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

In re:	)	
Shell Gulf of Mexico Inc. Frontier Discoverer Drilling Unit OCS Permit No. R10OCS/PSD-AK-09-01 and	)	OCS Appeal Nos. 10-01 through 10-04
Shell Offshore Inc. Frontier Discoverer Drilling Unit OCS Permit No. R10OCS/PSD-AK-09-02	)	

REQUEST OF SHELL GULF OF MEXICO INC. AND SHELL OFFSHORE INC. FOR PARTIAL RECONSIDERATION AND FOR CLARIFICATION OF ORDER DENYING REVIEW IN PART AND REMANDING PERMITS

Introduction

Shell Gulf of Mexico Inc. and Shell Offshore Inc. (collectively, "Shell") hereby move for reconsideration of portions of the Order Denying Review in Part and Remanding Permits, filed herein on December 30, 2010 ("Order"), and for clarification of the Order.[1] Shell first requests reconsideration of the Board's decision that the Region "did not include in the administrative record a cogent, reasoned explanation of its definition of the [Outer Continental Shelf ("OCS")] source." Order at 8. Shell respectfully submits that the Region did not clearly err when it determined that the *Frontier Discoverer* would be an OCS source only when it is "secure and stable in a position to commence exploratory activities," as determined by the transfer of authority from the vessel captain to the drilling contractor in accordance with recognized international offshore industry practices. The record in support of the Region's approach is not inconsistent or contradictory. Nor is there any question of an inappropriate delegation of regulatory authority to Shell because, as the record shows, the Region has itself decided when the *Frontier Discoverer* will become an OCS source and Shell has no incentive or realistic ability to somehow take improper advantage of the definition so as to begin drilling before the permit limitations on drilling emissions are effective.

Second, Shell requests reconsideration of the Order's direction to Region 10 to "apply all applicable standards in effect at the time of issuance of the new permits on remand." Order at 82. This instruction is an unwarranted departure from the general principle, reaffirmed by the Board as recently as November 2010, that the Agency will apply to a permit those standards that

[1] As Shell said in its January 10, 2011, opposition to Region 10's motion to extend the time for filing motions for reconsideration, Shell would have been prepared to meet the original deadline of January 12, 2011, but in light of the Board's granting of Region 10's motion, Shell has deferred its filing until the new deadline.

are in effect when issued. The Board rejected Petitioners' claims that Region 10 erred in not imposing the 1-hour National Ambient Air Quality Standard ("NAAQS") for NO_2 on these projects precisely because that standard was not effective when either permit was issued. *See* Order at 66, n. 76 ("the Board disagrees that, apart from the environmental justice analysis, the Region was required to apply the new 1-hour NO_2 standard in its PSD analysis"). Yet, without explanation and in stark contrast to its recent decision in *In re Russell City Energy Center*, the Board retroactively imposed the new standard on Shell's permits on remand. Shell submits that this exercise of the Board's claimed discretion to impose changed standards when it reviews permits was unjustified and should be deleted from the Order. Similarly, the Board offered no justification for imposing the new CO_2 Best Available Control Technology ("BACT") rule on these permits, which became effective some nine months after the Region issued the permits.

Third, Shell seeks reconsideration of the Board's determination that, following Region 10's reconsideration and reissuance of the remanded PSD permits, further proceedings before the Board will be necessary before the permits can become final. *See* Order at 82 ("anyone dissatisfied with the Region's decisions must file a petition seeking the Board's review in order to exhaust administrative remedies pursuant to 40 C.F.R. § 124.19(f)(1)(iii)"). It appears that the Board has sought to provide that final agency action and exhaustion of the administrative process could occur on these permits only after the Board has decided any subsequent petition for review, and thus that the permits will remain ineffective during that review process. Order at 82. Shell requests that the Board reconsider its inclusion of this reference to Section 124.19(f)(1)(iii) and allow these permits to become final upon the conclusion of Region 10's reconsideration and reissuance of the remanded permits. Additionally, in order to keep the PSD permitting process progressing to the maximum extent practicable, Shell requests that the Board modify the Order

to direct Region 10 to conclude its proceedings on remand and re-issue these permits on or before April 15, 2011.

Finally, Shell requests clarification of the scope of the Board's remand order with respect to issues raised by Petitioners on which review was neither granted nor denied. Clarification of what issues the Region must or may consider on remand is essential in order to focus and expedite that process. The Order refers to two issues as "examples" of issues not resolved by the Order, both raised by Petitioner AEWC *et al.*: (1) Region 10's evaluation of impacts of $PM_{2.5}$ emissions from Shell's project (including determination of background $PM_{2.5}$ levels at potentially impacted onshore locations and secondary formation of $PM_{2.5}$) and (2) the extent to which emissions that might result from emergency response actions or other non-routine activities should be included as part of the OCS source's potential to emit. However, it appears that these two issues are not merely "examples," but are effectively the *only* issues raised by any Petitioner and not resolved by the Order. Shell seeks clarification that, under the current Order, these are the only unresolved issues that Region 10 may or need address on remand (in addition to the two issues on which review was granted and the issues of NO_2 NAAQS compliance and BACT for CO_2).

