Vera P. Pardee
Brendan R. Cummings
Kevin P. Bundy
CENTER FOR BIOLOGICAL DIVERSITY
351 California Street, Suite 600
San Francisco, CA 94104
Phone: (415) 436 9682
Fax: (415) 436 9683

Attorneys for Petitioner

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

	)	
	)	
	)	OCS Appeal Nos. 10-01,
	)	10-02, 10-03 and 10-12
Shell Gulf of Mexico, Inc.	0	
Shell Offshore, Inc.	)	
Frontier Discovery Drilling Unit	)	
	)	
OCS Permit No. R10OCS/PSD-AK-09-01	)	
OCS Permit No. R10OCS/PSD-AK-2010-01	)	
	)	

REPLY BY CENTER FOR BIOLOGICAL DIVERSITY TO RESPONSES TO PETITION FOR REVIEW BY EPA REGION 10 AND SHELL GULF OF MEXICO, INC. AND SHELL OFFSHORE, INC.

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY ………………………………………….. 1

ARGUMENT ……………………………………………………………….. 3

I. THIS BOARD HAS JURISDICTION TO REVIEW WHETHER THE SHELL PERMITS MUST CONTAIN EMISSION LIMITATIONS FOR CO_2 ………………………………………………………………. 3

A. Review Proceedings Before the EAB Constitute the Proper Forum for Petitioner's Claim Because Petitioner Is Required to Bring them Here to Exhaust its Administrative Remedies……………………………………………………. 3

B. The Petition for Review Challenges Conditions of the Permits….. 4

C. EAB's Reluctance to Review EPA Regulations is a Matter of Practicality, Not Lack of Jurisdiction…………………………. 5

D. Under the Circumstances of This Case, EAB Review of the Reconsideration Is Warranted……………………………………. 7

II. EPA'S DECISION TO ISSUE THE SHELL PERMITS WITHOUT EMISSIONS LIMITATIONS FOR CO_2 IS CLEARLY ERRONEOUS, AND INVOLVES AN EXERCISE OF DISCRETION AND IMPORTANT POLICY CONSIDERATIONS THAT THIS BOARD SHOULD REVIEW AND THAT SHOULD LEAD TO A REMAND……………………………………………………………… 12

CONCLUSION……………………………………………………………… 15

INTRODUCTION AND SUMMARY

In their responses to Petitioner Center for Biological Diversity's (the "Center" or "Petitioner") April 30, 2010 Petition for Review, Region 10 of the Environmental Protection Agency ("EPA") and Shell Gulf of Mexico, Inc. and Shell Offshore, Inc. (collectively, "Shell") contend that the Environmental Board of Appeals ("EAB") is not the proper venue in which to bring the Center's claim that the PSD permits granted to Shell are invalid because EPA failed to require the application of best available control technologies ("BACT") to limit CO_2 emissions from Shell's Artic drilling operations.[1] That contention is incorrect.

The Center is required to bring its claims to the EAB in order to exhaust its administrative remedies, a statutory prerequisite to preserving them for judicial review should that become necessary. The Center is directly challenging the validity of the Shell permits. EPA has reinterpreted the phrase "subject to regulation" to mean "actual control of emissions" and has arbitrarily narrowed the phrase even further to apply only when an emissions control has already "taken effect," through some other regulation, to apply to the regulated activity – not even when an entity first engages in the regulated activity. EPA has improperly applied that reinterpretation to these permits, and has improperly finalized them without requiring CO_2 emissions limitations. Petitioner must bring this claim to the EAB before it can, if necessary, seek judicial review.

[1] As set forth in the June 1, 2010 Motion by Petitioners Natural Resources Defense Council, et. al to Vacate and Remand the Air Permits, Docket No. 31, Petitioner contends that the EAB should vacate and remand Permit Nos. R10OCS-AK-09-01 (the "Chukchi Permit") and R10OCS/PSD-AK-2010-01 (the "Beaufort Permit") because the government has suspended Shell's Artic exploratory drilling operations for at least six months to reexamine safety and other operational issues in light of catastrophic failures and environmental devastation in the Gulf of Mexico. However, in compliance with the EAB's Order dated June 4, 2010, Docket No. 39, Petitioner hereby files the instant reply brief on the merits of its Petition for Review, Docket No. 1.

