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 Appeal Nos.
OCS Permit No. R10 OCS/PSD-AK-09-01	)	10-01 through 10-04
	)	
and	)	
	)	
SHELL OFFSHORE, INC.,	)	
Frontier Discoverer Drilling Unit	)	
OCS Permit No. R10 OCS/PSD-AK-10-01	)	
	)	

EPA REGION 10 MOTION FOR RECONSIDERATION AND/OR CLARIFICATION

On December 30, 2010, the Environmental Appeals Board ("Board") issued an Order Denying Review in Part and Remanding Permits ("Remand Order") in this matter. On January 7, 2011, U.S. Environmental Protection Agency ("EPA") Region 10 ("Region 10") filed a motion requesting an extension of the deadline for filing any motion for reconsideration and/or clarification of the Remand Order. The Board granted Region 10's extension motion on January 11, 2011, extending the deadline for the filing of a motion for reconsideration and/or clarification by any party to January 21, 2011, and requiring that any replies to such motions be filed by February 7, 2010. In accordance with that extension, Region 10, in consultation and coordination with EPA's Office of Air and Radiation and Office of Enforcement and Compliance Assurance, hereby moves the Board for reconsideration and/or clarification of the Remand Order. Specifically, while EPA Region 10 is not requesting the Board to reconsider and/or clarify its

substantive decisions regarding the three issues addressed in the Remand Order, we are seeking reconsideration and/or clarification of the parts of the decision regarding the scope of the Board's remand (especially with respect to supplementation of the record for unresolved issues and the application of new standards), the issues raised in the petitions that were not addressed by the Remand Order, and the availability of additional EAB appeal opportunities after remand. While the Agency is committed to issuing OCS permits that properly address the OCS source at issue and that insure protection of vulnerable sub-populations, we maintain that the Board's Remand Order erred in its treatment of the other issues addressed in this case, and that if left unaddressed, these errors will lead to further uncertainty, inefficiency, and delay in resolving the Shell OCS-PSD Permits.

I. Background

On March 31, 2010, pursuant to Clean Air Act ("CAA" or the "Act") section 328, 42, U.S.C. § 7627, EPA Region 10 ("Region" or "Region 10") issued an Outer Continental Shelf ("OCS") Prevention of Significant Deterioration ("PSD") Permit to Construct, Permit Number R10OCS/PSD-AK-09-01 ("Chukchi Permit"), to Shell Gulf of Mexico, Inc. ("SGMOI"). On April 9, 2010, Region 10 issued another OCS PSD Permit to Construct, Permit Number R10OCS/PSD-AK-2010-01 ("Beaufort Permit"), to Shell Offshore, Inc. ("SOI").

The Chukchi and Beaufort Permits ("Permits") authorize SGOMI and SOI (collectively, "Shell") to construct and operate the Frontier Discoverer drillship ("Discoverer") and its air emission units to conduct air pollutant emitting activities for the purpose of oil exploration on lease blocks in the Chukchi and Beaufort Seas off the

North Slope of Alaska.[1] Chukchi Permit at 1; Beaufort Permit at 1. Both Permits provide for the use of an associated fleet of support ships ("Associated Fleet"), such as icebreakers and a supply ship, in addition to the Discoverer. OCS PSD permits are governed by 40 C.F.R. Part 55 and the procedural rules set forth in 40 C.F.R. Part 124. *See* 40 C.F.R. § 55.6(a)(3).

Three groups filed petitions requesting that the Board grant review of both the Chukchi and Beaufort Permits: 1) Center for Biological Diversity ("CBD"); 2) EarthJustice, on behalf of several conservation groups ("EJ Petitioners");[2] and 3) Alaska Eskimo Whaling Commission and Inupiat Community of the Arctic Slope ("AEWC"). Soon after the filing of the Petitions, the President announced a suspension of exploratory drilling in the Arctic for at least six months while the Department of Interior gathered additional information about oil spill risks and response capabilities in the Arctic waters, which was followed by Region 10 filing a motion to hold these matters in abeyance and Petitioners filing a motions asking the Board to vacate and remand the Permits. *See* Motion to Hold Matters in Abeyance (May 28, 2010); Motion to Vacate and Remand (June 2, 2010).[3]

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[1] The Secretary of the U.S. Department of the Interior ("DOI") regulates and manages the development of mineral resources on the OCS. *See* 43 U.S.C. § 1334 (authorizing Secretary to administer leasing on the OCS). In particular, the Bureau of Ocean Energy Management, Regulation and Enforcement ("BOEMRE") is responsible for overseeing the safe and environmentally responsible development of energy and mineral resources on the OCS. BOEMRE was established as a result of Secretarial Order 3302, signed on June 18, 2010, by the Secretary of the Interior. Secretary of the Interior, U.S. Department of the Interior, Secretarial Order No. 3302, *Change of the Name of the Minerals Management Service to the Bureau of Ocean Energy management, Regulation and Enforcement* (June 18, 2010), *available at* http://elips.doi.gov/app_so/index.cfm?fuseaction=chroList/.

[2] The EJ Petitioners include Natural Resource Defense Council, Native Village of Point Hope, Resisting Environmental Destruction of Indigenous Lands ("REDOIL"), Alaska Environmental Center, Ocean Conservancy, Oceana, Pacific Environmental, and Sierra Club.

[3] These announcements followed the catastrophic explosion of the drilling rig *Deepwater Horizon* in the Gulf of Mexico. DOI, *Increased Safety Measures for Energy Development on the Outer Continental Shelf* 1 (May 27, 2010), *available at* http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=33598/.

While the Board requested that full briefing on the merits of the Petitions continue, it postponed oral argument on the merits and instead heard oral argument regarding Region 10's and Petitioners' respective motions. The Board subsequently scheduled oral argument on the merits of the Petitions and directed the parties to focus their arguments on three issues: application of BACT to the Associated Fleets' emissions, the OCS source determination, and the environmental justice analysis of the impact of nitrogen dioxide (NO_2) emissions. Order Scheduling Oral Argument at 4-5 (July 19, 2010). At the time, the Board made clear that it had not yet decided whether it would proceed to issue a decision on the merits of those or any other issues. *Id*. That oral argument was held on October 7, 2010.

On December 30, 2010, the Board issued the Remand Order, ruling on the merits of the three issues on which the parties had presented oral argument. In the Remand Order, the Board upheld and denied review of EPA Region 10's decision not to apply BACT to the Associated Fleets' emissions. *Id.* at 38. However, the Board also found "clear error" in EPA Region 10's OCS source determination and the environmental justice analysis of the impact of NO_2 emissions. S*ee id.* at 62-63 (conclusions regarding the OCS source determination) and 80-81 (conclusions regarding the environmental justice analysis). The Board stated that it was remanding the Permits to Region 10 "in their entirety." Remand Order at 82.

