Michael LeVine
Clayton Jernigan
Eric Jorgensen
EARTHJUSTICE
325 Fourth Street
Juneau, AK 99801
Ph: (907)-586-2751
Fax: (907)-463-5891

Attorneys for Petitioners

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

In re:	)
Shell Offshore, Inc.	)
Permit No. R10OCS-AK-07-01, R10OCS-AK-07-02	)

PETITIONERS' REPLY TO EPA REGION 10 AND SHELL OFFSHORE INC.'S RESPONSES TO PETITIONS FOR REVIEW

Petitioners Resisting Environmental Destruction On Indigenous Lands, a Project of the Indigenous Environmental Network, Northern Alaska Environmental Center, Alaska Wilderness League, Center for Biological Diversity, and Natural Resources Defense Council (collectively, "REDOIL") submit this reply to EPA Region 10's Response to Petitions for Review (filed August 3, 2007) ("EPA Response") and Shell Offshore Inc.'s Response to Petitions for Review (filed, as corrected, July 30, 2007) ("Shell Response").

INTRODUCTION

The Environmental Protection Agency ("EPA") committed two fundamental errors in granting Shell Offshore, Inc. ("Shell") minor source permits for oil and gas exploration activities scheduled to take place on the Outer Continental Shelf ("OCS") over the next three years. It acted contrary to the plain language of the Clean Air Act by treating the same drill ship as a separate source at different well sites in determining that the ships were not subject to regulation under the Prevention of Significant Deterioration of Air Quality ("PSD") program. The agency also failed to provide any justification or analysis to support its conclusion that ships drilling at different well sites cannot be "contiguous or adjacent" for purposes of aggregating emissions if the well sites are more than 500 meters apart.

These issues—whether EPA has impermissibly interpreted the Clean Air Act and whether it has provided any justification for its use of 500 meters—are not technical in nature. Accordingly, EPA's determination on these matters is not owed special deference by the Board, and the Board should accept REDOIL's petition and vacate EPA's decision if it does not comport with the law or is not supported in the record.

In response to REDOIL's petition, neither EPA nor Shell can show that the agency's decision comports with the Clean Air Act. Contrary to their assertions, the Act does not allow—or require, as Shell argues—EPA to separate emissions from the same drill ship in the same year. EPA argues that OCS sources are no different than any other sources and that the only analysis it must undertake is to determine whether separate sites should be aggregated pursuant to 40 C.F.R. § 51.166(b)(6). That argument, however, does not comport with Congress's definition of an "OCS source" and simply presumes that emissions may be separated by well site. Shell takes this argument one step further and takes the inconsistent position that the statute and regulations

require EPA to treat the separate drill sites as separate sources. This argument finds no support in the statute or supporting regulations. Both EPA and Shell also contend that considering emissions from all wells drilled by the same drill ship in a given year would not comport with Congress's intent to subject OCS sources to regulations comparable to those onshore. Neither, however, provides any explanation for why this might be so or gives any examples of a similar onshore situation. In fact, there is no comparable statutory provision or regulation for portable drill rigs onshore and no showing that emissions from such rigs should not be aggregated for purposes of determining whether to apply PSD requirements.

Similarly, neither Shell nor EPA provide any justification for using 500 meters as the distance at which separate well sites are not "contiguous or adjacent." They can point to no analysis, and the administrative record does not reflect any, to show why the agency chose that distance. Because the agency failed to provide any explanation or analysis to support its decision to rely primarily on separation by 500 meters, the Board cannot uphold EPA's decision.

ARGUMENT

I. REDOIL'S PETITION FOR REVIEW DOES NOT RAISE TECHNICAL ISSUES ON WHICH EPA IS OWED PARTICULAR DEFERENCE.

EPA and Shell contend that issues presented in the petitions for review are technical in nature and that, accordingly, the agency's determinations should be afforded particular deference. *See* EPA Response at 4; Shell Response at 14-39.[1] This heightened deference, however, does not apply to REDOIL's petition because it does not raise issues within EPA's technical expertise.

[1] Shell argues directly that EPA's decision not to aggregate emissions from wells sites more than 500 meters apart is subject to this heightened deference. *See* Shell Response at 14-16. EPA references this standard but does not make a specific argument that it applies to REDOIL's claims. *See* EPA Response at 4.

