

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

OCS Appeal Nos 07-01 & 07-02

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 In re: :  
 SHELL OFFSHORE, INC. :  
 Kulluk Drilling Unit and :  
 Frontier Discoverer Drilling Unit :  
 Permit Nos. R10OCS-AK-01 :  
 R10OCS-AK-02 :  
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ENVIR. APPEALS BOARD

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HEARING PROCEEDINGS

Friday, August 10, 2007

Washington, D.C.

BEFORE:

JUDGE KATHIE A. STEIN

JUDGE EDWARD E. REICH

JUDGE ANNA WOLGAST

1 Presenting Argument via video:

2 Michael LeVine, Esq.,

3 on behalf of Earthjustice

4 Christopher Winter, Esq.,

5 on behalf of North Slope Borough (NSB)

6 Presenting in Person:

7 Duane A. Siler, Esq.,

8 Susan M. Mathiascheck, Esq.,

9 Patton Boggs

10 on behalf of Shell Offshore Inc (SOI)

11 Elliott Zenick, Esq.,

12 Juliane R.B. Matthews, Esq.,

13 Environmental Protection Agency,

14 on behalf of EPA

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## 1 P R O C E E D I N G S

2 JUDGE STEIN: Good afternoon. We  
3 are hearing oral argument in the matter of in  
4 re: Shell Offshore, Inc., OCS Appeal Number  
5 07-01 and 07-02. The Board has allocated a  
6 total of 100 minutes for oral argument today,  
7 25 minutes for each side. Each of the two  
8 petitioners have 25 minutes each for Shell  
9 and the Environmental Protection Agency. Two  
10 petitioners may reserve up to five minutes  
11 for rebuttal, and they may begin with their  
12 oral argument.

13 Additionally at this point, would  
14 counsel please introduce themselves and  
15 advise us who they represent, beginning in  
16 the order in which you'll be appearing, first  
17 North Shore Borough; second, Earthjustice  
18 representing a number of environmental  
19 groups; third, EPA; and lastly, Shell Oil.

20 MR. WINTER: Well, Your Honor, this  
21 is Chris Winter representing North Slope  
22 Borough. And actually, we have decided with

1 our co-petitioners that Earthjustice will be  
2 presented first, then we will go after that.

3 JUDGE STEIN: Okay. Earthjustice?

4 MR. LeVINE: Your Honor, my name is  
5 Michael LeVine, and I represent Resisting  
6 Environmental Destruction on Indigenous  
7 Lands, or REDOIL, Alaska Wilderness League,  
8 Northern Alaska Environmental Center, Center  
9 for Biological Diversity, and Natural  
10 Resources Defense Council.

11 JUDGE STEIN: Thank you. EPA?

12 MR. ZENICK: Elliott Zenick, Office  
13 of EPA, General Counsel.

14 MS. MATTHEWS: I'm Julianne Matthews  
15 from the Office of Regional Counsel in  
16 Region X.

17 MR. SILER: I'm Duane Siler  
18 representing Shell Offshore, Inc.

19 MS. MATHIASCHECK: And I'm Susan  
20 Mathiascheck on behalf of Shell Offshore,  
21 Inc.

22 JUDGE STEIN: I'd like to make just

1 a few opening remarks before we actually  
2 start the oral argument.

3 In proceeding today, we should  
4 assume that the Board has read and is  
5 familiar with your briefs. And while I'm  
6 sure you have some prepared remarks to make,  
7 please understand one of the primary purposes  
8 of oral argument is for us to be able to  
9 probe some of the issues and more complex  
10 issues in this case. So we appreciate your  
11 understanding of the numerous questions that  
12 are likely to come your way.

13 One additional matter I'd like to  
14 mention as we were advised I believe by  
15 Mr. Winter perhaps a few weeks ago the 9th  
16 Circuit has issued a stay which precludes, as  
17 I understand, Shell from drilling in the  
18 Beaufort Sea at least until the 14th of  
19 August, when the Court has oral argument  
20 scheduled. We've been asked to expedite our  
21 decision here, and for that reason, we would  
22 appreciate the parties apprising us of the

1 status of that stay following the hearing  
2 before the 9th Circuit, or if there should be  
3 any other material change that may affect the  
4 time limits on the matter. But I would  
5 appreciate the parties letting us know that  
6 in case -- obviously, it involves some  
7 complex issues. And while respecting Shell's  
8 request for expedition, we're also mindful of  
9 the importance of fully understanding and  
10 giving due consideration to the issues that  
11 have been presented to us for review. Yes?

12 MR. SILER: Your Honor, there has  
13 been a change in status that I wanted to  
14 apprise the Court of. I can do it at this  
15 time or during the scheduled argument, as you  
16 wish.

17 JUDGE STEIN: Why don't you just do  
18 it while you're standing there?

19 MR. SILER: Today Shell is filing  
20 with the Court of Appeals for the 9th Circuit  
21 a notice to advise the Court of two  
22 developments. One, that Shell Offshore,

1 Inc., has entered into a conflict avoidance  
2 agreement with the various stakeholders  
3 regarding the issue of impact on the whale  
4 hunt that is scheduled to occur by the  
5 Village of Nuiqsut coming up late in July.  
6 And the second matter is that Shell  
7 determined yesterday that, based on the  
8 pendency of this permit and the pendency of a  
9 couple of other permits, as well as some  
10 technical difficulties, that in light of this  
11 conflict avoidance agreement, Shell is going  
12 to forebear from any activity in the offshore  
13 Beaufort until the Nuiqsut whale hunt has  
14 been concluded.

15 So Shell would have been required  
16 to cease activities on August 25 and not  
17 resume them until the whale hunt is finished,  
18 which typically happens -- although it's also  
19 determined, I'm told, by weather conditions  
20 -- typically happens in mid to latter  
21 September.

22 And I would be happy to proffer for

1 the Court a copy of the filing that SOI has  
2 made with the 9th Circuit. That's the  
3 substance of it.

4 I would say that we still  
5 respectfully request that the Board expedite  
6 its consideration and determination of these  
7 petitions. If that could be done by the  
8 latter part of this month or very early in  
9 September at the latest, without presuming  
10 the outcome of that, Your Honor, it would  
11 still potentially allow SOI to have a  
12 truncated drilling season after the whale  
13 hunt is concluded and salvage something from  
14 the 2007 drilling program.

15 JUDGE STEIN: Let me ask a  
16 clarifying question. Did I understand you to  
17 say that typically, the whale hunt ends  
18 around the latter part of September?

19 MR. SILER: I'm told that  
20 historically, it usually ends between  
21 September 15 and September 25 when the  
22 weather gets bad. Very rarely has it gone on



1 beyond that. If it were important to provide  
2 historical records, we could do that, but  
3 that's what I understand, Your Honor.

4 JUDGE STEIN: So as a result of  
5 that agreement, you would not be -- assuming  
6 all of your other permits were in order and  
7 the 9th Circuit stay were lifted, you would  
8 not be drilling before the 25th or --  
9 sometime between the 15th to the 25th of  
10 September?

11 MR. SILER: That's correct, Your  
12 Honor.

13 JUDGE STEIN: That's very helpful.  
14 And with that, I would still appreciate  
15 anything that would be appropriate for us to  
16 follow on in the hearing on Tuesday, and  
17 that's not so much the merits of the 9th  
18 Circuit case but just anything on timing.  
19 And if any of the parties wants to let us  
20 know of different positions, that's fine.  
21 And with that, I think I will turn to  
22 petitioners for Earthjustice.

1 MR. SILER: By all means, Your  
2 Honor. And may I give this to the clerk?

3 JUDGE STEIN: Absolutely.

4 MR. LeVINE: This is Michael  
5 LeVine. And again, I represent petitioners  
6 REDOIL, Alaska Wilderness League, Northern  
7 Alaska Environmental Center, Center for  
8 Biological Diversity, and National Resources  
9 Defense Council.

10 At the outset I'd like to reserve  
11 five minutes for rebuttal. And also, I'm  
12 getting an echo, and I can hear myself, which  
13 is sort of distracting, and I'm wondering if  
14 there's anything that could be done.

15 JUDGE STEIN: Let me check with our  
16 technical person. Can you work on that? Is  
17 that better? No?

18 MR. LeVINE: That's much better.  
19 Well, it's better. That's fine.

20 JUDGE REICH: Sorry about that.

21 MR. LeVINE: Yes. Not a problem.  
22 Petitioners brought this challenge because

1 EPA violated the plain language of the Clean  
2 Air Act in granting minor source permits to  
3 drillships that will emit more than 250 tons  
4 of regulated pollutant and therefore should  
5 be subject to the PSD program.

6 Now, as you're aware, there are two  
7 petitions challenging this decision. I'm  
8 going to cover only the two main issues  
9 raised in REDOIL's petition, and Mr. Winter  
10 will address the additional issues raised by  
11 the North Slope Borough.

12 First, EPA acted contrary to the  
13 plain language of the Clean Air Act by  
14 treating emissions from the same drillship  
15 during the same year at different sites as  
16 emissions from separate sources. And second,  
17 even if EPA could separate the emissions by  
18 well site, it did not justify its decision  
19 that emissions from well sites further than  
20 500 meters apart need not be aggregated.

21 As a threshold matter, these  
22 questions involve the agency's obligations

1 under the law. Its compliance with the plain  
2 language of the Clean Air Act and its failure  
3 to justify its decision are a major criteria.  
4 These are not technical matters within the  
5 area of the agency's expertise, and EPA is  
6 not entitled to particular deference on these  
7 issues.

8 To answer the first question, we  
9 need look no further than the plain language  
10 of the Clean Air Act. Congress required that  
11 the PSD requirements apply to any source with  
12 the potential to emit 250 tons or more of  
13 antipollutant.

14 JUDGE STEIN: Let me interrupt you  
15 for a moment and direct your attention to  
16 Section 328 of the Clean Air Act and also  
17 Part 55 of the regulations, particularly  
18 Part 55.2. As I understand it, Part 55 of  
19 the regulations interprets the language of  
20 Section 328 of the Clean Air Act to provide  
21 that vessels are only covered when they're  
22 physically attached to the seabed. And my

1 understanding is that that is somehow due to  
2 a cross-reference to the Outer Continental  
3 Shelf Land Act in Subpart 2i of Section 328C.  
4 Could you explain how that bears on this case  
5 in your view, in particular, regulatory  
6 language?

7 MR. LeVINE: Absolutely, Your  
8 Honor. To answer that question, it bears on  
9 this case because in light of the statutory  
10 language requiring that a drillship that  
11 emits more than 250 tons per year of a  
12 pollutant requires compliance with the PSD  
13 provision, both EPA and Shell point to this  
14 regulation as the reason for which EPA is  
15 allowed to separate these emissions by well  
16 site. In fact, that regulation does nothing  
17 of the sort. This regulation doesn't address  
18 the question presented in this case, it  
19 states only that a drillship is a source only  
20 when it's attached to the ocean floor.

21 JUDGE STEIN: You don't dispute  
22 that, do you? You don't dispute a drillship

1 is a source only when it's attached to the  
2 floor of the seabed?

3 MR. LeVINE: For purposes of this  
4 appeal, we do not. We might not agree with  
5 the regulation, but it's not necessary to  
6 resolve that question for purposes of this  
7 case.

8 JUDGE REICH: Can you explain, if  
9 you agree for purposes of this case that a  
10 drillship is an OCS source only when attached  
11 to the seabed, what relevance does it have in  
12 terms of the PSD analysis of stationary  
13 source whether you consider these multiple  
14 sites a single OCS source or multiple OCS  
15 sources?

16 MR. LeVINE: Certainly. First, let  
17 me say that whether or not the drillship is a  
18 source only when attached doesn't address the  
19 question of whether or not it's a new source  
20 when it reattaches to the bottom. It's still  
21 the same drillship with the same support  
22 vessels undertaking the same activity, and

1    it's the same source, and so for purposes of  
2    the PSD provision, in this case, the  
3    drillship is allowed to emit 245 tons of  
4    pollutant at each well site. So if it  
5    becomes a new source at each well site, it  
6    need not obtain a PSD permit, but under EPA's  
7    interpretation, because it will emit less  
8    than 250 tons of a pollutant.

9                   If it's still the same source at  
10   each well site then, in fact, each drillship  
11   will emit up to three times 245 tons of the  
12   pollutant, or nearly 800 tons of pollutant  
13   per year, and therefore should be required to  
14   obtain a PSD permit.

15                   JUDGE REICH: But in terms of the  
16   analysis that would be done under the PSD  
17   program, if I'm looking at the definition in  
18   51166 and looking at the way a stationary  
19   source is defined, what relevance is there in  
20   that analysis as to whether, putting aside  
21   the "potential to emit" part, just in terms  
22   of the building, facility, whatever part of

1     that, what relevance is there whether you  
2     have these well sites as being a single OCS  
3     source or multiple OCS source?  If I'm  
4     starting from 166, why do I go back to 328 of  
5     the statute to figure out how that applies?

6                 MR. LeVINE:  Well, because the  
7     provisions defining what a stationary source  
8     is begin with the word "source."  Section 328  
9     tells you what the source is.  The source in  
10    this case is the OCS source as defined by  
11    Congress.  And if that is the drillship, as  
12    Section 328 makes clear, then you don't get  
13    to the definitions of "facility" or the issue  
14    about whether the separate sources are  
15    contiguous and adjacent for determining what  
16    the source is.

17                In this case, the source is the  
18    drillship, and there's one source.  And  
19    therefore, to calculate its potential to  
20    emit, you look only at the emissions over the  
21    course of the year from that drillship.

22                JUDGE STEIN:  But aren't there



1 potentially two ways to interpret that  
2 statute? And I'm just -- this is just  
3 hypothetically, that you could look at,  
4 assuming that the drillship is a source only  
5 when it's attached to the seabed, and say  
6 when it detaches that that's the end of  
7 source one and therefore, the only way that  
8 with the reattachment you could -- it could  
9 be one source under the aggregation  
10 provisions.

11 Another way to look at it would be  
12 essentially the comment that it's the same  
13 ship and therefore, by definition, it's the  
14 same source. If we don't reach the PSD  
15 regulations and we disagree with you, statute  
16 compels your result, how is it that this is  
17 regulated?