Background

Through no fault of Shell's, the Chukchi Sea and Beaufort Sea PSD permits have been remanded due to inadequacies that the Board perceived in Region 10's explanation and documentation of its permitting decisions. If the Order is not modified, the Region must, inter alia, reconsider the definition of "OCS source" as used in the permits and must conduct further analysis of environmental justice aspects of the permits. In addition, the Board has decreed that the Region apply more stringent substantive requirements to Shell's projects, including the new

1-hour air quality standard for NO_2 and new requirements for BACT for CO_2, neither of which applied to these permits when issued by Region 10.[2] The Order expressly does not reach the other issues raised by Petitioners, but directs the Region to "supplement the administrative record and/or reopen the public comment period to take into account availability of additional factual information concerning other issues raised in the petitions, *such as* any additional $PM_{2.5}$ background ambient air quality data, available modeling techniques for secondary formation of $PM_{2.5}$, or new information or changes in Shell's plans for spill prevention and response and use of the Associated Fleet." Order at 9 (emphasis added).

The Board's decision to remand these permits, and to impose additional requirements on its own initiative, is one more setback in Shell's five-year quest to obtain federal air permits that will enable Shell to explore for oil and gas on the Arctic OCS leases for which Shell paid the federal government some $2.2 billion. This seemingly interminable Clean Air Act permitting process has contributed to Shell's inability to drill on these leases for the last five years after expending hundreds of millions of dollars in preparation to do so. Now the 2011 season is at risk. Perhaps more important, this protracted process has thwarted Congress's declaration as a matter of national policy in the Outer Continental Shelf Lands Act ("OCSLA") in 1978 that "the

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[2] The Board ordered that "The Region shall apply all applicable standards in effect at the time of issuance of the new permits on remand." Order at 82. As noted previously, the Board expressly rejected AEWC's contention that the 1-hour NAAQS should have been applied to the permits when issued as a substantive requirement, as distinct from being an environmental justice consideration. Order at 66, n.76. The Board also said it did not "reach the merits of issues [Petitioners] raised concerning application of BACT to control CO_2 emissions." Order at 82. Nevertheless, by directing Region 10 to apply the now-applicable 1-hour NO_2 NAAQS and requirements for BACT for CO_2, the Board effectively granted Petitioners' request for review on those issues, but did so without making any findings that Petitioners had carried their burden of demonstrating that issuance of the permits without imposition of either requirement was clearly erroneous. *See* 40 C.F.R. § 124.19(a)(1). This instruction to the Region was certainly not legally compelled, but instead was an apparent exercise of what the Board called its "discretion to remand permit conditions for reconsideration in light of legal requirements that change before the permit becomes final agency action." Order at 73, n. 80.

Outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards." 43 U.S.C. § 1332(3).

Moreover, the delays that Shell is experiencing appear increasingly contrary to the assurance in EPA's OCS air permitting regulations, 40 C.F.R. Part 55, that "In implementing, enforcing and revising this rule and in delegating authority hereunder, *the Administrator will ensure that . . . the rule is not used for the purpose of preventing exploration and development of the OCS*." 40 C.F.R. § 55.1 (emphasis added). Last, but by no means least, Shell has been awaiting final Agency action on its Chukchi PSD permit for almost 18 months since the permit application was deemed complete in July 2009. The Beaufort PSD permit has been pending almost a full year, the permit application having been deemed complete on February 11, 2010. With remand proceedings now required, to be followed under the Order by an almost-certain second round of review by the Board before reissued permits can become effective, EPA will not take final action on either permit within a time frame anywhere close to the one-year deadline in Section 165(c) of the Clean Air Act, 42 U.S.C. § 7475(c) ("Any completed [PSD] permit application . . . for a major emitting facility . . . shall be granted or denied not later than one year after the date of filing of such completed application.").

