

BEFORE THE ENVIRONMENTAL APPEALS BOARD  
U.S. ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.

ORAL ARGUMENT

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IN THE MATTER OF: :

SHELL GULF OF MEXICO, INC. : OCS Appeal Nos.  
SHELL OFFSHORE, INC. : 10-01 through  
FRONTIER DISCOVERY : 10-04  
DRILLING UNIT :

OCS Permit No. R10OCS/ :  
PSD-AK-09-01 :

OCS Permit No. R10OCS/ :  
PSD-AK-2010-01 :

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Thursday,  
October 7, 2010

Administrative Courtroom  
Room 1152  
EPA East Building

1201 Constitution Avenue, NW  
Washington, DC

The above-entitled matter came on  
for hearing, pursuant to notice, at 1:00 p.m.

BEFORE:

THE HONORABLE EDWARD E. REICH  
Environmental Appeals Judge  
THE HONORABLE KATHIE A. STEIN  
Environmental Appeals Judge

THE HONORABLE ANNA L. WOLGAST  
Environmental Appeals Judge

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

2 1:00 p.m.

3 JUDGE WOLGAST: Good afternoon. We  
4 are here today pursuant to the Board's order  
5 of August 10, scheduling oral argument in this  
6 case. And the petitions at issue here, Region  
7 10, issuance of two Clean Air Act Outer  
8 Continental Shelf Prevention of Significant  
9 Deterioration permits for drilling exploration  
10 and drilling activities in the Chukchi and  
11 Beaufort Seas. The Board's previous order  
12 directed the parties to address three issues.

13 The Region's determination as to  
14 when the ship and its activities became an OCS  
15 source.

16 Second the Region's determination  
17 that best available control technology or BACT  
18 was not required for the ship supporting the  
19 Frontier Discoverer.

20 And third, the applicability, if  
21 any, of the new one-hour NAAQS standard for  
22 NO2 to the environmental justice analysis in

1 this case. The Board's orders also set forth  
2 the timing for the parties' arguments.  
3 Fifteen minutes for Earthjustice et al, with  
4 up to three minutes for rebuttal. Twenty-five  
5 minutes for AEWC of which up to five minutes  
6 maybe reserved for rebuttal. Thirty minutes  
7 response from the Region and ten minutes  
8 response from Shell.

9 And with that, please counsel will  
10 you state your name and who you represent as  
11 you begin your argument and we'll begin with  
12 counsel for Earthjustice et all petitioners,  
13 Mr. Grafe.

14 MR. GRAFE: May it please the  
15 Board. My name is Eric Grafe and I represent  
16 NRDC petitioners. I would like to reserve  
17 three minutes for rebuttal. In its July 19  
18 order, the Board requested oral argument on  
19 three issues.

20 I will address one issue and my  
21 colleague, Ms. Sanerib and Mr. Winter will  
22 address the two other issues. I would like to

1 address NRDC's argument that Section 328  
2 mandates the application of the complete sweep  
3 of PDS requirements, including back to the  
4 emissions of Shell's associated vessels.

5 Because the statute (1) unambiguously directs  
6 EPA to control air pollution from OCS sources  
7 under the PSD program and (2) specifically  
8 defines OCS source emissions to include  
9 emissions from associated vessels. Here  
10 Region 10 has issued two PSD permits to Shell.  
11 The PSD program is designed to keep clean air  
12 sheds clean. It has two primary mechanisms  
13 for doing so.

14 First, it requires emissions from  
15 new sources to meet their quality standards.  
16 Second, it requires the application of best  
17 available control technology BACT to the  
18 sources of emissions. The application ensures  
19 that pollution levels generated by the source  
20 will not only meet air quality standards but  
21 will remain as low as possible. In the  
22 offshore context Section 328(a)(1) directs EPA

1 to apply PSD to air pollution from OCS  
2 sources. Section 328(a)(4) defines emissions  
3 from associated vessels to be direct emissions  
4 from the OCS source.

5 JUDGE STEIN: Counsel is there a  
6 definition anywhere for what a direct emission  
7 is?

8 MR. GRAFE: Uh no, Your Honor, an  
9 emission but BACT an emissions limitation and  
10 that's designed to reduce the, to achieve the  
11 maximum reduction of pollution emitted from a  
12 source. And in defining the emissions from an  
13 OCS source to specifically include emissions  
14 from an associated vessel Section 328  
15 unambiguously directs the application of the  
16 PSD program including BACT to those emissions.

17  
18 JUDGE REICH: I think the question  
19 is does the word direct help us understand  
20 what's meant there. If they had not used the  
21 word direct, if it just said emissions would  
22 it have changed at all your analysis or do you

1 think the word direct is just surplusage?

2 MR. GRAFE: I think if anything  
3 direct the use of the word direct supports our  
4 analysis because it makes clear that the  
5 emissions from associated vessels should be  
6 treated the same as emissions from the OCS  
7 source. In other words they should be  
8 regulated under the PSD program and the use of  
9 the word direct would imply that all of the  
10 PSD requirements that apply to the OCS, to  
11 emissions from the OCS source also apply to  
12 emissions from the OCS vessel because they are  
13 the same. Emissions from the OCS, from the  
14 associated vessels are emissions from the OCS  
15 source.

16 JUDGE WOLGAST: Does that mean  
17 that the emissions from the associated vessel  
18 should be treated as emissions from a  
19 stationary source?

20 MR. GRAFE: Yes they should be  
21 regulated the same as the emissions from the  
22 OCS source, the stationary source. That's

1 what 328(a)(1) read with 328(a)(4)(c) directs.

2 JUDGE STEIN: Is that because they  
3 are part of the stationary source or part of  
4 the OCS source?

5 MR. GRAFE: It's because the  
6 emissions of, they are part of the emissions  
7 of the OCS source which is, which the statute  
8 directs EPA to apply BACT.

9 JUDGE STEIN: But isn't it  
10 possible that what the statute was requiring  
11 that it be taken into account, for example,  
12 for purposes of potential to omit or air  
13 quality emissions but not necessarily for  
14 purposes of BACT. And I think that's why we  
15 are struggling with the word direct emissions  
16 and whether there is anywhere else in guidance  
17 or the regulations or the statute that would  
18 define that term because its not clear to me.  
19 Simply because the word direct emissions are  
20 there necessarily means that BACT applies to  
21 those emissions.

22 MR. GRAFE: There isn't, in the

1 legislative history of 328 the responders of  
2 the provision evidence that awareness of  
3 technological controls as a means of  
4 controlling emissions, including associated  
5 vessel emissions and referred to the need to  
6 control associated vessel emissions, the same  
7 as emissions from the facility, the OCS source  
8 and the regulation that EPA has promulgated  
9 implementing 328 defines the emissions from an  
10 OCS, from associated vessels as being included  
11 in the potential to emit of the OCS source and  
12 that ties in with the 52.21(j)(2) which is the  
13 general PSD regulation that directs that any  
14 new major source must apply BACT to all  
15 regulated pollutants. It has the potential to  
16 emit. There's no evidence anywhere that BACT  
17 is any different than the other PSD  
18 requirements that Region 10 admits apply to  
19 associated vessels.

20 JUDGE REICH: Can you have without  
21 limited it to the 328 context? I'm talking  
22 about PSD generally. Can you have

1       circumstances where the act requires  
2       consideration of emissions for purposes of  
3       demonstrating attainment in the maintenance of  
4       ambient standards and yet does not require the  
5       application of BACT?

6                   MR. GRAFE:   The only example that  
7       Region 10 has provided for its notion that  
8       emissions that trigger the PSD program that  
9       are not regulated by the full sweep of the PSD  
10      program, including BACT, is an example not  
11      applicable to our situation.  It is an example  
12      of de-bottlenecking and in that instance it's  
13      the modification of an existing source and the  
14      regulations there carry forward the clear  
15      congressional intent to treat existing sources  
16      differently than new sources and to  
17      grandfather in some of the emissions.

18                   So, yes that is an example that  
19      EPA uses to say look, sometimes not all the  
20      emissions that we consider in determining  
21      whether PSD applies are regulated by the full  
22      sweep of PSD requirements including BACT.  But

1 it doesn't, it doesn't shed any light on how  
2 to interpret 328.

3 JUDGE REICH: What about  
4 construction emissions?

5 MR. GRAFE: I'm not aware of any  
6 other example.

7 JUDGE REICH: Okay.

8 MR. GRAFE: Other than Region 10's  
9 example which is not applicable and Shell's  
10 example.

11 JUDGE REICH: Well if we found  
12 that under the PSD regs, construction  
13 emissions are required to be considered as  
14 part of the ambient analysis but yet not  
15 subject to the BACT analysis. Doesn't that  
16 weaken what seems to be a presumption of yours  
17 that the two necessarily go hand in hand in  
18 saying that something is subject to PSD means  
19 it must be subject to both prongs of the PSD  
20 program, that is the air quality side and the  
21 BACT side?

22 MR. GRAFE: Well I think Section

1 328 is both on its face clear that PSD applies  
2 to all the emissions.

3 JUDGE REICH: We are not talking  
4 about whether -- okay. Which language in 328  
5 is clearest not just that PSD applies, but  
6 that all aspects of the PSD program  
7 necessarily apply?

8 MR. GRAFE: I would say A(1) which  
9 directs the administrator to establish  
10 requirements to control air pollution for OCS  
11 sources, to comply with the provisions of PSD  
12 at Part C, Chapter 1.

13 JUDGE REICH: Whatever they are.

14 MR. GRAFE: Yes, but PSD's  
15 provisions include, in the regs and in the  
16 statute, include, they are emissions controls  
17 and they include compliance with the  
18 increments and NAAQS and the emissions control  
19 in BACT.

20 JUDGE REICH: As we just said not  
21 necessarily. Typically yes they do but not  
22 invariably.

1                   MR. GRAFE: The only instance in  
2 which they don't that Region 10 has --

3                   JUDGE REICH: I know, we've been  
4 through that. So we don't need to pursue that  
5 further. Thank you.

6                   MR. GRAFE: Thank you. And I  
7 would just add on that note, the congressional  
8 history of 328 supports the notion that  
9 associated vessel emissions are meant to be  
10 regulated including through technology and as  
11 the application of 328 here demonstrates the  
12 importance of applying BACT to associated  
13 vessel emissions. They, the associated  
14 vessels emissions, constitute the lion's share  
15 of the pollution from Shell's operations.