In the Remand Order, the Board expressly did not reach the merits of other issues raised in the Petitions, including the application of BACT to control greenhouse gases (GHG), $PM_{2.5}$ background ambient air quality data, the appropriate approach to considering secondary PM2.5 formation in the National Ambient Air Quality Standards

("NAAQS") analysis, compliance with the newly issued 1-hour NO_2 NAAQS, and the inclusion of spill cleanup and certain other activities in the potential to emit analysis. *Id.* at 9 and 82; *see also id.* at 5 n.5.[4] The Board stated that "the administrative record pertaining to each of these issues will likely be significantly altered by the remand of the Permits to the Region to address the clear error discussed in the Board's analysis," *id.* at 9 and 82 (same), and therefore determined that "[t]hese issues and any others raised in the petitions before the Board…are also remanded to the Region," *id.* at 10. In so doing, the Board directed Region 10 to "supplement the administrative record and/or reopen the public comment period to take into account the availability of additional factual information concerning 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." *Id.* at 9. In addition, the Board explained that issues raised in the Petitions concerning applicability of the new 1-hour NO_2 NAAQS and the application of BACT to control GHG "depend on the date on which the Region issues its final permit decision under 40 C.F.R. § 124.15(a) upon conclusion of the remand proceedings." *Id.* at 9. The Board subsequently directed the Region to "apply all applicable standards in effect at the time of issuance of the new permits on remand." *Id.* at 82.

Finally, the Remand Order addressed further EAB challenges to any permits issued by Region 10 after remand, stating that anyone dissatisfied with Region 10's

[4] In addition to this list of specific issues, there are two other issues that were fully briefed by the parties but not addressed in the Remand Order: (a) Region 10's analysis of BACT for PM_{10} and $PM_{2.5}$, and (b) whether Icebreaker #2 is part of the OCS source during the anchoring process.

decision must file a petition seeking the Board's review pursuant to 40 C.F.R. § 124.19(f)(1)(iii). The Board limited the scope of such subsequent petitions "to issues addressed by the Region on remand and to issues otherwise raised in the petitions before the Board in this proceeding but not addressed by the Region on remand." *Id*. at 82.

II. Standard of Review for Motions for Reconsideration and/or Clarification

The regulations governing review of the Permits expressly provide for motions to reconsider a final order of the Board and require that motions for reconsideration set forth "the matter claimed to have been erroneously decided and the nature of the alleged errors." 40 C.F.R. §124.19(g). Such motions will not be granted absent a showing that the Board has made a clear error, such as a mistake of law or fact. *See, e.g., In re Dist. of Columbia Water and SewerAuth.*, NPDES Appeal Nos. 05-02, 07-10, 07-11, and 07-12, at 2 (EAB Apr. 23, 2008) (Order Denying Motion for Reconsideration). "The 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.'" *In re Town of Ashland Wastewater Treatment Facility*, NPDES Appeal No. 00-15, at 2 (EAB Apr. 9, 2001) (Order Denying Motion for Reconsideration) (quoting *In re S. Timber Products, Inc.*, 3 E.A.D. 880, 889 (JO 1992)); *see also* EAB Practice Manual (Sept. 2010) at 49.

Although the relevant regulation only addresses motions to reconsider, the EAB Practice Manual states that the Board will also entertain a motion for clarification filed promptly after issuance of the EAB final order if the moving party can demonstrate that an aspect of the EAB's decision is ambiguous. *See* EAB Practice Manual (Sept. 2010) at

49, n.55. Where a motion for clarification seeks a modification of some aspect of the decision, however, the EAB has treated it as a motion for reconsideration subject to the 10-day filing deadline for such motions. *In re Adcom Wire Co.*, RCRA Appeal No. 92-2, at 2 (EAB July 22, 1994) (Order on Adcom's Motion for Clarification).

In addition, as the Board noted in the Remand Order, the Board does not ordinarily review PSD permitting decisions unless the decision is based on a clearly erroneous finding of fact or conclusion of law or involves important matter of policy or an exercise of discretion warranting review. Remand Order at 10 (citing 40 C.F.R. § 124.19(a) and numerous cases). The Board further acknowledged that in promulgating 40 C.F.R. Part 124, EPA stated that the Board's power of review "should be only sparingly exercised" and that "most permit conditions should be finally determined at the Regional level." Remand Order at 10 (citing 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)).

III. Summary of Argument

As explained in more detail below, Region 10 maintains that the Board erred in several material respects and respectfully requests that the Board reconsider and/or clarify the sections of the Remand Order addressing the Board's decisions to remand the permits in their entirety, to direct the Region to apply permitting standards not applicable at the time the Region initially issued the Permits under review, and to remand unresolved issues to the Region with a direction to supplement the administrative record with additional information regarding those issues. As discussed below, the Board's opinion does not contain a clear explanation for its decision to order a remedy of this nature, and without such an explanation, the decision appears to be inconsistent with

relevant regulations and the Board's precedent. We also seek reconsideration and/or clarification of Board's decision not to reach the merits of other issues raised in the Petitions and to preserve further EAB appeal of these Permits after remand.

Specifically, EPA Region 10 asks the Board to clarify and/or reconsider the basis for deciding that the permits are remanded in their entirety, and directing the Region to further supplement the administrative record with additional information regarding unresolved issues and to apply "all applicable standards in effect at the time of issuance of new permits on remand." Remand Order at 9, 82. As explained below, the Board appears to have based this decision on the assumption that the permit record would change "significantly" on remand. However, until Region 10 has had an opportunity to assess the various options for addressing the Board's remand of the OCS source and environmental justice issues and to use its permitting discretion to arrive at a new determination on remand, it is not clear what changes to the permit the Region will determine are necessary in order comply with the Remand Order or whether those changes will be significant. Region 10 requests that the Board allow the Region to determine, after a careful evaluation of the administrative record and the Board's reasoning, how to address the deficiencies that led to remand of the OCS source and environmental justice issues. In so doing, the Region seeks to preserve its discretion to make permitting decisions on remand, including decisions that would lead to only very limited changes in the Permits and that would affect neither the ambient air and/or BACT analyses to which the new standards might apply nor the administrative record pertaining to the unresolved issues. Accordingly, we ask the Board to clarify that the application of new standards and the extent to which the administrative record should be supplemented

to address the issues left unresolved by the Remand Order will depend on the scope of the changes made to the Permits on remand, and that the Region retains the discretion to make a determination as to the extent to which its initial permitting decision needs to be revised on remand.

