Christopher Winter
CRAG LAW CENTER
917 SW Oak St.
Suite 417
Portland, OR 97205
Ph: (503) 525-2725
Fax: (503) 296-5454

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 (Revised)	)

REPLY BRIEF ON PETITION FOR REVIEW

NORTH SLOPE BOROUGH, ALASKA ESKIMO WHALING COMMISSION AND INUPIAT COMMUNITY OF THE ARCTIC SLOPE

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I. INTRODUCTION

The North Slope Borough, Alaska Eskimo Whaling Commission and Inupiat Community of the Arctic Slope (collectively, "NSB") submit the following reply brief in support of their petition for review of Permit No. R10-OCS-AK-07-01 (revised), issued to Shell Offshore, Inc. ("Shell"). The NSB incorporates by reference and joins in the reply brief submitted by the Alaska Wilderness League ("AWL") petitioners. In this reply, the NSB provides additional argument to the Environmental Appeals Board (the "Board") regarding the interdependence analysis performed by the Environmental Protection Agency ("EPA") and permit conditions 15.1 and 8 regarding Shell's Owner Requested Limits ("ORLs").

II. EPA'S INTERDEPENDENCE ANALYSIS

In this case, Shell has requested a minor source permit for a single drill ship – the *Kulluk*. The uncontested evidence in the record demonstrates that Shell plans to use the same equipment, the same crew and the same fleet of support vessels to drill multiple exploration wells to delineate the extent of a single prospect. The record and EPA's conclusions regarding that evidence demonstrate the following: 1) Shell coordinates the locations of exploration wells ahead of time to collect integrated data to determine whether and how to produce oil from a single prospect; and 2) Shell uses information from one well in the same season in determining the activities of the same equipment and the same crew at the next well site. Given this information, EPA's determination that well sites more than 1000 meters apart do not meet the "common sense notion of a plant" should be rejected by the Board as clearly erroneous. Indeed, the Kulluk is the core of the "plant," and it simply moves from one pre-determined location to the next, collecting

data on the size of a single prospect as it goes. Shell plans the location of these wells in an integrated fashion so that the information gathered from the wells can be used to evaluate and develop a single production scenario; this is the "product" and without it there would no reason to drill a single well.

The parties all agree that the central issue regarding the definition of "stationary source" in this case is whether the activities at different well sites are "located on contiguous or adjacent properties." 40 C.F.R. § 51.166(b)(6); 18 A.A.C. § 50.040(h)(4)(B)(iii). The parties also agree that EPA has consistently evaluated two factors when determining whether activities are on "contiguous or adjacent properties" and therefore constitute a single source: a) interdependence; and b) proximity. Supplemental Statement of Basis ("SSOB")[1] at 13; EPA Response Brief ("EPA Resp.") at 19.

In the SSOB, EPA set forth four questions for the public to consider in determining interdependence based on previous agency decisions. SSOB at 13-15 (citing Letter from Richard Long, Director, Air Program, U.S. EPA Reguon 8, to Lynn Menlove, Manager, New Source Review Section, Utah Division of Air Quality, Request for Guidance in Determining Adjacent with Respect to Source Aggregation (May 21, 1998)). These four questions were the only criteria set forth or discussed by EPA in the SSOB.[2]

As a result, the NSB worked with Ms. Susan Harvey, an engineer with twenty years of experience in the oil and gas industry, to submit into the record evidence that

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1 EPA Exhibit No. BB-9, Supplement to the Administrative Record.

2 EPA also referenced the Wehrum Memo, which speaks primarily to "proximity" as the "most informative factor" and provides little if any guidance in determining interdependence. Memorandum from William L. Wehrum, Acting Assistant Administrator, to Regional Administrators, Source Determinations for Oil and Gad Industries (Jan. 12, 2007) at 3. EPA did not use the Wehrum Memo as a basis for determining interdependence in the SSOB.

spoke directly to the four criteria set forth by EPA. *See* Declaration of Ms. Harvey (March 31, 2008) (attached to the Letter from the NSB to Dan Mahar, EPA Region 10 (April 1, 2008)) ("First Harvey Dec."); Supplemental Declaration of Ms. Harvey (June 6, 2008) (attached to the Letter from the NSB to Dan Mahar, EPA Region 10 (June 6, 2008)) ("Second Harvey Dec."). Ms. Harvey has twenty years direct experience "designing and drilling wells in the Beaufort Sea, including exploration wells, delineation wells and production wells." First Harvey Dec. at 1[3]; *see also* Second Harvey Dec. at 1[4].

NSB provides this reply on the issue of interdependence primarily to clarify for the Board the evidence in the record and EPA's ultimate conclusions regarding this information. EPA impermissibly changed the criteria in the final decision and thereby attempted to shift the focus of the analysis away from the initial information it solicited from the public. *See* NSB Petition at 20-23. Shell also takes unjustifiable liberties in portraying the record. *See* Shell Response Brief ("Shell Resp.") at 26-29. Given the confusion in the record as to which factor EPA ultimately relied upon, NSB focuses here on the initial criteria set forth by EPA in the SSOB and the evidence in the record regarding those criteria, as well as joining in AWL's broader refutation of EPA's new criteria.

EPA focused initially on the information collected at each well site as the "product" and concluded that "each location at which drilling will occur . . . is picked for its independent value as a potential source of information." SSOB at 13. EPA cited to some of Shell's submissions, which stated that "SOI's drill site locations are not chosen so that operations at those separate locations can be integrated." *Id.* at 13. EPA also

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[3] EPA Exhibit No. CC-5, Supplement to the Administrative Record.

