to first submit a PTE estimate providing a detailed description of all combustion sources operating at full load, 24 hours per day. As a second step in the analysis, the CAA does allow the applicant to propose federally enforceable operating restrictions and emission control obligations to allow the applicant to reduce the total amount of pollution from its operation. Shell has not provided the PTE values for either the Kulluk or Discoverer or any of the associated OCS support vessels. Rather, Shell bypassed the PTE requirements and immediately sought to avoid the rigors of a PSD major source permit, by proposing to reduce operating hours on units on an "assemblage of reasonable maximum activity levels."
8. Shell's emission inventory for the Kulluk drill ship and its associated support vessels of 245 tons of oxides of nitrogen (NO_x), barely falls below the PSD threshold for a major source permit of 250 tons. There is little room for error in this emission estimate. The total emissions can easily exceed 250 tons at any single well if it takes longer than 59 days to drill, heavy ice conditions are encountered, if any of Shells operating restriction assumptions are incorrect, or if a relief well is required.
9. Shell's emission inventory for the Kulluk and the Discoverer drill ships should include a cumulative total of all emissions required to drill the exploration wells planned in a calendar year. Total drill ship emissions for each ship, on a yearly basis, exceed the PSD threshold for a major source permit of 250 tons by several magnitudes. A minor source permit is inappropriate for these large industrial sources of air pollution.
10. Shell's application excludes emissions from the bow thruster diesel engine when it is used to move the supply boat (Jim Kilabuk) next to the drill ships. This clearly violates the CAA requirement to include all support vessel emissions in the emission inventory if they are operating within 25 miles of the OCS source.

11. Shell does not provide a historical basis for the operating hours or equipment use assumptions used in its application. Shell should be required to provide operating records for the Kulluk and Discoverer to verify combustion source usage requirements in previous similar exploration wells, so that the agencies and public can determine if the operating hours and usage restrictions proposed by Shell are realistic and appropriate. For example:
- a. Shell estimates the Kulluk will only operate one of the main engines for 24 hours/day for a 60 day period. It assumes that the second engine will only be operated for 23 days, and the third engine will not be operated at all; however, Shell provided no historical operating records to demonstrate that this is a realistic set of operating and equipment usage assumptions for drilling a well in the Arctic, at the depths and conditions Shell is planning.
 - b. Shell assumes that the emergency generator is never run at all. All other North Slope air permits are required to assume at least a minimum amount of emergency power use in remote locations. Shell also assumes that only one of the boilers and hot water heaters will be operated for a 60 day period, but assumes the other boiler and hot water heater will not be run at all.
 - c. Shell assumes the ice breakers' main engines will operate 6-38 days each. There is not a scrap of justification provided for this assumption: No ice data, and no equivalent historical operating records for similarly situated exploration sites.
 - d. Shell assumes that its Oil Spill Response (OSR) fleet main engines will only be run for 36 hours each, which is not realistic. The fleet should be used to practice and train for oil spill response while on standby at the location which will require engine power. The OSR fleet may also be called upon to support oil spill prevention activities, to boom vessels during fuel oil transfers, and to respond to oil spills.
12. Shell has not properly inventoried nor modeled carbon monoxide emissions for combustion sources that will be operated at low loads, where carbon monoxide emissions will be elevated. Rather, Shell provides very low operating hour estimates, assuming it can run many units at low loads, but illogically does not address the fact that at low loads carbon monoxide emissions will be substantially higher than its estimates.
13. Shell's emission estimates for 2007 are inconsistent with the emission estimates for 2008 and 2009. While Shell asserts that its operating hour estimates are realistic for 2007 based on a maximum operating timeframe of 60 days per drill site, it does not provide any rationale whatsoever to support the proposed reduction to 43 days per drill site in 2008 and 2009.

In 2007, Shell proposes to use the Tor Viking II for icebreaking. The Tor Viking II is equipped with some enhanced NO_x emission control equipment, which barely allows Shell to avoid PSD review at 245 tons per year (based on the flawed assumption that a single drill site is an OCS source). In 2008 and 2009, the Tor Viking II is not available, and an alternative ice breaker will be used (either the Nordica or the Fennica) neither of which is equipped with enhanced NO_x emission control equipment. Shell estimates NO_x emissions from the Tor Viking II are 21 tons per drill site, whereas either the Nordica or the Fennica emissions are much higher at 83 tons.

A 62 ton increase in NO_x emissions makes it impossible for Shell to remain below 250 tons at a single drill site in 2008 and 2009 using the same operating assumptions that are used in 2007. To avoid PSD, and attempt to remain below the 250 ton PSD threshold, Shell arbitrarily cuts back on the operating hours for the Kulluk Rig and the Vladimir Ignatjuk. In 2007, Shell assumes the Kulluk operates for 60 days at each drill site, in 2008 and 2009 Shell assumes the Kulluk only operates 43 days to reduce its potential NO_x emissions from 49 tons in 2007 to 36 tons in 2008 and 2009. Similarly, Shell arbitrarily reduces the operating hour assumptions for the Vladimir Ignatjuk from 38 days to 27 days to reduce NO_x emissions from 163 tons to 117 tons. Shell has provided no explanation for these significant changes in operating assumptions for 2008 and 2009. This information is inadequate and does not provide a sufficient basis for the issuance of these proposed permits.

Ambient Air Quality Analysis

Shell's ambient air quality analysis is seriously inadequate. It is not site-specific, does not include the maximum potential to emit for all combustion sources included in the OCS source definition, does not use appropriate background monitoring data for all OCS source locations, does not use an EPA approved meteorologic data set, and is based on a simple single pollution stack screening model, rather than a site-specific, multiple stack emission model.

Shell's application initially relied on an extremely simplistic screening model (SCREEN3), and was recently supplemented with ICS-PRIME analysis. Shell's air pollution modeling approach is not site-specific and does not meet the technical quality required by the EPA or MMS on past OCS exploration projects in the Beaufort Sea using the Kulluk. For example, the EPA and MMS required ARCO to use EPA's approved Industrial Source Complex Short-Term (ISC2) air dispersion model, complemented by MMS' Offshore Coastal and Dispersion (OCD) model for its 1993 air permit application for operation of the Kulluk to drill an exploration well in the OCS of the Beaufort Sea. The EPA and MMS held ARCO to high standards of technical care and analysis in 1993 for exploratory drilling using the Kulluk; it is only reasonable that Shell be held to this standard of technical analysis in 2007.

The EPA required Shell to submit an ambient air quality analysis to demonstrate compliance with all applicable air quality standards. Shell's ambient air quality analysis, which purports to conservatively represent operations of all OCS sources 24 hours per day over a 60 day period, does not meet this standard.

First, the model does not include all OCS combustion sources operating 24 hours per day for 60 days. For example, the air model only included 2 engines and 1 boiler, when there are actually 3 main engines and 2 boilers on the Kulluk.

Second, the model is not based on representative meteorological data collected in the region of operation and approved by the EPA. Section 4.3 of Shell's application states: "it was determined that representative meteorological data meeting U.S. EPA's requirements is not available for the project location."

