

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

In re:

Shell Offshore Inc.
Permit No. R10OCS030000

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) OCS Appeal No. 11-06
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**REPLY TO RESPONSE TO PETITION FOR REVIEW
SUBMITTED BY RESISTING ENVIRONMENTAL DESTRUCTION OF
INDIGENOUS LANDS, ALASKA WILDERNESS LEAGUE, CENTER FOR
BIOLOGICAL DIVERSITY, NATURAL RESOURCES DEFENSE COUNCIL,
NORTHERN ALASKA ENVIRONMENTAL CENTER, OCEANA,
PACIFIC ENVIRONMENT, SIERRA CLUB,
and THE WILDERNESS SOCIETY**

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INTRODUCTION

Petitioners Resisting Environmental Destruction of Indigenous Lands (“REDOIL”), Alaska Wilderness League, Center for Biological Diversity, Natural Resources Defense Council, Northern Alaska Environmental Center, Oceana, Pacific Environment, Sierra Club, and The Wilderness Society (“REDOIL Petitioners”) reaffirm that Region 10 of the United States Environmental Protection Agency (“the Region”) clearly erred when it issued to Shell Offshore Inc. (“Shell”) Permit No. R10OCS030000, an Outer Continental Shelf Permit Construct and Title V Air Quality Operating Permit (“*Kulluk* Permit”) that authorizes Shell to operate the *Kulluk* conical drilling unit in the Beaufort Sea.

This reply is submitted for the sole purpose of rebutting new arguments not previously presented by the Region. First, REDOIL Petitioners address new arguments and factual documents first identified by the Region in its response brief to support its assertion that clean air “increments” will not be violated by the *Kulluk*, despite the agency’s refusal to undertake any air quality impact analysis that addresses increments. The Region’s new rationales should be rejected by the Board because the agency is barred from relying on reasons never supplied during the permitting process. In any event, the Region’s new documents do not support the Region’s conclusion and, if anything, only serve to emphasize that the Region’s analysis is insufficient and therefore arbitrary. Second, REDOIL Petitioners briefly address a new, distinguishable authority offered by the Region in defense of the *Kulluk* Permit’s invalid blanket limitations on nitrogen oxide (NO_x) and carbon monoxide (CO) emissions.

ARGUMENT

I. THE REGION OFFERS IMPROPER *POST HOC* RATIONALIZATIONS TO BOLSTER ITS ASSERTION THAT, DESPITE ANY DIRECT ANALYSIS, THE RECORD STILL DEMONSTRATES COMPLIANCE WITH INCREMENTS.

In its response brief, the Region asserts new reasons and cites new documents to support its assertion that, the agency's refusal to analyze increments notwithstanding, the record nonetheless indicates that the *Kulluk*'s emissions will comply with clean air increments. These arguments were not articulated in the administrative record and therefore they are improper on appeal before the Board. To the extent the Region intends to rely on new reasons and new factual documents, the *Kulluk* Permit must be remanded so that the record may be reopened, updated, and made subject to public comment.

Neither the Region nor Shell dispute the fact that the Region did not analyze, nor develop permit conditions to assure compliance with, clean air increments. The lack of an air quality analysis assessing the *Kulluk*'s impacts on increments was intentional: the agency refused to analyze increments, based on its mistaken position that section 504(e) of the Clean Air Act requires some permits but not others (and not the *Kulluk* Permit) to “assure compliance” with “any applicable increment or visibility requirements under part C of subchapter I of [the Act].” 42 U.S.C. § 7661c(e). In lieu of a *factual* analysis of the impact of the *Kulluk* and its associated fleet on increments, the Region's decision was premised upon its *legal* position, which it defended—misguidedly, but at length—in the Statement of Basis, Technical Support Document, and Response to Comments. *See* AR-EPA-H-4 (Ex. 1) at H000148-50; AR-EPA-H-1 (Ex. 2) at H000006-07; AR-EPA-J-3 (Ex. 3) at J000319-26.¹