Moreover, to the extent the EAB determines that this Petition involves a challenge of EPA's reinterpretation separate and apart from the manner in which it has been applied to the Shell permits, this Board may nonetheless review that reinterpretation. The presumption against the Board's review of the validity of formal EPA regulations is based on a rule of practicality, not on lack of jurisdiction. The Board should not apply it to stymie its review of a reinterpretation that has already been before it in an earlier version in connection with another permit appeal, particularly since the new version (both as set forth in the so-called "Johnson memo" and as "refined" and finalized on March 29, 2010) conflicts with part of the Board's reasoning in *In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03 (EAB, Nov. 13, 2008) ("*Deseret*"). In addition, since *Deseret*, significant developments have occurred that are relevant to the issues previously decided by EAB and that will further inform and guide its considerations, including EPA's endangerment finding for greenhouse gases under Section 202 of the Clean Air Act ("CAA"); EPA's grant of a waiver under Section 209(b) of the CAA to California, twelve other states and the District of Columbia that resulted in actual control of emissions of CO_2 from vehicles in those states; the new mandatory greenhouse gas monitoring and reporting rule; and the finalization of the national vehicle greenhouse gas emissions standards. Moreover, two courts have found that the CO_2 emissions limitations in effect in California and twelve other states and the District of Columbia are indeed emissions limitations under the federal Clean Air Act, decisions which also contradict EPA's position. Under these compelling circumstances, review by the Board is appropriate.

On the merits, Shell and EPA mainly assert that the issues raised have been conclusively disposed of by EPA's reinterpretation. That tautology does not resolve the matter. Among other things, the Responses fail to address the fact that the term "subject to regulation" is not ambiguous and that CO_2 has been regulated; fail to address the discrepancies between this Board's reasoning in the *Deseret* decision and the reinterpretation; and Shell dismisses as irrelevant the impact of the finalization of the vehicle greenhouse gas emission rule, even though that event occurred before the Beaufort Permit was issued. EAB can and should review these and the other issues Petitioner has raised, and vacate and remand the permits.

ARGUMENT

I. THIS BOARD HAS JURISDICTION TO REVIEW WHETHER THE SHELL PERMITS MUST CONTAIN EMISSION LIMITATIONS FOR CO_2

A. Review Proceedings Before the EAB Constitute the Proper Forum for Petitioner's Claim Because Petitioner Is Required to Bring them Here to Exhaust its Administrative Remedies

EPA and Shell maintain that Petitioner has chosen the wrong forum for seeking review of its claim that the Shell permits require the application of BACT for CO_2. In fact, however, Petitioner must petition the EAB if it wishes to preserve its claim for judicial review, should that become necessary.

Appeals to this Board from the issuance of a final PSD permit decision are governed by 40 C.F.R. § 124.19. Under the applicable provisions, Petitioner must present its claims of error to EAB:

> (a) Within 30 days after a . . . PSD final permit decision . . . has been issued under Sec. 124.15 of this part, any person who filed comments on that draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision. . . . [¶¶]

> (e) A petition to the Environmental Appeals Board under paragraph (a) of this section is, under 5 U.S.C. 704, *a prerequisite to the seeking of judicial review of the final agency action*.
>
> (f)(1) For purposes of judicial review under the appropriate Act, final agency action occurs when a final . . . PSD permit decision is issued by EPA and *agency review procedures under this section are exhausted.*

40 C.F.R. § 124.19(a), (e), (f) (emphasis added). *See also City of San Diego v. Whitman*, 242 F.3d 1097, 1101 (9th Cir. 2001). Plainly, petitioning the EAB to review issues that affect any condition of the permit decision is a statutory "prerequisite" to judicial review, and agency action is not "final" for purposes of such review until EAB review procedures have been exhausted. 40 C.F.R. § 124.19(e), (f). Thus, contrary to EPA's and Shell's contention, this proceeding is the correct forum in which to bring the Center's claims.[2]