Third, lacking representative meteorological data, Shell used a less sophisticated air pollution model to estimate emission impacts. Shell selected the EPA's SCREEN3 model that does not include site-specific meteorologic data and is only capable of simplistically estimating one (1) hour air pollution concentrations from a single source at a time. The EPA's SCREEN3 model²

² EPA SCREEN3 Model User's Guide, September 1995, EPA-454/B-95-004.

cannot explicitly determine the maximum impacts from multiple sources. North Slope air pollution sources are typically modeled using ISC, a much more sophisticated, site-specific, multiple source air pollution modeling tool, which can examine maximum impacts over various time intervals at various distances from the source. The EPA does not recommend use of SCREEN3 for computing seasonal or annual emission estimates.

Fourth, no site-specific emissions data was collected to establish ambient background concentrations. Rather than collecting background data, Shell used BP's Arctic North Slope Eastern Region monitoring program data from 1999. While Shell asserts this data has been reviewed and approved by ADEC for use on this project, there is no evidence of any ADEC approval for use of this data at all of the exploration sites planned during the 2007-2009 exploration period. Background data east of BP's Badami facility, certainly would not be representative of Shell's proposed exploration sites planned north and west of Prudhoe Bay. Throughout Shell's application for this project, Shell seeks approval for either a 3 or a 5-year exploration period, but only provided data for 2007 and ignored site-specific issues associated with exploration in 2008 and 2009 and later years.

Human Health & Subsistence Impact Assessment

The NSB has been disappointed in both the state and federal agency's lack of response to the comments and concerns submitted by NSB, ICAS, Alaska Inter-Tribal Council, and individual NSB residents on the very important issue of the impact of air pollution on the health of our residents and subsistence resources. MMS and the EPA, in particular, have a responsibility to consult with the tribes and the NSB on air pollution impacts to human health and subsistence resources, and a federal trust responsibility to ensure that development in the region does not harm our health, our resources, or our way of life. Shell's application lacks data to adequately assess human health impacts to our coastal communities and to subsistence hunters and subsistence resources that will be located downwind of Shell's large industrial pollution source.

After more than 30 years of gradually expanding oil and gas development, North Slope residents have grown increasingly concerned about the impacts of oil and gas activities on every aspect of our health and well-being, and about the lack of attention to this issue in regulatory and permitting decisions. For years, for example, residents of Nuiqsut have testified to marked increases in pulmonary disease since the onset of operations at the Alpine Central Processing Facility. Yet to date, regulatory decisions are still based on scant data and models which have not been validated under Arctic conditions, with no monitoring data whatsoever available for some of the most concerning pollutants – namely PM2.5 and the hazardous air pollutants commonly associated with oil and gas operations.

The operations proposed by Shell will produce substantial air pollution, close to population centers such as Kaktovik, and within very commonly used subsistence corridors. It is important to note that the impact of air pollution in the arctic is much more significant than in a more temperate region. The arctic region is subject to extreme atmospheric inversions, which results in the pollution being trapped in a mixing layer only a few feet above the surface. The health impact is thus likely to be much more substantial in the Beaufort Seas even at much lower levels of pollution than urban areas.

We have a right to accurate information, based on monitoring and modeling which has been validated under Arctic conditions, regarding our current (baseline) and expected exposure to pollutants from Shell's operations, and the potential impacts on our subsistence resources as well.

The recent trend in applications seeking PSD avoidance permits by proposing to disaggregate their sources has created this air quality problem, because operators have been allowed to divide up their facilities into smaller and smaller units. As a result, they stay below the threshold for pollution control requirements established in the Clean Air Act and avoid the rigors and requirements of Prevention of Significant Deterioration, National Emission Standards for Hazardous Air Pollutants, and New Source Performance Standards.

Avoiding major source review under the PSD program undermines the goals and intent of the Clean Air Act and may result in public health consequences.

In making this permitting decision, it is important for EPA to recognize that the North Slope Inupiat population has particular vulnerabilities due to both our dependence on subsistence activities and wild foods, and due to the substantial baseline health disparities between our population and the general U.S. population.

Overall mortality rates on the North Slope are roughly 1.5 times the rate in U.S. whites. Chronic pulmonary disease mortality rates in Alaska Natives have climbed 192% since 1979, and North Slope residents have the highest mortality in the State from chronic lung diseases, at nearly 3 times the mortality rate for the U.S. (130/100,000 compared with 45/100,000). Cancer rates have also climbed substantially over the last 30 years, and North Slope residents now suffer the highest incidence of cancer in Alaska (at 579/100,000, compared with 461/100,000). North Slope Alaska Natives have the highest incidence of cancer in Alaska, at 579/100,000, compared with 461/100,000 for the U.S. general population. Cancer mortality rates for Alaska Natives, including North Slope residents, are also significantly higher than the US – 303/100,000 on the North Slope, compared with 163/100,000 – a disparity of great concern to health care providers in the state³. Finally, many health professionals working in our region have noted that the North Slope community appears particularly vulnerable to respiratory infections. This observation has been made in other coastal Alaska Native populations as well⁴.

It is in this context – that of a community with substantial health disparities and baseline vulnerability – that the significance of Shell's plan must be evaluated. We would ask, then, that you evaluate this permit request with a strong emphasis on the principles and requirements of Environmental Justice. Although seeking to avoid a "major source" designation may be

³ Day G, Provost E, Lanier A. 2006. Alaska Native Mortality Update 1999-2003. Alaska Native Epidemiology Center, ANTHC. Anchorage, Alaska 2006.

Lanier, A, Ehrsam G, Sandidge, J 2002. Alaska Native Mortality 1979-2002. Alaska Native Epidemiology Center, ANTHC. Anchorage, Alaska 2002

Lanier A, Kelly J, et al. Cancer in Alaska Natives 1969-2003: a 35 year report. Alaska Native Tribal Health Consortium. Anchorage, AK 2003.

Goldsmith et al 2004. *The Status of Alaska Natives Report 2004*. University of Alaska, Anchorage Institute for Social and Economic Research. Anchorage, Alaska. 2004. Accessed online on August 9, 2006 at <http://www.iser.uaa.alaska.edu/Home/ResearchAreas/statusaknatives.htm>.

⁴ Singleton R, Bruden D, Blukow L, Varney G, Butler J. 2006. Decline in respiratory syncytial virus hospitalizations in a region with high hospitalization rates and prolonged season. *Pediatric Infectious Disease Journal*. 25(12):1116-22.

expeditious for Shell from a business perspective, it is a flagrant and grievous violation of the principles of environmental justice. Given the already distressing increases and alarmingly high rates of pulmonary disease and cancer, our population warrants a particularly cautious regulatory approach to prevent further incremental degradation of our health.