16                   Seventy-five to ninety-six percent  
17 of the total of each regulated pollutant comes  
18 from the associated vessels. Yet the manner  
19 in which Region 10 has applied the statute and  
20 the regulation here exempts all those  
21 emissions from the very PSD program control  
22 meant to keep emissions in clean airsheds as

1 low as possible. And as a result, the  
2 operations really fill up the allowable  
3 increments and come very close to NAAQS. They  
4 just squeak under and that is not, doesn't  
5 fulfill the purposes of the PSD program and we  
6 argue that it violates the clear mandate in  
7 328 that says go regulate those pollutions.

8 JUDGE WOLGAST: And how in your  
9 view are we to harmonize the statutory  
10 provisions of 328 with the agency's regulation  
11 at 40 CFR 55.2? And again I know your focus  
12 here so I'm focused on the second part of  
13 that, that deals with other vessels physically  
14 attached to the OCS facility in which case  
15 only the stationary source aspects of the  
16 vessel would be regulated. So, thinking  
17 about, in this instance the icebreaker, for  
18 instance as part of the associated fleet, how  
19 -- in my mind this sort of gets back to this  
20 issue of direct emissions and what does that  
21 mean and what does that mean in the context of  
22 55.2?

1                   MR. GRAFE: 55.2 is consistent  
2 with Section 328. It's the Region's  
3 application of the regulation that is at issue  
4 here. 55.2 says that associated vessel  
5 emissions of an associate vessel is not  
6 attached within 25 miles of the drill ship  
7 shall be considered as part of the potential  
8 to emit of the OCS source. That language, the  
9 potential to emit, links in with the existing  
10 PSD regulations at 52.2(1)(j)(2) which directs  
11 that new major sources must apply BACT to  
12 regulated pollutants that the source has the  
13 potential to emit. So, if anything, the  
14 regulation suggests that BACT should apply.  
15 It links into the regs that say apply BACT to  
16 the pollution that the source has the  
17 potential to emit. It is not contrary in any  
18 way to the statute.

19                   JUDGE WOLGAST: And just so I  
20 understand your argument, so getting back to  
21 the question we had before about does this  
22 make this part of the OCS source and a

1 stationary source. As I understand what you  
2 are saying that the 328 applies to activities  
3 within the 25 mile range and shall be included  
4 as direct emissions, direct meaning in the  
5 context of 55.2 that they are direct (i.e.  
6 stationary source emissions) not indirect  
7 (i.e. mobile source emissions).

8 MR. GRAFE: That's right. They  
9 are to be considered emissions from the OCS  
10 source, direct emissions from the OCS source,  
11 from the stationary source and regulated as  
12 such. And Region 10 is doing that. They are  
13 regulating, they are applying Title I  
14 regulations, the PSD program. They are  
15 applying some elements to the associated  
16 vessels. They've just, the only thing they've  
17 exempted the associated vessels from is BACT.  
18 They are applying increment requirements and  
19 NAAQS requirements. They are even applying  
20 some technology requirements to the vessels.  
21 They just did not subject them to the BACT  
22 analysis.

1                   If there are no further questions  
2                   I would like to reserve my time for rebuttal.  
3                   Thank you very much.

4                   MS. SANERIB: Good afternoon. May  
5                   it please the board. My name is Tanya  
6                   Sanerib. I am here today representing AEWC  
7                   and ICAS. I am joined my co-counsel,  
8                   Christopher Winter. I will discuss the airs  
9                   with how Region 10 define the OCS source for  
10                  these permits as well as appropriate relief in  
11                  this case. And Mr. Winter will discuss our  
12                  environmental justice claim. I intend to  
13                  spend about 15 minutes of our time discussing  
14                  the OCS issue and relief. And we would like  
15                  to reserve five minutes of our time for  
16                  rebuttal.

17                  The definition of OCS source that  
18                  Region 10 applied to Shell's permits is  
19                  contrary both to the plain language of the  
20                  regulatory definition as well as the statutory  
21                  definition. Region 10 erred first by adding  
22                  requirements to the regulatory definition of

1 OCS source. It required that the drill ship  
2 be secure and stable and ready to drill before  
3 it became an OCS source. The net result of  
4 this application of the regulatory definition  
5 is a failure to apply BACT to the propulsion  
6 engine on the drill ship. Now the regulatory  
7 definition says that a vessel becomes an OCS  
8 source when it is attached to the seabed,  
9 erected thereon and used for the purpose of  
10 exploring for resources. When it comes to a  
11 drill ship, when a drill ship leaves harbor,  
12 it is erected, it is ready to drill. It need  
13 only attach to the seabed to become an OCS  
14 source. This is in contrast to other kinds of  
15 equipment that's used for drilling on the OCS,  
16 such as the jackup rig.

17 JUDGE REICH: Is there something  
18 that explains what was intended by the word  
19 erected?

20 MS. SANERIB: There is an  
21 explanation in the final preamble to the  
22 regulatory definition. What EPA said in the

1 final preamble is they looked to a provision  
2 in OCSLA, Section 1333 of OCSLA, and said that  
3 provision applies federal law on the OCS, when  
4 a thing has been erected on the OCS. So  
5 whether its an island, a production facility,  
6 something of that nature. And we think that  
7 is a significant error in EPA's understanding  
8 of OCSLA when they created the regulatory  
9 definition of OCS source.

10 Because if you look at OCSLA as a  
11 whole, Section 1333, which is sited to by EPA  
12 in no way defines the Department of Interior's  
13 authority under OCSLA. If you look at the  
14 definitions in Section 1331 of the statute,  
15 they provide very broad definitions for what  
16 exploration is, what production is, what  
17 development is, which are all the events that  
18 occur on the OCS. And for example, the  
19 Department of Interior has authority to  
20 regulate seismic exploration, which is simply  
21 ships going out to the OCS to explore the  
22 seabed floor. But what EPA did is it looked to

1 a provision that defines not the Department of  
2 Interior's jurisdiction under OCSLA but a  
3 section that was meant to apply federal law  
4 because they were dealing with an issue of  
5 entities coming from other countries and  
6 setting up jackup rigs or production, oil and  
7 gas facilities out on our OCS and Congress  
8 wanted to ensure that those things were  
9 regulated by our custom's laws.

10 JUDGE REICH: Is your argument  
11 that Region 10 erred relative to what the EPA  
12 regulations are or relative to what you think  
13 the EPA regulations should have been.

14 MS. SANERIB: Relative to what the  
15 EPA regulations are.

16 JUDGE REICH: So we can take as a  
17 starting point, EPA's regulations however  
18 flawed you may think they are.

19 MS. SANERIB: Yes, yes. And our  
20 first argument is that if you look at the  
21 plain language of that regulation when it  
22 applies to a drill ship and in contrast to a

1       jackup rig, which goes to the OCS, it attaches  
2       to the seabed floor and then several steps  
3       occur before its actually an entity that's  
4       erected on the OCS.

5                   JUDGE STEIN:   But where would we  
6       look besides your argument here for support  
7       for that proposition that in the context of  
8       this particular circumstance, the ship is  
9       already erected.

10                   MR. SANERIB:   You can look to the  
11       first statement of basis that was issued for  
12       the Chukchi permit back in August 2009.   In  
13       that permit EPA took the position that once  
14       the drill ship was at the lease block and  
15       dropped a single anchor it was an OCS source.  
16       And that was the position that EPA also took  
17       in the previous case before the Board dealing  
18       with the permits for the Kulluk.  And of course  
19       EPA --

20                   JUDGE STEIN:   Was that by silence  
21       or did in any way, shape or form before it re-  
22       proposed the permit, did it provide any

1 analysis of what erected thereon means?

2 MS. SANERIB: What EPA did between  
3 the first Chukchi permit and the second  
4 Chukchi permit is it created two options for  
5 when the drill ship became an OCS source. And  
6 the second option is the option it ended up  
7 adopting, which was the Shell proposal, that  
8 it had to be secure and stable. And in the  
9 process of issuing the statements of bases for  
10 these permits and the response to comments EPA  
11 failed to provide a reasonable explanation for  
12 the additional requirements it added on to the  
13 permits. And you've been asking me about the  
14 term erected thereon. If you go back and look  
15 through the statement of basis and the  
16 response to comments, at times EPA says that  
17 they are construing what use for the purpose  
18 of exploring for resources means. At times  
19 they are construing what erected thereon  
20 means. But they never provide a consistent  
21 reasonable explanation for why these  
22 additional requirements were imposed to be

1       able to define the OCS source in these  
2       permits. And that is the other critical error  
3       with the definition of the OCS source.

4                 JUDGE REICH: Can I clarify  
5       something you said just a little bit ago?  
6       When they initially talked about the single  
7       act anchor was that in the context of erected  
8       or is that in the context of attached?

9                 MS. SANERIB: They didn't provide  
10       any explanation. If you go back and look at  
11       the original Chukchi statement of basis it  
12       just says the drill ship becomes an OCS source  
13       once it drops a single anchor at the lease  
14       block site. And that's the end of the story.  
15       There is no further analysis.

16                JUDGE REICH: I had thought when  
17       you had started you were implying that it was  
18       erected even before that.

19                MS. SANERIB: That's been our  
20       position in these proceedings that yes, a  
21       drill ship, when it leaves harbor it is  
22       erected.

1                   JUDGE REICH:   Okay.   So we are  
2                   still searching for something that explains  
3                   why that's right.

4                   MS. SANERIB:   And I think the  
5                   other thing that's, the other discussion in  
6                   the final preamble to the regulatory  
7                   definition talks about the distinctions  
8                   between the different kinds of drilling  
9                   mechanisms.   And I think the jackup rig  
10                  provides an explanation for you that you are  
11                  looking for in terms of what does erected mean  
12                  because the jackup rig when it reaches the  
13                  lease block site, when it reaches the well  
14                  site, is not assembled.   It is not erected.  
15                  It has to be put together and various  
16                  different ships have to come to that site in  
17                  order to erect the actual drilling mechanisms.  
18                  So that to me and if you look at the final  
19                  preamble, that's what EPA had in mind when  
20                  they added erected thereon.   They didn't want  
21                  to say for a jackup rig, okay the second  
22                  something gets out to the drill site and

1 attaches to the seabed floor which happens  
2 rather quickly from that moment on because the  
3 original definition did not include erected  
4 thereon. It said it was attached to the  
5 seabed used for the purpose of exploring. We  
6 want to ensure for a jackup rig that its only  
7 once it actually becomes a jackup rig that it  
8 is regulated under the Clean Air Act. Now I  
9 think that might be inconsistent with the  
10 notion of preconstruction activities being  
11 covered under the PSD program as a whole and  
12 its one of the concerns we have with the  
13 regulatory definition of OCS source but for  
14 the purposes of how the regulatory definition  
15 was applied to these permits, EPA went beyond  
16 even what the regulation said and added in  
17 these extra requirements. So instead of  
18 saying the drill ship is used for the purpose  
19 of exploring, EPA said it has to be ready to  
20 drill.

