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

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

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF MOTIONS FOR RECONSIDERATION AND/OR CLARIFICATION

The American Petroleum Institute ("API") respectfully moves for leave to file the attached *amicus curiae* brief in support of the motions by Shell Gulf of Mexico Inc. and Shell Offshore Inc.[1] (collectively, "Shell") and by EPA Region 10[2] for reconsideration and clarification of the Board's December 30, 2010, Order Denying Review in Part and Remanding Permits ("Remand Order").[3] The proposed brief is limited to two issues which have the potential to adversely affect API's members in this and other cases. Although API previously submitted (jointly with other parties) an amicus brief,[4] that brief preceded the Remand Order and covered other topics. As a consequence, API was not in a position to address issues generated by the Remand Order, such as those addressed in the brief which is attached to this motion. Therefore, this appears to be API's only opportunity to participate in the Board's resolution of the issues raised by its Remand Order.

[1] Request of Shell Gulf of Mexico Inc. and Shell Offshore Inc. for Partial Reconsideration and for Clarification of Order Denying Review in Part and Remanding Permits (Jan. 21, 2011) (Doc. No. 93).
[2] EPA Region 10 Motion for Reconsideration and/or Clarification (Jan. 21, 2011) (Doc. No. 94).
[3] *In re Shell Gulf of Mexico, Inc.*, OSC Appeal Nos. 10-01-10-04, slip. op. (EAB Dec. 30, 2010), 15 E.A.D. ___.
[4] API et al. Motion for Leave to File Amicus Curiae Brief in Opposition to the Petitions for Review and Brief of Amicus Curiae the American Petroleum Institute et al. in Opposition to the Petitions for Review (June 25, 2010) (Doc. No. 63).

THE MOVANT

API is a national trade association representing all aspects of America's oil and natural gas industry. It is comprised of over 450 members, ranging from the largest oil conglomerates to the smallest independent oil companies. These members include oil producers, oil refiners, pipeline operators and marine transporters as well as service and supply companies that support all segments of the industry. Many of its member companies are regulated under the Clean Air Act ("CAA") and require, or may in the future require, Prevention of Significant Deterioration ("PSD") permits governing air emissions from their operations.

ARGUMENT

API hereby moves for leave to file the attached amicus curiae brief to further the interests of its members in the reasonable and lawful administration of the PSD permit requirements under the CAA. The attached brief addresses regulatory efficiency, delay, and finality with respect to the CAA permitting and permitting review processes, which API believes the Remand Order threaten to undermine. Specifically, API advocates for reconsideration of (1) the Board's instruction that EPA Region 10 apply all applicable standards in effect at the time of issuance of the new permits on remand, and (2) the Board's decision to remand the permits to EPA Region 10 without resolving, or at a minimum providing guidance or analysis sufficient to allow Region 10 to resolve, four issues raised by Petitioners.

EPA Region 10 and Shell have moved for reconsideration of the Board's Remand Order pursuant to 40 C.F.R. § 124.19(g) and for clarification of that Order pursuant to the authorization in the EAB Practice Manual (Sept. 2010) at 49. 40 C.F.R. § 124.19(g) sets a deadline for reconsideration motions of 10 days after service of the final order. However, the Board extended

this deadline to January 21, 2011, and extended until February 7, 2011, the deadline for Petitioners to file their replies.[5]

Amicus participation in the Board's proceedings is required to be permitted by 40 C.F.R. § 124.19(c) and is also contemplated by the EAB Practice Manual (Sept. 2010) at 39, 45-46. However, neither authority nor the briefing order here addresses amicus participation in briefing on motions for reconsideration or clarification or indicates a deadline for such a brief. Nor was any such deadline included in the Board's extension and scheduling order.[6]

In light of the absence of a deadline for interested parties to participate as amici for the purposes of briefing on motions for reconsideration or clarification, API requests that the Board grant this motion for leave and consider the attached brief. API submits this motion only two days after the deadline for Petitioners' replies. This motion is therefore timely and will not inconvenience or prejudice any party.