Argument

I. Region 10 Did Not Commit Clear Error in Its Definition of OCS Source.

The Region more than adequately explained its determination that, for purposes of these permits, the *Frontier Discoverer* would be an OCS source under section 328 of the Clean Air Act when it is "secure and stable in a position to commence exploratory activity." Contrary to the findings in the Order, no material inconsistency exists in the record between Region 10's and Shell's positions concerning the point during the process of anchoring (or de-anchoring) at which

the *Frontier Discoverer* should be deemed to be an OCS source. Both focused on when drilling would or could commence. Nor did Region 10 improperly delegate this determination to Shell.[3]

The Board "examin[ed] the Region's rationale for choosing Option 2" and whether that choice was "adequately explained and supported by the administrative record." Order at 44. The Board found that the Statements of Basis and Responses to Comments for the permits did not provide a "cohesive explanation" to support the Region's source definition decision. Order at 45-46. The Board thought that, on the one hand, the Statements of Basis assumed that the change in the *Frontier Discoverer*'s status under Option 2 will occur when two steps are completed, i.e., the vessel is "attached," then "erected" on the seabed. Order at 47-48. By contrast, the Board thought that the Region's explanation in the Response to Comments relied more heavily on the third criterion within section 55.2 [i.e., "used for exploration"] to explain its rationale for choosing Option 2. Order at 48-49. The Board faulted the Response to Comments for providing "scarcely a mention of the 'erected thereon' criterion or how it relates to a vessel being secure and stable." Order at 49. Thus, according to the Board, the flaw in the Region's decision-making was that:

> The 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.' In neither document does the Region set forth an explanation of how the Region interprets the two criteria of section

[3] The Order says that the source definition issue is "not academic" because "The later in time the Frontier Discoverer becomes an OCS source, and the sooner it ceases to be an OCS source, the longer air pollution from the Frontier Discoverer is unaddressed by BACT controls, and the more limited the inclusion of potential emissions from both the Frontier Discoverer and the Associated Fleet in air quality analyses." Order at 39. But maximizing the duration of Clean Air Act regulation is not the goal of EPA's regulations in 40 C.F.R. § 55.2. If it were, EPA might have written the definition of OCS source to require only "attachment," as opposed to including the additional prerequisites of "erected" and "used for exploration."

> 55.2 at issue. In short, the Region never plainly states a concise, coherent explanation for its reasoning.

Order at 49. The Board's fundamental concern was that the Region "talks about giving effect to the second and third criteria of section 55.2, but never actually sets forth an explanation for how it determined these criteria to mean 'secure and stable in a position to commence exploratory activity.'" Order at 50, n. 60.

The Order concludes that neither OCSLA section 4(a)(1) nor EPA's OCS air regulations, 40 C.F.R. Part 55, "expands upon what 'erected thereon' was intended to mean in section 55.2." Order at 52. However, the preamble to Part 55, as quoted in the Order, makes it clear that, while the regulations include "erected" as one of three criteria for an OCS source, that criterion is subsumed in the "attached" and "used for exploration" criteria (which makes sense – when the drill ship is capable of drilling it is necessarily both ready for "use" and erected for that purpose, regardless of what exactly confers the "erected" status). Thus, after quoting OCSLA's provision for regulation of "installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring, developing, or producing resources therefrom," the preamble says: "vessels *therefore* will be included in the definition of 'OCS sources' when they are 'permanently or temporarily attached to the seabed' and are being 'used for the purpose of exploring, developing or producing resources therefrom.'" 57 Fed. Reg. at 40,793 (emphasis added). Thus, the preamble cites OCSLA's "erected" requirement and, interpreting that requirement, says that vessels "therefore" will be deemed OCS sources when (1) attached and (2) used for exploration.

Shell respectfully submits that the Region very reasonably (and conservatively) translated the regulatory criteria – "attached" and "used for exploration" – to the facts and circumstances of

Shell's operation.[4] The record is clear that mere attachment of the *Discoverer* by one anchor does not make the vessel capable of being used for exploration (let alone causing it to be actually used for that purpose). Some additional attributes are necessary before the *Discoverer* can be used for drilling and, as is clear under the regulations and the preamble, that readiness is something beyond mere attachment to the seabed. Positioning at the desired location, security, and stability are all self-evident prerequisites for drilling from a floating unit in offshore waters. Indeed, what indicia could be more relevant to determining that an OCS drillship is ready to be used for exploration? Shell respectfully asks the Board to reconsider its finding that the Region did not explain and justify its adoption of these indicia – secure and stable in a position to commence exploratory activity – to define the *Frontier Discoverer* as an OCS source.

The Order finds that Region 10's definition is also clearly erroneous because, on the one hand, the determination of "ready to drill" would be left to Shell to make on site and Shell will do so only when all eight of the *Discoverer*'s anchors are emplaced. This, the Board says is flawed because (1) Region 10 cited record information (a patent on the *Discoverer*'s drilling

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[4] In fact, Region 10 conservatively applied the regulatory standard by decreeing the *Discoverer* to be an OCS source when it is *ready* to drill ("secure and stable in a position to commence exploratory activities"), even though drilling may not immediately commence. EPA's regulatory definition requires that the *Frontier Discoverer* be (1) attached to the seabed, i.e. by anchor(s); (2) erected on the seabed (meaning something more than mere attachment): and (3) "*used* for the purpose of exploring . . . resources." 40 C.F.R. § 55.2 (emphasis added) Under the literal terms of the regulation, the *Discoverer* would be an OCS source only when it is "attached" and "erected" *and* drilling has actually commenced.