21 JUDGE REICH: That example that  
22 you just gave is that something that EPA

1       itself articulated or is that a way in which  
2       you can make the distinction. I mean, has EPA  
3       said that or is it just the way you can see  
4       that those two concepts are different?

5                   MS. SANERIB: It's a way I can see  
6       those two concepts are different but the EPA  
7       does reference jackup rigs in the final  
8       preamble. It doesn't articulate that  
9       explanation quite as clearly as I did but I  
10      think its clear the agency had in mind all  
11      these different kinds of mechanisms for  
12      drilling on the OCS and wanted to make sure  
13      they had a definition that took that into  
14      account, that we have drill ship exploration  
15      but we also have these other mechanisms for  
16      drilling. And for that reason they needed a  
17      regulatory definition that made sure to sort  
18      of apply evenly to those different mechanisms.

19                   JUDGE WOLGAST: And is your  
20      argument that I'm looking at the parts that  
21      the Region cited in support of their argument  
22      to the preamble to the Part 55 regulations.

1 When they refer to a source permanently or  
2 temporarily attached to the seabed and being  
3 used for the purpose of exploring, developing,  
4 producing resources therefrom, and sort of  
5 conspicuously absent from that --

6 MS. SANERIB: Erected thereon.

7 JUDGE WOLGAST: -- erected  
8 thereon.

9 MS. SANERIB: That's right,  
10 because the draft regulation in the first  
11 preamble did not contain that terminology  
12 erected thereon. And so EPA cites that  
13 preamble for support but we think it actually  
14 supports the position that EPA had held before  
15 these permits in the position that we put  
16 before the Board today, which for a drill ship  
17 is once it is on the OCS, once it drops its  
18 anchor, and is attached to the seabed floor,  
19 it is erected and its used for the purpose of  
20 exploring. And so requiring that it be secure  
21 and stable and ready to drill only further  
22 narrows that regulatory definition.

1                   Now I want to point out one other  
2                   inconsistency in EPA's position in applying  
3                   the regulation to the definition of OCS  
4                   source. EPA said consistently throughout its  
5                   response to comments that the Discoverer  
6                   doesn't have to have all eight anchors in  
7                   place to be considered an OCS source. It also  
8                   rejected comments that said it should be  
9                   actually engaged in drilling before it becomes  
10                  an OCS source. But by adopting Shell's  
11                  proposition that the drill ship be secure and  
12                  stable and ready to drill, if you look back to  
13                  the center reply brief, if you look back to  
14                  Shell's application, that declaration is only  
15                  made once all eight anchors are in place and  
16                  once Shell determines that the drill ship is  
17                  secure and stable and ready to drill. So EPA  
18                  has taken inconsistent positions by adding  
19                  these criteria onto the regulatory definition.  
20                  It created a more onerous definition of OCS  
21                  source which it says itself shouldn't occur  
22                  because it says the drill ship can drill

1 without eight anchors on the OCS, or eight  
2 anchors on the seabed floor. And yet that's  
3 exactly what the agency is requiring for the  
4 drill ship to become an OCS source. Now we  
5 think that you mentioned in your order the  
6 intersection between the regulatory definition  
7 and the statutory definition. And I think if  
8 you look to the statutory definition and you  
9 look at what EPA did here in terms of how to  
10 apply this regulation, you can see that the  
11 agency took an already very narrow regulatory  
12 definition and further narrowed it. And I  
13 think its helpful to look at the statute first  
14 which says anything regulated or authorized  
15 under OCSLA should be the OCS source. And I'm  
16 just looking at one of the terms If you look  
17 at the regulation it says "a vessel that's  
18 used for the purpose of exploring for  
19 resources should be an OCS source." And if  
20 you look at what EPA did in these permits,  
21 they said it has to be ready to drill for it  
22 to be an OCS source. If you look at the

1 intersection of the statute, the regulation,  
2 what was done in these permits, its clear the  
3 agency committed a clear error. It is far too  
4 narrow a definition for these permits.

5 JUDGE STEIN: I have a couple of  
6 questions for you.

7 MS. SANERIB: Okay.

8 JUDGE STEIN: In 1978 my  
9 understanding as Congress amended Section  
10 4(a)(1) of the OCSLA Act of 53 and replaced  
11 the term fixed structures with the attachment  
12 language, but didn't alter the erection  
13 language in the statute, to what extent if at  
14 all is what EPA is doing here in these permits  
15 with its interpretation of erection re-writing  
16 the fixed structure's language back into the  
17 statute?

18 MS. SANERIB: I think that's a  
19 very good interpretation of what EPA has done  
20 here. I think that they really did look at  
21 the wrong provisions in OCSLA to take  
22 direction in trying to implement what Congress

1 says in Section 328, which is anything that's  
2 regulated or authorized under OCSLA can become  
3 an OCS source if it has a potential to emit  
4 and its on the OCS. And so there's a lot of  
5 different ways you can get direction from  
6 OCSLA in terms of what's regulated by the  
7 Department of Interior but the one provision  
8 that EPA chose and its regulations rely upon  
9 says nothing about what the Department of  
10 Interior actually regulates. And again, if  
11 you look at the definitions of exploration, of  
12 development and of production, in OCSLA they  
13 are incredibly broad definitions of what it is  
14 that Department of Interior has the authority  
15 to regulate under that statute. And for  
16 whatever reason EPA put on blinders to those  
17 definitions and focused in on the very narrow  
18 definition of how federal customs law and how  
19 other federal laws in other arenas would get  
20 applied two things that were actually attached  
21 to the seabed floor. But that's not at all  
22 the limit at the Department of Interior's

1 jurisdiction under OCSLA which is what  
2 Congress said should be regulated under  
3 Section 328. Anything authorized or regulated  
4 under OCSLA was meant to be part of the OCS  
5 source.

6 I think the other critical tension  
7 between the regulation and the statute is  
8 EPA's real failure to put forth an explanation  
9 between --

10 JUDGE WOLGAST: I'm just trying to  
11 check on the time because I think the time  
12 that was put on was the total time.

13 MS. SANERIB: Was the total time?  
14 Okay, all right. So if my colleague wishes to  
15 speak I should skip over to him.

16 JUDGE WOLGAST: I just wanted to  
17 alert you to that.

18 MS. SANERIB: No, thank you I  
19 appreciate that. If you don't have any other  
20 questions I will turn it over to Mr. Winter.  
21 Thank you.

22 MR. WINTER: Good afternoon Your

1 Honors. My name is Christopher Winter and I  
2 along with Ms. Sanerib represent petitioners,  
3 Alaska Eskimo Whaling Commission and the  
4 Inupiat Community of the Arctic Slope. By  
5 reserving our final five minutes for rebuttal  
6 I would like to take the remainder of our time  
7 to discuss briefly the environmental justice  
8 issues set forth in the petition.

9 First Your Honors, I would like to  
10 make two points. The first point is that there  
11 is no dispute in this case about a key fact  
12 that underlies petitioners' concerns on the  
13 environmental justice analysis. And that fact  
14 is that the Inupiat people that live in the  
15 Arctic on the North Slope are uniquely  
16 vulnerable to the impacts of air pollution.  
17 Rates of chronic lung disease are dramatically  
18 higher than the general U.S. population. And  
19 in particular folks on the North Slopes suffer  
20 from increased rates of asthma, as well as  
21 lung cancer and cardiorespiratory mortality.

22 The second fact which EPA admits

1 in passing a short-term NO2 standard is that  
2 the existing annual standard is inadequate to  
3 protect against risks from short-term  
4 exposures. And in particular those risks  
5 include airway response from asthmatics and  
6 respiratory morbidity. So the very health  
7 threats that triggered the short-term NO2  
8 standard are the same health threats that are  
9 experienced by people on the North Slope at  
10 disproportionately high levels. So despite  
11 EPA's explicit findings set forth in the  
12 record for the short-term NO2 standard, EPA  
13 now takes the Region 10 now takes a directly  
14 contrary position in this matter. And that  
15 position is that compliance with the annual  
16 NO2 standard is adequate to protect against  
17 threats to human health. So neither EPA nor  
18 Shell has provided a reasonable justification  
19 or explanation for how these two directly  
20 contrary positions can be reconciled. In its  
21 response brief, EPA essentially ignored its  
22 prior statements made in February of this year

1 in a short-term NO2 standard when it was  
2 passed in the federal register. Instead of  
3 footnote 36 Region 10 simply falls back on  
4 compliance with the existing NAAQS at the  
5 annual standard. So in effect what EPA is  
6 asking for is a per se rule that in all  
7 situations compliance with the NAAQS is  
8 adequate to address environmental justice  
9 concerns. And this per se rule that EPA is  
10 asking for would essentially do away entirely  
11 with the environmental justice analysis in the  
12 context of PSD permits because of course under  
13 the Clean Air Act every PSD permit must comply  
14 and result in compliance with ambient air  
15 quality standards. So here EPA was required  
16 to submit a reasonable explanation of whether  
17 and how Shell's particular emissions will  
18 cause a disproportionate adverse impact on a  
19 minority community. So in certain  
20 circumstances NAAQS compliance is certainly a  
21 relevant consideration. And that has been  
22 born out before in previous Board decisions.

1 But never has the Board gone so far as to say  
2 that is in and of itself, the sole  
3 consideration as a legal matter that EPA needs  
4 to make.

5 JUDGE REICH: What additional do  
6 you believe EPA should have done here?

7 MR. WINTER: I believe in this  
8 situation, Your Honor, EPA should have looked  
9 at the emissions from Shell's operations and  
10 determined whether because of short-term  
11 exposure, those emissions would result in a  
12 potential adverse health impact and if so they  
13 should have also considered the demographics  
14 of the local community and put that together  
15 in an environmental justice analysis. I think  
16 that's what we would ask that the agency do.

17 JUDGE REICH: If they had done an  
18 analysis relative to the 1 hour NO2 standard  
19 would that have been adequate or do you  
20 believe they would have to have gone beyond  
21 that?

