

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

In re:)
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)
Shell Gulf of Mexico, Inc.)
Permit No. R10OCS/PSD-AK-09-01)
)
and)
)
Shell Offshore, Inc.)
Permit No. R10OCS/PSD-AK-2010-01)
)
)
)

PETITION FOR REVIEW

**NATURAL RESOURCES DEFENSE COUNCIL, NATIVE VILLAGE OF POINT HOPE,
RESISTING ENVIRONMENTAL DESTRUCTION ON INDIGENOUS LANDS
(REDOIL), ALASKA WILDERNESS LEAGUE, AUDUBON ALASKA, CENTER FOR
BIOLOGICAL DIVERSITY, NORTHERN ALASKA ENVIRONMENTAL CENTER,
OCEAN CONSERVANCY, OCEANA, PACIFIC ENVIRONMENT,
and SIERRA CLUB**

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INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), Natural Resources Defense Council, Native Village of Point Hope, Resisting Environmental Destruction on Indigenous Lands (REDOIL), Alaska Wilderness League, Audubon Alaska, Center for Biological Diversity, Northern Alaska Environmental Center, Ocean Conservancy, Oceana, Pacific Environment, and Sierra Club (“Petitioners”) petition for review of the conditions of Outer Continental Shelf Prevention of Significant Deterioration Permit to Construct, Permit Number R10OCS/PSD-AK-09-01 (“Chukchi Permit”), which was issued to Shell Gulf of Mexico Inc. (“Shell”) on March 31, 2010, and Outer Continental Shelf Prevention of Significant Deterioration Permit to Construct, Permit Number R10OCS/PSD-AK-2010-01 (April 9, 2010) (“Beaufort Permit”), which was issued to Shell Offshore Inc. (“Shell”) on April 9, 2010, by Region 10 of the United States Environmental Protection Agency (“the Region”).¹ The permits at issue in this proceeding authorize Shell to construct and operate the *Frontier Discoverer* drillship and its air pollutant emission units and to conduct other air pollutant emitting activities while Shell engages in exploration drilling in the Chukchi and Beaufort seas. The operations will produce substantial air pollution – well over 1,000 tons per year each of nitrogen oxides, as well as hundreds of tons per year of fine particulate matter. The lion’s share of these emissions – anywhere from 75% to 96% of the total of each pollutant – will be produced by the fleets of support vessels that will assist the drillship in these operations.

The Outer Continental Shelf (“OCS”) provisions of the Clean Air Act (“CAA” or “the Act”) require that the Environmental Protection Agency (“EPA”) control air pollution from OCS sources to meet ambient air quality standards and Prevention of Significant Deterioration (“PSD”) requirements. 42 U.S.C. § 7627(a)(1). These provisions also direct EPA to treat the

¹ Ocean Conservancy petitions for review of the Chukchi Permit only.

emissions from support vessels associated with an OCS source as direct emissions from that source. *Id.* § 7627(a)(4)(C). In these permitting actions, however, the Region did not require application of a critical element of the Prevention of Significant Deterioration (PSD) program – Best Available Control Technology (“BACT”) – to the emissions from the support vessels associated with Shell’s drillship operations, thereby allowing the bulk of the operations’ pollution to avoid BACT and ignoring half of the PSD program. Petitioners contend that the Region’s failure to require Shell to apply BACT to the associated vessel emissions was clearly erroneous. Petitioners respectfully request that the Environmental Appeals Board (“Board”) review these permitting decisions and remand the permits to the Region for application of BACT to the associated vessel emissions.

FACTUAL BACKGROUND

The Chukchi Sea and the Beaufort Sea are located in the Arctic Ocean, off the coast of Alaska. The Chukchi Sea borders Northwest Alaska, stretching from the Seward Peninsula and Bering Strait all the way to Point Barrow. The Beaufort Sea borders Northern Alaska from Point Barrow eastward to well beyond the United States-Canada border. The Arctic region is rich in marine mammals, fish, and birds, which sustain Native cultures that have inhabited the area for thousands of years. *Ex. 1 at 1.* The region is also fragile, and the rapid changes being wrought by industrialization and global warming are already straining the Arctic “web of life.” *Id.* Nonetheless, air quality is still relatively pristine in the Arctic, and coastal villages remain in compliance with air quality standards. *Ex. 5 at 54; Ex. 6 at 15-17.*

Shell submitted applications to the Region for two PSD construction permits to perform exploratory drilling on lease blocks Shell purchased during recent federal oil and gas lease sales. Shell has applied for a permit to authorize operations in the Chukchi Sea on lease blocks from Lease Sale 193, and another permit to authorize operations in the Beaufort Sea on lease blocks

from lease sales 195 and 202. The Region issued the Chukchi permit on March 31, 2010, Ex. 7 at 1, and the Beaufort permit on April 9, 2010, Ex. 8 at 1. The permits are multi-year permits that allow Shell to conduct industrial activities in the sensitive Arctic environment each year between July 1 and December 31 on lease blocks covering vast expanses of the Arctic. They authorize Shell to operate numerous vessels that have the potential to emit large amounts of air pollution. In addition to its drillship, Shell's operations will require an associated fleet of support vessels that includes two ice breakers, an oil spill response fleet of four vessels for the Chukchi operation and five vessels for the Beaufort operation, and a supply ship. Ex. 5 at 56; Ex. 6 at 18. These permits are the first EPA has authorized for this type of operation (i.e., authorizing the construction on the OCS of a major emitting facility supported by a large fleet of support vessels).

Shell's permits mark the beginning of a wave of potential offshore industrial activity in the Arctic. Over the last decade, the Minerals Management Service ("MMS") has issued a large number of oil and gas leases in both the Chukchi and Beaufort seas. Between 2003 and 2007, MMS held three lease sales on the Beaufort Sea – lease sales 186, 195, and 202.² In 2008, MMS held Lease Sale 193 on the Chukchi Sea.³ These recent lease sales now account for the vast majority of active leases on the Alaska Outer Continental Shelf (OCS) Region.⁴ Chukchi Lease Sale 193 resulted in the leasing of a particularly massive amount of the Alaska OCS – 488 lease

² See Minerals Mgmt. Serv., Beaufort Sea - Multiple Sales 186, 195, and 202, *available at* <http://www.mms.gov/alaska/cproject/beaufortsale/index.htm> (last visited May 1, 2010).

³ See Minerals Mgmt. Serv., Chukchi Lease Sale 193, *available at* <http://www.mms.gov/alaska/cproject/Chukchi193/Chukchiindex.htm> (last visited May 1, 2010).

⁴ See Minerals Mgmt. Serv., Active Lease Summary Table Minerals Management Service, Alaska OCS Region, MMS (Oct. 15, 2009), *available at* http://www.mms.gov/alaska/lease/hlease/LeasingTables/act_lease_sum.pdf (last visited May 1, 2010).

blocks covering over 2.7 million acres.⁵ Thus, the decision reached by the Board here will have continuing and far-reaching effects on the air quality of the Arctic region.