Region 10 rejected this position in favor of the more restrictive "ready to explore" standard, triggered by the standard written declaration that the *Discoverer* is "secure and stable in a position to commence exploratory activity at the drill site." As the Region explained: "At this point the Discoverer is clearly both attached to and erected on the seabed 'for the purpose of exploring, developing, or producing resources therefrom' within the meaning of EPA's OCS implementing regulations." Chukchi Statement of Basis at 21; Beaufort Statement of Basis at 24. In this formulation, far from adding new requirements not found in section 55.2, Region 10 eliminated the element "*used* for the purpose of exploring" in favor of an earlier trigger whereby readiness to drill renders the *Discoverer* an OCS source before actual use begins and after it ends.

system) indicating it might be possible to drill from the *Discoverer* with fewer than eight anchors in place and (2) this gives Shell too much control over when the *Discoverer* is deemed to be an OCS source. Shell submits that neither of these points constitutes clear error.

First, it is correct, and the record confirms, that Shell will not drill with fewer than all eight anchors in place. As the Order notes, this is driven by safety concerns. *See* Order at 56, n. 64. Shell should be commended for this safety-first policy, not punished with a remand of its PSD permits. More important, the Board's concerns about the supposed six anchors vs. eight anchors discrepancy seems to reflect a concern that Shell might abuse what would effectively be an all-anchors-down test. But this is unfounded. First, Shell would gain, at most, a few hours of drilling time by starting drilling with six anchors down in order to drill while the remaining two are being put in place.[5] Offset against this modest incentive is Shell's affirmation that this could compromise safety and that Shell has no intention of doing it. To the extent the concern is that, under an eight-anchors-down test, Shell would *continue* to drill with only six anchors down and avoid Clean Air Act controls for the duration of the project, that concern is preposterous in light of Shell's representation that it will not do so, the decrement in safety that would result, and the scrutiny that these drilling operations will receive.

In this regard, the Board appears to have misinterpreted the suggestion by Region 10's counsel that Shell would have "financial incentives" to declare the *Discoverer* an OCS source as soon as possible in the anchoring process so that it could start drilling sooner. Order at 60, n. 68, citing Oral Arg. Tr. at 55-56. This suggestion is not record evidence and also is contrary to Shell's representations in its permit applications and to the Board. Shell has gone on record unequivocally in written statements to Region 10 that it cannot and will not transfer operation

[5] "Setting of each anchor consumes about 30 minutes." Chukchi Statement of Basis at 19.

and commence drilling until all eight anchors are emplaced. And the supposed contrary incentive – a few hours of drilling time while the two remaining anchors are placed – is patently insufficient for Shell to take any risk associated with drilling before the *Discoverer* is completely anchored and stable. Moreover, the PSD permits do not allow operation of the propulsion engine when the *Discoverer* is an OCS source and require Shell to report any deviation within three business days. *See, e.g.,* Chukchi PSD permit, Approval Condition D at p. 19. Shell respectfully submits that the supposed incentives for Shell to "declare early" are a red herring – they are inconsequential and would in any case trigger permit compliance at that point.

Shell also respectfully suggests that the Board has misconstrued the nature of the process whereby the Shell company representative would declare and document that the *Discoverer* is stable and ready for transfer to the control of the drilling contractor. First, as explained above, Shell's company representative will have no authority or incentive to advance this declaration so as to start drilling before the vessel is completely anchored. Nor will he or she be able to evade permit requirements by delaying this declaration after drilling has begun following anchoring. As the record demonstrates, drilling cannot occur until control is transferred to the drilling contractor, rendering the *Discoverer* an OCS source under the permits. Thus, the permits' use of the declaration of transfer of control of the *Discoverer* by the Shell representative, as documented by standard International Association of Drilling Contractors records, as a trigger for regulatory requirements does not give Shell improper control over its own regulation. Indeed the Board itself observed that Shell would not gerrymander the transfer declaration in order to evade regulation: "Shell's business decisions regarding the operation of the Frontier Discoverer are made for purposes other than deciding when the Frontier Discoverer becomes an OCS source and subject to regulation under CAA 328." Order at 58, citing Oral Arg. Tr. At 44-48. This

observation sums up precisely why the Region's reliance on the transfer-of-control trigger for OCS source status was not an improper delegation of regulatory authority. The transfer is fully documented and is an objective – not subjective – event that will occur for reasons independent of the air permit. It provides the most reliable verification that the vessel has become "secure and stable in a position to commence exploratory activity" – certainly more reliable than Region 10 personnel unfamiliar with offshore drilling operations could provide. The transfer-of-control declaration will be a bright-line event that can be easily verified in the Discoverer's operating records.[6] After that triggering event, EPA can readily determine from the records required to be kept under the permit whether Shell has complied with the PSD permit.