[4] EPA Exhibit No. CC-2, Supplement to the Administrative Record.

concluded in the SSOB that each well "produces a unique product – information about the specific and unique potential for oil in a given location – and does so independently at each location regardless of the outcome at a prior location." *Id.* at 14. EPA further concluded based on select submissions from Shell that "any information shared between well site locations within a given year would be unanticipated, minimal and incidental to the purposes of drilling operations at the different locations." *Id.*

As the public comment process irrefutably pointed out, the information in the record directly contradicts the agency's initial determination as well as the representations made in Shell's submissions to the agency. In particular, Ms. Harvey stated in her second declaration that the "location of these wells was sited proximate to each other to gather sufficient data to confirm the commercial viability, to develop a unified production scenario, and to enable this prospect to be produced into a single surface facility." Second Harvey Dec. at 4. Ms. Harvey also established that "[d]ata collected in the first of the three Sivulliq delineation wells may provide important information to the Shell exploration team to determine how to proceed with the next two wells into the same prospect area." First Harvey Dec. at 4. She clarified that Shell is likely to use data from one well to inform its operations at a subsequent delineation well on the same prospect in the same season. *Id.*

Furthermore, Shell admitted that operations at delineation wells are interdependent. Shell Offshore Inc. Letter from Keith Craik to Daniel Meyer Re: Phone Conversation of January 18, 2008 (Feburary 6, 2008) at 2-3[5]. Mr. Craik stated to EPA that Shell pre-determines and coordinates the location of multiple delineation wells "to determine reservoir extent and reservoir continuity." *Id.* at 2. Shell's documents cited in

[5] EPA Exhibit No. BB-9.13, Supplement to the Administrative Record.

NSB's supplement to its petition also establish that data from planned wells are used in a coordinated fashion to "refine these proprietary [geologic] models that influence lease acquisition strategies, delineate geologic areas and drilling targets, influence resource estimates, reservoir development analysis, and field development plans." Administrative record Document HH-4, Attachment at 1. These documents, produced by Shell, directly conflict with Shell's statements quoted in the SSOB that "SOI's drill site locations are not chosen so that operations at those separate locations can be integrated." SSOB at 13.

EPA was forced to admit after taking public comments that information provided to the agency conflicted with its initial determinations. EPA conceded that the wells share a "common operational goal, such as delineating the extent of the hydrocarbon reservoir." Response to Comments ("RTC") at 62. EPA further stated that "Shell will most likely use information collected at one well to refine its exploratory drilling plans for other locations." *Id.* EPA explicitly recognized that Shell plans the locations of the wells in a coordinated fashion and is likely to use information collected at one well in planning for operations at the next well. Instead of changing the outcome of its analysis, EPA then changed the applicable criteria. *See* NSB Petition at 20-23; AWL Reply at III.C.

In contrast, Shell misrepresents or misconstrues the findings of the agency in its response brief. According to Shell, EPA concluded that "information is not shared between wells during the same drilling seasons." Shell Resp. at 27. Shell fails to provide a citation to the record for this assertion and does not reconcile its statement with EPA's directly contrary findings in the Response to Comments.

Furthermore, Shell continues to argue incorrectly that "each drilling location is selected independent of any other location and is chosen for its independent value as a potential source of information on what is thought to be a distinct accumulation of oil." Shell Resp. at 35. Shell again fails to provide any citation to the record or refute the numerous contrary record documents cited by petitioners. Shell cannot cite to any of the submissions it made in response to Ms. Harvey's declarations, nor can Shell point the Board to any other documents that support this conclusory statement. Instead, Shell attempts to support its statement by citation to the Supplemental Statement of Basis, but that document was prepared before the public had an opportunity to submit information to EPA or review the agency record. *Id.* Shell does not discuss or reconcile its argument with the numerous documents in the record establishing that Shell does, in fact, coordinate the locations of planned wells to delineate the boundaries of a single prospect. The unsupported arguments made by Shell in its Response Brief defy common sense and the existing evidence in the record.

Instead of pointing to evidence that affirmatively supports its incorrect statement, Shell attempts to undercut Ms. Harvey's information by arguing that her "assertions do not address the uncertainties inherent in exploratory activity, instead treating it like a smooth and predictable process." Shell Resp. at 28. In particular, Shell claims that Ms. Harvey assumes that exploratory wells will delineate hydrocarbon that "will then be produced" and that she disregards "the high rate of dry holes." *Id.* In fact, Ms. Harvey described the uncertainties of exploratory drilling, stating that if "the first and second wells were dry-holes, it would likely cause serious reconsideration before drilling the third delineation well." First Harvey Dec. at 4. This is precisely the reason that Shell

uses information collected from one well in planning operations at subsequent wells in the same season. Because of the uncertainties involved with exploration drilling, Shell must assess information so that it can "inform short-term decision about whether, how, and where to drill subsequent delineation well on that same prospect." *Id.* at 3. Ms. Harvey did not assume that production was a foregone conclusion but rather described how the information-collecting activities are coordinated to update Shell's geologic models to determine if production is possible and, if so, what that scenario would look like. The very purpose of Shell's coordinated drilling activities is to gather integrated information to resolve the existing uncertainties and plan for a possible production facility.

