

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

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In re:	)	
	)	
Shell Gulf of Mexico, Inc.	)	
Shell Offshore, Inc.,	)	OCS Appeal Nos. 10-01
Frontier Discoverer Drilling Unit	)	through 10-04
	)	
OCS Permit No. R10 OCS/PSD-AK-09-01	)	
OCS Permit No. R10 OCS/PSD-AK-10-01	)	
_____	)	

**EPA REGION 10'S  
OPPOSITION TO PETITIONERS' MOTION TO VACATE AND REMAND  
AND  
REPLY TO SHELL'S OPPOSITION TO MOTION TO HOLD MATTERS IN  
ABEYANCE**

## I. Introduction

On March 31, 2010, the Director of the Office of Air, Waste and Toxics for the U.S. Environmental Protection Agency (EPA), Region 10 issued Outer Continental Shelf/Prevention of Significant Deterioration Permit No. R10OCS/PSD-AK-09-01 (the Chukchi OCS/PSD Permit) under the Clean Air Act to Shell Gulf of Mexico, Inc. to allow exploratory oil and gas drilling operations in the Chukchi Sea. On April 9, 2010, the Director of the Office of Air, Waste and Toxics for EPA Region 10 issued Outer Continental Shelf /Prevention of Significant Deterioration Permit No. R10OCS/PSD-AK-2010-01 (the Beaufort OCS/PSD Permit) under the Clean Air Act to Shell Offshore Inc. to allow exploratory oil and gas drilling operations in the Beaufort Sea.

On May 3 and 12, 2010, Petitions for Review of these OCS/PSD permits were filed by Center for Biological Diversity (CDB), Earth Justice on behalf of several conservation groups (EJ Petitioners), and the Alaska Eskimo Whaling Commission and the Inupiat Community of the Arctic Slope (collectively, “AEWC Petitioners”). On May, 14, 2010, in response to a request from Shell Gulf of Mexico, Inc. and Shell Offshore Inc. (collectively, “Shell”), the Board consolidated the Petitions and set the case on an expedited review schedule.

On May 28, 2010, shortly before Responses to the Petitions were due under that schedule, EPA Region 10 – in consultation with EPA headquarters offices – filed a Motion to Hold Matters in Abeyance pending the conclusion of President Obama’s moratorium on drilling activities on the Outer Continental Shelf (OCS).<sup>1</sup> On June 1,

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<sup>1</sup> EPA Region 10 acknowledges that its reference to the “moratorium” in the Motion to Hold Matters in Abeyance may have been imprecise, as the moratorium covers deepwater drilling activity and Shell’s operations addressed in the Chukchi and Beaufort OCS/PSD

Shell filed an opposition to Region 10's Motion and Petitioners filed a joint Motion to Vacate and Remand the Air Permits, as well as a response to Region 10's Motion to Hold Matters in Abeyance. On June 2, the Board issued an Order denying Region 10's Motion in so far as it requested to hold the briefing schedule in abeyance, noting that the Board could better evaluate the pending Motions if it had the benefits of briefing on the merits of the Petitions. Further, the Board ordered that the June 18, 2010 oral argument would be held on the pending motions instead of on the merits of the Petitions for Review, as previously scheduled. The June 2 Order also instructed EPA Region 10 to respond to Petitioners' Motion to Vacate and Remand and to reply to Shell's opposition to the Motion to Hold Matters in Abeyance.<sup>2</sup>

As explained more fully below, EPA Region 10 hereby opposes Petitioners' Motion to Vacate and Remand and continues to support the Region's pending Motion to Hold Matters in Abeyance. EPA Region 10's request to hold this case in abeyance is consistent with the direction provided by President Obama regarding OCS drilling

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Permits are not deepwater operations. However, we also note that Shell's exploratory oil and gas drilling operations addressed in these challenged permits are the focus of the President's announced "suspension" of Arctic drilling activity. *See* Ex. 1 to Pets.' Motion to Vacate and Remand (filed June 1, 2010), Remarks by the President on the Gulf Oil Spill (May 27, 2010) at ¶15 (stating that "we will suspend the planned exploration of two locations off the coast of Alaska"). DOI also specifically noted that "in light of the need for additional information about spill risks and spill response capabilities, [the Administration] will postpone consideration of Shell's proposal to drill up to five exploration wells in the Arctic this summer." Ex. 2 to Pets.' Motion to Vacate and Remand, Press Release, U.S. Department of Interior, *Salazar Calls for New Safety Measures for Offshore Oil and Gas Operations; Orders Six Month Moratorium on Deepwater Drilling* (May 27, 2010) at ¶ 5. Accordingly, any references to the moratorium and related activities were meant to encompass the suspension of Shell's activities that were also addressed in the moratorium announcements.