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. The three cases cited by the Board do not support the Board's reasoning. *See* Order at 61-62. In *Fund for Animals v. Kempthorne,* environmental groups challenged a Fish and Wildlife Service ("FWS") Depredation Order that allowed the employees of state agencies and Indian Tribes to decide when cormorants were causing a "depredation" of natural resources and could, therefore, be killed without violating the Migratory Bird Treaty Act ("MBTA"). 538 F.3d 124, 132-134 (2nd Cir. 2008). Environmental groups challenged the Depredation Order as an improper delegation of FWS's statutory responsibility to determine when, and to what extent, migratory birds can be lawfully taken under the MBTA. *Id.* at 133. The Second Circuit found no improper delegation of FWS's authority because the Depredation Order "restricts the species, locations, and means by

[6] As Shell explained in its comments on the proposed Chukchi PSD permit, the drilling contractor who will conduct drilling operations on the *Discoverer* will complete a standard International Association of Drilling Contractors form indicating that the drillship is now under its control, which must be signed by Shell's representative in order to be effective and without which the drilling contractor does not proceed. Shell February 10, 2010 comments at 10.

which takings in response to such depredations could occur, thereby restricting the discretion that may be exercised by third parties acting under the Order." *Id.* The Second Circuit concluded that "[b]y adopting a rule that provides local agencies discretion to determine what constitutes a 'depredation' within a localized context, the FWS was exercising its 'broad permitting authority' while incorporating 'obviously relevant local concern[s] as . . . element[s] of its decision process.'" *Id.* (quoting *U.S. Telecom v. FCC*, 359 F.3d 554, 567 (D.C. Cir. 2004)). In the present case, there is even less reason to find an improper delegation. Region 10, unlike FWS, did not confer discretion on Shell to determine when the Discoverer becomes an OCS source because, as the Board recognized, that determination is an artifact of an entirely independent process of determining when the drillship is ready to drill, i.e., "Shell's business decisions" that are "made for purposes other than deciding when the Frontier Discoverer becomes an OCS source and subject to regulation under CAA 328." Order at 58

In *U.S. Telecom*, the D.C. Circuit held that the FCC could not delegate unbundling decisions to state utility commissions. 359 F.3d at 565-68. The Telecommunications Act of 1996 had given the FCC broad powers "to make 'network elements' available to other telecommunications carriers" – a process known as "unbundling." *Id.* at 561. Congress left to the FCC the choice of elements to be unbundled, but required the FCC to "consider, at a minimum, whether . . . the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." *Id.* (quoting Telecommunications Act of 1996). In the regulations challenged before the D.C. Circuit, the FCC "gave the states virtually unlimited discretion" over the definition of relevant markets and delegated its authority to make the statutory impairment determination to the states. *Id.* at 564. In other words, the FCC had completely delegated one of its primary

policy-making responsibilities under the Act. The D.C. Circuit, unsurprisingly, found FCC's actions to constitute an improper "subdelegation of decision-making authority." *Id.* at 566. By contrast, the court noted that where an agency "establish[es] a reasonable condition for granting federal approval" the subdelegation-of-authority doctrine is not implicated. *Id.* The court observed that "a federal agency entrusted with broad discretion to permit or forbid certain activities may condition its grant of permission on the decision of another entity . . . so long as there is a reasonable connection between the outside entity's decision and the federal agency's determination." *Id.* at 567. Here, Region 10 "establish[ed] a reasonable condition for granting federal approval." *Id.* at 566. Region 10's actions bear no resemblance to the FCC's decision to delegate completely one of its central, nation-wide, decision-making responsibilities.

The third case cited by the Board, *Sierra Club v. Sigler*, merely stands for the unremarkable proposition that where the National Environmental Policy Act requires a federal agency to draft an Environmental Impact Statement ("EIS"), the agency may not allow an outside consulting firm to draft the entire EIS. 695 F.2d 957, 962 n.3 (5th Cir. 1983). That holding has little application to this case because the Region's narrow use of the ready-to-drill declaration as a trigger for OCS source status bears no resemblance to the sweeping delegation of authority to a private party to prepare an agency's EIS.