Finally, we wish to draw your attention to what may in the end be among the most significant impacts of actions which appear to us to show a deep disregard for our health. The stress, fear and tension caused by multiple, simultaneous, and increasingly frequent proposals for development in the heart of our subsistence region are in and of themselves among the most difficult health problems we face, made worse by regulatory decisions that appear to value industry convenience over the well-being of our communities. These effects and the tension and emotion caused by this proposed permitting decision were made crystal clear in the public meeting and hearing conducted by EPA in Nuiqsut, May 8. Rates of suicide, domestic violence, and other social pathology are epidemic on the North Slope. It is precisely the type of concern represented by this permit application – that of actions that threaten not only to directly harm our health but to contaminate our subsistence resources as well – that leads to feelings of desperation, anxiety, helplessness, and anger among our residents. Sincere efforts by regulators to protect our health would go a long way toward preventing this problem.

Supporting Technical Information

Shell's application does not include all required supporting technical information. As detailed above, for example, there is no information on the Jim Kilabuk, fuel tanks, or other emission sources that vent to atmosphere or on the well testing plans, baseline emission monitoring, site specific meteorology, and fuel source and compositional analysis, among other required items.

Hazardous Air Pollution Estimates

Shell's application estimates hazardous air pollutants at a drill site level, but not at an OCS source level. In addition to this error, Shell's application does not provide hazardous air pollutant emission estimates for sources vented to atmosphere; Shell only provides estimates for combustion sources.

USCG Safety Zone Exclusion

The USCG has not approved Shell's request for a safety exclusion zone.

SOI Attachment 9

PUBLIC HEARING TESTIMONY SUMMARY

EPA Region 10 Staff: Dan Meyer, Presenter
Natasha Greaves, Presiding Officer (NG)

Translator: Eli Nukapigna

PEOPLE PROVIDING PUBLIC TESTIMONY

LL: Leonard Lampe, Village of Nuiqsut
EdN: Edward Nukapigak, Nuiqsut Whaler and Hunter
RA: Rosemary Ahtuanguak, Nuiqsut Resident
TM: Thomas Napageak, Nuiqsut Whaling Captain
EK: Erica Kunaknana, City of Nuiqsut Cultural Coordinator
EIN: Eli Nukapigna, Nuiqsut City Council

Time Recorded Start Time: 2:50:25, Nuiqsut Hearing Recording CD

NG My name is Natasha Greaves and I am employed by the Environmental Protection Agency (EPA) in Seattle. I am the presiding officer for this evening's public hearing. It is my responsibility to ensure that anyone who chooses to provide testimony this evening has the opportunity to do so.

Dan Meyer, who presented to you earlier, will be assisting me as necessary.

Eli will be translating this evening from English to Inupiat. This hearing is taking place on Tuesday, May 8, 2007, in the Nuiqsut Community Center, Nuiqsut, Alaska. You most likely became aware of this public hearing event via word of mouth, perhaps over the radio. Written invitation to this hearing hopefully has been displayed at the Nuiqsut Post Office and at the Nuiqsut City Office beginning April 5, 2007. Notice of this hearing was published in the Anchorage Daily News on April 5, 2007.

Dan and I are here this evening to hear from you. We would like you to tell us what you think about EPA's preliminary decision to allow Shell to conduct exploration drilling in the Beaufort Sea.

Details of Shell's air pollution impacts and EPA's preliminary decision are documented in writing. EPA widely distributed on April 5, 2007 Shell's two applications, EPA's two proposed air permits, and EPA's accompanying support materials considered in the permit decision. A hard copy of the materials is available at the Nuiqsut City Office. The information remains available to you on the internet at the web address printed on these information cards. If you are interested, please check-in with Dan and he will give this information card to

Nuiqsut Public Hearing Testimony, May 8, 2007
Nuiqsut Community Center, Nuiqsut AK

you.

If interested, please pick up one of these information cards before going home this evening.

Your input tonight will help us finalize or modify the permits as currently proposed. We are most interested in your ideas about the air pollution resulting from Shell's activities and the terms of the two proposed permits. If you think EPA should deny Shell's applications, it is important for EPA to hear this along with the reasons why.

EPA will respond to everyone's testimony. Our response will be in writing and will accompany the final permit decision. If you provide us your contact details, you will personally receive a copy of tonight's testimony, EPA's written response, and EPA's final permit decision. You can provide us your contact details by filling out the Public Hearing Sign-In Sheet.

In addition to taking oral testimony, EPA is also accepting written comments. If you don't want to testify, you can provide us with written comments by using a Comment Sheet and EPA will accept those today.

EPA is accepting both spoken and written testimony. You have the option of providing spoken testimony, written comments, or both.

If you choose to submit written comments, Dan or I would be happy to take your written comments before the evening concludes.

You can post your written comments to EPA. Have them postmarked no later than May 12, 2007 if they are going to be considered part of the record.

Written comments can be mailed to the address on the information cards. If you need EPA's mailing address, please see Dan. EPA's address is also on the Comment Sheet. The information card also has an e-mail address. If you would like to submit comments by email, you can do so. EPA must receive the e-mail no later than May 12, 2007 to be considered.

We will now begin receiving spoken testimony. Please speak slowly and clearly so that the tape recorder can pick up your testimony. We will be using a tape recorder this evening to get an official record of the hearing.

As you begin your testimony, please state your name clearly for the record along with who you are speaking for.

It is now 9:05 pm and EPA will open the floor to take public testimony. You may speak up front and use the microphone to make sure that EPA gets a clear recording.

Nuiqsut Public Hearing Testimony, May 8, 2007
Nuiqsut Community Center, Nuiqsut AK

LL For the record, my name is Leonard Lampe Sr., I represent the Village of Nuiqsut. The Native Village of Nuiqsut has over 300 tribal members recognized under the United States Constitution. I also wear many hats in the Village, just for the record. Our Box Number is 269 Nuiqsut Alaska, 99789. First of all, I would ask for a second hearing to address the Clean Water Act (CWA). There has been a lot of discussion about the Clean Air Act (CAA), but none on the CWA. I believe that it is the responsibility of the EPA to provide the community of Nuiqsut with information on how EPA is going to keep the water clean in regards to these two permits by Shell Oil.

Direct Implementation Tribal Cooperative Agreement (DICTA) is a program that is regulated in the lower 48 for Tribes to address and monitor air quality. I would encourage that for the State of Alaska. Currently there is no program in the State of Alaska and I would really encourage the EPA to start this program. This program would allow the Tribes to train local people and purchase air monitoring equipment to be used in Nuiqsut. So I would like to encourage that.

Again, I am very disappointed about the level of information we got on the CWA. We also did not get all the information that we were asking for on the CAA. I want that to be in the record.

I opposed this project, because Shell Oil does not have a proven plan to clean oil spills in the Beaufort Sea or arctic water. There is no proven method in the world that a spill of any size can be adequately cleaned. So, I oppose this project.

Deferral areas. There are deferral areas for the Village of Barter Island. There are deferral areas for the Village of Barrow. There is no deferral area for the most impacted village of the project, which is Nuiqsut. I would encourage that the issue of a deferral area be revisited for the Village of Nuiqsut for their whaling grounds and subsistence resources.

I would like to comment on the vessels that are being used in the project. The majority of these vessels have never seen harsh climate or waters as exist in upper Alaska or the North Slope. None of these vessels have experience, nor staff with experience in these weather conditions. This would make it even harder for them to react or appropriately take care of their personnel as well as property if an incident did occur.

