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
and	)	
Shell Offshore, Inc. Permit No. R10OCS/PSD-AK-2010-01	)	

PETITIONERS NATURAL RESOURCES DEFENSE COUNCIL, NATIVE VILLAGE OF POINT HOPE, RESISTING ENVIRONMENTAL DESTRUCTION ON INDIGENOUS LANDS (REDOIL), ALASKA WILDERNESS LEAGUE, AUDUBON ALASKA, CENTER FOR BIOLOGICAL DIVERSITY, NORTHERN ALASKA ENVIRONMENTAL CENTER, OCEAN CONSERVANCY, OCEANA, PACIFIC ENVIRONMENT, and SIERRA CLUB'S REPLY TO ENVIRONMENTAL PROTECTION AGENCY'S AND SHELL OIL'S RESPONSES TO PETITION FOR REVIEW

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

FEDERAL REGISTER NOTICES

LEGISLATIVE HISTORY

OTHER MATERIALS

Section 328 subjects emissions from outer continental shelf (OCS) sources to National Ambient Air Quality Standards (NAAQS) and Prevention of Significant Deterioration (PSD) requirements. Subsection (a)(4)(C) of Section 328 provides that associated vessel emissions "shall be considered direct emissions from the OCS source," and subsection (a)(1) requires that all OCS source emissions comply with PSD requirements. 42 U.S.C. §§ 7627(a)(1), (a)(4)(C). Read together, these provisions unambiguously direct the Environmental Protection Agency (EPA) to ensure that air pollution emissions from vessels associated with OCS sources comply with the PSD program, including the "core" application of best available control technology (BACT). *See In re General Motors, Inc.*, 10 E.A.D. 360, 363 (EAB 2002).

Despite this clear statutory mandate, EPA applied only some PSD regulations to emissions from associated vessels in the permits at issue in these petitions, exempting those vessels from the PSD program's BACT requirement. EPA and Shell attempt to justify this application of Section 328 by arguing that differential treatment of emissions from OCS sources and emissions from associated vessels is justified because Section 328 addresses emissions from associated vessels separately in its definition of OCS source. The language of subsection (a)(4)(C), they argue, was meant to carry forward the onshore distinction between regulation of stationary sources under Title I of the Clean Air Act and mobile sources under Title II of the Act and justified exempting associated vessels from the Title I PSD program's BACT requirement. However, neither the language of Section 328, its legislative history, nor the structure of the Clean Air Act compel the interpretation Shell and EPA put forward; indeed, they support the opposite conclusion. Furthermore, EPA's OCS regulations do not directly or indirectly exempt associated vessels from BACT. Accordingly, the Board must remand the permits to EPA to correct its clearly erroneous application of Section 328.

ARGUMENT

I. EPA'S INTERPRETATION OF SECTION 328 TO EXEMPT ASSOCIATED VESSELS FROM BACT IS CLEARLY ERRONEOUS

A. Section 328's definition of OCS source does not support EPA and Shell's conclusion that emissions from associated vessels are not subject to BACT.

EPA and Shell argue that subsection (a)(4)(C) of Section 328—by defining emissions of associated vessels as emissions of the OCS source but not explicitly including associated vessels in the definition of OCS source—distinguishes between emissions from an OCS source and emissions from vessels associated with the OCS source and, therefore, justifies different regulatory treatment. EPA Region 10 Response to Petitions for Review at 28, 33 (Docket No. 44) ("EPA Response"); Shell Response to Petitions for Review at 48-56 (Docket No. 45) ("Shell Response"). They contend that the language of (a)(4)(C) by implication carries forward into the offshore context the distinction between EPA's onshore authority to regulate stationary sources under Title I of the Clean Air Act and to regulate mobile sources under Title II of the Act. EPA Response at 37; Shell Response at 55. Accordingly, they conclude that Section 328 must be read

to limit EPA's authority to apply BACT to just the emissions from the stationary OCS source and not to emissions from the mobile associated vessels.[1]

