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ENVIR. APPEALS BOARD

*Attorneys for Shell Offshore Inc. and
Shell Gulf of Mexico Inc.*

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

In re:)
)
)

Shell Gulf of Mexico Inc.)
Frontier Discoverer Drilling Unit)
OCS Permit No. R10OCS/PSD-AK-09-01)

OCS Appeal Nos. 10-01 through 10-04

and)
)
)

Shell Offshore Inc.)
Frontier Discoverer Drilling Unit)
OCS Permit No. R10OCS/PSD-AK-09-02)

NOTICE OF RELATED AUTHORITY

Shell Gulf of Mexico Inc. and Shell Offshore Inc. (collectively, "Shell") respectfully submit as authority related to the above-captioned matter the attached Declaration of Regina McCarthy, filed by Defendants on January 31, 2011, in *Avenal Energy Center LLC v. U.S. Environmental Protection Agency, et al.*, Case No. 1:10-cv-0083-RJL (U.S. District Court for the District of Columbia) ("McCarthy Declaration") ("Attachment A"). In her capacity as Assistant

Administrator of the Office of Air and Radiation, Ms. McCarthy sets forth an Agency policy that strongly supports part of Shell's pending motion for reconsideration of the Order Denying Review in Part and Remanding Permits filed herein on December 30, 2010 ("Order"). In the Order, the Board directed Region 10 to "apply all applicable standards in effect at the time of issuance of the new permits on remand." Shell sought reconsideration of this instruction because it is an unwarranted departure from the general principle, enunciated in other EAB decisions, that the Agency will apply to a permit those standards that are in effect when first issued, a principle recently confirmed in *In re Russell City Energy Center*.

The Assistant Administrator's Declaration says that the Agency has decided not to apply certain air quality requirements to pending PSD permit applications, including the permit for Avenal Power Center at issue in that litigation. These grandfathered applications will not have to meet the 1-hour NO₂ NAAQS, which became effective April 12, 2010, or other new permitting "requirements that have taken effect during the period of time [that the permit application has] been pending." McCarthy Declaration at ¶ 6. These requirements could include, e.g., the regulation requiring as of January 2, 2011, BACT for CO₂ on new major sources; the PM_{2.5} PSD increment that became effective on December 20, 2010; and the SO₂ 1-hour NAAQS that took effect on August 23, 2010. The McCarthy Declaration says that EPA will "grandfather" the PSD permit for the Avenal project without regard to any of these new standards and will propose to grandfather similarly situated PSD permit applicants in the same way.

The Assistant Administrator explained that the reason for the new policy is that applicants for PSD permits "have experienced unforeseen challenges with the preparation and review of information to predict the impact of proposed sources on hourly NO₂ concentrations,"

as a result of which EPA undertook a “policy review.” McCarthy Declaration at ¶ 5. She testified that:

As part of this policy review, EPA has determined that it is appropriate, under certain narrow circumstances, to grandfather certain PSD applications from the requirement to demonstrate that the proposed facility will not cause or contribute to a violation of the hourly NO₂ standard. In addition, EPA believes the factors that justify such an approach for the hourly NO₂ standard also provide a basis not to subject these same permit applications to additional permitting requirements that have become effective during the period of time these permit applications have been pending and permit applicants have been seeking to compile the additional information necessary to demonstrate that the source will not cause or contribute to a violation of the hourly NO₂ standard.

Id. at 6. This grandfathering policy, the Assistant Administrator stated, covers Avenal’s 2008 permit application. *Id.*

Importantly, EPA is taking this position even though the Avenal PSD permit has not yet been issued by Region 9 (though the application was complete as of March 2008). In light of this policy of grandfathering *pending* PSD applications from the 1-hour NO₂ standard and, *inter alia*, the CO₂ BACT requirement for new or modified major sources, the Board should not require Region 10 to apply those very same standards to Shell’s PSD permits that had already been issued when the standards took effect. There is an even stronger justification for *not* applying these new standards to Shell’s permits on remand than there was for grandfathering Avenal’s PSD permit, which has not yet been issued by the Region.¹

¹ To the extent that, under the policy set forth in the McCarthy Declaration, the grandfathered status of a pending PSD permit is based on the filing of an application before EPA proposed the 1-hour NO₂ standard on July 15, 2009, both of Shell’s initial permit applications would qualify even were the permits not already issued. The Chukchi and Beaufort applications were first submitted, respectively, on December 11, 2008 and May 29, 2009. *See* Order at 13-17. While it is acknowledged that each application was subsequently supplemented and determined to be complete after July 15, 2009, the Order recognizes that Region 10 did not ask Shell to consider or assess compliance with the proposed standard in order to complete the applications. *Id.*