There is a Federal Act that NOAA (?) imposes to protect aboriginal sites, subsistent areas of a Tribe. This Tribe has proven documentation that Cross Island has always been used for subsistence resources as long as the Tribe has been in existence. This is another Federal Act that I think will be violated if this permit is approved.

Nuiqsut Public Hearing Testimony, May 8, 2007
Nuiqsut Community Center, Nuiqsut AK

The accumulation of discharge. There is no total discharge for Prudhoe Bay and Kuparuk area and this project will add to total discharge of air pollutants coming to the Village of Nuiqsut. EPA needs to take a closer and better look at accumulation of what is happening in the Village of Nuiqsut, or near the Village of Nuiqsut.

The discharge of human waste or air discharge is at a much higher level than we would like to see. We would like to see more restriction on daily discharges. Currently two tons or more is allowed to be discharged daily, or even more. These discharge rates will impact human activities and subsistence resource. There is no doubt that our way of life will be impacted or deferred.

Global warming is a real reality in the world. What is EPA doing to slow this down? What is EPA doing to protect our way of life when it comes to regulating and monitoring on site project? There is no regulation, no monitoring on site, which makes it a real concern for the Tribe as well as the Village of Nuiqsut. If anything can ease the people it would be regulation and monitoring so that we could have eyes and ears on what is happening to our ocean as well as the land.

We need total pounds of emission on Nuiqsut from all production and activity near and around Nuiqsut, especially in traditional grounds as Cross Island. I would also like to ask if Shell has a secondary plan if emissions are higher than planned or permitted. What is the plan to reduce air emissions?

These are some of the comments that I have today. I would like to keep the comments open until May 12, 2007.

NG Thank you Leonard. Is there anyone else that would like to come forward? I can bring the microphone to you also, whatever works, to best provide spoken testimony.

RA For the record my name is Rosemary Ahtuanguaruak. I have lived in Nuiqsut since 1986. I worked as a Community Health Aid in our Village Clinic for 14 years. I attended the University of Washington's Physician Assistant Medical North West Program. I graduated in 1991 and passed my National Boards in 1993. I am not currently working at the Clinic. I am a previous City Council member. I have been involved with the Inupiat Community of the Arctic Slope. I have been involved with the Native Village of Nuiqsut. I attend local community meetings about activities in our community. I research issues being presented to our community that are important to our lives in Nuiqsut.

These comments tonight, I give as an individual. I want to express concern about issues the Elders commented on decades ago. Their concern is our reality. Their concerns need to be reassessed. The life they lived is different from the lives we are forced to live today. That needs to be researched to validate what they predicted, the changes we see today.

Nuiqsut Public Hearing Testimony, May 8, 2007
Nuiqsut Community Center, Nuiqsut AK

One of the first issues I have is that the information presented in EPA's information session is too wide in scope. EPA presented on Shell's entire lease area. It is not project specific.

EPA is looking at resource development for industry. EPA is allowing industry to fill in the boxes and present it to them. EPA then builds regulations after they receive information from industry. This causes lots of problems in our community.

EPA does not look at all of the emissions. Mobile emissions are looked at separately and not as part of the entire development. There are cumulative effects that are not evaluated as part of this project that can help plan for future development.

The studies that EPA relies on are not in this area. This causes lots of questions for this community. What can we expect about what will actually happen here? EPA is not looking at existing conditions, but at condition in another area with changes to the numbers to quantify effects that are based on standards elsewhere.

No attempt has been made to assess changes. There have been lots of changes with monitoring. These changes are not included in EPA's analysis. Monitoring methods from years ago has changed from what is being done today. But, that information is not presented to our community to make it easy for us to understand and comment.

Lots of questions about real effects that are happening to our community exist. It is hard to explain cause. We know that lifestyle is a factor. Development and exploration activities cause emissions that result in a great impact. Our bodies are being filled up and overflowing and we can't take anymore insult. The level of impact our community is more concentrated here in Nuiqsut.

We are concerned about how emissions impact us. Emergency emission occurs without any reaction. Industry emits emissions and says that it is not a problem. We are concerned about how emissions are reported. Emergency emissions occur without any EPA reaction. Industry emits then categorizes them as emergency, routine. A lot is categorized as emergency but there is no reaction to industry in terms of these emergency responses. So we just continue to breathe what occurs to us. There are a lot of regulations regarding temporary monitoring to decrease the effects of emissions.

We are experiencing changes and there is no reaction to these types of things. We continue to attend meetings about problems and still there is no change. There is concern about concentrated emissions during inversions and its impacts to our community. This keeps happening without any changes. There is even a greater push because when the viscosity of the oil is high, the greater the push

Nuiqsut Public Hearing Testimony, May 8, 2007
Nuiqsut Community Center, Nuiqsut AK

there is to get it through the pipeline. There is an increase in pressure which results in emergency releases to decrease the pressure. This impacts the air that we breathe. There are a lot of broken promises regarding regulations that protect us.

The lack of monitoring that allowed the recent discharge to occur. There is a lack of enforcement, a lack of assessment of what is happening to us as a result of the recent discharge. There are expansions but EPA relies on a monitoring system from the 1970s, yet the impact and concentration of all these development projects continue to exist. There is no help to deal with it. The latest technology is not being used at development projects because of cost constraints. There is a lot of information being used in certain areas with lots of people to help decrease emissions. Because we have a small community here, they are not being used here. We are told that they are not cost effective for companies to implement.

There were three bad events that happened in 1989 that led to the CAA Amendments of 1990. A lack of enforcement by the Federal Government led to people being hurt, then a law was created. We have old documents based on standards currently being used for development. We fought for decades on these processes. Our elders fought for five years to get stipulations that would give us the ability to continue our traditional and cultural uses in these areas. Yet, with the development that has occurred in over five years there has been no enforcement and exceptions is given for factors that continue to have effects.

There is a concern about other issues such as noise. This causes changes for us as we do traditional use.

There is concern about staff that has been dismissed before because of their attempts to decrease emissions. Individuals working within the State and Federal Government who tried to do their jobs. But because industry felt that it was too cost constraining on them, these people were forced out for doing their jobs of protecting the environment. There is a lack of staff to monitor existing fields effectively with expansion and exploration. There is a lack of effective monitoring at North Star. There was a gas leak, which was a result of ineffective monitoring. That is not an old development, yet we are not effectively managing it. We already have emissions from North Star that were not planned because of a lack of maintenance. This causes increased risk factors for our community. There isn't an open book policy towards industry. Efforts in legislature regarding British Petroleum and monitoring of the breakdown in the system led to the recent discharges. It's hard to get records public. These should be open to the public. Yet, we are getting extension requests from industry as we try to assess what needs to be changed to prevent this problem.