Section 328, however, does not sustain the distinction EPA and Shell impute to it. Subsection (a)(1) states that all emissions from OCS sources are subject to PSD. 42 U.S.C. § 7627(a)(1). Subsection (a)(4)(C) directs that "emissions from any vessel servicing or associated with an OCS source . . . shall be considered direct emissions from the OCS source." 42 U.S.C. § 7627(a)(4)(C). The language of the statute could hardly be more clear in its mandate that emissions from associated vessels are subject to PSD requirements. Indeed, EPA admits that "section 328 . . . unambiguously directs EPA to ensure that air pollution from OCS sources, including emissions from associated vessels, comply with . . . PSD." EPA Response at 36.[2] There is no basis in that language of the statute to differentiate among PSD requirements as EPA

[1] Shell cites subsection (a)(1)'s statement that offshore sources will be subject, in some instances, to "the same" regulations as onshore sources in further support of its claim that Section 328 carries forward the onshore paradigm to the offshore context and restricts Title I PSD regulation to the stationary OCS source only. Shell Response at 53. The citation is misleading and unsupportive of Shell's argument. Subsection (a)(1) consists of several sentences. The first sentence subjects all emissions from the OCS source to the PSD program. 42 U.S.C. § 7627(a)(1). The second sentence—from which Shell plucks its quotation—states that a subset of OCS sources, those within 25 miles of shore, will also be subject to "the same" regulations, for example state implementation plans, as sources in the corresponding onshore area. *See id.* The sentence grants states influence over the control of air pollution levels in nearby waters. It does not, as Shell suggests, address the application of the PSD program to emissions from OCS sources or associated vessels. The first sentence of (a)(1), in conjunction with (a)(4)(C), does that. That language explicitly *expands* Title I authority in the offshore context by including emissions from associated vessels in the definition of the stationary OCS source emissions that it subjects to Title I PSD regulation.

[2] Although EPA acknowledges that at least some PSD requirements apply to emissions from associated vessels, Shell attempts to draw a sharper distinction. Shell argues that Section 328 excludes associated vessel emissions from Title I PSD requirements altogether. Shell Response at 49. But this assertion directly contradicts what EPA—as it admits in its briefing—did in the permits at issue here, namely regulate the associated vessels to require that they meet at least some Title I PSD requirements, though not BACT. *See, e.g.*, EPA Response at 33-34; *see infra* at 10-11.

attempts to do. The statutory language states or implies that only some PSD requirements, but not others, apply to emissions from associated vessels, and the language certainly does not specially exempt associated vessel emissions from BACT. By including the obligation to regulate emissions from associated vessels in Section 328, Congress plainly provided for different rules in the OCS context than would otherwise apply under Title I of the Act.

The legislative history, which EPA and Shell fail to accommodate, confirms Congress's intent to fully regulate associated vessel emissions through Section 328, including through the application of technology controls. The history evidences a consistent intent to control emissions of associated vessels "as if they were part of the OCS facility's emissions." NRDC Petition for Review at 15-18 (Docket No. 2) ("NRDC Petition"). It also shows that Congress was aware that regulating in this manner would require the application of pollution control technology to control associated emissions. *Id.* at 17-18 (citing 136 Cong. Rec. H12845, H12889-90 (Oct. 26, 1990) (stating that OCS platforms and associated vessels can emit substantial amounts of pollution and that "[e]xisting pollution control technology can significantly reduce these pollution levels.")). This history confirms that Congress defined associated vessel emissions as OCS source emissions, and required the control of OCS source emissions under PSD, in order ensure that associated emissions would be subject to all PSD requirements, including BACT.