Denial of this motion for leave would preclude any possibility for API to represent the views of its members and to provide aid to the Board in its review of the motions for reconsideration and/or clarification. First, API has a wide range of member entities in the oil and natural gas industry with interests which may differ from those of EPA Region 10. Many of API's members have been and in the near future will be subject to the PSD program and PSD permitting, both before state and local permitting authorities and EPA regional offices. Second, API's members have a broader interest in these proceedings – and in future proceedings which may be impacted by the principles underlying the Board's instructions on remand here – than those represented by Shell. API's arguments, therefore, will address broader policy issues than those specifically addressed by Shell or the Region in their respective motions. Therefore, API

[5] Order Granting Extension of Time to File Motion for Reconsideration or Clarification and Setting Reply Deadline (Jan. 11, 2011) (Doc. No. 91).
[6] *See id*.

requests that its brief be considered at the same time the Board considers the parties' briefs on reconsideration and/or clarification.

CONCLUSION

For the foregoing reasons, API respectfully requests the Board to grant this motion and direct the clerk to file the enclosed *amicus curiae* brief.

February 9, 2011

Respectfully submitted,

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Permit No. R10OCS/PSD-AK-10-01	)	
	)	

BRIEF OF AMICUS CURIAE THE AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF THE MOTIONS FOR RECONSIDERATION AND CLARIFICATION

The American Petroleum Institute ("API") submits this brief in support of the motions by Shell Gulf of Mexico Inc. and Shell Offshore Inc. ("Shell Motion")[1] and by EPA Region 10 ("Region Motion")[2] for reconsideration and clarification of the Environmental Appeals Board's ("Board") December 30, 2010, Order Denying Review in Part and Remanding Permits ("Remand Order").[3] API agrees that the Board should reconsider (1) its instruction to the Region to apply all applicable standards in effect at the time of issuance of the revised permits on remand, and (2) its decision to remand the permits to the Region without resolving all the issues raised by Petitioners. Reconsidering these issues will provide greater certainty and finality to the remand and will expedite this already extended permitting process.

Reconsideration is warranted as a legal matter because these two aspects of the Remand Order are inadequately explained or supported and are inconsistent with recent Agency pronouncements, prior Board and judicial decisions and Agency guidance, as well as the Clean

[1] Request of Shell Gulf of Mexico Inc. and Shell Offshore Inc. for Partial Reconsideration and for Clarification of Order Denying Review in Part and Remanding Permits (Jan. 21, 2011).

[2] EPA Region 10 Motion for Reconsideration and/or Clarification (Jan. 21, 2011).

[3] *In re Shell Gulf of Mexico, Inc.*, OSC Appeal Nos. 10-01-10-04, slip. op. (EAB Dec. 30, 2010), 15 E.A.D. ___.

Air Act and the Outer Continental Shelf Lands Act. Reconsideration is also appropriate as a matter of sound policy, because the Board's Order raises serious questions of finality, fairness to applicants, and regulatory efficiency in this and future cases. The Remand Order unnecessarily extends the already lengthy permitting process in this case and thus threatens harm to Shell and future permit applicants, including API's members.

BACKGROUND

The Remand Order concerns two Prevention of Significant Deterioration ("PSD") permits issued by EPA Region 10 ("the Region") for exploratory drilling by Shell at its leases on the Outer Continental Shelf in the Chukchi and Beaufort Seas. Shell's applications for these permits were submitted on December 11, 2008 (the Chukchi Sea permit), and May 29, 2009 (the Beaufort Sea permit); the applications were deemed complete on July 31, 2009, and February 11, 2010, respectively; and Region 10 issued the final permits on March 31, 2010, and April 9, 2010, respectively. Remand Order at 13-17.