There is concern about increased respiratory health problems, increases risk to heart disease, diabetes. Emissions based on scientific models, actual exposure

Nuiqsut Public Hearing Testimony, May 8, 2007
Nuiqsut Community Center, Nuiqsut AK

during bad events started this model, started the standards. But affected communities are still trying to prove impact and they are not even compensated. Is this the standard that we have to face if something catastrophic happens up here? There are plans for in-situ burning if there is an event. An actual event led to exposure in a community near Exxon Valdez. Pregnant women and children were not evacuated during this event. They are still not recognizes as being exposed. This is a plan that is going to occur if there are spills, blow-outs or other factors.

Based on EPA's presentation, the rigs running 24/7 will cause emissions. Since they will not be pushing ice all the time, EPA looked at a medium. But, if you have a bad ice year and you have to run the rigs more, the exposure at that level is not evaluated and that causes community concerns. There is an issue of the cumulative impact of all the equipment being used out there. Everything is lumped together and not looked at individually in terms of emission factors. A lot of man contact hours could occur. But it is lumped together as part of the assessment.

There was some good discussion regarding global warming, but there is a lack of change to regulations that is needed.

There is a lot of information coming out about local effects with the judicial system. How is this going to affect what is being discussed here today? Are we going to be able to benefit from some of those activities based on old science from the 1970s. They looked at 96 hour bio-assays in which adult animals were exposed to oil. They only looked at the volatile organic compounds. They did not look at the black stuff. That was ignored in those earlier studies. Now we know from the Exxon Valdez that the black stuff is more toxic. And yet this was not analyzed during the opening of new development. New science is not being incorporated now. It is still based on 70s science.

There are international impacts from increased emission, yet the US fails to look at decreased emissions. We have industry lobbying that keeps the status quo. There is impact at the current level, yet there is more impact to come with increased development and exploration.

There is diesel emission changes in the lower 48 on busses used to transport kids with asthma, yet permits allow exposure to occur.

Regulations concerns with subsistence. There is a disconnect to traditional and cultural uses and the health and safety issue. We are proactive in educating our families in century old ways to live here and this presentation by EPA goes against teachings by increasing the risk to health and safety. With the level of disconnect the risk factors to local residents increase with activities coming to us. We have activities that support our village and this project is negative to the village needs. The level of disconnect is [in-audible] to us. It increases health

and safety factors in traditional and cultural uses.

Information is based on if the project is good, but if the project goes bad, then the assessments is on the low side. If there is a major blow-out, air dispersion factors are based on old information. In the past few years, our community has had industry presentations that show dispersion factors that are very different from what was used by EPA. We have information that dispersion factors are on the low side, but in reality, they are much higher if you consider newer information.

There is information that came from Prince William Sound because of the event there. That information is not included here. The efforts to reduce emission at the Valdez Port. Equipment was in place but there was a lack of enforcement to make sure that the equipment was used to reduce emissions. Discharge to water occurred. Some of the water treatment was supposed to occur, yet, there was no assessment or monitoring. That allowed piping to be put in that bypassed treatment to decrease cost and their emission still continues.

Health effects in our village to bad air. Health effects in our village in increased calls to the clinic, increased severity of calls, increased concentration of the severity of calls, there is increase cost to supplies, increase cost to transportation, increase cost to the pharmacy, increase emergency refills, increase cost to village members, increase cost to travel, increase cost to family support, increased cost to village structures. These people have hats. When they go out, all of their hats go with them and our structure looses when they are gone. Loss to village resource needs. Key hats are absent at important meetings. Costs to overall health care. Increased risk to complications, increased risk to village wide problems. We have a lot of kids sent out this year and a lot of elders sent out in the past few years.

Decreased ability to work away from the village, decreased ability to do basic life needs. When you have increased respiratory problems, it increases your risk factors for hypertension, hypersensitivity, heart disease, diabetes. We have increased problems with thyroid disease. We have people developing chemical sensitivities. There is a lot of increase in asthma, upper respiratory, bronchitis, pneumonia, [in-audible], COPD, emphysema. They are concerns about leukemia and cancer. We have increased social ills, increased domestic violence, increased drugs and alcohol use. These are all increased village costs and increased village loss. When you increase childhood illness, you decrease adult health. You increase your loss to elder preservation. All these factors affect our family and our community. All these factors increase clinical provider's burnout. You increase the difficulty in recruiting providers. You have increased ambulance calls, increased amount of health care providers needed, increase number of providers, increased number of follow-up visits, increased support needed. All of this comes back to impact our community.

Nuiqsut Public Hearing Testimony, May 8, 2007
Nuiqsut Community Center, Nuiqsut AK

The concern about air quality is increased, yet we have to accept it because Washington DC has this same level. Before it was better, but it has been left to deteriorate because other areas are worse. This is bad for us. There is concern about elder's stories which is different from our stories. Changes are occurring, impacting what we do and how we do things. Other countries control industry. They do not let them write permit applications and make the regulations. We have to fight for the small things we get and our local corporation gets minimal profit. And yet, we have the biggest impact.

There is drilling discharges to the ocean and a whole level of changes that is going to occur to the water quality, temperature, turbidity, salinity, turbulence, changes to the water, changes to the uses of water, microscopic changes, the animals that use them and the people that use the animals. Exemption to emission occurs in a standard way and yet we are continually impacted by the, There is a good video by the Sierra Club that looked at the social effects of Exxon Valdez. It looked at community wide effects. Those are real factors that EPA should consider as part of their assessment. There is a book written by a toxicologist that moved to Cordova, Sound Truth Corporate Myth that should be reviewed and incorporated into this.

Lease sales based on science from the 1970s. Nine-hour bio assays did not look at life stages and the two parts of oil. It only looked at impact and the worse part was not looked at. Studies have been done since then that needs to be reviewed and incorporated into this process. There needs to be a push towards new standards for development. New science shows long term effects but they are not put into these documents. The burden of proof has been out on the local area. That needs to be stopped. We need to be on a precautionary principal. We don't want to wait for an exposure to occur. We need to be aggressive in preventing that exposure to occur. It needs to be done with engineering, reduction, and recycling. We need to stop all persistent organic pollutants from being discharged during development and exploration.

Historical information results in a change in risk factors, but current information, actual changes, makes EPA's approach conservative. The lack of ice coverage and lack of protection that is in early documents isn't the current pattern we have and the risk factors are much higher. Changes to Title 19 and the Costal Zone Management Plan results in concern. There is a comprehensive plan that has been put through the North Slope Borough. These regulatory changes have not been well assessed. There has been presentations by agencies in our community that raises questions on how agencies are going to enforce some of the issues raised. There are division changes that occur that affect these documents. Who is supposed to manage changes that occur and make sure that it is effectively done the right way. Changes in the regulations are not well understood, they are broad and they are making it difficult for us to look at how we are going to prevent the things that are going to occur. Industry is allowed to affect a project instead of looking and developing resources in a safe effective way.

Nuiqsut Public Hearing Testimony, May 8, 2007
Nuiqsut Community Center, Nuiqsut AK

NG Thank you Rosemary. Would you like to comment?