II. The Board Should Not Require Region 10 to Apply Regulations That Post-Date Initial Issuance of the PSD Permits.

As noted, the Order instructs Region 10 to "apply all applicable standards in effect at the time of issuance of the new permits on remand." Unless the 1-hour NO_2 NAAQS, which became effective April 12, 2010, and/or the regulation requiring BACT for CO_2 on new major sources that emit more than 75,000 tons per year of CO_2, effective January 3, 2011, are invalidated or withdrawn, Region 10 will have to go through extensive air quality impacts analysis for NO_2 and

a potentially time-consuming BACT analysis for CO_2 emissions. The Board's action is not consistent with its reasoning in *In re Russell City Energy Center*, LLC, 15 E.A.D ___ (Nov. 18, 2010). In that very recent decision the Board rejected a petitioner's contention that the Board should review, "as an important policy consideration," whether the NO_2 standard that EPA published on February 9, 2010, and that was effective April 12, 2010, should be applied to a PSD permit that was issued by a state agency on February 3, 2010. In *Russell City*, the Board reviewed cases in which it had addressed "the extent to which new rules or guidelines issued after initial permit issuance should be considered in ongoing permitting proceedings." Slip op. at 109. Summarizing in *Russell City* its earlier survey of those cases in *In re Dominion Energy Brayton Point, LLC* 12 E.A.D. 490, 614-16 (EAB 2006), the Board noted the Administrator's long-standing pronouncement in *In re U.S. Pipe & Foundry Co*., NPDES Appeal No. 75-4 (Adm'r 1975) that, in order to provide finality to a permit applicant, review of a permit issuer's decision should be based on the standards and guidelines in existence at the time the original action was taken. *Russell City* at 110. The Board noted only two occasions when it has departed from this principle, both of which involved unique procedural situations – not simply new requirements that came into effect after the initial permit was issued. *Id*.[7] To be sure, the Board reiterated in *Russell City* its determination in *Dominion Energy* that the Board has "discretion to remand permit conditions for reconsideration in light of legal requirements that change before the permit becomes final agency action." *Id.* at 111. However, in *Russell City* the Board

[7] In *In re J&L Specialty Prods. Corp*., 5 E.A.D. 31 (EAB 1994), the permittee itself filed a permit modification request based on the changed regulation. In *In re GSX Servs. Of S.C., Inc.,* 4 E.A.D. 451 (EAB 1992), the new rule itself required revaluation of all pending permits. In both cases, these special circumstances underlay the Board's departure from the principle articulated by the Administrator in *U.S. Pipe & Foundry Co*.

declined to remand the permit for reconsideration under the new NO_2 standard. The reasoning is instructive:

> First and most significantly, the [NO_2] rule itself does not indicate that it is intended to be applied retroactively to permits for which a final permit decision has already been issued. In fact, by using the future tense and by referring to 'applications' in the context of the impacts of the rule on the PSD program, the language in the preamble to the final rule suggests the reverse.

Id. at 112. The new NO_2 standard, the Board concluded, "was not intended to require permit decisions already issued to be reopened." *Id*. In addition, the Board noted that the permit proceedings had been ongoing since 2006 and that the permitting agency "has spent several years and significant resources during this time considering the permit applications in light of the existing rules and standards," and cautioned against a potential "endless loop of permit issuances, appeals, and remands" driven by changes in regulatory standards. *Id*. For these reasons, the Board found it "inappropriate to remand the permit . . . to reconsider the Final Permit in light of the new NO_2 rule." *Id*. at 113.

The Board's reasoning in *Russell City* in rejecting application of the new NO_2 standard to a PSD permit issued in early 2010, after several years of effort by the permitting agency and the applicant, is no less applicable to Shell's permits that were remanded on other grounds. In the present case, the Board provides no explanation for reaching the opposite conclusion, offering only the summary instruction that "The Region shall apply all applicable standards in effect at the time of issuance of the new permits on remand." Order at 82. Shell respectfully submits that, having offered no explanation for why it exercised its "discretion" to impose new legal

standards on these permits, nor any rationale for treating Shell's permits differently from the *Russell City* permit, the Board should remove that requirement from the Order.[8]

III. The Board Should Not Require Post-Remand Review Before Shell's Re-Issued Permits Can Become Effective.

Shell has previously provided extensive information to the Board about the critical need for final action on these PSD permits well in advance of the very limited summer drilling season on the Arctic OCS. *See* Urgent Request of Shell Gulf of Mexico, Inc. and Shell Offshore Inc. for Leave to Participate and Motion for Expedited and Combined Review (May 5, 2010) and attached Declaration of Peter E. Slaiby. Shell lost the 2010 drilling season as a result of matters outside its control, including the Macondo oil spill in the Gulf of Mexico and the pendency of petitions for review of these PSD permits before the Board. Shell is now threatened with the loss of the 2011 drilling season as a result of the remand of the permits.