¹ REDOIL Petitioners' petition for review addressed the Region's flawed legal position and attendant unlawful failure to abide by Congress's intent, as reflected in the plain language and structure of Clean Air Act section 504(e). *See* REDOIL Petition at 19-37. Further elaboration is unnecessary here, save for two points. First, the Region asserts that REDOIL Petitioners have

In contrast to the Region’s expansive legal argument that it need not conduct an increments analysis, only one sentence in the Region’s decisional documents substantively addressed the agency’s assertion that the *Kulluk*’s emissions will not result in a violation of increments. *See* Response to Comments, AR-EPA-J-3 (Ex. 3) at J000323. The inadequacies of this single substantive sentence are addressed in REDOIL Petitioners’ petition for review. *See* REDOIL Petition at 35-37.

The Region’s response brief now offers new rationales not found in its analysis in the record. *Compare* Region Response at 12-14 *with* Response to Comments, AR-EPA-J-3 (Ex. 3) at J000323; Statement of Basis, AR-EPA-H-4 (Ex. 1) at H000148-50; Technical Support Document, AR-EPA-H-1 (Ex. 2) at H-000006-07. Further, the Region now seeks to rely upon two new factual documents, both air permit analyses conducted by the Alaska Department of Environmental Conservation (“ADEC”) for sources other than the *Kulluk*. But neither of these documents was cited by the Region in its decision. *Compare* Region Response at 13 & n.11

(continued) misconstrued the term “applicable” as used in section 504(e) by linking increment applicability to the triggering of the minor source baseline date. *See* Region Response at 9. The Region oversimplifies REDOIL Petitioners’ argument, which focused upon the minor source baseline date because it establishes the applicability threshold for a nominally “minor” PSD source such as the *Kulluk*. The Region does not address REDOIL Petitioners’ broader point, namely, that Congress used the word “applicable” in section 504(e) to distinguish between the universally applicable NAAQS and increments that are only applicable to sources in an area if the major source baseline date (for major sources) or minor source baseline date (for minor sources) has been triggered. *See* REDOIL Petition at 21-22.

Second, the Region argues that increments may not be directly applied to individual sources because section 163 of the Clean Air Act specifies state implementation plans (“SIPs”) must implement increments. Region Response at 8. While it is true that section 163(a) requires SIPs to include provisions that assure compliance with increments, section 163(b) independently establishes the increment limits. 42 U.S.C. §§ 7473(a), (b). NAAQS are implemented through SIPs in the same manner. *See* 42 U.S.C. §§ 7409 (establishing NAAQS), 7410 (requiring SIPs to provide for NAAQS implementation). Yet the Region does not dispute that section 504(e) establishes NAAQS as a requirement directly applicable to temporary sources. Region Response at 5. The Region has failed to distinguish NAAQS from increments, both of which are directly applicable to temporary sources in the Title V permitting context as a consequence of the plain language of section 504(e). *See* REDOIL Petition at 21-25, 28-32.

(citing documents AR-EPA-B-30 & AR-EPA-B-31) *with* Response to Comments, AR-EPA-J-3 (Ex. 3) at J000319-26 (no mention of ADEC’s assessment of the BP Endicott facility’s compliance with increments); Statement of Basis, AR-EPA-H-4 (Ex. 1) at H000148-50 (same); Technical Support Document, AR-EPA-H-1 (Ex. 2) at H-000006-07 (same).

The Board should disallow the Region’s new reasons and factual citations, which the Region offers in an impermissible attempt to fill the gap in the record that resulted from the agency’s deliberate refusal to analyze increments. Having declined to undertake a factual analysis prior to issuance of the permits, the Region’s lawyers may not supply it now. It is well established that an agency decision “[must] be upheld, if at all, on the same basis articulated in the [decision] by the agency itself.” *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962). The Board frequently has refused to accept arguments like those offered by the Region here for “the first time on appeal” because an agency only may rely on arguments and authority “asserted and explained in the record.” *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 424 (EAB 1997); *see also id.* at 418 n.25; *In re Chem. Waste Mgmt. of Ind., Inc.*, 6 E.A.D. 144, 154 (EAB 1995) (same); *In re Amoco Oil Co.*, 4 E.A.D. 954, 964 (EAB 1993) (same).