18 I mean, I'm referring -- in other  
19 words, well, what I'm trying to say is you've  
20 argued that there is an interpretation of the  
21 statute, that it's unnecessary to reach the  
22 PSD aggregation provisions because by the

1 terms of the statute in 328, it's a single  
2 source. And I'm suggesting that that is a  
3 possible interpretation of the statute, but  
4 there might be other interpretations of the  
5 statute, namely, the ones that Shell and EPA  
6 have posited here by which absent the PSD  
7 aggregation provisions, you don't. The ship  
8 is a source of site one, and when it picks up  
9 and moves to site two, that's the end of  
10 source one. Under your analysis, how is it  
11 that we just avoid looking at the PSD regs?

12 MR. LeVINE: Well, Your Honor, were  
13 you to accept that or read that Section 328  
14 could be read to allow the same drillship  
15 during the same year to be separate sources,  
16 you would then have to go to the PSD  
17 provisions to see whether the different  
18 sources, the various well sites, should be  
19 aggregated for determining the applicability  
20 of the PSD requirement.

21 JUDGE STEIN: Is it your contention  
22 that the reading of the statute that Shell

1 and EPA have suggested, that after the end of  
2 attachment one, that's the end of sort of  
3 source one, that that's not a possible  
4 interpretation of the statute?

5 MR. LEVINE: Yes, Your Honor, that  
6 is not a possible interpretation of the  
7 statute.

8 Congress was very clear on this  
9 point. It specifically defined an OCS source  
10 as equipment, activity or facility which  
11 emits a pollutant, is regulated under OCSLA,  
12 and is on or above the OCS. It did not  
13 include the restriction that it occur only at  
14 a drill site. Congress was free to have that  
15 requirement if it chose. EPA is not. The  
16 statutory language is very clear. And, in  
17 fact, in the next sentence of that provision  
18 it specifically includes drillship,  
19 exploration as regulated under the provision  
20 as something that's an OCS source. So to add  
21 the requirement that the drillship becomes a  
22 new source at each well site is contrary to

1 the specific direction that Congress put in  
2 place.

3 JUDGE REICH: Could I go back to  
4 the interrelationship between 328 and  
5 Part 166 reg? You indicated that the  
6 starting point is the word "source." The way  
7 I look at the regulations, the starting point  
8 is the word "stationary source." Stationary  
9 source in Part 160 says "has a specific  
10 definition." That specific definition then  
11 leads you to the building, structure,  
12 facility, etc. Are you saying that the  
13 definition of "OCS source" in 328 supplants  
14 the definition of "stationary source" in the  
15 Part 166 regulations?

16 MR. LEVINE: Your Honor, that's the  
17 specific argument that Shell makes in its  
18 response to the Petition for Review. I don't  
19 think it's necessary to go so far as to say  
20 that the definition in Section 328 supplants  
21 the definition of "stationary source" in  
22 Part 166. It is necessary to know that

1 Congress did specifically tell you what the  
2 source is that's being regulated.

3 It would be possible, I think, to  
4 read "stationary source" in Section 166 to  
5 include the drillship in this case during the  
6 times that it's attached to the ocean floor.  
7 Those two things aren't inconsistent.

8 What Congress did here was provide  
9 specific direction for this instance and  
10 define what an OCS source is.

11 JUDGE WOLGAST: Going back to  
12 looking again at the terms of Section 328 of  
13 the Air Act, I hear your argument. And I  
14 understand when you look at activities, it  
15 specific includes drillship exploration.  
16 But, as I understand it, Shell and EPA would  
17 say yes, and we're regulating, and we are  
18 receiving a permit for drillship exploration.

19 I mean, isn't it just as fair to  
20 say that the statute simply doesn't address  
21 the details that this case is turning on,  
22 that is, what happens when the exploration is

1 moved from site to site?

2 MR. LeVINE: Should I wait to  
3 answer that question until they're back?

4 COURTROOM TECHNICIAN: They got  
5 kicked off.

6 JUDGE WOLGAST: Just wait one  
7 second. They should be back on in less than  
8 a minute.

9 MR. LeVINE: Okay.

10 JUDGE STEIN: We won't penalize  
11 your time for that.

12 MR. LeVINE: While we're waiting,  
13 I'm wondering if there's a way to tone down  
14 the echo again. I'm still getting it. If  
15 there's anything that could be done, I'd  
16 appreciate it.

17 JUDGE STEIN: We'll try to take  
18 care of that.

19 MR. LeVINE: Thank you.

20 Mr. Kuchera, are you the one reconnecting, or  
21 is it someone else?

22 COURTROOM TECHNICIAN: It's R2P.

1 JUDGE STEIN: Mr. Kuchera, can you  
2 give us a time estimate?

3 COURTROOM TECHNICIAN: I'm on it  
4 now. Couple minutes. The problem is --

5 JUDGE STEIN: I can't hear you.

6 COURTROOM TECHNICIAN: The problem  
7 is recording itself. It's not with our  
8 network.

9 JUDGE STEIN: I see. There's  
10 apparently a problem with the coordinate and  
11 not with our network. We're trying to  
12 resolve that as soon as we can. If not, we  
13 may just go ahead and proceed on this issue  
14 if it's going to take considerable time,  
15 since Mr. Winter will be covering different  
16 issues.

17 I think at this point we are just  
18 going to go ahead and proceed. My  
19 understanding is they've lost power in Oregon  
20 and are in the process of rebooting. And  
21 therefore, since you and Mr. Winter are both  
22 on the same side and covering different

1 issues, I will let you proceed, and we'll see  
2 where we are at the end of your presentation.  
3 Hopefully, he will be back online before  
4 then.

5 MR. LeVINE: Thank you, Your Honor.

6 As I understood your question, it was  
7 addressed to whether or not EPA and Shell's  
8 reading of Section 328 is possible and  
9 whether there are actually competing  
10 interpretations of the statute.

11 I would say that EPA and Shell's  
12 reading is not permissible by the language of  
13 the statute for two reasons. The first is  
14 that though the language is clear, it  
15 specifies equipment activity at facility. It  
16 doesn't mention a location at which that  
17 equipment emits pollution. And second,  
18 Congress was aware that these sources were  
19 going to move.

20 In enacting Section 328, it was  
21 responding to specific concerns about  
22 drilling on the OCS and the amount of



1 pollution that the drillships and the  
2 associated icebreakers and support vessels  
3 created. It was aware of the situation and  
4 knew that these ships were going to move from  
5 place to place. If it had intended each well  
6 was a separate source, they very easily could  
7 have said so, knowing what was happening  
8 there.

9 JUDGE WOLGAST: And, in turn, it  
10 could have said that the emissions of a ship  
11 operating in this manner and performing these  
12 activities can't emit more than 250 TPY per  
13 year. It doesn't say that either. I guess  
14 I'm having trouble with the first argument,  
15 that the plain terms can only mean your  
16 interpretation, and also in looking at that  
17 how do you interpret little sub ii of the  
18 authorization under OCXLA and how that  
19 factors into a reading of 328.

20 JUDGE STEIN: Mr. Kuchera, could we  
21 get the --

22 COURTROOM TECHNICIAN: We're

1 working on it.

2 JUDGE STEIN: Okay, you're back.

3 You're back, and I believe Oregon is back  
4 online also. So, if you could, respond to  
5 Judge Wolgast's question.

6 MR. LeVINE: Sure. First let me  
7 say that Congress did not need to specify the  
8 ship couldn't emit more than 250 tons per  
9 year. It did specify that these sources must  
10 comply with the PSD requirements and not  
11 requirements found in those provisions.

12 Second, in response to the question  
13 about little Subpart ii, that's the provision  
14 that requires the source be regulated under  
15 OCXLA, and this goes back to the point I  
16 addressed a little earlier with regard to the  
17 regulations. Accepting EPA's interpretation  
18 of OCXLA as allowing regulation of a source  
19 only when attached, that doesn't address this  
20 question.

21 There is no reason that a drillship  
22 drilling in two separate places is not the

1 same equipment or facility during the same  
2 year and shouldn't be required to comply with  
3 the PSD requirements.

4 JUDGE STEIN: Well, what if the  
5 same drillship drills in one particular  
6 location and then moves 20 miles away and  
7 drills in another location? Is it your  
8 position that those two sources segregated by  
9 20 miles be need to be considered a single  
10 source?

11 MR. LeVINE: Yes, Your Honor, they  
12 would. In that situation, Shell can speak to  
13 it more than I can here, but in the context  
14 of Outer Continental Shelf lease blocks that  
15 are very large, these ships might very well  
16 drill wells separated by one or two or 20  
17 miles. And it's still in the same year,  
18 would be the same source, pursuant to the  
19 same projects or authorization.

20 I'd like to touch briefly on the  
21 second point, which is that even if EPA  
22 lawfully could treat the same drillship as

1 separate sources at different sites, it's not  
2 justified the most significant criterion used  
3 in determining whether emissions from those  
4 separate sites should be aggregated. The  
5 question here, as we touched on already, is  
6 whether or not separate sites are contiguous  
7 and adjacent as that term is used in the EPA  
8 regulations.

9           In making this decision, EPA  
10 determined that two sources cannot be  
11 contiguous and adjacent if they are separated  
12 by more than 500 meters. The North Slope  
13 Borough argues that, given the facts of this  
14 case, that determination is erroneous.  
15 Mr. Winter will address those points during  
16 his arguments. I'll limit my argument to  
17 showing that EPA failed entirely to justify  
18 or explain its reliance on 500 meters as the  
19 distance beyond which sources are not  
20 contiguous or adjacent.

21           In its Statement of Basis  
22 addressing this point, EPA says only that

1 sources cannot be contiguous and adjacent if  
2 they are separated by more than 500 meters.  
3 It doesn't give any other reason for its  
4 decision, and it provides no evidence to  
5 support this choice of a distance. The only  
6 explanation given is that Shell suggested 500  
7 meters as the proper distance. That's not  
8 sufficient.

9           There's no showing that EPA  
10 considered the effects of emissions from the  
11 drillships and support vessels at this  
12 distance or any other from each other, that  
13 it thought about the unique circumstances on  
14 the OCS where the majority of emissions come  
15 from the icebreakers and support vessels, or  
16 that it did any analysis other than simply  
17 accept Shell's suggestion.

18           In response to this point, both  
19 Shell and EPA rely on the same paragraphs in  
20 the Response to Comments. First, they say  
21 that EPA basically said the sites are likely  
22 to be far apart and therefore don't comport

1 with the common sense notion of a plant.

2           This in fact, is just EPA's  
3 speculation. The permits do not limit how  
4 close the drill sites may be, and this type  
5 of a guess isn't sufficient, nor does it  
6 really address the point. It doesn't explain  
7 how EPA chose 500 meters as the appropriate  
8 distance.

9           The only arguably relevant  
10 statement on this point is found two  
11 paragraphs later where EPA writes that to  
12 address airship concerns, Shell requested the  
13 500-meter limit. It then writes, quote,  
14 based on consideration of allowable air  
15 emissions, operational scenarios and other  
16 factors, EPA determined this approach as  
17 reasonable.

18           EPA, however, does not explain what  
19 the allowable air emissions operational  
20 scenarios or other factors are, or how they  
21 may have led to this outcome, nor does EPA or  
22 Shell point to any record documents

1 reflecting consideration of these factors.

2 Ultimately, this statement is  
3 unsupported and reflects no actual analysis.  
4 It's simply not enough under the law.

5 JUDGE WOLGAST: Let me ask you a  
6 question about that. Under the applicable  
7 regulations, what do you contend would be  
8 appropriate factors for EPA to look to to see  
9 whether and how aggregation across source  
10 emissions would be appropriate?

11 MR. LeVINE: Well, EPA should look  
12 to a distance. That should be one factor in  
13 determining whether it's contiguous or  
14 adjacent. At some point, the ships are going  
15 to be close enough that they're clearly going  
16 to be proximate and adjacent.

17 EPA also could look to the unique  
18 circumstances here where you have two  
19 drillships, but each drillship associated  
20 with it has several icebreakers and other  
21 support vessels which are responsible for the  
22 majority of the emissions. So in determining

1    whether to aggregate sources, the EPA should  
2    look to that situation and, finally, should  
3    look to see what might happen at various  
4    distances with those ships.

5                   JUDGE STEIN:  Let me clarify one  
6    thing with the clerk.  I'm a little confused  
7    on where we are on time at the moment.  Okay.  
8    So we have not penalized the petitioner for  
9    the technical difficulties we're having?

10                  THE CLERK:  No.

11                  JUDGE STEIN:  Okay, I think at this  
12    point you're out of time.  What I'd like to  
13    do is to ask whether any of the other panel  
14    members have additional questions they'd like  
15    to ask at this time.  Okay, then let's turn  
16    to petitioner North Shore Borough.  Thank you  
17    very much, and we will hear from you again  
18    during rebuttal.

19                  MR. LeVINE:  Thank you, Your Honor.

20                  MR. WINTER:  Good morning.  This is  
21    Chris Winter representing North Slope  
22    Borough.  I'd just like to make sure that



1 you-all can hear me in the courtroom there.

2 JUDGE REICH: Yes, we can hear you  
3 quite well.

4 MR. WINTER: Thank you very much.  
5 In this case, we're addressing two separate  
6 permits that EPA issued for minor sources.  
7 Shell is proposing to use two separate  
8 drillships in the Beaufort Sea, each drilling  
9 at two separate drill sites over the next  
10 three months. That's four drill sites over  
11 the next three months. Currently, Shell is  
12 allowed to emit up to 235 tons per year of a  
13 NOx in each of these drill sites and so in  
14 total, the big picture here is that Shell is  
15 planning to emit almost a thousand tons of  
16 NOx at four well sites within the next three  
17 months between now and the end of October.  
18 And those drill sites can all be within just  
19 over 500 meters from each other. So the  
20 central question is whether or not this, yes,  
21 thousand tons of emission of NOx requires  
22 Shell to go through a PSD permitting process

1 as a major source.

2 JUDGE REICH: Are you arguing that  
3 potentially both drillships could be the same  
4 OCS source?

5 MR. WINTER: That's right. Our  
6 position is that not only should EPA have  
7 aggregated the drill sites that a single  
8 drillship would operate at, but yes,  
9 each -- the two drillships combined should be  
10 considered a single source.

11 JUDGE REICH: Under the OCS  
12 definition, or because you would aggregate  
13 them under the PSD definition?

14 MR. WINTER: Because we would  
15 aggregate them under the PSD definition. I  
16 would talk about the regulatory definition.

