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

In re:	)	
Shell Gulf of Mexico, Inc. Permit No. R10OCS/PSD-AK-09-01	)	OCS Appeal Nos. 10-01 through 10-04
&	)	
Shell Offshore, Inc. Permit No. R10OCS/PSD-AK-2010-01	)	
(Frontier Discovery Drillship)	)	

PETITIONERS' JOINT RESPONSE AND OPPOSITION TO THE MOTIONS FOR RECONSIDERATION AND/OR CLARIFICATION OF THE BOARD'S DECEMBER 30TH DECISION IN THIS MATTER

Tanya M. Sanerib
Christopher Winter
CRAG LAW CENTER
917 SW Oak Street, Suite 417
Portland, OR 97205
Counsel for Petitioners AEWC & ICAS

Joined by:

Vera Pardee
CENTER FOR BIOLOGICAL DIVERSITY
351 California Street, Suite 600
San Francisco, CA 94104
Counsel for Petitioner Center for Biological Diversity

Eric P. Jorgensen
EARTH JUSTICE
325 Fourth Street
Juneau, AK 99801

David R. Hobstetter
Erik Grafe
EARTHJUSTICE
441 W 5th Avenue, Suite 301
Anchorage, AK 99501
Counsel for Petitioners NRDC, *et al.*

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INTRODUCTION

Petitioners Alaska Eskimo Whaling Commission and the Inupiat Community of the Arctic Slope are joined by Natural Resources Defense Council, *et al.*, and the Center for Biological Diversity (collectively, Petitioners) in responding to and opposing Region 10's and Shell Offshore Inc. and Shell Gulf of Mexico's (hereafter "Shell") motions for reconsideration and/or clarification. (Docket Nos. 94, 93) (hereafter "Region 10 Br." and "Shell Br."). On December 30, 2010, the Board issued a carefully crafted decision explaining that Region 10 "clearly erred in determining when the Frontier Discoverer becomes an OCS source" and "also clearly erred in the limited scope of its analysis of the impact of NO emissions on Alaska Native 'environmental justice' communities located in the affected area," and remanding in full to Region 10 the two challenged outer continental shelf (OCS) prevention of significant deterioration (PSD) permits issued to Shell. *In re Shell Gulf of Mexico and Shell Offshore Inc.*, OCS Appeal No. 01-04, 15 E.A.D. ---, slip op. at 7 (EAB Dec. 30, 2010) (hereafter "*In re Shell*"). Because Region 10's and Shell's motions for reconsideration and/or clarification of the Board's December 30th decision fail to meet the standards for reconsideration, they should be denied.

Neither Region 10 nor Shell have demonstrated that the Board made a clear "mistake of law or fact," EAB Practice Manual at 49, in remanding the permits in full to the agency upon finding the Region clearly erred. A full remand based on the Board's findings is well supported by EAB precedent. *See, e.g.*, *In re Desert Rock Energy Co., L.L.C.*, PSD Appeal Nos. 08-03-06, slip op. at 16 (Sept. 24, 2009) ("*Desert Rock*"). Additionally, Shell's decision to change its proposed operations for the Arctic and the on-going review of offshore oil and gas activities by the Department of Interior (DOI) further support the Board's decision to remand the two permits

in full to the agency, enabling the agency to decide what the appropriate permit conditions for Shell's revised operations should be in the first instance.

Likewise, Region 10 and Shell did not show that it was clearly erroneous for the Board to require Region 10 to apply existing legal standards in making its new permitting decisions. EPA's own guidance documents, prior EAB decisions, and the record of these proceedings supports this outcome. Region 10 acknowledged in June 2010 that the new standards would apply if the agency needed to make a new permitting decision. Shell's meddling in the permitting process, petitioners' request for compliance with currently applicable legal requirements, and the language in the statute – as well as common sense – all support the need for Region 10 to ensure existing regulations will be complied with in any new permitting decisions made by the agency.

Further, neither Region 10 nor Shell identified any clear error of law or fact regarding the Board's decision to require a new record, a new public comment period, and an appeal to the EAB. Precedent from the EAB squarely supports this decision. Shell has failed to offer any legal or compelling other rationale that supports its request for resolution of the remand proceedings and new permitting decisions in less than four months – *i.e.*, by April 15, 2011. Indeed, in light of Shell's announcement on February 3, 2011 that it is no longer seeking to drill in the Arctic in 2011, Taylor, Shell Cancels 2011 Arctic Drilling Plans. NYTimes (Feb. 3, 2011) (Exhibit 1), there is no need for Region 10 to issue new permit decisions by that date or any other deadline.

As for Region 10's request, proffered for the first time on reconsideration, that the Board decide four additional issues at this time, these issues may or may not be relevant in light of Shell's changes to its operations and the evolution of the record that may occur on remand. For

this reason, the Board's decision to remand these matters to the agency comports with EAB precedent and policy. However, if the Board is nevertheless inclined to resolve these matters, Petitioners request the opportunity for further briefing and argument in accordance with 40 C.F.R. § 124.19, so they may articulate a way forward on these matters in light of the evolving record.

Finally, Shell's efforts to ask for reconsideration of the Board's ruling regarding the definition of OCS source for these permits fail to meet the reconsideration standard and offer nothing more than a recycling of the company's previous arguments in this case and *post hoc* rationalizations for the agency's prior permitting decisions. Nothing Shell has put forth demonstrates that the Board committed a clear error of law or fact that necessitates reconsideration of the December 30th decision.

Therefore, Petitioners respectfully oppose any reconsideration of the Board's December 30th decision in this matter.

STATEMENT OF FACTS

Although the underlying facts of this case have been well established through these proceedings, several salient facts bear repeating here.

A. The Development Of Air Permits For Shell's Arctic Operations.

The record shows that Shell's own misguided efforts in 2007 and 2008 to obtain only minor source air permits delayed its proposed exploration activities and resulted in two separate sets of appeals to the Board. *See, e.g.*, *In re Shell Offshore Inc. Kulluk Drilling Unit and Frontier Discoverer Drilling Unit*, 13 E.A.D. 357 (EAB 2007) ("*Kulluk*"); *In re Shell Offshore Inc., Kulluk Drilling Unit,* OCS Appeal Nos. 08-01-03, Order Dismissing Petitions for Review (April 30, 2009). After finally deciding to apply for major source air permits in 2009, Shell

placed tremendous pressure on EPA to move quickly to approve the permits. *See, e.g.*, Letter from Peter Slaiby, Vice President Shell Alaska to Michelle L. Pirzadeh, Acting Regional Administrator, EPA Region 10 (Sept. 1, 2009) (AR C-306) (Exhibit 2) (expressing "Shell's need to have both permits issued in final form by R10 by at least the end of 2009"). At the same time, the major source permitting process was delayed by the company's failure to start collecting air quality data in 2008, Letter from Richard Albright, EPA to Susan Childs, Shell at 11 (Sept. 4, 2009), and to provide "updated emissions" and other information to Region 10 in a timely basis. Letter from Michelle L. Pirzadeh to Peter Slaiby (July 27, 2009) (AR C-257) (Exhibit 3) (noting "the delay in receiving updated emissions information in turn delayed our ability to work on drafting the permit and support documents"). The record further demonstrates that Shell itself was the proponent of at least one permit condition – the definition of OCS source ultimately adopted by Region 10 – that was the subject of the petitions for review filed with the EAB.

The delay from Shell's attempts to seek minor instead of major source permits resulted in Shell seeking major source permits at the same time that EPA adopted several key changes to the PSD program. Most notably, these changes include the new hourly NAAQS for NO_2, the greenhouse gas (GHG) triggering and tailoring rules that require a BACT analysis for CO_2, and the new PSD increments for $PM_{2.5}$.

On June 26, 2009, EPA proposed the new NO_2 NAAQS, 74 Fed. Reg. 34,404 (June 26, 2009), which were finalized on February 9, 2010. 75 Fed. Reg. 6,474 (Feb. 9, 2010). The new NO_2 NAAQS rulemaking was the result of a judicial order that had set June 26, 2009 and January 22, 2010 as the deadlines for the draft and final rules. 75 Fed. Reg. at 6,477. The new NO_2 NAAQS includes a one hour "standard of 100 parts per billion (ppb)." 75 Fed. Reg. at 6,474. The one hour standard is designed to "protect against adverse health effects associated

with short-term exposure to NO_2, including respiratory effects that can result in admission to a hospital." EPA Fact Sheet, Final Revisions to the National Ambient Air Quality Standards For Nitrogen Dioxide.

The question of when EPA should commence regulation of CO_2 emissions from stationary sources has been highly publicized. After the Supreme Court, in *Massachusetts v. EPA*, 549 U.S. 497, 529 (2007), held that CO_2 was "without a doubt" an air pollutant as defined in the Clean Air Act, the issue of when CO_2 becomes "subject to regulation" for purposes of PSD permitting under CAA sections 165(a)(4) and 169(3), 42 U.S.C. §§ 7475(a)(4), 7479(3),[1] came before this Board in *In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03, slip op. at 1-2 (Nov. 13, 2008) *("Deseret Power").* The Board's remand in that decision, *Deseret Power,* slip op. at 54, resulted in the EPA's development of a memorandum by Stephen L. Johnson, 73 Fed. Reg. 80,300, 80,301 (Dec. 31, 2008) (the "Johnson Memo"), in which the agency opined that CO_2 would be "subject to regulation" for PSD purposes after emissions had been subjected to some other regulation that requires actual, physical emission controls, and that GHG monitoring and reporting regulations did not suffice. On reconsideration of the Johnson Memo, EPA determined that CO_2 "would . . . become 'subject to regulation' upon final promulgation of the [greenhouse gas] Light Duty Vehicle Rule." 74 Fed. Reg. 51535, 51547 (Oct. 7, 2009).[2]

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[1] Sections 165(a)(4) and 169(3) require the use of best available control technology to limit emissions from operations "for each pollutant subject to regulation under [the CAA]." CAA §§ 165(a)(4), 169(3), 42 U.S.C. §§ 7475(a)(4), 7479(3).

[2] *See also* 74 Fed Reg. 55,292, 55,300 (October 27, 2009) ("EPA expects to promulgate [the vehicle rule] by the end of March 2010. . . . [I]t is EPA's position that new pollutants become subject to PSD and title V when a rule controlling those pollutants is promulgated (and even before that rule takes effect). Accordingly, as soon as GHGs become regulated under the light-duty motor vehicle rule, GHG emissions will be considered pollutants 'subject to regulation' under the CAA and will become subject to PSD and title V requirements.").