The permits, as issued, allow Shell to emit high levels of air pollution and degrade air quality significantly. For example, Shell's Chukchi operations have the potential to emit 1,188 tons per year of nitrogen oxides (NO_x), Ex. 5 at 56, and Shell's Beaufort operations have the potential to emit 1,371 tons per year of NO_x, Ex. 6 at 18. Shell's modeling indicates that these emissions could cause a violation of the 1-hour NO₂ air quality standards that became effective on April 12, 2010, three days after the Region issued the Beaufort Permit. 75 Fed. Reg. 6,474, 6,474 (Feb. 9, 2010); Ex. 8 at 1; Ex. 3 at 9, 31. The great bulk of these emissions will be produced by the associated vessels; in the Chukchi operation, for example, the associated vessels will produce 96 percent of the operation's NO_x. Ex. 5 at 56. The ice breakers in particular contribute a large percentage of total potential emissions. Ice Breaker #1 alone has the potential to emit 849.88 tons per year of NO_x, which is 75 percent of the fleet's total potential emissions for the pollutant. *Id.* Shell's operations will also emit a large amount of fine particulate matter (PM_{2.5}). Its operations may increase PM_{2.5} concentrations by more than double the proposed PSD increments for 24-hour PM_{2.5}. 72 Fed. Reg. 54,112, 54,115 (Sept. 21, 2007) (proposing an increment of 9 µg/m³); Ex. 5 at 53 (showing a potential impact of 18.4 µg/m³); Ex. 6 at 14 (showing a potential impact of 19.2 µg/m³). These PM_{2.5} emissions also may increase air pollution concentrations in coastal communities by a substantial amount. *See, e.g.*, Ex. 6 at 15 (estimating a potential 8.3 µg/m³ increase in Kaktovik). A significant amount of these PM_{2.5} emissions will be black carbon emissions, which pose a special threat to the Arctic environment

⁵ See Minerals Mgmt. Serv., Chukchi Lease Sale 193 Sale Day Statistics, *available at* <http://www.mms.gov/alaska/cproject/Chukchi193/193Saleday/Sale%20193%20Sale%20Day%20Stats.pdf> (last visited May 1, 2010).

because they are important drivers of Arctic warming. Ex. 3 at 6-7. Again, the associated vessels are the main culprit, producing 92 percent of total potential PM_{2.5} emissions from the Chukchi operations. Ex. 5 at 56.

Shell's operations qualify as major emitting facilities and therefore must comply with PSD requirements. 42 U.S.C. § 7479(1); Ex. 5 at 56. The PSD program requires, among other things, that major emitting facilities meet applicable air quality standards and increments, and apply BACT to control emissions. 42 U.S.C. § 7475(a)(3), (4). The Region required Shell to apply BACT to emissions from the drillship and a single emissions unit on the supply ship when it is attached to the drillship, but otherwise did not require BACT for the associated vessel emissions from Shell's operations. *See, e.g.*, Ex. 5 at 16-52. As a result, the majority of Shell's emissions will escape BACT requirements.

Because so much of the pollution from Shell's operations will come from the associated vessel fleet, even after the Region applied BACT to the drillship, it could not establish that Shell's operations would not cause a violation of air quality standards or increments, as the PSD program requires. *Id.* at 10; Ex. 6 at 8. As a result, the Region added to Shell's permits operational limitations on Shell's ice breakers and support activities, such as limitations on the amount of time and the locations in which ice breakers can operate, and requirements that Shell employ technological controls on some associated vessel emissions units. Ex. 5 at 4 (noting that the permit requires the use of technological controls on support vessels); *id.* at 10 (noting that "[a]fter application [to the drillship and supply ship] of emission limitations that represent BACT, preliminary modeling indicated that additional restrictions on Shell's emissions and mode of operation would be needed to ensure attainment of the NAAQS and compliance with increment for some pollutants"); *id.* at 12-14 (describing operational controls on the ice breakers); *see also*,

Ex. 6 at 8, 10-12 (same). These controls and limitations on the associated vessel emissions brought the total projected operation emissions down below the standards, but just barely. Ex. 5 at 53 (showing maximum predicted impacts reaching 84 percent of national ambient air quality standards (“NAAQS”) for 24-hour PM_{2.5}); Ex. 6 at 14 (showing maximum predicted impacts reaching 83 percent of NAAQS for 24-hour PM_{2.5}). Because the Region refused to apply BACT to the associated vessels, it did not require Shell to apply these technological controls that could have led to substantial additional reductions.

THRESHOLD PROCEDURAL REQUIREMENTS

Natural Resources Defense Council, Alaska Wilderness League, Audubon Alaska, Center for Biological Diversity, Northern Alaska Environmental Center, Ocean Conservancy, Oceana, Pacific Environment, Sierra Club, and World Wildlife Fund are conservation groups that work to protect the Arctic environment. The Native Village of Point Hope is a federally recognized tribal government located in northwestern Alaska, on the coast of the Chukchi Sea. The village is the oldest continuously inhabited village in all of North America. Village residents are concerned about the effects Shell’s operations will have on local air quality, human health, and subsistence resources. REDOIL is an organization of Arctic residents devoted to empowering Indigenous Peoples to protect health and the environment, and influencing policies that affect Indigenous Peoples on a local, tribal, state, regional, national and international level.

Petitioners satisfy the threshold requirements for filing a petition for review under Part 124, as follows:

1. Petitioners may appeal the permit decisions because Petitioners participated in the public comment periods on the permits by submitting comments and participating in the public comment period. *See* 40 C.F.R. § 124.19(a); Ex. 1, 2, 3, and 4.

2. The issue raised by Petitioners in this petition was raised during the public comment period and therefore was preserved for review. Ex. 10 at 7-8; Ex. 9 at 4-6.

3. Petitioners have timely filed this petition for review. Ex. 11 at 1 (setting May 3, 2010, as the filing deadline for the Chukchi Permit); Ex. 12 at 1 (setting May 12, 2010, as the filing deadline for the Beaufort Permit).

ARGUMENT

The Region's failure to apply BACT to emissions from the support vessels associated with Shell's exploratory drilling operations will result in the vast majority of the air pollution from these operations escaping pollution controls under the PSD program. This result is directly contrary to Congress' intent in enacting Section 328 of the CAA – which was to apply air pollution controls under the PSD program to air pollution from OCS sources, including the vessel emissions that are defined as direct emissions from the source. The Region has not supplied a rational or persuasive justification for its interpretation of Section 328 and the implementing regulations. The Region's decision to avoid controlling the bulk of the air pollution from Shell's drilling operations was clearly erroneous and should be remanded to the Region for application of BACT to the associated vessel emissions.

I. STANDARD OF REVIEW

The Board's review of PSD permitting decisions is governed by 40 C.F.R. part 124. *In re Prairie State Generating Co.*, PSD Appeal No. 05-05, slip op. at 13 (EAB, Aug. 24, 2006), 13 E.A.D. ___. The Board will review a permitting authority's decision to issue a PSD permit if “the decision is based on either a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review.” *Id.* “The burden of demonstrating that review is warranted rests with the petitioner challenging the permit decision.” *Id.* Here, the Region's decision to not apply BACT to the associated vessel emissions

represented a clearly erroneous interpretation of its authority under the CAA and implementing regulations. This matter also involves an important policy question with respect to the regulation of support vessel emissions from OCS operations. As a result, the Board should accept review and remand the permits for application of BACT to the associated vessel emissions.