<sup>2</sup> On June 4, 2010, in response to EPA Region 10's Partially Unopposed Motion for Extension of Time (filed June 3, 2010), the Board granted a short extension of time for filing the responses to the Petitions and the Motions, but did not change the scope of those briefings or otherwise alter the previous Orders in this case.

activities and additional actions announced by the U.S. Department of Interior (DOI). The President announced an extension of the existing moratorium on OCS drilling activity for at least 6 months to put into place new operating standards and requirements and to conduct further review of these activities, with particular focus on whether additional safety and environmental precautions may be necessary, and an accompanying suspension of Arctic drilling activity. *See generally* Ex. 1 to Pets.’ Motion to Vacate and Remand, Remarks by the President on the Gulf Oil Spill (May 27, 2010), *also available at* <http://www.whitehouse.gov/the-press-office/remarks-president-gulf-oil-spill>. In addition, DOI announced that it would implement “aggressive new operating standards and requirements for offshore energy companies” in order to “improve the safety of oil and gas development in federal waters, provide greater environmental protection and substantially reduce the risk of catastrophic events.” Ex. 2 to Pets.’ Motion to Vacate and Remand, Press Release, U.S. Department of Interior, *Salazar Calls for New Safety Measures for Offshore Oil and Gas Operations; Orders Six Month Moratorium on Deepwater Drilling* (May 27, 2010) at ¶ 1, *also available at* <http://www.doi.gov/news/pressreleases/Salazar-Calls-for-New-Safety-Measures-for-Offshore-Oil-and-Gas-Operations-Orders-Six-Month-Moratorium-on-Deepwater-Drilling.cfm>. DOI further explained that

the Administration will continue to take a cautious approach in the Arctic and, in light of the need for additional information about spill risks and spill response capabilities, will postpone consideration of Shell’s proposal to drill up to five exploration wells in the Arctic this summer.

*Id.* at ¶ 5.

While Shell argues that these announcements and forthcoming activities will not result in any actions that should impact the current proceedings and the Petitioners argue

that they definitely will, EPA Region 10's Motion recognizes that at the present time, we simply do not know what effect, if any, these actions will have on the pending Chukchi and Beaufort OCS/PSD Permits. Accordingly, Region 10's request to hold these matters in abeyance is not only consistent with the standards and precedent governing this review, but also best carries out the policy expressed in the President's announcement – to put decisions regarding OCS drilling activities on hold while the government as a whole figures out the best path forward. *See In re Desert Rock Energy Company, LLC*, PSD Appeal No. 08-03 to 08-06, 14 E.A.D. \_\_ (EAB Sept. 24, 2009), slip op. at 19 (noting that “the Board typically grants a motion where...granting the motion makes sense from an administrative or judicial efficiency standpoint”).

## **II. Opposition to Petitioners' Motion to Vacate and Remand the Air Permits**

Petitioners' request to vacate and remand the Chukchi and Beaufort OCS/PSD Permits must be denied because they have failed to show the standard for remand is met. Petitioners cite to no standard of review or EAB precedent indicating that remand is appropriate at this time. While the moratorium, suspension, and related activities could impact Shell's operations in the future, there is no guarantee that they will and that the impact will necessitate changes to the permits. The fact that the President and his Administration are conducting comprehensive reviews of and implementing new standards for OCS drilling does not establish that these Shell permits are currently based on a clearly erroneous finding of fact or conclusion of law, and that is the standard that governs remand of permits pending before the Board. *See* 40 C.F.R. § 124.19 (a) & (c); *In re Prairie State Generating Company, LLC*, PSD Appeal No. 05-05, 13 E.A.D. \_\_

(EAB Aug 24, 2006), slip op. at 19 (finding that a failure underlying the development of a permit condition “constitutes clear error and, therefore, is grounds for remand”).