Thus, at least as of October 7, 2009, Shell knew it was highly likely that permits issued after March 31, 2010 would require CO_2 BACT limitations. The GHG vehicle rule became final on April 1, 2010. However, by means of an additional rulemaking on April 2, 2010 (the so-called tailoring rule), EPA delayed the date when it deemed CO_2 BACT regulations to become effective until January 2, 2011. 75 Fed. Reg. 17004 (April 2, 2010). This rule was published two days after the issuance of the Chukchi permit and seven days before the issuance of the Beaufort permit.

EPA has also created a PSD increment for $PM_{2.5,}$ 72 Fed. Reg. 54,112 (Sept. 21, 2007), that was finalized on October 20, 2010 and went into effect on December 20, 2010. 75 Fed. Reg. 64864 (Oct. 20, 2010). Particulate matter is important because both "[p]rimary and secondary fine particles have long lifetimes in the atmosphere (days to weeks) and travel long distances (hundreds to thousands of kilometers)." 72 Fed. Reg. 54,112, 54,127 (Sept. 21, 2007). Particulate matter is generated by the burning of diesel fuel in operations such as those proposed by Shell. The new PSD increments go into effect on October 20, 2011, 75 Fed. Reg. at 64,865, and for Class 1 annually are 1 $\mu g/m^3$ and over 24 hours are 2 $\mu g/m,^3$ while for Class 2 annually are 4 $\mu g/m^3$ and over 24 hours are 9 $\mu g/m^3$. *Id.* at 64,871.

Region 10 released the revised proposed Chukchi permit on January 8, 2010 and the proposed Beaufort permit on February 17, 2010. The public was notified about the final Chukchi air permit on March 31, 2010 and about the final Beaufort air permit on April 12, 2010. As a result of the timing of the new legal requirements, the new NO_2 NAAQS rule was final before Region 10 approved Shell's permits and went into effect on the same day that the announcement of the Beaufort permit was made, and the CO_2 BACT requirement was final two

days after the approval of the Chukchi permit and seven days before the approval of the Beaufort permit.[3]

B. The Petitions For Review Of The 2010 Air Permits Issued To Shell.

Shortly after petitions for review of the OCS PSD permits issued to Shell for offshore oil and gas activities in the Arctic were filed with the EAB, one of the greatest natural disasters in U.S. history occurred. On April 20, 2010, BP's *Deepwater Horizon* well caught on fire and exploded due to the blowout of the exploration well it was drilling. National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Deep Water, The Gulf Oil Disaster and the Future of Offshore Drilling* at vi (January 2011) ("BP Oil Commission Report").[4] Over three months, more than four million barrels of oil flowed into the Gulf of Mexico, *id.*, making the *Deepwater Horizon* disaster the largest accidental oil spill in history. The full cost of this disaster to unique local ways of life and precious habitats is not yet understood, "but it is already clear that the impacts on the region's natural systems and people were enormous, and that economic losses total tens of billions of dollars." BP Oil Commission Report at vi.

As a result of these events, Shell's 2010 operations were halted by DOI. This led to a round of motions and a hearing before the Board to determine how this matter should proceed. At the hearing on June 18, 2010, before the EAB on Region 10's motion to hold the permits in abeyance and Petitioners' subsequent motion to remand the permits in full or alternatively hold

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[3] The hourly NO_2 NAAQS rule creates no exemptions or grandfather provisions. 75 Fed. Reg. at 6,490. As a result, EPA's policy memorandum on the PSD program concludes that "permits issued under 40 CFR 52.21 on or after April 2, 2010, must contain a demonstration that the source's allowable emissions will not cause or contribute to a violation of the new 1-hour NO_2 NAAQS." Memorandum from Stephen D. Page, EPA Office of Air Quality Planning and Standards, Applicability of the Federal Prevention of Significant Deterioration Permit Requirements to New and Revised National Ambient Air Quality Standards at 3 (April 1, 2010) (hereafter "Page PSD Memorandum") (Exhibit 4).

[4] Available at: http://www.oilspillcommission.gov/final-report (lasted visited February 4, 2010).

them in abeyance, the agency stated that "[i]f the Board were to act on the [permits] right now, it would basically amount to an advisory opinion because it is not clear that we will take the same stance in a later permit." Oral Argument Transcript at 41 (June 18, 2010). Counsel for Region 10 also noted that "to the extent that any additional emissions [come from] this project, that affects the NAAQS process which could in turn affect our permit in multiple ways." Oral Argument Transcript at 69 (June 18, 2010).

Also during the June 18, 2010 hearing, counsel for Region 10 stated that "we concede that if there was any need to withdraw or voluntar[ily] remand a permit and issue a new final permit, that the new NO_2 standard would come into effect." Oral Argument Transcript at 52-53 (June 18, 2010). This understanding was echoed by Judge Stein who said:

> Because to the extent that the Agency decides that it needs to make at least one change in this permit [i]t seems to me a number of things flow from that which is if I understand you correctly that [if] the Agency takes the permit back to deal with one issue and this NO_2 issue pretty much goes away.

Oral Argument Transcript at 80 (June 18, 2010). Counsel for Region 10 did not take issue with this characterization of the agency's position. *Id.*

C. Changes to Shell's Proposed Operations For 2011 And The Necessary Other Permits And Authorizations That Shell Still Must Obtain.

Shell's permit applications for its Beaufort and Chukchi OCS PSD permits were based on the company's exploration plans (EPs) for the 2010 drilling season. However, the Deepwater Horizon disaster has brought to light serious concerns regarding Arctic offshore oil and gas activities that may render Shell's 2010 plans obsolete. The National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling released a final report calling for a "comprehensive overhaul of both leasing and the regulatory policies and institutions used to oversee offshore activities." BP Oil Commissions Report at 250. Specific to the Arctic OCS,

the Commissions calls for immediate efforts to improve our ability to respond to an Arctic oil spill and demonstrations from industry that their spill response plans are effective and adequate to support operations. *Id.* at 303-04.

These changes will surely require future changes to Arctic OCS operations that differ from those reviewed in the PSD permits at issue here. Indeed, in the wake of the Deepwater Horizon spill, Shell proposed amendments to its Beaufort Sea exploration plan. The proposed revisions included additional vessels. Shell Beaufort EP Revisions at 9.[5] According to Shell:

> [t]he tug and the barge would enter the prospect area at about the same time as the drillship, and exit the Beaufort Sea at the end of the drilling season ... Once the barge is moored the tug will move off and be stationed at a distance of ≥ 25 mi (40 km) from the drillship and cuttings barge. The tug and barge will transit out of the area with the drillship and other support vessels [for two whale hunts].

Shell Beaufort EP Revisions at 12. In addition, Shell intends to use a second drillship – the Kulluk – to drill a relief well in the event of a blowout oil spill. Petitioners' Joint Motion to Vacate and Remand the Air Permits and Response to the Environmental Protection Agency's Motion to Hold These Proceedings in Abeyance at 5 (June 2, 2010) (Docket No. 31)

On February 3, 2011, the company announced it no longer intended to pursue the activities it proposed for 2011. Taylor, Shell Cancels 2011 Arctic Drilling Plans. NYTimes (Feb. 3, 2011) (Exhibit 1). As of that date, Shell had not yet received DOI approval of the amended exploration plan, nor approval of a permit to drill in the Beaufort. Additionally, Shell did not obtain an incidental harassment authorization (IHA) from the National Marine Fisheries Service (NMFS) or a letter of authorization from the Fish and Wildlife Service (FWS) to ensure compliance with the Endangered Species Act and Marine Mammal Protection Act (MMPA).

[5] Available at: http://alaska.boemre.gov/ref/ProjectHistory/Shell_CamdenBF/2010_1005_epUpdate.pdf (last visited January 31, 2011).

While EPA accepted public comment on Shell's notice of intent to operate under the Arctic General Permit, Shell did not receive authorization to operate under the Clean Water Act. It is evident that the nature, scope, and timing of Shell's Arctic drilling operations remain in flux, and that the factual record for these activities is far from being settled.

STATEMENT OF LAW

In issuing PSD permits, the agency first issues a draft permit and accepts public comment thereon. *See* 40 C.F.R. § 124.2 (draft permit "a document prepared under § 124.6 indicating the Director's tentative decision to issue or deny, modify, revoke and reissue, terminate, or reissue a 'permit'"); *id.* § 124.10 (laying out public notice requirements). "After the close of the public comment period" on the "draft permit, the Regional Administrator shall issue a final permit decision," provide notification of that decision, and reference the "procedures for appealing [the] decision." 40 C.F.R. § 124. 15. "For the purposes of this section, a final permit decision means a final decision to issue, deny, modify, revoke and reissue, or terminate a permit" by the agency. *Id.*

Once the agency makes its decision on a PSD permit, that decision is a final agency action when "agency review procedures" are exhausted, which means:

> "either: (1) the EAB issues a final decision denying review; (2) the EAB issues a final decision on the merits that does not include a remand; or (3) "the remand procedures are completed and the remand order [does] not require appeal of the remand decision to exhaust administrative remedies."

EAB Practice Manual at 38 (quoting 40 C.F.R. § 124.19(f)(1)(i)-(iii)) (internal citations omitted). In making its decision on review, the EAB may rule on one or several issues and remand the permit to the agency for a new decision. *See* EAB Practice Manual at 39 ("[t]he EAB then considers the petition, and any response brief received, and issues a decision either declining review or granting the petition and, where appropriate, remanding the permit for further

review"); *id.* at 40 ("If the EAB identifies any deficiencies in the permit terms or permit-issuance process warranting a grant of review, it may grant the petition and remand the permit to the permit issuer with instructions to correct the deficiencies"); *id.* at 49 ("The Board's decision may include remanding an issue or issues to the permitting authority for further action").

In making the decision whether to remand a permit, the Board follows "[a]gency policy," which "favors allowing the Region to make permit condition decisions rather than the Board." *Desert Rock*, slip op. at 16 (2009) (citing *In re Dominion Energy Brayton Point, LLC*, NPDES Appeal No. 07-01, slip op. at 9 (EAB Sept. 27, 2007), 13 E.A.D. ---, appeal rendered moot by settlement, No. 07-2059 (4th Cir. Dec. 17, 2007); *In re Teck Cominco Alaska Inc.*, 11 E.A.D. 457, 472 (EAB 2004); *In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999)).