TN Hello, my name is Thomas Napageak Jr. I am a Whaling Captain in Nuiqsut. I am also KSOP, Kuukpik [in-audible] Subsistence Oversight Panel. I am on the Board, I am the Chairman. I am opposed to offshore drilling, to the two permits for the Kulluk and Frontier Discoverer, because of impact to whaling subsistence. The use of 13 vessels in the Beaufort Sea will create an impact on our subsistence. I have seen one boat impact our whale hunt and that does not do us any good. When will we have this conversation with Shell about [in-audible] cannot compensate for the subsistence hunt for Nuiqsut. It is not right! On behalf of my whaling crew, I am opposed to Shell Offshore Drilling. I would appreciate EPA's review of their decision. Thank you.

NG Thank you Thomas. Is there anyone else that would like to provide testimony tonight?

EdN My name is Edward Nukapigak, I am a Nuiqsut whaler. I would like to address my testimony. Earlier we saw that Shell is planning to drill during the whaling season, from July 1 to November 1. I would oppose that because whaling has been our livelihood. It will effect the migration of the whaling. It is not easy to go out and hunt what we harvest. From time to time this has been addressed with Shell. Yet, Shell is still proceeding with open-water offshore drilling. EPA and the Minerals Management Service (MMS) needs to understand and the Department of Interior (DOI). EPA has to answer to the DOI. Therefore, the drilling should not occur during migration of the bowheads and the seals that we hunt. [in-audible] occurs at the 60-meter mark, which has been back in 86. Shell has been gone for 20 years and [in-audible] they are probably going to recap and put that online. The community has spoken from time to time.

We were told that the testimony was supposed to be on air quality. But the whole thing cannot be on air quality. It includes the marine mammals that we hunt. This is what we harvest. The Kulluk will be close to [in-audible] and Cross Island. Shell's plan is to enter through the [in-audible] entrance, then landfall to Point Thompson. This is according to what I have read on Shell's presentation and the newspaper. How can Shell go there and do drilling then the Department of Natural Resources has terminated Point Thompson? That was Shell's original plans for the land fall.

During whaling season, Shell should not, by all means, do any seismic or any open sea water. Shell has heard that loud and clear. Air quality is the other issue that has to be addressed. It will eventually affect the community, the sea mammals and the water [in-audible] which the community depends on. EPA does not have answers for some of the issues raised earlier that. The fact that EPA does not have answers leaves this community up in the air. The community has spoken. EPA needs to go back to the drawing board. EPA needs to go back

Nuiqsut Public Hearing Testimony, May 8, 2007
Nuiqsut Community Center, Nuiqsut AK

to gather all the information. The data that EPA used could be from 1986, or it could go way back to the 70s. It is not the new database that Shell has documented, according to the draft Environmental Impact Statement (EIS) for the Outer Continental Shelf (OCS). The draft EIS was not in-house. The community of Nuiqsut has not been given a chance to get their comments in and document their concerns to the draft EIS for the OCS. That leaves this community out.

As Nuiqsut whalers, and Nuiqsut hunters, EPA should strongly consider the drilling that is going to be continuing during whaling season. Just imagine a hammer head can be heard even if the platform is not visible. Some of the ice packs that we have encountered in the past are not natural mounds, it is the mounds from platforms. We have encountered those when we are out scouting for whales. So where is all of this coming from? [in-audible] coming from those platforms. Those were addressed. Regardless of the output of this public hearing, what is going to happen? Is EPA going to come back and give a presentation to this community with the whole nine yards? Or is EPA going to go ahead and leave the community and do their part at and issue the permits to Shell. EPA has heard a lot of strong comments and issues based on the question that came up earlier during this meeting.

Without having proper updated data before us, we have no idea what is going on. Anytime EPA calls a public meeting, we like to see the data so that those who are here can read and make a proper presentation. Instead of just coming here to have a public hearing. What is a public hearing? What are the topics? You need to put this in black and white so that we can review it before a public hearing. This public hearing is a very short notice. The issue that has been raised is that we are strongly oppose to offshore exploration for a time, until EPA and the MMS and OCS have given the community information, in black white, so that we can review. Right now, everything is up in the air. It is just an oral testimony. What EPA has presented is not enough to say go ahead and issue a permit to Shell Oil or a portion of the permit to Shell Oil.

Of course the pollution is man made. It can be seen during winter months, early spring and in summer. They may look like clouds but it just hovers. These clouds are just going back and forth by the wind, from east to west, south to north. They are not going anywhere. It is polluting our atmosphere. And part of that atmosphere is what impacts us. We are the ones breathing it. We are the ones breathing it when we are out hunting. We have a big impact.

So how can you help us? How can EPA or the agencies go ahead and approve Shell's permit. If EPA is going to approve Shell's permit, then this community had [in-audible] offshore mammals, then this community should be compensated individually because we are the one that is impacted. The air quality, the same as the water, is both the same. What is being discharged has to go up, regardless of whether it is domestic water, grey water. It is still being transported into

Nuiqsut Public Hearing Testimony, May 8, 2007
Nuiqsut Community Center, Nuiqsut AK

humans through our mammals. I am opposed to what Shell is going to do here with the Kulluk and the other offshore platform.

As a community as a whole that depends on the land and sea. We have short seasons during summer. That is the time that we harvest for the long winters. EPA should understand that during whaling season, based on what I know or may have heard from Shell, is that Shell will not do any seismic or exploration during whaling season. Now, what is presented here is that they want to drill from July 1 to May 1, I mean November 1 right through whaling season when the bowheads are right on the path of Hammerhead. The whales are on the 60-meter mark. That will divert the whales further north, making it difficult for the whalers to go out and pursue them and harvest their quota. This should be considered as priority and Shell should not drill during whaling season. From what I saw, from July 1 to November 1, Shell wants to drill. From July 1 to November 1 Shell wants to do seismic, not giving this community a time to harvest. EPA needs to understand that we have a short season. The oil industry has all the time to drill during winter.

The community goes way back, when there was an Elders' Conference in Barrow in 1978. The oil companies when to Barrow to find out what the ice conditions were east of Barrow, during the Elders' Conference. They did not know that they were going to drill offshore. A lot of issues have been raised by the elders that have left us. They have interest on the current shifts, on how the ice moves in this area. They are talking about Flaxman Island, Cross Island, Camden Bay. Those were addressed by the elders that left us a while back. Some may still be alive. They asked questions about the ice and sea conditions east of Barrow, knowing that the oil companies have interest going offshore. They collected data from those elders in Barrow.

Right now, I fully oppose the proposed activities. I strongly oppose the open water seismic and staging of exploratory wells during the migration of bowheads. At the earliest, the bowheads migrate during the third week of August. Barrow is already hunting the second week of April. The migration of the bowheads is occurring earlier than the last part of April or the first week of May. In this area we do have a short season.

EPA have any answers to the questions raised by the community at any time did. EPA needs to come back and address all the questions and comments raised earlier. Not just folks from air quality, we need to see those from water. Right now, I am fully opposed to what is going to be going on until we have a complete study of that area and accurate answers to issues raised earlier.