Contrary to Petitioners’ assertions, there are as yet no changed requirements for Shell’s operations that Region 10 failed to consider in issuing these permits. In their pending motion, Petitioners are basically saying there may be a problem with the permits as they now read when compared to possible requirements that might be imposed in the future. *See* Pets.’ Motion to Vacate and Remand at 5 (asserting that DOI’s pending review “makes it likely that there will be substantial change to Shell’s operations that will affect the air permits”). But such claims are not, and cannot be, ripe for consideration at this time. As the Board has recognized, claims are “‘ripe’ or fit for disposition by the Board if a final permit decision has been issued by the Region, and the petitioner is challenging the permit *as it now reads.*” *In the Matter of General Electric Company Permittee*, 4 E.A.D. 615, 623 (EAB 1993) (citing 40 CFR § 124.19(a)) (emphasis added); *cf. W.R. Grace & Co. v. U.S. E.P.A.*, 959 F.2d 360, 364 (1st Cir. 1992) (noting that “perhaps the most important consideration in determining whether a claim is ripe for adjudication is the extent to which the claim involves uncertain and contingent events that may not occur as anticipated, or indeed may not occur at all”) (internal quotation marks omitted).

Moreover, it would not serve administrative or judicial efficiency to needlessly vacate and remand the permits if, at the end of the DOI’s reviews of Shell’s Arctic activities, there are no changes to Shell’s operations that require changes to the Chukchi and Beaufort OCS/PSD permits as they now read. *See In re Indeck-Elwood, L.L.C.*, PSD Appeal No. 03-04, Order Denying Respondent’s Motion for Voluntary Partial Remand

and Petitioners' Cross Motion for Complete Remand, and Staying the Board's Decision on the Petition for Review (EAB May 20, 2004) (hereinafter, "*Indeck-Elwood* Remand Order"), at 8-9 (finding a request for full remand of a permit did not serve judicial efficiency because forthcoming actions might not result in a change to any permit terms). As stated in Region 10's Motion to Hold Matters in Abeyance, and reaffirmed here, "[g]iven the unknown outcome of the moratorium and related actions on Shell's exploratory oil and gas drilling operations in the Chukchi and Beaufort Seas, EPA Region 10, in consultation with EPA headquarters offices, cannot currently determine if a remand and/or withdrawal of the Shell permits will be necessary or appropriate to address the concerns that prompted the moratorium." *Id.* at ¶ 9. Petitioners do not, and of course cannot, know what (if any) changes may be required as a result of DOI's review. Thus, the Petitioners have presented no facts that require a change to the permits or Region 10's determination in this regard. Petitioners' request for remand is based on contingent events which may or may not occur, and therefore, their Motion should not be granted.<sup>3</sup> *See In the Matter of Columbia Gulf Transmission Company*, PSD Appeal No. 88-11, Order on Motion for Stay, 1990 WL 324099 (Adm'r July 03, 1990) (granting a stay of a case, as

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<sup>3</sup> While Petitioners point to statements Shell made to DOI regarding potential use of another drill rig (the Kulluk) in some emergency circumstances, *see* Pets.' Mot. at 5 (citing Ex. 3), this statement alone does not mean that the present permits were issued in error. The letter cited by Petitioners does not provide the facts necessary to show that the Kulluk *will* be a part of Shell's exploratory operations, and that even if it is, that the Kulluk would be operating within 25 miles of the Discover and thus covered by the OCS regulations that govern these permits. *See* Pets.' Mot., Ex. 3 at 4, ¶ g (letter from Shell to DOI noting that Shell would mobilize the Kulluk *if* the Discoverer were lost as the result of a blowout and that Shell is currently trying to make the Kulluk ready for such actions); *see also* 42 U.S.C. § 7627(a)(4)(C) and 40 C.F.R. § 55.2 (limiting consideration of emissions in an OCS permitting action to those vessels within 25 miles of the OCS source). If anything, the lack of information regarding the possible use of the Kulluk weighs in favor of holding this case in abeyance to see what, if anything, DOI does with the information that Shell has provided and how the decisions of DOI and Shell may impact the air permits at issue here.

opposed to a remand, were it was not clear that the permitting authority's consideration of new information concerning the permitting analysis would require a change in the permit terms).