STANDARD OF REVIEW

A motion for reconsideration of a Board decision must establish that one or more matters were "erroneously decided and the nature of the alleged errors." 40 C.F.R. § 124.19(g). Motions for reconsideration or clarification "will not be granted absent a showing that the EAB has made a clear error, such as a mistake of law or fact." EAB Practice Manual at 49. As the EAB Practice Manual explains, "[t]he reconsideration process should not be regarded as an opportunity to reargue the case in a more convincing fashion. It should only be used to bring to the attention of [the Board] clearly erroneous factual or legal conclusions." *Id.* (internal quotations and citations omitted). The EAB has often noted, "[a] party's failure to present its strongest case in the first instance does not entitle it to a second chance in the form of a motion to reconsider." *Hawaii Electric Light Company, Inc.*, PSD Appeal Nos. 97-15- 97-23, Order Denying Motions for Reconsideration and Lifting Stay at 6 (March 3, 1999); *In re District of Columbia Water and Sewer Authority*, NPDES Appeal Nos. 05-02, 07-10, 07-11, and 07-12,

Order Denying Motion for Reconsideration at 3 (April 23, 2008) (a motion to reconsider does not provide a party a second chance "to reargue the case in a more convincing fashion" (internal citations omitted)).

Motions for clarification are "not expressly provide[d] for" in the Rules, but the Board "will entertain [them] . . . where the moving party can demonstrate that an aspect of the EAB's decision is ambiguous." EAB Practice Manual at 49-50.

ARGUMENT

I. THE MOTIONS FOR RECONSIDERATION AND/OR CLARIFICATION SHOULD BE DENIED.

A. A Full Remand Of The Two Permits Is Necessary Under The Circumstances And Well Supported By EAB Precedent.

Region 10 fails to demonstrate that the Board made a "clear error" in deciding to remand the two permits in full to Region 10. *In re Knauf Fiber Glass, GmbH*, PSD Appeal Nos. 99-8 to -72, Order on Motions for Reconsideration at 3 (EAB, Feb. 10, 2000). While it is clear Region 10 desires a different outcome, it has failed to show the Board made either a mistake of law or fact that must lead to a partial, rather than a full, remand, or a remand of only certain issues raised by the permits. Nor has Region 10 offered a policy justification that compels only a partial or limited remand under the unique circumstances presented here.

Based on EAB precedent, a single error is sufficient for a full remand. *See In re Desert Rock*, slip op. at 3 (2009) ("the entire Permit should be remanded to the Region at this time with respect to one overarching issue related to the Region's best available control technology ("BACT") analysis"); *In re Brooklyn Navy Yard Resource Recovery Facility*, 3 E.A.D. 867, 1992 EPA App. LEXIS 39 (EAB 1992). Indeed, the EAB has frequently remanded PSD permits in their entirety without ruling on all the issues raised in the petitions. *Desert Rock*, slip op. at 3,

47-48 (2009); *id.* at 78 ("The Board also concludes that, based upon a review of the administrative record, the entire Permit should be remanded to the Region because the Region abused its discretion in declining to consider IGCC in step 1 of the BACT analysis for the Facility"); *In re Russell City Energy*, PSD Appeal 08-01, 14 E.A.D. ---, slip op. at 39 (July 29, 2008) ("Because the Board's remand will allow Mr. Simpson and other members of the public the opportunity to submit comments to the District on PSD-related issues during the new comment period, the Board refrains at this time from opining on such issues raised by Mr. Simpson in his appeal"); *In re Amerada Hess Corporation Port Reading Refinery*, PSD Appeal No. 04-03, 12 E.A.D. 1 , 2-3 (Feb. 1, 2005) (remanding permit to agency where it "failed to respond adequately to the Petitioner's comments on the draft permit" and "included non-PSD requirements in Hess' PSD Permit"); *see also In re Teck Cominco Alaska Inc., Red Dog Mine*, 11 E.A.D. 457, 461 (EAB 2004) (NPDES permit decision "remanding th[e] [TSD] limit based on antidegradation concerns" and "remanding the [petitioner's] antibacksliding argument for the Region to consider as appropriate during the remand proceeding").[6]

In these cases, the permit condition or conditions found to be erroneous by the Board often may influence other permit conditions during the remand, thus warranting a remand of the entire permit to the agency. The same is true here. The Board found "clear error" in the Region's permitting decision. *See In re Shell*, slip op. at 8-9, 82. This included a determination that the Region erred in defining the "OCS Source." This determination affects the remainder of

[6] In an effort to justify its request for a partial or limited remand, Region 10 asserts that the "Board has only remanded issues after providing some analysis of the record in light of the review standard." Region 10 Br. at 11. Of course, here the Board did provide: an analysis of the record for the claims it resolved, *In re Shell*, slip op. at 8, 45-49, 68-71; explanations for why it remanded the entire permits, *id.* at 5, 9, 82, and an analysis of why it chose not to resolve all outstanding issues, *id.* at 82. The EAB precedent cited above makes clear that the Board has discretion to provide such analysis on even a single issue raised by the petitions and still remand the permit in its entirety.

the permit, because it defines when and for how long the source is regulated under the Clean Air Act, *In re Shell*, slip op at 39, and could alter the underlying modeling, operational scenarios, and air quality analysis relied upon by the Region in finding that the permits comply with applicable laws. *See e.g.*, *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 144 (EAB 1999) (explaining that "[t]he purpose of the air quality analysis is to demonstrate that emissions from a proposed new source and other existing sources will not cause or contribute to a violation of a NAAQS or PSD increment"); Shell Br. at 22 ("to the extent that Shell's operations change or are modified . . . and those changes will cause increased emissions from the project, different emissions may need to be addressed in updated air quality impact evaluations").

Likewise, a properly conducted environmental justice analysis that addresses whether communities along the North Slope of Alaska, who already suffer from lung and heart related conditions at a higher rate than most U.S. populations, will suffer disproportionate impacts from Shell's proposed emissions could also alter the conditions included in any OCS permits issued for this region. The Board correctly determined, and explained, that "the administrative record pertaining to each of [the remanded issues] will likely be significantly altered" once the Region has corrected the errors relating to the OCS source determination and the environmental justice analysis. *In re Shell*, slip op. at 9, 82. Under these circumstances, a full remand of the permits to Region 10 allows the agency to determine the effect the correction of its errors will have on other permit conditions, and to make the necessary changes to the permits as a whole. This result is precisely what EAB precedent calls for. *See Desert Rock*, slip op. at 22 (2009) (noting it was "important for the Region to have the opportunity on remand to consider the permit as a whole

so that it may evaluate the impact of changing one permit condition on any other impacted conditions").[7]

Indeed, it is EPA policy that "favors allowing the Region to make permit condition decisions rather than the Board." *Desert Rock*, slip op. at 16 (2009). This "principle" is articulated in the "preamble to the part 124 regulations," which provides that "'most permit conditions should be finally determined at the Regional level.'" *Id.* (quoting Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)). Therefore, as the EAB has explained:

> [t]his is one of the reasons the Board often remands a permit to the permit issuer rather than making a decision on the merits when the Board finds error in the permit decision. *See e.g.*, *Teck Cominco*, 11 E.A.D. at 496 (remanding a second issue to the permit issuer rather than reaching its merits where the Board had already decided to remand the permit on other grounds); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 140-41, 175 (EAB 1999) (remanding one issue to allow permit issuer to further develop its rationale and a second issue to place rationale in administrative record); *City of Hollywood*, 5 E.A.D. at 166-68 (remanding several additional issues for further consideration by the permit issuer in light of remand on another issue); *see also In re Dominion Energy Brayton Point*, LLC, 12 E.A.D. 490, 508-09 (EAB 2006) (explaining that Board typically either sustains a permit decision or remands it to the permit issuer).

Desert Rock, slip op. at 16 (2009). Remanding these permits in their entirety is consistent with the EAB manual, EAB precedent, and EPA policy, and clearly is not an error of law or fact.

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[7] Region 10's indication (for the first time in its motion for reconsideration) that how it defines the OCS source may not impact the rest of the permit conditions, Region 10 Br. at 14, is irrelevant to the scope of the remand. PSD permits have previously been remanded to an agency even where the EAB was cognizant of the fact that the permit may not change based on the remand proceedings. *See In re Prairie State Generation Station*, 12 E.A.D. 176, 180 (EAB 2005) ("We therefore conclude that a remand is in order. As in *Weber*, although this remand might not result in any changes to the final permit, a remand is nevertheless appropriate to ensure that IEPA fully complies with the requirement to give adequate and timely consideration to public comments at the time of issuing the final permit decision." (citing *Weber*, 11 E.A.D. at 245)). A full remand in this case will provide the Region with the opportunity to determine in the first instance, with public input, how a rational definition of OCS source affects the permit as a whole. A full remand will also help to guard against the Region using the remand proceeding to rubber stamp a decision that was made on a flawed record.

Region 10 has cited no case, statute, or other authority showing that the Board lacks discretion to remand a permit in full or in part. To the contrary, the Board's decision is well supported.[8]

A full remand of the permits is further supported by Shell's decision to change the operations upon which the Region's permitting decision was based. As petitioners informed the Board on June 2, 2010, Shell now intends to employ a second drillship in its operations – the Kulluk. Petitioners' Joint Motion to Vacate and Remand the Air Permits and Response to the Environmental Protection Agency's Motion to Hold These Proceedings in Abeyance at 5 (June 2, 2010) (Docket No. 31). As discussed during oral argument, the presence of a second drillship (that will also attach to the OCS) is certainly relevant to Region 10's new deliberations on the meaning of OCS source. Oral Argument Transcript at 102 (October 7, 2010). Moreover, Shell's revised plans include the addition of a barge and tug boat to its operations. Shell Beaufort EP Revisions at 9, 12; *supra* at 9. These changes alone warrant sending the permits back to Region 10 to supplement the Administrative Record and explain whether Shell's new operations will not "cause or contribute to air pollution in excess of any . . . national ambient air quality standard (NAAQS) or . . . or any other applicable emission standard," 42 U.S.C. § 7475(a)(3), and for the agency to ensure that "best available control technology" is applied to "each pollutant subject to regulation" that is "emitted from, or which results from" the facility. *Id.* § 7475(a)(4). Shell's

[8] Shell's argument that the EAB cannot remand any issue unless it has found, and provided an explanation for its finding, that it contains a clear error in fact or law, Shell Br. at 10, is incorrect. As described above, while an error of law or fact must be shown for EAB to grant review of a permit, EAB has discretion in deciding whether to remand all or parts of a permit to the agency.

changes to its operations are relevant to Region 10's new permitting decisions and the record for this case supports a full remand of the permits here.[9]

Moreover, neither Shell nor Region 10 requested only a partial or limited remand from the EAB until after the Board rendered its decision, and this new request is inconsistent with these parties' prior positions. Region 10 first asked the Board to hold these issues in abeyance, Region 10 Motion to Hold Matters in Abeyance (May 28, 2010) (Docket No. 29), and then later asked for resolution of only the three issues the Board designated for oral argument. *See* Region 10 Unopposed Motion to Reschedule Oral Argument (July 28, 2010) (Docket No. 71); *see also* Order Scheduling Oral Argument (July 19, 2010) (Docket No. 67). Shell requested expeditious resolution of the petitions. *See, e.g.*, Shell's Opposition to Petitioners' Motion to Reschedule the Date of the Merits Hearing (08/09/2010) (Docket No. 77). Neither party ever indicated that a partial or limited remand was the only appropriate remedy should the Board decide the three issues designated for argument.