I fully oppose what is going to be going on east of our village. Flaxman Island is also a place where our folks have used for seal [in-audible]. They can go as far as Flaxman Island or [in-audible] Island to harvest their bowheads and now they are coming back. Offshore platforms will divert the bowheads making it

Nuiqsut Public Hearing Testimony, May 8, 2007
Nuiqsut Community Center, Nuiqsut AK

difficult for us. We have to travel further north just to harvest or fulfill our quota.

EPA does not have some of the answers to some of the questions raised here today. So, EPA needs to come back. Some of the issues that are unanswered need to be answered clearly. As of now I am opposed to the offshore open water season. We have spoken from time to time and Shell has heard our concerns and our issues. And still they keep coming back to this village wanting the EPA and MMS to craft their permit. Those have been addressed from time to time. They will keep coming back until they convince the State and Federal Governments to issue their permits to process and startup production of the exploratory wells, and possibly have discovery on line while the price of oil is up in the \$60s plus more. When you see Shell on the news and read the newspaper, they are desperate to make a discovery and build pipeline once they have their permits. The permits should be delayed until we have clear answers about our concerns and issues. As a Nuiqsut whaler and hunter, I am opposed to what is going to take place. Thank you.

NG Thank you Edward. Is there anyone else that would like to submit testimony for the record tonight?

EK Hello, my name is Erica Kunaknana. I am the Cultural Coordinator at the City of Nuiqsut. I would like to say that I am opposed to the exploratory plan and drilling Shell wants to do. Our people have relied on this land for many years, and we have many generations to go. A lot of kids that do not know about subsistence, but are willing to learn. With EPA here drilling around, it will be hard for them to learn.

I just want to say that I am opposed to offshore drilling.

NG Thank you Erica. Is there any one else this evening that would like to submit testimony?

EIN Hello, I am Eli Nukapigna with the Nuiqsut City Council. [in-audible] I reside in Nuiqsut [in-audible] planning and wildlife. We have had so many meetings in Nuiqsut that it becomes frustrating in these kinds of meetings and hearings. Shell's exploration is in the heart of the migration of whales and seals, all the marine mammal go through the 30-60 meter mark.

The current goes through these areas [in-audible] in our arctic water. New currents are also in the path of big icebergs moving in and out. The ice [in-audible]. Now, when you break up the motion of the ice, it shifts towards our coast line. The increase of ice that we have seen in the past five years is multiyear ice, ten or more years not [in-audible]. This multiyear ice is floating in the arctic ocean that sometimes covers the whole arctic [in-audible], so many weeks. What will happen if a big iceberg hits the drill ship [in-audible] late 40s

Nuiqsut Public Hearing Testimony, May 8, 2007
Nuiqsut Community Center, Nuiqsut AK

or 50s? What will happen if a big iceberg hits one of those [in-audible] where the currents are really strong? What will happen if 200,000 gallons of diesel spill? We know that there will be devastation if this happens. Devastation of our living and rapid devastation that we do not know what we are going to do after this happens.

I will support the community and my best interest because [in-audible]. I support our [in-audible] to the Whaling Captains and the crew. I fully support comments and also support community when they speak. Cumulative impact has never been addressed. We need more answers questions raised in this hearing. Can we have other agencies, MMS, EPA, [in-audible], all the Federal Government agencies to come to this community. I invite them all to hear some of these issues that have been raised to EPA and provide answers. Some of these answers have not been provided as yet, but we need to know because are concerned.

The arctic culture is our [in-audible] and we cherish the food that comes from the ocean. We need to pass it down to our younger generation that is trying to learn how to hunt in the arctic ocean. How are we going to teach them when there is a big drill ship in the heart of where we do our hunting? How are we going to teach our younger generation the Inupiat culture and way of life that is part of our people? I was brought up of Barrow in the early 50s in [in-audible] before new machines came around. I know the old people stories that have been passed down to me. How am I going to teach our younger people that kind of stuff, if this arctic ocean is now being explored and developed for the sake of our national security? I oppose Shell offshore and I hope that EPA comes back with other agencies to answer some of the questions that have been raised for the last 35 years. Thank you.

NG Thank you Eli. Is there one else that would like to provide spoken testimony tonight? Seeing that there is no one else left to testify, this hearing is closed at 10:10 pm. Thank you.

SOI Attachment 10



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington 98101

MAY 08 2007

Reply To
Attn Of: AWT-107

Johnny Aiken
Director, North Slope Borough Planning Department
P.O. Box 69
Barrow, Alaska 99723

Re: Request to Extend the Public Comment Period
Air Quality Control Minor Permit Nos. R10OCS-AK-07-01 and R10OCS-AK-07-02

Dear Mr. Aiken:

Thank you for your letter of April 18, 2007 requesting US Environmental Protection Agency (EPA) to extend the public comment period on our preliminary decision to issue two Air Quality Control Minor Permits to Shell Offshore Inc. allowing the company to conduct exploration drilling in the Beaufort Sea.

The public comment period for these permits began on April 5, 2007, and is scheduled to conclude on May 12, 2007. A public hearing is scheduled for today, May 8, 2007, in Nuiqsut, Alaska. In your letter you explained that May is a critical subsistence harvest month for marine mammals, including the bowhead whale, and that due to the subsistence harvest and cultural activities the residents would be unable to effectively participate during a public comment period in May. Accordingly, you requested that public hearings be deferred to the week of June 4, 2007, and that the public comment period be extended until after the June public hearings are complete. As communicated to your staff on May 4, 2007, and explained in more detail below, EPA is denying your request to defer the public hearing or to extend the public comment period.

In making this decision, I recognize that we must carefully balance competing interests. We acknowledge and respect the importance of providing North Slope communities the opportunity to express their concerns regarding potential impacts that these projects may have on their subsistence lifestyle and I am concerned about the difficulty of North Slope residents doing so during the spring hunt. At the same time, however, I also considered that expediting energy related projects is a national priority, and that conditions on the North Slope are such that extending our permitting process would delay exploration activity for an entire year. Additionally, I took into account the amount of information-sharing and other communication that has already occurred with the North Slope Borough regarding these permits. After careful consideration of these and other factors, EPA decided not defer the public hearing or to extend the public comment period. Accordingly, the public comment period will close on May 12, 2007.

List of Addressees

Distribution List:

NSB Mayor Edward S. Itta
Karla Kolash, NSB Mayors Special Assistant
Gordon Brower, NSB Land Management Regulations
Taqulik Hepa, NSB Wildlife Department
Bessie O'Rourke, NSB Law Department
Layla Hughes, NSB Law Department
Harvey Consulting, L.L.C.
City of Pt. Lay
City of Pt. Hope
City of Wainwright
City of Atkasuk
City of Anaktuvuk Pass
City of Barrow
City of Kaktovik
City of Nuiqsut
Alaska Eskimo Whaling Commission
Inupiat Community of Arctic Slope (IRA)
Native Village of Barrow Inupiate Traditional Government
Native Village of Nuiqsut
Native of Kaktovik
Village of Wainwright
Point Lay Tribal Council (IRA)
Native Village of Point Hope

SOI Attachment 11

Presidential Documents

Title 3—**Executive Order 13175 of November 6, 2000****The President****Consultation and Coordination With Indian Tribal Governments**

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:

Section 1. Definitions. For purposes of this order:

(a) "Policies that have tribal implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

(b) "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

(c) "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

(d) "Tribal officials" means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

Sec. 2. Fundamental Principles. In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

(a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

(b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

(c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

Sec. 3. Policymaking Criteria. In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:

(a) Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

(b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:

(1) encourage Indian tribes to develop their own policies to achieve program objectives;

(2) where possible, defer to Indian tribes to establish standards; and

(3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

Sec. 4. *Special Requirements for Legislative Proposals.* Agencies shall not submit to the Congress legislation that would be inconsistent with the policy-making criteria in Section 3.