17 JUDGE REICH: Do you think there  
18 are different OCS sources?

19 MR. WINTER: Under the OCS, EPA has  
20 the discretion to define them, each  
21 drillship, as an individual OCS source. But  
22 I think that for purposes of this case, as

1   soon as we look at the regulations, they do  
2   need to be combined into a single source for  
3   permitting purposes. The statute talks about  
4   the drillship itself. Also, I'd just like to  
5   clarify I'd like to reserve five minutes for  
6   rebuttal, if I could.

7               JUDGE STEIN: That would be fine.

8               MR. WINTER: So I want to touch on  
9   four major points. First, I'm going to  
10   discuss the applicable regulatory language,  
11   and I'd like to talk about the PSD regulation  
12   which have already come up in conversation.  
13   The main point is that EPA's interpretation  
14   here renders much of that language  
15   inoperative and superfluous and that showed  
16   the EPA has violated the plain language of  
17   that regulation.

18              Secondly, I'm going to discuss the  
19   modeling that EPA conducted in this case.  
20   Now, EPA compounded the problem of treating  
21   these as separate minor sources because they  
22   failed to consider in its modeling the

1 combined impact on air quality of the  
2 emissions from the two drillships that could  
3 be operated simultaneously in close proximity  
4 to each other. Nowhere did EPA consider  
5 those combined emissions, and there's  
6 evidence in the record that demonstrates  
7 those combined emissions may very well result  
8 in a violation of air quality standards,  
9 particularly for Pienta (?).

10 Third, I'd like to discuss EPA's  
11 Environmental Justice analysis. It's  
12 critical to keep in mind the setting for  
13 these proposed tests is on the North Slope  
14 located in a near-shore environment primarily  
15 used by Inupiat Eskimos. They spend much of  
16 their time during fall in the open water and  
17 in the near-shore environment, not in the  
18 villages, as suggested by our respondents.  
19 And any threat to health caused by these  
20 activities will rest squarely on the shoulder  
21 of the EPA.

22 I would like to discuss briefly

1 EPA's failure to request the maximum design  
2 capacities for the equipment and how that  
3 bears on the question of whether the  
4 owner-requested limit is valid in this case.

5           So on the first point, the first  
6 point is that EPA's interpretation of the  
7 regulatory language is contrary to the plain  
8 meaning of the regulation. The central  
9 language in the regulation is found at 40 CFR  
10 Section 51.166 and defines the facility to be  
11 all polluting emitting activities,  
12 pollution-emitting activities that are  
13 located on, quote, contiguous or adjacent  
14 properties.

15           Now, this language is designed to  
16 ignore that the OCS sources that would  
17 otherwise be subject to PSD review not avoid  
18 controlled requirements as a result of  
19 arbitrary subdivisions of the definition of  
20 the source.

21           Now, in this case, EPA defined the  
22 property as that term is used in regulation

1 as each individual drill site. EPA  
2 furthermore stated that activities are  
3 contiguous. And "contiguous" and "adjacent"  
4 have two separate meanings. Activities are  
5 contiguous only when undertaken at the same  
6 drill site. And EPA then defined the  
7 boundaries of the drill site as the hull of  
8 the drillship.

9 JUDGE STEIN: Mr. Winter, if we  
10 were just to decide that you substitute OCS  
11 source for what would -- under the  
12 circumstances of this case, how is it that we  
13 reach or draw in these PSD provisions that  
14 you're asking us to rely on of adjacency and  
15 contiguousness? In other words, if what we  
16 should look at when we're looking at the  
17 interrelationship between OCS and PSD is  
18 simply to say that an OCS source is defined  
19 by the terms of Section 328 in Part 55, then  
20 how is it that we ever get to this question?

21 MR. WINTER: Your Honor, it's our  
22 position -- and we share this position with

1 the other petitioners -- that the first  
2 analysis is whether or not EPA's definition  
3 of "source" clicks with the statutory  
4 language, which defines the OCS source as the  
5 drillship. Only if the Board finds that  
6 EPA's determination of that preliminary issue  
7 is within its discretion as defined by  
8 Congress, only then do we get into the  
9 aggregation language that is in the PSD  
10 regulations. And so the argument that I'm  
11 making now is an alternative argument to that  
12 statutory language.

13 JUDGE REICH: Don't we have to get  
14 into the adjacency argument to combine the  
15 two drillships into one single PSD source?

16 MR. WINTER: That's correct. I  
17 believe that's correct. And the Board would  
18 have authority to report to the agency  
19 without getting into that because we do have  
20 the decision to not aggregate separate sites  
21 from the same ship. But the Board would also  
22 go further to reach that second question of

1 aggregating between the ships by getting into  
2 those PSD regulations.

3           So again, if I could just return to  
4 where I was, EPA defines the boundary of the  
5 drill site itself as the hull of the ship.  
6 This is found in the permits themselves. For  
7 example, Petitioner's Exhibit 5 at page 11,  
8 EPA sets forth in its definition. So EPA's  
9 definition is set forth by this in several  
10 respects. First, the decision to regulate by  
11 drill site conflicts with the plain meaning  
12 of the word "property" as used in the  
13 regulation. A drill site is not a property,  
14 which is a bundle of mineral rights. A drill  
15 site is a location.

16           JUDGE STEIN: Is the term  
17 "property" defined in the regulations?

18           MR. WINTER: Your Honor, the term  
19 "property" is not defined in the regulations  
20 that we found, but it should be looked at  
21 with respect to the Outer Continental Shelf  
22 Act, which Congress specifically provided



1 direction on the lease itself. And so the  
2 property for purposes of OCS activities are  
3 the leased blocks. So when Congress did  
4 OCXLA, it was very specific that the  
5 government was to regulate OCS activities and  
6 to grant legal rights according to  
7 specifically defined areas. So, as an  
8 example, Congress stated that the lease is  
9 the form of authorization for exploration,  
10 development of mineral resources. This is at  
11 42 USC 1301C. It created the lease as the  
12 bundle of legal rights.

13 Congress also was very specific in  
14 delineating the geographic scope of those  
15 bundle of rights, stating that the lease  
16 shall be, quote, a compact area not exceeding  
17 5,736 acres. This is 42 USC Section 1336D1.  
18 So Congress not only defined the type of  
19 property interest or those bundle of rights  
20 by requiring the government use a lease, but  
21 it also defined very specifically the  
22 geographic scope of that property interest,

1    which is the leased block.  So in defining  
2    "property" for purposes of regulation at the  
3    drill site, EPA has ignored fundamental  
4    statutory structure that Congress created in  
5    arguing the drill site could not be leased  
6    proper --

7                   JUDGE WOLGAST:  How does that  
8    square with the -- I'm thinking of Part 55  
9    and the preamble to those regulations in  
10   terms of trying to make the regulation of  
11   Outer Continental Shelf activity analogous to  
12   its on-land counterparts for purposes of PSD  
13   analysis.  How would looking at it in terms  
14   of the lease block fit that goal?

15                  MR. WINTER:  There are certain  
16   contexts there is a real segment that's point  
17   of origin, or at least target origin, is part  
18   of the larger mineral lease.  On the offshore  
19   context, it's the same thing.

20                  JUDGE WOLGAST:  Well, is it the  
21   same thing?  That's my question.  In the  
22   sense of the emission, if we're trying to

1 focus on the emission activity, the emission  
2 at this time certainly isn't necessarily  
3 something with as great a geographic scope as  
4 a leased one.

5 MR. WINTER: In Outer Continental  
6 Shelf activity we have support vessels that  
7 go from the ship, so Congress explicitly  
8 expanded that concept to 25 miles from the  
9 drillship itself. So Congress has already  
10 recognized it is not the same as onshore. So  
11 they wanted to move towards permitting both  
12 types of facilities.

13 But recognize the difference in an  
14 offshore facility, because of the nature of  
15 drilling in the open water. So even 25 miles  
16 is necessary to encompass all of the  
17 activities that take place around a drill  
18 site. This is consistent with the concept of  
19 creating the leased block, which is far less  
20 in geographic scope than that 25-mile  
21 boundary as the property that's to be  
22 regulated. So there is a fundamental

1 difference between onshore and offshore  
2 activities as Congress recognized in the  
3 statute.

4 JUDGE STEIN: But I'm assuming that  
5 if you're onshore, you own a piece of  
6 property, that often there's a fence around  
7 that property and that nobody else can come  
8 onto that property without permission  
9 generally, whereas when you're in the open  
10 sea, I presume other vessels of other ships  
11 can -- at least in transiting to our areas,  
12 these leases don't preclude those vessels  
13 from crossing into the sea. Do they? In  
14 other words, if there's another company --  
15 maybe not Shell -- I presume they can sail on  
16 the open water in the same area where Shell  
17 is drilling. They're not precluded by that,  
18 are they?

19 MR. WINTER: No, they're not  
20 precluded by that. But that question, the  
21 scope of the property interest, in other  
22 words, whether that property interest

1 includes the right to exclude other people in  
2 the geographic boundary of the lease, isn't  
3 necessarily the relevant factor in looking at  
4 whether or not the emissions should be  
5 aggregated to a major source. The property  
6 in this case is clearly the lease block and  
7 the rights that Shell has to that lease  
8 block. Whether that right includes the right  
9 of exclusion doesn't go toward defining what  
10 that property interest is.

11 JUDGE STEIN: But if I understand  
12 your typical factory, don't you essentially  
13 draw a little circle around whatever that  
14 factory is and you really are looking at the  
15 emissions impact beyond that little circle?  
16 If I'm correct -- and I guess I'm trying to  
17 figure out whether the circle, the analogous  
18 circle that we draw for purposes of the  
19 situation we're dealing with here is the hull  
20 of a ship or the whole lease block. And it  
21 seems to me you're arguing it's the whole  
22 lease block.

1           MR. WINTER: That's right, Your  
2 Honor. I would like to, if I could, get back  
3 into the language to show why if it is just  
4 the hull of the ship that conflicts with the  
5 plain meaning of the regulatory language.

6           The regulations have two  
7 considerations as to whether or not they  
8 should be considered the same source. The  
9 first is continuity, if the property is  
10 contiguous. The second is adjacency. These  
11 two regulatory words have two very specific  
12 and different meanings, as we discussed in  
13 our Petition for Review and this Board needs  
14 to decide.

15           Contiguity, or contiguous, suggests  
16 the properties are touching or share a common  
17 boundary, whereas adjacency is determined by  
18 some measure of proximity. In this case, by  
19 defining the boundary as the drill sites or,  
20 in other words, the hull of the drillship,  
21 EPA has essentially rendered that contiguous  
22 determination or contiguous as it is in the

1 regulations inoperable in the context of the  
2 OCS in considering whether to aggregate the  
3 emissions are two separate drillships. It's  
4 physically impossible for one drillship to be  
5 operated within the boundaries of the hull of  
6 the other drillship, and so when EPA took  
7 this definition, it made it physically  
8 impossible, logically impossible for EPA ever  
9 to find that two drillships were contiguous  
10 and read that language out of the regulation,  
11 and focused solely on proximity.

12           So based on this approach EPA has,  
13 there is no way ever for EPA to find that two  
14 drillships are contiguous. It's a physical  
15 impossibility.

16           Now, the second point is that EPA  
17 has previously regulated OCS activity by  
18 focusing on the lease block as the primary  
19 meaning of property. And this is the  
20 document that EPA -- EPA submitted some  
21 documents in an effort to -- in this case,  
22 the operations were on neighboring lease

1 blocks, and EPA told the applicant that  
2 because those lease blocks were contiguous,  
3 or shared a boundary, that they were  
4 therefore part of the same source.

5 JUDGE STEIN: But isn't that  
6 situation factually distinguishable from  
7 yours? We just got your brief this morning  
8 so we haven't had an opportunity to fully  
9 digest everything that's in there, but wasn't  
10 there a greater interrelationship between the  
11 various drill sites there than you have in  
12 this particular instance?

13 MR. WINTER: I don't believe there  
14 is a greater interrelationship between the  
15 drill sites. The lease blocks themselves  
16 were contiguous, and EPA referenced the lease  
17 blocks in their contiguity in determining  
18 that was the OCS source. The more important  
19 point is that EPA looked at the block itself  
20 as that meaning of "block" in determining  
21 adjacent or contiguous land use. It wasn't  
22 looked whether the sites were adjacent, but



1 the lease blocks themselves.

2 JUDGE STEIN: Isn't it fair to say  
3 in light of Alabama Power and in light of the  
4 preamble to the PSD regulations that we have  
5 some examples at least where things that are  
6 fairly far along different places on a  
7 pipeline that EPA has exercised its -- what  
8 it claims to be its discretion to make  
9 case-by-case determinations where things  
10 don't make sense and has really moved beyond  
11 just a literal definition of "property"? Are  
12 you saying that they don't have the  
13 discretion to do that?

14 MR. WINTER: Your Honor, in this  
15 case, EPA responded to the Alabama Power  
16 decision by issuing regulations. Now, EPA is  
17 bound by the plain language of those  
18 regulations and has to give effect to all of  
19 those terms. If EPA provided some direct  
20 guidance on its intention with respect to  
21 this situation in the preamble, perhaps it  
22 would have the discretion to take the

1 interpretation in what could be the plain  
2 language of the regulation.

3 In fact, in the preamble, EPA spoke  
4 specifically to several different scenarios  
5 but did not speak specifically to this  
6 scenario, so EPA did not provide any guidance  
7 on its, quote-unquote, regulatory intention  
8 as it relates to OCS activities in the  
9 preamble.

10 JUDGE STEIN: But if I'm correct in  
11 understanding the PSD regulations, it's here,  
12 not the 1990 amendment, so it's not -- isn't  
13 that a correct understanding? So Section 328  
14 didn't exist in its current form at the time  
15 the PSD regulations on this point came out?