The Region's interpretation of the CAA is not entitled to deference. *In re Lazarus, Inc.*, 7 E.A.D. 318, 351 n.55 (EAB 1997). As the final decision maker for EPA, the Board performs its own "independent review and analysis of the issue." *In re Ocean State Asbestos Removal*, 7 E.A.D. 522, 543 n.22 (EAB 1998) (quoting *In re Mobil Oil Corp.*, 5 E.A.D. 490, 508-509 and n.30 (EAB 1994)). The Board will remand a PSD permit to the Region if it is based on an erroneous interpretation of the CAA. *See In the Matter of Hadson Power 14—Buena Vista*, 4 E.A.D. 258, 273-75 (EAB 1992).

In interpreting a statute, the Board begins by reviewing the plain meaning of the statutory language, in order to "give effect to the unambiguously expressed intent of Congress." *In re Ocean*, 7 E.A.D at 542 (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984)). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843. In addition, a "regulation must . . . be 'interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements.'" *In re Bil-Dry Corp.*, 9 E.A.D. 575, 595 (EAB 2001) (quoting *Secretary of Labor v. W. Fuels-Utah, Inc.*, 900 F.2d 318, 320 (D.C. Cir. 1990)).

II. THE REGION CLEARLY ERRED IN FAILING TO APPLY BEST AVAILABLE CONTROL TECHNOLOGY TO EMISSIONS FROM THE SUPPORT VESSELS ASSOCIATED WITH SHELL'S OPERATIONS.

The Region's failure to require BACT for emissions of Shell's associated vessels is clearly erroneous. The unambiguous mandate of Section 328 of the CAA is to ensure that air

pollution (i.e., emissions) from OCS sources, including the emissions of associated vessels that are defined as direct emissions from the OCS source, comply with the national ambient air quality standards (NAAQS) and PSD program. By failing to apply BACT, a key element of the PSD program, to the associated vessel emissions, the Region has failed to implement this clear statutory mandate. The Region's stated rationales for its decision not to apply BACT to the associated vessel emissions do not make sense of the statutory scheme or the implementing regulations, so they do not justify its decision.

- A. Congress's clear objective in enacting Section 328 was to control emissions from OCS sources, including the emissions of associated vessels, under the provisions of the PSD program.

The plain language of Section 328 requires EPA to control air pollution from OCS sources, including emissions of associated vessels, to comply with the provisions of the PSD program. Compliance with the PSD program requires that a facility demonstrate that emissions from the source will not cause a violation of air quality standards or increments and apply BACT to all emissions from a source, and thus, an OCS source must apply BACT to associated vessel emissions. The legislative history of Section 328 supports this plain language reading of the statute.

1. *The plain language of Section 328 indicate that Congress intended to regulate emissions, including associated vessel emissions, from OCS sources.*

Section 328(a)(1) directs EPA to require that emissions from OCS sources attain air quality standards and comply with the provisions of the PSD program. 42 U.S.C. § 7627(a)(1). Section 328(a)(4)(C) requires that associated vessel emissions be considered direct emissions of the OCS source. *Id.* § 7627(a)(4)(C). Together, these subsections of Section 328 of the CAA unambiguously direct EPA to ensure that air pollution emissions from OCS sources, including the emissions of associated vessels, comply with NAAQS and the PSD program.

Section 328(a)(1) directs the Administrator to:

establish requirements to control *air pollution from Outer Continental Shelf sources . . . to attain and maintain . . . ambient air quality standards and to comply with the provisions of part C of subchapter I of this chapter* [the PSD program].

42 U.S.C. § 7627(a)(1) (emphasis added). In this provision, Congress directed its mandate at “*air pollution from Outer Continental Shelf sources,*” not at the OCS sources that produce the air pollution. Moreover, this provision mandates that the air pollution (or emissions) “comply with the provisions of [the PSD program]” – not some provisions of the PSD program, but all of them.

Section 328(a)(4)(C) defines “OCS source” and specifically includes emissions from associated vessels in this definition as direct emissions from the source. 42 U.S.C. § 7627(a)(4)(C). The subsection defines the responsible entity for purposes of regulation – the OCS source⁶ – and specifies the emissions for which the OCS source is responsible, stating that:

[f]or purposes of this subsection, emissions from any vessel servicing or associated with an OCS source, including emissions while at the OCS source or en route to or from the OCS source within 25 miles of the OCS source, shall be considered direct emissions from the OCS source.

Id. Thus, while Section 328 does not necessarily include the associated vessels in the definition of OCS source,⁷ it identifies the emissions of associated vessels as emissions of the OCS source. Read in conjunction with Section 328(a)(1), which requires that EPA control air pollution from OCS sources to comply with NAAQS and PSD, Section 328(a)(4)(C) includes the emissions of associated vessels within the scope of the air pollution from the OSC source that EPA must

⁶ Specifically, Section 328(a)(4)(C) defines OCS source as “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.” 42 U.S.C. § 7627(a)(4)(C).

⁷ Based on its view that unattached vessels are not regulated or authorized under the Outer Continental Shelf Lands Act, and therefore do not fall within the statutory definition of OCS source at Section 328(a)(4)(C), EPA’s regulatory definition of OCS source explicitly excludes unattached vessels. *See* 40 C.F.R. § 55.2 (definition of OCS source).

control.⁸ As a result, the Region must apply the provisions of the PSD program, including BACT, to the emissions of associated vessels as direct emissions of the OCS source – as part of the whole OCS source package.

2. *Once the PSD program is triggered, all of its requirements apply to emissions from the source.*

The purpose of the PSD program, which applies in areas that meet air quality standards, is to “assure that emissions from any source” do not interfere with the continuing attainment of air quality standards and to prevent the significant deterioration of air quality. 42 U.S.C. § 7470. The PSD program is triggered when a source qualifies as a major emitting facility. 42 U.S.C. §§ 7475(a), 7479(1). “Major emitting facility” is defined in relevant part as, “any . . . source with the potential to emit two hundred and fifty tons per year or more of any air pollutant.” 42 U.S.C. § 7479(1). While the CAA does not specifically define “potential to emit,” the regulations do, stating that “[p]otential emissions means the maximum emissions of a pollutant from an OCS source operating at its design capacity.” 40 C.F.R. § 55.2.