B. The Petition for Review Challenges Conditions of the Permits

There also is no doubt that Petitioner's challenge is squarely directed at the conditions of Shell's permits themselves. Petitioner commented on the lack of BACT requirements to limit CO_2 emissions from Shell's drilling operations during the public comment period, Center for Biological Diversity Chukchi Comments, AR EPA Ex. K-14 K000200; Center for Biological Diversity Beaufort Comments, AR EPA ex. O-19 at OO000127, but EPA nonetheless failed to require such emissions limitations as a condition to the permits. Petitioner now seeks administrative review of the lack of BACT for CO_2 emissions in these specific permits. EPA, however, cited only one reason to justify its decision – the finalization of the Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs;

[2] Indeed, it is highly probable that any failure to petition the EAB for this review would be cited as a reason to dismiss these claims in federal court for failure to exhaust administrative remedies, should litigation of these EPA permit decisions there become necessary.

Final Rule, 75 Fed. Reg. 17004 (May 7, 2010) (the "Reinterpretation"). Response to Comments for OCS PSD Permit No. R10OCS/PSD-AK-09-01, *available at* http://yosemite.epa.gov/R10/airpage.nsf/Permits/chukchiap at 132-133; Response to Comments for OCS PSD Permit No. R10OCS/PSD-AK-2010-01, *available at* http://yosemite.epa.gov/R10/airpage.nsf/Permits/beaufortap at 57-58. Thus, the Petition for Review necessarily discusses why the Reinterpretation is erroneous and was erroneously applied to the Shell permits. Nonetheless, it is the conditions of these specific permits that prompt this Petition for Review; as such, the Petition is properly first brought before the EAB.

C. EAB's Reluctance to Review EPA Regulations is a Matter of Practicality, Not Lack of Jurisdiction

Shell maintains that the EAB has no jurisdiction to consider the Petition, and that its review is "barred by longstanding EAB precedent and the Clean Air Act" because the Petition contains a challenge to an EPA regulation. Shell's Response to Petitions for Review at 15, 16. However, even if EAB views this Petition as challenging solely the Reconsideration, that is not the case; the EAB's powers of review are not so far restricted.

First, as the EAB has held repeatedly, Section 307(b) of the CAA, 42 U.S.C. § 7607(b), precludes only *judicial* review of nationally applicable regulations, not their *administrative* review. *E.g.*, *In re Echevarria*, 5 E.A.D. 626, 634 ("it is true . . . that Clean Air Act § 307(b) only makes direct reference to preclusion of judicial review, not administrative review"); *In re Woodkiln*, 7 E.A.D. 254, 1997 WL 406530, at * 9 n.16 (EAB 1997). Thus, nothing in the Clean Air Act removes the EAB's jurisdiction or prevents the EAB from reviewing a challenge to an EPA regulation.

Second, the EAB itself has been careful to state that the presumption against reviewing EPA regulations is a rule based on practicality – not on the lack of jurisdiction. *E.g.*, *In re Echevarria*, 5 E.A.D. 626, 634 ("[t]he presumption against challenges to the validity of a regulation in enforcement proceedings is a rule of practicality"); *id.* at 634 n.13 ("[b]ut as a rule of practicality, some recognition must be given to the possibility of an exceptional case [justifying review]"). Again, the EAB, according to its own precedent, retains discretion to review final EPA regulations, and, as shown below, it has exercised that discretion in the past.

Third, this is not a case where Petitioner seeks review here simply to evade the running of a statute of limitations elsewhere. Petitioner has timely filed a petition for review of the Reconsideration itself in the United States Court of Appeals for the District of Columbia Circuit. *Center for Biological Diversity v. EPA*, Case No. 10-1115, filed May 28, 2010 (D.C. Cir), attached as Exhibit F to EPA Region 10's Response to Petitions for Review.[3] Therefore, cases in which the EAB chose to deny review of an EPA regulation because of concerns about lack of timeliness or an attempted end-run around statutes of limitation are inapposite. *E.g., In re Echevarria*, 5 E.A.D. 626, 634 (EAB 1994); *In re Woodkiln, Inc.*, 7 E.A.D. 254, 269-270 (EAB 1997); *In re USGen New England Inc., Brayton Point Station*, 11 E.A.D. 525, 556-57 (EAB 2004).