### **III. Reply to Shell's Opposition to Motion to Hold in Abeyance**

Just as Petitioners' Motion improperly relies on presumptions about what will happen in the future, Shell's Opposition to Region 10's Motion to Hold Matters in Abeyance also relies on a series of presumptions and flawed premises. First, Shell asserts that there is no reason to think the air permits at issue here will be affected by the moratorium and related activities because the suspension on Arctic drilling "does not appear to be related to air emissions." Shell Opp'n at 2; *see also id.* at 5 (asserting that the concerns that prompted the moratorium "appear to have nothing to do with air emissions"). While it is true that neither the President nor DOI addressed air emissions in discussing the moratorium, the suspension of Arctic drilling, and future actions, Shell's argument fails to recognize (or drastically underplays) the possibility that new requirements imposed on their operations as a result of the Administration's review could change the nature of their operations, which could in turn change the nature, amount, and location of the air emissions associated with their exploratory operations and, as a result, would also change Region 10's analysis of the emissions underlying these permits. For example, DOI could require additional emergency response vessels, impose additional requirements regarding location of response vessels relative to the drill ship, or require changes to the well shut-in process, each of which could result in emissions that EPA Region 10 would need to analyze in light of CAA permitting requirements. *See Mot. to Hold Matters in Abeyance* at ¶ 8. Thus, it is completely reasonable to hold these matters



in abeyance to determine what, if any, effect DOI's future actions would have on the air emissions that must be considered by EPA Region 10 in issuing these permits.

Second, Shell argues that the issues currently pending before the Board are "primarily legal issues" and thus can (and should) be decided now because they are not affected by the current suspension of Shell's actions or DOI's future activities. Shell Opp'n at 6-7. Many of the issues challenged in the Petitions for review involve combined issues of law and fact. *See, e.g.*, EPA Region 10's Response to Petitions for Review (filed June 7, 2010) at 17 and 39 (explaining that application of the definition of OCS source to a particular vessel or drilling rig is a fact specific determination); *id.* at 50 (explaining the Region's determination that the data as a whole was sufficient for a complete and adequate analysis of Shell's proposed operations). And in responding to the merits of the pending Petitions, Shell appears to agree. *See, e.g.*, Shell's Response to Petitions for Review (filed June 7, 2010) at 35 (noting that Region 10 made a fact-specific determination regarding when the Discoverer becomes an OCS source); 39 (acknowledging that the definition of OCS source is tied to the specific operational design of Shell's projects); 41 (noting that determining the stationary source aspects of an associated vessel is a fact-specific determination). Shell simply cannot have it both ways – arguing that the issues are fact-specific and thus accorded deference to the Agency's judgment when opposing the Petitions for Review, but then also arguing they are primarily legal issues when opposing Region 10's Motion to Hold Matters in Abeyance.

Moreover, to the extent that some issues presented are "primarily legal," resolution of those issues may still not be necessary at this time. For example, DOI's actions could lead to underlying changes in Shell's use of the Discoverer and/or the

specific operational design of the project, which would change the facts underlying these issues on appeal, which would in turn affect the weight and/or scope of the arguments made by the Petitioners and the Board's consideration of them. In addition, given the inter-relatedness of the various analyses required in issuing these OCS/PSD permits, any alteration the specific operational design of the equipment regulated under these permits could affect other aspects of those permits. *See, e.g.,* EPA Region 10's Response to Petitions for Review (filed June 7, 2010) at 14-39 (discussing how the make-up, relative position, and connection of support vessels to the Discoverer can impact the OCS source determination, which in turn will impact the air quality modeling and BACT analysis). Thus, future actions could make consideration of such issues moot to the extent the underlying facts no longer give rise to Petitioners' claims and/or no longer provide support for the Agency's permitting decision as required by the regulations at issue. *See, e.g., In re Russell City Energy Center*, PSD Appeal No. 08-01, 14 E.A.D. \_\_\_ (EAB July 29, 2008), slip. op at 39 (declining to address substantive petition issues where a procedural error meant the draft permit would have to be reissued, thus reopening the public comment period). Contrary to Shell's argument that the specific issues on appeal here could not be impacted by the outcome of DOI's review, it is simply not possible to say how (or even if) the permits will be affected until we know the scope of DOI's actions and the resulting extent of changes that may need to occur in our permitting action. Thus, the best course of action is to hold these matters in abeyance.<sup>4</sup>