Shell also argues that BACT cannot apply to associated vessels because BACT requirements apply to "facilities" or other emissions units and not to "emissions." Shell Response at 49-51. The argument distorts the definition of BACT. Though of course BACT requirements ultimately involve control technology measures at a pollution emitting facility, this does not justify exclusion of associated vessels from BACT. BACT is an "emission limitation based on the maximum degree of reduction of each pollutant subject to regulation . . . emitted

from *or which results from* any major emitting facility . . . ." 42 U.S.C. § 7479(3) (emphasis added). In defining emissions from associated vessels as "direct emissions from the OCS source," Congress could hardly have been more clear that such emissions should be treated as emissions which "result from" the OCS source and are, therefore, subject to BACT. Moreover, Shell's focus on "facility" fails to distinguish BACT requirements from air quality or increment limits which EPA admits must apply to associated vessels. In language very similar to the BACT provisions, Congress imposed the obligation to comply with air quality standards and increments on "facilities": operators are required to demonstrate that "emissions from construction or operation of [a] facility will not cause, or contribute to" a violation of these standards. 42 U.S.C. § 7475(a)(3). Here too, Congress made clear that associated vessel emissions are emissions from the OCS source and therefore subject to these PSD requirements. The "facility" language Shell cites does not support, therefore, a distinction between BACT and other PSD requirements for associated vessels.

Finally, Shell argues that in passing Section 328, Congress must have intended to omit associated vessels from BACT because it was aware of a case, *Natural Resources Defense Council v. EPA*, 725 F.2d 761 (D.C. Cir. 1984), that held emissions from ships in port could only be regulated when the ships were docked at the port, and then only to the extent the emissions were generated from the vessels' stationary source activities. Shell Response at 54. Shell asserts that Congress in Section 328 meant to limit the scope of its regulation of associated vessel emissions to that set out in *Natural Resources Defense Council*—only when they were attached to the OCS source and then only their stationary source emissions. *Id.* This interpretation patently contradicts the language of the statute. Section 328 specifically instructs EPA to regulate emissions from associated vessels while "en route to or from the OCS source within 25

miles of the OCS source." 42 U.S.C. § 7627(a)(4)(C); *see also* EPA Response at 36 ("EPA agrees with the EJ Petitioners that section 328 of the Clean Air Act unambiguously directs EPA to ensure that air pollution from OCS sources, including the emissions from associated vessels, comply with the NAAQS and with PSD."). If, as Shell suggests, Congress wanted to adopt the *Natural Resources Defense Council* rule, it would have excluded emissions from unattached OCS vessels from the definition of OCS source emissions. The fact that it did not, and the legislative history demonstrating Congressional intent to regulate associated vessels, including through the application of technology, show that Congress in fact intended to change the *Natural Resources Defense Council* rule in the OCS context and expand its regulation of emissions to unattached, mobile associated vessels.

B. EPA and Shell fail to offer other relevant examples of similar PSD regulation.

In a further attempt to support EPA's application of some PSD requirements but not others to emissions from associated vessels, EPA and Shell dispute the general principle that, once the PSD program is triggered, all PSD requirements apply to source emissions considered in triggering the program. However, EPA's example demonstrates only that there are exceptions to this general rule under circumstances not relevant here, and Shell's example is inapposite, as it deals with emissions that are not even considered in the potential to emit.

1. EPA's example does not support the selective application of PSD requirements once PSD is triggered.

EPA claims that an onshore regulation related to major modifications of existing stationary sources rebuts Petitioners' assertion that once triggered, the full suite of PSD regulations apply to all emissions that triggered the PSD program in the first place. EPA's example concerns the modification of an emissions unit at an existing source that "debottlenecks" other, unmodified units at the facility, by, for example, allowing those units to

operate at a higher capacity. EPA Response at 34-35. In determining whether the modification triggers the PSD program, EPA considers emissions from the debottlenecked units as well as the unit that is being modified. *Id.* at 34-35; 40 C.F.R. § 52.21(b)(2). However, if PSD is triggered, it only requires BACT for emissions from the modified unit, not the debottlenecked units. 40 C.F.R. § 52.21(j)(3).