In addition, Region 10 asks the Board to reconsider its decision not to address the merits of a number of issues. With regard to four of these issues, we ask the Board to provide a decision on the merits, as they involve important underlying legal or technical issues that would guide the Region's actions on remand – namely, whether Icebreaker #2 is part of the OCS source during the anchoring process; the appropriate approach to considering secondary PM2.5 formation in the NAAQS analysis; Region 10's analysis of BACT for PM_{10} and $PM_{2.5}$; and the inclusion of spill cleanup and certain other activities in the potential to emit analysis. As explained in the summaries below, Region 10 believes its Response to Petitions for Review filed on June 7, 2010 ("Region 10's Response to Petitions") establishes that there was no error on the Region's part with regard to the underlying legal and/or technical issues on these four additional issues raised in the Petitions. Therefore, Region 10 requests that the Board, in consideration of the briefs already filed on the merits of these issues, uphold those determinations and deny review without additional briefing or oral argument. Ruling on these four issues prior to Region 10's completion of actions to address the Remand Order would provide for the most efficient use of the Region 10's resources on remand, limit the issues the Board might need to consider in future challenges to the remanded permits, and provide all parties with more certainty regarding timely final action on Shell's request for permits

authorizing the use of the Discoverer and the Associated Fleet to conduct exploratory drilling operations in the Chukchi and Beaufort Seas.

Region 10 also respectfully requests that given the unique circumstances in this case, the Board reconsider its decision to allow for further EAB appeals after remand. In the interest of limiting the time and resources necessary to arrive at a final permit decision in this case, we ask the Board not to exercise the discretion provided in 40 C.F.R. § 124.19(f)(1)(iii). Instead, we ask the Board to amend the Remand Order to delete the reference to further EAB challenges after remand so that Region 10 may issue final and effective Permits on remand, with any further appeals proceeding directly to federal court.

IV. EPA Requests that the Board Reconsider Its Decision to Remand the Permits in Their Entirety, Including Directing Region 10 to Supplement the Administrative Record with Regard to Unresolved Issue and to Apply New Standards to Any Permits Issued on Remand

Although the Board failed to reach the merits of a many issues raised in the Petitions, the Remand Order remanded the Permits to Region 10 in their entirety. The Board's decision appears to be based on an assumption that "the administrative record pertaining to each of these issues will likely be significantly altered" in the future actions the Region will take to address the errors in the OSC source determination and the environmental justice analysis that were identified by the Board. Remand Order at 9, 82. However, as the Board has recognized, under the regulations governing EAB review, a permit decision will ordinarily not be reviewed – much less remanded – unless the decision is based on either a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. 40

C.F.R. § 124.19(a). *See also In re Zion Energy*, 9 E.A.D. 701, 705 (EAB 2001); *In re RockGen Energy Ctr.*, 8 E.A.D. 536, 540 (EAB 1999); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126-27 (EAB 1999). As the Administrator clearly stated when creating the EAB, the regulations in section 124.19 contain the "express delegation[] of authority from the Administrator to the Board to hear and decide appeals of various types of cases," including permit appeals. 57 Fed. Reg. 5320, 5320 (Feb. 13, 1992). Accordingly, any Board action taken during a permit appeal must be based on the authority provided in part 124. Given the bounds of the regulatory delegation, the Board has recognized that it usually disposes of issues raised on appeal in "one of two forms: either it sustains the permit decision as rationally based on the record before the permit issuer or it remands the permit based on the determination that the record is inadequate or that the permit issuer otherwise erred in issuing the permit." *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 508-09 (EAB 2006).

In this case, the Board took an action – remanding the Permits in their entirety, – without making findings of record inadequacy or other errors regarding all the issues raised in the Petitions. *See generally* Remand Order at 8-10 and 83 (remanding these issues without any explanation of the basis for that remand). The Board's full remand on all issues without either qualification or explanation of the basis for remanding several of the issues raised by Petitioners is a departure from the Board's past precedents remanding permits back to permitting authorities. In the past, the Board has only remanded issues after providing some analysis of the record in light of the review standard. *See, e.g., Northern Michigan University Ripley Heating Plan*, PSD Appeal No 08-02, slip op. at 48 (EAB, Feb. 18, 2009) (finding clear error because many of the facts and analyses

underlying the permitting authority's conclusions about the PSD increment calculus are missing from the permit record); *Teck Cominco Alaska Incorporated*, 11 E.A.D. 457, 486 (EAB 2004) (remanding permit because record demonstrates clear error).

While the Board has sometimes remanded many issues in a permit after formally deciding that remand was warranted under the part 124 standard of review for one issue, the Board has provided more justification for such actions than is reflected in its order on the Shell Permits. In those cases where the Board remanded additional issues after finding clear error with one specific issue, the Board's decisions still contained some analysis of those additional issues and noted serious legal and/or factual questions relating to the permit decision and/or record regarding those issues that could be clarified on remand, even if the Board did not actually find additional issues warranted review under the part 124 standard. *See, e.g., In re Desert Rock*, slip op. at 33-46 (granting a motion for voluntary remand based, in part, on the Board's concerns with the existing endangered species analysis)*; Teck Cominco*, 11 E.A.D. at 496 (remanding a second issue based on the fact that it concerned a permit condition that was added in the final permit and not subject to public comment); *Knauf*, 8 E.A.D. at 140-41, 175 (remanding on a BACT issue after noting numerous questions not resolved in the permit record, but which were necessary to assess the permitting authority's BACT determination); *In re City of Hollywood*, 5 E.A.D. 157, 166-68 (EAB 1994) (while noting that two of the Region's permit conclusions were correct based on the existing record, remanding for further consideration of those conclusions in light of factual evidence that the City had taken additional, new actions that would affect that determination).