Finally, Region 10's arguments that the Board's decision somehow curtails the agency's permitting discretion are faulty. Indeed, the very reason permits are remanded to the agency in full is to provide every opportunity to that agency to exercise its discretion on each permit condition, including the discretion to decide that its initial determination remains correct. Region 10's inference that its hands are tied by a full remand is contrary to the purpose and effect of such a remand and fails to show clear error on the Board's part. The Board has ruled on only the three issues presented in the October hearing. With respect to the unaddressed issues,

[9] Shell's most recent decision not to undertake any drilling activities in 2011 adds even more uncertainty to the record, as it is presently unclear whether and how Shell will proceed in 2012.

the Board's remand decision leaves all options open and Region 10, on remand, has full discretion to address them as it chooses.

For all these reasons, Region 10 and Shell's arguments that the Board should only remand part of the permits fails to demonstrate that the Board made mistakes of fact or law that warrant changing the December 30th decision.

B. The Board Did Not Err in Requiring Region 10 to Apply All Existing Legal Requirements To Shell's Operations On Remand.

Region 10 and Shell ask the Board to reconsider its direction in the December 30th order that Region 10 must "apply all applicable standards in effect at the time of issuance of the new permits on remand." *In re Shell*, slip op. at 82. The Board should reject this request. The Board found clear legal errors in Region 10's permitting decisions and has remanded the permits in full for the agency to make new permitting decisions. Therefore, both the Board's order and Shell's decision to alter its operations for which it seeks a permit have re-started the permitting process. The Board's directive that any permits issued at the completion of this new process comply with then-effective standards simply applies a long-established general rule that PSD permitting decisions must ensure compliance with current legal requirements. As a result, the Board's decision here is consistent with EPA's long-standing general rule, EAB decisions, the statutory language and goals of the Clean Air Act, and the equities in this case. Shell and Region 10 have not demonstrated that the Board committed any error in requiring compliance with "all applicable standards in effect at the time of issuance of the new permits . . . ." *In re Shell,* slip op. at 82.

As a general matter, permitting and licensing decisions of regulatory agencies must reflect the law in effect at the time the agency makes a final determination on a pending application. *See, e.g., Ziffrin v. United States,* 318 U.S. 73, 78 (1943); *Alabama et rel. Batley v.*

EPA, 557 F.2d 1101, 1110 (5th Cir. 1977). In the context of air permits issued by the EPA, the agency has long maintained the position that this general rule requires permit decisions to ensure compliance with current legal requirements. *See* Letter from Director of Air and Radiation Division at EPA to the Assistant Commissioner of the Indiana Department of Environmental Management Office of Air Quality at 2 (Feb. 26, 2004) (Exhibit 5) (explaining that "a source that submits a permit application before the nonattainment designation effective date, but does not obtain a final issued permit by the effective date must apply for a part D nonattainment NSR permit if emissions exceed the major source or major modification threshold"); Memorandum from Stephen D. Page, Director EPA Office of Air Quality Planning and Standards, Applicability of the Federal Prevention of Significant Deterioration Permit Requirements to New and Revised National Ambient Air Quality Standards at 2 (April 1, 2010) (hereafter "Page PSD Memorandum") (Exhibit 4) ("each final PSD permit decision [must] reflect consideration of any NAAQS that is in effect at the time the permitting authority issues a final permit"); *see also* Memorandum from Stephen D. Page, Director EPA Office of Air Quality Planning and Standards, Guidance Concerning the Implementation of the 1-hour SO_2 NAAQS for the PSD Program at 1 (Aug. 23, 2010) (Exhibit 6) (Page 1-hour SO_2 Memorandum) ("any federal permit issued under 40 CFR 52.21 on or after that effective date [of the new SO_2 standard] must contain a demonstration of source compliance with the new 1-hour SO_2 NAAQS"); Memorandum from Stephen D. Page, Director EPA Office of Air Quality Planning and Standards, Guidance Concerning the Implementation of the 1-hour NO_2 NAAQS for the PSD Program at page 1 of Att. A (June 29, 2010) (Exhibit 7) (Page 1-hour NO_2 Memorandum) ("the owner or operator of the source is required to demonstrate that the source does not cause or contribute to a violation of a NAAQS [] and/or PSD increments").

Similarly, the Board has held that an agency must "apply the [] statute and implementing regulations in effect at the time the final permit decision is made." *In re Russell City Energy Center, LLC*, PSD Appeal Nos. 10-01 through 10-05, slip. op. at 108 n.98 (EAB 2010) (quoting *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 478 n.10 (EAB Nov. 18, 2002) (quotation marks omitted)). Based on the consolidated regulations, the agency's "final permit decision" includes not only the original decision on a permit but any "final decision to issue, deny, modify, revoke and reissue, or terminate a permit" by the agency. 40 C.F.R. § 124.15. Therefore, the agency's long-standing policy, the Board's recognition of that policy, and the agency's regulations all support the general rule that a new permitting decision, whether made initially or on remand, must ensure compliance with current legal requirements. The position Region 10 advocates for here – forcing PSD applicants to comply *only* with the law in effect at the time EPA grants their original PSD applications – would represents a sea change in EPA's administration of the PSD program and goes against the agency's long-standing policies.

Indeed, Region 10 itself admitted at the hearing in June that if the permits were withdrawn or voluntarily remanded to the agency, the new NO_2 rule would apply. *See* Oral Argument Transcript at 52-53 (June 18, 2010). In other words, if Region 10 is going to issue new permits (as the Board has now directed the agency to do, *In re Shell*, slip op. at 82), the agency's position on the record in June was that the new NO_2 NAAQS standard would apply to that decision. *Id.* Therefore, the record for these proceedings fully supports the Board's ruling that, in making its new permitting decisions, Region 10 must ensure compliance with "any

applicable standard in effect at the time [the permits] are issued on remand." *In re Shell*, slip op. at 6 n.5.[10]

The EAB has also recognized that this general rule applies to the issuance of permits after a remand process as it does to the first issuance of permits. In *Russell City Energy*, the Board recognizes that if the permit was remanded, "it is possible that another standard may be issued during the remand period" that would necessitate consideration and that "significant regulatory changes already occurred between draft and final permit issuance that affected the PSD requirements, requiring new analyses and resources (e.g., the non-attainment PM rule)." *In re Russell City Energy*, slip op. at 112. Similarly, in *ConocoPhillips*, the Board directed the agency to "consider any new or additional information that comes to light during the course of remand," because "the NSR Manual provides: 'The BACT emission limit in a new source permit is not set until the final permit is issued.'" *In re ConocoPhillips,* 13 E.A.D. 768, 786 n.19 (EAB 2008) (citing the New Source Review Manual at B.55); *see also In re Prairie State Generation Station*, 12 E.A.D. 176, 180 (EAB 2005) ("On remand, IEPA must reconsider and reissue a final permit decision, after due consideration of comments received and of the response to comments document, exercising its discretion as appropriate and in accordance with the facts and *the law*" (emphasis added) (citing *Weber*, 11 E.A.D. 241, 246 (EAB 2003)).

Region 10 and Shell's reliance upon the EAB's decision in *Russell City Energy*, fails to show the Board's decision here was in error or inconsistent with prior precedent. In *Russell City Energy*, the Board addressed the question of whether to exercise its discretion under 40 C.F.R. §

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[10] Region 10 cites to the transcript from the October hearing for support for the agency saying that "the applicability of new requirements would depend on the scope of the remand." Region 10 Br. at 18. However, the segment of the transcript cited by Region 10 relates to what the impact of remanding the OCS source definition would be on the agency's environmental justice analysis – not what the agency's view was on the applicability of new legal standards on remand. *See* Oral Argument Transcript at 80-81 (Oct. 7, 2010).

124.19(a)(2) to remand a permit *solely* because a new standard came into effect between the time the agency issued its permit decision and the time the Board completed its review of the permit appeal. *In re Russell City Energy*, slip op. at 112-13 (declining to remand permit to apply NO_2 1-hour NAAQS that went into effect between the agency's granting of the permit and the resolution of the petition for review). Shell argues the reasoning of *Russell City Energy* ought to apply to the entirely different factual situation presented here. Shell Br. at 16. Region 10's argument mischaracterizes the decision and argues that the application of newly-effective standards to permits issued after remand "was specifically addressed by the Board in the recent *Russell City Energy* decision, in which the Board declined to apply new standards on remand after analyzing the facts of the case in light of the two factors identified [in the decision]." Region 10 Br. at 21. Neither party's arguments are correct.