16 MR. WINTER: That's correct. And  
17 so that supports our position that EPA could  
18 not have had a regulatory intent with respect  
19 to this scenario when it showed those PSD  
20 regulations and is therefore bound by the  
21 plain language of the regulations. If EPA  
22 would like to clarify how it intends to

1 regulate OCS sources in a way that conflicts  
2 with that plain language of the regulation,  
3 it needs to reissue a specific regulation for  
4 the OCS. At this point, EPA is bound by the  
5 plain language of the regulation that we have  
6 in place. Now, given that plain language --

7 JUDGE REICH: Can I come back to  
8 your comment that there are no meaningful  
9 differences between Destin Dome and this  
10 case? My understanding of the logic  
11 underlying the agency's decision here is you  
12 have a drill site, it creates no CF source,  
13 it detaches, there's a period of time when  
14 you basically do not have an OCS source, it  
15 reattaches somewhere else and creates an OCS  
16 source, arguably, a different one. You might  
17 argue a reiteration of the same one, but  
18 there's that discontinuity there, and it's  
19 really that discontinuity that seems to  
20 suggest to the agency that it makes sense to  
21 treat them separately. In Destin Dome, you  
22 had all of these wells on different lease

1 blocks. But as I read that again just  
2 quickly this morning, it seemed like there  
3 was a common production platform, a common  
4 living quarters platform. And I'm assuming  
5 that you didn't have the discontinuity that  
6 the OCS source talked about there where the  
7 platforms as well as the wells in those  
8 platforms would remain an OCS source even if  
9 a given well at any given time was or wasn't  
10 operating. So it seemed to me you didn't  
11 have the now you have it, now you don't, now  
12 you have it again element in Destin Dome that  
13 you have in this case. Why is that not  
14 correct?

15 MR. WINTER: Your Honor, in this  
16 case, the regulations direct us to look at in  
17 terms of proximity, they direct us to look at  
18 whether it's the same operator, whether it's  
19 the same industry classification, and whether  
20 the properties are contiguous or adjacent.  
21 So those are the relevant factors in  
22 determining whether or not they are

1     aggregate. In this case, it's undisputed  
2     that we have the same operator and the same  
3     industry classification, just as was the case  
4     in Destin Dome. And so the only other issue  
5     are whether the properties themselves are  
6     adjacent or contiguous. And the lease block  
7     that you have proffered that EPA considered  
8     in the Destin Dome project, just as we are  
9     arguing here, is the reg. Although in Destin  
10    Dome there may be a sharing of platforms or  
11    facilities, those don't go to the relevant  
12    regulatory requirements. The requirement is  
13    the property, the lease block, contiguous or  
14    adjacent? It's certainly clear it's the same  
15    operation as the SIC, so it's an analogous  
16    situation, Your Honor, despite the fact there  
17    may be finer distinctions that aren't  
18    relevant to the regulatory definition.

19                 So again, the North Shore  
20    interpretation, is the only one that makes  
21    sense and gives full effect to the regulatory  
22    language of both "contiguous" and "adjacent."

1 EPA needs to provide some of the things to  
2 determine contiguous, if the -- to determine  
3 to be contiguous and has not done so in this  
4 case, has read that requirement out of the  
5 regulations.

6 JUDGE STEIN: I believe that you're  
7 out of time. What I'd like to do is to find  
8 out whether any of the judges have additional  
9 questions at this point. Okay, thank you,  
10 Mr. Winter. You can come back to your other  
11 issues in rebuttal. At this point, I would  
12 like to hear from the EPA.

13 I'd like to start out with a  
14 question, because we have lots of questions  
15 for you. As you can probably tell by the  
16 questions, we are trying to understand the  
17 relationship between Section 328 and the PSD  
18 regulations, how these fit together or they  
19 don't fit together. So if you could start  
20 out with that explanation, you would do us a  
21 service.

22 MR. ZENICK: I certainly can. As I

1 think was clear from the brief, the position  
2 of the EPA Region X is that at each location,  
3 the OCS source is a different OCS source, and  
4 all that that does within the meaning -- and  
5 if you look at 55.13 and 55.14 -- is direct  
6 that those will be subject, potentially, to  
7 PSD regulations the same extent that they  
8 would be subject to those regulations were  
9 they on the corresponding onshore area.

10 328A1 similarly states that they're  
11 supposed to be subject to the same degree  
12 that they would be on the corresponding  
13 onshore area.

14 Both North Shore Borough and REDOIL  
15 merge terms in such a way that does not  
16 comport with the plain language of the  
17 regulations. Under the PSD regulations,  
18 51.166, the starting point is not what the  
19 source is. The ending point of the analysis  
20 is a determination of what the stationary  
21 source is based on the definition of  
22 building, structure, facility or

1 installation.

2           It is in that part of the  
3 definition that you have the three criteria:  
4 common owner or operator, same SIC code, or  
5 continuous or adjacent. It is the agency's  
6 position that in following through 51166, you  
7 walk through that same analysis and that the  
8 definition of "OCS source" has no direct  
9 bearing on that application.

10           If Congress had intended -- let me  
11 make clear. Our position is that the  
12 position reflected in Region X brief is that  
13 the regulation of the statutes are subject to  
14 either the interpretation that you profess,  
15 but the better interpretation is the one that  
16 Region X has put forth.

17           Had Congress intended for the PSD  
18 source and the OCS source to have the same  
19 meaning, they could have very easily stated  
20 that to be the case. Indeed, an analogous  
21 situation within 328, they provided in 328,  
22 I'm sorry, A4D that for the purposes of



1 Section 111, "new OCS source" means a new  
2 source within the provisions of that section.  
3 There's no parallel provision saying that a  
4 OCS source constitutes a PSD source. And  
5 even if it had that statement in there, that  
6 an OCS source is a PSD source, it wouldn't  
7 tell you whether or not you have to look more  
8 broadly at the issue of aggregation, whether  
9 it was appropriate to look across drill  
10 sites.

11 JUDGE REICH: Can I understand then  
12 that if -- can you have a stationary source  
13 on your PSD that is smaller than the OCS  
14 source?

15 MR. ZENICK: That is smaller than  
16 the OCS? In terms of emissions or in terms  
17 of --

18 JUDGE REICH: Physical boundary.

19 MR. ZENICK: You could. I mean,  
20 you could potentially have a single generator  
21 that has sufficient emissions such that it  
22 would exceed the major source -- be a major

1 PSD source, or as -- you could have a  
2 generator below the main. You could have a  
3 generator that feeds in to, say, power a  
4 small town or something like that, and  
5 physically that could be smaller.

6 JUDGE REICH: If we concluded in  
7 this case that contrary to your argument, the  
8 OCS source is the drilling ship every time it  
9 attaches, that not each attachment is a  
10 different OCS source, how, if at all, would  
11 that affect the analysis that you do of  
12 stationary source under the PSD regs?

13 MR. ZENICK: I don't think that it  
14 would. There's nothing in Section 328 that  
15 says that for PSD purposes, the two terms are  
16 equal. As I indicated, it does specifically  
17 indicate so for Section 111 new source and  
18 existing source.

19 JUDGE REICH: So you're basically  
20 saying that if the key thing we're trying to  
21 determine here is how the PSD regs applied,  
22 it's really not particularly relevant whether

1 we look at this as a single OCS source or  
2 multiple OCS sources.

3 MR. ZENICK: I think that the  
4 cleaner cases, certainly if you look at  
5 those, separate OCS sources. But if they are  
6 considered to be even a single OCS source,  
7 that does not in and of its terms dictate the  
8 outcome from PSD.

9 JUDGE STEIN: Am I correct in  
10 understanding that you would agree that  
11 Section 328 allows for more than one  
12 interpretation of whether the source is the  
13 drillship, you know, each attachment  
14 considered one source versus the way you've  
15 interpreted it?

16 MR. ZENICK: The position stated by  
17 the Region was that it was not a matter of  
18 Chevron I that they were interpreting, it was  
19 Chevron II, subject to multiple  
20 interpretations. I think it was very clear  
21 from the questions that you had for  
22 petitioners.

1 JUDGE STEIN: Has EPA ever  
2 interpreted -- you know, prior to this  
3 particular case, has there ever been an  
4 instance where they interpreted a drillship  
5 at a particular site to be the source, or is  
6 this the first instance where the EPA has  
7 done that?

8 MR. ZENICK: Without really knowing  
9 the details, I don't know the details of all  
10 of the OCS source permits that they have been  
11 issued. And petitioners cite two different  
12 examples, the Region IV example which we just  
13 saw this morning and haven't had a chance to  
14 analyze yet, and then they also rely on the  
15 previous permitting of the KULLUK underneath  
16 the major source provision. This issue was  
17 not reached there, nor is it necessary,  
18 because it was a major PSD source based on  
19 the emissions from a single location.

20 JUDGE STEIN: Okay. I'd like to  
21 ask several questions about the 500 meter  
22 limitation.

1 MR. ZENICK: Yes, Your Honor.

2 JUDGE STEIN: And in particular, as  
3 I read through the Response to Comments and  
4 the Statement of Basis and briefs, I see  
5 different things in different places, and I  
6 would like to understand what is it that EPA  
7 relied on in making the determination as to  
8 500 meters.

9 MR. ZENICK: Yes, Your Honor.  
10 Could I please start by just trying to make a  
11 slight clarification with respect to the way  
12 the Region X did its analysis here? The  
13 Region actually in the first instance  
14 concluded that it would be appropriate to  
15 determine that the stationary source for PSD  
16 purposes would be the drillship itself, even  
17 without the 500 meter zone. And that is we  
18 look at page 59 of the Response to Comments  
19 on to page 60, the paragraph going across.

20 And it is in that paragraph where  
21 it describes why it was appropriate to  
22 consider the individual drillship to actually

1 be the OCS source.

2           And in doing so, they discuss  
3 common sense notion of a plant does not  
4 support aggregation in which no emission  
5 gathering activities occur. Even if they  
6 were in the same box, they would be likely  
7 separated by a number of miles. They don't  
8 share a physical connection, and they are not  
9 dependent on each other. There's evidence  
10 from the applicable interpretation the agency  
11 has done before physical connectedness and  
12 independence are important factors in  
13 reaching the adjacent determination. In the  
14 first instance, they determine that the drill  
15 site itself would be appropriate. They have  
16 a request in from Shell to include a  
17 500-meter zone around the ship in order to  
18 accommodate certain local air quality  
19 concerns. Specifically, Shell sent an e-mail  
20 suggesting that if the two ships were  
21 operating within 500 meters of each other at  
22 exactly the same time there was a potential

1 NAAQS violation from the combined emissions  
2 of the two within that close a proximity. So  
3 the Region believed it was reasonable to go  
4 ahead and draw the 500-meter circle as an  
5 additional precautionary measure, and that's  
6 reflected in the air quality concerns line  
7 that appears within the responsive comments  
8 that was referred to by counsel for North  
9 Shore Borough.

10 JUDGE STEIN: But doesn't EPA state  
11 expressly in the Response to Comments that  
12 within 500 meters it is contiguous or  
13 adjacent?

14 MR. ZENICK: The result of  
15 adopting -- it did not believe that that was  
16 necessary as reflected by stationary source  
17 analysis, which resulted in the conclusion  
18 that the individual drillship itself would be  
19 appropriate stationary source because recall,  
20 the building, structure, facility or  
21 installation definition gets there. In  
22 adding the 500 meters, they basically

1   accepted extending that out because of air  
2   quality concerns and saying that given the  
3   requests from the out plant that we believe  
4   -- and in order to provide additional  
5   protection, we think it's appropriate to draw  
6   that wider circle and consider anything  
7   within that circle be contiguous or adjacent  
8   for purposes of the PSD.

9                   JUDGE STEIN:  For purposes of our  
10   decision in this case, then, since the  
11   Response to Comments assumed that within 500  
12   meters was contiguous or adjacent, should we  
13   continue to understand that that reflects the  
14   agency's position, or is the agency changing  
15   its response?

16                   MR. ZENICK:  It's not changing its  
17   position.  Certainly, the same analysis that  
18   justified the drillship itself with no  
19   additional distance constituting the  
20   stationary source would be equally true if  
21   you went out 500 meters, although the Region  
22   did not think that that 500 meter boundary



1 was necessary.

2 JUDGE STEIN: Is there analysis --

3 I'm sorry. Just one moment. In the record

4 of the facts that support some of the

5 statements you quoted me on page 59, at no

6 time do two drillships share a physical

7 connection? At no time is one drillship

8 dependent on support of one another?

9 MR. ZENICK: There's nothing in the

10 record to suggest that they ever are.

11 They're going to be at different drill sites

12 at different times drilling. There's no

13 indication in the record that they share any

14 products between the two of them, that they

15 shift crews between the two of them or

16 anything else that would connote the types of

17 common types of connections that we looked at

18 in previous PSD determinations. Defined that

19 they were contiguous or adjacent based on

20 those comments, the comments.

21 JUDGE STEIN: There were a lot of

22 conclusions stated in that particular section

1 of the Response to Comments, and I know that  
2 the Board has several questions about what  
3 analysis or analyses might be in the record  
4 that underlie those particular conclusions.

5 MR. ZENICK: As far as I'm aware,  
6 it's based on the way that we understand  
7 Shell's operations to be, that they will have  
8 the two drillships out drilling at separate  
9 locations and that there was nothing in the  
10 record to indicate that they'd have any type  
11 of exchange between them, that they would not  
12 be sharing any -- one does not produce a  
13 product that's shared with another one,  
14 there's no indication they would be sharing  
15 crews in the record, even. There's nothing  
16 in the record to indicate that there are the  
17 type of interdependencies.

18 JUDGE STEIN: But there's no  
19 analysis we can look to in the record where  
20 EPA wrote down, you know, how it is they  
21 arrived at these conclusions that are in that  
22 particular provision of the Response to

1     Comments.

2                   MR. ZENICK:  There's nothing beyond  
3     the Response to Comments.

4                   JUDGE WOLGAST:  To go back to your  
5     example of if the drillships were within some  
6     proximity to each other that there's some  
7     potential for a NAAQS violation, I'm not  
8     understanding how the 500 meter as the only  
9     geographic restriction presupposes that you  
10    won't have that scenario, or guards against  
11    it.

12                  MR. ZENICK:  The information that  
13    the agency had received that the ships are at  
14    least 500 meters apart, there wouldn't be a  
15    NAAQS violation because North Shore Borough  
16    acknowledges in its brief it's not possible  
17    for the ships to operate within 1200 meters  
18    of each other because of the anchors.  One of  
19    the ships has a 500-meter anchor length.  The  
20    other one has a 700-meter anchor length.  
21    This is not the typical length of a ship  
22    anchor you think of.  They're actually

1 floating anchors that are out that are more  
2 like long lines of a spiderweb. If they were  
3 in any closer proximity, you would actually  
4 have tangling of the anchors.

5 JUDGE WOLGAST: And where is that  
6 analysis if they don't operate within the  
7 proximity that you just referenced that there  
8 wouldn't be an emissions violation?

9 MR. ZENICK: The information in the  
10 record simply indicates that outside of 500  
11 meters, that they would not have a problem,  
12 that the information we received, the  
13 analysis we received from Shell indicated if  
14 they were past 500 meters, there would not be  
15 a potential problem. If they were in 500  
16 meters, you have a potential problem.