In sum, the Board should disregard Shell's bald assertions that it does not coordinate and integrate the locations of well sites and that it does not share information from those sites in a coordinated fashion. All the evidence in the record and EPA's own conclusions refute those statements. The Kulluk meets a common sense definition of a plant, because Shell uses the same equipment, the same crew, and the same support vessels in the same season to collect information on a single prospect. Shell plans the location of the wells ahead of time to achieve this purpose, and Shell shares information from these wells in the same season to inform subsequent drilling activity and to update its geologic models. EPA erred by allowing Shell to segregate the emissions of the Kulluk at separate well sites in order to avoid the more rigorous permitting process that applies to major sources pursuant to the Prevention of Significant Deterioration ("PSD") program.

III. PERMIT CONDITIONS 15.1 AND 8.

Shell requested two specific owner requested limits ("ORLs") in order to avoid designation as a major source and the more rigorous permitting process of the PSD program. Pursuant to 18 A.A.C. § 50.542(f)(8)(A), EPA was required to find that Shell was capable of complying with the ORLs in order to issue the minor source permit. In this case, EPA failed to make the required findings.

A. EPA failed to conclude that Shell is capable of complying with Permit Condition 15.1 as required by 18 AAC 50.542(f)(8)(A).

1. NSB preserved this issue for appeal.

EPA argues unpersuasively that the NSB has not preserved this issue for appeal solely because NSB did not include in its comments a specific reference to 18 A.A.C. § 50.542(f)(8)(A). EPA Resp. at 46; *see also* Shell Resp. at 60. EPA's argument conflicts with the language of the regulation and would create an unreasonable burden on the public.

EPA's regulations state that a person requesting review must demonstrate "that any issues being raised were raised during the public comment period (including any public hearing) to the extent required by these regulations." 40 C.F.R. § 124.19(a); *see also In re ConocoPhillips Co.*, PSD Appeal No. 07-02, slip op. at 44 (EAB, June 2, 2008). Issues must be raised with a "reasonable degree of specificity and clarity during the comment period in order for the issue to be preserved for review." *Id.* at 86 (citing *In Re Shell Offshore Inc.*, 13 E.A.D. __, slip op. at 53 n. 55 (EAB, Sept. 14, 2007)).

Here, the NSB's comments meet the requirements of the regulation, and NSB has preserved this issue for appeal. The NSB clearly stated in its comments that "the record does not support EPA's 80-day operating limit for each 'Exploratory Operation.'" Letter

from NSB to Dan Mahar, EPA Region 10 (April 1, 2008) at 13-14 (Section C). The NSB also specifically noted that neither EPA nor Shell has provided any support for the assumption that an exploration, replacement and relief well could all be drilled within a period of 80 days. *Id.* The NSB also referred to this requirement as an "owner requested limit." *Id.*

EPA does not contest that NSB's comments raised the specific issue of whether the record supports a determination that Shell is capable of complying with the 80-day limit. In fact, EPA "acknowledges that NSB's public comments questioned Shell's ability to comply with the 80-day limit." EPA Resp. at 53. Instead, EPA argues simply that NSB did not reference the specific regulatory section at issue. – 18 A.A.C. § 50.542(f)(8)(A).

EPA's argument misses the mark because neither the regulations nor prior EAB decisions require the public to include such precise legal formulations in their comments. Issues must be raised only with a "reasonable degree of specificity." *In re ConocoPhillips Co.*, slip op. at 44. There is no requirement in the regulations or otherwise that imposes upon the public the level of legal specificity demanded by EPA in this case. Courts have routinely refused to impose such requirements, because it would place an unreasonable burden on members of the public who participate without the benefit of counsel. *See, e.g., Adams v. Rice*, 531 F.3d 936, 953 (D.C. Cir. 2008) (stating that it would "frustrate the statute's aim to expect" the public to "list the precise way in which they satisfy the Rehabilitation Act's definition section in 29 U.S.C. § 705(20)(B)"); *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 900 (9th Cir. 2002) (holding that "requiring more might unduly burden those who pursue administrative

appeals unrepresented by counsel who frame their claims in non-legal terms rather than precise legal formulations"). The NSB was not required to recite the precise legal citation in order to preserve the issue for appeal.

Furthermore, the Board should reject EPA's argument that it "did not have an opportunity to address the applicability of 18 AAC § 50.542(f)(8)(a)." EPA Resp. at 46. In other places in the record, EPA acknowledged that this regulation was applicable to ORLs in the permitting process for the Kulluk. RTC at 44. The NSB identified the 80-day limit as an ORL in its comments, and EPA knew full well that this regulation applied to ORLs. EPA had every opportunity to address this issue and failed to do so.

2 Permit Condition 15.1 is an Owner Requested Limit

EPA attempts to sidestep the capability determination required by 18 A.A.C. § 50.542(f)(8)(A) by arguing that Permit Condition 15.1 is not an ORL. According to EPA's argument, "under the applicable Alaska regulations, an ORL is a limitation that is requested to make unnecessary an otherwise applicable permitting requirement." EPA Resp. at 47. EPA asserts that "the term 'owner requested limit' in the ORL regulations is not intended to encompass every condition or limitation that is included in the permit at the owner's request, only those that are included to avoid classification as a major source." *Id.* at 48-49 (emphasis added). Shell has not joined EPA in this argument.

EPA is wrong because the Alaska regulations require EPA to "deny a minor permit application for a stationary source" if operations will result in a violation of an "ambient air quality standard." 18 A.A.C. § 50.542(f)(1)(B). To "avoid classification as a major source" and receive a minor source permit, Shell was required to demonstrate and EPA was required to find that operation of the Kulluk would not result in a violation

of the standards. *See, e.g.*, RTC at 36 (stating that "EPA will deny a minor source permit application if it shows that the source will cause or contribute to a NAAQS violation").