The question presented in *Russell City Energy* – whether to remand a permit based on a new legal requirement that emerged between the issuance of the agency's permitting decision and the appeal to the EAB – is very different from the issue and facts presented here. Slip op. at 107-08. In *Russell City Energy*, the petitioners asked the EAB to apply the new standards to a permit that otherwise required no remand or other change, and where the agency's permitting decision was affirmed on all counts. In that situation, the Board considered whether a new standard should be applied retroactively and whether it would be equitable to do so. *Id.* at 111-12. Here, the standard would not be applied retroactively since a new permitting decision will be made by Region 10. Thus, the governing principle *here* is the agency's general rule that all standards in effect at the time of a permit decision must be applied. Thus, the analysis

underlying the Board's decision in a retroactive application context like *Russell City Energy* is simply not applicable.[11]

Region 10 also misleadingly cites and quotes *In re U.S. Pipe & Foundry Co.*, NPDES Appeal No. 75-4 (Adm'r 1975), *aff'd in relevant part by Alabama ex rel Batley*, 557 F.2d at 1108-10, to suggest that the Board has distinguished between initially issued permits and permits issued after a remand when determining whether then-applicable legal standards apply. *U.S. Pipe*, however, offers no support for this proposition. In *U.S. Pipe*, as in *Russell City Energy* and the other authorities cited by the Board in its decision, *see In re Shell*, slip. op. at 9, the Board was addressing whether legal requirements that came into effect after the permit was issued but before the administrative appeal process was concluded should nonetheless apply to the permit. *See In re Dominion Energy Brayton Point, LLC.*, 12 E.A.D. 490, 614-18 (EAB 2006); *id.* at 618 ("although during administrative review, the Agency has the discretion to remand permit conditions for reconsideration in light of legal requirements that change before the permit becomes final agency action, in this case, it is not appropriate to remand the Permit to the Region"); *Alabama*, 557 F.2d at 1108-10 (holding that the after-issued standards should not be applied to the already-issued permit). Like *Russell City Energy*, the *U.S. Pipe* case did not result in a remand or address what standards apply to a permit issued after a remand, let alone distinguish between permits issued before a remand and those issued after a remand. The agency's policy and the Board's decisions articulate the general rule that an agency must ensure

[11] Region 10's request for the opportunity to consult with others at the agency regarding whether the new NO_2 NAAQS, the CO_2 BACT requirements, and the new PSD increments should apply on remand, Region 10 Br. at 19-20, proceeds from an incorrect premise. There is no issue of retroactive intent to assess here. EPA has pointed to no precedent (beyond the inapplicable *Russell City Energy* case), rule, or policy that suggests any reason not to apply the agency's general rule here that PSD permitting decisions must ensure compliance with current legal requirements. Thus, there is no need for further agency consultation.

compliance with then-applicable legal requirements, which applies equally to final permits issued after a remand. *Russell City Energy* and *U.S. Pipe* are not to the contrary.[12]

Requiring compliance with current legal requirements in a permitting decision, whether made initially or on remand, also comports with the plain language of the Clean Air Act and its goals. The statute provides that no new source "may be constructed" until that source demonstrates "that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of *any*" NAAQS or "*any* other applicable emission standard or standard of performance under this chapter." 42 U.S.C. § 7475(a)(3)(B)-(C) (emphasis added). The focus of the statute is, therefore, on ensuring compliance with the NAAQS and any other applicable standards before construction commences. The PSD program as whole is designed to "protect public health and welfare from any actual or potential adverse effect which . . . may reasonably be anticipate[d] to occur from air pollution" and "to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision . . . ." 42 U.S.C. § 7470(1), (5); *see also* 42 U.S.C. § 7401(b)(1) (one goal of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population").

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[12] Indeed, these cases are also distinguishable in that here, the rules for the new one-hour NO_2 NAAQS and for the CO_2 BACT analysis for the Chukchi permit were final before the permits were issued. *See supra* at 6-7.

Additionally, the Clean Water Act cases to which Region 10 cites – *e.g.*, *Dominion Energy*, 12 E.A.D. at 490 – can be further distinguished on the grounds that a permit had already been issued to the facility and the question before the Board was whether the new permit should be upheld and put into effect, or remanded for compliance with new legal requirements. In contrast, the operations here have yet to be permitted.

Allowing new sources to skirt current legal requirements on remand is contrary to the statutory goals of protecting public health and welfare and careful evaluation of the consequences of an air permit. Indeed, "[a]s 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.'" *In re General Motors, Inc.*, 10 E.A.D. 360, 363 (EAB 2002) (quoting *In re Steel Dynamics*, 9 E.A.D. 165, 172 (EAB 2000)).

The facts presented by this case also support the Board's decision to require application of the law in existence at the time of the new permitting decisions. As discussed *supra* at 3-4, *infra* at 36-28, Shell is largely responsible for the delays in obtaining lawful air permits. Shell has repeatedly pressured the agency to adopt permit conditions that sought to circumvent, and overstep, the bounds of the Clean Air Act. *Id.* It began by attempting to obtain only minor source permits, resulting in two separate sets of appeals to the Board. *Id.* When Shell finally decided to apply for major source permits, it pressured Region 10 to act quickly, while simultaneously thwarting the permitting process by failing to collect required air quality data. *Id.* Finally, Shell advocated for and received permits that the Board here found to contain a definition of OCS source that "does not reflect considered judgment" and "improperly delegates" authority to the permittee, while also containing a "clear error" in assuming the old NO_2 NAAQS would protect local communities. *In re Shell*, slip op. at 8. Shell itself is primarily to blame for any delay of which it complains.

In addition, Shell has announced that it will both change and delay its operations, rendering the scope and emissions from the operations uncertain. *See supra* at 8-9. It bears noting that once finalized, the permits issued to Shell will set new precedent as they constitute

the first major source permits for the OCS. Moreover, review of all permit conditions necessitated by the clear errors identified by the Board may lead to additional changes, the nature of which cannot presently be determined. Shell's situation does not warrant the special exemption from now-applicable air quality requirements here requested. If anything, the record demonstrates that this remand should be used as an opportunity for Region 10 to take the time it needs, particularly in light of Shell's cancellation of its 2011 drilling plans, to ensure that any permit issued after the remand fully protects the health of local North Slope communities.

The Board's decision directing the Region to "apply all applicable standards in effect at the time of issuance of the new permits," *In re Shell*, slip op. at 82, is fully consistent with the general rule that permits must comply with the standards in effect when the agency issues them, the Board's past acknowledgments of this rule and its application in the remand context, the policies underlying the Clean Air Act and PSD program, and the equities of this particular case. Here the Board has remanded the permits, and the Region will issue new permits after the remand period. As the Board correctly noted, "whether the[se] permits must comply with the new 1-hour NO2 NAAQS or the Agency's requirements for CO2 or other greenhouse gases [or any other standard in effect at the time the agency issues the new permits] depends upon the date on which the Region issues its final permit decisions under 40 C.F.R. § 124.15(a) upon conclusion of the remand proceedings." *In re Shell*, slip op. at 9.

For all these reasons, the Board should not reconsider its December 30th order requiring that Region 10's new permitting decisions ensure compliance with currently applicable legal requirements.

C. It Was Not Clear Error For The Board To Call For A New Record And A New Comment Period On Remand.

Region 10 and Shell failed to demonstrate it was clear error for the Board to call for a new record and comment period on remand. The record here shows that Shell has changed its operations both in scope and in time, *see supra* at 8-9, and for this reason alone the record should be reopened, and the public should be allowed to comment upon these new operations and whether they comply with the requirements of the OCS PSD program.

Moreover, in redefining when an OCS source is established, conducting an environmental justice analysis, and ensuring compliance with currently applicable legal requirements, Region 10 will obviously need to supplement the record. For example, the Board found that "the Region did not include in the administrative record a cogent, reasoned explanation of its definition of the OCS source in light of the criteria set forth in 40 C.F.R. § 55.2; CAA § 328, 42 U.S.C. § 7627; and OCSLA § 4(a)(1), 43 U.S.C. § 1333(a)(1)." *In re Shell*, slip op. at 8. The only way this issue can be resolved is by supplementing the record with a new explanation for when the OCS source is established. Similarly, the application of BACT to control Shell's CO_2 emissions requires a factual record and an analysis that does not presently exist. Clearly, this record, and the conclusions the Region draws from it, must be developed and then submitted to public review and comment. The determinations the agency must make in its new permitting decisions trigger the need for public notice and comment. It would thwart the public involvement goals of the statute and Executive Order 12898 for AEWC and ICAS to ask for an environmental justice analysis in their comments on the 2010 permits, pursue the issue before the EAB, and obtain an EAB ruling that such an analysis is required, but for Region 10 to then foreclose these parties from commenting upon the very environmental justice analysis they sought in the first instance.

Additionally, DOI has yet to conclude its review of offshore oil and gas issues and EPA still needs the discretion to adjust the permit conditions to DOI's eventual findings. Providing for a new record and a new comment period on remand is the best way to give Region 10 the full discretion necessary to decide in the first instance how to respond to whatever actions DOI may take.

In its *Deseret Power Electric Cooperative*, decision, the Board similarly remanded a PSD permit to the Region and required the Region to "develop an adequate record for its decision, including reopening the record for public comment." *Deseret Power*, slip op. at 64. Region 10 and Shell have not presented any EAB precedent showing that requiring a new record and a new public process was a clear error. *Deseret Power Electric Cooperative* supports the Board's decision here and reconsideration of this issue is not warranted.

D. Appeal To The EAB Is An Appropriate Remedy Especially In Light Of The Board's Full Remand Of The Permits To Region 10.

Region 10 and Shell failed to demonstrate it was clear error for the Board to provide for an administrative appeal of the remand proceedings. Section 124.19(f)(1)(iii) specifically notes the Board's authority to require "appeal of the remand decision" in order to "exhaust administrative remedies." 40 C.F.R. § 124.19(f)(1)(iii). EAB precedent supports the Board's exercise of its discretion and decision to require an EAB appeal before the next permits become final. *See Desert Rock*, slip op. at 79 (2009) ("appeal of the remand decision will be required to exhaust administrative remedies"); *In re ConocoPhillips*, 13 E.A.D. at 786 ("If Petitioners or other participants are not satisfied with IEPA's explanation of changes on remand, Petitioners or other participants with standing may appeal the IEPA determination to this Board pursuant to 40 C.F.R. § 124.19"); *In re Prairie State*, 12 E.A.D. at 180-81 ("An administrative appeal of the remand decision will be required in order to exhaust administrative remedies under 40 C.F.R. §

124.19(f)(1)"); *In re Amerada Hess Corporation Port Reading Refinery*, 12 E.A.D. at 21 n.39 ("An administrative appeal of New Jersey DEP's decision on remand is required to exhaust administrative remedies under 40 C.F.R. § 124.19(f)(1)"); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. at 176 ("Any party who participates in the remand process may file an appeal with the Board pursuant to 40 C.F.R. § 124.19"); *In re Hawaii Electric Light Company, Inc.*, 8 E.A.D. at 109 ("any party who participates in the remand process on these issues and is not satisfied with DOH's decision on remand may file an appeal with the Board pursuant to 40 C.F.R. § 124.19"); *In re World Color Press, Inc.*, 3 E.A.D. 474, 1990 EPA App. LEXIS 40 (EPA App. 1990) ("IEPA's final permit upon remand is subject to review pursuant to 40 CFR § 124.19, and any appeal from its final permit is subject to the exhaustion of administrative remedies requirement in 40 CFR § 124.19(f)(1)(iii)"). Region 10 and Shell have failed to point to any precedent supporting their position that the Board's common practice of requiring an EAB appeal after remand of a PSD permit should be thwarted.[13]

As stated previously, Region 10 committed clear error in failing to prepare an environmental justice analysis when the initial permits were issued, deciding instead to rely on compliance with superseded NAAQS in finding no potential for adverse health impacts. The required environmental justice analysis will therefore be developed on remand. If AEWC and ICAS are foreclosed from seeking review from the EAB following the remand proceedings, the Region's initial error will, in effect, deprive them of significant procedural rights – namely the opportunity for review of Region 10's environmental justice analysis before the Board.