22 MR. WINTER: So Your Honor I think

1 that is something that we would want to  
2 address with the agency on remand. And I  
3 think on remand compliance with the short-term  
4 standard is a relevant consideration and would  
5 be one criteria. But I don't think that would  
6 be the only criteria. I think the agency  
7 would also have to consider all the other  
8 relevant facts and then come up with a  
9 reasonable analysis based on other relevant  
10 facts that would also be in the record.

11 JUDGE WOLGAST: And by other  
12 relevant facts, do you mean other facts within  
13 the scientific realm that was the body  
14 evidence that made up the NO2 standard or  
15 something beyond scientific body of evidence?

16 MR. WINTER: I think -- as an  
17 example one of the unique types of situations  
18 I think that can call for an analysis beyond  
19 the NAAQS is if a minority community is  
20 located on a toxic hotspot. Something that is  
21 not envisioned by EPA when it passes the  
22 NAAQS. There are multiple sources of

1 pollutants and toxics that are combining to  
2 create a uniquely harmful situation for a  
3 local community and the proposed emission is  
4 being laid over top of that already  
5 potentially dangerous situation. So it is that  
6 type of specific facts in the unique situation  
7 that I think EPA Region 10 would have to  
8 consider in addition to NAAQS' compliance.  
9 And for instance, in Prudhoe Bay on the North  
10 Slope there are other existing sources of  
11 emissions from the oil and gas industry. And  
12 its those types of site specific facts that we  
13 would ask that Region 10 consider in addition  
14 to the short-term NAAQS on remand.

15 So I don't want to take up the  
16 rest of my time. If anybody else has any  
17 questions I would be happy to answer them.

18 JUDGE WOLGAST: Thank you.

19 MR. WINTER: Okay, thank you very  
20 much.

21 JUDGE WOLGAST: Ms. Vergeront?

22 MS. VERGERONT: Good afternoon.

1 I'm Julie Vergeront with USEPA Region 10 in  
2 Seattle. In the Office of Regional Counsel  
3 with me are Julie Matthews, also of Region  
4 10's Office of Regional Counsel and Kristi  
5 Smith of the Office of General Counsel. I'm  
6 going to first address the issue regarding  
7 EPA's determination that the Discoverer  
8 becomes a stationary, an OCS source when made  
9 sufficiently secure and stable to commence  
10 drilling operations. Now I would like to as  
11 the Board acknowledged many of the arguments  
12 the petitioner made just now and in their  
13 briefs, in fact challenge the regulation at  
14 issue. And I think the Board is correct that  
15 we need to start with the regulation that EPA  
16 promulgated. The regulation was already once  
17 challenged. The time for challenging it has  
18 passed. And this Board acknowledged in the  
19 Kulluk decision that the Region is not free to  
20 ignore the regulatory definition of OCS  
21 source. So, I think all of the arguments that  
22 have been made suggesting that its

1 inconsistent with the statute, I don't believe  
2 those are appropriate considerations at this  
3 time.

4 JUDGE STEIN: But can we look to  
5 the statute in defining what the terms of the  
6 regulations might mean?

7 MS. VERGERONT: Yes, I think that  
8 is appropriate to look at the statute to  
9 interpret the regulations to the extent that  
10 they are not clear on its face. But here when  
11 EPA promulgated the definition of OCS source,  
12 EPA clarified that a vessel would be  
13 considered an OCS source only when attached to  
14 the seabed, erected thereon, and used for the  
15 purpose of exploring or developing resources.  
16 And they did look to the jurisdictional  
17 provisions of OCSLA in coming up with these  
18 criteria.

19 JUDGE REICH: Can you help us with  
20 the issue we wrestled with before. Where is  
21 the clearest expression of what the word  
22 erected was intended to mean?

1 MS. VERGERONT: And I don't have  
2 anything to point the Board to other than it  
3 is used in OCSLA Section 4(a)(1). But it is  
4 a separate criteria. They are separated by  
5 ands and of course as the Board is aware that  
6 when we initially proposed the permit, we  
7 proposed that attachment by a single anchor  
8 was sufficient. And when we got comments and  
9 I would also like to point out we did not, our  
10 option two when we, the position that we  
11 landed upon, sufficiently secure and stable to  
12 commence exploratory operations, that was not  
13 Shell's position. Shell's position was that  
14 all eight anchors need to be in place before  
15 it would need an OCS source.

16 JUDGE REICH: But in practical  
17 terms is it different?

18 MS. VERGERONT: I think it is  
19 different.

20 JUDGE REICH: If in the  
21 implementation of the permit the person  
22 designated by Shell determines that its eight

1 anchors, is there any basis under the permit  
2 under which you can challenge that  
3 determination?

4 MS. VERGERONT: Well I guess if  
5 they make that determination I think it would  
6 be very difficult to do so but I think --

7 JUDGE REICH: To make the  
8 determination or to challenge the  
9 determination?

10 MS. VERGERONT: To challenge the  
11 determination but I guess I would like to  
12 point out that this is a determination that  
13 Shell makes for operational purposes. This is  
14 not something that we created to implement  
15 this permit. This is something they make  
16 under that's made, its my understanding, by  
17 drill ships worldwide, the international  
18 association of drilling contractors. This is  
19 the determination.

20 JUDGE WOLGAST: And what factors  
21 do you think would go into their determination  
22 on the ship?

1 MS. VERGERONT: I think that's  
2 perhaps a better question for Shell but --

3 JUDGE WOLGAST: This is an  
4 important question for you because you've  
5 abdicated the analysis to Shell.

6 MS. VERGERONT: Again, we've taken  
7 a determination that they make for other  
8 purposes and we used that here. We think it  
9 appropriately signals based upon the  
10 information submitted to us when the vessel  
11 changes from being a vessel and when it is in  
12 the operational mode as a drilling rig. And  
13 I think in general my understanding is there  
14 will be eight anchors down when they are in  
15 that mode. But there are situations where  
16 they may take up some anchors to prepare to  
17 vacate but they will still be in that  
18 operational mode. I guess I would also like  
19 to say I think the financial incentives here  
20 are very much way in favor of Shell declaring  
21 itself to be ready and in a position  
22 sufficiently stable to drill as soon as

1 possible because they want to be there for  
2 exploration operations.

3 JUDGE WOLGAST: Actually I think  
4 it maybe cuts the other way. I mean, I'm  
5 imagining myself on the top of the Frontier  
6 Discoverer as the manager in charge of the  
7 ship. I know I'm sitting on top of a multi-  
8 million dollar investment and the potential  
9 production from this exploration is God knows  
10 to tens of millions at a minimum and I can't  
11 imagine that any prudent business person  
12 wouldn't be extremely conservative in  
13 determining anything that would put at risk  
14 either the ship or that potential production  
15 investment. So I really can't envision the  
16 situation when a manager is going to say you  
17 know, we've got six down, good enough.

18 MS. VERGERONT: So I don't think  
19 that the criteria, that the relevant criteria  
20 is how many anchors they have down but whether  
21 they are in a position to be able to start  
22 their exploration activity.

1                   JUDGE WOLGAST: That's exactly  
2                   though what happens when you count the  
3                   emission so of course it matters how many  
4                   anchors are down from a Clean Air Act analysis  
5                   purpose and that's the agency's job to figure  
6                   out.

7                   MS. VERGERONT: But again this is  
8                   a determination they make for other purposes.  
9                   It is for when the ship, for when the ship --

10                  JUDGE WOLGAST: But that is  
11                  exactly my point.

12                  MS. VERGERONT: But they are not  
13                  going to be able to start what gets them the  
14                  money until they make this call. There is  
15                  information in the record showing everyday out  
16                  there is, you know, in the millions and  
17                  millions of dollars.

18                  JUDGE WOLGAST: And we just saw in  
19                  the Gulf cutting things short can cost a whole  
20                  lot of money.

21                  MS. VERGERONT: I don't think it's  
22                  the air permitting requirements that are going

1 to drive that because I think the air --

2 JUDGE WOLGAST: That's also  
3 exactly my point. These are business  
4 decisions. They are being made for business  
5 purposes. They are not on top of a ship  
6 figuring out whether within the meaning of 328  
7 or the EPA's regulations, we checked all the  
8 boxes. This is a completely separate parallel  
9 analysis. It is the agency's job to figure  
10 out when those statutory and regulatory  
11 criteria have been met, not Shell's, which  
12 takes me to another question, which is there's  
13 a long line of cases on the fact that an  
14 agency cannot abdicate its regulatory  
15 responsibilities to a private entity. Why  
16 isn't that what's happened here?

17 MS. VERGERONT: I guess we don't  
18 see this is as different than other kinds of  
19 self-monitoring that's done in the regulatory  
20 context. We rely all the time on company's --

21 JUDGE REICH: But this isn't self-  
22 monitoring. I mean this goes to the essence of

1 when it becomes subject to regulation, which  
2 is a totally different concept than self-  
3 monitoring.

4 MS. VERGERONT: When a company  
5 commences construction, I mean that's not an  
6 act that we have control over but that's for  
7 PSD purposes.

8 JUDGE STEIN: But you have  
9 objective criteria that apply. Here you've  
10 basically put the regulated community in  
11 charge of deciding when they are subject to  
12 these regulations and you so narrowly define  
13 the universe of what an OCS source, that the  
14 vast bulk of the emissions aren't even  
15 included.

16 MS. VERGERONT: The vast bulk of  
17 the emissions from the operations are included  
18 here. There's a period of approximately 18  
19 hours at each well site between the time when  
20 the first anchor is placed and the last anchor  
21 is placed. So the vast majority --

22 JUDGE WOLGAST: The record shows

1 that could be up to 42 hours.

2 MS. VERGERONT: That would be  
3 counting, I guess that's right, for putting  
4 anchors down and up, you're right. I erred  
5 there. But the vast majority of emissions are  
6 covered under the permit and the emissions  
7 that are occurring during that anchoring  
8 process are propulsion emissions. And EPA in  
9 coming up with this approach --

10 JUDGE WOLGAST: Propulsion  
11 emissions from the icebreaker. Is that wrong?

12 MS. VERGERONT: Propulsion  
13 emissions from the drill ship and the  
14 icebreaker.

15 JUDGE WOLGAST: But you don't even  
16 count the icebreaker emissions until its  
17 secured not just working on the last anchor  
18 but secured the last anchor.

19 MS. VERGERONT: Until it  
20 sufficiently secured and commenced operations.  
21 And again we think that implements the  
22 criteria as well as carrying out what was the

1 clear intent as EPA expressed in their  
2 regulations.