Three groups of Petitioners filed petitions for Board review of these permits. The Board resolved three of seven issues raised by petitioners, finding error in the Region's determination on two grounds – namely, in determining when the Frontier Discoverer becomes an Outer Continental Shelf source and in not considering the new, but not yet effective, hourly NO_2 National Ambient Air Quality Standard ("NAAQS") in its environmental justice analysis. *See* Slip. Op. at 7-10. The Remand Order denied review on a third issue: the Region's decision not to apply Best Available Control Technology ("BACT") to the associated fleet's emissions. *Id.*

The Remand Order, however, did not discuss or reach the merits of four other issues raised by the Petitioners: (1) the applicability of BACT to control emissions of CO_2, (2) $PM_{2.5}$ background ambient air quality data and secondary $PM_{2.5}$ modeling, (3) compliance with the newly-issued 1-hour NO_2 NAAQS, and (4) inclusion of spill cleanup and certain other activities

in the analysis of potential to emit. *Id.* The Board supported its decision not to address these issues by asserting that "[t]he administrative record pertaining to each of these issues will likely be significantly altered by the remand of the Permits to the Region." *Id*. at 9. Thus, the Board remanded both permits in their entirety and ordered the Region to supplement the record to account for any new factual information related to these unresolved issues. *Id*. at 9-10, 82. The Board, without explanation, also directed the Region to "apply all applicable standards in effect at the time of issuance of the new permits on remand." *Id*. at 82.

Both the Region and Shell have moved for partial or full reconsideration and/or for clarification of the Order. The Region's Motion requests reconsideration of the decision to remand the permits in their entirety, including the direction to supplement the record on the unresolved issues and to apply new standards to the permits on remand. See Region Motion at 10-22. The Region also requests that the Board resolve the four final issues raised by Petitioners, *id*. at 23-31, and requests the Board to reconsider it decision to retain jurisdiction for a further appeal after remand, *id*. at 32-33. Similarly, Shell's Motion seeks reconsideration of the instruction to apply standards that post-date initial issuance of the permits and the Board's reservation of post-remand review, among others. Shell Motion at 14-20. Shell also seeks clarification from the Board as to the scope of remand for the four unresolved issues raised by Petitioners. *Id*. at 20-22. API supports these requests for reconsideration and clarification.

ARGUMENT

I. The Board Should Not Require Application of Standards Not in Effect at the Time of the Original Issuance of the Permits

The Remand Order's command that the Region "apply all applicable standards in effect at the time of issuance of the new permits on remand," *id*. at 82, undermines finality and timely resolution of the permitting process. The Remand Order offers no elaboration or support for this

position. *See id*. at 9, 82. In so doing, the Board cites various authorities which it suggests support the application of these new standards on remand.

These authorities, however, do not support the Board's decision, and their reasoning illustrates the fundamental problem with the Board's approach – that "floating" regulatory requirements unnecessarily create a moving target for applicants and permitting authorities, threatening a regulatory "endless loop" which severely undermines regulatory efficiency and core interests in finality and fairness. Indeed, the decision is flatly inconsistent with a recent Agency announcement not to require application of newly effective standards to pending permits. The Board should reconsider this aspect of its decision.

A. Prior Board decisions do not support application of newly effective requirements to the remanded permits

The cases cited by the Board do not address Shell's situation. To the contrary, they stand for the entirely opposite proposition – that permits should be governed by standards and rules in effect *at the time of the Region's original permit issuance*, not by those that come into effect at some later date in the administrative process.

Two of the Board orders cited in the Remand Order address the question of whether *the Board*, as part of its review, should apply a standard that becomes effective after the original issuance of the permit being reviewed. These cases do not speak to what the permitting authority must do on remand, and, in any event, they both conclude that the Board itself should not apply such new standards. In *In re Dominion Energy Brayton Point, L.L.C.*, 12 E.A.D. 490, 616-17 (EAB 2006) ("*Dominion Energy*"), the Board concluded that it was not appropriate to remand the permit to the Region for consideration of a new rule which came into effect after the permit was originally issued. Thus, the standard on remand was not an issue. Similarly, in *In re Russell City Energy Center, L.L.C.*, 15 E.A.D ___, PSD Appeal Nos. 10-01, 10-02, 10-03, 10-04, 10-05,