17 JUDGE WOLGAST: And where is that?

18 MR. ZENICK: That is at Exhibit  
19 E32.

20 JUDGE STEIN: What is E32? Is that  
21 an analysis?

22 MR. ZENICK: It's an e-mail from

1 Shell indicating that the analyses that they  
2 had conducted indicated that that was where  
3 they -- the ADC did not do an independent  
4 analysis of the potential NAAQS violations  
5 because it is not required to do so under the  
6 minor source permitting requirements. It's  
7 only required to make that determination on  
8 source-by-source basis, and since it had  
9 already determined that the individual  
10 drillships at the individual drill sites were  
11 the source, it wasn't required to consider  
12 the total sum of different sources together  
13 in evaluating the NAAQS.

14 JUDGE WOLGAST: And are the  
15 calculations upon which Shell relied included  
16 in the record?

17 MR. ZENICK: No, Your Honor.

18 JUDGE STEIN: Just one more  
19 question on this 500 meters. I believe in  
20 the same page of the Response to Comments it  
21 says beyond this distance. The Response to  
22 Comments actually says 500 miles --

1           MR. ZENICK: Which is an oversight,  
2   I guess.

3           JUDGE STEIN: -- which assumes you  
4   meant 500 meters, drillship is not  
5   anticipated to have an impact greater than  
6   the EPA's significance levels. Does this  
7   refer to the significant impact levels or the  
8   SILS?

9           MR. ZENICK: No, Your Honor. I  
10   think it's a not exactly artful use of the  
11   term. It was not a PSD analysis done on two  
12   ships together. My understanding, NSR does  
13   not require that you PSD analysis unless the  
14   state specifically requires that you do so.  
15   As I indicated, the information we have from  
16   Shell indicated that beyond that distance,  
17   you would not have problems with the NAAQS.

18           If I may, there were a couple of  
19   statements that were made -- I also want to  
20   make sure I reserve some time for my  
21   co-counsel to address the other issues --  
22   that I wanted to try to touch upon quickly.

1           You had asked about the issue of  
2   the lease block and whether or not, given the  
3   exclusion issues, that's where you would look  
4   for determining impacts, basically, the  
5   ambient air analysis. Given the definition  
6   of "ambient air" from the PSD regulations,  
7   your initial supposition that it would be the  
8   borders of the ship were actually correct,  
9   because ambient air is defined as the area  
10   from which the public is excluded. Because  
11   the public's not excluded from the lease  
12   blocks themselves in terms of going -- of the  
13   water over the lease blocks, the ambient air  
14   would be at the borders of the ship itself as  
15   opposed to the borders of the lease blocks.  
16   So I'll state that as an initial point.

17           I've run past my time, so unless  
18   Your Honors have any additional questions,  
19   I'll just state that given the definition of  
20   OCS in the PSD regulations, the Region  
21   properly concluded that the individual drill  
22   sites were appropriate stationary source for

1 purpose of analysis and appropriately  
2 provided PSD permits to the two drillships.  
3 Thank you.

4 JUDGE WOLGAST: Let me just  
5 understand one thing. Are you saying that  
6 there was no obligation to put any geographic  
7 limit in the permit itself, like the 500  
8 meters was completely not required by the  
9 applicable regs?

10 MR. ZENICK: The position reflected  
11 in the Response to Comments was that  
12 applications of the contiguous and adjacent  
13 analysis would lead to the drill site itself  
14 being the source and they were not obligated  
15 to put the 500 meters in, that's correct.

16 JUDGE STEIN: Okay. If the -- I  
17 have one more question.

18 MR. ZENICK: Oh, of course.

19 JUDGE STEIN: We've got at least  
20 two different -- we have got two different  
21 drillships, and we don't know where these  
22 drill locations are going to be. Isn't it



1 fair to assume that in the absence of knowing  
2 where those locations might be that we would  
3 have to assume a worst-case kind of analysis  
4 so that -- assume that the two drillships  
5 might be within, you know, 501 meters of one  
6 another or that you could pick up the KULLUK,  
7 it could be done at its drilling at one drill  
8 hole, if I have the correct terminology, and  
9 it could move over, you know, 501, 502  
10 meters. Am I correct in understanding that  
11 we really ought to be -- we should be  
12 assuming the worst in the absence of any  
13 information in the record that tells us that  
14 that would be happening?

15 MR. ZENICK: Even if it is  
16 happening, the conclusion was that each one  
17 of those individual drill sites is  
18 appropriate to consider it to be a separate  
19 stationary source because the operations from  
20 one location to another are independent. And  
21 given the independence between there, there's  
22 no tie -- drilling at one location doesn't

1 dictate with respect to drilling at the next  
2 location in terms of searching for --

3 JUDGE STEIN: But at no point do we  
4 look at the cumulative impact of, you know,  
5 emissions coming from here, they stop from  
6 here, they move other here? There's no  
7 localized way that we should be looking at  
8 what's the cumulative impact to the  
9 particular area?

10 MR. ZENICK: The agency has  
11 traditionally not considered that in making  
12 these contiguous and adjacent determinations.

13 JUDGE WOLGAST: Let me stop you  
14 there. Don't they look at proximity,  
15 geographic proximity?

16 MR. ZENICK: Yes, but that's not  
17 been from the standpoint of looking typically  
18 at air quality concerns. It's been trying to  
19 -- the building, structure, facility or  
20 installation definition and three component  
21 parts are directed at trying to determine  
22 what the common sense notion of a plant is.

1 And the common sense notion of a plant isn't  
2 dictated by potential emissions impacts of  
3 the components of the plant. In that regard,  
4 looking at the 500 meters and adding it  
5 around is something unique and additional in  
6 this particular permit that did not to my  
7 knowledge appear in any other permits EPA  
8 issued in the past.

9 JUDGE WOLGAST: I think that  
10 that -- and I may be misstating Judge Stein's  
11 question, but what I thought she was getting  
12 at is not we got the right geography for the  
13 definition of the source itself, but given  
14 that it's a mobile source, what should you be  
15 looking to in order to determine whether  
16 emissions from one activity to another should  
17 or should not be aggregated?

18 MR. ZENICK: The agency has not  
19 typically or to my knowledge has ever taken  
20 emission impacts into account in doing that,  
21 in part because with the exception of the OCS  
22 source and now depart (?) ports, mobile

1 sources are generally precluded from  
2 regulation as stationary sources under the  
3 definition of major stationary source in 328.  
4 And the definition's in there.

5 JUDGE WOLGAST: I'm sorry.

6 MR. ZENICK: I'm sorry, I gave you  
7 the wrong cite. I apologize. I apologize.  
8 It's not Section 328, it's the general  
9 definition section in the Act, 302.

10 JUDGE WOLGAST: Right. But what  
11 about just a generator that's large enough to  
12 be considered a source for PSD, like an  
13 aquicultural generator that moves from point  
14 to point? Under what circumstances would you  
15 aggregate those emissions to determine  
16 whether that generator is a major stationary  
17 source?

18 MR. ZENICK: Well, there are a lot  
19 of circumstances. If it's a generator that's  
20 moving from point to point, say, on an  
21 individual farm, they likely would be  
22 aggregated as emission points of that farm.

1 They would be servicing that same farm at  
2 those times. If it was a generator that  
3 moved from Person A's farm to person B's  
4 farm, it's likely not to be aggregated  
5 because it would not meet the common sense  
6 notion of a plant to aggregate those two  
7 farms.

8 JUDGE WOLGAST: Then why is that  
9 not, just that example, that hypothetical  
10 example, why isn't that analogous to this  
11 discussion in the sense of if you pick up the  
12 drill bit of Ship A and move it, you know,  
13 some small distance, why should the agency  
14 not be looking at an aggregation of emissions  
15 to determine whether or not this is a major  
16 source as opposed to what we consider to be  
17 the source?

18 MR. ZENICK: The Board obviously  
19 would -- if they thought that was a relevant  
20 factor, could add that. We have  
21 traditionally not considered emissions  
22 impacts in doing the analysis. It would be a

1 departure from past agency practice on this  
2 issue to do so and would not necessarily  
3 comport with the intent of the regulatory  
4 definition of connoting what the common sense  
5 notion of a plant is.

6 JUDGE WOLGAST: So explain to me  
7 why -- in other words, you're saying so these  
8 two scenarios, our real scenario and the  
9 hypothetical AG scenario, are completely  
10 disparate. And I'm not understanding why  
11 they're completely disparate.

12 MR. ZENICK: In the AG scenario, in  
13 a broader operation, the farm itself that is  
14 being serviced, the generator itself is not  
15 an end of itself. It needs to move to  
16 different points in order to continue to  
17 service the operations of that farm as a  
18 whole. There's broader operations going on.

19 JUDGE WOLGAST: You're saying you'd  
20 never consider the generating unit itself as  
21 moving around a source?

22 MR. ZENICK: It is unlikely that

1    you would.  There are certain circumstances  
2    where the generator was large enough, it  
3    could potentially get an independent PSD  
4    permit as a portable source.  That is a  
5    voluntary provision we have with the PSD  
6    regulations that it can actually, if it's  
7    large enough in its emissions at all points,  
8    it would exceed the major source thresholds  
9    at those locations, it can actually get a PSD  
10   permit to move from one location to another  
11   without having to go through an entirely new  
12   PSD analysis.

13               JUDGE WOLGAST:  Let me just ask one  
14   more thing just to make sure I understand.  
15   So if we then -- to stay with that  
16   explanation of why it would be dissimilar, if  
17   you had, then, looking at these as two  
18   separate sources, same ship, Drill Bit A and  
19   Drill Bit B in close proximity, are you  
20   saying that there's no instance in which the  
21   agency would look at the aggregation of two  
22   separate sources to determine whether or not

1 for PSD purposes the emission should be seen  
2 as a single major source?

3 MR. ZENICK: If you had reached the  
4 conclusion that those are separate sources,  
5 you would not aggregate those sources. The  
6 definition of "sources" is a result of the  
7 aggregation, of the application of the  
8 aggregation provisions, though. So you have  
9 building, structure, facility, which feeds  
10 into the definition of stationary source.  
11 The stationary source is defined basically as  
12 any building, structure, facility or  
13 installation. It's a direct relationship  
14 between the two. The only difference between  
15 a stationary source and major facility from  
16 the meaning of PSD is simply the total  
17 emissions from that stationary source which  
18 was a result of the application of the  
19 aggregation provisions.

20 JUDGE REICH: Why don't we hear  
21 from your co-counsel, since we have consumed  
22 the rest of your time with our questions? If



1 we could hear briefly from your co-counsel.

2 MR. ZENICK: Thank you, Your Honor.

3 MS. MATTHEWS: Good afternoon. I'm  
4 not sure on the timing.

5 THE CLERK: Five.

6 MS. MATTHEWS: Okay. I'd like to  
7 address briefly three main topics. First,  
8 that the opportunity for a meaningful  
9 participation throughout this permit process  
10 was provided. Secondly, that the permit  
11 terms and conditions are sufficient to limit  
12 Shell's emissions to less than 250 tons per  
13 year and a minor source permit is entirely  
14 appropriate. And then finally, that the air  
15 quality modeling demonstration indicates that  
16 the NAAQS will not be exceeded as a result of  
17 this proceeding.

18 JUDGE STEIN: Could you start with  
19 the second issue?

20 MS. MATTHEWS: Yes.

21 JUDGE STEIN: I think, given the  
22 interest of time, we'd rather hear that

1 first.

2 MS. MATTHEWS: This is a permitting  
3 action to allow the operation of a minor  
4 source on the Outer Continental Shelf.  
5 Region X permitted Shell's exploratory  
6 drilling activity as a minor source because  
7 the terms and the conditions in this permit  
8 effectively limit the emissions to below 250  
9 tons per year. In this case, the permit  
10 restricts the NOx emissions very effectively.  
11 Shell, the owner, specifically requested the  
12 permit contain the permission to emit more  
13 emissions than that.

14 JUDGE REICH: Before we get to the  
15 individual aspects of the permit which you  
16 claim will keep the emissions to 245 TPY,  
17 what is the agency's position on whether the  
18 enforceability issue is preserved for review?

19 MS. MATTHEWS: Our position is that  
20 while general comments regarding  
21 enforceability of the permit were raised  
22 during the public comment period, the

1 specific issues regarding federal  
2 enforceability and practical enforceability  
3 were not raised. And our Response to  
4 Comments did not really address practical  
5 enforceability of the permit terms because it  
6 was not specifically raised. So we don't  
7 believe that it is effectively preserved for  
8 review.

9 JUDGE REICH: On that point -- and  
10 I don't know if she even had a chance to see  
11 the North Slope reply brief. And if you  
12 haven't, then feel free not to answer the  
13 question. But among the things they cite is  
14 they do cite an AGECE comment, which is the  
15 only thing that I saw in there that they  
16 cited that actually made specific reference  
17 back to enforceability in the context of a  
18 synthetic minor. Why does that comment, if  
19 you're familiar with it, not preserve the  
20 issue for review?

21 MS. MATTHEWS: I did very briefly  
22 review the reply brief I can't say that I

1 digested it completely. In AGECE's comments  
2 they did mention some concerns about some  
3 specific permit conditions. And in response  
4 to that, we did add to some of the conditions  
5 as it's spelled out in the Response to  
6 Comment, specifically regarding source tests  
7 and some fuel usage limits to keep track of  
8 how much fuel was used. So we did respond in  
9 that way to add more specificity to the  
10 permitting terms and conditions of the  
11 permit. But we did not view their comments  
12 as raising a practical enforceability kind of  
13 issue.

14 JUDGE REICH: Thank you.

15 JUDGE STEIN: Given that, I think  
16 we'd be interested in hearing about the  
17 modeling issue, unless you can think of  
18 anything else. The modeling issue.

19 JUDGE REICH: Okay.

20 JUDGE WOLGAST: Let me ask you one  
21 point before we leave this issue. Even in a  
22 synthetic minor permitting context, how under

1 the Alaska regulations would you avoid having  
2 to do a maximum emissions calculation?