A search of EAB decisions found only two other instances in which the Board remanded CAA permits in their entirety, and both of those decisions involved motions for voluntary remand in which the permitting authority explained that they intended to address and/or change numerous matters in the permit if remand was granted. *See In re Peabody Western Coal Company*, CAA Appeal No. 10-01 (EAB, Aug. 13, 2010); *In re Desert Rock Energy Company, LLC*, PSD Appeal Nos. 08-03, 08-04, 08-05, 08-06 (EAB, Sept. 24, 2009) (also finding that the Region erred in failing to include a technology in step one of the BACT analysis). Otherwise, the Board's normal practice appears to be remanding on the specific issues for which they find clear error (or that otherwise meet the standard of review set out in 40 C.F.R. § 124.19(a)) and then limiting the scope of the remand to only those issues. *See Northern Michigan*, slip op. at 66 (limiting remand of the permit to "five components"); *In re Shell Offshore, Inc.*, 13 E.A.D. 357, 406 (EAB 2007) (remanding on the sole issue of the "stationary source" determination and denying review on all other issues); *Knauf*, 8 E.A.D. at 175-76 (specifically stating that the permit is remanded "for the following limited purposes"). Given that the Region did not ask for voluntary remand in this case or specify that it would be making extensive changes to the Permits on remand, the Board should have limited its remand only to the specific issues it addressed on the merits in the decision, consistent with its past practice. In the alternative, the Board could have qualified its remand of the other issues to make clear that the Region must only reopen other terms or conditions to the extent the analysis on remand compels their reopening.

A closer look at Remand Order's treatment of OCS source determination and environmental justice analysis issues provides further evidence that the Board erred in

failing to provide a clear justification for remanding the permits in their entirety. The OCS source determination was remanded because the Region's administrative record did not include "an adequate explanation" of how the Region applied the relevant statutory and regulatory criteria to their source determination in this case and the environmental justice analysis was remanded because the Region erred in applying a limited scope of analysis relating to NO_2 emissions. While it is *possible* that the Region's actions to address the errors regarding the OCS source determination and environmental justice on remand *might* affect many other parts of the permit (if for example, the Region determined that the drill ship becomes an OCS source much earlier in the anchoring process such that there are new OCS emissions that needed to be considered in the ambient air and/or BACT analyses), it is *also* possible that Region 10 could address the OCS source determination and environmental justice analysis errors that were identified in the Board's Remand Order without making far reaching changes in the permit (if for example, Region 10 found that there were not disproportionally high and adverse impacts to the communities at issue after considering the new NO_2 NAAQS in the environmental justice analysis). In the former case, the Region might need to re-open the parts of the permit to which the new standards could apply and/or the parts of the record involving the unresolved issues, but in the latter instance, it is not clear that any such permit re-opening would occur. It is up to the Region to make these determinations on remand, and without clear evidence that far reaching permit changes will occur or are likely to occur, there does not appear to be a basis for remanding the Permits in their entirety.

In this case, the Board has not provided any analysis of the existing permitting record regarding the unresolved issues, or identified error in or concerns with the

Region's existing determinations on those issues. Instead, the Board states that there "will likely be" significant changes in the permit on remand that will affect these issues. Remand Order at 9, 82. However, until Region 10 applies its permitting discretion to assess the options for addressing the Board's remand of the OSC source determination and the environmental justice analysis and to arrive at a new determination on remand, it is not clear what changes to the permit the Region will determine are necessary in order comply with the Remand Order or whether those changes will be significant. Accordingly, the Board's order remanding the Permits in their entirety should include a specific determination that each remanded permitting decision is based on either a clearly erroneous finding of fact or conclusion of law or that it involves an important matter of policy or exercise of discretion that warrants review. *See* 40 C.F.R. 124.19(1).

A. The Remand Order Improperly Directs Region 10 to Supplement the Administrative Record Concerning Unresolved Issues

Further, the Board's order does not contain any detailed support for the conclusion that Region 10 should "supplement the administrative record and/or reopen the public comment period to take into account the availability of additional factual information" concerning these unresolved issues. *Id.* at 9. The primary support the Board provides for this part of its order is a reference to a portion of the Board's order in the *Prairie State* case, which is described in a parenthetical as "discussing the availability of new information during the pendency of a permit proceeding." Remand Order at 9, citing *In re Prairie State Generating Co.,* 13 E.A.D. 1, 64-70 (EAB 2006), *aff'd sub nom. Sierra Club v. U.S. EPA*, 499 F.3d 653 (7th Cir. 2007). However, it is not clear from the Board's order how the discussion in the *Prairie State* decision supports the Board's conclusions in Shell Remand Order that the record should be reopened. In *Prairie State,*

the Board found that the permitting authority did not commit clear error or abuse its discretion in failing to re-open or update its BACT analysis to include additional information that became available after the close of the comment period. 13 E.A.D at 70. The majority of the discussion from *Prairie State* that the Board cites in the Shell Remand Order explains why a permitting authority is not obligated to reopen the administrative record to consider new information after the close of the public comment period. While the discussion in the cited *Prairie State* opinion acknowledges the discretion of the permitting authority to consider such information, the Board's order remanding the Shell Permits effectively directs Region 10 on how to exercise that discretion without providing a clear explanation of the reason why the Region should do so.

In one paragraph of the cited portion of the *Prairie State* decision, the Board explained that "there are circumstances in which significant new information becomes available following the close of public comment that appropriately should be considered in finalizing the permit's terms." 13 E.A.D at 69. The opinion then goes on to describe an example of such a circumstance and then explains why the issue of updating the BACT analysis in *Prairie State* was not appropriate. In contrast, the portion of the Remand Order requiring supplementation of the record with new information does not provide a clear explanation as to why the Board feels the Shell case presents a circumstance where significant new information appropriately should be considered by the Region 10 on remand or explain how these circumstances implicate the entire permit and issues left unaddressed by the Board. In the absence of a detailed justification for directing the Region to supplement the permit record on these unresolved issues, Region

10 respectively requests that the Board – consistent with the reasoning in the cited portion of the *Prairie State* decision – allow Region 10 to make its own judgment as to whether supplementing the administrative record with regard to the unresolved issues is necessary in light of the specific actions the Region takes in addressing the Board's Remand Order in this case.

B. The Remand Order Improperly Directs Region 10 to Apply New Standards to Any Permits Issued on Remand

While the Board said it was not addressing the merits of a number of issues – including the arguments regarding the applicability of the new 1-hour NO_2 NAAQS and the application of BACT to control greenhouse gases ("GHGs") – the decision effectively orders the very remedy the Petitioners requested regarding application of these new standards by requiring Region 10 to apply the hourly NO_2 NAAQS and GHG BACT requirements to the Permits on remand. For example, the Board stated that applicability of these standards will "depend on the date on which the Region issues its final permit decision under 40 C.F.R. § 124.15(a) upon conclusion of the remand proceedings." *Id.* at 9. Since it would have been virtually impossible for the Region to issue a decision on remand before the January 2, 2011 date when greenhouse gases became subject to regulation under the Clean Air Act, the Board's Remand Order effectively requires the relief Petitioners requested on one of the issues that the Board expressly declined to address – the applicability of GHG requirements to these Permits. In addition, the Board's decision implies that the Region was not required to apply the new 1-hour NO_2 standard in its PSD analysis in the initial permit, but then immediately stated that consideration of the issue was mooted by the nature of its remand. *See* Remand Order at

66, n. 76. And later in its order, the Board directed the Region to "apply all applicable standards in effect at the time of issuance of the new permits on remand." *Id.* at 82.