10-12, 10-13 (Nov. 18, 2010) ("*Russell City*"), the Board declined to remand a permit to consider the new hourly NO_2 NAAQS standard or EPA's new greenhouse gas permit regulations, both of which became effective after the permit was issued. The *Russell City* Board noted the absence of a statement in the NO_2 NAAQS rule that it was to be applied retroactively to permits or to require reopening of permits. *Id.*, slip op. at 111-112 (citing 75 Fed. Reg. at 6525).[4] It also referred to EPA's *PSD and Title V Permitting Guidance for Greenhouse Gases*, which provides that permits issued before the effective date of EPA's greenhouse gas rules need not comply with those rules, even if the effective date precedes the Board's final action on review. *See Russell City*, slip op. at 109, n.100 (*citing* Office of Air and Radiation, U.S. EPA, *PSD and Title V Permitting Guidance for Greenhouse Gases* at 3, n.6 (Nov. 2010)).

Other EPA and court decisions reach similar conclusions. In *Alabama v. EPA*, 557 F.2d 1101, 1110 (5th Cir. 1977), the court affirmed EPA's conclusion that "appropriate standards to be applied in a permit are those in effect at the time of *initial permit issuance*[,]" not standards that come into effect during the pendency of the permit review process. (emphasis added). Similarly, the Administrator previously rejected a request to apply a new standard, promulgated after a decision was made regarding whether a facility was a "new source" subject to permitting requirements, noting that:

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[4] The Board explained that:

> by using the future tense and by referring to "applications" in the context of the impacts of the rule on the PSD program, the language in the preamble to the final rule suggests the reverse. *See, e.g.*, 75 Fed. Reg. at 6525. In explaining how the new rule will apply, EPA states that 'major new and modified sources *applying* for NSR/PSD permits will *initially* be required to demonstrate that their proposed emissions increases of NO_x will not cause or contribute to a violation of either the annual or 1-hour NO_2 NAAQS and the annual PSD increment.' *Id.* This language suggests that the rule was not intended to require permit decisions already issued to be reopened to await the development of such tools.

Slip op. at 111-112 (emphasis in original; footnotes omitted).

> Although matters contested in an adjudicatory hearing do not become final for purposes of judicial review until the Administrator has acted on Appeal, the Administrator's review of the original action taken by the Regional Administrator should be based on the standards and guidelines in existence at the time the original action was taken, and thus, to that extent, finality must be accorded the original action taken.

In re Beker Phosphate Corp., 1 E.A.D. 499 (Adm'r 1979) (*quoting In Re U.S. Pipe & Foundry Company*, NPDES Appeal No. 75-4 at 8-9 (Adm'r 1975); *see also Dominion Energy*, 12 E.A.D. at 614-16.

Underlying these decisions is the concern that applying standards which take effect after original issuance of the permit will cause delay and inefficiency, harming both the applicant's and broader regulatory interests. Yet that is precisely the result of the Board's instruction here. The Board in *Dominion Energy* explained that applying a requirement that came into effect after the issuance of the permit would harm the applicant and the region, both of which had expended significant resources and time in reaching a final permitting decision. 12 E.A.D. at 618. Furthermore, the Board noted, "if regional offices were required to reconsider every pending permit and every permit on appeal to the Board each time a new rule was issued, such a requirement could wreak havoc on the Agency's permitting program." *Id.*, n. 203.

The Board in *Russell City* referenced a similar commitment of applicant and regulatory resources when cautioning against applying new standards and thereby creating "an endless loop of permit issuances, appeals, and remands":

> [The permitting authority] has spent several years and significant resources during this time considering the permit application in light of the existing rules and standards. The other participants have likewise spent significant time and resources in participating, commenting, and/or addressing various permit-related issues. Should the Final Permit be remanded to reconsider the NO_2 NAAQS final rule, it is possible that another standard may be issued during the remand period, which would delay the permit proceedings even further and result in an endless loop of permit issuances, appeals, and remands.

Russell City, slip op. at 112.