In certain circumstances, the Board will accord heightened deference to highly technical determinations that lie within the agency's realm of expertise. *See In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667-70 (EAB 2001) (describing calculation of low-flow value for receiving waters as a "technical judgment"); *In re Am. Soda, LLP*, 9 E.A.D. 280, 295-97 (EAB 2000) (stating that EPA's determination concerning the reliability of groundwater monitoring data is technical); *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 403-04 (EAB 1997) (determining that a risk assessment methodology is a technical issue); *In re Wash. Aqueduct Water Supply System*, 11 E.A.D. 565, 573-74 (EAB 2004) (indicating that the selection of "representative" data sets as a basis for permit conditions is a technical issue). Neither of REDOIL's arguments here invoke the agency's technical expertise. There is no challenge to an expert's computation, assessment of a methodology, or determination of the integrity of data. Rather, REDOIL challenges EPA's interpretation of the Clean Air Act and its complete failure to justify the decision (as opposed to the adequacy of any justification) that well sites are not contiguous and adjacent if they are farther than 500 meters apart. These decisions are not entitled to deference.

In situations such as this, that do not involve technical determinations, the Board will remand a permit that does not comport with the law. *See, e.g., In re Teck Cominco Alaska, Inc., Red Dog Mine*, 11 E.A.D. 457, 491-94 (EAB 2004) (remanding a permit that fails to ensure compliance with water quality standards when the Board "cannot determine that the Region's decision was something other than arbitrary and capricious"); *In re Caribe Gen. Elec. Prod., Inc.*, 8 E.A.D. 696, 712 (EAB 2000); *Ash Grove Cement Co.*, 7 E.A.D. at 416-18.

Further, whether or not the agency's technical judgment is involved, EPA must explain and adequately support its decision in the record. *See In re NE Hub Partners, L.P.*, 7 E.A.D.

561, 568 (EAB 1998) ("Nonetheless, the Board takes a careful look at technical issues and will not hesitate to order a remand when a Region's decision on a technical issue is illogical or inadequately supported by the record."); *Ash Grove Cement Co.*, 7 E.A.D. at 417 ("[T]he Region 'must articulate with reasonable clarity the reason for [its] conclusions and the significance of the crucial facts in reaching those conclusions.'") (quoting *In re Carolina Power & Light Co.*, 1 E.A.D. 448, 451 (Act'g Adm'r 1978)); *In re Dominion Energy Brayton Point, LLC*, NPDES Appeal No. 03-12, slip op. at 28 (EAB, Feb. 1, 2006) ("The Region's rationale for its conclusions, however, must be adequately explained and supported in the record."); *In re Gov't of the D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 342-43 (EAB 2002) ("Without an articulation by the permit writer of his analysis, we cannot properly perform any review whatsoever of that analysis and, therefore, cannot conclude that it meets the requirement of rationality.").

Finally, REDOIL's petition presents important policy considerations subject to the Board's review. *See* 40 C.F.R. § 124.19(a)(2). The accelerated leasing of oil and gas on the OCS, coupled with persistently high oil prices means that interest in exploration drilling in the Arctic Ocean is likely to increase dramatically in coming years. *See* Petition for Review (filed July 16, 2007) at 4-5 ("REDOIL Petition"). Properly regulating these sources of air pollution and greenhouse gases is crucial to ensuring air quality in the region and effectuating the goals of Congress. *See id.* at 6-9.

II. EPA AND SHELL SEEK TO LIMIT THE CLEAN AIR ACT IN A MANNER CONTRARY TO THE CLEAR LANGUAGE OF THE STATUTE AND CONGRESS'S INTENT.

As explained in REDOIL's Petition, EPA has acted contrary to the plain language of the Clean Air Act and Congress's intent, by considering emissions from the same drill ship at

different well sites to be different sources for purposes of determining whether the PSD provisions apply. In an effort to justify this determination, EPA and Shell take inconsistent positions about the effect of Clean Air Act section 328, 42 U.S.C. § 7627, and its interplay with the PSD program. Ultimately, neither EPA nor Shell can harmonize the language of the Clean Air Act with the decision in this case.

EPA asserts that Section 328 does not create a special category of OCS sources but simply confers authority to regulate sources on the OCS under the existing Clean Air Act framework. *See* EPA Response at 5-8. Thus, according to EPA, the only relevant inquiry in this case is whether emissions from the separate well sites should be considered "contiguous and adjacent." *Id.* at 8. This analysis is flawed in several respects.