Lastly, as EPA acknowledges, the Reconsideration is not a substantive rulemaking and did not result in new regulatory text that was subject to notice and comment rulemaking requirements under the Clean Air Act or the Administrative

[3] It must be noted, however, that, depending on the timing, rationale and scope of the D.C. Circuit court's eventual ruling, Petitioner's success in its petition to that court for review of the Reconsideration itself (rather than of the conditions of the permits here) may not provide relief in the instant proceedings by invalidating these permits. Only review in the instant proceedings can assure Petitioner of obtaining a remedy that will certainly apply to the permits at issue.

Procedure Act. *See* U.S. EPA, "Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by the Federal PSD Permit Program", 74 Fed. Reg. 51535, 51548 (Oct. 7, 2009) ("[i]n the case of this reconsideration process, public notice and comment was not required under the APA or CAA, but rather was voluntarily conducted in accordance with the February 17, 2009 letter granting reconsideration") s*ee also* Shell's Response to Petitions for Review, Docket No. 45, at 12 n.11. Thus, considerations that might play a part in leading the EAB to refrain from the review of codified regulatory text that is issued after formal rulemaking procedures subject to both the provisions of the Clean Air Act (such as Section 307(d)) and the Administrative Procedure Act are less pertinent in the instant, less formal reinterpretation.[4]

D. Under the Circumstances of This Case, EAB Review of the Reconsideration Is Warranted

The EAB has previously exercised its discretion to review final, codified regulations where compelling circumstances warrant it. In *In re Echevarria*, *supra,* 5 E.A.D. at 635 n.13, the EAB cited with approval two cases that undertook such a review, and that invalidated EPA regulations as contrary to statute.[5] In one such case, *In the*

---

[4] *See In re Lazarus*, 7 E.A.D. 318, 352 (EAB 1997) (less formal interpretations do not receive the same deference as those "'that derive from the exercise of . . . delegated lawmaking powers' such as promulgated regulations or adjudications") (citation omitted). In any event, where, as here, agency interpretations are inconsistent, "courts decline to extend deference to an agency interpretation." *In re Lazarus*, *supra*¸ 7 E.A.D. at 353 n.61; *cf. In Re Howmet Corporation,* RCRA Appeal No. 05-04, slip op. at * 14 (E.A.B. May 24, 2008), 13 E.A.D. at ___ (EPA's interpretations should be considered persuasive when its rulings, legal interpretations, and opinions are consistent over long periods of time). In the instant case, inconsistencies and direct contradictions in EPA's interpretations of the term "subject to regulation" over several decades abound, and no deference is due to EPA.

[5] The recitation of circumstances warranting EAB review of regulations in *In re Echevarria* is not exclusive; rather, many factors are relevant in determining whether review is appropriate in a particular case. *See In re USGen New England, Inc., Brayton Point Station*, 11 E.A.D. 525, 556-57 (EAB 2004), citing *In re Transportation, Inc.*, CAA Dkt. No. (211) – 27 n.8, 1982 WL 43367 (JO, Feb. 25, 1982). As stated in *In re Transportation,* those factors include, but are not limited to, whether the challenge is

Matter of 170 Alaska Placer Mines, More or Less, 1 E.A.D. 616, 1980 WL 26837 at * 6 (EAB Nov. 10, 1980) ("*Alaska Placer Mines")*, the EAB, on appeal from a permit decision, reviewed a final regulation, codified in the Code of Federal Regulation, that prescribed the burden of proof in an administrative proceeding. Finding that the regulation misallocated that burden, it held that the regulation was "contrary to the statutory scheme" of the Clean Water Act and thus "must be regarded as a nullity, since it is tantamount to a revision of the statutory scheme and is, therefore, beyond the agency's authority to promulgate," and remanded the permit. *Id.* at * 6-7. In another case, *In re Transportation, Inc.*, (Adm'r, Feb. 25, 1982), Docket No. CAA (211) – 27 *et al.*, 1982 WL 43367, the Office of the Administrator invalidated another CFR regulation, setting forth a hearing process for the assessment of civil penalties under CAA Section 211(d), as being contrary to statute: "[T]he challenged EPA [regulations] are inconsistent with the plain language of Section 211(d)." *Id.* at * 5. Notably, the decision strongly condemned the hearing officer's reliance on policy considerations to justify the regulation's departure from plain statutory language. *Id.* at *6.