Once a source is determined to meet the potential to emit threshold, all of the PSD program elements are triggered, starting with the need to obtain a permit. 42 U.S.C. § 7475(a)(1)-(8) (identifying each requirement that a facility must meet before beginning

⁸ The Board’s decision in the case of *In re Shell Offshore Inc., Kulluk Drilling Unit and Frontier Discoverer Drilling Unit*, OCS Appeal Nos. 07-01 & 07-02 (EAB, Sep. 14, 2007), 13 E.A.D. ___, is not contrary to this conclusion. In that decision, the Board was asked to decide “whether, under section 328, the Region may define each separate location at which [a Shell] drilling vessel attaches to and detaches from the seabed as a separate OCS source, and how, if at all, such determination impacts the scope of what constitutes a single stationary source for purposes of the PSD regulations.” *Id.* at 4. As part of that analysis, the Board considered “whether the PSD regulations require emissions from the same drilling vessel at different locations, or from the two drilling ships considered together, to be aggregated as a single stationary source.” *Id.* Here, there is no dispute over the definition of OCS source or over which emissions should be included in the potential to emit analysis; rather the question is whether the associated vessel emissions that fall squarely within the congressional directive in Section 328(a)(4)(C) are subject to PSD requirements, including BACT, as direct emissions from the source.

construction). The two central PSD elements are (1) a demonstration that emissions will not cause a violation of NAAQS or increments, *id.* § 7475(a)(3), and (2) the requirement that BACT be applied for each regulated pollutant emitted. *Id.* § 7475(a)(4); *see also In re Shell*, OCS Appeal Nos. 07-01 & 07-02, slip op. at 11 (stating that the PSD program has “two central elements: a demonstration that the source will not have an unacceptable impact on air quality, and a requirement to utilize [BACT] to control emissions.”); *In re General Motors, Inc.*, 10 E.A.D. 360 (2002) (“As the Board has noted on prior occasions, ‘[t]he requirements of preventing violations of the NAAQS and the applicable PSD increments, and the required use of BACT to minimize emission of air pollutants, are the core of the PSD regulations.’”) (quoting *In re Steel Dynamics*, 9 E.A.D. 165, 172 (EAB 2000)).

These two central mechanisms of the PSD program for controlling air pollution in attainment areas are complementary but independent requirements. NAAQS were established to protect the public health and welfare by establishing a maximum level of criteria pollutants that may exist in the ambient air. 42 U.S.C. § 7409(b). The PSD increments are set, among other reasons, in order to assure that the emissions of any individual source will not cause significant deterioration of air quality. *See* 42 U.S.C. §§ 7470(4), 7473. Requiring compliance with both NAAQS and increments ensures that allowing construction of new pollution sources in areas that currently meet air quality standards will not result in a substantial reduction of air quality.

The second central PSD element, BACT, functions differently than air quality standards and is an independent requirement of PSD. BACT is defined as an “emission limitation” that is “based on the *maximum degree of reduction of each pollutant* subject to regulation under this chapter *emitted from or which results from any major emitting facility . . .*” 42 U.S.C. § 7479(3) (emphasis added). BACT is a technology-based standard that involves the “application of

production processes and available methods, systems, and techniques . . . for control of each pollutant.” *Id.* Section 165(a)(4) states that the proposed facility is subject to BACT for “each pollutant subject to regulation . . . emitted from . . . such facility” 42 U.S.C. § 7475(a)(4). Thus, compliance with air quality standards ensures that even though pollution emissions from a new facility will increase air pollution levels, they will do so within constraints. Compliance with BACT, by contrast, ensures that these pollution levels will remain as low as possible, based on application of technologies to achieve “the maximum degree of reduction of each pollutant . . . emitted.” 42 U.S.C. § 7479(3). The air standards and BACT requirements are overlapping but independent, and the emissions from a major emitting facility must comply with both. A source cannot meet the goals of the PSD program if it complies only with one of these central program elements but not the other.

Not only do both PSD requirements apply once a source is determined to be subject to PSD, but they apply to all the emissions that are determined to be emissions of the source. The PSD requirements are emission limitations, meaning that they are aimed at regulating all emissions from the source. 42 U.S.C. § 7602(k) (“‘emission limitation’ . . . mean[s] a requirement . . . which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis”). In requiring compliance with air quality standards, for example, the PSD program establishes limits that ensure that “*emissions from* construction or operation of [a] facility will not cause” a violation of air quality standards. 42 U.S.C. § 7475(3) (emphasis added). BACT is also an emissions limitation, as discussed in the previous paragraph. Thus, while the PSD program identifies the major emitting facility as the entity responsible for demonstrating compliance with the air quality standards, the statute establishes that the standards and the BACT requirement apply to “emissions from [the] facility.” 42 U.S.C. § 7475. Where

Congress has defined associated vessel emissions as direct emissions from the source (or facility), as it has in Section 328(a)(4)(C), the PSD requirements then apply to those vessel emissions as “emissions from [the] facility.” 42 U.S.C. § 7475.

As the above discussion shows, once the PSD program is triggered, all of its requirements apply to all the emissions that are considered to be emissions from the source. A source cannot achieve the maximum degree of reduction by applying BACT to only some of its emissions, or by complying with air quality standards alone, since complying with these standards does not necessarily achieve the same extent of pollution reduction. Nor can the Region give effect to the objective of the PSD program by enforcing air quality standards alone and failing to require application of BACT to all the emissions of a source.

In Section 328, Congress defined the emissions from an OCS source as including emissions from associated vessels, and required EPA to control these emissions to comply with air quality standards and all the provisions of the PSD program. 42 U.S.C. §§ 7627(a)(1), (a)(4)(C). Thus, while Congress did not explicitly include associated vessels in the definition of OCS source, it nevertheless directed EPA to require that associated vessel emissions comply with the provisions of the PSD program as direct emissions from the OCS source. This includes the two central emissions limitation mechanisms of the PSD program: compliance with air quality standards and increments and application of BACT. *See* 42 U.S.C. § 7475. The PSD program does not differentiate between these two requirements; once a source triggers the PSD requirements, it must comply with both. Only by applying all PSD requirements to all emissions of the OCS source can the Region give full effect to the clear language and intent of Section 328 and the PSD provisions.

The Region, however, in violation of this statutory mandate, did not apply all PSD requirements to Shell's operations. The Region acknowledged that all source emissions must comply with air quality standards and increments and recognized that achieving this compliance necessitates regulating associated vessel emissions. *See Ex. 10 at 8* ("Although this permit does not impose BACT on emission units that comprise the Associated Fleet, . . . the permit does limit emissions from the Associated Fleet to ensure that the potential emissions of the OCS source do not cause or contribute to a violation of the NAAQS or violate increment."). The Region, however, did not apply BACT to most source emissions, and as discussed below in Part II.C, the Region failed to provide a rational justification for distinguishing between these critical PSD requirements.

3. *The legislative history of Section 328 confirms that Congress mandated the control of associated vessel emissions as emissions of the OCS source.*

The legislative history of Section 328 supports this plain language reading of the statute. Congress added Section 328 to the CAA as part of the 1990 Clean Air Act Amendments in response to growing concern about the large amount of pollution that results from the operation of OCS facilities and their associated vessels. Throughout the process leading to enactment of Section 328, the reports and discussion indicated a clear and consistent intent to regulate the emissions of associated vessels along with their parent OCS source.