These sections of the Remand Order do not clearly articulate whether the Board's decisions regarding the applicability of new requirements to the Shell Permits on remand are based on the particular circumstances of this case or whether the Board is intending to establish a general principle that new requirements must always apply to a permit on remand. As counsel for Region 10 articulated in response to the Board's questioning at oral argument, the applicability of new requirements would depend on the scope of the remand. *See* Oral Argument Transcript (October 7, 2010) at 81 (Oct. Oral Arg. Tr.) (explaining that Region 10 would "need to see the scope of the remand and figure out what portions of the permit it would affect and from there we would determine what parts and what aspects would be appropriate to reopen and look at again"); *see also* Oral Argument Transcript (June 18, 2010) at 53 (June Oral Arg. Tr.) (stating that further discussion within EPA was needed regarding the application of new standards in the case of a remand that resulted in changes only to the permit record). However, it is unclear from the Remand Order whether the Board agrees with that principle or whether it intends to establish a more sweeping precedent, in which new requirements apply in any circumstances where a permit is remanded on one or more issues, no matter how narrow those issues may be.

The question of the extent to which new requirements should apply to a remanded permit has not been clearly resolved by prior EPA statements or EAB opinions. While the Board cited to EAB cases and EPA guidance documents to support the statement that applicability of the new standards will "depend on the date on which the Region issues its

final permit decision under 40 C.F.R. § 124.15(a) upon conclusion of the remand proceedings," none of the cited documents actually addressed permits issued after remand from the EAB. Instead, they all addressed initial permit issuance by the permitting authority. Region 10 respectively requests that the Board provide Region 10 the opportunity to consult with EPA Headquarters and other Regions on this issue before establishing that the reasoning of prior EPA statements made in the context of initial permit issuance applies in the same manner to the potentially distinct circumstances at issue here, in which after a remand by the Board the permit record may be supplemented without changes to the initial permit, the initial permit may be revised in part, or the initial permit may be re-issued in its entirety by the Region

There may, in fact, be grounds to conclude that the relevant EPA guidance and EAB decisions support a finding that permits issued after remand from the Board are not new final permits, but rather are continuations of the permit originally issued by the Region such that the applicable legal standards should relate back to the point in time when the Region initially issued the permit. While the Remand Order cites to the Agency's greenhouse gas permitting guidance, *see id.* at 9 (citing Office of Air and Radiation, U.S. EPA, *PSD and Title V Permitting Guidance for Greenhouse Gases* at 3 n.6 (Nov. 2010)), that guidance does not address the issue of whether the GHG permitting requirements apply to permits issued before January 2, 2011 that are subsequently remanded. Based on a review of the guidance, it is not clear that EPA's Office of Air and Radiation, as well as other interested offices, have reached a conclusion as to whether the greenhouse gas requirements should apply to a permit on remand. Region 10 thus respectively requests that the EAB clarify its order to ensure that Region

10 has the opportunity to consult with the Office of Air and Radiation and other EPA offices in considering the extent to which greenhouse gas requirements should apply to permits on remand.

In addition, prior EAB cases set out two factors that the EAB considers in deciding whether new standards should apply after the Region's initial permit issuance: (1) whether the rule promulgating the new standard indicated that the standard is intended to apply to permits retroactively, and (2) whether a remand of the new standard would be equitable. *See, e.g., In re Russell City Energy Ctr., LLC, PSD Appeal Nos. 10-01 through 10-05, slip op. at 107-113 (EAB 2010), 15 E.A.D. __; In re Dominion Energy Brayton Point, LLC,* 12 E.A.D. 490, 614-18 (EAB 2006). The Board conducted no such analysis in this case, but instead summarily concluded that the Region should apply "all applicable standards in effect at the time of issuance of the new permits on remand," regardless of whether those standards were in effect at the time the Region initially issued the permit. Remand Order at 82. However, there is no evidence that the Agency intended that the new NO_2 NAAQS or GHG permitting requirements should apply retroactively. Primary National Ambient Air Quality Standards for Nitrogen Dioxide; Final Rule, 75 Fed. Reg. 6474, 6529 (February 9, 2010) (stating that the standards come into effect 60 days after promulgation); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule, 75 Fed. Reg. 31514, 31516 (stating that GHG permitting requirement do not begin to apply to any sources until Jan. 2, 2011 – almost seven months after promulgation – and that the requirements would not apply to other sources until July 2011 or later).

As the Administrator stated in the decision that underlies the various EAB decisions the Board relied on here,

> The standards and guidelines for the preparation of NPDES permits must be fixed at some point in time so permit terms can become final and pollution abatement can proceed. I believe the proper point in time for fixing applicable NPDES standards and guidelines is when the Regional Administrator *initially* issues a final permit.

In re U.S. Pipe & Foundry Co., NPDES Appeal No. 75-4 (Adm'r 1975) (emphasis added), *aff'd in relevant part by Alabama ex rel. Baxley v. EPA*, 557 F.2d 1101, 1108-1110 (5th Cir. 1977). In this case, the Board has not provided a fixed point in time for applying the standards, but instead has created a system in which any permit remand requires the permitting authority to address the new standards. Such an outcome was specifically addressed by the Board in the recent *Russell City* 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 above. *Russell City*, slip op. at 107-113. In particular, the Board discussed that the permitting process had been ongoing for almost four years, noted that significant time and resources had been devoted by the permitting authority (in applying the old/existing standards) and other parties (in commenting, participating, etc.), and rejected the idea that a remand should lead to an "endless loop" of permit issuances, appeals, and remands. *Id.* at 112. Likewise, the Shell OCS permitting matters at issue here have been on-going for many years[6] and have involved significant time and resources from the Region, the applicant, the petitioners, and the Board.

[6] While the specific Permits addressed in this matter were issued last year, Region 10's OCS permitting of Shell's exploratory activities using the Discoverer drillship was the subject of a previous permit and petition, and Shell has been seeking OCS permits authorizing exploratory activity with regard to the leases at issue in this case since at least 2007. *See In re Shell Offshore, Inc.*, 13 E.A.D. 357, 406 (EAB 2007).