EPA's isolated example does not undermine the general rule articulated by NRDC Petitioners. The Clean Air Act treats differently new sources—like those at issue in the permits here—and the modification of existing sources—like those in EPA's example. Congress recognized that the most economical time to impose control technology requirements on a source of pollution is at the time of construction. *In re Rochester Public Utilities*, 11 E.A.D. 593, 611 (EAB 2004) (supplemental opinion of Judge McCallum) (citing H.R. Rep. No. 95-294, at 185 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1264). Thus, Congress structured the PSD program "to minimize disruption, by exempting existing sources from the permit requirement of section 165 until 'modifications' of those facilities increased emissions . . . ." *Ala. Power Co. v. Costle*, 636 F.2d 323, 350 (D.C. Cir. 1979); *see also* 42 U.S.C. 7479(2)(C). EPA's regulation for the application of BACT for major modifications simply furthers the statutory language and Congressional intent by providing that when an existing source is modified, only emissions from the modified unit—the new source, as it were—are subject to BACT. 40 C.F.R. § 52.21(j)(3). The regulation serves to identify "the emissions units that must apply BACT and those that remain grandfathered" or unchanged. *In re Rochester*, 11 E.A.D. at 616. BACT is not applied to emissions resulting from unchanged but debottlenecked emissions units because those emissions units remain grandfathered.

EPA's example thus describes a limited exception to the general rule that BACT applies to all emissions of a source that are considered in triggering PSD requirements and that exception is applicable only to source modifications. In the OCS context at issue in these petitions, by contrast, all of the emissions are emissions of a *new* OCS source, and, contrary to the modification provisions of the statute, Section 328 specifically *includes* emissions from associated vessels as direct emissions from the OCS source and explicitly subjects these emissions to the PSD program without explicit exception. EPA's example is thus not relevant here.

2. Shell's example does not support the selective application of PSD requirements once PSD is triggered.

Shell, like EPA, also argues that an onshore example shows that EPA sometimes selectively applies PSD requirements to emissions once the PSD program is triggered. It points to the onshore application of the PSD program to sources of secondary emissions. Shell Response at 52. The example is even further afield than EPA's, and it offers no support for Shell's argument. Onshore secondary emissions are specifically defined as emissions that "do not come from the major stationary source," 40 C.F.R. § 52.21(b)(18); New Source Review Workshop Manual: Prevention of Significant Deterioration and Nonattainment Area Permitting (Draft) (October 1990), available at http://www.epa.gov/ttn/nsr/gen/wkshpman.pdf, and, as such, are not counted for purposes of determining whether emissions from that source trigger the PSD program, *see* NSR Manual at A.16 ("Secondary emissions are not considered in the potential emissions accounting procedure."). Shell's example is thus not similar to EPA's action here, where emissions are considered in determining whether the PSD program applies and then not subject to all PSD requirements if PSD is triggered. As such, the example is irrelevant.

II. EPA AND SHELL'S RESPONSES MISCHARACTERIZE EPA'S OCS REGULATIONS

As NRDC Petitioners demonstrate in their petition for review, the OCS regulations do not alter Section 328's mandate that all PSD requirements must be applied to associated vessel emissions. NRDC Petition at 20-27.[3] EPA and Shell argue that the regulations establish that emissions from associated vessels are to be treated differently (*i.e.*, exempt from the BACT requirement) than emissions from the OCS source. EPA Response at 36-39; Shell Response at 54-55. However, neither EPA nor Shell cite any provision of the actual regulation stating that BACT is not applied to emissions of associated vessels. EPA Response at 36-39; Shell Response at 54-55. They rely instead on language in the preambles to the regulation and the proposed rulemaking. EPA Response at 36-39; Shell Response at 54-55. Preambles generally do not control the meaning of a regulation, though they may serve as a source of evidence concerning agency intent. *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999). However, as NRDC Petitioners demonstrate in their petition for review, the language of the