Even if the Board considers the Region’s new explanations and documents, the agency still cannot demonstrate that the *Kulluk* will comply with increments, as required by section 504(e) of the Act. If anything, the Region’s newly extended analysis indicates that the agency cannot “assure compliance” with the increment for 24-hour concentrations of coarse particulate matter pollution (PM₁₀).²

² In addition to its new analysis of the *Kulluk*’s prospects for complying with the 24-hour PM₁₀ increment, the Region also offers an expanded defense of its previously unexplained conclusion that the *Kulluk* will comply with increments for nitrogen dioxide (NO₂) and sulfur dioxide (SO₂). The Region acknowledges the requirement to use modeling instead of monitored ambient air data to assess increment compliance, but insists that the use of ambient air measurements was

In the vicinity of the *Kulluk*, the applicable increment for 24-hour concentrations of PM₁₀ is 30 µg/m³. 40 C.F.R. § 52.21(c). Emissions from the *Kulluk* and associated vessels will result in 24-hour concentrations of PM₁₀ as high as 20.8 µg/m³. Technical Support Document, AR-EPA-H-1 (Ex. 2) at H-000033, Table 11. Pollution at this level consumes more than two-thirds of the increment. The *Kulluk*, however, is not entitled to consume the entire increment itself: the increment is a limit on the cumulative impact of all increment-consuming operations in the area and, as a new source, the *Kulluk* may only pollute to the extent others sources have not already consumed the increment. 42 U.S.C. § 7473(b); *Great Basin Mine Watch v. EPA*, 401 F.3d 1094, 1096 (9th Cir. 2005). For the area onshore and within 25 miles of Alaska’s state seaward boundary, the increment also is consumed by any major sources constructed after June 5, 1975, as well as any minor sources constructed after November 13, 1978. Discoverer Beaufort Statement of Basis, AR-EPA-I-8 (Ex. 6) at I001542, I001637-38. For the area beyond 25 miles from Alaska’s seaward boundary, major sources constructed after June 5, 1975, consume the increment, as do any minor sources constructed after July 31, 2009. *Id.*

Although the Region asserted in the Response to Comments that Table 11 of the Technical Support Document demonstrates that the *Kulluk* will comply with increments, *see* EPA-AR-J-3 (Ex. 3) at J000323, the Region’s assertion is incorrect. Table 11 of the Technical Support Document indicates that the *Kulluk*’s 24-hour PM₁₀ impact of 20.8 µg/m³ is *in addition* to background pollution levels of 53 µg/m³. Technical Support Document, AR-EPA-H-1 (Ex. 2)

(continued) acceptable in this instance because the Region used data from a monitor “adequately sited to capture impacts from off-site sources.” Region Response at 13 n. 9 (citing AR-EPA-J-3 at J000317-18). The record, however, does not support the Region’s conclusion. The portion of the Response to Comments cited by the Region merely states that the Region’s ambient monitor is likely to capture impacts from the largest sources in Prudhoe Bay. Accounting for *some* off-site, increment-consuming sources with monitored data obtained at *one* location is no substitute for accounting for all of the sources that must be addressed in a modeled analysis (including mobile sources) within the entire significant impact area. *See* REDOIL Petition at 37.