In *Russell City*, the Board also explained that the cases in which the Board *did* direct the permitting authority to apply new standards on remand were cases in which the permittee had already filed a permit modification request based on the new standard or where the rule establishing the new standard already required the permittee to seek a permit modification to apply the new standard. *Id.*, slip op. at 110, *citing In re J&L Specialty Prods. Corp.*,5 E.A.D. 31, 66 (EAB 1994), and *In re GSX Servs. of S.C., Inc.,* 4 E.A.D. 451, 465 (EAB 1992), respectively. Neither of these circumstances is present in the current Shell permitting action.

The broad remand that the Board has issued in this case, including exercising its discretion to direct Region 10 to apply new standards in effect when issuing the permit on remand, is creating exactly the type of "endless loop" of permit issuances, appeals, and remands that the Board sought to avoid in *Russell City* without undertaking the analysis considered appropriate in that in other decision. Accordingly, we request that the Board clarify how its approach to these issues in the Shell matter can be reconciled with the reasoning employed in *Russell City* and the other permitting decisions cited above.

For all the reasons described above, we believe the Board should reconsider its decision that the Permits are remanded in their entirety, including the decision that the Region should apply new standards when acting in response to the Board's remand and should supplement the record with information concerning issues unresolved by the Board. Accordingly, EPA Region 10 requests that the Board clarify that the Permits are only remanded with regard to the OCS source determination and environmental justice analysis, and that the extent to which new standards apply and the administrative record

must be supplemented on remand will depend on the extent to which the Region re-opens the Permits on remand.

V. A Board Ruling on Four Additional Underlying Legal and/or Technical Issues Raised in the Petitions Will Provide All Parties with More Certainty Regarding Timely Final Action on the Permits

Now that the Board has addressed the merits of three of the issues raised in the Petitions and remanded the Permits to EPA Region 10 to address the OCS source determination and the environmental justice analysis, the Board should also rule on four additional underlying legal and/or technical issues raised in the Petitions.[7] As the Board has recognized, this is not the first time these permitting matters have been before the Board. Oral Argument Transcript (June 18, 2010) at 58-59 (June Oral Arg. Tr. Ruling on these issues now, instead of deferring judgment and allowing for the possibility that the Board could later determine Region 10 erred on these issues, would alleviate the on-going uncertainty in this case, while increasing administrative and judicial efficiency and mitigating additional delays in taking final action on the Permits.[8]

Moreover, there is a particular need for administrative efficiency in the case of PSD permits, such as these, the permitted activities cannot begin until the petition has been resolved and a final permit issued. In fact, based on these limitations, such permits are given priority before the Board on petitions for review. June Oral Arg. Tr. at 44; *see*

[7] To the extent the Board declines at this time to grant or deny review on these four issues or any of the other unresolved issues in the Petitions, Region 10 requests that the Board clarify that it is deferring ruling on these issues, rather than that it is remanding these issues to Region 10. As explained above, it is Region 10's position that the Board has not provided a basis for remanding the Permits to Region 10 on any issues other than the three issues on which the Board expressly granted or denied review in the Remand Order.

[8] The remaining issues that were not addressed in the Board's Remand Order – regarding application of the newly issued 1-hour NO_2 NAAQS, application of BACT to control GHGs, and the $PM_{2.5}$ background ambient air quality data – involve areas of the permit in which the Region retains the discretion to determine the extent to which its initial permitting decision needs to be revised and/or supplemented on remand, as explained in §IV, *supra*.

also EAB Practice Manual at 48, n. 53 and appendices 2 and 3 (generally allowing 45 days for submission of responses to petitions for review of non-PSD permits, but specifying 15 or 30 days for the submission of responses to petitions for review of PSD permits). Ruling on these issues now will give all parties the benefit of the Board's decision on these issues before Region 10 completes its action in response to the Board's Remand Order with respect to the definition of OCS source and the environmental justice analysis.

The four additional issues on which Region 10 requests that the Board rule now are: 1) whether Icebreaker #2 is an OCS source during the anchoring process; 2) the appropriate technical approach to considering secondary formation of $PM_{2.5}$ in connection with the $PM_{2.5}$ NAAQS demonstration; 3) Region 10's analysis of BACT for PM_{10} and $PM_{2.5;}$ and 4) the inclusion of spill cleanup and certain other activities in the potential to emit analysis. Although each of these four issues does involve minor consideration of factual issues that could change on remand, they also involve fundamental legal questions or technical determinations that are unlikely to change in light of Region 10's consideration the OCS source determination and environmental justice analysis on remand. Because these issues have been fully briefed and are ripe for review,[9] Region 10 requests that the Board reconsider its decision to remand these four issues to Region 10 and instead deny review on these four issues based on the briefs that

[9] *See In the Matter of General Electric Company Permittee*, 4 E.A.D. 615, 623 (EAB 1993) (stating that claims are "'ripe' or fit for disposition by the Board if a final permit decision has been issued by the Region, and the petitioner is challenging the permit as it now reads" (citing 40 CFR § 124.19(a))); *cf. W.R. Grace & Co. v. U.S. E.P.A.*, 959 F.2d 360, 364 (1st Cir. 1992) (noting that "perhaps the most important consideration in determining whether a claim is ripe for adjudication is the extent to which the claim involves uncertain and contingent events that may not occur as anticipated, or indeed may not occur at all") (internal quotation marks omitted).

have been submitted by the parties.[10] *See* June Oral Arg. Tr. at 28-29 (recognizing that, if there are issues that are primarily legal, it is in the parties' interest to have the Board identify any errors earlier in the review process); 59 (recognizing the importance of guidance from the Board on issues that are likely to arise again in review in the case of these particular permits due to the short drilling season and the time it takes to get through the permitting process); 77 (discussing the time savings in knowing earlier on in the process the changes that the Board may require).