3 JUDGE WOLGAST: But if that's so  
4 clear then what happened? Why did you say it  
5 was attached and it was sufficient that one  
6 anchor down met the statutory and regulatory  
7 criteria in the first Chukchi proposal?

8 MS. VERGERONT: That we, you know  
9 we started with that position and in response  
10 to comments. We got comments that said "you  
11 did not give meaning to the other criteria in  
12 there, erected and used for the purpose of  
13 drilling operations." And when the vessel is  
14 being transported on the ocean and getting  
15 into position it is a vessel at that point in  
16 time. Its only when it is sufficiently secure  
17 and stable that it is used for the purpose of  
18 drilling. Prior to that time --

19 JUDGE STEIN: But to be secure and  
20 stable to my understanding doesn't appear in  
21 the regulations. That's what EPA has come up  
22 with. It seems to me that if in your first

1 analysis you didn't adequately look at what  
2 the language erected thereon was, you could  
3 have proposed comment rather than just option  
4 two on what those words meant. Maybe they  
5 don't need that much different than what  
6 attachment refers to. Maybe they mean the  
7 conservative position that you took here that  
8 Shell decides but it seems to be there's not  
9 really much of an analysis in the record of  
10 what the words erected thereon mean. I mean  
11 possibly it means what you said but you didn't  
12 take comment on a range of options. You went  
13 from over here to over here.

14 MS. VERGERONT: And the people  
15 were free to comment on everything in between  
16 and in fact they did. The petitioners  
17 commented that there should be no attachment  
18 requirement and several of the oil companies  
19 said that every anchor needed to be attached.  
20 So we --

21 JUDGE REICH: Which is in essence  
22 what you've agreed to. I mean you can frame

1 it however you want but you have essentially  
2 admitted that in most instances they are going  
3 to apply eight anchors. And so it is just an  
4 indirect way of largely reaching the same  
5 result, the effect of which is you have all of  
6 these emissions right literally at the site  
7 but we are ignoring them because until that  
8 eighth anchor is down, we don't even begin to  
9 start counting because its not an OCS source.

10 MS. VERGERONT: Right. And we  
11 believe that was appropriate because to do  
12 otherwise would ignore the two other criteria  
13 in the regulation.

14 JUDGE WOLGAST: What about the  
15 question that I was discussing with Ms.  
16 Sanerib which is that in support of not the  
17 first proposed permit but in the final you  
18 cite to the preamble of the Part 55  
19 regulations and specifically to the language  
20 that goes to permanently or temporarily  
21 attached and for the purpose of exploring,  
22 developing or producing not even mentioning

1 erected thereon and yet we jump from that to  
2 an interpretation which in the real world  
3 means that you are in a position to  
4 immediately commence drilling operations which  
5 appears absolutely nowhere.

6 MS. VERGERONT: There is this, the  
7 preamble does state as you state but the  
8 regulation controls here I would submit and  
9 that does have the word erected in it. And we  
10 don't believe that we added criteria. What we  
11 did was try to add clarity to the permit by  
12 translating the criteria into enforceable  
13 permit conditions. Obviously had we just  
14 included in the permit the requirements that  
15 it would be an OCS source when attached to the  
16 seabed and erected thereon and used for the  
17 purpose of, all the parties here would have  
18 different ideas of what that means.

19 JUDGE WOLGAST: That goes exactly  
20 to Judge Reich's point when we started this  
21 conversation which is that it's always going  
22 to be eight anchors down. It is always going

1 to be the minimal calculation of emissions.

2 And you've admitted that it will be extremely  
3 hard to enforce anything else.

4 MS. VERGERONT: We think that it  
5 would be hard to enforce something other than  
6 --

7 JUDGE WOLGAST: Shell's  
8 determination at the site on that day.

9 MS. VERGERONT: Yes and because  
10 Shell makes this determination for operational  
11 purposes, that have to do with when they can  
12 commence what brings them money, we think  
13 that's going to be a determination that they  
14 make about getting into position as soon as  
15 they can. So if the concern is that there are  
16 going to be waiting until the last possible  
17 moment to declare this to spare themselves  
18 penalties under the Clean Air Act, I think it  
19 works the other way. I think there are going  
20 to be declaring themselves in a position to  
21 drill, to begin exploratory activities sooner  
22 rather than later because --

1 JUDGE WOLGAST: Well what happened  
2 to the other record aspects that you cite  
3 which is the patent.

4 MS. VERGERONT: The patent makes  
5 clear and that is why we didn't accept Shell's  
6 eight anchor approach is because the patent  
7 shows that there are conditions, the patent --

8 JUDGE WOLGAST: No, the patent  
9 says that is designed to be able to operate  
10 with four anchors down.

11 MS. VERGERONT: And because of  
12 that we didn't believe it was appropriate to  
13 say they always had eight anchors down to be  
14 sufficiently secure and stable to drill.  
15 There was other information in the record  
16 available to us that suggested that that point  
17 could come earlier. We do --

18 JUDGE WOLGAST: So is the upshot  
19 of your argument that they are going to  
20 operate with less than eight anchors down for  
21 financial purposes? Is that the gist of the  
22 argument?

1 MS. VERGERONT: I think that they  
2 are going to operate in a way that they, I  
3 would hope they would operate for reasons that  
4 don't relate to air quality. I would hope  
5 that they would relate/operate in a way that  
6 they are in a safe mode before they make this  
7 declaration.

8 JUDGE REICH: I mean we'll have to  
9 ask Shell directly but I guess what I am  
10 struggling with is if Shell had said that they  
11 needed the eight anchors down and that was  
12 their comment. And I'm assuming that they  
13 were saying that because that's when they felt  
14 they would be in a stable position to do  
15 drilling then why you would be suggesting that  
16 to try to save money, they would be drilling  
17 with fewer anchors down and they already went  
18 on record in saying that they need to be  
19 stable and secure.

20 MS. VERGERONT: I guess we wanted  
21 to provide for the event that if they really  
22 were beginning exploration.

1                   JUDGE REICH: Right. Doesn't it,  
2 I can call into question your assumption that  
3 they would be drilling or declaring themselves  
4 with less than eight anchors down if they've  
5 already gone on record and said that's  
6 basically what a stable configuration is?

7                   MS. VERGERONT: Then our, the  
8 regulation or the permit term that we can up  
9 then will accommodate that if that's what they  
10 need to do to operate in the safe drilling  
11 mode, that's the declaration.

12                  JUDGE REICH: Which is, I think,  
13 why its fair for us to assume that you have in  
14 fact accepted a definition that in reality is  
15 going to lead, right and wrongly, is going to  
16 lead to basically having all eight anchors  
17 down before you begin to consider this an OCS  
18 source and begin to consider the emissions  
19 associated with it.

20                  MS. VERGERONT: And again we  
21 looked at the distinction between when is it  
22 operating as a vessel and when is it operating

1 as a drilling, a stationary source and that's  
2 what we believe takes into consideration the  
3 elements of the regulation and EPA's expressed  
4 intent in making that distinction between  
5 vessel type emissions and stationary sources.

6 JUDGE STEIN: Can I go back to a  
7 question that I asked earlier? And if I  
8 understand it, you said we could look to the  
9 statute in looking at the terms of the  
10 regulations. And when I look at the  
11 regulations in Part 55, and it is language on  
12 erected thereon, its different than what's in  
13 the statute. Because the statute seems to  
14 refer to two criteria, rather than three. And  
15 it talks about devices permanently or  
16 temporarily attached to the seabed, which may  
17 be erected thereon for the purpose of  
18 exploring for developing or producing  
19 resources therefrom. So when you are looking  
20 at what erected thereon means in the  
21 regulations, did you look at all to the  
22 statutory language and the change that EPA

1 made in the regulations as to whether that  
2 should inform how broadly or narrowly you are  
3 to interpret erected thereon at this time?

4 MS. VERGERONT: Well because of  
5 how the regulation ended up with an and  
6 between all of those, I think that our  
7 regulation says that all three criteria have  
8 to be met. And so I don't think that the  
9 statute in that instance informs that. I'm  
10 not sure --

11 JUDGE STEIN: Then maybe what you  
12 ought to be doing is a narrower construction  
13 of erected thereon than the broadest possible  
14 construction. I mean obviously there are a  
15 range of ways clearly those words are in the  
16 regulation. You know, clearly some meaning  
17 needs to be ascribed to those words. But if  
18 I look at Kulluk 1 and I look at the first  
19 iteration of this permit. EPA had no focus  
20 whatsoever to my knowledge on the words  
21 erected thereon and now they've driven us to  
22 a place where not only are they the

1 centerpiece, but they are so important that  
2 EPA itself can't even decide what erected  
3 thereon and has to give that responsibility to  
4 the regulated entity. And I'm very concerned  
5 about that in light of this statutory  
6 language. And I don't think that the  
7 statutory language is irrelevant.

8 MS. VERGERONT: We did look at the  
9 statute in interpreting the regulations here  
10 but we gave meaning to the word erected as  
11 being sufficiently secure and stable to  
12 commence operations because we were very  
13 cognizant of what EPA said when it promulgated  
14 the regulations about the distinction between  
15 when a ship was operating, as a drill ship was  
16 operating as a vessel and when it was  
17 operating as a stationary source. And until  
18 it is really prepared to commence that  
19 activity, it is our view that it is not  
20 operating as a stationary source and that's  
21 not an OCS source.

22 JUDGE STEIN: I know we have to

1 move on to the other topics.

2 MS. VERGERONT: Yes.

3 JUDGE STEIN: But when Congress  
4 passed Section 328, it is sort of hard for me  
5 to imagine looking at the statute and  
6 legislative history that all of this was about  
7 the narrowist possible definition of OCS  
8 source. And I'm concerned about it because  
9 what I see in Congress is in the statute is a  
10 concern about the air emissions. And in order  
11 to figure out which air emissions were first  
12 covered by the OCS source and then a  
13 stationary source. Don't we at some level have  
14 to look at what Congress is intending to  
15 address?

16 MS. VERGERONT: I think we do but  
17 we have to do so within the confines of the  
18 regulation and that's what Region 10 did here.

19 So I would like to next move to  
20 the issue of EPA's determination that BACT  
21 does not apply to support vessels. Here I  
22 think both petitioners are making a facial

1 challenge to the statute. The Earthjustice  
2 petitioners try very hard to characterize it  
3 as Region 10's application of the statute but  
4 what was very interesting about the discussion  
5 today and large portions of the brief is that  
6 it really focuses on what the statute says.  
7 And EPA promulgated the Part 55 regulations  
8 and we think that does give meaning and that  
9 has to be a given meaning.