at H-000033, Table 11. At $73.8 \mu\text{g}/\text{m}^3$, the combined impact of the *Kulluk* and background sources greatly exceeds the applicable increment of $30 \mu\text{g}/\text{m}^3$. 40 C.F.R. § 52.21(c). Therefore, depending upon how much of the background pollution is attributable to other increment-consuming sources that must be identified and counted, the *Kulluk*'s emissions may unlawfully exceed the increment. In fact, if as little as $9.3 \mu\text{g}/\text{m}^3$ of the $53 \mu\text{g}/\text{m}^3$ of background PM_{10} pollution comes from increment-consuming sources, then the additional $20.8 \mu\text{g}/\text{m}^3$ of PM_{10} pollution caused by the *Kulluk* will lead to a violation of the 24-hour increment limit of $30 \mu\text{g}/\text{m}^3$. 40 C.F.R. § 52.21(c). The Region does not dispute that the background data identified for the *Kulluk* includes emissions from increment-consuming sources. *See* Region Response at 13 n.9 (“monitoring data in this case . . . includes impacts from some sources that consume increment”).³ The Region, however, has not compiled an inventory of these sources or otherwise conducted an analysis of increments, meaning the Region cannot claim credibly that the *Kulluk*'s emissions will not cause or contribute to an increment violation, as required by Clean Air Act section 504(e).

Confronted with this fatal analytical gap, the Region's lawyers cite two previously unacknowledged air analyses conducted by ADEC. *See* Region Response at 13 & n.11 (citing AR-EPA-B-30 & AR-EPA-B-31). But these two documents, impermissibly invoked for the first time on appeal, do not support the Region's assertion that the *Kulluk* will not violate increments. The shortcomings of the two ADEC analyses, inasmuch as they are offered for the purpose of evaluating increment compliance by the *Kulluk*, are several and severe:

³ The Region's response brief asserts that “monitored concentrations of PM_{10} include a more significant contribution from sources that do not consume the increment . . . such as windblown dust.” *Id.* at 13 n.10. Notably, the Region fails to offer a citation to support this assertion.

- The Region must assure compliance with increments in two distinct air quality control regions: the area onshore and within 25 miles from Alaska’s seaward boundary; and the area more than 25 miles beyond Alaska’s seaward boundary. *See* Bray Memorandum, AR-EPA-BB-34 (Ex. 7) at BB002850-52; Discoverer Beaufort Statement of Basis, AR-EPA-I-8 (Ex. 6) at I001637. The ADEC analyses only addressed increments within ADEC’s jurisdiction, *i.e.*, onshore and within 25 miles of the state’s seaward boundary. *See* 18 AAC § 50.015(c)(1) (identifying the state’s four air quality control regions); *see also* ADEC Central Compressor Plant Analysis, AR-EPA-B-31 (Ex. 5) at B001145 (noting that increment analysis was for the Northern Alaska Intrastate Air Quality Control Region only).
- Neither of the two ADEC analyses includes a full increment analysis. With respect to PM₁₀ pollution, the ADEC analysis for BP’s Endicott Production Facility did not account for background pollution or other increment-consuming sources. ADEC based its decision to forego analysis of off-site sources on “past modeling assessments.” AR-EPA-B-30 (Ex. 4) at B001111. These past modeling assessments are not in the record. Likewise, the full increment analysis for BP’s Central Compressor Plant was included in an attachment to the ADEC report, *see* AR-EPA-B-31 (Ex. 5) at B001145, but the Region has not included the attachment in the record.
- Citing the ADEC analysis for BP’s Endicott Production Facility, the Region suggests that if “off-site sources of PM₁₀ do not have a significant impact at Endicott,” “located on an island 3.8 miles offshore,” they are unlikely to have an impact at the

Kulluk. Region Response at 13.⁴ The Region’s mention of the distance from Endicott to the shore is misleading. While the island is just 3.8 miles offshore, the relevant factor is the distance between Endicott and the nearest off-site sources of PM₁₀ pollution, onshore or otherwise. The Region does not supply this key detail, and instead newly asserts, without citation, that Shell’s lease blocks are further than Endicott from Prudhoe Bay sources. *See* Region Response at 13 n.11. In fact, the Region elsewhere acknowledges that Shell’s nearest lease blocks are only 27 miles away from Deadhorse, AR-EPA-H-2 (Ex. 8) at H000044, which is just south of the Prudhoe Bay facilities. *Compare id.* at H000043 with AR-EPA-B-56 (Ex. 11); *and see* AR-EPA-B-66 (Ex. 10). By contrast, ADEC’s analysis suggests that the nearest off-site pollution sources to Endicott are located 37 miles away in Prudhoe Bay. AR-EPA-B-30 (Ex. 4) at B001092.