A. Region 10's Determination that Icebreaker #2 is not an OCS Source During the Anchoring Process is a Legal Conclusion that is Ripe for the Board's Consideration

In issuing the Permits, Region 10 concluded that Icebreaker # 2 was not an OCS source. Chukchi January 2010 Statement of Basis, AR EPA Ex. J-2 at J000078, n. 7; Beaufort February 2010 Statement of Basis at NN-10 at N000142, n. 8; *see also* Region 10 Response to Petitions at 23-26. The relevant regulatory language in the case of a vessel that is not itself an OCS source is whether the vessel is physically attached to an OCS facility, in which case only the stationary source aspects of the vessel will be regulated as an OCS source. 40 C.F.R. § 55.2. Thus, the questions to be decided are whether Icebreaker # 2 is physically attached to the Discoverer (1) during the anchoring process and (2) while the Discoverer is an OCS source; and (3), if so, whether Icebreaker #2 has "stationary source aspects" during this time. There is no reason to believe that either the connection between Icebreaker #2 and the Discoverer during the anchoring process or the activities that Icebreaker #2 will engage in during the anchoring process

[10] While Region 10 believes denial of review of these issues is appropriate, as explained herein, in the event that the Board disagrees, Region 10 still requests a decision on the merits of these issues, given the certainty that such a ruling would provide going forward.

are likely to change as a result of the steps the Region will take to address the OCS source determination or the environmental justice analysis on remand.

When the Discoverer becomes an OCS source is an issue that the Board has directed Region 10 to reconsider on remand and therefore could change in permits issued by Region 10 in response to the Remand Order. However, Region 10 can think of only one scenario – a determination that the Discoverer is not an OCS source until all eight anchors are attached – that would render it unnecessary for the Board to determine on remand whether Region 10 erred in concluding that Icebreaker #2 is not an OCS source during the anchoring process, since this is the only scenario where the Discoverer would not be an OCS source during the anchoring process. If the Board agrees with the AEWC Petitioners that Icebreaker #2 is an OCS source during the anchoring process, Shell would be required to conduct and submit to Region 10 a BACT analysis for at least some emissions from Icebreaker #2 during the anchoring process, which would further delay issuance of any permits in response to a remand. Because the underlying legal issues (i.e., the extent of a connection necessary for a "physical attachment" and the "stationary source aspects" of Icebreaker #2 during the anchoring process within the meaning of the definition of OCS source in 40 C.F.R. § 55.2) will not change without a further ruling from the EAB, the Region's prior determination that Icebreaker # 2 is not an OCS source during the anchoring process is also not expected to change on remand. Therefore, it would be most expedient for the Board – prior to Region 10's reissuance of the Permits in response to the Remand Order – to rule on the Petitions based on the briefing that has been submitted by the parties to date. And, for the reasons set forth in Region 10's

Response to Petitions, Region 10 requests that the Board deny the Petitioners' request for review on this issue.

B. Region 10's Approach to Demonstrating Compliance with the $PM_{2.5}$ NAAQS Relating to the Secondary Formation of $PM_{2.5}$ Is Unlikely to Change on Remand

In issuing the Permits, Region 10 concluded that the proposed source would not cause or contribute to a violation of the $PM_{2.5}$ NAAQS and included in that determination consideration of secondary formation of $PM_{2.5}$. Region 10 explained that the proposed source would not be expected to contribute significantly to sulfate and nitrate concentrations in the ambient air and that a conservative modeling assessment of direct $PM_{2.5}$ emitted from the proposed OCS source was sufficient to account for potential secondary formation of $PM_{2.5}$ attributed to the permitted emissions. Chukchi Response to Comments, AR EPA Ex. L-2 at L000154-155, L000188; Beaufort Response to Comments, AR EPA Ex. PP-5 at PP000393; *see also* Region 10 Response to Petitions at 56-57. Region 10 also determined that, consistent with EPA guidance, secondary formation of $PM_{2.5}$ from other sources was adequately reflected in the monitored background concentrations of $PM_{2.5}$. Beaufort Response to Comments, AR EPA Ex. PP-5 at PP000393; Chukchi Response to Comments, AR EPA Ex. L-2 at L000188; *see also* Region 10 Response to Petitions at 58.

It is possible that the demonstration that the Discoverer will not cause or contribute to a violation of the $PM_{2.5}$ NAAQS may need to be reconsidered on remand due to a revised OCS source determination. However, there is little reason to believe that Shell's or Region 10's basic approach for considering secondary $PM_{2.5}$ formation in the $PM_{2.5}$ NAAQS analysis – which, as explained in the statements of basis, response to

comments and briefs, is consistent with EPA regulations and guidance on this issue – will change on remand. Thus, if the Board were to find clear error in Region 10's approach in the Permits to the $PM_{2.5}$ NAAQS demonstration as it relates to secondary $PM_{2.5}$ formation, delaying a decision on the merits of this issue until after the Region has completed its actions on remand will only serve to further delay final action on Shell's request to conduct exploratory operations in the Chukchi and Beaufort Seas. Region 10 therefore respectfully requests that the Board deny review of this issue at this time based on the briefing that has been submitted by the parties to date and for the reasons set forth in Region 10's Response to Petitions.

C. Region 10's BACT Analysis for $PM_{2.5}$ and PM_{10} Is Unlikely to Change on Remand

In issuing the Permits, EPA conservatively assumed that all PM_{10} was $PM_{2.5}$ and determined that the control devices designed to reduce $PM_{2.5}$ emissions for these particular sources are also effective on particulate matter in the larger size ranges, such as PM_{10}. *See* Chukchi Response to Comments, AR EPA Ex. L-2 at L000096; *see also* Region 10 Response to Petitions at 66-70. The AEWC Petitioners challenged this determination. [11]

Although consideration on remand of when the Discoverer becomes an OCS source could result in the need to conduct a BACT analysis for additional emission units, there is no reason to expect that Region 10's basic approach to analyzing BACT for PM_{10} and $PM_{2.5}$ for engines and other emission units in the Permits will change when Region 10 reconsiders the OCS source determination or environmental justice analysis on

[11] The Remand Order does not specifically identify the PM_{10} and $PM_{2.5}$ BACT determination as an issue that remains to be decided, but the issue is presumably addressed in the Remand Order by the directive that "any other issues raised in the petitions before the Board in this proceeding, therefore, are also remanded to the Region." Remand Order at 10.

remand. Because the issue of BACT for PM_{10} and $PM_{2.5}$ has been fully briefed by the parties and is not expected to change on remand, Region 10 respectfully requests that the Board deny the Petitions on this issue for the reasons set forth in Region 10's Response to Petitions.