Based on these legal requirements, Shell specifically requested "restrictions under the owner-requested limits (ORLs) for the purpose of complying with the ambient air quality standards." Letter from Susan Childs to Dan Mahar, EPA Region 10 (January 8, 2007) at 1[6]. Air Sciences prepared a "Modified Impacts Analysis Report" submitted to EPA, which included revisions from the 2007 modeling "accounting for drilling duration owner-requested limits (ORLs) to become part of the Approval to Construct." Kulluk, Beaufort Sea Exploratory Drilling Program, Modified Impacts Analysis Report, Approval to Construct (No. R10-OCS-AK-07-01) at 1. Air Sciences again specifically listed the "proposed ORLs," which included the "maximum duration of well drilling of 80 days (while an OCS source), in any one year." *Id.* at 10. In order to be permitted as a minor source, Shell specifically requested Permit Condition 15.1 as an ORL. Even in its response brief Shell still refers to condition 15.1 as an ORL. Shell Resp. at 68 (stating that the ORL includes both "synthetic minor source compliance and NAAQS compliance").

Furthermore, EPA errs in arguing that "the 80-day limit would be necessary even if the exploratory operation was permitted as a major source." EPA Resp. at 49. Without Permit Condition 15.1, Shell could not demonstrate compliance with the ambient air quality standards and could not receive a minor permit. Shell would then have been required to apply for a permit as a major source subject to the PSD program. As a part of that review, EPA would have required Shell to implement the Best Achievable Control Technology ("BACT"). 42 U.S.C. § 7475(a)(4). EPA wrongly assumes that the same

[6] EPA Exhibit No. AA-1, Supplement to the Administrative Record.

permit limits would be needed after implementation of BACT. If EPA had required Shell to implement the BACT, operation of the source may or may not have threatened violations of the ambient air quality standards. Instead of applying as a major source and implementing updated emissions controls, Shell applied for a minor source permit and requested ORLs to ensure compliance with air quality standards. Shell specifically requested permit condition 15.1 "to avoid classification as a major source" and a BACT review pursuant to the PSD program. EPA Resp. at 49.

3. EPA never determined that Shell was capable of drilling a Planned Well and a Relief Well in compliance with the 80-day limit in Permit Condition 15.1

EPA's response clarifies for the Board that it failed to determine whether Shell was capable of complying with Permit Condition 15.1 as required by 18 A.A.C. § 50.542(f)(8)(A). Instead of conducting the analysis, EPA erroneously concluded that Shell did not have to demonstrate that it was capable of complying with the permit condition. RTC at 36. EPA cannot point to anywhere in the record where the required analysis is set forth, because it does not exist. Acknowledging these problems, EPA now attempts to re-create that analysis in its response brief, but that *post-hoc* rationalization must be rejected by the Board. *In re Austin Power Co.*, 6 E.A.D. 713, 719-20 (EAB 1997). EPA's position during the permitting process was that Shell was not required to demonstrate the capability to comply with the permit condition. EPA may not arbitrarily change its position at this late date and argue for the first time that the record would have supported that determination if EPA had conducted the appropriate analysis.

The Board should first take note of EPA's original position as set forth in the Response to Comments. In arguing that it adequately responded to NSB's comments,

EPA clarifies the position it asserted during the permitting process. EPA Resp. at 54. "It was not necessary for Shell to demonstrate its ability to collectively drill within the 80-day period a Planned Well, Replacement Well, and Relief Well." *Id.* According to EPA, Shell only had to demonstrate that application of the permit conditions would result in compliance with ambient air quality standards. *Id.*[7] Shell was not required by EPA to demonstrate that it was capable of complying with permit condition 15.1.

In its Response Brief, however, EPA has once again arbitrarily changed course mid-stream. Now, for the first time, EPA argues that "the Region did in fact consider whether Shell could comply with this permit condition." EPA Resp. at 50. EPA's argument on this point is highly suspect since EPA stated in plain, unequivocal terms that Shell was not required to provide that information in the Response to Comments. RTC at 36.

Furthermore, the record belies EPA's claim that it conducted the required analysis. EPA argues that it considered several pieces of record information in making this determination. EPA Resp. at 51-52. The record, although it contains the information referenced by EPA, does not contain any evidence that EPA actually analyzed this information as it claims to have in its response brief. EPA never concluded in the Response to Comments that Shell is capable of complying with permit condition 15.1, and EPA's analysis of this issue cannot be found in the record. EPA's analysis and

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[7] The Board should reject EPA's argument that it adequately responded to NSB's comments on this issue. EPA Resp. at 53-56. EPA simply dismissed the concerns of NSB without a reasoned response, stating without reference to the regulations or any other source of authority that Shell did not have to demonstrate the capability to operate in compliance with the permit condition. EPA's response does not reflect the "serious consideration" required. *See In re RockGen Energy Ctr.*, 8 E.A.D. 536, 557 (EAB 1997).

conclusions on this issue are not in the record, because EPA took the position that Shell was not required to submit this information. RTC at 36.

Now, after the permit has been challenged, EPA finally tips its hat as to its conclusion regarding this issue.

> Shell will need to determine how many days may be spent drilling the planned well while leaving sufficient time to drill a replacement or relief well would should one be needed. EPA Region 10 recognizes that Shell may need to curtail planned well drilling sooner than anticipated in order to leave sufficient time for a relief well, but the recordkeeping requirements contained in the permit make it possible for Shell to track the number of days the Kulluk is at each exploratory operation and to plan accordingly.