The policy to which the Assistant Administrator testified also is contrary to authority cited by the Board for its instruction. The Order says the Region's determination regarding "whether the permits must comply with the new 1-hour NO₂ NAAQS or the Agency's requirements for CO₂ or other greenhouse gases depends upon the date on which the Region issues its final permit decisions under 40 C.F.R. 124.15(a) upon conclusion of the remand proceedings." Order at 9. The Order cites as the most recent authority for this proposition the Office of Air and Radiation's November 10, 2010 document entitled "PSD and Title V permitting Guidance for Greenhouse Gases" at 3 n. 6 ("November 2010 Guidance"). *Id.* Even assuming that the November 2010 Guidance ever covered Shell's permits,² that guidance has clearly been modified by the policy to which the Assistant Administrator testified on January 31, 2011, under which Shell's permits should be grandfathered from new requirements that post-date their issuance by Region 10. As the Assistant Administrator testified, "This determination [to grandfather pending PSD permits from requirements imposed during permit processing] represents a change in . . . previous interpretive statements issued by EPA." McCarthy Declaration at ¶ 6. In sum, Shell respectfully suggests that the Board's instruction to the Region retroactively to apply "new" requirements – including the new NO₂ standard and greenhouse gas requirements – is plainly contrary to both the Board's own recently affirmed precedent and the

² This earlier guidance says the Agency's policy is that "EPA generally applies the requirements in effect at the time a permit is issued by a Regional Office unless the Agency has expressed an intent when adopting a new requirement that the requirement apply to permits that were issued earlier but not yet effective." November 2010 Guidance at 3, n.6 It goes on to note that EPA uses the term "'issued' to describe the time when a permitting authority issues a PSD permit." *Id.* Thus, even before the Assistant Administrator announced the grandfather policy for pending PSD permit applications, the Board's reliance on the November 2010 Guidance was misplaced because Shell's permits had been "issued" before either the 1-hour NO₂ standard or the greenhouse gas BACT rule took effect.

recently changed official policy of the Agency that is set forth in the McCarthy Declaration.³ Under this policy, the Board should, as Region 10 requested, make clear that Shell's permits were not remanded in their entirety and that the "new" standards should not be applied to the permit in the remand process. *See* EPA Region 10 Motion for Reconsideration and/or Clarification, filed herein on February 7, 2011 ("EPA Reconsideration Motion"), at 21-22 ("The broad remand that the Board has issued in this case, including exercising its discretion to direct Region 10 to apply new standards in effects when issuing the permit on remand, is creating exactly the type of 'endless loop' of permit issuances, appeals, and remands that the Board sought to avoid in *Russell City*").

Further, as the Assistant Administrator testified, EPA has a "statutory obligation to grant or deny a complete PSD permit application within one year." McCarthy Declaration at ¶ 6. Retroactive application of the new standards to Shell's permits on remand will only exacerbate EPA's failure to take final agency action within the statutory deadline, which has already been exceeded for both permits. Accordingly, the instruction should be deleted from the Order and the Board should direct Region 10 to apply to Shell's Chukchi and Beaufort PSD permits the standards and regulations that were in effect when the permits were issued on, respectively, March 31 and April 9, 2010. Alternatively, the policy to which the Assistant Administrator testified would require at least that the Region be afforded on remand the flexibility to determine

³ At the June 2010 hearing, counsel for Region 10 stated that "we concede that if there was any need to withdraw or voluntar[ily] remand a permit and issue a new final permit, that the new NO₂ standard would come into effect." Oral Argument Transcript at 52-53 (June 18, 2010). To the extent that this statement accurately reflected Agency policy at the time, and assuming it was relevant to the situation presented here, i.e., further proceedings following remand by the Board, it no longer reflects Agency policy as expressed in the McCarthy Declaration.

whether Shell's issued permits meet the applicable criteria for grandfathering under the Agency's policy or must meet requirements that took effect after their issuance in 2010.