First, EPA fails to give proper weight to Congress's action in adding Section 328. As explained in REDOIL's petition, Congress amended the Clean Air Act to include Section 328 in response to its concern about the significant pollution emissions on the OCS. *See* REDOIL Petition at 5-6. To address that situation, Congress did more than simply allow EPA to regulate emissions on the OCS. It required regulation of "OCS sources," specifically including drill ship exploration, under the PSD program. *See* 42 U.S.C. § 7627(a)(1) & (4)(C). Congress went so far as to instruct the agency to include the emissions from support vessels within 25 miles of the drill ship as emissions from an "OCS source." *Id.* Thus, Congress did more than simply state that OCS activities could be regulated; it instructed the agency which activities, equipment, and emissions to include.

EPA agrees that "the OCS source is the drillship[] and its associated vessels," Response to Comments at 52 (NSB Ex. 12); *see also* Statement of Basis at 5-6 (NSB Ex. 3) (identifying the emissions sources from the Kulluk as the "OCS Source"), but does not explain how that

recognition comports with its decision to separate emissions from that source by well site. EPA does not respond to REDOIL's argument that the agency has added a limitation to the definition of "OCS source" enacted by Congress that cannot be supported by the text of the statute. Congress could have, but did not, define an "OCS source" as "the drill ship *at a specific drill [s]ite*," EPA Response at 14 (emphasis added). Rather, Congress specifically regulated "equipment, activit[ies], or facilit[ies]" including drill ships without reference to individual drill sites. 42 U.S.C. § 7627(a)(4)(C). By adding that limitation, EPA has acted contrary to the clearly stated intent of Congress.

Moreover, EPA's argument does not address whether EPA may properly separate emissions by well site. There is no showing that, under "a traditional interpretation of the PSD regulations regarding source determinations," EPA Response at 8, emissions from the same source may be separated by location. By asserting that it must look only to see whether emissions at separate sites are "contiguous and adjacent," EPA presumes the answer to the most important question—whether those emissions may be separated by site in the first instance. This determination also means that the agency could aggregate emissions from the same drill ship only if it determines that separate wells, drilled at separate times are contiguous and adjacent.

In its Response, Shell argues that EPA may not rely on "the standard definition of 'stationary source' used in other sections of the Clean Air Act" because the definition of "OCS source" in Section 328 supplants it. *See* Shell Response at 8. This position is inconsistent with EPA's contention that Section 328 does no more than grant the agency authority to regulate sources on the OCS and comports more closely with REDOIL's argument that, by defining "OCS source" specifically, Congress created a category of sources to be regulated and subject to PSD requirements. Shell, however, attempts to avoid the conclusion that the drill ships must

comply with the PSD requirements by imbuing the agency regulations with a meaning that simply is not there. Shell argues that the regulation interpreting the statutory definition of "OCS source" to include drill ships only when they are attached to the ocean floor "*requires* EPA to treat separate drill sites as separate OCS sources." *Id.* at 9 (emphasis in original). This argument reads too much into 40 C.F.R. § 55.2. That regulation does not address the applicability of the PSD program and does not state that separate well sites should be treated as separate sources. Indeed, EPA has never stated that its intent in promulgating those regulations was to require that separate sites be treated as separate sources. Ultimately, there is no justification to conclude that because emissions from the drill ship might not be regulated while the ship is between drill sites, each site must be a separate source.[2]

Further, neither EPA nor Shell provide a persuasive response to the contention that EPA's interpretation of Section 328 would contravene the intent of Congress by allowing an OCS source to emit an unlimited amount of pollutants each year simply by drilling wells at separate locations. *See* REDOIL Petition at 14. Shell purports to address this argument but simply misses the point. *See* Shell Response at 37-38. The issue is not whether one ship might drill the same well at different sites, but that each ship will be allowed to emit more than 250

[2] Shell goes so far as to accuse REDOIL of "completely ignor[ing]" the MMS regulations stating that a drill ship is an OCS source only when attached to the ocean floor and states that REDOIL "acknowledges that a Board decision requiring ship-by-ship permitting would render the existing regulations at Part 55 invalid as inconsistent with the organic statute." Shell Response at 11-12 & n.7. Both statements are obviously incorrect. As REDOIL stated in its petition, the Board need not address the validity of those regulations. *See* REDOIL Petition at 14 n.5. Even if EPA can regulate the drill ships only when attached to the sea floor, as the regulations state, the agency still may not separate their emissions by well site.