EPA Resp. at 52. For the first time during the permitting process, EPA states that Shell must limit the number of days of operation at a planned well to provide for the contingency of a blowout and the need for a replacement well. EPA never provided this information to the public during the notice and comment process.

EPA discusses how Shell is capable of complying with permit condition 15.1 for the first time in its response brief. The agency's rationale, however, must be adequately set forth in the record. *In re City of Moscow, Idaho*, 10 E.A.D. 135, 142 (EAB 2001); *In re Hub Partners, L.P.*, 7 E.A.D. 561, 567-68 (EAB 1998). The Board should reject this *post-hoc* rationalization because it was not provided to the public during the public process. The agency's shifting rationale necessitates a remand to the agency to clarify the record. *In re Austin Power Company*, 6 E.A.D. at 719-20 (rejecting a rationale for the agency's decision raised for the first time on appeal); *see also In re McGowan*, 2 E.A.D. 604, 606-07 (Adm'r 1988) (remanding permit decision where EPA offered explanations for the first time on appeal).

The Board should also note that EPA has not and does not rely on the likelihood of a blowout as a rationale. EPA never relied on this reasoning with respect to permit condition 15.1 in the Response to Comments or anywhere else in the record. RTC at 36. Nor did EPA rely on this rationale in its response brief. EPA mentions that it considered "information regarding the likelihood of blowouts and the potential need for relief wells." EPA Resp. at 51. EPA never states, however, that the likelihood of a blowout played any role in its alleged conclusion that Shell was capable of complying with permit condition 15.1. Instead, EPA states that "Shell will need to determine how many days may be spent drilling the planned well while leaving sufficient time to drill a replacement well should one be needed." *Id.* at 52. EPA explicitly states in its response brief that Shell must plan for the contingency of a blowout regardless of the likelihood that such an event will occur.

In contrast, Shell relies heavily on the likelihood of a blowout in defending EPA's actions with respect to permit condition 15.1. Conflating a discussion of permit conditions 8 and 15.1, Shell recasts EPA's position. Shell states that EPA interprets 18 A.A.C. § 50.542(f)(8)(A) to apply "only to emissions from reasonably foreseeable contingencies." Shell Resp. at 65.[8] EPA has not set forth this interpretation of the regulation as it applies to permit condition 15.1. EPA never provided the public with this rationale in the Response to Comments. Even now when EPA has changed its rationale

[8] The Board should also disregard Shell's effort to confuse the issue by arguing that the NSB seeks "*absolute certainty* that the permittee will comply with the permit conditions in every single circumstance, no matter how remote." Shell Resp. at 62 (emphasis in original). 18 A.A.C. § 50.542(f)(8)(A) requires EPA to determine whether Shell is *capable* of complying with ORLs. EPA included a Relief Well as part of the same source as a Planned Well, and EPA must therefore demonstrate that Shell is *capable* of drilling both wells in compliance with the permit terms. NSB has requested no more than what is required by the regulations, and Shell's efforts to recast NSB's arguments are unavailing and inconsistent with the language of the regulation.

on appeal, EPA still has not interpreted the regulation to apply only to "reasonably foreseeable contingencies." Instead, EPA specifically stated that it expects Shell to "curtail planned well drilling sooner that anticipated in order to leave sufficient time for a relief well." EPA Resp. at 52.[9] Despite Shell's effort to recast EPA's position, the agency never relied on the likelihood of a blowout as a basis for concluding that Shell could comply with permit condition 15.1.[10]

EPA, Shell and the public all have a very different understanding of the agency's determination in this case. EPA first claimed that Shell did not have to demonstrate its capability to comply with permit condition 15.1. EPA, in its response brief, then stated for the first time that Shell will have to curtail operations to plan for the contingency of a relief well, although nothing in the permit or the record specifies that requirement. Shell, on the other hand, believes that EPA interpreted 18 A.A.C. § 50.542(f)(8)(B) to apply only to "reasonably foreseeable contingencies." The Board should remand this permit to the agency so that EPA can clarify its position, provide support for that position in the record, and provide the public an opportunity to comment on its interpretation of the permit terms.

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[9] Similarly, Shell argues that "grouping like issues together and providing collective responses can be a proper and non-prejudicial manner of addressing comments." Shell Resp. at 67. The obvious weakness with Shell's argument is that EPA has never argued that the likelihood of a blowout has any relevance in determining Shell's ability to comply with permit condition 15.1. Shell repeatedly tries to recast EPA's position in this case, but the fact remains that EPA did not rely on this factor in the Response to Comments and further distanced itself from this consideration in the Response Brief.

[10] The Board should also reject Shell's hyperbolic argument that EPA "could never issue synthetic minor source permits for any industry in which emergencies that might result in additional emissions could occur." Shell Br. at 66. Shell's argument presumes that it cannot, in fact, drill a Planned Well and a Relief Well in compliance with the 80-day limitation. In the same breath, however, Shell asserts that it is possible to drill a Planned Well and Relief Well in compliance with the permit conditions. Shell Br. at 63. Furthermore, EPA also takes the position that Shell can drill a planned well while planning for the contingency of a relief well by limiting the number of days of operation at a planned well site. EPA Resp. at 52. Shell's arguments are internally inconsistent and contradicted by EPA's position.

Finally, the Board should reject EPA's argument that recordkeeping and monitoring requirements are adequate and can substitute for the capability determination required by 18 A.A.C. § 50.542(f)(8)(A). The very next sentence of the regulation states that EPA must also determine that "permit conditions are adequate for determining compliance with the limit." 18 A.A.C. § 50.542(f)(8)(B). The regulations require *two separate findings*: a) the source is capable of complying with the ORL; and b) that the monitoring and recordkeeping requirements are adequate for determining compliance. Here, EPA attempts to conflate the two into a single requirement for adequate monitoring and recordkeeping. That rationale squarely conflicts with the plain language of the regulation.