The Administrator has also cautioned against application of "floating" standards during the pendency of review:

> EPA should do its utmost to avoid the problems associated with 'moving target' criticism so often asserted by those subject to the regulatory requirements of this and other government agencies. The standards and guidelines for the preparation of … 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 … standards and guidelines is when the Regional Administrator initially issues a final permit.

In re Beker Phosphate Corp., 1 E.A.D. 499 (*quoting In Re U.S. Pipe & Foundry Company*, NPDES Appeal No. 75-4 at 8-9). The Fifth Circuit upheld this conclusion, observing that applying to a permit standards which are effective not at the time of initial permit issuance, but took effect later during the "full administrative process, … would create havoc in EPA's permit development procedures" and therefore must be rejected. *Alabama*, 557 F.2d at 1110; *see also Alaska Professional Hunters Ass'n, Inc. v. Federal Aviation Administration*, 177 F.3d 1030, 1035 (D.C. Cir. 1999) ("Those regulated by an administrative agency are entitled to know the rules by which the game will be played").

These same concerns are present here. Shell and the Region have expended considerable resources in the development of these permits. Shell applied for these permits more than 18 months ago. The pendency of these appeals forced Shell to cancel its 2010 exploration plans and announce its intent to cancel plans to begin exploration in 2011.[5] To require Shell and the Region to start anew at this time and apply new standards will unnecessarily extend the permitting process and potentially threatens to further delay Shell's exploration program. The Board should reconsider its order and only require application of standards in effect at the time the Region initially issued Shell's permits.

[5] "Offshore Drilling: Shell cancels 2011 Arctic drilling plans," Greenwire, Feb. 3, 2011, available at http://www.eenews.net/Greenwire/2011/02/03/2/ (accessed Feb. 3, 2011).

B. EPA Guidance does not support the application of new standards on remand

The EPA guidance documents cited by the Board, *see* slip op. at 9, also counsel against application of newly effective standards that post-date the initial issuance of a PSD permit.

The Page Memorandum responds to the questions of parties "currently developing or reviewing applications for PSD permits" and concludes that new hourly NO_2 NAAQS applies only to permits which had not been issued by the standards' effective date, because "permitting and licensing decisions of regulatory agencies must reflect the law in effect at the time the agency makes a final determination on a pending application." Memorandum from Stephen D. Page, Director, Office of Air Quality Planning & Standards, *Applicability of the Federal Prevention of Significant Deterioration Permit Requirements to New and Revised National Ambient air Quality Standards* at 2 (Apr. 1, 2010) (citations omitted). Thus, the Page Memorandum indicates that that the new NO_2 NAAQS should not be applied to Shell's permit because it was issued before the effective date of that NAAQS.

Similarly, EPA's permitting guidance for greenhouse gases concludes that the PSD program only applies to greenhouse gas emissions from sources with a permit issued on or after the effective date of the effective date of those rules, explaining that "a permit is 'issued' when the Regional Office makes a final decision to grant the application, not when the permit becomes effective or final agency action[.]" Office of Air and Radiation, U.S. EPA, *PSD and Title V Permitting Guidance for Greenhouse Gases* at 3 and n.6 (Nov. 2010) (citation omitted). As the guidance explains, "EPA generally applies the requirements in effect at the time a permit is issued by a Regional office unless the Agency has expressed an intent when adopting a new requirement that the requirement apply to permits that were issued earlier but not yet effective or final agency action by the time the new requirement takes effect." *Id*. Again, because Shell's

permit was initially issued before the effective date of the PSD rules for greenhouse gases, Shell should not be subjected to those rules.

C. Assistant Administrator McCarthy's recent announcement in a similar case supports the conclusion that newly effective standards should not be applied to the remanded permits

The Board should also take notice of Assistant Administrator McCarthy's recent announcement that EPA will not apply the new greenhouse gas permitting rules to a PSD permit application which was completed prior to the effective date of those rules, as well as "similarly situated" permit applications. *See Avenal Power Center v. EPA*, No. 1:10-cv-00383-RJL (D.D.C.), Corrected Second Declaration of Regina McCarthy, Feb. 4, 2011, Decl. at ¶ 6 (Doc. No. 33).[6] The Assistant Administrator explained that this approach was appropriate for the permit at issue in the *Avenal Power* case in part because of "EPA's statutory obligation to grant or deny a complete PSD permit application within one year." *Id.* That approach should apply equally to Shell's permits here given that the applications were administratively complete and the permits issued well before the effective date of the greenhouse gas rules or the new NO_2 NAAQS. The McCarthy declaration thus provides one additional reason for the Board to reconsider its decision.