10 JUDGE WOLGAST: In that regard  
11 what about the discussion that I was having  
12 with Mr. Grafe which is you say that's only to  
13 be attributed if its attached and we assume  
14 for instance the icebreaker will be attached.  
15 I read your briefs to say that the one anchor  
16 down actually is attachment but it doesn't  
17 satisfy the other prongs of your definition.

18 MS. VERGERONT: So is your  
19 question why is one anchor down sufficient for  
20 attachment with respect to the vessel but not  
21 with respect --

22 JUDGE WOLGAST: No.

1 MS. VERGERONT: Okay.

2 JUDGE WOLGAST: No, because I'm  
3 just looking at the regulatory definition of  
4 the other fleets, speaking specifically as an  
5 example, the icebreaker.

6 MS. VERGERONT: Yes.

7 JUDGE WOLGAST: It says that those  
8 type vessels will be considered part of the  
9 OCS source in 55.2 if its attached and it will  
10 be treated and the emissions will be those  
11 emissions only allocated of stationary source.

12 MS. VERGERONT: So I'm not sure  
13 that the question --

14 JUDGE WOLGAST: Well I'm not  
15 finished with my question. So I'm trying to  
16 say it more directly. And the question though  
17 that we discussed was at page 24 and 25 of  
18 your response, you say that the icebreaker  
19 isn't part of the OCS source because the cable  
20 line attaching it isn't good enough for  
21 attachment. But, even if it were, the  
22 emissions from the icebreaker are not

1 stationary source submissions. And the  
2 conversation we were having earlier is, well  
3 is that necessarily true when Congress said  
4 that the emissions from these associated  
5 vessels should be treated as direct (i.e.  
6 stationary source emissions) as opposed to  
7 indirect (i.e. mobile source emissions) which  
8 is your argument. That even if it were  
9 attached it moves around and ergo has to be a  
10 mobile source emission. I'm saying why don't  
11 you look back to the statute that says that no  
12 these are direct emissions.

13 MS. VERGERONT: So in the Santa  
14 Barbara case I think the, well first of all we  
15 think the statute, Congress made a distinction  
16 between the OCS source and between emissions  
17 that would be attributable to the OCS source.

18 JUDGE WOLGAST: We're just talking  
19 about OCS sources, because I'm talking about  
20 EPA's regulatory definition of OCS source.

21 MS. VERGERONT: Yes, and what the  
22 Santa Barbara court said was that statute was

1       ambiguous and EPA was --

2                   JUDGE WOLGAST:   The statute or the  
3       reg?

4                   MS. VERGERONT:   The statute was  
5       ambiguous and EPA, you know was within its  
6       discretion to clarify that in the regulation  
7       and what the regulation says is first of all  
8       there has to be physical attachment for a  
9       support vessel to be considered part of the  
10      OCS source and then its only the direct, its  
11      only the, its not the propulsion emissions,  
12      its only the stationary source aspects of  
13      that, of any vessel that would be physically  
14      attached.   So --

15                  JUDGE WOLGAST:   And so your  
16      position is that the fact that Congress said  
17      that these emissions were direct emissions has  
18      no bearing on the interpretation of the word  
19      stationary source in the EPA regulation?

20                  MS. VERGERONT:   No, we don't think  
21      that calling them direct emissions makes them  
22      stationary source emissions.

1 JUDGE WOLGAST: What are direct  
2 emissions?

3 MS. VERGERONT: You know, its not  
4 defined that I know of. All I can think of is  
5 that Congress was making a distinction between  
6 secondary emissions and secondary emissions  
7 aren't considered in the potential to emit but  
8 they are considered in the air quality  
9 analysis. And here Congress said clearly, and  
10 EPA said very clearly that these emissions  
11 should be considered in the potential to emit.  
12 It is very interesting where EPA put that, the  
13 congressional directive. They put it in the  
14 definition of potential to emit. So to apply  
15 PSD to an OCS source under EPA's regulations,  
16 first you determine what the OCS source is and  
17 then you determine what are the potential  
18 emissions of the OCS source. And there EPA  
19 said you consider the emissions of the  
20 associated fleet that aren't attached, aren't  
21 physically attached because the physically  
22 attached one are part of the OCS source. So

1       you consider these support vessel emissions  
2       and that's the potential to emit of the OCS  
3       source. Then you go to the PSD regulations  
4       and then the PSD regulations say that BACT  
5       applies to major stationary sources. And EPA,  
6       we think the structure is clear, that EPA did  
7       not consider these associated fleet vessels to  
8       be stationary sources or emissions of the  
9       stationary source and we think its very clear  
10      from the preamble where EPA said we regulate  
11      the drill ship as a stationary source. We're  
12      not regulating, directly regulating, these  
13      associated fleets because we don't think  
14      Congress gave us authority to do so. So, we  
15      think the statute is clear on this issue of  
16      whether BACT applies, that Congress made this  
17      distinction. EPA carried out this distinction  
18      in its regulations and we think when you apply  
19      PSD, the BACT requirement to the stationary  
20      source, you come up with a result that BACT  
21      does not apply to the support vessels. Again,  
22      --

1                   JUDGE STEIN:  Where do you, I  
2                   mean, in Kulluk 1, we talked about their being  
3                   two stages.  One, what is the OCS source and  
4                   two, what is the stationary source?  And I  
5                   realize the issues were somewhat different  
6                   there.  Where in this analysis do you get to  
7                   the second question?  It seems like you've  
8                   just assumed that the OCS source and the  
9                   stationary source are one and the same.

10                  MS. VERGERONT:  Well again we  
11                  looked at the preamble for clarification there  
12                  where they said the drill ship is the  
13                  stationary source.  And so we taking that and  
14                  then looking at what the major stationary  
15                  source was.  Here we think it is the OCS  
16                  source.

17                  JUDGE STEIN:  I mean it doesn't  
18                  totally get to Judge Wolgast's question which  
19                  is the scope of the OCS source, but I'm not  
20                  convinced that even if you were to conclude  
21                  that the icebreaker is not part of the OCS  
22                  source, you don't have a second analysis that

1 hasn't been undertaken in this case.

2 MS. VERGERONT: So, yes and we  
3 think looking at the regulations that once you  
4 determine what the potential to emit is of the  
5 OCS source, then you apply the PSD regulations  
6 and here the OCS source is --

7 JUDGE STEIN: Well isn't that  
8 inconsistent with what the Board said in  
9 Kulluk 1?

10 MS. VERGERONT: No, I think it  
11 said, well once you determine the OCS source,  
12 you apply the program according to its terms.  
13 And here --

14 JUDGE STEIN: You have to look at  
15 what the stationary source is.

16 MS. VERGERONT: Yes and I think by  
17 making the distinction in the statute and in  
18 our regulations between what the associated  
19 fleet is and what the other fleet is and  
20 looking at the preamble and EPA's regulations,  
21 I think we made that distinction that the  
22 support vessels were not considered part of

1 the stationary source. Otherwise, EPA would  
2 have said in the preamble, they would not have  
3 said we are not going to be regulating these  
4 as stationary sources. And that is stated in  
5 EPA's preamble. So to the extent that its not  
6 clear in the regulations, we think it is  
7 clarified by the preamble.

8 JUDGE STEIN: Has EPA undertaken  
9 an analysis of where direct emissions is used  
10 in statute and in the regulations and in  
11 guidance as part of an effort to inform us of  
12 what the term direct emissions in the statute  
13 might have meant.

14 MS. VERGERONT: I am not aware of  
15 where its used. I can go back and confer with  
16 my colleagues and we could submit supplemental  
17 briefing to the extent we, anyone else is  
18 aware of it in our discussion of this and we  
19 haven't come up with any place else where that  
20 term is used.

21 JUDGE WOLGAST: Let's move to the,  
22 you are out of time but I do want to get your

1 views on the environmental justice analysis  
2 here. And particularly we would like you to  
3 focus on why in this context, in an  
4 environmental justice context it was  
5 appropriate for the agency to rely in meeting  
6 the executive order, on a body of evidence  
7 that the agency had already determined was not  
8 sufficient to protect public health?

9 MS. VERGERONT: Yes and we are  
10 certainly sensitive to the concerns of the  
11 community and the Board with respect to the  
12 timing of the issuance of the NO2 standard and  
13 issuance of the permits and the statements  
14 made in that. In issuing these permits,  
15 Region 10 followed the approach that EPA has  
16 generally followed in analyzing and doing an  
17 environmental justice analysis in the PSD  
18 context by looking at the impact of the  
19 proposed permits on compliance with the NAAQS  
20 and affected at the time of permit issuance  
21 and that is an approach that the Board has  
22 endorsed.

1                   JUDGE REICH: Are you aware of any  
2 case where the board has taken that approach  
3 with an ambient standard for which a new  
4 ambient standard had already been adopted and  
5 was just pending the effective date?

6                   MS. VERGERONT: No I am not aware  
7 and it is an unusual situation that arose here  
8 but we believe that the same need for finality  
9 and timely completion of the permitting  
10 process that leads EPA to the conclusion that  
11 for PSD compliance purposes you look at the  
12 NAAQS and effect at the time of permit  
13 issuance. We think those same considerations  
14 here, even though they have consequences that  
15 are difficult --

16                  JUDGE WOLGAST: But here you have  
17 as of July of 2009, almost a year before these  
18 permits were issued, you had the body of  
19 evidence that underlay the agency's proposal  
20 and you had the agency's determination that it  
21 wasn't sufficient to project public health  
22 subject to public comment. So all the data

1 was available. It wasn't like you had to  
2 start analyzing in February.

3 MS. VERGERONT: And prior to the  
4 proposal there were probably technical  
5 positions staked out there as well. The  
6 concern that we have with choosing a date  
7 other than the effective date is that it is  
8 essentially moves up the effective date of the  
9 standard.

10 JUDGE STEIN: I'm not sure that it  
11 really does. I think the answer is  
12 potentially different for the effective date  
13 of the new standard kicking in from what it  
14 means in the context of an environmental  
15 justice analysis. And in the context of an  
16 environmental justice analysis historically  
17 the board has looked to compliance with NAAQS  
18 because it is a health based standard that we  
19 can look to saying well if this standard is  
20 met public health is protected. But when that  
21 data is 40 years old as it is in this case,  
22 the underlying data, and you have new data

1 that shows that the game has changed, why  
2 would you not at least for purposes of the  
3 analysis of EJ look in addition to the NAAQS  
4 whether or not there was an impact using the  
5 potential numbers in the new standard. Why  
6 would that have been so burdensome?