In summarizing these two cases, *In re Echevarria* asserted that they involved exceptional situations in which an intervening court decision had already invalidated the regulations at issue in the administrative appeal. *In re Echevarria, supra*, 5 E.A.D. at 635 n.13 (an exceptional case exists "where [the regulation] has been held invalid in an intervening court decision"). However, that was not what happened in the cases that *In re Echevarria* summarized. Although both of those decisions relied on pertinent case law that buttressed their conclusions, none of those court cases had ruled on the specific

---

primarily legal or factual, the particular need for finality, and whether petitioner has an adequate remedy absent administrative review.

regulation before the administrative appellate tribunal. *See In re Transportation, Inc.,* 1982 WL 43367 at * 8 ("I am unaware of any case law which squarely addresses the precise issue presented by this interlocutory Appeal"); *Alaska Placer Mines,* 1 E.A.D. 616, 1980 WL 26837 at * 5-6.[6] Later EAB decisions citing to *In re Echevarria* also incorrectly characterize that case as supporting the proposition that the "compelling circumstances" referred to there involved situations in which the challenged regulation had already been effectively invalidated by a court. *See, e.g., In re Carney Industries*, 7 E.A.D. 171, 194 (EAB 1997); *In re City of Irving, Texas Municipal Separate Storm Sewer System, NPDES Appeal No. 00-18* (July 16, 2001), 10 E.A.D. 111, 124 n.17. In fact, in both *In re Transportation, Inc.* and *Alaska Placer Mines*, the reviewing tribunals themselves analyzed and then invalidated the final EPA regulations challenged in the appeals, compelled not by intervening court decisions that had invalidated the specific regulation before them but by the regulation's departure from the statutory language and intent.

As fully set forth in the Petition for Review, the Reconsideration at issue here, as applied to the Shell permits, also is contrary to the plain language of CAA Section 165(a)(4), 42 U.S.C. § 7475(a)(4), and to the structure of the CAA. Moreover, EPA's position concerning whether and when CO2 is "subject to regulation" has been dramatically inconsistent and arbitrary, from its initial position in 1978 that CO_2 indeed was subject to regulation to its ever more irrational and restrictive explications over the

[6] In *Alaska Placer Mines*, the EAB referred to a subsequent revision of a related regulation which had properly reallocated the burden of proof. *Id.,* 1 E.A.D. 616, 1980 WL 26837 at * 7. However, that revision was not the basis for the decision's holding. On the question of whether the EAB can overturn a regulation, the opinion had this to say: "While it is well settled in court decisions that an administrative agency must follow procedures set forth in its own regulations, these decisions necessarily presuppose that the regulations themselves are within the agency's authority to promulgate. I am not aware of any decisions requiring an agency to adhere to its own regulations if the regulations improperly interpret the statute and produce a result which is contrary to the statute." *Id.,* 1 E.A.D. 616, 1980 WL 26837 at * 10 n.6.

last several years to the contrary, seemingly driven only by a desire to continue to delay PSD permitting requirements for CO_2 to another day. *See* the Center's Petition for Review. Docket No. 1, at 19-26, 28-36. This is indeed a case in which administrative review of an interpretative action, to the extent EAB deems it as such, is warranted.

Moreover, as in *In re Transportation, Inc.* and *Alaska Placer Mines,* case law exists that supports a reversal of the reinterpretation that has erroneously affected the Shell permits. Two courts have already determined that CO_2 emission limitations in California and other states are federal Clean Air Act standards. *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F.Supp.2d 1151, 1165-1173 (E.D. Cal. 2007); *Green Mountain Chrysler v. Crombie*, 508 F.Supp.2d 295, 350 (D.Vt. 2007). These cases directly undermine EPA's conclusion in the Reconsideration that its grant of a waiver to California (and other states) under Section 209(b) of the CAA, causing those states immediately to regulate CO_2 emissions from vehicles, does not constitute a regulation under the CAA requiring actual control of CO_2 emissions that are already in effect.[7] The instant situation thus is on all fours with *In re Transporation* and *Alaska Placer Mines*.