[13] Indeed, Region 10 seems to justify its request on the grounds that it is "confident . . . that [it] will be able to defend any subsequent permitting decision in federal court at the completion of the remand." Region 10 Br. at 33.

Moreover, requiring an appeal to the EAB is the best way to ensure compliance with the Board's December 30th decision. It also makes sense from the standpoint of judicial efficiency. The Board has already devoted substantial time and energy to the issues raised by the various iterations of Shell's permits and in particular the question of how the OCS source is defined. It is only logical for the Board to be involved in whatever the next permitting process might entail.

The Board here deliberately chose to review only three among many issues raised by Petitioners that required immediate correction, and to permit Region 10 to adjust its permitting decisions concerning the issues not yet reviewed by the Board in light of those corrections. This step-wise approach wisely promotes judicial economy while allowing the Board the ability to exercise its jurisdiction to review and correct these forthcoming agency decisions concerning these precedent-setting permits. The Board's decision to retain oversight in this matter promotes the application of the Board's high degree of expertise in these matters and continuing uniformity among EAB precedents.

E. Shell Failed To Show It Was Clear Error For The Board Not To Impose A Deadline For The Remand Proceedings.

Shell fails to demonstrate it was clear error for the Board to retain an open timeline for the remand proceedings. Shell Br. 19-20. Shell provided no justification necessitating a less than four month remand when that request was made, and now that Shell has announced a decision that it will no longer attempt to drill in the Arctic Ocean in 2011, there truly is no basis for this unusual request.

Shell offers no precedent that supports its request that Region 10 be ordered to complete the remand proceedings and make new permitting decisions within a specific time frame, let alone the less than four month deadline Shell has requested. Nor have petitioners found any precedent that supports such a drastic remedy. Additionally, beyond its now-abandoned desire to

explore this summer, Shell has failed to put forth a basis for the Board to shackle Region 10 to such an unrealistic schedule in determining how the OCS source is defined and whether local communities will be disproportionately impacted by Shell's emissions. Such a compressed schedule is likely to deprive the local communities of a fair and reasonable opportunity to comment on the Region's deliberations and decisions on remand, an outcome that would be particularly ironic and unfortunate given that the remand is necessitated in part by the Region's failure to prepare an adequate environmental justice analysis. In addition, in light of the company's recent decision not to pursue exploration in the Arctic in 2011, Shell's only purported basis for requesting such a drastic timeline no longer exists.

Nor should Shell's request for rapid remand proceedings serve as a basis for allowing the company not to comply with the current NAAQS for NO_2 and PSD increments, and the CO_2 BACT analysis requirement. Indeed, it was this very pressure from Shell to hurry up while the last permits were being approved by Region 10 that contributed to this matter coming before the EAB for resolution. By asking for the remand proceedings and new permit decisions from Region 10 to be completed by April 15, 2011, Shell is virtually guaranteeing another outcome along the lines of the previous OCS permits that found their way to the Board. More than four months is required for the critical and precedent-setting decisions that must be made by Region 10 with the benefit of a fair and open public process for local impacted communities. How the OCS source is defined and how Shell's amended operations will be accounted for are precedential for these permits and others on the OCS. Ensuring protection of and participation by environmental justice communities is equally critical. As is the time for Region 10 to be able to respond to DOI's final reviews of offshore oil and gas operations and any regulatory changes DOI makes that may well once again impact Shell's operations.

Additionally, ensuring compliance with current legal standards will take some time. Shell itself acknowledges that preparing a "BACT analysis for CO_2 emissions" would be "potentially time-consuming." Shell Br. at 14-15. Of course, ensuring compliance with this current legal requirement is critical to EPA's on-going efforts to curb global climate change. Likewise, ensuring compliance with the new NO_2 NAAQS and, if relevant, the new $PM_{2.5}$ PSD increments is part of Shell's obligation to demonstrate "that emissions from construction or operation of [the] facility will not cause, or contribute to, air pollution in excess of any" NAAQS or "any other applicable emission standard or standard of performance under this chapter." 42 U.S.C. § 7475(a)(3).

Therefore, Shell has failed to demonstrate it was clear error for the Board not to impose a timeline on the remand proceedings and failed to justify an April 25, 2011 deadline for the remand proceedings.

II. THE REQUEST FOR RESOLUTION OF FOUR ADDITIONAL ISSUES RAISED IN THE PETITIONS SHOULD BE DENIED BY THE BOARD; ALTERNATIVELY THE BOARD SHOULD PROVIDE FOR FURTHER BRIEFING AND ARGUMENT BY THE PARTIES.

Region 10 fails to demonstrate why the Board should resolve additional issues raised by the petitions for review. Certainly, it was not clear error for the Board to rule on only a select number of the issues presented in the petitions for review and to remand the permits in their entirety to Region 10. *See supra* at 15 (citing *Teck Cominco*, 11 E.A.D. at 496; *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. at 140-41, 175; *City of Hollywood*, 5 E.A.D. at 166-68). As previously discussed, such an outcome is most common where – as here – the issues remanded to the agency may impact other permit conditions, or at minimum require the agency to consider changing other permit conditions. *See Desert Rock*, slip op. at 22 (2009) (noting it was "important for the Region to have the opportunity on remand to consider the permit as a whole

so that it may evaluate the impact of changing one permit condition on any other impacted conditions"). In such situations, the agency's permitting discretion is best preserved by a full remand of the permits so the agency can decide in the first instance how to craft the new permits. Indeed, it is for this reason that Region 10's request that the Board simply "defer" its ruling on these issues, Region 10 Br. at 23 n.7, rather than remanding them back to the agency, is nonsensical and would tie the agency's hands on remand.[14]

Moreover, the four additional issues that Region 10 has identified for resolution are not just legal questions, but mixed questions of law and fact. *See e.g.*, Region 10 Br. at 24 (each issue "does involve minor consideration of factual issues that could change on remand"). For this reason, it also makes sense that they are remanded to Region 10 for consideration in the first instance. The record on remand has already changed – Shell has altered its operations by bringing in additional vessels, *see supra* at 9 – and the record may continue to change depending on DOI's final analysis of the regulatory and other changes that are necessary for offshore oil and gas activities as a result of the Deepwater Horizon catastrophe in the Gulf. Therefore, it makes little sense for the EAB to spend its resources ruling on issues that involve questions of fact where the record is already out of step with Shell's changing operations.[15]

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[14] Region 10's request that the issues be resolved now by the Board also directly contradicts the Region's prior request that the Board hold the entire petition in abeyance pending resolution of the pause in Shell's drilling for 2010 in light of the Deepwater Horizon spill. Region 10 Br. at 30. The Region has not offered a convincing explanation of what has changed. The circumstances meriting holding the permits in abeyance – the likelihood that Shell's operations will change, warranting changes to the air permit – also support remand of the permits here without addressing first the additional issues. As described *supra* at 8-9, Shell's now abandoned plans for 2011 differed from those underlying the PSD permit. There is still every indication that Shell's future plans will include important differences to address the lessons of the Gulf spill. The Region should address the implications of these changes in the first instance.

[15] Petitioners also point out that Region 10 waited until its motion for reconsideration to ask for resolution of these issues instead of articulating its request: (1) during the June 18, 2010

Having said that, should the Board nonetheless decide to grant Region 10's request, Petitioners respectfully ask for the opportunity to submit further briefing and for argument on these issues. Typically, once the Board accepts review of a permitting decision, a briefing schedule is set for the case. 40 C.F.R. § 124.19. Because Petitioners were without the Administrative Record when they filed their petitions and because the case was briefed on an extremely expedited schedule, Petitioners request the opportunity to brief and argue any additional issues the Board decides to address.

These additional issues can readily be resolved in AEWC Petitioners' favor. Regarding the first issue Region 10 identifies, the question of whether the icebreaker is part of the OCS source when it is attached to the drillship during anchoring depends in part on Region 10's new analysis of the OCS source for these permits on remand. While AEWC Petitioners maintain that the icebreaker is part of the OCS source during anchoring, because of its attachment to the drillship, 40 C.F.R. § 55.2, and therefore, its emissions must be subject to a BACT analysis, this issue is closely tied to when the drillship becomes an OCS source. It also requires further exploration of the term attachment and Region 10's justification for excluding the icebreaker from the BACT analysis. As one of the largest contributors of air emissions from Shell's fleet, a ruling that the icebreaker is attached to the drillship during anchoring and must undergo a BACT analysis would go a long way toward maintaining air quality in the area.

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hearing before the Board where extensive discussions about how this case should progress took place; (2) in the agency's motion last summer in which it changed its position and asked the Board to resolve the three issues identified for argument but failed to ask for resolution of any other issues, EPA Region 10's Unopposed Motion to Reschedule Oral Argument at 3 (July 28, 2010) (Docket No. 71); or (3) at the hearing on October 7, 2010 when the Board noted it has "made no final determination as to whether to proceed to issue a decision on the merits" and invited the parties to discuss how to proceed. Order at 4 (July 19, 2010) (Docket No. 67).

Region 10 next advocates for resolution of AEWC Petitioners' argument that the agency failed to account for the formation of secondary $PM_{2.5.}$ Region 10 has never denied that it failed to model these emissions; therefore, the only question is whether the agency can lawfully avoid taking these emissions into account in making its new permitting decisions. Under the agency's own policy, in light of "the important contribution from secondary formation of $PM_{2.5}$, which is not explicitly accounted for by the dispersion model, PSD modeling of $PM_{2.5}$ should currently be viewed as screening-level analyses . . . ." Memorandum from Stephen D. Page, Director, Office Air Quality Planning and Standards, dated March 23, 2010 Re: Modeling Procedures for Demonstrating Compliance with PM2.5 NAAQS at 5 (AR B-118); *id.* at 9 ("if the facility emits significant quantities of $PM_{2.5}$ precursors, some assessment of their potential contribution to cumulative impacts as secondary $PM_{2.5}$ may be necessary"). Put another way, the agency's policy is that secondary formation of $PM_{2.5}$ will be accounted for somehow during the PSD process and this policy should apply with equal force to Shell's operations as any other operations.