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<sup>4</sup> In arguing that DOI's actions are unlikely to affect Shell's operations, and thus the underlying permits, Shell argues that the "relevant conditions" as they relate to oil spills are "profoundly different" than those found in the of the Gulf of Mexico, and they provide a list of those differences. *See* Shell Opp'n at 5 and n.4. However, EPA Region 10 notes evidence that describes other conditions affecting operations in Arctic waters

Finally, Shell asserts that to decide the issues now “would be efficient and would conserve the Board’s and the parties’ resources.” Shell Opp’n at 7. EPA Region 10 appreciates Shell’s interest in resolving all permitting issues on a schedule that will allow them to move forward with these projects in the 2011 season, but given the current situation, EPA Region 10 believes judicial and administrative efficiency weigh heavily in favor of holding this case in abeyance. As noted above, the factual predicates could change for the pending issues on appeal and/or those issues could become moot as a result of the DOI’s forthcoming decision, in which case there is simply no need for the Board to decide those issues now. *See, e.g., In re Los Mestenos Compressor Station*, CAA Appeal No. 09-01, Order Granting Stay (EAB Dec. 11, 2009) at 2 (staying consideration of a permit appeal “in the interest of judicial economy” where the

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that could be also relevant to DOI’s review, such as the generally harsh and remote Arctic conditions requiring use of specialized vessels and other equipment, the regular presence of ice in the drilling areas, and the very limited infrastructure on the Alaska North Slope. *See generally* Petroleum News Article, EPA Ex. 89 at B005452, 5469-5470 (describing how drilling further north in the Arctic OCS requires innovations and modifications in drilling safety equipment); Shell January 18, 2010 Beaufort Application, EPA Exhibit AA-1 at AA000038 (explaining that ice floe frequency and intensity are unpredictable in the Beaufort Sea and could range from no ice to ice sufficiently dense so that Shell’s fleet would have insufficient capacity to manage the ice floe such that the Discoverer would need to disconnect from its anchors and move off site) and Appendix L at AA000435-438 (Beaufort Sea Ice Statistics); 2010 Outer Continental Shelf Lease Exploration Plan Appendix H at 158-159 and 167-168, AR EPA Ex- EE-1 (providing information about the limited infrastructure on the North Slope of Alaska, including “limited offshore and coastal infrastructure in the immediate vicinity of [Shell’s] proposed project area”; “a need for more emergency dispatch radio connections and improved communications”; and a lack of “traditional road access”); North Slope Communications Protocol, AR EPA Ex. G-6 at G-00041-41 (providing description of “Travel to the North Slope” that highlights the remoteness of the area and the limited services available). *See also* Attachment A, Nick Jans, *BP Tragedy Gives Us Pause Here in Alaska*, USA Today, June 8, 2010 at 9A (discussing difficulties of drilling in the Arctic). Accordingly, without the benefit of DOI’s review, EPA Region 10 does not believe it is appropriate to assume that “Shell’s well designs are sound and its oil spill prevention and response plans are exemplary” such that DOI will not require changes to their operations. Shell Opp’n at 5.

permitting authority argued that the permit conditions challenged in the petition would be moot based on their plan to revise the underlying permit analysis, re-submit the permit for public comment, and then issue a new permit). While acknowledging Shell's concerns, Region 10 simply does not agree that Shell's proposed course of action represents the most efficient use of the parties' and the Board's resources. In fact, proceeding with review of these cases could lead to repetitious permitting efforts that would unnecessarily increase the many resources that have already been dedicated to issuance of these permits.