- Whatever ADEC’s conclusions about the impact (or lack thereof) of off-site sources near Prudhoe Bay upon Endicott, the ADEC documents do not provide a sufficient analysis for the *Kulluk*, which will operate relatively close to other off-site sources of pollution. *See* Environmental Justice Analysis, AR-EPA-H-2 (Ex. 8) at H000044 (noting that two communities—Kaktovik and Nuiqsut—are located within 8 and 22 miles of Shell’s lease blocks, respectively).
- The Region also cites ADEC’s analysis of the BP Central Compression Plant to support its new analysis regarding the *Kulluk*’s asserted compliance with the 24-hour

⁴ The Region also cites ADEC’s BP Central Compressor Plant analysis for the proposition that “the impact from Prudhoe Bay sources is insignificant at Endicott.” Region Response at 13 n.11 (citing AR-EPA-B-31 at B001126). This citation appears to be a mistake, as no such fact appears on the cited page and Endicott was not the subject of the BP Central Compressor Plant analysis.

PM₁₀ increments. Region Response at 13 n.11 (citing AR-EPA-B-31 at B001126). The Region's reliance is obviously misguided, as ADEC's analysis for this facility exclusively addressed SO₂ emissions, *see* AR-EPA-B-31 (Ex. 5) at B001123. To the extent ADEC's analysis for the BP Central Compressor Plant is at all relevant here, the analysis underscores the arbitrariness of the approach adopted by the Region. The ADEC report stated that an air quality analysis "must include impacts from large sources located within 50 km of the applicant's [significant impact area]" and, for its increment analysis, "included the permitted stationary sources located within Prudhoe Bay, Milne Point, the Kuparuk River Unit, and Deadhorse in the modeled off-site inventory." AR-EPA-B-31 (Ex. 5) at B001154. The Region conducted no such similar analysis for the *Kulluk*.

Ultimately, the very fact that the Region has been forced to resort to citing air analyses conducted by another agency, for sources other than the *Kulluk*, involving locations different than those at issue here, makes plain that the Region cannot claim that it has compiled a record sufficient to demonstrate that the *Kulluk*'s emissions will not cause or contribute to increment violations. The Region unlawfully ignored section 504(e) of the Act and eschewed the requirement to undertake an air quality analysis that addressed increments. As the Region's *post hoc* rationalizations are both impermissible and unavailing, the Board should grant review of the *Kulluk* Permit and remand the decision to the Region.

II. THE NEW AUTHORITY CITED BY THE REGION FAILS TO ESTABLISH THE VALIDITY OF THE *KULLUK* PERMIT'S BLANKET EMISSION LIMITATIONS.

In its response brief, the Region argues that disallowed "blanket emission limits" established in the *Kulluk* Permit are enforceable and lawful because Shell will be required to monitor fuel usage and to calculate and record regularly the facility's emissions based on the

application of certain emission factors. Region Response at 14-19. But the Region's argument ignores REDOIL Petitioners' fundamental objection, namely, that the blanket emission limits for NO_x and CO—and Shell's subsequent emissions calculations to verify compliance—are premised upon emission factors that are assumed to be accurate, even though Shell has not identified all of the equipment it intends to use and the permit requires no testing to verify the emission factors once the equipment is finally installed. REDOIL Petition at 11-14. The Region's response brief, for the first time, cites a decision of the Administrator and suggests that the approach contested here has been endorsed by the agency previously. Region Response at 17 (citing *In the Matter of Pope and Talbot, Inc.*). No issues regarding the validity of the emission factors were raised in that case, however, meaning the Administrator's *Pope and Talbot* decision is inapposite. See AR-EPA-B-24 (Ex. 9) at B000867-68.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Petition for Review, REDOIL Petitioners respectfully request that the Board grant review of the *Kulluk* Permit and remand the decision to the Region.