4. The Board should reject Shell's arguments that this issue is procedurally barred.

Shell makes two procedural arguments related to the prior 2007 permitting process: a) NSB's 2007 argument on practical enforceability is identical to its argument on permit condition 15.1 and therefore the law of the case controls; and b) alternatively, this issue was "reasonably ascertainable" during the first round of permitting. EPA does not join in Shell's procedural arguments. Shell is wrong on both counts, and the Board should reject these arguments.

a. The law of the case does not bar NSB from raising this issue.

Shell argues in its response brief that the NSB is precluded from raising the issue of EPA's compliance with 18 A.A.C. § 50.542(f)(8)(A) based on the prior 2007 proceedings. Shell Resp. at 55-57. Shell first groups together the NSB's arguments regarding permit condition 15.1 and permit condition 8 and then inaccurately recasts

those arguments. According to Shell's mischaracterization, the NSB seeks a ruling "that the Alaska ORL regulation requires *absolute certainty* that an emergency such as Relief Well drilling will not cause ORL exceedances." *Id.* at 55; *see also* supra n.3. Shell then argues that the law of the case applies based on two issues that were raised in the prior proceedings: 1) whether the ORLs were practically enforceable; and 2) whether EPA included all emissions units in the air quality modeling. *In re Shell Offshore Inc.*, slip op. at 52-54; 59-60.

Under the doctrine of the law of the case, "'a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation.'" *In re J.V. Peters and Company*, 7 E.A.D. 77, 93 (EAB 1997) (quoting James W. Moore, Moore's Federal Practice at 404[1]). The doctrine applies in the administrative context, as discussed in prior EAB decisions. *Id.* Shell's arguments should be rejected by the Board, because the issues litigated in the prior proceedings in 2007 are separate and distinct from the issue of whether EPA complied with 18 § A.A.C. § 50.542(f)(8)(B) in approving permit condition 15.1.

i. NSB's prior argument on practical enforceability is separate and distinct from its argument on permit condition 15.1.

The law of the case does not bar NSB from raising permit condition 15.1 because EPA amended the permit on remand and included this condition for the first time in the 2008 permit. At the time the Board remanded the 2007 permits, it stated that subsequent appeals "shall be limited to the issue being remanded and *issues arising as a result of any modification the Region makes to its permitting decisions on remand.*" *In re Shell Offshore Inc.*, slip op. at 69 (emphasis added). On remand, Shell provided new modeling

data to EPA and requested for the first time "restrictions under the owner-requested limits (ORLs) for the purpose of complying with the ambient air quality standards." Letter from Susan Childs, Shell Offshore Inc., to Daniel Mahar, EPA Region 10 (January 8, 2007) at 1. The new ORLs, which differed from those in the 2007 permits, included the "maximum duration of well drilling of 80 days (while an OCS source), in any one year." *Id.* at 10. Furthermore, the initial permits did not even contain a reference to relief wells. EPA explicitly included relief wells within the covered activities for the first time on remand. EPA amended the permits on remand to include condition 15.1 at Shell's request, and therefore this issue falls squarely within the scope of issues subject to appeal as established by the Board. *In re Shell Offshore Inc.*, slip op. at 69.

Shell's only response to this issue is to repeat its same flawed mischaracterizations of the NSB's arguments – "NSB is making the essentially (sic) legal claim that the Alaska ORL regulation needs to be applied in a certain manner." Shell Resp. at 60. According to Shell, NSB is "only objecting to general aspects of these Conditions" so "its challenge falls outside the scope of the remand order." *Id.* Shell's effort to rewrite the NSB's arguments should be rejected by the Board. The NSB is not making "general objections" to the Conditions, nor is the NSB seeking "absolute certainty." Rather, the NSB has stated specifically that EPA must find that Shell is *capable* of complying with permit condition 15.1 as required by 18 A.A.C. § 50.542(f)(8)(A). That discrete legal issue was not presented to the Board during the first appeal.

Furthermore, the issue of permit condition 15.1 raised by NSB in this proceeding is separate and distinct from the issue of practical enforceability. In the prior proceeding,

NSB argued that the ORLs "are not accompanied by adequate monitoring provisions allowing regulators to determine whether or not SOI is meeting" the ORLs. *In re Shell Offshore Inc.*, slip op. at 52. Here, NSB is making a separate and distinct argument – whether EPA has concluded that Shell is capable of complying with permit condition 15.1, which is a new ORL that was not included in the initial permits. Shell improperly attempts to gloss over the distinctions between the two issues. The current issue has nothing to do with the monitoring provisions. The issue is whether Shell is capable of complying with the ORL and not whether the monitoring provisions are adequate to measure compliance. Again, the issue of whether Shell is capable of complying with an 80-day limit was not at issue in the first appeal, because that condition was not set forth in the 2007 permits.