Under the circumstances, Shell respectfully asks the Board to reconsider its decision to prevent Shell's permits from being final upon the conclusion of Region 10's proceedings on remand. Absent this instruction in the Order, Shell's permits would be final upon conclusion of remand proceedings. *See* 40 C.F.R. § 124.19(f) (1) ("For purposes of judicial review under the appropriate Act, final agency action occurs when a final . . . PSD permit decision is issued by EPA and agency review procedures under this section are exhausted. A final permit decision shall be issued by the Regional Administrator: . . . (iii) Upon the completion of remand proceedings if the proceedings are remanded, unless the Environmental Appeals Board's remand

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[8] Shell notes that the Order cites *Russell City* and the Board's claimed discretion to retroactively impose new standards on permits issued before those standards were effective, but does so only in the course of rejecting "the Region's argument that the Board should uphold the application of the then-effective annual NO_2 standard to the environmental justice analysis in the interest of finality." Order at 72-73, n. 80. The Order does not discuss why the Board reaches a diametrically opposite result from *Russell City* with regard to the substantive application of the new NO_2 standard retroactively to Shell's permits.

order specifically provides that appeal of the remand decision will be required to exhaust administrative remedies."). Thus, had the Board not specifically referred to Section 124.19(f)(3), a "final permit decision" would be issued by the Regional Administrator upon the conclusion of remand proceedings and "agency review procedures" would at that point be concluded without further EAB review. Shell respectfully requests that the Board reconsider and eliminate from the Order its determination that Shell's permits will not be final and will not constitute final agency action without a second appeal to the Board.[9]

With the clarification that Shell seeks today, the Board will have given Region 10 detailed guidance in the Order concerning what issues must be addressed on remand (and what legal requirements shall be applied). Region 10 should be capable of proceeding appropriately on the remanded permits, and will do so with required public participation. Any person with standing could of course seek judicial relief, including an injunction, if he or she believed that the Region had acted unlawfully in re-issuing final permits. Given Shell's good-faith effort over the past five years to obtain an OCS air permit from EPA, including the imposition of extraordinary controls on its proposed operations, and the fact that waiting to conclude a second round of appeals to the Board of reissued permits in 2011 could delay final permitting action until it is too late for Shell to undertake drilling in the 2011 drilling season, the Board should adhere to the default process contemplated by section 124.19(f) of EPA's decision-making regulations. Under that process, the next iteration of these PSD permits, when issued by Region

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[9] 40 C.F.R. § 124.15(b) provides that "A final permit decision . . . shall become effective 30 days after the service of notice of the decision unless: . . . (2) Review is requested on the permit under §124.19." However, it is clear that section 124.19 does not authorize a petition for EAB review of the final permit decision following remand, unless the remand order so provides.

10, would be final and effective permits. These permits have already undergone extensive scrutiny by Region 10, which presumably understands and is equipped to address the remanded issues. Shell respectfully submits that it is time to break the "endless loop of permit issuances, appeals, and remands" against which the Board properly cautioned in *Russell City*.

If the Board retains its decision not to allow the Region to issue final permits following remand proceedings (or even if it does not), Shell requests that the Board direct the Region to conclude those proceedings by a date certain that reflects the Board's legitimate expectations that the Region will expedite the remand. Shell respectfully asks that the Board revise the Order to direct Region 10 to complete its analysis on remand and issue final permit decisions on or before April 15, 2011.

The Region required approximately eight months to issue the Chukchi PSD permit, from the completeness determination on July 19, 2009, to a final permit on March 31, 2010, but the trailing Beaufort permit was issued in less than 60 days from the completeness determination on February 11, 2010 to final issuance on April 9, 2010. The speed with which Region 10 was able to process the second, trailing permit suggests that the Region has ascended a learning curve regarding OCS air permitting and that, with the parameters of the remand well defined, Region 10 ought to be able to complete proceedings on the permits on remand in 60 days time, i.e., from around February 15 to April 15, 2011.

Clearly, issuance of a scheduling order to the Region is within the Board's authority to direct the scope and pace of proceedings on remanded PSD permits. As EPA's ultimate decision-maker on these permits (assuming a follow-on appeal), the Board can certainly instruct the Region as to the date by which the Board wishes to receive any petitions for review of the newly issued permits so as to allow adequate time for decision, and can require the Region to

conclude its proceedings on remand prior to that date. Such a schedule for Region 10 action would conserve the Board's resources, reduce the potential necessity for a "fire drill" by the Board later this year or in 2012, and ensure enough time for careful review that is consistent with the Agency's obligation to "ensure" that the air permitting regulations are "not used for the purpose of preventing exploration and development of the OCS," especially where the prejudice to Shell from delay is so extreme. Even if the Board decides to dispense with a follow-on appeal, imposing such a deadline for Region 10 action is amply justified, irrespective of whether Shell can salvage a 2011 drilling season, in order to simply move Shell closer to having usable permits for exploration of its federal OCS leases.