Perhaps the most compelling circumstance warranting EAB review is the fact that in *Deseret,* the EAB previously considered and opined upon some of the relevant issues presented here, but the Reconsideration deviates considerably from the reasoning in that decision even though intervening events have simply reinforced the EAB opinion. In particular, in *Deseret*, the Board found that prior EPA rulemakings, pronouncements and

[7] As EPA has stated, "thirteen States and the District of Columbia, comprising approximately 40 percent of the light-duty vehicle market, have adopted California's standards. These standards apply to model years 2009 through 2016 and require CO_2 emissions for passenger cars and the smallest light trucks of 323 g/mi in 2009 and 205/g/mi in 2016. . . On June 30, 2009, EPA granted California's request for a waiver of preemption under the CAA. The granting of the waiver permits California and the other States to proceed with implementing the California emission standards." 74 Fed. Reg. 49459. Plainly, these regulations now actually control and limit vehicle CO_2 emissions.

its own practice did not support EPA's position that it had lacked authority to interpret the phrase "subject to regulation" in CAA Section 165 and 169 as applying to monitoring and reporting regulations because of an alleged historical interpretation of the phrase as meaning "subject to a statutory or regulatory provision that requires actual control of emissions" of a pollutant, *Deseret*, PSD Appeal No. 07-03, slip op. at 53-54. Further – and contrary to the conclusion reached in the Reconsideration – the EAB found that a 1978 preamble setting forth EPA's "final" interpretation of the phrase "augers [sic] in favor of finding" that "subject to regulation under the Act" encompasses "'any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations,'" regulations which specifically include CO_2 emissions monitoring, recording and reporting requirements. *Id.* at 3, 41. In addition, significant developments have occurred since the EAB issued *Deseret* that support EAB's reasoning, but that the EAB has not yet been able to consider, including the finalization of an endangerment finding for greenhouse gases under CAA Section 202(a), 74 Fed. Reg. 66,496 (Dec. 15, 2009) (the "Endangerment Finding"), the adoption of a new, comprehensive and stringent set of mandatory greenhouse gas monitoring and reporting regulations, 74, Fed. Reg. 56,250 (Oct. 30, 2009) (the "GHG Monitoring and Reporting Regulation"), the granting of a waiver to California (and other states) under CAA Section 209(b) that caused the actual control of CO_2 emissions from automobiles, 74 Fed. Reg. 32,744 (July 8, 2009) (the "Section 209 Waiver"), and the finalization of the national greenhouse gas vehicle emissions limitation regulation, 75 Fed. Reg. 25,343 (May 7, 2010) (the "GHG Vehicle Regulation"). As shown in detail in the Petition for Review, each of these rulemakings undermines EPA's Reinterpretation. The fact that the EAB in *Deseret*, an appeal from a

PSD permit, has previously granted review of and spoken on many of the issues affecting the instant permit conditions is yet another compelling reason why the EAB should exercise its discretion to do so again.[8]

II. EPA'S DECISION TO ISSUE THE SHELL PERMITS WITHOUT EMISSIONS LIMITATIONS FOR CO_2 IS CLEARLY ERRONEOUS, AND INVOLVES AN EXERCISE OF DISCRETION AND IMPORTANT POLICY CONSIDERATIONS THAT THIS BOARD SHOULD REVIEW AND THAT SHOULD LEAD TO A REMAND