Finally, even assuming *arguendo* that the law of the case does apply, its application would be extremely limited. In the first case, the Board ruled only that the NSB had not preserved the practical enforceability issue for appeal in its 2007 comments. *In re Shell Offshore Inc.*, slip op. at 52-54. On remand, EPA added permit condition 15.1 and provided a new public comment process. Any legal ruling on the adequacy of NSB's comments would be limited to the facts of the NSB's 2007 comments. As NSB unequivocally raised this issue in its 2008 comments, the law of the case would not prevent NSB from raising this issue now.

ii. NSB's prior argument on modeling is separate and distinct from its argument on permit condition 15.1

Shell also argues that the law of case precludes NSB from raising permit condition 15.1 because NSB previously questioned the modeling performed by EPA. In the 2007 proceedings, NSB argued that EPA should have required modeling for "3 main

engines and 2 boilers" in the analysis. *Shell Offshore Inc.*, slip op. at 56. The Board upheld EPA's modeling, because the modeling only had to include emissions from "routine operations." *Id.* at 59.

On remand, Shell amended its modeling approach and requested "restrictions under the owner-requested limits (ORLs) for the purpose of complying with the ambient air quality standards.". Letter from Susan Childs to Dan Mahar, EPA Region 10 (January 8, 2007) at 1. NSB now questions whether EPA determined that Shell is capable of complying with the new ORL that was requested by Shell for the first time on remand. NSB's arguments following remand do not relate to whether EPA included all emissions units in the modeling anlaysis, which was the issue presented in the first case. Rather, NSB limits its issue to the specific ORL that was newly added by Shell and EPA as a condition on the updated air quality analysis.

b. Issues related to permit condition 15.1 were not "reasonably ascertainable" during the first round of permitting.

The Board should also reject Shell's erroneous argument that the NSB could have "reasonably ascertained" issues related to a permit condition that did not exist during the first round of permitting. Shell Resp. at 57-58. Shell again improperly generalizes the issue in order to manufacture a procedural defense. Shell claims only that NSB was "unquestionably aware of the Relief Well drilling issues in 2007." Shell Resp. at 58.

Shell conducted a new round of air quality modeling during remand. As a result of that modeling, Shell requested a specific ORL that limits the number of days of its operation in order to demonstrate that it could comply with the ambient air quality standards. Moreover, EPA clarified for the first time on remand that planned wells and replacement wells were part of the same "Exploratory Operation." All of these concepts

were added to the permit as a result of the remand. *See In re Brooklyn Navy Yard Res. Recovery Facility*, 3 E.A.D. 867, 890 (Adm'r 1992) (holding that the office would review "issues relating to the changes that prompted the opening of the public comment period"). NSB would have no way to "reasonably ascertain" issues related to an ORL that did not exist as part of the original permitting process.

B. EPA failed to conclude that Shell is capable of complying with Permit Condition 8 as required by 18 A.A.C. § 50.542(f)(8)(A).

1. NSB preserved this issue for appeal

Shell argues without the support of EPA that the NSB did not preserve this issue for appeal. Shell Resp. at 59. Shell again argues that NSB was required to set forth the specific legal formulation in its comments and that NSB's failure to do so "improperly deprive[ed] EPA of an opportunity to respond to that argument." *Id.* The Response to Comments directly contradicts Shell's position. RTC at 44. EPA clearly had notice of this issue, because it listed the following comment – "If the permit is to remain a minor source permit, the emissions associated with a relief well should be considered." EPA then specifically cited 18 A.A.C. § 50.542(f)(8)(A) in its response. EPA did, in fact, respond directly to this issue, and Shell's specious arguments that NSB somehow deprived EPA of this opportunity should be rejected by the Board. EPA does not join Shell in this argument.

2. EPA did not consider whether Shell was capable of drilling both a planned well and a relief well in compliance with condition 8.

On remand, EPA included a new definition of "Exploratory Operation" and explicitly included relief wells within the same source as planned wells. Final 2008 Permit Condition 1.6 (defining the term "Exploratory Operation"). EPA also amended

the ORLs to prohibit the "sum of emissions from an Exploratory Operation" to exceed 245.0 tons of NO_x within a rolling 52-week period. Final 2008 Permit Condition 8. Pursuant to the Alaska regulations, EPA was required to find that "the stationary source is capable of complying with the limit." 18 A.A.C. § 50.542(f)(8)(A). EPA, in this case, made no effort to determine whether the "source," which includes "the sum of emissions from both a planned well and a relief well," is capable of complying with the 245 ton ORL for NO_x.

In the Response to Comments, EPA set forth its rationale on this issue, which conflicts with the plain meaning of the regulation. EPA stated that "[a]lthough emissions resulting from drilling a Relief Well shall still be considered part of the stationary source, given the infrequent need for relief wells, EPA has determined that Shell is not required to submit further information related to relief well emissions." RTC at 45. In its response, EPA takes the same position. EPA states first that "the likelihood of ever having to drill a relief well is unpredictable" and then goes on to assert that "potential emissions generated by relief wells are unpredictable and simply are not quantifiable in advance." EPA Resp. at 40.[11]

First, and most importantly, EPA's position on this issue directly contradicts the language of the regulation, and EPA has not offered any interpretation of the language in support of its position. Specifically, the regulation states that the "source" must demonstrate that it is "capable of complying with the limit." 18 A.A.C. §

[11] EPA errs when stating, as a practical matter, that relief well emissions "simply are not quantifiable in advance." EPA Resp. at 40. EPA can employ the same method it uses to predict emissions from the drilling of a planned well. In both cases, EPA can use a set of emission factors and predict in advance how long it would take to drill a well. In the case of both a planned well and a relief well, EPA does not know for certain how long it will take to drill the well, but EPA can predict how long that process may take. If EPA is able to predict the emissions from a planned well, it is also able to predict emissions from a relief well.