3 MS. MATTHEWS: Under the Alaska  
4 regulations, which are the corresponding  
5 onshore regulations that we would turn to  
6 here, at 18 AAC50.540C2, those provisions  
7 spell out the requirements for modeling to be  
8 conducted under a minor permit. And the  
9 minor permitting rules simply do not require  
10 that the combined concentrations of other  
11 sources be considered or included in that  
12 modeling analysis. Either do the rules  
13 require that a specific model be used and  
14 strict compliance with Appendix W is also not  
15 required under those provisions. So we agree  
16 that a cumulative analysis was not done in  
17 this case to combine the emissions between  
18 the KULLUK and the FRONTIER DISCOVERER. It  
19 was not necessary under the minor permitting  
20 rules in this case. And moreover, it doesn't  
21 seem like it was really needed under the  
22 facts of this case given, as my colleague

1 described, it's not practically possible for  
2 the two drilling ships to be co-located that  
3 closely together so that they would -- so  
4 that their impacts would, you know, would  
5 result in a big impact.

6 JUDGE STEIN: To your knowledge,  
7 has EPA ever permitted on a drill  
8 site-by-drill site basis -- and I'm using  
9 that as a shorthand for the drillship when  
10 attached to a site. I mean, we've certainly  
11 heard from the petitioners that this very  
12 same ship when perhaps owned or leased by a  
13 different company was permitted by Region X  
14 in a different way where the ship, you know,  
15 wherever it went, was considered the source.  
16 And we've read your briefs. But is this the  
17 first time that EPA has ever looked at this  
18 kind of an operation on a -- effectively a  
19 drill site-by-drill site basis?

20 MS. MATTHEWS: I'm not aware of  
21 another circumstance that's been permitted  
22 similarly to this one where the drillships

1 are separate. But I do know that in some of  
2 the states that are -- you know, that there's  
3 records reflected and included in the record.  
4 Louisiana, for example, does recognize that  
5 sources greater than 500 meters would not be  
6 aggregated. So there is circumstances where  
7 other states have separated drilling or oil  
8 operations that are greater than a quarter  
9 mile apart. Are there other questions on  
10 modeling?

11           On a point on the model analysis in  
12 particular, any modeling analysis includes a  
13 number of technical decisions regarding the  
14 choice of computer models. The petitioners  
15 raise concerns about the model that was used  
16 here, the specific inputs put into that  
17 model, the selection of specific background  
18 data, where the receptor locations are.  
19 Those kinds of decisions are all of a very  
20 technical nature, and we would respectfully  
21 request that the Board defer to the Region's  
22 technical expertise in that regard.

1 JUDGE STEIN: Okay, I think we're  
2 done. Did you have one final point you were  
3 trying to make?

4 MS. MATTHEWS: I would like to  
5 address the petitioner's concern that they  
6 raised in the reply brief regarding the  
7 government-to-government consultation. We  
8 included in our brief an Exhibit L, memo that  
9 describes the efforts and activities that the  
10 Region engaged in to involve and specifically  
11 request and invite the federally recognized  
12 tribes to initiate government-to-government  
13 consultation. So I would point the Board to  
14 that exhibit to explain the efforts that we  
15 went through on the government-to-government  
16 consultation.

17 JUDGE STEIN: Okay, thank you.  
18 Given that the Region and Shell have not had  
19 an opportunity perhaps to fully digest what  
20 is in the two -- certainly the reply brief we  
21 got this morning, perhaps we will come back  
22 to this. I wanted to figure out whether the



1 parties were seeking to file a reply. And,  
2 if so, how soon that they would envision  
3 being in a position to get that to us.

4 MR. ZENICK: Your Honor, we have  
5 not had a chance to evaluate whether we would  
6 like to at this time. We just received the  
7 NSB brief this morning.

8 JUDGE STEIN: Okay.

9 MR. ZENICK: But we can let you  
10 know sometime in the next few days.

11 JUDGE STEIN: Right. If anything  
12 else is going to come in, we're going to want  
13 it in pretty quickly. So we recognize that  
14 you didn't have a full opportunity at least  
15 here to let us know your reaction to things  
16 that may have been said.

17 I want to ask one question before  
18 we go on to Region X. Is it the Region's  
19 position that Executive Order 13175 does not  
20 apply to permitting activities?

21 MS. MATTHEWS: The agency does not  
22 have a final position on that issue.

1 JUDGE STEIN: Thank you.

2 MS. MATTHEWS: We have proposed in  
3 the Federal Register notice to that effect,  
4 but we have received comments on that and we  
5 have not taken that.

6 JUDGE STEIN: Okay. Thank you.

7 MR. SILER: Your Honor, to my  
8 knowledge, Shell Offshore, Inc., has not been  
9 served with the reply brief. At least I've  
10 not seen it.

11 JUDGE STEIN: Either one, or with  
12 North Shore Borough's?

13 MR. SILER: Neither North Shore  
14 Borough's nor REDOIL's. We would like an  
15 opportunity to reply. But I have to  
16 emphasize we would like to do that on a very,  
17 very short schedule because, as I said  
18 earlier, it is still imperative for Shell  
19 Offshore that we received a disposition in  
20 this matter as quickly as we can. And  
21 indeed, Mr. Mark Stone, Shell's counsel who's  
22 with us today, has told me that it is not

1    only the weather that may determine the  
2    determination of the Nuiqsut whaling  
3    activity, but there is a quota, a number of  
4    whales that the Village can take. So it  
5    depends on how good the whaling is. That  
6    could occur in early September, Your Honor.

7                   JUDGE STEIN: Okay.

8                   MR. SILER: So again, it's very  
9    important to SLI that we expedite this, and  
10   we would ask for the right to reply within a  
11   matter of, say, three days, assuming we can  
12   be served with that brief today, both those  
13   briefs today.

14                  JUDGE STEIN: All right. I would  
15   imagine that can be done. And you certainly  
16   have given us plenty of material to read, so  
17   the additional couple of days will -- I  
18   assure you that we will still be working on  
19   this next week. So if you want to take a  
20   couple days to get a reply in and let the  
21   Region have an opportunity to evaluate it --  
22   but if replies could be -- you'll be able to

1 get that in sometime next week?

2 MR. SILER: Yes, Your Honor. I  
3 should think we could get that in by  
4 Wednesday.

5 JUDGE STEIN: Okay. I'll let the  
6 Region have an opportunity to take a look at  
7 it and make their own determination. That  
8 would be helpful.

9 MR. SILER: If I may, I would like  
10 before taking your questions to just step  
11 back and establish some basic context on two  
12 points. One, of course, is the heavy burden  
13 the petitioners bear in this matter to  
14 persuade the Board to grant review on these  
15 petitions. And the second is the importance  
16 of consistency with requirements in the  
17 corresponding onshore area as required in  
18 Section 328.

19 This Board has consistently  
20 accorded a great deal of deference to the  
21 Region's permitting decisions and has  
22 repeatedly stated that agency policy favors

1 determination of permit terms and conditions  
2 by the Region. As the Board put it in in re:  
3 Steel Dynamics, quoting in part, we  
4 repeatedly held the standard of review is  
5 applied stringently in practice. The Board  
6 went on to stay, quote, it is infrequent that  
7 the Board will grant review in a permit  
8 appeal. The Board exercises this authority  
9 only when the petitions for review and the  
10 administrative record are abundantly  
11 persuasive that the Board's active  
12 involvement in the matter is warranted.

13 On technical issues, of course, the  
14 burden is higher still, as the Board  
15 articulated this standard in in re: Peabody  
16 Western Coal Company, quote, when a  
17 petitioner seeks review of a permit based on  
18 issues that are fundamentally technical in  
19 nature, the Board assigns a particularly  
20 heavy burden on the petitioner. Where a  
21 permit decision pivots on the resolution of a  
22 genuine technical dispute or disagreement,

1 the Board prefers not to substitute its  
2 judgment for the judgment of the  
3 decision-maker specifically tasked with  
4 making such determination in the first  
5 instance.

6 We would submit that NSBs and  
7 REDOIL's petitions raise almost entirely  
8 technical issues on which they carry  
9 particularly heavy burden to show clear  
10 error.

11 JUDGE REICH: Do you think the  
12 definition of an OCS source is a technical  
13 issue rather than a legal issue?

14 MR. SILER: I think it's a  
15 technical issue, Your Honor, when it  
16 implicates so many technical issues,  
17 including with respect to source aggregation,  
18 for example, the degree of the way in which  
19 these putatively aggregated sources operate,  
20 what their emissions are, what their  
21 functional relationship is and, of course,  
22 what their proximity is. These are all

1 technical issues best ascertained by the  
2 permit staff at the Region.

3 JUDGE REICH: Do you think the  
4 basic structural relationship between 328 and  
5 the PSD regulations is a technical issue or a  
6 legal issue?

7 MR. SILER: That's a regulatory  
8 legal issue. But again, it's one on which  
9 petitioners have a burden of showing clear  
10 error.

11 JUDGE REICH: Uh-huh.

12 MR. SILER: And I think as we will  
13 see during our conversation here, many -- in  
14 many respects, the Region has exercised  
15 reasonable and informed discretion on these  
16 matters, and their discretionary  
17 determinations should not be disturbed.

18 The second overarching principle I  
19 wanted to articulate was -- it's been alluded  
20 to before, but it's worth revisiting, and  
21 that is Section 328 mandates that in  
22 regulation of OCS sources there should be

1 parity between sources onshore and offshore.

2 It says, quote, air pollution control  
3 requirements shall be the same as would be  
4 applicable if the source were located in the  
5 corresponding onshore area.

6 To the extent the petitioners are  
7 now disputing Region X's interpretation or  
8 application of regulatory requirements, we  
9 submit that the Board should be pretty well  
10 asked of views on the permits. And in that  
11 regard, the record demonstrates that Alaska  
12 did, in fact, review, comment on and secure  
13 changes in both permits. The comments were  
14 submitted on May 11, 2007. They're in the  
15 record. The ADAQ person reviewed the  
16 applicable requirements under Alaska law,  
17 concluded, and I quote, the Division of Air  
18 Quality finds that the Shell Offshore, Inc.,  
19 exploration plans will be consistent with  
20 Alaska air quality statutes and regulations  
21 if certain alternate measures are added. And  
22 those included, as we may discuss later,



1 certain measures designed to improve the  
2 enforceability and precision and accuracy of  
3 the owner-related limitation that was in the  
4 permits.

5 JUDGE STEIN: Did ADAQ, I guess, if  
6 that's the way you refer to them, comment at  
7 all on the 500 meter limit? And I ask that  
8 because EPA refers in the Response to  
9 Comments to their failure to object to that  
10 limitation. But I was wondering if you could  
11 tell me if there was anything in particular  
12 that they said about that limitation other  
13 than their alleged failure to object.

14 MR. SILER: I don't believe they  
15 did, but there were any number of issues that  
16 they did not go through as a catalog every  
17 issue in the permit but simply determined  
18 that it would be consistent with the  
19 regulations in corresponding onshore area  
20 with respect to requirements in the permits,  
21 with a few modifications, all of which as  
22 counsel for the regions that were made.

1           As this Board has previously said  
2     in the Teck Cominco case, we do give general  
3     substantial deference to the state's  
4     interpretation of its own laws. In this  
5     case, Alaska reviewed these permits and found  
6     them consistent with the corresponding  
7     onshore requirements.

8           Petitioners have not alleged or do  
9     not believe they had misinterpreted its own  
10    regulation of the laws. There's no such  
11    contention before the Board, and so given  
12    that there's no dispute that Alaska has  
13    confirmed that these permits are consistent  
14    with the COA requirements, we would submit  
15    that as a matter of law, the mandated  
16    Section 328 has been satisfied and the  
17    permits should be upheld.

18           JUDGE STEIN: Mr. Zenick referred  
19    to an exhibit, I don't know if it was Exhibit  
20    E, that apparently is the basis for the  
21    statement in the Response to Comments -- I  
22    may have the exhibit number wrong -- that

1    were outside of this 500 meter limit,  
2    significance levels would -- wouldn't be  
3    exceeded. He said there was some analysis  
4    that was done by your client as the basis for  
5    that. Do you know whether that particular  
6    exhibit includes numbers so that we could see  
7    what it is that's being relied on here? As  
8    you probably gathered, the support for that  
9    particular Response to Comments is something  
10   that's of great interest to the Board in  
11   terms of understanding what the basis for it  
12   is.

13               MR. SILER: I think the record  
14   document that pertains to this is the  
15   addendum that was filed to the permit  
16   application on March 26, 2007. And it  
17   addressed a number of issues, but it also  
18   addressed Shell's request for the  
19   owner-requested limit for a minimum 500 meter  
20   distance.

21               As Your Honor will see if you have  
22   a chance to look at this, what Shell

1 basically said here is, first of all, we've  
2 seen the memorandum that the administrator  
3 wrote on the application of source  
4 aggregation under PSD to oil and gas  
5 facilities onshore and offshore. And we've  
6 taken note of his reference to the fact that  
7 some southern states have used a one-quarter  
8 mile proximity test within which sources will  
9 be aggregated if they're on contiguous or  
10 adjacent property. So in this submission,  
11 Shell said we would like to have and will  
12 agree to a 500 meter spacing. They said,  
13 quote, SOI commits to a minimum spacing of  
14 500 meters between sites in any one year,  
15 which is greater than the suggested  
16 quarter-mile radius. Furthermore, from an  
17 impact analysis perspective, this distance is  
18 sufficient even under the worst combinations  
19 of source, locations and winds to avoid  
20 impact aggregation.

21 JUDGE STEIN: But the data that  
22 underlies that is not in the record, is that

1 correct?

2 MR. SILER: I don't believe it is,  
3 Your Honor. I know that modeling was  
4 performed and worst-case aggregations were  
5 constructed of two facilities operating  
6 simultaneously, and it was determined that  
7 500 meters -- that the NAAQS would not be  
8 exceeded if the distance were 500 meters or  
9 greater. As far as I know, that is not in  
10 the record.

11 JUDGE STEIN: Okay. Just for point  
12 of clarification, more for perhaps the Region  
13 than for you, my understanding is that  
14 despite what might be in the Region's reply  
15 brief, they took position in Response to  
16 Comments that they were not relying on the  
17 Warrum memo. And so I understand your point  
18 is what Shell wanted, but for purposes of the  
19 Board's consideration, they did take that  
20 position in Response to Comments.

21 MR. SILER: I understand that, Your  
22 Honor. But I think when you read the Warrum

1 memo, you'll see it is a very good exposition  
2 of 20-plus years of history of how the agency  
3 has applied the aggregation of adjacent or  
4 contiguous facilities and how that can be  
5 applied reasonably in the oil and gas  
6 situation where, contrary to this extremely  
7 literalist position that they are taking,  
8 which is that a lease constituting 5,000 plus  
9 acres is a property, that if you have two of  
10 those touching each other, you have  
11 contiguous properties and any source located  
12 anywhere on there, these two sources should  
13 be aggregated and, moreover, that if you have  
14 adjacent sources which are said to be close  
15 and nearby, it leads to frankly  
16 unadministrable and ridiculous results. I've  
17 put on the projector here -- perhaps your  
18 technical person can project this for us.