On the merits of whether EPA's Reinterpretation of the term "subject to regulation," as used in Section 165(a)(4) and 169(3) and in the context of the Clean Air Act's overall structure and as applied to the Shell permits, is clearly erroneous or involves an exercise of discretion or important policy considerations that this Board should review, Shell dismisses Petitioner's contentions by claiming that they confuse whether CO_2 is "subject to regulation" with whether CO_2 is "named in a regulation." Shell Response to Petitions for Review, Docket No. 45, at 26 n.18. In light of the thousands of pages of Federal Register rulemaking devoted entirely to CO_2 and other greenhouse gases, including a review of the overwhelming scientific evidence demonstrating that CO_2 endangers both public health and welfare and will cause catastrophic damages unless emissions are sharply curtailed; a waiver under the Clean Air Act resulting in immediate CO_2 emissions control from vehicles in thirteen states; the finalization of the first set of CO_2 emissions limitations for the nation's entire light duty vehicle fleet; the tracking of CO_2 emissions across all industries; and the physical control

---

[8] In *Deseret*, the EAB was well aware that the issues arising from that permit appeal were of national scope (indeed, it invited extensive briefing from third parties), and yet it reviewed EPA's interpretation of the statutory phrase "subject to regulation," found it wanting, and remanded the matter. To be sure, EPA sought comment during its reconsideration, a step that had been lacking when *Deseret* was decided. However, the fact that the outcome of this process conflicts with part of the EAB's reasoning, coupled with all other circumstances in this case, renders this case indeed the exceptional circumstance where the EAB should again exercise its oversight.

of actual emissions nationwide through a new set of detailed, strict and comprehensive monitoring and reporting requirements, it is absurd to contend that CO_2 has merely been "named" in some regulatory text.[9] Further, neither Shell nor EPA has shown that the phrase "subject to regulation" is ambiguous (and that EPA therefore has discretion to redefine the phrase as pertaining exclusively to only one type of minutely defined and torturously narrowed "actual control" regulation but can disregard all others) since neither can dispute that every regulation exerts control over the regulated activity. Instead, EPA is impermissibly rewriting the statute by not only substituting the need for actual emissions control for the phrase "subject to regulation," but also by arbitrarily delaying PSD permitting implementation by requiring that those actual emissions controls have "taken effect" through some other regulation to affect a regulated activity.

In addition, the responses to the petitions do not address the contradictions between this Board's *Deseret* decision and the Reinterpretation. In *Deseret,* the EAB determined that EPA's proffered interpretation requiring that CO_2 has already been "subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant" was not compelled by EPA's historical interpretations, pronouncements or practices, nor by the legislative history and language (thus highlighting the agency's clear lack of consistency), *Deseret*, slip op. at 3, 41, 54-54; and yet, EPA's current Reinterpretation has not only adopted that same former interpretation but has now grafted additional and irrational limitations on top of it. Moreover, even absent the Endangerment Finding, the Section 209(b) Waiver, the overhauled and expanded 2009 GHG Monitoring and Reporting Regulation, and the final national GHG Vehicle

---

[9] Petitioner hereby withdraws its argument concerning the effect of the renewable fuel standard program, 75 Fed. Reg. 14670.

Regulation, *Deseret* found that EPA's own interpretations and its 1993 monitoring and reporting regulations alone "auger[] [sic] in favor of a finding" that "subject to regulation under this Act" encompasses "'any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations,'" *id.* at 3, 41. The EAB thus has clearly expressed its disagreement with EPA on crucial issues raised in this Petition in the past, and it can and should review the merits of EPA's position now.

Lastly, Shell dismisses as irrelevant the fact that the GHG Vehicle Regulation was finalized, announced and published by the President and Administrator Jackson on April 1, 2010, even though that event occurred, as it *had to* under the Energy Policy and Conservation Act ("EPCA") to which it is tied,[10] before the Beaufort Permit was issued on April 9, 2010. Shell Response to Petitions for Review, Docket No. 45, at 28. Instead, Shell makes much of the fact that the GHG Vehicle Regulation was not published *in the Federal Register* until May 7, 2010. Yet, EPA had previously announced that PSD and Title V permitting for CO_2 would commence at the end of March 2010 and as soon as the Vehicle GHG Regulation was promulgated and even before that regulation took effect:

> EPA expects to promulgate [the Vehicle GHG Rule] by the end of March 2010. . . . *[I]t is EPA's position that new pollutants become subject to PSD and title V when a rule controlling those pollutants is promulgated (and even before that rule takes effect*). Accordingly, as soon as GHGs become regulated under the light-duty motor vehicle rule, GHG emissions will be considered pollutants "subject to regulation" under the CAA and will become subject to PSD and title V requirements.