Sec. 5. *Consultation.* (a) Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:

(1) funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of the regulation, (A) consulted with tribal officials early in the process of developing the proposed regulation;

(B) in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(C) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,

(1) consulted with tribal officials early in the process of developing the proposed regulation;

(2) in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the

need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(3) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(d) On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

Sec. 6. Increasing Flexibility for Indian Tribal Waivers.

(a) Agencies shall review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

(c) Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency, or as otherwise provided by law or regulation. If the application for waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.

(d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

Sec. 7. Accountability.

(a) In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866 of September 30, 1993, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.

(b) In transmitting proposed legislation that has tribal implications to OMB, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.

(c) Within 180 days after the effective date of this order the Director of OMB and the Assistant to the President for Intergovernmental Affairs shall confer with tribal officials to ensure that this order is being properly and effectively implemented.

Sec. 8. Independent Agencies. Independent regulatory agencies are encouraged to comply with the provisions of this order.

Sec. 9. General Provisions. (a) This order shall supplement but not supersede the requirements contained in Executive Order 12866 (Regulatory Planning and Review), Executive Order 12988 (Civil Justice Reform), OMB Circular A-19, and the Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments.

(b) This order shall complement the consultation and waiver provisions in sections 6 and 7 of Executive Order 13132 (Federalism).

(c) Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments) is revoked at the time this order takes effect.

(d) This order shall be effective 60 days after the date of this order.

Sec. 10. *Judicial Review.* This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

William Clinton

THE WHITE HOUSE,
November 6, 2000.

[FR Doc. 00-29003
Filed 11-8-00; 8:45 am]
Billing code 3195-01-P

SOI Attachment 12



U.S. Environmental Protection Agency

Region 10: The Pacific Northwest

[Recent Additions](#) | [Contact Us](#) | [Print Version](#) Search:
[EPA > Region 10 > Tribal Page > Programs > Consultation](#)

First Time Visitors
Index A - Z

Air Quality
Cleanup
Waste & Toxics
Water Quality

Business & Industry
Concerned Citizens
Compliance & Enforcement
Information Resources
Innovative Solutions

EPA's Consultation Procedures

U.S. ENVIRONMENTAL PROTECTION AGENCY- REGION 10 TRIBAL CONSULTATION FRAMEWORK

REGION 10 WORKING DEFINITION OF TRIBAL CONSULTATION

"Consultation" means the process of seeking, discussing, and considering the views of federally recognized tribal governments at the earliest time in EPA Regions 10's decision-making. Consultation generally means more than simply providing information about what the agency is planning to do and allowing comment. Rather, consultation means respectful, meaningful, and effective two-way communication that works toward a consensus reflecting the concerns of the affected federally recognized tribe(s) before EPA makes its decision or moves forward with its action.

REGION 10 GUIDING PRINCIPLES

1. The Region will consult with federally recognized tribal governments in a sensitive manner respectful of tribal sovereignty and culture.
2. The Region will maintain government-to-government communications with federally recognized tribal governments by interacting through officials of appropriate stature and authority as determined by the Regional Administrator and tribal government. For major consultation issues, the time frame and manner in which EPA will consult with a specific Tribe will be negotiated between EPA and the Tribe.
3. In situations where EPA has the ultimate decision-making authority, federal policies direct EPA to consult with affected federally recognized tribal governments prior to decision-making. The Region will work within the following guidelines when deciding how to consult with federally recognized tribes:
 - When the matter may directly affect the environment, resources, treaty rights or other legal rights of a specific or small number of federally recognized tribes, EPA will meet with, have conference calls, and send letters to tribal leaders of the affected individual tribe(s). EPA will provide feedback as specifically requested by the Tribe(s) and take any agreed upon follow-up action on the matter in a timely manner;
 - When seeking perspectives from all interested federally recognized tribes in the Region on national or broad Regional issues, EPA will meet with, or have a conference call, or solicit written views in a letter from EPA;
 - When looking for broad guidance on tribal policy or implementation matters of national or Regional interest either at a preliminary stage or requiring fast turn-around, EPA will rely on the Regional Tribal Operations Committee for assistance and input. This dialogue will not replace the government-to-government relationship

and communication between EPA and the Tribe(s);

4. On specific matters, the Region should contact and provide any available materials necessary to the potentially affected federally recognized tribes as early as practicable, to provide time for consultation prior to making a decision.
5. Where feasible and appropriate, the Region will encourage regular participation of federally recognized elected tribal representatives or their designees on Regional planning groups and work groups.
6. The Region will directly notify federally recognized tribe(s) where specific tribal interest or trust resources may be involved, and offer the respective tribe(s) an opportunity to participate without resolving whether the tribe(s) has a legal right to consultation.
7. The Region will meet with individual federally recognized tribes upon request of the tribe's leaders.
8. The Region should endeavor to build an on-going relationship with each federally recognized tribal government(s) to increase communication, and to ensure that consultation on specific proposals will be more constructive and effective.
9. The Region will encourage meetings with federally recognized tribal governments on their homelands, to the extent resources allow, to strengthen the EPA federal-tribal relationship and facilitate EPA understanding of respective tribal issues, concerns and perspectives.
10. Public participation which involves individual citizens of Indian Country, is not the same as consultation with affected federally recognized tribal governments. EPA has the responsibility to consult with federally recognized tribal governments separate from, and in addition to, the public participation process for interested stakeholders.
11. Consultation with tribal governments should occur independent of the public participation process. Tribal consultation does not replace requirements to promote public participation that may apply to a given proposed federal action.

ISSUE RESOLUTION

Should disputes arise between one or more tribes and EPA Region 10, the parties will strive to address the matter informally, at the staff level. In the event that staff are unable to resolve a dispute, the issue will be presented to immediate supervisors, who will attempt to resolve the dispute. If the dispute is not resolved, the staffs will present the matter to progressively higher levels of management until consensus is reached. In the event consensus is not reached, the EPA Regional Administrator, after consulting with the elected leader(s) of the federally recognized Tribe(s), will make the final decision.

IndianPolicy/TribalConsultationFinal7-16-01

*Unit: Tribal Program
Point of contact: Judi Lefferson
Email: lefferson.judi@epa.gov
Phone Number: 206-553-4011
Last Updated: 07/15/2005 02:34:25 PM*

[EPA Home](#) | [Privacy and Security Notice](#) | [Contact Us](#)

URL: <http://yosemite.epa.gov/r10/tribal.NSF/Programs/Consultation>