19 JUDGE STEIN: Mr. Kuchera?

20 MR. SILER: This will give you some  
21 idea of the geography involved here. This  
22 map, which is captioned SOI Exhibit 8, August

1 10, 2007, shows the location of Shell's lease  
2 blocks in the Balkan Sea which are covered by  
3 the MMS authorization. And as you will see,  
4 Your Honor, with respect to contiguous lease  
5 blocks, those that actually touch, you could  
6 actually have sources that were as far apart  
7 as 55 miles, by our reckoning. And depending  
8 on how you define "adjacency," which no one  
9 knows, because there are -- no definition's  
10 been offered. If all of these blocks are  
11 determined to be close enough to each other  
12 to be deemed adjacent, you could have sources  
13 as far as apart as 300 miles be aggregated.

14           This same analysis, I might add,  
15 applies equally to the question of whether a  
16 drillship which detaches from Location A and  
17 moves to Location B is or is not the same  
18 source that it was. The rule for which  
19 petitioners contend here, because they're  
20 offered no other in response to the agency's  
21 determination, is that the drillship, no  
22 matter where it goes, continues to be the

1 same source. And frankly, that has no --  
2 that makes no sense. When you're talking  
3 about locations, it could be 300 miles apart  
4 and are completely remote from each other in  
5 terms of any air quality issues.

6 Similarly, the rule for which they  
7 contend and they assume to be inviting this  
8 work to fashion some alternative, because I  
9 noticed that counsel for NSB focused almost  
10 entirely on the question of two drillships  
11 operating in proximity to each other whereas  
12 the rule for which they contend in their  
13 briefs is that any two sites that are drilled  
14 by the same ship that are on contiguous  
15 leased blocks should be aggregated, even  
16 though those are not going to be simultaneous  
17 emission sources. Nevertheless, the rule for  
18 which they contend, the only articulated rule  
19 they offer is, yes, that any two locations on  
20 contiguous leased blocks, even if they are  
21 drilled consecutively and are 55 miles apart,  
22 should be aggregated under some -- under



1 their interpretation that lease blocks are  
2 property.

3 JUDGE STEIN: Isn't the challenge  
4 that we have here is that we don't really  
5 know how far apart the drilling will occur,  
6 that Shell may -- you know, you may not know  
7 even after you begin operating, that the  
8 challenge I think for the Board in looking at  
9 this 500 meter limit is, you know, is it  
10 really realistic to think that ship number  
11 one will attach, do its thing and then, you  
12 know, disengage from the seabed and move to  
13 an area that's not 55 miles away but is  
14 really quite close? And that presents a  
15 slightly different question, because that  
16 presents a question of how solid is the  
17 support for the conclusion that 500 meters  
18 really is a limit within which there's not  
19 going to be a NAAQS violation?

20 MR. SILER: Under your  
21 hypothetical, I'm assuming this is one vessel  
22 in which Location A to Location B, so let's

1 discuss that hypothetical.

2 JUDGE STEIN: Correct.

3 MR. SILER: The 500 meter  
4 limitation is not essential for the  
5 determination. And, indeed, it's largely  
6 irrelevant to the determination of whether or  
7 not these two drill sites you posited that  
8 are 501 meters apart are contiguous and  
9 adjacent for purposes of aggregation under  
10 the PSD standard. The test that's been  
11 articulated over and over again, most  
12 recently in Mr. Warrum's memo, going all the  
13 way back to Alabama Power, this unique  
14 situation where sources can be aggregated  
15 under certain limited circumstances, whether  
16 this proposed aggregation resembles a common  
17 sense notion of a plant, because go back to  
18 the Alabama Power, the Court was prescinding  
19 directly from the fact there was a PSD in  
20 Section 169 some reference to plants. So the  
21 plant is a crucial concept.

22 Continuity and adjacency are

1 important, but at the end of the day, common  
2 sense notion of a plant is what the agency  
3 has consistently applied. It's what Mr.  
4 Warrum said would govern his determinations  
5 under the unique situation where you have  
6 vast properties onshore or offshore, where  
7 you have drill sites that occupy small areas.

8           And the question of plant implies  
9 some kind of functional connection between  
10 the activities. For example, you will find  
11 in the record the Alaska Department of  
12 Environmental Conservation's determination  
13 with respect to source aggregation in the  
14 onshore Prudhoe Bay unit, which was issued in  
15 2004 and as to which the administrator  
16 declined to object in 2005, in which they  
17 make the point that onshore, just like  
18 offshore, because you have vast distances,  
19 what you need to look at is whether two  
20 facilities operate as a confluence of a  
21 plant. Does Point A send raw materials to  
22 Point B for processing? Point B send the

1 product someplace else?

2 And even under that analysis, there  
3 are limitations. Agencies consistently say  
4 you don't regulate every emission source on a  
5 pipeline, for example. It's transporting  
6 product. But that is the central question  
7 here.

8 Getting back to your hypothetical,  
9 now, if you have a vessel drilling at  
10 Location A moving and drilling another well  
11 at Location B, they are independent  
12 activities. They do not depend on each  
13 other. They're separate in time. In your  
14 hypothetical, consecutive. The air impacts  
15 are consecutive, not additive. And this --  
16 the agency reasonably determined, as Mr.  
17 Zenick said, under this situation, the 500  
18 meter rule is really just out of an abundance  
19 of caution and unrelated to the question of  
20 whether these should be aggregated.

21 It is instead something that Shell  
22 suggested because Shell had done modeling

1 concerning the protection of the NAAQS which  
2 showed that at the hull of the ship, the  
3 NAAQS would not be exceeded, but the question  
4 would be what if there was an additive effect  
5 from another promotional vessel, a separate  
6 source for PSD purposes but possibly a  
7 contributor for NAAQS compliance? And it was  
8 determined that 500 meters, as was said in ,  
9 this addendum, would not -- would be  
10 sufficient to preclude any additive  
11 exceedings of the NAAQS and any health risk  
12 to people who might be in that proximity.

13 I submit to the Board that these  
14 are different issues. 500 meters is not the  
15 criterion for source aggregation. Your  
16 acceptance so far is Shell has accepted that  
17 as part of the owner-requested limitations  
18 for this project.

19 JUDGE STEIN: Do you agree that the  
20 drillship in a particular drill site is the  
21 source, if I understand it correctly, and  
22 that when it detaches, that's the end of that

1 source? Isn't there discretion on the part  
2 of EPA to have interpreted it that it's the  
3 drillship itself at these different  
4 locations? Or is it your position that EPA  
5 does not have discretion to make that  
6 determination?

7 MR. SILER: Our position would be  
8 that based on the literal language of the  
9 regulation which says that in Part 55.2 that  
10 an OCS source is only a source when it's  
11 attached, that when this source finishes  
12 drilling and detaches, it ceases to be that  
13 source. If it reattaches someplace else,  
14 it's another OCS source. But nothing in that  
15 regulation suggests to us that EPA could have  
16 an on-again/off-again source, OCS source  
17 status for a vessel for drilling.

18 JUDGE STEIN: Isn't that  
19 effectively what they've done in some of  
20 their other permits in the ARCO permit in  
21 '93, the Region IV situation?

22 MR. SILER: The ARCO permit, Your

1 Honor, you're referring to the previous  
2 permitting. As I recall it, there was some  
3 discussion earlier about aggregation of  
4 sources under the PSD permit, but there  
5 really wasn't any aggregation. ARCO  
6 permitted that, that vessel's emissions, on  
7 the assumption that all of the emissions  
8 would be subject to aggregation, whether as a  
9 single source or as an aggregating source.  
10 The issue was never addressed, but there was  
11 no -- there was no decision by an agency that  
12 the emissions from differing ARCO drilling  
13 sites should be aggregated. The issue never  
14 came up.

15 JUDGE STEIN: But it wasn't an  
16 illegal permit, I take it.

17 MR. SILER: It wasn't an illegal  
18 permit. It was the method by which that  
19 permittee chose to permit.

20 If I may say so, Your Honor, seems  
21 to me somewhat ironic that the emissions,  
22 when you average them, not that they were

1 aggregate, but when you look at number of  
2 sites ARCO was going to drill and did drill,  
3 the emissions per site were almost twice what  
4 the -- may have been more than twice what the  
5 request of the limit would be for -- under  
6 these permits for this time around.

7 JUDGE STEIN: Environmentally, what  
8 are we really arguing about here in the sense  
9 of if a PSD analysis were required, what in  
10 practical terms -- do we know what in  
11 practical terms it means for this particular  
12 ship or set of ships? Or is that something  
13 that's really -- that, you know, hasn't been  
14 reached because that's not the determination  
15 that's been made?

16 MR. SILER: I don't think it has --  
17 I personally don't know, Your Honor. I know  
18 that there would be somewhat more modeling  
19 requirements and -- but beyond that, I'm not  
20 sure why the decision was made to permit it  
21 in this fashion.

22 I will say that the consultants



1 ARCO engaged in this project, Air Sciences,  
2 they were among the country's most respected  
3 air pollution consultants. If you go to  
4 their website, you will see that they work  
5 for the agency, they work for other federal  
6 land managers, and they work for the states.  
7 And, indeed, they say they work for some 20  
8 Indian tribes. So these were experts AACA  
9 engaged -- I mean that Shell Offshore  
10 engaged. We attempted to do this right in  
11 every respect and provide any and all  
12 information that the agency wanted in this  
13 exercise.

14 JUDGE REICH: I understand that you  
15 don't consider the drill sites contiguous or  
16 adjacent, but just to understand again the  
17 relationship between 328 and the PSD  
18 regulations, can there be a set of  
19 circumstances where you have more than one  
20 OCS site that the agency determines should be  
21 treated as a single stationary source under  
22 the PSD regulation?

1 MR. SILER: Your Honor, you're  
2 asking whether there could be two sources  
3 that are actually separate OCS sources?

4 JUDGE REICH: Right, that can still  
5 nonetheless be considered a single stationary  
6 source based on adjacency or --

7 MR. SILER: I can see  
8 hypothetically that could be the case if you  
9 had a permanent installation of producing  
10 wells, for example, and a processing plant to  
11 which they were sending oil to be processed  
12 and improving qualities of product. Indeed,  
13 I believe that that was the thrust of the  
14 discussion earlier in terms of permitting in  
15 the Gulf, that these are permanent operations  
16 where you have producing wells, a number of  
17 which are providing product to a processing  
18 plant, and that again, Your Honors, is  
19 exactly what the 2004 permit ADAQ issued to  
20 BPXA shows would be the case onshore in  
21 Alaska, what they call the wheat and spoke  
22 analysis where you actually have permanent

1 production wells providing product to  
2 processing plants.

3 JUDGE REICH: So ultimately, it's  
4 the facts and the circumstance that preclude  
5 considering different sites to be a single  
6 stationary source for PSD purposes rather  
7 than the pure legal analysis under 328.

8 MR. SILER: To the extent that  
9 follows -- and I believe it does -- from the  
10 hypothetical we just discussed, yes. But I  
11 believe also that that's a question of  
12 technical expertise. And, more importantly,  
13 it's clear from your decisions and from the  
14 -- and from EPA's repeated guidance on the  
15 subject the question of aggregation is a  
16 case-by-case determination which again  
17 implies and implicates technical knowledge on  
18 the part of the permit writers in the Region.

19 I see that I'm out of time, and I  
20 had hoped to be able to allow my colleague to  
21 address briefly the issues on  
22 intergovernmental consultation and tribal

1 sovereignty. Could we have a couple minutes  
2 for that?

3 JUDGE STEIN: You could, but I have  
4 one more question before I let you go. And  
5 in Section 328C, there is after Sub 1, the  
6 little i, 1 little i, 2 little i, 3 little i,  
7 there's a sentence that says such activities  
8 include but are not limited to platform and  
9 drillship exploration, construction,  
10 development, production, processing and  
11 transportation. What does the transportation  
12 refer to, if we know? And, two, do we know  
13 why the statute refers to activities rather  
14 than equipment activity or facility? It's a  
15 point that I've been trying to understand,  
16 and I thought perhaps you could shed some  
17 light on that.

18 MR. SILER: Let me address the  
19 second one, because North Slope Borough makes  
20 an argument based on the word "activity,"  
21 suggesting that that means that a drillship  
22 remains the same source no matter how far

1 away it goes, who's operating it, where it's  
2 drilling, whatever.

3 Our reading of activities, in fact,  
4 bolsters the contrary interpretation because  
5 the activity of exploration drilling can only  
6 occur when a vessel is attached to a flooring  
7 of the sea in some means or another. So to  
8 us, the term "activity" in that part of the  
9 statute is entirely consistent with EPA's  
10 long-settled interpretation that sources -- a  
11 vessel only when attached to the seabed is an  
12 OCS source.

13 As for the transportation, I would  
14 only be speculating, I'll be frank. But it's  
15 clear that it doesn't apply to vessels in  
16 transit, because it does not regulate them in  
17 that fashion.

18 JUDGE STEIN: Okay. Why doesn't  
19 your colleague take a couple minutes, then we  
20 will go to rebuttals.

21 MR. SILER: Could we have a couple  
22 of minutes for my colleague, Your Honor?

1 JUDGE STEIN: Yes.

2 MR. SILER: Thank you.

3 MS. MATHIASCHECK: Good afternoon.

4 I'll keep this brief. I just want to address  
5 a couple of issues on the draft guidance the  
6 EPA has discussed earlier.

7 On Executive Order 13175 on  
8 government-to-government consultation,  
9 consultation with the tribe specifically in  
10 this instance, said Region X failed to comply  
11 with the order which provides for  
12 consultation and collaboration between the  
13 U.S. and the tribes as sovereigns regarding  
14 policy-level actions.