In short, prior practice, decisions and EPA guidance all support the conclusion that the Region should not be required to apply new standards that were not in effect at the time the Shell permits were first issued.

II. The Board Should Resolve all Issues Before It – or at a Minimum, Provide a Thorough Analysis of all Issues – to Enable Efficient Permit Resolution on Remand

By leaving unresolved four of the seven issues raised by Petitioners and then requiring the Region to reopen and reconsider these issues, the Board's Remand Order also promises to

[6] A copy of Assistant Administrator McCarthy's Corrected Declaration is attached to this Brief.

unnecessarily prolong the already protracted permitting process. Deferral of these issues in this manner threatens further delay should the Board conclude in another round of appeals that the Region's disposition of these unresolved issues was improper. It would be far more efficient and benefit all the parties if the Board were to resolve these issues now before they are remanded or, at a minimum, provide clear guidance to the Region and Shell on how they should be addressed.

A. Efficiency and finality dictate resolution of all issues

Judicial and administrative efficiency, as well as timely and expeditious resolution of the permitting process, favor resolution of all the issues raised by petitioners. These factors have led the Board on many past occasions to address all challenged aspects of a permit. *See, e.g.*, *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121 (EAB 1999) (remanding permit conditions related to BACT determination and environmental justice analysis, but denying review of seven other issues after considering them on the merits). This promotes administrative efficiency by ensuring that the permitting authority does not waste time and resources by reevaluating permit conditions that were properly decided in the first instance. It also promotes judicial efficiency by preventing subsequent challenges that merely restate the same concerns already before the Board. And it will help to avoid the possibility that the Board might remand the permits again should it conclude that the Region's initial or subsequent resolution of the undecided issues on remand was improper. Thus, a thorough merits-based analysis now will provide guidance to the Region as well as future permit applicants and ensure that any mistakes, should they exist, are not repeated.

Only limited circumstances not present here would support deferring resolution of all the issues before the Board. Deferral may be appropriate when a challenged issue is mooted due to either remand of that issue on other grounds or remand of some other, related issue. For example, the Board remanded an entire PSD permit without deciding all issues before it after

finding that the Region should have considered integrated gasification combined cycle (IGCC) as a potential control technology in its BACT determination. *In re Desert Rock Energy Company, LLC*, 14 E.A.D. ___, PSD Appeal Nos. 08-03, 08-04, 08-05, & 08-06, slip. op. at 47-48 (EAB Sept. 24, 2009). The Board reasoned that "the Region's IGCC determination is essentially a BACT step 1 issue [and] reconsideration of the issue could have overarching impacts on the rest of the Region's BACT analysis and consequently on a number of the Permit conditions." *Id.* at 48; *see also in re Teck Cominco Alaska Inc., Red Dog Mine*, 11 E.A.D. 457, 496 (EAB 2004) (remanding an antibacksliding challenge to a TDS permit condition after determining that the Region committed clear error with respect to the TDS permit condition on other grounds).

These circumstances do not exist in this case. The Board asserts 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 two issues found to constitute clear error. Remand Order at 82. This assertion is puzzling and effectively grants the petitions on the other four issues without any explanation. The Board found clear error in the Region's environmental justice analysis and its determination of when the Frontier Discoverer becomes an OCS source. It is not evident how the Region's consideration of these issues could affect the four undecided challenges involving: (1) the applicability of BACT to control emissions of CO_2, (2) $PM_{2.5}$ background ambient air quality data and secondary $PM_{2.5}$ modeling, (3) compliance with the newly issued 1-hour NO_2 NAAQS, and (4) inclusion of spill cleanup and certain other activities in the analysis of potential to emit. Absent the Board's Order directing it to do so, the Region to would not be obligated to reconsider these four issues.[7]

[7] While the undecided NO_2 NAAQS issue arguably is peripherally related to the remanded environmental justice analysis, nothing in the Board's environmental justice remand actually requires *application* of the new one hour NAAQS, merely consideration of how that newly effective standard might affect the environmental justice analysis. Remand Order at 81.