Respectfully submitted,

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DATED: December 28, 2011

CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2011, copies of the foregoing REPLY TO RESPONSES TO PETITION FOR REVIEW in the matter of *Shell Offshore Inc., Permit No. R10OCS030000*, OCS Appeal No. 11-06, were served by electronic mail on the following persons:

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TABLE OF EXHIBITS

<u>Exhibit No.</u>	<u>Administrative Record No.</u>	<u>Description</u>
1	AR-EPA-H-4	U.S. Environmental Protection Agency (EPA) Region 10, Statement of Basis for the Draft Outer Continental Shelf Permit to Construct and Title V Air Quality Operating Permit No. R10OCS030000, Shell Offshore Inc., Beaufort Sea Exploration Drilling Program (July 22, 2011) (excerpts)
2	AR-EPA-H-1	EPA Region 10, Technical Support Document, Review of Shell's Ambient Air Quality Impact Analysis for the Kulluk OCS Permit Application, Permit No. R10OCS030000 (July 18, 2011) (excerpts)
3	AR-EPA-J-3	EPA Region 10, Response to Comments for Outer Continental Shelf Permit to Construct and Title V Operating Permit, Conical Drilling Unit Kulluk, Shell Offshore Inc. Beaufort Sea Exploration Drilling Program Permit No. R10OCS030000 (Oct. 21, 2011) (excerpts)
4	AR-EPA-B-30	Alaska Department of Environmental Conservation (ADEC), Air Permits Program, Technical Analysis Report for Air Quality Control Minor Permit No. AQ0181MSS04, BP Exploration (Alaska) Inc. (BPXA), Endicott Production Facility (Mar. 30, 2009) (excerpts)
5	AR-EPA-B-31	ADEC, Air Permits Program, Technical Analysis Report, Air Quality Control Minor Permit No. AQ0166CPT04, BP Exploration (Alaska) Inc., Central Compressor Plant (CCP) and Air Quality Control Construction Permit AQ0270CPT04, BP Exploration (Alaska) Inc., Central Gas Facility (CGF) (Oct. 13, 2009) (excerpts)

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|----|--------------|--|
| 6 | AR-EPA-I-8 | EPA Region 10, Statement of Basis for Proposed Outer Continental Shelf Prevention of Significant Deterioration Permit No. R10OCS/PSD-AK-09-01, Shell Gulf of Mexico Inc., Frontier Discoverer Drillship, Beaufort Sea Exploration Drilling Program (Feb. 17, 2010) ¹ (excerpts) |
| 7 | AR-EPA-BB-34 | Memorandum from D. Bray, Senior-Policy Advisor, U.S. EPA, to R. Albright, Director, Office of Air, Waste, and Toxics, U.S. EPA (July 2, 2009) |
| 8 | AR-EPA-H-2 | EPA Region 10, Environmental Justice Analysis for proposed Outer Continental Shelf Permit No. R10OCS030000, Kulluk Drilling Unit (July 19, 2011) (excerpts) |
| 9 | AR-EPA-B-24 | Order, <i>In the Matter of Pope and Talbot, Inc., Lumber Mill, Spearfish, South Dakota</i> , Petition No. VIII-2006-04 (Mar. 22, 2007) (excerpts) |
| 10 | AR-EPA-B-66 | BPXA Prudhoe Bay Monitoring Map (undated) |
| 11 | AR-EPA-B-56 | Beaufort Sea - Outer Continental Shelf Lease Ownership Map (Aug. 30, 2011) |

¹ The Certified Index identifies AR-EPA-I-8 as “Attachment to AWL Comments. U.S. EPA Region 10, Statement of Basis for Draft OCS Title V Air Quality Operating Permit No. R10OCS020000.” This one record entry actually includes several distinct documents, including the Statement of Basis for Shell’s Discoverer Drillship, which begins at I001542. Commenters combined multiple documents into a single .pdf file for electronic submission to the Region; as a consequence, not every distinct document submitted by commenters appears to have been logged separately in the Certified Index.