tons per year of a regulated pollutant.[3]

Both EPA and Shell also imply that considering emissions from a drill ship at multiple sites would contravene congressional intent to make regulation of the OCS comparable to the associated onshore regime. *See* EPA Response at 7-8, 15-16; Shell Response at 13. This contention, however, is entirely unsupported. Neither makes any effort to show how a portable onshore source might be regulated, and, instead EPA can rely only on the fact that the State of Alaska did not provide a specific objection to this approach in its comments on the permit. *See* EPA Response at 16. This statement is a far cry from an evaluation of the applicable regulations or a showing of how the State might confront this issue if it arose directly.[4] Similarly, the permitting decision referenced by Shell is inapposite because it does not address the issue presented here—drilling at multiple locations in one year using the same portable rig. *See* Shell Response at 35-37; *id.*, Attachment 5 at 4-8.

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[3] Shell also posits that considering emissions from one drill ship at multiple sites could lead to "absurd results" if a drill ship traveled large distances between wells. *See* Shell Response at 7, 11. This example is not repeated by EPA and, of course, is purely hypothetical. Shell can point to no instance in which a drill ship must comply with the PSD requirements because it is drilling multiple wells at locations great distances from each other. Nor does Shell argue that such a situation is likely. It is far more likely that, as has happened here, the multiple wells would be part of the same project. Though the Board need not address this issue, it might be reasonable for EPA to limit the geographic scope of the drill ship emissions it considers in determining whether PSD requirements apply. To give effect to Congress' intent that OCS sources should be subject to similar regulations as onshore sources, an appropriate limit might be found in the PSD provisions applicable onshore. Accordingly, EPA might look to the boundaries of attainment and non-attainment areas or other similar geographic limits based on regional air quality concerns. For purposes of this petition, however, it is sufficient that the law does not allow EPA to separate emissions by well site.

[4] In fact, the most closely analogous onshore situation likely involves portable winter drill rigs. The State of Alaska allows those rigs to be regulated pursuant to a minor general permit. *See* "Minor General Permit MG1 Oil or Gas Drilling Rigs," *available at* http://www.dec.state.ak.us/air/ap/genperm.htm. The supporting document for that permit shows that the drill rigs will emit no more than approximately 95 tons of NO_x per year. *See* "Proposed Changes to the Drill Rig General Permit MGI (MGPI)," *available at* http://www.dec.state.ak.us/air/ap/rewrite.htm. Accordingly, there is no analysis of whether the PSD provisions are triggered and no discussion of the way in which the State might address the question.

Ultimately, neither EPA nor Shell can show that separating emissions from the same source by well site in order to avoid the PSD regulations comports with the Clean Air Act.

III. EPA HAS NOT JUSTIFIED USING 500 METERS AS THE BASIS FOR DETERMINING THAT TWO DRILL SITES ARE NOT CONTIGUOUS OR ADJACENT.

In addition to violating the Clean Air Act by separating emissions from the same drill ship by well site, EPA also erred in determining that emissions from different drill ships need not be aggregated if the drill sites are more than 500 meters apart. In the Statement of Basis explaining its decision to grant a minor source permit, EPA relies exclusively on the distance between two drill sites to determine whether their emissions must be aggregated. EPA explained that, since the sources are operated by Shell and share the same industrial code, the only issue to be resolved in determining whether the sources should be aggregated is whether they are "contiguous or adjacent." *See* Statement of Basis at 10 (NSB Ex. 3). EPA then stated that this determination would be based on the distance between the drill sites. *See id.* ("What needs to be determined is the maximum distance between two OCS sources for which EPA still considers them to remain close enough in proximity so as to be considered contiguous or adjacent."). EPA "determine[ed] that distance, in this case, to be 500 meters." *Id.* No other factor was mentioned in the Statement of Basis, and no explanation was provided for the choice to use 500 meters, other than that it was suggested by Shell. *See id.* This failure to provide any explanation or justification for its use of 500 meters as a determinative factor in deciding whether to aggregate emissions from drill sites requires the Board to vacate EPA's decision.[5]

[5] Contrary to Shell's assertion, REDOIL's argument on this point is in no way inconsistent with NSB's contention that EPA must aggregate emissions from the same or adjoining lease blocks. *See* Shell Response at 18. Whether or not EPA must aggregate emissions on the same or

Neither Shell nor EPA can point to any evidence in the Statement of Basis, Response to Comments, or elsewhere in the administrative record to show that EPA considered the effects of emissions or activities 500 meters apart from each other. Nowhere does the record reflect an evaluation of the relationship between OCS activities at that distance or any other. EPA contends that it did "justify the 500-meter limit," EPA Response at 13, but it can point to no explanation in the record to explain how that distance was chosen, other than that it was suggested by Shell. *See* Statement of Basis at 10 (NSB Ex. 3). In short, there is no reason given for choosing 500 meters as opposed to any other distance except that Shell suggested it. *Id.*; EPA Response at 13.