7 MS. VERGERONT: Well and I think  
8 again it goes to the issue of what date do you  
9 use? Do you use the proposed rule date, the  
10 date before that when the technical report was  
11 at the agency, the final date?

12 JUDGE STEIN: The final was in  
13 effect before you issued this permit.

14 MS. VERGERONT: But it was not --

15 JUDGE STEIN: It had been  
16 promulgated in the federal register as a final  
17 agency action. So you knew at that point in  
18 time that the science was set.

19 MS. VERGERONT: Yes. Yes, but  
20 Judge Wolgast, also mentioned the time of the  
21 proposal and that is the difficulty with this  
22 and we think the interest of finality and

1 timely issuance are issues we have to raise.  
2 I guess I also want to emphasize that we don't  
3 believe that there was a clear legal or  
4 factual error here. We do recognize that its  
5 an important policy, issues are at stake and  
6 EPA is taking several steps to address the  
7 policy issues both at the regional level in  
8 connection with this project.

9 JUDGE REICH: But let me go back.  
10 What we are talking about here is an analysis,  
11 okay. It is a different issue from whether  
12 the one hour standard applies or not. We are  
13 basically raising the question of as a minimum  
14 should you not have at the least done an  
15 analysis. You could have done an analysis and  
16 come to the conclusion that the health effects  
17 are such that it would be acceptable issuing  
18 a permit the way it was. The fact that you  
19 have to do an analysis doesn't dictate a  
20 particular result. But it appears from the  
21 record that basically you didn't want to do  
22 that for whatever reason. I agree that

1       there's some question about when do you start  
2       doing that but I think the Administrator going  
3       on record in the proposal laying out the data  
4       certainly seems to be one relevant point to  
5       look at. And that was well before this permit  
6       was that far along. And to be honest about  
7       it, even relative to the existing ambient air  
8       quality standard, I don't see much of an  
9       analysis. I see a conclusory couple of  
10      paragraphs and that's about it. So I'm not  
11      even sure how much that really looks like an  
12      analysis to me. But certainly I think you  
13      could have done far more than you did here  
14      relative to the one hour standard without it  
15      necessarily unduly delaying the permit.

16                 JUDGE WOLGAST: And just to follow  
17      up on Judge Reich's point, I think part of  
18      what you are hearing is that this isn't a case  
19      where we are trying to figure out when someone  
20      can sue on the final NO2 permit. This is an  
21      environmental justice analysis that the agency  
22      as of March 31 and April 9 had to determine

1       whether there was a disproportional adverse  
2       human health or environmental impact where the  
3       comment had been squarely raised by  
4       subsistence population in this case.  And so  
5       the question is so, as when you, when someone  
6       is signing their name to this, what body of  
7       evidence is it appropriate to look to.  And  
8       how could it be appropriate to look to a body  
9       of evidence that the agency itself has already  
10      determined is inadequate to protect public  
11      health.

12                   MS. VERGERONT:  Well the executive  
13      order talks about to the extent practicable.  
14      And in this case given the timing, we would  
15      contend following the approach that had been  
16      followed in other cases, we determined that it  
17      was appropriate to look to the NAAQS standard  
18      in effect at the time of permit issuance.  We  
19      were very aware of the fact that the Title 5  
20      permit for this source will require compliance  
21      with the NO2 standards so that information  
22      will be coming, that analysis is underway.

1 Shell is in the process of collecting the  
2 necessary data and we are working with Shell  
3 to commence to work on the modeling and figure  
4 out how this kind of modeling inputs  
5 demonstration will be done. So that work is  
6 underway.

7 JUDGE WOLGAST: How much time did  
8 it take you to do this environmental justice  
9 analysis? As Judge Reich points out its about  
10 a page and a half total?

11 MS. VERGERONT: Well, it did in  
12 fact take quite a bit of time. We had a staff  
13 person who was devoted to working on it and we  
14 looked at the community that was out there and  
15 we did a lot of extensive outreach which is a  
16 key component of our environmental justice --

17 JUDGE WOLGAST: Right. There is a  
18 procedure and then there is the actual  
19 analysis of the public health threat.

20 MS. VERGERONT: There is.

21 JUDGE REICH: I don't have the  
22 executive order in front of me but you say it

1 requires the analysis to the extent  
2 practicable. Am I not right that what it  
3 actually says is you are suppose to implement  
4 the order consistent with the extent permitted  
5 by existing law?

6 MS. VERGERONT: To the extent  
7 practicable and permitted by law identify and  
8 address as appropriate disproportionately high  
9 and adverse human health and --

10 JUDGE REICH: Is that the standard  
11 for addressing or is that the standard for  
12 doing analysis?

13 MS. VERGERONT: That's the  
14 standard for the extent to which we are to  
15 address it but I think that's also what we  
16 look at in analyzing it.

17 JUDGE STEIN: If the board were to  
18 remand on one of the, at least one of the  
19 issues before us, if for example, we were to  
20 find clear error in the agency's approach to  
21 the OCS source definition. And a remand on  
22 that issue, what implications does that have,

1 timing-wise, for whether or not a different  
2 answer might be required for the EJ analysis  
3 or is it irrelevant or don't you know?

4 MS. VERGERONT: Well I think it  
5 would really depend on what the remand issue  
6 was. And that's the same -- its true for the  
7 EJ analysis and also true for whatever other  
8 requirements that might come into effect. We  
9 really need to see the scope of the remand and  
10 figure out what portions of the permit it  
11 would affect and from there we would determine  
12 what parts and what aspects would be  
13 appropriate to reopen and look at again. So  
14 I don't think that's an answer, something that  
15 I can answer here. Again, with respect to the  
16 environmental justice, I would just like to  
17 say that we do recognize there are important  
18 policy considerations. Region 10 in this case  
19 is working with Shell to come up with the  
20 information and to gather the information and  
21 to do the analysis to demonstrate compliance  
22 with the new NO2 standard that will be

1 required in their Title 5 permit. The agency  
2 after these permits were issued, the EPA  
3 administrator issued interim guidance, talking  
4 about how it would address environmental  
5 issues in agency-wide actions and we also in  
6 July put forth to the national advisory  
7 committee on environmental justice solicited  
8 there input on how we should address  
9 environmental justice in the permitting  
10 process. So there are important policy issues  
11 at play. The agency is addressing those issues  
12 and we therefore think that in light of the  
13 record in this case, we believe that the Board  
14 should not grant review on this issue and  
15 should approve the permit.

16 JUDGE REICH: Just out of  
17 curiosity and this doesn't go to whether there  
18 was error in this case or not but in doing  
19 this further analysis have you discussed the  
20 scope of what you are doing with for instance  
21 AEWC and making sure that the concerns that  
22 they might have are at least considered in the

1 scope of your analysis so that when you  
2 ultimately come up with an analysis it might  
3 be one that everybody can feel comfortable  
4 with?

5 MS. VERGERONT: I don't believe  
6 we've been having conversations with them but  
7 that's certainly something we can consider.

8 JUDGE WOLGAST: Thank you. Your  
9 time is expired.

10 MR. SILER: Good afternoon. May it  
11 please the board. I am Duane Siler and I am  
12 here representing Shell Offshore Inc. and  
13 Shell Gulf of Mexico, Inc. With me at the  
14 counsel table is Sarah Bordelon and seated  
15 behind her is Mr. Lance Tolson from Shell's  
16 law department. Your Honor in the original  
17 scheduling order you invited the parties if  
18 they wished to discuss the path forward in  
19 terms of what the Board should do with these  
20 appeals. Nobody's addressed that but if I may  
21 I would like to just take a minute or two to  
22 reiterate that Shell more than ever seeks a

1 prompt decision on these petitions for review.  
2 Shell still has an urgent need, even more so,  
3 I think than when we were here four months ago  
4 and discussed this. Affirmance of these  
5 permits at least in the case of the Beaufort  
6 permit, because I think Your Honors know the  
7 Chukchi permit. The Chukchi project is for  
8 the time being on hold while a supplemental  
9 EIS is being prepared for the original lease  
10 sale that underlies that project. But with  
11 respect to the Beaufort project, affirmance of  
12 these permits will allow Shell to move forward  
13 with planning for the 2011 summer drilling  
14 season with some major certainties,  
15 uncertainties resolved. Similarly a remand on  
16 any of these issues that have been raised by  
17 petitioners which might necessitate further  
18 proceedings by the Region, it would be very  
19 beneficial if those could proceed sooner  
20 rather than later for the reasons we discussed  
21 in June. We don't want to have to back here  
22 in the Spring with these same issues being

1 presented to you for decision at that time  
2 because the Region didn't have time properly  
3 to consider them and any remanded proceedings  
4 on these permits or at least on the Beaufort  
5 permit. I would note that in its June 28  
6 filing with the Board seeking a postponement  
7 of the previous August 17 hearing date, EPA  
8 agreed that it would be appropriate for the  
9 Board to proceed and decide these three  
10 issues. There is really no good reason not to  
11 decide them. I know there were concerns  
12 expressed in June about what additional  
13 requirements might be imposed by the Bureau of  
14 Ocean Energy Management on these permits by  
15 the Department of the Interior pursuant to the  
16 suspension. That's been in effect for the  
17 2010 drilling season in the Arctic. There  
18 have in fact been a number of regulatory  
19 activities by the bureau but none of them has  
20 affected nor does it appear they will affect  
21 the emissions profile of this project.