50.542(f)(8)(A). EPA reiterates in its Response Brief that "emissions generated during relief well operations are considered part of the stationary source." EPA Resp. at 40. EPA must therefore find that Shell is capable of drilling both a relief well and a planned well in compliance with the 245 ton ORL in condition 8. EPA has not offered any competing interpretation of the regulatory language. EPA's failure to document that Shell could drill a relief well in compliance with the condition 8 violated the plain language of the regulation and must be set aside as clear error.

Instead of relying on a plain language interpretation of the regulation, EPA attempts to analogize to different legal issues. For instance, EPA relies upon statements from the first appeal in which the Board was interpreting an entirely separate regulatory section – 18 A.A.C. § 50.225(b)(2)-(3). *In re Shell Offshore Inc.*, slip op. at 50-51. In the earlier proceeding, NSB argued that Shell must provide information on the maximum design capacity of the equipment in order to calculate the impact of the ORL on the source's potential to emit. The Board ruled that Shell only had to provide the source's potential to emit, taking into consideration any "physical or operational limitation on the capacity of the source to emit a pollutant." Slip Op. at 50. The issue of how a source calculates the ORL's impact on the potential to emit (either with or without providing information on maximum design capacity) is distinct and separate from the issue of whether the source is capable of complying with the ORL.

18 A.A.C. § 50.225(b)(2)-(3) establishes how the source calculates its potential to emit based on the ORL. In contrast, 18 A.A.C. § 50.542(f)(8)(A) imposes an additional obligation that the source must demonstrate that it is capable of complying with the ORL. In other words, it is not enough for a source simply to calculate its potential to emit

within the constraints established by the ORL. The source must also demonstrate that it is capable of operating in compliance with those limits. These are two distinct regulatory requirements. EPA did not require Shell to demonstrate that it was capable of operating the source, which includes both a planned well and a relief well, in compliance with the 245 ton ORL.

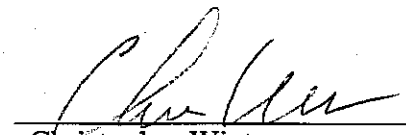
EPA also misplaces its reliance on *U.S. v. Louisiana-Pacific Corporation*, 682 F. Supp. 1142 (D. Colo. 1988). In that case, the defendants in an enforcement action challenged evidence of the source's potential to emit because the data was allegedly collected from tests in which the equipment was not operated properly. *Id.* at 1150-51. The court rejected the results of the emissions tests, holding that "potential to emit does not refer to the maximum emissions that can be generated by a source hypothesizing the worst conceivable operation. Rather, the concept contemplates the maximum emissions that can be generated while operating the source as it is intended to be operated and as it is normally operated." *Id.* at 1158.

Here, NSB has not asked that EPA quantify the potential to emit based on improper operation of the equipment or a worst case scenario regarding equipment malfunction. NSB asks only that EPA consider whether Shell is capable of complying with the ORL "while operating the source as it is intended to be operated." *Id.* The source, as EPA readily admits, includes both a planned well and a relief well. In addition, *U.S. v. Louisiana-Pacific Corporation* does not address ORLs, how a source demonstrates that is capable of complying with the ORL, or the specific language of the Alaska regulations at issue.

Struggling with the language of the regulation, EPA attempts to muddy the water in arguing that it "concluded that Shell is capable of complying with the 245 ton per year NOx limit *even when relief well emissions are considered.*" EPA Resp. at 43 (emphasis added). EPA cites back to pg. 44 of the Response to Comments in support of this statement, but all EPA stated in the record was that Shell submitted a "reasonable projection of actual emissions." RTC at 44. The Response to Comments does not provide a citation to the material submitted by Shell, nor does EPA assert that the emissions information contained any data related to the drilling of a relief well. In its response brief, EPA relies heavily on the fact that it "considered Shell's projections of annual emissions and determined that the projections were reasonable." EPA Resp. at 44. EPA, however, simply cites back to the same page in the RTC. *Id.* The record is devoid of any analysis or conclusions made by EPA that Shell was capable of drilling both a planned well and a relief well in compliance with the 245 ton limit. EPA strongly implies that it considered emissions from the drilling of a relief well, but EPA has failed to provide any record support for its position.

IV. CONSLUSION

The North Slope Borough, the Alaska Eskimo Whaling Commission and the Inupiat Community of the Arctic Slope respectfully request that the Board remand the permit to Region 10 of the EPA to correct the deficiencies identified in their Petition for Review or, in the alternative, to accept the petition for review.



Christopher Winter
CRAG LAW CENTER

Attorneys for Petitioners North Slope Borough, Alaska Eskimo Whaling Commission and the Inupiat Community of the Arctic Slope

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply on the Petition for Review was filed via overnight delivery with the Environmental Appeals Board and sent via first class mail on the 27th day of October, 2008 to the following:

Juliane Matthews
Edward Kowalski, Regional Counsel
Office of Regional Counsel
U.S. EPA Region 10
1200 Sixth Avenue
Seattle, WA 98101

Janis Hastings
Director
Office of Air Quality
U.S. EPA, Region 10
1200 Sixth Avenue
Seattle, WA 98101

Bill MacClarence, P.E.
10840 Glazanof Drive
Anchorage, AK 99507

Peter Van Tuyn
Bessenyey & Van Tuyn, L.L.C.
310 K. St. #200
Anchorage, AK 99507

Eric Jorgensen
Earthjustice
325 Fourth Street
Juneau, AK 99801

Duane Siler
Susan Mathiascheck
Sarah Bodelon
PATTON BOGGS, LLP
2550 M Street NW
Wasghinton, DC 20035

Dated this 27th day of October, 2008

Megan Hooker
Legal Assistant
CRAG LAW CENTER