The report accompanying the original bill (S. 1630) reported from the Senate Committee on Environment and Public Works states:

The construction and operation of OCS facilities emit a significant amount of air pollution which adversely impacts coastal air quality in the United States. Operational emissions from an OCS platform *and associated marine vessels* can routinely exceed 500 tons of oxides of nitrogen (NO_x) and one hundred tons of reactive hydrocarbons annually. . . . *Yet under current Federal law, emissions from these major sources of air pollution are not required to be mitigated or controlled.*

S. Rep. No. 101-228, at 76 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3462 (emphasis added). The reference to emissions from “associated marine vessels” indicates that Congress was aware of and concerned about the pollution from these vessels as well as from the sources they support. This language also demonstrates that the lack of controls on these emissions was a problem that the bill’s sponsors recognized and sought to resolve.

Senator Baucus, who introduced the 1990 Clean Air Act Amendments,⁹ submitted an analysis of the OCS provisions shortly before the Senate passed the bill, which indicates that Congress intended to regulate associated vessel emissions along with those of the parent source:

Marine vessels emissions, including those from crew and supply boats, construction barges, tugboats, and tankers, which are associated with an OCS activity, will be included as part of the OCS facility emissions for the purposes of regulation. Air emissions associated with stationary and in-transit activities of the vessels will be included as part of the facility's emissions for vessel activities within a radius of 25 miles of the exploration, construction, development or production location. This will ensure that the cruising emissions from marine vessels are controlled and offset as if they were part of the OCS facility's emissions.

136 Cong. Rec. S17118, S16983 (Oct. 26, 1990) (emphasis added). The statements that marine vessels associated with an OCS source “will be included as part of the OCS facility emissions for the purposes of regulation” and that Section 328 ensures that vessel emissions “are controlled . . . as if they were part of the OCS facility’s emissions” underscores the intent of the bill’s sponsors to apply air pollution controls to the associated vessel emissions along with other source emissions.

⁹ Senator Baucus introduced the 1990 Clean Air Act Amendments, 135 Cong. Rec. S11139 (Sept. 14, 1989), and was influential in the drafting of the Amendments, 136 Cong. Rec. S27, S250 (Jan. 23, 1990) (statement of Sen. Cranston). *See North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 526-27 (1982) (establishing that where the statements are prepared and submitted right before the final vote, statements “of the sponsor of the language ultimately enacted, are an authoritative guide to the statute’s construction”).

The House legislative history also shows a congressional intent to regulate vessel emissions as if they were part of the OCS facility's emissions. Representative Levine stated that Section 328 was necessary because the Department of the Interior had failed to "regulate emissions from the platforms and their service vessels" as required by OCSLA. 136 Cong. Record H2511, H2916 (May 21, 1990). To remedy this, Section 328 would "require the EPA to regulate platforms and their service vessels . . ." *Id.* at H2917. Representative Lagomarsino confirmed this intent, stating that the provision would require EPA "to regulate platforms on the OCS and the vessels that service them" in order to "ensure[] that OCS facilities meet their fair share of air pollution reductions."¹⁰ *Id.* at H2920. Shortly before the enactment of the 1990 Clean Air Act Amendments, Representative Lagomarsino provided further explanation of this in a prepared analysis of the OCS air pollution provisions that was placed in the record. This analysis stated:

The construction and operation of Outer Continental Shelf (OCS) facilities emit a significant amount of air pollution which can adversely impact coastal air quality in the United States. Uncontrolled operational emissions from an OCS Platform *and associated Marine vessels* can exceed 500 tons oxides of nitrogen (NO_x) and 100 tons of reactive hydrocarbons annually. . . . *Existing pollution control technology can significantly reduce these pollution levels.*

. . .

Marine vessels emissions, including those from crew and supply boats, construction barges, tugboats, and tankers, which are associated with an OCS activity, will be included as part of the OCS facility emissions for the purposes of regulation. Air emissions associated with stationary and in-transit activities of these vessels will be included as part of the facility's emissions for vessel activities within a radius of 25 miles of the exploration, construction, development or production location. This will ensure that the cruising emissions from marine vessels are controlled and offset as if they were part of the OCS facility's emissions.

¹⁰ Representative Levine and Representative Lagomarsino were sponsors of the Levine-Lagomarsino-Lowery amendment to the OCS air pollution provisions of the House bill, which added what became the final language of these provisions. 136 Cong. Rec. H2511, H2920 (May 21, 1990) (statement of Rep. Lagomarsino); *see also id.* at H2916 (statement of Rep. Levine).

136 Cong. Rec. H12845, H12889-90 (Oct. 26, 1990) (emphasis added). This analysis also confirms that Congress wanted to control pollution from vessels associated with OCS facilities by controlling those vessel emissions as if they were part of the facility's emissions.

Thus, in requiring the regulation of associated vessel emissions as direct emissions from the OCS source, Congress sought to ensure that NAAQS and PSD requirements would apply to *all* emissions for which an OCS facility is responsible – including the support vessel emissions that would not occur but for the operation of the OCS source.

B. The Region's decision not to apply BACT to associated vessel emissions is neither consistent with the statute nor supported by its asserted rationales.

The Region declined to apply BACT to emission units on the associated vessels. *See* Ex. 10 at 8. As a result, the lion's share of the direct emissions from the OCS source are left uncontrolled by BACT, and Shell's operations avoid half of the PSD requirements that Congress intended in Section 328 to impose. In light of the statutory structure requiring air pollution from OCS sources to comply with PSD (of which BACT is a critical element), 42 U.S.C. § 7627(a)(1), and defining associated vessel emissions as direct emissions from the OCS source, *id.* § 7627(a)(4)(C), the Region's decision not to apply BACT to the associated vessel emissions fails to comport with the statute.

Nor do the Region's stated rationales for declining to apply BACT to the associated vessel emissions provide sufficient justification for its decision. In its response to Petitioners' comment that BACT should be applied to the associated vessel emissions, the Region did not address the language or meaning of Section 328. Instead, the Region's response made essentially three points – based primarily on its implementing regulations at 40 C.F.R. part 55 and its rulemaking preambles – each of which fails to justify the decision.

1. *The Region's failure to apply BACT to the associated vessel emissions is not justified by the exclusion of the vessels from the definition of "OCS source" and "stationary source."*

First, relying on *Santa Barbara County Air Pollution Control Dist. v. U.S. Env't'l Prot. Agency*, 31 F.3d 1179, 1181 (D.C. Cir. 1994), the Region stated that:

Under the regulatory definition of "OCS source," only vessels that are "attached to the seabed and erected thereon and used for the purpose of exploring, developing, or producing resources therefrom . . ." or that are attached to an OCS facility are considered an OCS source and subject to regulation as stationary sources under the PSD program.

Ex. 10 at 8. This assertion does not justify the Region's decision not to apply BACT to the associated vessel emissions. It is true that the regulatory definition of OCS source does not include unattached vessels. 40 C.F.R. § 55.2. This is beside the point, however, since Petitioners do not assert that the associated vessels should be independently defined as an OCS source. Instead, Petitioners assert that the *emissions* from the associated vessels are considered direct emissions from the OCS source and are therefore subject to PSD requirements along with all the other emissions from the OCS source, as Congress required in Section 328(a)(1) and (a)(4)(C).