IV. The Board Should Clarify the Scope of Remand Proceedings on the Undecided Issues.

Setting aside Petitioners' claims that CO_2 BACT and the 1-hour NO_2 standard should apply to Shell's permits, which the Order says were not decided, but on which as a practical matter review was granted, the Order is ambiguous as to what other issues raised by the Petitioners that the Board did not reach. On the one hand, the Order directs possible supplementation of the record regarding "other issues raised in the petitions, *such as* any additional $PM_{2.5}$ background ambient air quality data, available modeling techniques for secondary formation of $PM_{2.5}$, or new information or changes in Shell's plans for spill prevention and response and use of the Associated Fleet." Order at 9 (emphasis added). This statement can be read to indicate that there are additional unspecified issues raised by Petitioners beyond the $PM_{2.5}$ and emergency response issues. On the other hand, the ordering provisions of the Order state that "the Board does not reach a number of additional issues AEWC raised [i.e. other than CO_2 BACT and 1-hour NO_2 standard] concerning $PM_{2.5}$ background ambient air quality data and secondary $PM_{2.5}$ modeling, . . . and inclusion of spill cleanup and certain other

activities in the potential to emit analysis." Order at 82. This statement specifies these two issues as *the* issues (beyond CO_2 BACT and 1-hour NO_2 standard) that remain unaddressed in the petitions, not as examples of "such" issues.

The latter formulation is correct. Taken together, the Petitions raised seven issues: (1) definition of OCS source [AEWC]; (2) application of BACT to associated vessels [NRDC]; (3) applicability of CO_2 regulations to the project [CBD; AEWC]; (4) applicability of the 1-hour NO_2 standard [AEWC]; (5) failure to consider the 1-hour standard in the environmental justice analysis [AEWC]; (6) adequacy of air quality impact analysis for $PM_{2.5}$ emissions, including background concentrations and secondary formation [AEWC]; (7) inclusion in the emissions profile for the project of allegedly "routine emissions" from emergency response activities, from vessels operating more than 25 miles from the *Frontier Discoverer*, and from the drillship propulsion engines [AEWC]. The Order decided issues 1, 2, and 5; and as a practical matter granted review on issues 3 and 4, leaving *only* issues 6 and 7 as to which review was neither granted nor denied.

In short, Region 10 should not be required to engage in guesswork on remand. The Order should be clarified to indicate that these two issues are the only issues not effectively resolved by the current Order. In addition, the Order should provide clearer guidance on the Region's scope of work with respect to the issues on remand. It would appear that, under the current Order, Region 10's tasks on remand are (1) determine the proper criteria for determining when the *Frontier Discoverer* will be an OCS source (assuming that the Board does not reconsider this decision); (2) conduct an appropriate environmental justice analysis with respect to short-term NO_2 emissions from the projects; (3) determine what is BACT for CO_2 emissions from the *Frontier Discoverer*; (4) evaluate air quality impacts and compliance with the 1-hour NO_2

NAAQS; (5) reassess air quality impacts of $PM_{2.5}$ emissions in light of any data on background air quality and/or $PM_{2.5}$ emissions that were not available when the permits were issued; and (6) determine whether there is any reason to evaluate additional allegedly "routine" emissions from, inter alia, potential emergency response activities in a manner different from the Region's previous approach. Depending on the disposition of Shell's motion for reconsideration of enumerated issues 1, 3 and 4, the Order should provide a specific scope of work for Region 10 to address the issues on remand, while noting that, if and to the extent that Shell's operations change or are modified, e.g., at the direction of the Department of Interior, and those changes will cause increased emissions from the project, different emissions may need to be addressed in updated air quality impact evaluations.

Conclusion

For the foregoing reasons, the Board should reconsider its determination that Region 10 clearly erred when it determined that the *Frontier Discoverer* would be an OCS source only when it is "secure and stable in a position to commence exploratory activity," as determined by the documented transfer of authority from the vessel captain to the drilling contractor in accordance with recognized international offshore industry practices. The Board also should reconsider and delete from the Order its instruction to Region 10 to apply the 1-hour NO_2 NAAQS and the CO_2 BACT rule. In addition the Board should remove from the Order the requirement for disposition of petitions for review of the PSD permits that Region 10 will re-issue to Shell before those permits are final and effective. Shell also requests that the Board direct Region 10 to conclude its proceedings on remand and re-issue the permits on or before April 15, 2011. Finally, The Board should clarify that the "undecided" issues that Region 10 is to examine and consider in remand proceedings are limited to analysis of the air quality impacts

of $PM_{2.5}$ emissions from Shell's operations and whether the Region determines that its previous decision not to include emergency and other allegedly "routine" emissions in the permit's air quality analyses remains correct.

Respectfully submitted,

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DATED: January 21, 2011

CERTIFICATE OF SERVICE

I herby certify that I have caused a copy of the foregoing Request for Partial Reconsideration and for Clarification of the Order Denying Review in Part and Remanding Permits to be served by electronic mail upon:

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