Processing Shell's permits in accordance with the new Agency policy set forth in the McCarthy Declaration is essential to enable Shell to secure long-delayed OCS air permits for exploration of its OCS leases. On February 2, 2011, Shell announced that due to uncertainty about the outcome of federal permitting efforts, including this proceeding, Shell could no longer proceed with plans to drill with the *Discoverer* in 2011, but plans to commence drilling in 2012. Nevertheless, the urgency surrounding the remand proceedings and issuance of revised PSD permits remains. EPA has opposed Shell's request that the Board impose a deadline of April 15, 2011, for Region 10 to complete remand proceedings under the Order. In the alternative, Region 10 requested that the deadline be six months after the Board rules on EPA's and Shell's pending reconsideration requests. See EPA Region 10's Partial Opposition to Shell's Request for Partial Reconsideration, filed herein on February 7, 2011 ("EPA Partial Opposition"). Based on the permitting history in this matter, as outlined in Shell's prior filings, an open-ended remand, or even one that does not conclude for a minimum of six months from the present, could seriously prejudice Shell's ability to obtain appropriate PSD permits for the *Discoverer*. If Region 10 does not issue revised permits until approximately late August, 2011, then petitions for review of the permit revisions would be filed in late September, 2011, leaving the Board relatively little time to address the inevitable petitions for review, placing Shell in the same position as in late 2010, and thereby seriously jeopardizing Shell's plans for the Summer 2012 drilling season. Indeed, even though the Region opposes a deadline for concluding the remand process, the Region has recognized the need for expedition in the remand process, and the consequent need for an EAB decision on unresolved issues raised by Petitioners. See EPA Reconsideration Motion at 23

(“Ruling on these issues now . . . would alleviate the on-going uncertainty in this case, while increasing administrative and judicial efficiency and mitigating additional delays in taking final action on the Permits.”).

The Region cited in support of its inability to meet an April 15, 2011 deadline the necessity to, inter alia, “obtain necessary information from Shell; analyze such information to determine the applicability of such new requirements; [and] assure the remanded permits comply with such requirements (as necessary).” *Id.* at 3. Processing Shell’s permits under the Agency’s new policy will relieve Region 10 of these obligations and greatly assist it in meeting the April 15, 2011 (or other) deadline.

Respectfully submitted,

/s/ Duane A. Siler

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DATED: February 9, 2011

ATTACHMENT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AVENAL POWER CENTER, LLC)

Plaintiff,)

v.)

U.S. ENVIRONMENTAL PROTECTION)
AGENCY and LISA P. JACKSON, in her)
capacity as Administrator of the)
U.S. Environmental Protection Agency)

Defendants.)

Case No.: 1:10-cv-00383-RJL
(Hon. Richard J. Leon)

DECLARATION OF REGINA MCCARTHY

I, Regina McCarthy, declare under penalty of perjury under the laws of the United States of America that the following is true and correct to the best of my knowledge, information and belief, and is based on my own personal knowledge or on information contained in the records of the United States Environmental Protection Agency (EPA) or supplied to me by EPA employees.

1. I am the Assistant Administrator of the Office of Air and Radiation in EPA, a position I have held since June 2009. The Office of Air and Radiation (OAR) is the EPA office that develops national programs, technical policies, and regulations for controlling air pollution. OAR's assignments include the protection of public health and welfare, pollution prevention and energy efficiency, air quality, industrial air pollution, pollution from vehicles and engines, acid rain, stratospheric ozone depletion, and climate change.

2. OAR is responsible for development of National Ambient Air Quality Standards and the development and implementation of regulations, policy, and guidance associated with the Prevention of Significant Deterioration (PSD) permitting program.

3. Prior to joining EPA, I served as the Commissioner of the Connecticut Department of Environmental Protection. I have worked at both the state and local levels on critical environmental issues, and helped coordinate policies on economic growth, energy, transportation and the environment. I have a B.A. in Social Anthropology from the University of Massachusetts at Boston and a joint M.S. in Environmental Health Engineering and Planning and Policy from Tufts University.

4. On February 9, 2010, EPA issued a National Ambient Air Quality Standard (NAAQS) for hourly concentrations of nitrogen oxides ("hourly NO₂ standard").

5. In a prior declaration, I testified that applicants seeking PSD permits to construct stationary sources of air pollution have experienced unforeseen challenges with the preparation and review of information to predict the impact of proposed sources on hourly NO₂ concentrations. This gave rise to an EPA policy review that has now proceeded to the point that the agency can more specifically explain how it intends to move forward with action on the PSD permit application submitted by Avenal Power Center ("Avenal"). See paragraphs 5-8, Declaration of Regina McCarthy (January 7, 2011).

6. As part of this policy review, EPA has determined that it is appropriate, under certain narrow circumstances, to grandfather certain PSD applications from the requirement to demonstrate that the proposed facility will not cause or contribute to a violation of the hourly NO₂ standard. In addition, EPA believes the factors that justify such an approach for the hourly NO₂ standard also provide a basis not to subject these same permit applications to additional permitting requirements that have taken effect during the period of time these permit applications have been pending and permit applicants have been seeking to compile the additional information necessary to demonstrate that the source will not cause or contribute to a violation of the hourly NO₂ standard. The PSD permit application submitted by Avenal in 2008 is among those PSD permit applications that EPA believes it is appropriate to grandfather from these additional requirements, particularly in light of EPA's statutory obligation to grant or deny a complete PSD permit application within one year and other circumstances present in this case. EPA will propose to extend similar relief to other permit applicants that can show they are similarly situated. This determination represents a change in the position EPA has taken in this matter and in previous interpretive statements issued by EPA, including statements cited by EPA to support its Cross Motion for Summary Judgment in this litigation.