Shell argues that EPA considered other factors, in addition to the 500-meter distance, in determining that the drill sites are not contiguous or adjacent. *See* Shell Response at 30-34. This contention is based entirely on one paragraph in the Final Response to Comments in which EPA states:

> The emissions generating activity occurs within a very, very small fraction of the entire area controlled by Shell. A "common sense notion of plant" does not support aggregating emissions across vast swaths of area upon which no emissions generating activity occurs. Even if two drillships should be operating within the same lease block, the ships could still be separated by a number of miles. In any case, at no time do two drillships s [sic] share a physical connection, and at no time is one drillships [sic] dependent upon the support of another drillships . [sic] Their operations are independent in that sense.

Response to Comments at 59-60 (NSB Ex. 12).[6]

This paragraph does not satisfy EPA's obligation. First, it does not excuse EPA's reliance on the 500-meter distance without any substantial explanation for how it was chosen or

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adjoining lease blocks, it cannot separate emissions on the grounds that they are more than 500 meters apart without providing sufficient justification.

[6] Shell also argues that EPA considered "local airshed concerns," "air emissions," and "operational scenarios" in determining that 500 meters is appropriate. *See* Shell Response at 33 (citing Response to Comments at 60). These factors are not explained by EPA and are not used in the record to justify the agency's choice of 500 meters.

evaluated.[7] It also does not account for the fact that the permit does not limit the location at which Shell may drill, other than to say that the sites may not be closer than 500 meters. There is no reason to assume that the well locations will be far apart. These issues are not addressed anywhere in the record other than the mention in this paragraph. Rather, in explaining its decision about when well sites should be aggregated, EPA relies exclusively on whether they are 500 meters apart. *See* Statement of Basis at 10 (NSB Ex. 3). Without an explanation for its choice of that distance, EPA's decision cannot stand. *See Ash Grove Cement Co.*, 7 E.A.D. at 416-18; *Dominion Energy Brayton Point*, slip op. at 28.

CONCLUSION

For the foregoing reasons and those explained in REDOIL and the North Slope Borough's petitions for review, the Environmental Appeals Board should accept the petitions and vacate the minor source permits issued to Shell.

Respectfully submitted this 8th day of August, 2007,

Michael LeVine
Clayton Jernigan
Eric Jorgensen
EARTHJUSTICE
325 Fourth Street
Juneau, AK 99801
Ph: (907)-586-2751
Fax: (907)-463-5891

Attorneys for Petitioners

[7] Shell relies on an EPA memorandum which describes "proximity" as the "most informative factor in making determinations" about whether oil and gas facilities are contiguous or adjacent. *See* Shell Response at 26-27. While REDOIL may not agree that focus on the physical distance between two sources comports with the Clean Air Act, the fact that EPA has placed such importance on that factor supports the contention that the agency must justify the distance it chooses.

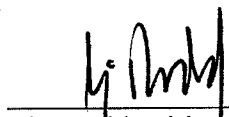
CERTIFICATE OF SERVICE

I, Liz Dodd, hereby certify that on August 8, 2007, true and correct copies of the PETITIONERS' REPLY TO EPA REGION 10 AND SHELL OFFSHORE, INC.'S RESPONSES TO PETITIONS FOR REVIEW were sent by electronic mail and first-class mail to:

Elliott Zenick (Zenick.Elliott@epamail.epa.gov)
Juliane Matthews (Matthews.Juliane@epamail.epa.gov)
Office of Regional Counsel
EPA Region 10
1200 6th Avenue
Seattle, WA 98101

John C. Martin (JMartin@PattonBoggs.com)
Patton Boggs, L.L.P.
2550 M Street NW
Washington, DC 20037

Christopher Winter (chris@crag.org)
Crag Law Center
917 Southwest Oak Street, Suite 417
Portland, OR 97205



Liz Dodd, Litigation Assistant