Region 10 also requests resolution of AEWC's concerns with the agency's combined BACT analysis for PM_{10} and $PM_{2.5}$. The PSD program requires BACT limits for "each pollutant subject to regulation." 42 U.S.C. § 7475(a)(4); 40 C.F.R. § 52.21(j)(2)). Because $PM_{2.5}$ and PM_{10} are regulated as two separate air pollutants under the Clean Air Act, Region 10 needed to provide separate BACT analyses for each of them. It failed to do so and its argument that providing BACT limits for $PM_{2.5}$ and PM_{10} separately was sufficient, Region 10 Response to Petitions for Review at 66 (Docket No. 44), misses the point of a top-down BACT analysis and is not in step with the agency's repeal of the PM_{10} surrogate policy.

Finally, to the extent that oil spill response activities are planned and carefully rehearsed on the OCS during the time Shell is operating, the emissions from these activities must be included in the potential to emit. Region 10 is well aware that Shell's operations include "on-water drills" for training that last approximately 8-hours at a time and occur no more than once per day. *See* EPA Beaufort Stmt of Basis at NN000132 (AR NN10) ("In preparation for a potential spill, the oil spill response (OSR) fleet will conduct frequent drills"). Additionally, Shell is legally required to have an Oil Spill Response Plan that lays out in detail the company's planned operations in the event of a spill. 30 C.F.R. § 250.220(a) (requiring OCS operators to describe "their emergency plans to respond to a blowout, loss or disablement of a drilling unit, and loss of or damage to support craft"). Nevertheless, these specific parts of Shell's operations were unlawfully excluded from the company's potential to emit.

III. SHELL'S EFFORTS TO RE-LITIGATE THE OCS ISSUE DOES NOT WARRANT RECONSIDERATION.

Shell's motion for reconsideration is the latest example of how Shell's own actions are further delaying its "five-year quest" to receive OCS PSD permits. Shell Br. at 5. In its motion, Shell is yet again proffering its financial investments and other irrelevant considerations as a reason to rush this permitting process and ignore statutory requirements, a process that has led to substantial errors.

A. Shell Must Accept The Blame For The Definition Of OCS Source.

As discussed earlier, Shell played a key role in the delay it claims to have experienced in receiving final permits to drill in the Beaufort and Chukchi Seas. Shell Br. at 4 (claiming that the Board remanded the permits "[t]hrough no fault of Shell's"). Shell has taken several actions since 2007 that have prevented Region 10 from issuing legally defensible permits. Originally, Shell attempted to obtain minor source permits to evade the more stringent requirements of the

Clean Air Act's major source program. *Kulluk*, 13 E.A.D. at 360 (noting Shell's application for a minor source permit); Letter from Susan Childs, Alaska Regulatory Affairs Manager for Shell to Dan Mahar, EPA Region 10 (April 1, 2008) (Exhibit 8) (supporting EPA's decision to issue a minor source permit). Next, Shell failed to collect its own preconstruction monitoring data and updated emissions information, which eventually lead to delays in the permitting process. *See* Letter from Michelle L. Pirzadeh to Peter Slaiby (July 27, 2009) (AR C-257) (Exhibit 3).

In its push to explore in the Arctic in 2010, Shell placed immense pressure on Region 10 to rush through the decision-making process. For example, Shell sent many requests to Region 10 to issue these permits as soon as possible. *See, e.g.*, Letter from Peter Slaiby, Vice President Shell Alaska to Michelle L. Pirzadeh, Acting Regional Administrator, EPA Region 10 (September 1, 2009) (Exhibit 2) (stating "Shell's need to have both permits issued in final form by R10 by at least the end of 2009"); Letter from Peter E. Slaiby to Gina McCarthy (January 4, 2010) (AR C-409) (Exhibit 9) (requesting that Region 10 finalize the Chukchi Permit "within 10 days of the close of the comment period" and expedite the Beaufort permitting process). EPA also received political pressure to the same effect. Letter from Senators Lisa Murkowski and Mark Begich and Congressman Don Young to Michelle Pirzadeh (July 30, 2009) (Exhibit 10) (urging EPA to complete permits for "certain offshore oil and gas exploration . . . in the Chukchi Sea and Beaufort Sea" within 2009 and stating that oil exploration "must . . . proceed without bureaucratic impediments").

At the same time, Shell's own actions slowed down the permitting process. *See* Letter from Richard Albright, EPA to Susan Childs, Shell at 11 (Sept. 4, 2009); Letter from Michelle L. Pirzadeh to Peter Slaiby (July 27, 2009) (AR C-257) (Exhibit 3) (noting "the delay in receiving updated emissions information in turn delayed our ability to work on drafting the permit and

support documents"). Once before the EAB, Shell attempted to place similar pressure on the Board to expedite its decision and "convene a status conference as soon as practicable for the purpose of hearing from the Parties on what would be an appropriate timetable for determination of these Petitions." Shell Gulf of Mexico Inc.'s and Shell Offshore Inc.'s Notice of Related Decision And Request For Status Conference at 3 (Nov. 12, 2010) (Docket No. 85); *id.* at 3 (stating "[a]s Shell has shared with the Board on several occasions, a determination of the merits of these Petitions this Fall is critical for Shell to know whether to make the required significant financial commitments for exploration drilling in 2011").

Shell also advocated for Region 10 to take specific actions that resulted in the Board's decision to remand the 2010 permits in their entirety. For example, Region 10 originally issued a proposed OCS permit in 2009 that would have defined the Discoverer as an OCS source from the time that it placed a single anchor on the seabed floor. *In re Shell*, slip op. at 41. Shell requested a different definition, the Region complied, and a new proposed permit and a new public comment process ensued with Shell's chosen definition in the permit. Shell Gulf of Mexico Inc., Supplemental Comments on the August 2009 Proposed Discoverer / Chukchi OCS / PSD Permit to Construct at 3 (Oct. 20, 2009) (AR A-54) (insisting that the Discoverer becomes "an OCS Source only after the anchoring process is complete, *i.e.*, all anchors are emplaced and tensioned and the Discoverer is stabilized and ready to proceed with drilling activities"); *In re Shell*, slip op. at 41-44 (describing the evolution of the OCS source definition throughout the permitting process). By arguing it is not to blame, Shell simply fails to accept responsibility for the legally indefensible definition of OCS source that it explicitly requested. By asking for reconsideration of the Board's decision rejecting the company's preferred definition of OCS source, Shell is only further delaying the ultimate resolution of these proceedings. Because Shell's arguments

regarding the OCS source definition for these permits fail to meet the standard necessary for reconsideration and rehashes old arguments, the motion for reconsideration should be denied.

B. Shell Failed to Demonstrate that the Board Committed a Clear Legal or Factual Error in Rejecting the Definition of OCS Source in the Permits.

Shell has failed to demonstrate that the Board made "manifest errors of law or fact" in its December 30th ruling. *In re Knauf Fiber Glass GmbH*, PSD Appeal Nos. 99-8 through 99-72, Reconsideration Order at 3 (EAB April 10, 2000) (citing *Publishers Res., Inc. v. Walker-Davis Publ'ns, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985)). In the remand order, the Board found error in: 1) the Region's explanation of and support for the OCS source definition and 2) the Region's improper delegation of statutory authority to the permittee. *In re Shell*, slip op. at 8. Shell has not demonstrated that any aspect of the Board's ruling contains errors or law or fact.

In ruling that the OCS definition adopted for the permits lacked "a cogent, reasoned explanation," *In re Shell*, slip op. at 8, the Board cited several examples in the record of the Region's confusing and contradictory rationale for the definition of OCS source. *Id.* at 45-46 ("The Statements of Basis and the Chukchi Response to Comments each contain brief analyses that leave the Board without a cohesive explanation for the Region's decisionmaking process with respect to the OCS source definition contained in the Chukchi and Beaufort Permits"). For example, the Region relied upon different explanations and regulatory criteria in the Statement of Basis, Response to Comments, and at oral argument. *Id.* at 50 n.60. The Board found that "[t]he Region's explanations in the Statements of Basis and the Chukchi Response to Comments vacillate, rationalizing the proposed OCS source definition alternately with a focus on 'erected thereon' and 'used for the purpose of exploration, development or production." *Id.* at 49. Despite the Region's heavy reliance on these regulatory criteria, the Board found that "[n]owhere in the administrative record before the Board is there a clear statement of how the Region

interpreted 'erected thereon' to mean 'sufficiently secure and stable to commence operations." *Id.* at 51. The Board described the Region's "changing explanations" as "troubling and emblematic of the lack of precision and clarity in the Region's rationale for its selection of Option 2 to define the OCS source." *Id.* Ultimately, the Board remanded the OCS source definition, in part, because "the Region's explanation is unclear, inconsistent, and fails to explain how the approach selected is consistent with the legislative history and purpose of the statutes." *Id.* at 62.

Instead of showing clear legal error in any part of the Board's decision, Shell's motion simply rehashes many of the same arguments it made before the Board in its prior briefs. For example, Shell argued in its response to the petitions for review that "Region 10 provides a thorough and well- reasoned explanation of its determination that the *Frontier Discoverer* becomes an OCS source." *See, e.g.*, Shell Response To Petitions for Review at 34 (June 7, 2010) (Docket No. 45). The company makes the same argument here. Shell Br. at 6 (arguing that "[t]he Region more than adequately explained its determination"); *see also id.* at 8 (describing the regulatory preamble in an attempt to explain the Region's decision with respect to the "erected thereon" requirement); *In re Shell*, slip op. at 54 (finding that the regulatory preamble was "ambiguous with respect to how EPA intended to interpret 'erected thereon"). Another example is Shell's attempt to argue that Region 10 "very reasonably (and conservatively) translated the regulatory criteria – 'attached' and 'used for exploration' – to the facts and circumstances of Shell's operation." Shell Br. at 8-9. These are arguments that the Board has already considered and rejected, and Shell's repackaging does not make them any less erroneous. EAB precedent is clear that a motion for reconsideration is not "a second chance" for the party to

"present its [] case." *Hawaii Electric Light Company, Inc.*, PSD Appeal Nos. 97-15- 97-22, Order Denying Motions for Reconsideration at 6 (March 3, 1999).