---

[10] Under EPCA, the National Highway Traffic and Safety Administration must adopt a final rule setting forth applicable vehicle mileage standards at least 18 months before the beginning of the model year to which the standard applies, 49 U.S.C. § 32902(g)(2); car manufacturers' model years commence on October 1 of any year; thus, the 2012-2016 GHG Vehicle Regulation, tied as it is to the national mileage standards, *had* to be adopted and published *no later than April 1, 2010*. *See* Average Fuel Economy Standards Passenger Cars and Light Trucks Model Year 2011 Final Rule, 74 Fed. Reg. 14196, 14199 (March 20, 2009).

Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Proposed Rule, 74 Fed Reg. 55292, 55300 (October 27, 2009) ("Tailoring Rule") (emphasis added).[11] Petitioner contends that CO_2 has been subject to regulation for years, and that EPA's unlawful scramble for ever more delay is clear error and beyond its discretion; however, should the EAB determine that CO_2 did not become subject to regulation until April 1, 2010, the day when the GHG Vehicle Regulation was actually finalized and published – that is, on the very last day required by law – it must reverse the Beaufort Permit.

CONCLUSION

The EAB has the discretion to grant review of the instant Petition as well as to review the Reconsideration; under the rare circumstances of this case, the EAB should do so now and vacate and remand the Permits subject to this appeal.

Respectfully submitted this 15th of June, 2010,

*/s/ Vera P. Pardee*______
Vera P. Pardee
Center for Biological Diversity
Petitioner

[11] *See also:* "CAA section 165(a), by its terms, prohibits a source that is subject to PSD from constructing or modifying without a permit. As noted elsewhere, as a result of the proposed light-duty vehicle rule, *expected to be promulgated at the end of March 2010, sources of GHG emissions in those States will be subject to the requirement of CAA section 165(a) to obtain a preconstruction PSD permit*." Tailoring Rule, 74 Fed. Reg. 55344 (emphasis added); s*ee also* 74 Fed. Reg. 55292, 55328, 55449 and *passim*.

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2010, I served a copy of foregoing REPLY BY CENTER FOR BIOLOGICAL DIVERSITY TO RESPONSES TO PETITION FOR REVIEW BY EPA REGION 10 AND SHELL GULF OF MEXICO, INC. AND SHELL OFFSHORE, INC. in the matter of *In re: Shell Gulf of Mexico, Inc., Permit No. R10OCS/PSD-AK- 09-01 and Shell Offshore, Inc., Permit No. R10OCS/PSD-AK-2010-01*, OCS Appeal Nos. 10-01, 10-2, 10-3 and 10-12 by electronic mail on the following persons:

Kristi M. Smith
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW (2344A)
Washington, DC 20460
Smith.kristi@epamail.epa.gov

Tanya Sanerib
Christopher Winter
Crag Law Center
917 SW Oak Street, Suite 417
Portland, OR 97204
tanya@crag.org
chris@crag.org

Duane A. Siler
Susan M. Mathiascheck
Sarah C. Borelon
Crowell & Moring LLP
1001 Pennsylvania Avenue NW
Washington, DC 20004
dsiler@crowell.com
smathiascheck@crowell.com
sbordelon@crowell.com

Julie Vergeront
Juliane R.B. Matthews
Office of Regional Counsel
U.S. Environmental Protection
Agency, Region 10
Suite 900
12000 Sixth Avenue, OCR-158
Seattle, WA 98101
Vergeront.julie@epa.gov
Matthews.juliane@epa.gov

Erik Grafe
David Hobstetter
EARTHJUSTICE
441 W 5th Avenue, Suite 301
Anchorage, AK 99501
egrafe@earthjustice.org
dhobstetter@earthjustice.org

Eric Jorensen
EARTHJUSTICE
325 Fourth Street
Juneau, AK 99801
ejorgensen@earthjustice.org

s/ Vera Pardee

Center for Biological Diversity
351 California Street, Suite 600
San Francisco, Ca 94104