15 The guidance itself says that, or  
16 the Executive Order, excuse me, says that  
17 agencies shall respect Indian tribal  
18 self-governed and sovereignty, and that's the  
19 key issue here, because it is not simply that  
20 any action which may affect an Indian tribe  
21 is relevant in this Executive Order, but it's  
22 an issue that affects tribal governments as

1 governments as sovereigns. The Executive  
2 Order itself makes clear on its face it does  
3 not apply to permitting decisions such as  
4 this. It applies to regulations, legislative  
5 comments or proposed legislation, other  
6 policy statements or actions that have  
7 substantial direct effects on Indian tribes.  
8 A permitting action that does not apply to  
9 the tribe, it does not treat the tribe as a  
10 subordinate entity, it does not replace a  
11 regulatory burden on the tribe, is not the  
12 sort of thing that this Executive Order is  
13 aimed at, and that's precisely what EPA's  
14 guidance is getting at.

15 I realize that it's draft guidance  
16 that has not been finalized and the region  
17 does not have a position on it yet, but it is  
18 fully consistent with the language of the  
19 Executive Order itself. The EPA drafted  
20 guidance goes on to explain that to the  
21 extent that permitting actions do not in and  
22 of themselves require any action or

1 compliance by tribal governments, these  
2 actions will not have direct effects on  
3 governments and will not have tribal  
4 implications.

5 By the same token, the guidance  
6 goes on to explain that it focus on  
7 regulatory directives and unfunded mandates,  
8 addressing the issue of treating the tribal  
9 sovereign as sovereigns in a situation where  
10 they might otherwise be burdened with  
11 regulatory or other burden.

12 Permits issued to nonprofit  
13 facilities, even if they may have an effect  
14 on tribal lands, are not within the scope of  
15 the Executive Order as EPA guidance makes  
16 clear. Even if the facility is located in or  
17 near Indian country or some other area of  
18 interest, since the effect on the tribe would  
19 be indirect in nature, the permit does -- the  
20 permit's issuance is not something that is  
21 subject to Executive Order.

22 And I think as EPA set forth in the



1 briefing in a fair amount of detail, so I  
2 won't go into it at this point, EPA has  
3 already complied with the functional  
4 equivalent of the Executive Order anyway by  
5 its outreach to the tribes and to the various  
6 federally recognized entities in the North  
7 Slope.

8 I think that's all I need to cover  
9 today. Thank you.

10 JUDGE STEIN: Thank you. Thank you  
11 very much.

12 MR. SILER: Before we break, may we  
13 move into the record the exhibit that I was  
14 referring to, which is SOI Exhibit A?

15 JUDGE STEIN: Is it currently in  
16 the record?

17 MR. SILER: It's a clearer version  
18 of a map that's currently in the record, and  
19 it's in nice full color.

20 JUDGE STEIN: Why don't we have it  
21 at least lodged with the clerk and go from  
22 there.

1 MR. SILER: Very well, Your Honor.

2 JUDGE STEIN: Mr. LeVine, we will  
3 try to allow you time to proceed without  
4 technical difficulties, and you have five  
5 minutes for your rebuttal.

6 MR. LeVINE: Thank you, Your Honor.  
7 I will be brief. And I'd like to address  
8 three main points.

9 The first concerns two questions  
10 that Judge Stein asked regarding the language  
11 of Section 328 of EPA's response that it is  
12 subject to two interpretations. We have made  
13 the argument and discussed the words of the  
14 statute, and I would remind the Court this  
15 language is not open to two interpretations  
16 because Congress made absolutely clear its  
17 intent. It was responding to concerns about  
18 significant air pollution on the Outer  
19 Continental Shelf from drillships and from  
20 the associated icebreakers and support  
21 vessels which can emit even more pollutants  
22 than the drillships themselves. It would

1     contravene this intent to allow a drillship  
2     to be separated by a well site.

3             In addition, Congress went on, as  
4     Judge Stein just pointed out, to include  
5     transportation activity, transportation and  
6     other activities in the purview of this  
7     provision. This broadens the coverage of the  
8     statute arguably and evidences Congress'  
9     intent to draft broad coverage here.

10            Second, I would like to address a  
11     point that was raised by Shell, that somehow  
12     treating this single drillships at different  
13     sites as a single source would be contrary to  
14     onshore regulation. Shell has produced and  
15     EPA relied on a letter from DEC. That  
16     letter, to my knowledge, doesn't address this  
17     specific question, nor is there any reference  
18     to any onshore regulatory structure that  
19     would be inconsistent with this approach.  
20     And there's no showing that this situation  
21     has ever arisen onshore. Given the  
22     relatively low emissions from drill rigs of

1 -- and the fact there's not icebreakers or  
2 other high-emitting support vessels, it may  
3 never be a portable stationary source moving  
4 from place to place onshore would have  
5 emissions in excess of 250 tons in one year.

6           Finally, I'd like to address this  
7 idea that somehow, the reading of the statute  
8 allowing for -- requiring that this single  
9 drillship be a single source throughout the  
10 year would lead to an absurd result. That  
11 question isn't before the Court right this  
12 minute. It's purely a hypothetical idea that  
13 the drill sites might be really far apart.  
14 And the question that really is at issue here  
15 is whether the EPA can separate these source  
16 by drill site, not by any particular  
17 distance. And it's not that the EPA might be  
18 without any discretion to limit the scope of  
19 this review should the EPA decide that this  
20 was -- the geographic limit was appropriate.  
21 It might look to the requirement that this  
22 regulation comport with onshore regulations.

1 And the onshore areas are regulated according  
2 to attainment and nonattainment areas, which  
3 is an idea referenced in Section 328. So  
4 that might provide a reasonable geographic  
5 limit, should EPA require one.

6 And if I could have another moment,  
7 I'd just like to touch on the idea that the  
8 500 meter limit wasn't necessary in  
9 determining whether the sources were  
10 contiguous and adjacent. In the Statement of  
11 Basis, EPA says, quote, what needs to be  
12 determined is the maximum distance between  
13 two OCS sources for which EPA still considers  
14 them to remain close enough in proximity so  
15 as to be considered contiguous or adjacent.  
16 We are determining that distance in this case  
17 to be 500 meters.

18 That is the reason given in the  
19 Statement of Basis for determining that the  
20 drill sites should not be aggregated.

21 JUDGE REICH: Could you give us the  
22 cite to the Statement of Basis?

1           MR. LEVINE: I believe that's in  
2   page 10 in the KULLUK Statement of Basis. I  
3   will look to make sure. But if not, it's  
4   referenced in our petition and I think again  
5   in our reply brief.

6           In conclusion, EPA acted  
7   arbitrarily and contrary to the plain  
8   language of the Clean Air Act by treating the  
9   single drillship as a single source in a  
10  given year. It also failed to explain its  
11  use of 500 meters as an incidence at which  
12  emissions from separate OCS sources need not  
13  be aggregated. For those reasons -- sorry.  
14  It is page 10 in the KULLUK Statement of  
15  Basis. For that reason, the Board should  
16  vacate these permits and remand it to the  
17  agency. If there are no further questions, I  
18  will turn this over to Mr. Winter.

19           JUDGE STEIN: I think we have no  
20  further questions. And thank you very much.  
21  And we will turn this over to Mr. Winter.

22           MR. WINTER: Thank you, Your Honor.

1 Could I just confirm that you-all can hear me  
2 in the courtroom?

3 JUDGE REICH: Yes, we can hear you  
4 just fine.

5 MR. WINTER: Okay. Thank you very  
6 much. Your Honor, I'd like to return to this  
7 issue that I -- what I'd liked to pick up on  
8 in my original presentation, which is the  
9 question of whether there was a combined  
10 analysis of whether the two drillships will  
11 or may likely cause a violation of the NAAQS  
12 for PM10. The most fundamental question and  
13 concern for the Borough is whether these  
14 activities are going to present an  
15 unacceptable risk to the human health of  
16 North Slope residents.

17 It was clear throughout the  
18 permitting process that EPA did not consider  
19 the combined emissions and, in fact, EPA  
20 conceded as much in its oral argument. We  
21 now learned for the first time today that  
22 Shell has done some modeling on that point,

1 but we have no idea what's contained in that  
2 modeling. The North Slope's staff, Borough  
3 staff was never given an opportunity to  
4 review that information, and the Board has no  
5 ability to determine whether this 500 meter  
6 limit will, in fact, prevent unacceptable  
7 health risks to North Slope residents.

8           And this entire conversation I  
9 think has operated in a vacuum without that  
10 adequate consideration at least before the  
11 agency during the permitting process of  
12 whether these combined emissions will, in  
13 fact, present that health risk. I think  
14 there's adequate information in the record to  
15 give rise to that suspicion in question, and  
16 EPA should have done a much better job of  
17 taking a look at that.

18           I would ask the Board to look at 18  
19 AAC 50.540, Subsection 2, there has to be a  
20 demonstration that the proposed stationary  
21 source will not interfere with the ambient  
22 air quality standards. So there does have to



1 be a determination of whether or not that  
2 will take place. It has to --

3 JUDGE REICH: But doesn't the  
4 owner-requested limit of 245 tons for NOx,  
5 which is in this permit, sort of moot that  
6 question in some sense since that particular  
7 number, assuming they comply with terms of  
8 the permit, which, you know, the Board will  
9 assume that a company's going to comply with  
10 the terms of its permit, may be that, you  
11 know, it doesn't, but that's not something  
12 that we're going to assume when we're looking  
13 at the permit. Why doesn't that take care of  
14 your concern?

15 MR. WINTER: Even assuming, Your  
16 Honor, that Shell will comply with that 245  
17 tons of NOx limit, there are four separate  
18 well sites. All can be drilled in close  
19 proximity to each other. That will come  
20 close to almost a thousand tons of NOx. The  
21 evidence in the record suggests that those  
22 present direct violation of the ambient air

1 quality standard. So the owner-requested  
2 limit only ensures that they stay under the  
3 definition of source, major source. That  
4 does not translate into a guarantee there  
5 will be no health threats to the residents of  
6 the North Slope Borough. That factual  
7 determination has never been made by the  
8 agency, and that's the primary issue the  
9 Borough is concerned about is the health of  
10 its residents on the North Slope.

11 JUDGE WOLGAST: What record  
12 evidence are you relying on when you say  
13 there is the analysis that it will violate  
14 NAAQS?

15 MR. WINTER: Plaintiff's Exhibit 12  
16 is the response to Congress. If you look at  
17 page 93 of Plaintiff's Exhibit 12, there's  
18 evidence that the combined emissions of the  
19 KULLUK and DISCOVERER may likely, not  
20 necessarily as a certainty, but may likely  
21 cause a violation of the 24-hour standard, or  
22 PM standard. We set this forth in our reply

1     brief.

2                   JUDGE REICH:  What page of the  
3     Response to Comments was that?

4                   MR. WINTER:  Page 93 of 96, Your  
5     Honor.  And there are two tables there.  One  
6     table sets forth the predicted emissions from  
7     the KULLUK, and just under that there's a  
8     table that sets forth the predicted emissions  
9     for the DISCOVERY.  And they also included  
10    the standard, the maximum.  The 24-hour PM10  
11    standard is 150 micrograms per cubic meter.  
12    The combined emission from both the KULLUK  
13    and DISCOVERER are predicted to be at least  
14    187 micrograms per cubic meter.  That's well  
15    over the NAAQS for PM10.  There's nothing in  
16    the record to suggest that this 500 meter  
17    limit will prevent those emissions from being  
18    additive.  Nothing in the record to support  
19    that conclusion.

20                  JUDGE STEIN:  But you're -- for  
21    that purpose, you're adding together the  
22    emissions from the KULLUK and the DISCOVERER,

1 is that correct?

2 MR. WINTER: That's correct, that's  
3 correct. And so it very likely -- in fact,  
4 possible, due to the terms of the permit they  
5 will be operating at the same time in close  
6 proximity, and we're taking the position they  
7 should be permitted together as a single  
8 major source. Even setting aside that major  
9 source determination pursuant to EPA's own  
10 guidance, even if treated as separate minor  
11 sources, the modeling pursuant to Appendix W  
12 should have included a neighboring minor  
13 source in the background concentrations, and  
14 that was not done in this case. Therefore,  
15 we have no idea whether or not this is  
16 actually going to result in a violation of  
17 the NAAQS and is going to have an impact on  
18 health of North Slope residents.

19 Now, other consequences follow from  
20 that determination, specifically, the  
21 Environmental Justice analysis context. EPA  
22 and Shell rely on their determination of

1 NAAQS compliance as a surrogate for  
2 determining if the impacts on North Slope  
3 residents are disproportionate. And in this  
4 case, that decision is arbitrary. We haven't  
5 looked at the cumulative impact of these two  
6 sources. And both the Executive Order and  
7 EPA's own Environmental Justice analysis  
8 require that EPA look at the cumulative  
9 impact specifically when discussing the  
10 Environmental Justice implications of their  
11 permitting decisions. So not only do we have  
12 a problem with the modeling, lack of a  
13 100 cumulative analysis, they've  
14 also fundamentally underpriced the agency's  
15 Environmental Justice analysis and the  
16 agency's attempt to rely on NAAQS to act as a  
17 surrogate for analysis. We would ask that  
18 the Court remand the permit, give the agency  
19 an opportunity to review the modeling  
20 situation, and that the Board accept the  
21 petitions for review. Thank you.

22 JUDGE STEIN: Thank you,

1 Mr. Winter. I would like to thank all of the  
2 counsel and the parties who have been here  
3 today both for their briefs and also for the  
4 argument today. It's been most helpful to  
5 the Board and will be helpful to us as we  
6 proceed to decide this matter.

7 Just as a wrap-up in terms of  
8 things that are outstanding, my understanding  
9 is that I've asked the parties to advise us  
10 following the 9th Circuit argument next week  
11 if there's anything that we need to know that  
12 would affect, you know, timing or stay,  
13 things of that nature, that we will be  
14 expecting a reply brief from Shell probably  
15 by Wednesday of next week, and that the  
16 agency will review the reply briefs, make a  
17 determination. But that in any event, any  
18 reply we take we're going to want relatively  
19 soon. And then I believe that Shell's  
20 commitment to provide a reply brief by  
21 Wednesday was conditional on their

22 101 being served today with a copy

1 of the two reply briefs. Usually you get  
2 those up on our website pretty quickly. I  
3 don't know whether they're up on the website  
4 at this point, but if either the petitioner  
5 or EPA has -- clearly, I want to do what we  
6 can to get copies of that as quickly as  
7 possible to Shell so they can proceed with  
8 their reply brief.

9 With that, I believe we have gone  
10 on long enough. And I thank everybody for  
11 their patience and time and for their  
12 assistance to the Board in this matter.

13 (Whereupon, at approximately 3:35  
14 p.m., the hearing was adjourned.)

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