Nor do Petitioners argue that the associated vessels are independently "subject to regulation as stationary sources under the PSD program." *See* Ex. 10 at 8. Instead, Petitioners assert that the *emissions* from the associated vessels must be considered direct emissions from the OCS source and subject to PSD requirements along with all the other emissions from the OCS source. In other words, the associated vessels are not themselves separate stationary sources, each of which must obtain a PSD permit if it exceeds the applicable emissions threshold. Rather, the *emissions* from these vessels are folded into the emissions from the OCS source itself and are subject to PSD requirements (and NAAQS) as part of the whole OCS source package.

The Region's citation to *Santa Barbara County* misses the mark. The issue in that case was whether EPA erred in failing to include in its definition of "OCS source" vessels in transit among OCS sources. *Santa Barbara County*, 31 F.3d at 1180. The court distinguished the statute's treatment of vessels in transit from its treatment of support vessels and noted that the statutory definition of OCS source did not mention vessels in transit. *Id.* at 1181. Based on this statutory silence, the court upheld the regulatory definition of OCS source, finding it "reasonable for the EPA to conclude that OCS sources did not include vessels that were merely traveling over the OCS." *Id.* With respect to associated vessels, the court noted only that the statute explicitly requires the inclusion of emissions from vessels servicing or associated with an OCS source with those of the parent source. *Id.*; see also *In re Shell*, OCS Appeal Nos. 07-01 & 07-02, slip op. at 25 (stating that *Santa Barbara* held "that the regulation's distinction between attached and detached vessels is a permissible reading of the statute and that it was reasonable for EPA to conclude that OCS source does not include vessels that were merely traveling over the OCS"). Thus, contrary to the Region's assertion, the case did not address any issues related to support vessels and instead upheld the EPA regulations only with respect to its omission of vessels in transit from the definition of OCS source. Thus, the case does not support the Region's decision not to apply BACT to the associated vessel emissions.

2. *The Region's failure to apply BACT to the associated vessel emissions is not justified by the regulations or rulemaking preamble on which the Region relies.*

The Region's second rationale for failing to apply BACT to the associated vessel emissions was that:

The OCS regulations make clear that, although the emissions from a vessel servicing an OCS source and within 25 miles of the OCS source are not regulated as part of the OCS source, emissions from such vessels are considered to be emissions from the OCS source and thus are considered in the ambient air quality impact analysis and offset calculations.

Ex. 10 at 8 (citing 57 Fed. Reg. at 40,794). This assertion also does not justify its decision, as neither the OCS regulations nor the preamble to which the Region actually cites make it clear that associated vessels emissions “are not regulated as part of the OCS source” *Id.*

The “OCS regulations” to which the Region refers in its Response to Comments says two things that are relevant. First, the regulations define “OCS source” in a manner that mirrors the statutory definition:

“OCS source” means any equipment, activity, or facility which:

- (1) Emits or has the potential to emit any air pollutant;
- (2) Is regulated or authorized under the Outer Continental Shelf Lands Act (OCSLA) (43 U.S.C. § 1331 *et seq.*); and
- (3) Is located on the OCS or in or on waters above the OCS.

40 C.F.R. § 55.2. Unlike the statutory definition, the regulatory definition then goes on to state explicitly that the definition of OCS source includes vessels only when they are permanently or temporarily attached to the seabed. *Id.* This aspect of the EPA regulation addresses only the definition of OCS source and says nothing about the treatment of associated vessel emissions as direct emissions from the OCS source.

Second, the regulation defines “potential emissions” as “the maximum emissions of a pollutant from an OCS source operating at its design capacity.” *Id.* The definition also adds:

Pursuant to section 328 of the Act, emissions from vessels servicing or associated with an OCS source shall be considered direct emissions from such a source while at the source, and while enroute to or from the source when within 25 miles of the source, and shall be included in the “potential to emit” for an OCS source.

Id. This regulatory definition tracks the statutory definition in Section 328(a), repeating the mandate that associated vessel emissions be considered direct emissions from the OCS source.

The definition goes beyond the explicit statutory language by adding the statement that

associated vessel emissions will be included in the “potential to emit” for the OCS source. This is perfectly consistent with the statutory mandate to treat associated vessel emissions as direct emissions from the source, since the “potential to emit” analysis is used to determine whether PSD requirements will apply. 40 C.F.R. § 52.21(b)(4). By explicitly stating that the vessel emissions are included in the “potential to emit,” the regulation indicates that these emissions will be required to meet PSD requirements as well, if the PSD requirements are triggered.

Once PSD is triggered, a “new major stationary source shall apply [BACT] for each regulated NSR pollutant that it would have the potential to emit in significant amounts.” 40 C.F.R. § 52.21(j)(2). Moreover, BACT must apply to all emissions from an OCS source, since BACT is an “emissions limitation . . . based on the maximum degree of reduction for each pollutant subject to regulation under Act which would be emitted from any proposed major stationary source” 40 C.F.R. § 52.21(b)(12). In the OCS context, where associated fleets can account for the lion’s share of total potential emissions, this “maximum degree of reduction” is impossible to achieve without applying BACT to the vessel emissions from the OCS source. Thus, the OCS regulations, by including associated vessel emissions in the potential to emit, indicate that those emissions will be subject to all PSD requirements, including BACT. At the very least, the regulation does not prohibit the Region from applying BACT to all direct emissions from the OCS source, and it therefore provides no support to the Region’s decision not to apply BACT to the vessel emissions.

Nor do the regulations make clear that emissions from associated vessels are only “considered in the ambient air quality impact analysis and offset calculations.” Ex. 10 at 8 (citing 57 Fed. Reg. at 40,794). Again, these statements do not come from the regulations. As discussed above, the relevant regulatory definition states only that associated vessel emissions

will be included in the “potential to emit” for the OCS source. 40 C.F.R. § 55.2 (definition of “potential emissions”). Thus, the regulation itself does not say that associated vessel emissions will be considered in the air quality impact analysis and offset calculations but will not be subject to BACT.

The language that the Region cites in its Response to Comments to support its second point is found not in the regulations but rather in the preamble to EPA’s final OCS Air Regulations. *See* Response to Comments at 23 (citing 57 Fed. Reg. 40,792, 40,794 (Sept. 4, 1992)). The preamble, however, also fails to provide support for the Region’s decision not to apply BACT to the associated vessel emissions. The preamble language is not clear and does not demand an interpretation of the regulations as barring the application of BACT to emissions from associated vessels. The Region cannot rely on the ambiguous language of the preamble to the final rule (or the preamble to the proposed rule) to fill in language absent from the actual regulation.

Generally, the rulemaking preamble is not itself an operative part of the regulations and it does not confer powers on the agency. *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999). Where the enacted or operative parts of a statute or regulation are unambiguous, the meaning of the statute or regulation cannot be controlled by the language in the preamble. *See id.* A preamble can have “independent legal effect” only when the preamble is “sufficiently clear” to demonstrate the agency’s intention to bind itself or regulated parties. *Kennecott Utah Copper Corp. v. U.S. Dept. of Interior*, 88 F.3d 1191, 1223 (D.C. Cir. 1996). “Although the preamble does not ‘control’ the meaning of the regulation, it may serve as a source of evidence concerning contemporaneous agency intent.” *Wyoming Outdoor Council*, 165 F.3d at 53 (finding preamble language unhelpful where preamble is as ambiguous as the

regulation itself). A “regulation must, of course, be ‘interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements.’” *In re Bil-Dry Corp.*, 9 E.A.D. at 595 (quoting *Sec’y of Labor v. W. Fuels-Utah, Inc.*, 900 F.2d 318, 320 (D.C. Cir. 1990)).