[3] EPA and Shell take issue with Petitioners' characterization of whether *Santa Barbara County Air Pollution Control District v. EPA*, 31 F.3d 1179 (D.C. Cir. 1994) addressed associated vessels or not. EPA Response at 30-31; Shell Response at 43-44. Even if the opinion can be read to address associated vessels, and the language of the opinion is far from clear on this point, *see Santa Barbara County*, 31 F.3d at 1181 (upholding EPA regulatory exclusion of vessels "merely traveling over the OCS" from the definition of OCS source), the decision addressed a different argument than presented by NRDC Petitioners here. Santa Barbara County argued that EPA's regulation violated Section 328 because it excluded associated vessels from the definition of OCS sources. At issue was the provision in the second sentence of subsection (a)(1) that applies the same requirements to OCS sources within 25 miles of the seaward boundary of a state as are applied to onshore sources, including mobile onshore sources. *Id.*; Brief of Petitioner Santa Barbara County, *Santa Barbara County Air Pollution Control District v. EPA*, 1993 WL 13650745 at IV.A (D.C. Cir. Dec. 23, 1993) (demonstrating Santa Barbara's concern was with subjecting marine vessels to California's onshore emissions controls per subsection (a)(1)'s mandate). By contrast, NRDC Petitioners do not argue associated vessels are part of the OCS source, but instead that Section 328 imposes PSD limits, including BACT, on associated vessel emissions as a result of the first sentence of subsection (a)(1). Neither the *Santa Barbara* briefing nor the opinion addressed the argument at issue here.

preambles is at best ambiguous, and does not demonstrate any intent to exempt associated vessels from the BACT requirement. NRDC Petition for Review at 23-26.

EPA argues that statements in the regulatory preambles establish that "[e]quipment or activities that met the definition of OCS source were to be regulated as stationary sources, whereas emissions from vessels related to OCS activity that were not themselves OCS sources would be regulated as mobile sources under Title II of the CAA." EPA Response at 37. EPA overstates the language in the preambles. The preambles do state that equipment that meets the definition of an OCS source, including vessels that are attached to the OCS source, will be regulated as stationary sources. Outer Continental Shelf Air Regulations (Final Rule), 57 Fed. Reg. 40,792, 40,793-94 (Sept. 4, 1992); Outer Continental Shelf Air Regulations (Proposed Rule) 56 Fed. Reg. 63,774, 63,777 (Dec. 5 1991). However, they do not preclude regulation under the Title I PSD program of emissions from associated vessels that are not defined as part of the OCS source. Rather, they state emissions from these vessels will be accounted for in the potential to emit and subject to at least some PSD regulations. 57 Fed. Reg. at 40,794 (stating that associated vessel emissions will be included in the OCS source's potential to emit). The preambles do not address whether these associated vessel emissions will be subject to BACT.[4]

Further, EPA's own treatment of associated vessel emissions in the permits at issue in these petitions belies its argument that those emissions can only be regulated under Title II. But for the BACT requirement, the EPA permits do in fact regulate associated vessel emissions to

[4] EPA's suggestion that the preambles' list of PSD regulations to which associated vessel emissions are subject—inclusion in potential to emit, impact analyses, and offset calculations—is exclusive, EPA Response at 37-39, is contradicted by EPA's actions in the permits at issue here. As discussed *infra*, in the permits at issue here, EPA imposes PSD requirements in ways not on this list. For example, in addition to including vessel emissions in the potential to emit and impact analyses, the Chukchi Sea permit actually imposes control technology on Shell's icebreakers.