Moreover, Shell's attempts to make sense of the Region's lack of a "cogent, reasoned explanation," *In re Shell*, slip op. at 8, for its permitting decision amounts to a series of *post hoc* rationalizations for the agency's decisions. Shell boldly tries to argue that Region 10 eliminated the regulatory criteria "*used* for the purpose of exploring" when it established the "ready to explore" standard for the Discoverer. Shell Br. at 9 n.4 (claiming that the regulatory criteria "used for exploring" requires that "drilling has actually commenced"). The Region rejected Shell's argument that the Discoverer must be actually engaged in exploration to fit the third regulatory criteria. *In re Shell*, slip op. at 48-49 n.57 (explaining that the Region did "not require Frontier Discoverer to be actually engaged in exploratory activity"). Even if these arguments had merit, Shell forgets that the Board faulted *the Region* with failing to provide these explanations in the *record*. Thus, Shell's post-hoc explanations for the agency's earlier decisions fail to point to any clear error on the Board's part.

Shell also advocates for reconsideration of the Board's decision that Region 10 erred in allowing an on-site Shell representative to determine when the Discoverer becomes an OCS source. Shell Br. at 9-10. The Board advanced two reasons for why the Region's definition is erroneous: first, that "the Region's rationale conflicts with the practical effects of the decision," *In re Shell*, slip op. at 56, and second, that the Region "improperly delegated its statutory authority" to Shell. *Id.* at 61-62. In the motion for reconsideration, Shell tries to argue that neither of these points were clear error. Shell Br. at 9-10. Both of Shell's arguments are meritless.

In its decision, the Board found that "the Region's decision to abdicate to Shell the decision of when the Frontier Discoverer becomes an OCS source is perplexing given that the record indicates that Shell and the Region disagree on what constitutes 'secure and stable." *In re Shell*, slip op. at 59. The Board noted that throughout the record, the Region disagreed with Shell's position that the Discoverer becomes an OCS source once all of the anchors are set. *Id.* at 60 ("The administrative record contains several statements made over the course of the respective permitting processes wherein the Region plainly states that it disagrees with Shell's position[] that the Frontier Discoverer is not an OCS source until all eight anchors are down"). Despite the Region's opposition to Shell's position, Shell has repeatedly indicated that it would not define the Discoverer as an OCS source until all eight anchors are down. *Id.* at 59 ("The record indicates that Shell equates 'secure and stable' with the Frontier Discoverer being completely anchored, that is, all eight anchors attached to the seabed"); *see also* Oral Argument Transcript at 88 (Oct. 7, 2010) ("Shell's position is that the ship needs to be fully anchored to be secured and ready to drill. That would certainly be the general rule that Shell operations people would follow").

Thus, the Board determined that the "practical effect" of the "secure and stable" definition was that Shell would define the Discoverer as an OCS source in a way that the Region opposed. *In re Shell*, slip op. at 55-56. As a result, the Region's decision to allow this OCS source definition is erroneous because it is inconsistent and contradicts the evidence in the record. *Id.* ("It is well established that a permit issuer must articulate with reasonable clarity the rationale for its conclusions and provide adequate support for those conclusions in the administrative record" (citing *In re ConocoPhillips Co.*, 13 E.A.D. 768, 780 (EAB 2008); *Shell*, 13 E.A.D. at 386; *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417, 423- 25 (EAB 1997)).

Far from showing that the Board's finding was erroneous, Shell's motion for reconsideration proves the Board's point. Shell reiterates its argument that the Discoverer will not commence drilling until all eight anchors are placed, citing safety concerns and small financial incentives as reasons why it will not drill sooner. Shell Br. at 10-11 ("Shell has gone on record unequivocally in written statements to Region 10 that it cannot and will not transfer operation and commence drilling until all eight anchors are emplaced"). The fact that Shell will not declare the Discoverer to be an OCS source until all eight anchors are down conflicts with the evidence in the record that the Region disagrees with the eight-anchors down definition. *See, e.g.*, Oral Argument Transcript at 56 (Oct. 7, 2010) (the Region stating "we didn't believe it was appropriate to say they always had eight anchors down to be sufficiently secure and stable to drill"). This conflict is precisely the reason why the Board found error in the Region's decision. *In re Shell*, slip op. at 56. Because Shell's definition of OCS source conflicts with the Region's, the Board properly determined that the Region's definition was erroneous and Shell's efforts to reargue this issue fail to demonstrate the Board committed a legal or factual error in its decision.

Shell further argues that the Board wrongly decided the Region improperly delegated its statutory responsibility to define the OCS source to Shell. Shell Br. at 11-14. In the remand order, the Board relied on a long line of cases that establish the principle that an agency may not delegate its statutory responsibilities to outside entities without "specific authorization from Congress." *In re Shell*, slip op. at 61-62. The Board determined that "Option 2 represents an improper delegation to Shell of the Region's authority to determine when the Frontier Discoverer is subject to regulation under CAA § 328." *Id.* at 63.

Trying to distinguish the cases upon which the Board relied, Shell argues that "Region 10's definition of OCS source does not implicate any of the concerns that have led courts to find

improper delegations of authority from agencies to outside entities." Shell Br. at 12. Namely, Shell argues that Region 10 ceded a smaller amount of statutory authority to Shell, and that somehow this makes the unlawful delegation cases to which the Board cited inapplicable. *Id.* at 13. But this argument misses the fact that part of the Board's concern was that "[b]y allowing Shell alone to determine when the Frontier Discoverer becomes an OCS source, the Region essentially allows Shell to inform EPA when EPA's authority to regulate emissions from the" drillship commences. *In re Shell*, slip op. at 62. Whether this is characterized as a "large" or "small" delegation of authority is irrelevant. The agency has handed over to a private company the decision about when its jurisdiction starts and ends. It is *the Region* who must "determine when the Frontier Discoverer is subject to regulation under CAA § 328." *Id.* at 63. Without retaining the ability to have a say when Shell is and is not a source, Region 10 completely and improperly abdicated its statutory responsibility.

Put simply, Shell fails to demonstrate that the Board committed a clear error in ruling that Region 10 must redefine the OCS source for these permits.

CONCLUSION

The EAB has often noted in remanding PSD permits that it is "mindful of the importance of resolving PSD permits expeditiously and of the fact that a remand will further lengthen the permit issuance process," but that a remand is nevertheless "the appropriate outcome." *See e.g.*, *In re General Motors, Inc.*, 10 E.A.D. 360, 362 (EAB 2002). This is precisely such a situation. The Board found errors with Region 10's permitting decisions that necessitate a full remand of the permits and another record and round of public involvement. Petitioners respectfully urge the Board to ensure that Shell is required to comply with the applicable law designed to protect public health and welfare if it is to receive OCS PSD permits, rather than to put at risk the global

climate and subject local communities of Alaska Natives to air emissions based on outdated or nonexistent standards and poor air quality as a result of Shell's operations.

Respectfully submitted,

s/ *Tanya M. Sanerib*

Tanya M. Sanerib
Christopher Winter
CRAG LAW CENTER
917 SW Oak Street, Suite 417
Portland, OR 97205

Counsel for Petitioners AEWC & ICAS

Vera Pardee
CENTER FOR BIOLOGICAL DIVERSITY
351 California Street, Suite 600
San Francisco, Ca 94104

Counsel for Petitioner CBD

Eric P. Jorgensen
EARTH JUSTICE
325 Fourth Street
Juneau, AK 99801

David R. Hobstetter
Erik Grafe
EARTHJUSTICE
441 W 5th Avenue, Suite 301
Anchorage, AK 99501

Counsel for Petitioners NRDC, *et al.*

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CERTIFICATE OF SERVICE

I certify that I have caused a copy of the foregoing to be served by electronic mail upon counsel for the parties to these proceedings:

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

Julie Vergeront
Juliane R.B. Matthews
Office of Regional Counsel
U.S. Environmental Protection Agency,
Region 10
Suite 900
1200 Sixth Avenue, OCR-158
Seattle, WA 98101
Vergeront.julie@epa.gov
Matthews.juliane@epa.gov

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

s/ *Tanya M. Sanerib*
Tanya M. Sanerib
CRAG LAW CENTER
917 SW Oak Street, Suite 417
Portland, OR 97205

List of Exhibits In Support of Petitioners' Joint Response and Opposition To The Motions For Reconsideration

1. Taylor, Shell Cancels 2011 Arctic Drilling Plans. NYTimes (Feb. 3, 2011) (Exhibit 1).

2. Letter from Peter Slaiby, Vice President Shell Alaska to Michelle L. Pirzadeh, Acting Regional Administrator, EPA Region 10 (Sept. 1, 2009) (Exhibit 2).

3. Letter from Michelle L. Pirzadeh to Peter Slaiby (July 27, 2009) (Exhibit 3).

4. Memorandum from Stephen D. Page, EPA Office of Air Quality Planning and Standards, Applicability of the Federal Prevention of Significant Deterioration Permit Requirements to New and Revised National Ambient Air Quality Standards at 3 (April 1, 2010) (hereafter "Page PSD Memorandum") (Exhibit 4).

5. Letter from Director of Air and Radiation Division at EPA to the Assistant Commissioner of the Indiana Department of Environmental Management (Feb. 26, 2004) (Exhibit 5).

6. Memorandum from Stephen D. Page, EPA Office of Air Quality Planning and Standards, Guidance Concerning the Implementation of the 1-hour SO_2 NAAQS for the PSD Program at 1 (Aug. 23, 2010) (Exhibit 6).

7. Memorandum from Stephen D. Page, EPA Office of Air Quality Planning and Standards, Guidance Concerning the Implementation of the 1-hour NO_2 NAAQS for the PSD Program at Att. A (June 29, 2010) (Exhibit 7).

8. Letter from Susan Childs, Alaska Regulatory Affairs Manager for Shell to Dan Mahar, EPA Region 10 (April 1, 2008) (Exhibit 8).

9. Letter from Peter E. Slaiby to Gina McCarthy (January 4, 2010) (Exhibit 9).

10. Letter from Senators Lisa Murkowski and Mark Begich and Congressman Don Young to Michelle Pirzadeh (July 30, 2009) (Exhibit 11).