The portion of the preamble that the Region cites in its Response to Comments reads as follows:

All vessel emissions related to OCS activity will be accounted for by including vessel emissions in the “potential to emit” of an OCS source. Vessel emissions must be included in offset calculations and impact analyses, as required by section 328 and explained in the [notice of proposed rulemaking].

57 Fed. Reg. 40,792, 40,794 (Sept. 4, 1992). This paragraph is too ambiguous to provide support for the Region’s interpretation.

First, as discussed above with respect to the regulatory definition of “potential emissions,” the preamble statement that vessel emissions will be included in the “potential to emit” of an OCS source suggests that, if the potential to emit threshold is met, these emissions will also be subject to PSD – not the opposite as the Region now suggests. Since it is the potential to emit analysis that determines whether the emissions from a source must comply with PSD, it follows that if the potential to emit threshold is met, the emissions included in the analysis would all be subject to the PSD requirements. This is particularly true in light of the congressional mandate in Section 328(a)(1) and (a)(4)(C) that air pollution from OCS sources comply with NAAQS and PSD and that associated vessel emissions be considered direct emissions (air pollution) from the OCS source.

Second, while this paragraph is explicit that EPA will include associated vessel emissions “in offset calculations and impact analyses,” it is silent on whether these emissions must comply with BACT. Although the Region appears to suggest that this silence was meant to indicate that

vessel emissions would be required to comply with only some of the PSD requirements (the impact analysis, 42 U.S.C. § 7475(a)(3)) and not others (BACT, *id.* § 7475(a)(4)), the language of the preamble does not say this. Given the lack of explanation for why the vessel emissions would be included in the potential to emit analysis and then included in some of the resulting PSD requirements but not others, this is not even a sensible reading of the paragraph. More to the point, this ambiguous language does not help to shed light on the regulation, which addresses only the potential to emit and is silent on whether and which PSD requirements will apply to the vessel emissions if the threshold is met. This ambiguous language also does not provide any interpretive assistance with respect to the plain language and meaning of Section 328.

Although the Region's response to comments cited only the paragraph quoted above, the Region may attempt to argue here that the preceding two paragraphs support its interpretation. In these paragraphs, EPA discusses when it will treat vessels as individual OCS sources, 57 Fed. Reg. at 40,794 ("Part 55 thus will not regulate vessels en route to or from an OCS facility as "OCS sources"), and when it will treat vessels as part of the OCS source, *id.* at 40,793 ("when vessels are in transit, they are specifically excluded from the definition of OCS source"). These paragraphs do not directly or explicitly address the treatment of emissions from associated vessels and Congress' mandate in Section 328(a)(1) and (a)(4)(C). Thus, the thrust of these paragraphs is to confirm that the regulations exclude unattached vessels from the definition of OCS source and that there is no independent regulation of unattached vessels. Petitioners do not dispute this, but it leaves unaddressed the statutory requirement that associated vessel emissions, as direct emissions of the OCS source, must comply with provisions of the PSD program. The Region has not provided any explanation of how its failure to apply BACT for the majority of the OCS source's emissions squares with this requirement.

The preamble to the proposed rulemaking – which the Region does not explicitly rely on in its Response to Comments – does not provide any additional clarity with respect to EPA’s intent in promulgating the final rule. Again, this preamble indicates that EPA will not regulate vessels as independent sources. 56 Fed. Reg. 63,774, 63,777 (Dec. 5, 1991) (“EPA is proposing not to regulate vessels as ‘OCS sources[]’”). It also confirms that EPA will include emissions of associated vessels in the OCS source’s potential to emit and will account for those emissions in the impact analyses. *Id.* Finally, it indicates that EPA is deciding not to develop a separate regulatory scheme for vessels. *Id.* (“It would be premature to develop another regulatory scheme for vessels”). Like the preamble to the final rule, this preamble does not specifically address BACT or EPA’s authority to treat emissions from associated vessels as direct emissions from the OCS source for purposes of compliance with NAAQS and PSD.¹¹ *Id.*

¹¹ There is a very brief discussion in this preamble of a comment that appears to have presented an argument concerning regulation of associated vessels. 56 Fed. Reg. at 63,777. EPA’s response to the comment is unhelpful, since it relies on a patently incorrect reading of Section 328: “This interpretation appears, however, to contravene the plain language of the statute, which does not explicitly include vessels in the definition of ‘OCS source’ but does explicitly include vessels emissions in offset calculations and impact analyses, indicating that such emissions were not intended to be regulated directly.” *Id.* at 63,778. Section 328 is entirely silent on offset calculations and impact analyses, so it is simply incorrect to say that the statute “explicitly include[s]” vessel emissions in these considerations or that the statute indicated “that such emissions were not intended to be regulated directly.” Given this plainly wrong reading of Section 328, this discussion cannot be given any weight. Petitioners are not arguing, moreover, that vessel emissions were “intended to be regulated directly”; rather, they were intended to be regulated as emissions of the parent OCS source. In any event, EPA did not conclude by rejecting the argument, but instead stated that it was “soliciting comment on this interpretation.” *Id.* No follow-up discussion of the argument appears in the preamble to the Final Rule.

Thus, the preamble to the proposed rule is also too ambiguous to provide support for the Region's decision.¹²

3. *The Region's failure to apply BACT to the associated vessel emissions is not justified by its apparent application of other PSD requirements to these emissions.*

The final point which the Region made in its response to the comment that BACT should apply to the associated vessel emissions was as follows:

Although this permit does not impose BACT on emission units that comprise the Associated Fleet . . . the permit does limit emissions from the Associated Fleet to ensure that the potential emissions of the OCS source do not cause or contribute to a violation of the NAAQS or violate increment.

¹² For the reasons stated above, Petitioners do not challenge the regulation and instead challenge the application of this regulation in these permits. Apparently for this reason, the Region did not assert that Section 307(b) of the CAA bars this challenge, *see* Ex. 10 at 7-8, as it did in response to other comments, *cf.* Ex. 10 at 3 (raising the Section 307(b) statute of limitations in response to a comment challenging the regulatory definition of "OCS source" in 40 C.F.R. § 55.2 as inconsistent with the statute). Indeed, such an argument would not make sense because Petitioners' argument is that the regulation is consistent with the assertion that Section 328 of the CAA requires that associated vessel emissions be subject to BACT and other PSD requirements along with those of the parent OCS source. If, nevertheless, the Region were to make such an argument, it would have no merit because the regulation does not clearly state that associated vessels are not subject to PSD requirements, or in particular BACT. Without this clear statement, this aspect of the regulation would not have legal effect or constitute a final agency action subject to judicial review under Section 307(b), and thus the statute of limitations would not be triggered. *See Natural Res. Def. Council v. Env't'l Prot. Agency*, 559 F.3d 561, 564-65 (D.C. Cir. 2009) (finding no jurisdiction under Section 307(b) to review alleged "high wind" rule where the final rule failed to mention high winds). Nor would the ambiguous preamble statements have "independent legal effect" that could be reviewed under Section 307(b). *See id.* (citing *Kennecott Utah Copper Corp. v. U.S. Dept. of Interior*, 88 F.3d 1191, 1223 (D.C. Cir. 1996)).