It may be, as the Board suggests, that the Board's decision to require application of the new NO_2 NAAQS and greenhouse gas permitting requirements to the reissued permit could affect how the Region addresses the two undecided challenges that petitioners raised on these points. *See* Remand Order at 9. As explained in the previous section, however, the Board should reconsider its instruction to apply the new standards to the remanded permits, as that direction is inconsistent with the Board's own precedent and Agency guidance.[8] Moreover, even if the Region were required to apply these new standards – which it should not be – that in no way affects the other two undecided issues regarding the Region's $PM_{2.5}$ analysis and inclusion of emissions from spills or other activities in the potential to emit calculation. Thus, because the unaddressed issues are completely independent of the remanded permit conditions, judicial and administrative efficiency dictate that the Board address them separately on the merits now and not require the Region to reconsider them on remand. Deferring the decision until a later date merely adds uncertainty to the Region's task upon remand and creates a risk that the final issuance of the permits will be delayed yet again to the detriment of the permittee.

B. <u>At a minimum, the Board should provide a thorough analysis of the unresolved issues to guide the remand</u>

Strong policy considerations favor further Board analysis and clarification to the parties on the undecided issues. The fact that the Region and Shell have requested clarification makes it clear that the Board's guidance is needed and would assist the parties on remand. The Region cannot realistically be expected to respond adequately to the Board's concerns absent a clearer and more detailed explanation of those concerns. The absence of clear guidance from the Board unnecessarily creates a risk that the Region and Shell may not address the issues in a manner that

[8] Indeed, it is the Board's direction to apply the newly effective standards, not its finding of clear error on two issues, that creates the potential need to "reopen" these issues. Absent that instruction, there is absolutely no link between the decided and undecided issues that would suggest a need to reopen the record on the undecided issues.

the Board later upholds. Providing instructions now on these issues will enhance the remand proceedings and foster administrative efficiency by reducing the possibility that the Board will find it necessary to remand the permits again.

The Board in the past has provided such guidance in similar circumstances. For example, the Board provided a 14-page explanation of how to address ESA consultation requirements in PSD permits after granting a motion for voluntary remand. *Desert Rock*, slip. op. at 33-46 . The Board reasoned that due to "the significance and complexity of th[e] issue" it should "review it in some detail . . . to assist the agency on remand and in other permit cases." *Id.* at 34. Similarly, the parties here and in future cases would benefit from the Board's instructions on all the outstanding issues.

In short, the more guidance the Board is able to give to the Region upon remand, the greater likelihood that the Region will resolve the issues in a manner that withstands further challenges and allows the permittee to move forward in a timely manner.

III. The Board's Order Inappropriately Compounds Delay, Uncertainty and Inefficiency

The Board's instruction to the Region to apply new standards that have come into effect after the initial issuance of the permits in March and April 2010 unnecessarily adds to the permitting complexity and burden on Shell and the Region, and thus to the uncertainty and delay associated with the remand. The Remand Order's failure to resolve or provide guidance on four of the seven issues raised by Petitioners further compounds these problem and increases the risk of further error and even more delay in final issuance of the permits. Accordingly, the Board's approach to these two issues has increased the likelihood of further administrative proceedings, at which point the Region and applicant will have to address not only the issues specified for remand, but also any new standards which have come into effect in the interim. The risk of

delay and uncertainty created by the Board's Remand Order is both unnecessary and counter-productive.