D. Region 10's Determination that Neither the Clean Air Act nor or the PSD Regulations Require EPA to Include Emissions from Emergency Oil Spill Responses or Unplanned Operations is a Legal Conclusion Ripe for Decision by the Board

In issuing the Permits, Region 10 concluded that only routine emissions associated with normal operations of the project are to be considered as part of the source's potential to emit, and that speculative emissions that could be associated with possible emergency situations are not included in the required analysis for PSD permits. *See* Chukchi Response to Comments AR EPA Ex. L-1 at L000159; *see also* Region 10 Response to Petitions at 87-94. Therefore, in permitting the Shell operations in this case, Region 10 did not and was not required to quantify emissions from the "worst" or unpredictable emergency situations in which oil spill response related emissions might result and include them in the potential to emit and the air quality analysis. The AEWC Petitioners challenged EPA's determination on this issue. Although it is possible that the extent of emissions included in the potential to emit of the OCS source in these permits could change when EPA addresses the scope of the OCS source on remand or based on other circumstances, the premise underlying Region 10's determination of the potential to emit of the OCS source—that only routine emissions associated with normal operations of the project are to be considered as part of the source's potential to emit, and that speculative emissions that could be associated with possible emergency situations are not

included in the required analysis for PSD permits—is a legal interpretation of the PSD regulations and the Clean Air Act. Because this issue has been fully briefed by the parties and is not expected to change on remand, Region 10 respectfully requests that the Board deny review of this issue at this time for the reasons set forth in Region 10's Response to Petitions.

E. Region 10's Previous Motion to Hold Matters in Abeyance is not Inconsistent with Region 10's Current Request that the Board Deny Review of the Petitions on these Issues at this Time

EPA Region 10 acknowledges that in motions and briefs filed on May 28, 2010, and June 10, 2010, Region 10 requested that the Board hold its review of the Permits in abeyance pending the outcome of the moratorium, suspension and related activities on Shell's exploratory oil and gas drilling operations in the Chukchi and Beaufort Seas. Region 10 based its request on the fact that DOI stated it would postpone consideration of Shell's proposed exploration in the Arctic until 2011, in order to gather additional information about oil spill risks and response capabilities in the Arctic waters. *See* EPA Region 10's Opposition to Petitioner's Motion to Vacate and Remand and Reply to Shell's Opposition to Motion to Hold Matters in Abeyance at 3. Region 10 requested that the briefing of and oral argument on the issues raised in the Petitions, as well as the Board's ruling on the merits of the Petitions, be held in abeyance.

The circumstances that existed at the time Region 10 requested that the Board hold its review of the Permits and consideration of the Petitions in abeyance have since changed in a number of respects. First, the Board denied Region 10's request to hold the briefing schedule in abeyance and all issues raised in the Petitions have been fully briefed by the parties on the merits. Second, the moratorium for the 2010 drilling season is no

longer in effect and, although DOI has not completed its review of offshore drilling in all respects, EPA understands that DOI is currently reviewing Shell's Application to Drill in the Beaufort Sea. *See* Shell's Notice of Related Decision and Request for Status Conference (Nov. 12, 2010) at 2. Although DOI has not completed its review of offshore drilling at this time and Region 10 does not know whether DOI may at some point impose requirements that could change the emissions profile of the sources authorized under the Permits, we believe at this point in time – given that it is now almost 10 months since the Permits were issued – it is appropriate for the Board to review the Permits as they now stand.

Most importantly, the Board has issued a ruling on the merits of three issues raised in the Petitions and remanded the Permits to Region 10. The Permits are therefore before Region 10 for further consideration at this time. An EAB ruling on the merits of the four additional legal and technical issues discussed above would add further clarity to the scope of issues Region 10 must consider on remand and reduce potential issues to be considered in any appeals after remand. This would in turn reduce the likelihood that the Permits, if reissued by Region 10 in response to the Remand Order and again the subject to a petition for review, are yet again remanded to Region 10 because the Board finds a clear legal or factual error in Region 10's determination. Region 10 therefore respectfully requests that the Board rule at this time on the merits of the four issues discussed above and, for the reasons set forth in Region 10's Response to the Petitions, that the Board deny review of these four issues.

VI. The Board Should Reconsider Its Decision to Preserve EAB Appeal of the Permits Following Remand

The Board's Remand Order addressed further EAB challenges to any permits issued by Region 10 after remand, stating that anyone dissatisfied with Region 10's decision could file a petition seeking the Board's review pursuant to 40 C.F.R. § 124.19(f)(1)(iii). That regulation specifically provides that, for the purposes of judicial review in federal court, a "final" permit is issued by the permitting authority "[u]pon the completion of remand proceedings if the proceedings are remanded, *unless* the Environmental Appeals Board's remand order specifically provides that appeal of the remand decision will be required to exhaust administrative remedies." *Id.* (emphasis added). Accordingly, under the regulations, there is no right to EAB review of a permit decision after remand – it exists only if the Board exercises its discretion to provide for it. Given the unique circumstances in this case, we ask the Board to reconsider its use of discretion to allow for further EAB appeals after remand in this case.

As the Board has recognized, Region 10 and Shell have been working on these OCS permitting matters for many years, and this is not the first time these permitting matters have been before the Board. June Oral Arg. Tr. at 58-59. While the Board has as a matter of practice generally preserved review of PSD permits after remand, such permits usually address conventional stationary sources that will operate for decades after receiving final PSD permits. *See, e.g., Northern Michigan University*, slip op. at 67; *In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03 (EAB, Nov. 13, 2008), slip op. at 64. However, we believe the unique circumstances limiting Shell's ability to undertake the specific activities that would be addressed in a final permit decision in this

matter – namely, the short yearly drilling season and the time-limited nature of their leases for these exploratory activities – weigh in favor of adopting a different approach and limiting further EAB review in this case. In addition, the Board itself has expressed a desire to arrive at a final permitting decision in this matter without consuming more Board resources and without asking the Board to act on an expedited schedule. June Oral Arg. Tr. at 58-59.

Given the likelihood that Petitioners will seek to challenge any decision by the Region granting a permit to Shell upon completion of the remand, the Board's discretionary provision of further EAB appeals in this matter ensures that the issuance of a final permit decision will be further delayed. Region 10 is confident, in light of the direction provided in the Remand Order for addressing the OCS source and environmental justice issues, that we will be able to defend any subsequent permitting decisions in federal court at the completion of the remand, especially if the Board grants our request and fully addresses the other outstanding issues at this time. Accordingly, we ask the Board to grant reconsideration on this issue and amend the Remand Order to delete the reference to further EAB challenges after remand.

VII. Conclusion

For the foregoing reasons, EPA respectfully requests that the Board grant this Motion for Reconsideration and/or Clarification and modify the portions of the Remand Order containing the errors discussed above.

Dated this 21st day of January, 2011

Respectfully submitted,

__/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the EPA REGION 10 MOTION FOR RECONSIDERATION AND/OR CLARIFICATION to be served by electronic mail upon the counsel listed below.

Dated this 21st day of January, 2011

__/s/_____
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