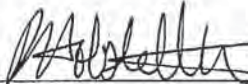
Ex. 10 at 8. While this statement appears to be an accurate characterization of the permit,¹³ it does not amount to a rational justification for failing to apply BACT to the associated vessel emissions. What the Region appears to be saying is that even though it did not apply BACT to the vessel emissions, it did ensure that the emissions will meet some of the PSD requirements – specifically, NAAQS and increments. As the Region states, the permit does impose emissions limits on the associated vessels, and it does so “to ensure that the potential emissions of the OCS source” comply with NAAQS and increments. Given that it is the large amount of emissions from the associated vessels that made it difficult for the source to achieve the standards, the Region’s statement must mean that it imposed emissions limits on the associated vessels so that the potential emissions of the OCS source – including the vessel emissions – comply with NAAQS and increments. Yet the Region fails to explain how it has the authority to apply half the PSD program – NAAQS and increments – and not apply BACT. Indeed, the Region’s acknowledgment that it limited associated vessel emissions to ensure compliance with NAAQS

¹³ The Chukchi Permit clearly covers the associated vessel emissions along with the OCS source: it authorizes Shell “to construct and operate the Frontier Discoverer drillship and its air emissions units *and to conduct other air pollutant emitting activities* in accordance with the permit conditions.” Ex. 7 at 1 (emphasis added). As EPA stated in its Response to Comments, the Chukchi Permit indeed strictly limits allowable emissions from associated vessels, and bases these limitations on the requirement that Shell operate the associated vessels in a certain manner, and in some cases, on the requirement that Shell use specific pollution control technology to control emissions. *See, e.g.*, Ex. 7 at 3 (Permit Condition O.3) (requiring that Ice Breaker #2 not emit NO_x at a rate greater than 71.2 tons per rolling 12-month period); Ex. 5 at 4 (indicating the Chukchi Permit requires the use of selective catalytic reduction controls on the main engine of Ice Breaker #2 in order to reduce NO_x emissions). EPA imposed these limits in order to achieve compliance with air quality standards, as required by the PSD program, 42 U.S.C. § 7475(a)(3). *See, e.g.*, Ex. 5 at 10 (noting that “[a]fter application of emission limitations that represent BACT [to the drillship and supply ship], preliminary modeling indicated that additional restrictions on Shell’s emissions and mode of operation would be needed to ensure attainment of the NAAQS and compliance with increment for some pollutants,” and that EPA and Shell achieved this, in part, by controlling emissions from the associated vessels). EPA’s imposition of these limits to achieve NAAQS and increments appears to directly contradict EPA’s second justification for its decision *not* to impose BACT, which is that the regulations make clear that associated vessel emissions “are not regulated as part of the OCS source” Ex. 10 at 8; *see supra* Part II.B.2.

and increments, while failing to explain its failure to apply BACT, indicates that the Region's application of its CAA authority in these permit decisions was clearly erroneous. Thus, this rationale also fails to justify the Region's decision.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Board grant review of the Region's failure to require that emissions from Shell's associated vessels meet BACT requirements and remand the Chukchi and Beaufort permits to the Region for application of BACT to the associated vessels.



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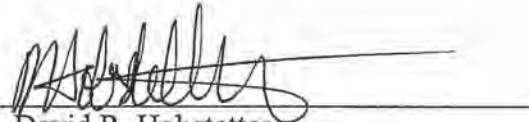
Date: May 3, 2010.

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2010, a copy of foregoing **PETITION FOR REVIEW**, with attachments, 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* were served by U.S First Class Mail on the following persons:

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TABLE OF EXHIBITS

<u>Exhibit No.</u>	<u>Description</u>
1	Native Village of Point Hope Comment Letter re. Proposed OCS Prevention of Significant Deterioration Permit No. R10OCS/PSD-AK-2010-01 (March 22, 2010)
2	Native Village of Point Hope Comment Letter re. Draft OCS Prevention of Significant Deterioration Permit for Shell Gulf of Mexico; Permit No. R10OCS/PSD-AK--01 (October 20, 2009)
3	Alaska Wilderness League, et al. Comment Letter re. Proposed OCS Prevention of Significant Deterioration Permit No. R10OCS/PSD-AK-2010-01 (March 22, 2010)
4	Alaska Wilderness League, et al. Comment Letter re. Proposed OCS Prevention of Significant Deterioration Permit No. R10OCS/PSD-AK-09-01 (February 17, 2010)
5	U.S. Environmental Protection Agency, Region 10, Statement of Basis for Proposed OCS Prevention of Significant Deterioration Permit to Construct, No. R10OCS/PSD-AK-09-10, for Shell Gulf of Mexico Inc. Chukchi Sea Exploration Drilling Program (January 8, 2010) (excerpts)
6	U.S. Environmental Protection Agency, Region 10, Statement of Basis for Proposed OCS Prevention of Significant Deterioration Permit to Construct, No. R10OCS/PSD-AK-2010-01, for Shell Offshore Inc. Beaufort Sea Exploration Drilling Program (February 12, 2010) (excerpts)
7	U.S. Environmental Protection Agency, Region 10, OCS Prevention of Significant Deterioration Permit to Construct, Permit No. R10OCS/PSD-AK-09-01 (March 31, 2010) (excerpts)
8	U.S. Environmental Protection Agency, Region 10, OCS Prevention of Significant Deterioration Permit to Construct, Permit No. R10OCS/PSD-AK-2010-01 (April 9, 2010) (excerpts)
9	U.S. Environmental Protection Agency, Region 10, Response to Comments for OCS Prevention of Significant Deterioration Permit No. R10OCS/PSD-AK-2010-01 for Shell Offshore Inc. Beaufort Sea Exploration Drilling Program (April 9, 2010) (excerpts)
10	U.S. Environmental Protection Agency, Region 10, Response to Comments for OCS Prevention of Significant Deterioration Permit No. R10OCS/PSD-AK-09-01 for Shell Gulf of Mexico Inc. Chukchi Sea Exploration Drilling Program (March 31, 2010) (excerpts)

<u>Exhibit</u> <u>No.</u>	<u>Description</u>
11	U.S. Environmental Protection Agency, Announcement Re. Final Decision to Issue an OCS/PSD Permit to Shell Gulf of Mexico Inc. for Exploratory Drilling Operations in the Chukchi Sea (March 31, 2010)
12	U.S. Environmental Protection Agency, Announcement Re. Final Decision to Issue an OCS/PSD Permit to Shell Offshore Inc. for Exploratory Drilling Operations in the Beaufort Sea (April 9, 2010)