meet Title I PSD requirements, as EPA readily admits in its response. EPA Response at 33-34 ("associated emissions are required to be regulated . . . to ensure that . . . the vessels associated with and proximate to the OCS source do not cause or contribute to a violation of any applicable . . . increments."); *see also id.* at 35 ("The . . . Permits therefore impose other operating restrictions and control requirements requested by Shell or otherwise imposed by EPA to ensure that these emissions do not cause or contribute to a violation of any applicable NAAQS or increments); *id.* at 36 ("EPA agrees with the EJ Petitioners that section 328 . . . unambiguously directs EPA to ensure that air pollution from OCS sources, including emissions from associated vessels, comply with the NAAQS and with PSD."). For example, the Chukchi Permit strictly limits allowable emissions from associated vessels—sometimes by requiring the use of specific pollution control technology—in order to ensure compliance with NAAQS and increments. *See* NRDC Petition, Ex. 5 at 4 (requiring the use of selective catalytic reduction controls on the main engine of Ice Breaker #2 in order to reduce NO_X emissions); *id.* at 29 ("After application of emission limitations that represent BACT [to the drillship and supply ship], preliminary modeling indicated that additional restrictions on Shell's emissions and mode of operation would be needed to ensure attainment of the NAAQS and compliance with increment for some pollutants"). Thus, even EPA does not interpret or apply the regulation in the way it now asserts the preamble should be read.

Shell argues that the final rule regulatory preamble's reference to *Natural Resources Defense Council v. EPA* shows that EPA intended to regulate associated vessels in a manner analogous to vessels at dockside, regulating them only when attached and then only the stationary source aspects of the vessels. Shell Response at 54. However, the preamble's reference to the *Natural Resources Defense Council* case addresses when EPA will consider

vessels OCS sources, or part of an OCS source, and not how it will regulate emissions from associated vessels that are not OCS sources or attached to an OCS source. 57 Fed. Reg. at 40,793-94. The reference sheds no light on Section 328's inclusion of associated vessel emissions in OCS source emissions or the regulations' inclusion of these emissions in the source's potential to emit.[5]

None of the statements in the regulatory preambles to which EPA and Shell point clarify what EPA intended with respect to the application of BACT to associated vessels when it passed the regulations. The regulations do not address the issue directly. In light of the clear mandate of Section 328, the legislative history underlying the provision, the operation of the PSD program, and the ambiguity of the regulatory preambles, the regulations cannot be read to preclude the application of BACT to associated vessel emissions.

[5] Similarly, the language in the OCS regulations Shell refers to that states that when associated vessels are attached to an OCS source "only the stationary source aspects of the vessels will be regulated," Shell Response at 54, does not address regulation of emissions from unattached associated vessels or cabin Section 328's express inclusion of those emissions in emissions from the OCS source.

CONCLUSION

For the foregoing reasons and the reasons in NRDC Petitioners' petition for review, the Board should vacate and remand the permits and instruct EPA to remedy its clearly erroneous application of Section 328 and the OCS regulations.

s/ *David Hobstetter*
David R. Hobstetter
Erik Grafe
EARTHJUSTICE
441 W 5th Avenue, Suite 301
Anchorage, AK 99501
T: (907) 277-2500
F: (907) 277-1390

Eric P. Jorgensen
EARTHJUSTICE
325 Fourth Street
Juneau, AK 99801
T: (907) 586-2751
F: (907) 463-5891

Date: June 15, 2010.

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2010, a copy of PETITIONERS NATURAL RESOURCES DEFENSE COUNCIL, *ET AL.*'S REPLY TO ENVIRONMENTAL PROTECTION AGENCY'S AND SHELL OIL'S RESPONSES TO PETITION TO REVIEW in the matter of *In re: Shell Gulf of Mexico, Inc., Permit No. R10OCS/PSD-AK-09-01 and Shell Offshore, Inc., Permit No. R10OCS/PSD-AK-2010-01*, OCS Appeal Nos. 10-01 through 10-04, was served by electronic mail on the following persons:

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

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

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

Vera P. Pardee
Kevin P. Bundy
Center for Biological Diversity
351 California Street, Suite 600
San Francisco, CA 94104
vpardee@biologicaldiversity.org
kbundy@biologicaldiversity.org

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

Brendan Cummings
Center for Biological Diversity
P.O. Box 549
Joshua Tree, CA 92252
bcummings@biologicaldiversity.org

s/ *David Hobstetter*
David R. Hobstetter
EARTHJUSTICE
441 W 5th Avenue, Suite 301
Anchorage, AK 99501