This delay and uncertainty is also exacerbated by the Board's reservation of jurisdiction for further review after remand is completed, Remand Order at 82 – an approach inconsistent with EPA's regulations, under which completion of the remand itself exhausts administrative remedies and is "final agency action" for the purposes of obtaining judicial review. *See* 40 C.F.R. § 124.19(f)(1)(iii). The Board's approach here pushes judicial review, and therefore the prospect of finality for the applicant and permitting authority, even further out of reach. The Board's retention of jurisdiction is an unreasonable impediment to the right to judicial review enshrined in section 307 of the CAA, 42 U.S.C. § 7607 and raises the specter of the "endless loop" which the Board cautioned against in *Russell City*.

It is for this reason that the Remand Order is plainly inconsistent with the Board's previous decisions and the Clean Air Act and Outer Continental Shelf Lands Act.

First, the Remand Order conflicts with the principle that the Board's resolution of permit challenges should avoid "significant prejudice to the permittee's interest in a timely resolution of the permitting process[,]" *see, e.g.*, *In re Zion Energy LLC*, 7 E.A.D. 701, 707 (EAB 2001). Shell has already been prejudiced by the delay here. Shell's permit applications were deemed complete 18 months and one year ago, respectively. Having already taken losses associated with cancellation of its exploratory drilling plans for the 2010 season, Shell has recently announced that the continuing regulatory uncertainty related to its permits has led the company to cancel its 2011 drilling plans as well – putting in jeopardy the significant funds that Shell has invested in its Arctic exploration plans.[9] Shell would be seriously prejudiced if it were forced to cancel its

[9] "Offshore Drilling: Shell cancels 2011 Arctic drilling plans," Greenwire, Feb. 3, 2011, available at http://www.eenews.net/Greenwire/2011/02/03/2/ (accessed Feb. 3, 2011).

2012 drilling plans due to a subsequent remand based on one of the issues that the Board declined to address. Consistent with its prior decisions, the Board should make every effort to resolve the challenges to Shell's permits in a timely and expeditious fashion. Not only is that an appropriate goal here, it applies equally to other permit challenges that Board will consider in the future.

Second, timely resolution of PSD permit applications is called for in the CAA itself. Section 165(c) of the Act requires that EPA grant or deny a PSD permit within one year from the date on which the permit application is complete. 42 U.S.C. § 7475(c). This provision was intended to prevent the very type of administrative delay that Shell has confronted here, as recently noted by Assistant Administrator McCarthy in her decision against application of new standards to already issued permits. Indeed, as the legislative history of this provision explains, Congress "does not intend that the permit process" for PSD "should become a vehicle for inaction and delay[,]" but that permitting authorities "must do all that is feasible to move quickly and responsibly on permit applications[,]" because "[n]othing could be more detrimental to the intent of this section and the integrity of this Act than to have the process encumbered by bureaucratic delay." S. Rep. No. 94-717, at 23 (1976). The Remand Order commits the very sin that Congress intended to avoid.

Third, as Shell notes, Shell Motion at 6, the Board's Order thwarts Congress' express desire to develop the Outer Continental Shelf, as articulated in the Outer Continental Shelf Lands Act: "[T]he Outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for *expeditious* and orderly development, subject to environmental safeguards[,]" 43 U.S.C. § 1332(3) (emphasis added).

In short, the Board's Order to defer consideration of all the issues and require application of newly effective standards is contrary to the core principle of prompt resolution of permit applications articulated in the Board's prior decisions, the CAA and the Outer Continental Shelf Act. The Board should reconsider these two aspects of the Remand Order.

CONCLUSION

For the foregoing reasons, API respectfully urges the Board to reconsider (1) its instruction that the Region shall apply all applicable standards in effect at the time of issuance of the new permits on remand, and (2) its decision to remand the permits to the Region without resolving, or even providing guidance or analysis sufficient to allow the Region to resolve, four issues raised by Petitioners.

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CERTIFICATE OF SERVICE

I certify that I have caused a copy of the foregoing Motion for Leave and Proposed Amicus Brief in Support to be served by electronic mail on February 9, 2011, upon counsel for the parties to these proceedings:

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