7. Because this change in position requires that EPA modify or narrow previous interpretations of EPA regulations and the position EPA has taken in public statements to this court regarding this permit, the Agency reads applicable regulations and case law to require that the EPA provide the public with an opportunity to comment on this proposed action before the Agency can issue a final decision on the pending permit application that exempts Avenal from these additional requirements.

8. EPA intends to issue a supplemental public notice that will request comment on EPA's proposal to approve Avenal's application without requiring a demonstration that this source will not cause a violation of the hourly NO₂ standard. In addition, this notice will also request comment on EPA's proposal not to require this source to meet emissions limitations for greenhouse gases or to demonstrate that the proposed source will not cause or contribute to a violation of the National Ambient Air Quality Standards for hourly concentrations of sulfur dioxide which became effective on August 23, 2010. The notice will also inform interested persons of the opportunity to provide comments on these subjects at a public hearing.

9. As a result of a recent ruling by the EPA Environmental Appeals Board, EPA has also determined that it is necessary to supplement its analysis of whether minority and low income communities may be disproportionately affected by emissions of NO₂ from the Avenal facility. See, *In re: Shell Gulf of Mexico, Inc. and Shell Offshore, Inc.*, OCS Appeal Nos. 10-1 to 10-4, Slip. Op. at 63-81 (EAB December 30, 2010). A copy of this decision may be obtained at

[http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/OCS+Permit+Appeals+\(CAA\)?OpenView](http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/OCS+Permit+Appeals+(CAA)?OpenView).

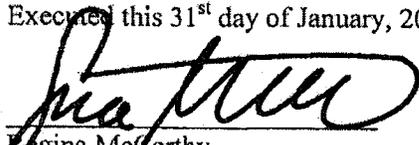
10. EPA is in the process of drafting a supplemental statement of basis to explain its justification for exempting Avenal from these additional requirements described above and to provide a supplemental analysis concerning disproportionate impacts to minority and low income communities. EPA requires an additional 3 weeks to complete this document.

11. Once the document described in paragraph 10 is completed, EPA requires an additional 3 weeks to complete and arrange for publication and direct mail distribution of the public notice. This time is necessary to translate the public notice into Spanish, book the public hearing venue and court reporter to transcribe the hearing, provide advanced copies of the public notice to newspapers for publication, and complete the procurement processes for such services. From the date this notice is published and distributed, EPA will require approximately 5 weeks to complete the public comment and hearing process, in order to allow the 33 days for public comment required by 40 CFR 124.10(b) and 124.20(d) and several additional days for completion of the public hearing. EPA is required to hold a public hearing if requested by any interested person, to provide 33 days notice of such a hearing, and to keep the public comment period open until the hearing concludes. 40 CFR 124.12; 40 CFR 124.10(b)(2); 124.20(d). EPA anticipates based on prior public comments on this permit that a public hearing will be requested. Thus, to expedite the public comment process as much as possible, EPA will provide public notice of the hearing at the same time as public notice of the supplemental statement of basis. In light of the scope of the issues addressed in the supplemental statement of basis, public interest in such matters, and volume of public comments EPA expects to receive, once the comment period ends, EPA will require an additional 6 weeks to consider public comments, prepare responses thereto, and issue a final permit decision in accordance with 40 CFR 124.15.

12. A least four EPA career staff persons and several additional supervisors already familiar with the subject matter are assigned to prepare and review these actions by EPA. The career staff preparing initial drafts of the necessary documents include an Environmental Engineer and Air Permits Manager in EPA's Region 9 office and staff attorneys from both the Region 9 Office of Regional Counsel and the Office of General Counsel at headquarters. At least 5 additional staff and supervisors in Region 9, the headquarters Office of Air and Radiation, and the Office of General Counsel will need to review and approve these actions. The timetable described above cannot be expedited by reassigning additional EPA staff because the time required for such persons to obtain the necessary familiarity with the technical and factual background on this permit application and the issues it presents (and already-assigned staff to train such persons) would offset any benefit from having more manpower involved.

13. After consideration of public comments the Agency may receive in response to this public notice, EPA will be able to complete final action on this permit application by May 27, 2011, as I have previously testified.

Executed this 31st day of January, 2011.



Regina McCarthy

Assistant Administrator
Office of Air and Radiation
United States EPA

CERTIFICATE OF SERVICE

I herby certify that I have caused a copy of the Notice of Related Decision to be served by electronic mail upon:

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