As Shell recognizes, if the cases were to proceed on the current schedule, it is possible that the Board could remand the current permits on one or more of the issues identified in the Petitions. *See* Shell Opp'n at 8. As the result of a remand, Region 10 would have to take action to resolve the remanded issues, only to possibly find that new DOI-imposed requirements would change the factual circumstances of Shell's operations in such a way that would make Region 10's actions incorrect, or even unnecessary. For example (and without conceding to any arguments put forward in the Petitions for Review), the Board could remand on issues related to the ambient air modeling for these permits and Region 10 could conduct another analysis and/or make permit changes in accordance with the Board's order, only to find out later that DOI was requiring additional vessels in Shell's operations or revised operational scenarios that would necessitate further changes to the modeling and/or permit conditions.<sup>5</sup> Instead, Region 10

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<sup>5</sup> Shell also asserts that any changes to the permits that might be required after DOI acts could be addressed simply through a permit modification. Shell Opp'n at 7. However, the air quality analysis – the permitting piece that would most likely need to be modified to account for any changes in Shell's operations – is the foundation of the Agency's efforts to protect air quality, and thus our PSD permitting actions. *See* CAA § 160, 42

believes it would be the most efficient to hold this case in abeyance in order to know the specific factual circumstances that will actually underlie Shell's activities (if and when they are authorized to drill) and to allow those facts to inform the CAA permitting decisions at issue here and the Board's consideration of them.

The outcome suggested by Region 10 is consistent with the prior EPA decisions to hold a permitting challenge in abeyance. For example, in *Indeck-Elwood*, the permitting authority moved to have the Board rule on the legality of various permit provisions prior to completion of an Endangered Species Act consultation process, and the petitioners moved to remand the entire permit pending the outcome of that consultation process. *See Indeck-Elwood* Remand Order at 6 and 8. After considering the arguments from the parties, the Board denied both motions and instead elected to hold the case in abeyance until completion of the consultation process. *Id.* at 9. In denying the permitting authority's motion, the Board stated that "while it is *conceivable* that the consultation process will not lead to any changes in the permit, we may not presume this to be the case in our disposition of the current case." *Id.* at 6 (emphasis in original). The Board concluded that "[b]ecause it is impossible at this juncture for us to predict which permit conditions, if any, might change as a result of the [] consultation process, we cannot appropriately issue a decision on any of the contested permit conditions." *Id.* at 8. Likewise, the Board found that granting the petitioners request for a full remand was "unduly restrictive" and not in the interests of judicial efficiency because the consultation

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U.S.C. § 7470. Given that such an important aspect of this permitting action could be changed based on DOI's review and subsequent action, a simple permit modification is unlikely to be the appropriate vehicle for revising the permits. The fact that the necessary modification would likely amount to another major permitting effort on the Agency's part provides additional weight against Shell's argument to proceed with this case in the interests of efficiency.

might result in an outcome in which no permit terms needed to change, such that the Board could lift the stay and issue a decision on the record before it. *Id.* at 8-9.

Like *Indeck-Elwood*, the current case involves permit provisions which *could* be subject to change pending the completion of the DOI review process, but such changes (if any) are not, and cannot, be known at this time. Accordingly, Shell's request that the Board presume that its underlying operations and thus the permit provisions will not change, and Petitioners' request based on a presumption that they will change, should both be rejected, and EPA Region's request to hold the case in abeyance should be granted. *See also In the Matter of Honolulu Resource Recovery Facility*, 2 E.A.D. 375, 380 (Adm'r 1987) (holding consideration of a petition for review in abeyance pending a Region's reconsideration of its concurrence with the analysis underlying a state agency's permitting decision).

## V. CONCLUSION

For the reasons stated above, EPA respectfully requests that the Board deny Petitioners' request to vacate and remand these permits, and instead grant Region 10's request to hold challenges to the Chukchi and Beaufort OCS/PSD Permits in abeyance

pending the outcome of the moratorium, suspension, and related activities on Shell's exploratory oil and gas drilling operations in the Chukchi and Beaufort Seas.

Dated this 10<sup>th</sup> day of June, 2010.

Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a copy of the above EPA REGION 10'S OPPOSITION TO PETITIONERS' MOTION TO VACATE AND REMAND THE AIR PERMITS AND REPLY TO SHELL'S OPPOSITION TO MOTION TO HOLD MATTERS IN ABEYANCE, with related excerpts from the Administrative Record and Attachment A, to be served by electronic mail upon the counsel listed below.

6/10/10  
Date

/s/  
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