22 Yesterday by coincidence, Shell

1 filed an application with DOE for permit to  
2 drill, authorization for permission to drill  
3 in the 2011 Summer season. One well in the  
4 Beaufort Sea pursuant to the already approved  
5 and judicially upheld exploration plan. There  
6 is one minor modification which is that the  
7 projects will go largely to zero discharge to  
8 the waters and instead muds and cuttings and  
9 waste water will be stockpiled and removed for  
10 disposal on shore. But the point is that  
11 Shell is planning to go forward. Shell has no  
12 indication that the Bureau will not process  
13 this APD in as much as the suspension was only  
14 for the 2011, the 2010 season in the Arctic  
15 and Shell has complied with the ensuing NTL's  
16 notices to lessees that have been issued by  
17 DOE to provide additional information  
18 including on Shell's worst case spill estimate  
19 and the adequacy of Shell's response plan.  
20 None of which has altered the emissions  
21 profile of the project or would require  
22 reopening this air permit. Shell wants to use

1 this air permit that's before the Board in the  
2 Beaufort Sea in 2011. It is important to  
3 remember that in turning to the merits of  
4 these issues that the burden obviously the  
5 petitioners have here is to show that there  
6 was clear legal error on the part of Region 10  
7 in determining how to define OCS source in  
8 this situation and determining whether BACT  
9 would apply to the associated vessels that  
10 never attached to the seabed or to the  
11 Frontier Discoverer. We submit that it was  
12 not unreasonable for the Region to come out  
13 where it did in terms of a workable definition  
14 for when the Discoverer becomes an OCS source.  
15 After all some line does have to drawn. With  
16 all due respect the argument that the  
17 Discoverer is an OCS source when it leaves  
18 port because at that point it has been erected  
19 and needs only to be attached apparently.  
20 That's not a workable test. Region 10 had to  
21 come up with a standard and they did that by  
22 looking at Section 55.2 of the regulations

1       which as the Board noted in the Kullik case  
2       appropriately embodied the restrictions in  
3       Section 328, which in turn referred back to  
4       Section --

5                   JUDGE REICH:  Putting aside the  
6       legal issues involved, just from a technical  
7       standpoint, what is Shell's view of the  
8       stability of the ship for drilling purposes  
9       with less than eight anchors down?

10                   MR. SILER:  Shell's position is  
11       that the ship needs to be fully anchored to be  
12       secured and ready to drill.  That would  
13       certainly be the general rule that Shell  
14       operations people would follow.  If I may Your  
15       Honor, there's absolutely no incentive for  
16       Shell to either shortcut this or extend it  
17       because as was pointed out in the earlier  
18       Kulluk, these operations are under intense  
19       scrutiny.  We have to operate safely.  That's  
20       the top priority.  The vessel is not going to  
21       be declared ready to drill and start drilling  
22       prematurely.  That would not be prudent.

1                   JUDGE REICH: Given that comment,  
2 would you say that it is unlikely then that  
3 financial considerations are going to drive  
4 you to make the declaration of stability with  
5 less than eight anchors down very often?

6                   MR. SILER: I think financial  
7 stability will not outweigh, assuming there's,  
8 sorry, financial incentives will not outweigh  
9 operating prudence in this case given the  
10 scrutiny that we are going to be under,  
11 operating in the Arctic. The procedure is a  
12 well recognized one. The anchors have to be  
13 properly tension. Tension is measured. The  
14 location is determined whether it is precisely  
15 over the target. And at that point there is  
16 a handoff, if you will from vessel status to  
17 drilling status. People in charge of the  
18 vessel yield to people who are in charge of  
19 the drilling operation. It is a well  
20 recognized process that's documented in the  
21 IADC logs. It is not, Shell will have no  
22 incentive to game this system for air

1 pollution reasons. There are far more  
2 important considerations at stake here.  
3 Namely safety. Now it is true that the  
4 patent, that I believe Region 10 actually  
5 discovered for this, does suggest it can drill  
6 with fewer than four anchors. And one can  
7 imagine that might be tauting this technology  
8 a little bit of something that can be used  
9 more quickly than an eight anchoring process  
10 would require. But Shell's position is that  
11 there's a reason for the eight anchor pattern.  
12 That is what renders the vessel ready to  
13 drill. And we don't think its inappropriate  
14 that while that process is occurring there  
15 will be anchors set and emissions will occur  
16 from the icebreaker. The icebreaker is at  
17 that point performing the function of a  
18 vessel. It is pulling on loose lines. It is  
19 not attached to the drill ship in any sense  
20 that their relative motion is prevented in the  
21 sense that when you lure something to another  
22 vessel.

1                   JUDGE STEIN: Are there another  
2 set of laws that while it's a vessel would be  
3 controlling those emissions before its  
4 considered effectively a stationary source?

5                   MR. SILER: I don't believe so  
6 Your Honor because I think the recently  
7 adopted Title 2 standards for vessels would  
8 not apply to these vessels.

9                   JUDGE STEIN: If the agency would  
10 have decided to follow the patent and say that  
11 at or effectively follow the patent that at  
12 four anchors down, for example, they would  
13 consider that, you know it may not be perfect  
14 but it is a reasonable cut that could have  
15 been made. That doesn't compel Shell to start  
16 drilling at that point, does it? That would  
17 simply, if the agency decided that you are an  
18 OCS source with four anchors down, that would  
19 still enable Shell to do whatever it needed to  
20 do for purposes of its own safety and other  
21 operational checks. Am I correct?

22                   MR. SILER: I guess the question

1 then would be whether the Discoverer at that  
2 point is still a vessel or is an OCS source.  
3 Shell does plan to operate the main engines of  
4 propulsion under the Discoverer in order to do  
5 safe anchoring. It is still a vessel while  
6 that is occurring. And that was one of the  
7 bases upon which the MMS expressed concern  
8 about the one anchor down option one  
9 definition.

10 JUDGE WOLGAST: Well assume for  
11 purposes of Judge Stein's question that the  
12 agency determined that it was an OCS source  
13 and a stationary source at four anchors down  
14 looking to the permit. Then what is the  
15 upshot from your perspective of that?

16 MR. SILER: The practical upshot  
17 Your Honor is that then arguably from that  
18 point in time onward, the Discoverer is an OCS  
19 source and is subject to BACT.

20 JUDGE WOLGAST: And how would that  
21 affect your operations?

22 MR. SILER: It would be very

1       difficult to install, determine what is BACT  
2       for those propulsion engines and install it.  
3       That is one of the reasons it matters to Shell  
4       although we still believe that legally it is  
5       the correct outcome under this bright line  
6       test that needs to be drawn between vessel  
7       versus OCS source. The correct time is when  
8       it is attached, erected and in a position that  
9       is secure and stable and ready to drill. I  
10      know Your Honors were concerned about the  
11      meaning of erected here but clearly it means  
12      something. Its not surplusage. Attachment is  
13      not sufficient. There is an additional  
14      requirement here and counsel for AEWC has  
15      suggested that what this really means is it  
16      only applies to jackup rigs because they are  
17      in some sense lifted in the air once they are  
18      brought to the site and seated on the bottom.  
19      But any kind of offshore drilling, mobile  
20      offshore drilling unit is going to require  
21      something in addition to attachment before it  
22      will be ready to be used for exploration.

1                   JUDGE STEIN: But why do you think  
2 when Congress changed the definition from  
3 fixed structure to attachment, do you know why  
4 they did that, what was driving them and why  
5 they at the same time didn't focus on the  
6 erected thereon language?

7                   MR. SILER: Well I think that  
8 there was in fact a concern that there was  
9 going to be more offshore oil exploration and  
10 that the fixed structure language was not  
11 comprehensive enough. But they still adopted  
12 again and presumably thereby reiterated and  
13 intended to adopt the three criteria in OCSLA  
14 that these facilities or vessels be attached,  
15 that they be erected and that they be used for  
16 exploration.

17                  JUDGE STEIN: Is there any  
18 regulatory history of what erected thereon  
19 means?

20                  MR. SILER: I'm not aware of any.  
21 If I could just make, finish the point I was  
22 going to make. If you think about any form of

1 drilling, operation offshore, if it's a jackup  
2 rig its at least two steps. It is floated  
3 there. It is probably anchored so it won't  
4 float away. Legs are extended down and its  
5 jacked up. So there's clearly attachment plus  
6 erection in that situation. There's  
7 attachment in something that probably is  
8 erection when you have a bottom founded unit  
9 which is taken out to the source to the  
10 location, anchored and then actually sunk so  
11 it sits on the bottom. It is erected in that  
12 sense in that it is ready to drill only when  
13 that happens. And similarly the Discoverer is  
14 erected only after its been attached and also  
15 has been stabilized so its ready to drill.

16 JUDGE WOLGAST: And what part of  
17 imagining the Discoverer's operations, what  
18 part is attachment and what part is erected  
19 thereon?

20 MR. SILER: Attachment is, the  
21 parties seem to read it attachment occurs when  
22 one anchor is down but that is not erection.

1       Although I think one could argue, its not the  
2       position that the agency has taken I don't  
3       believe in the record but that really  
4       attachment doesn't occur until the vessel is  
5       fixed and situated. I think in the record,  
6       the rationale is that attachment occurs when  
7       one anchor is down.

8                   JUDGE WOLGAST: And I'm just  
9       trying to understand in your view, you know,  
10      as a practical matter in this instance, what  
11      is the difference on the ground between  
12      attachment and erected thereon?

13                   MR. SILER: Attachment does occur  
14      when anchoring occurs. But anchoring leaves  
15      a vessel free to move around, depending on how  
16      the anchoring occurs. If it is intended to  
17      completely stabilize and render it stationary  
18      that's one thing. But I think in common  
19      parlance a vessel is attached to the seabed by  
20      an anchor but it is by no means ready at that  
21      point to be used for exploration. And even if  
22      the Board reads erected and used as a single

1 second component as opposed to those being  
2 separate and I believe one of Your Honors was  
3 pointing to the punctuation as leading to that  
4 possible reading. Still there is that second  
5 element and attachment plus something is  
6 required. And given that the purpose of the  
7 original OCS, the OCSLA jurisdictional  
8 provisions was to capture activities that are  
9 no longer vessel activities but stationary  
10 activities on the OCS. That is the best  
11 reading of erection and it's the one that the  
12 Region used here in making the determination  
13 with respect to the Discoverer.

14 JUDGE STEIN: If instead of doing  
15 what the Region had done, they had decided  
16 that attachment and erected thereon, those two  
17 criteria were met, when eight anchors were  
18 down as opposed to this recording in the log.  
19 In your view had they done that, is that  
20 problematic from Shell's perspective or from  
21 a legal perspective? I'm asking that question  
22 because obviously one of the areas of the

1 Board's concern is whether the Region has  
2 inappropriately abdicated its regulatory  
3 responsibilities to an outside third party.  
4 I'm not sure there would be a practical  
5 difference drilling-wise so I wanted to get  
6 your view on that.

7 MR. SILER: It would provide a  
8 bright line test that would not be problematic  
9 because that's what Shell intends to do. In  
10 other words drop eight anchors before being  
11 ready to drill. I think its really only the  
12 wildcard patent that's in the record that is  
13 creating this issue.

14 If Your Honors have no more  
15 questions I'd like to speak just briefly about  
16 BACT on the associated vessels.

17 First of all its perfectly clear  
18 that associated vessels in the fleet that are  
19 servicing the Discoverer cannot be part of the  
20 OCS source unless one of two things is  
21 fulfilled, well only one thing. They have to  
22 be actually attached to the OCS source. But

1 if they were themselves attached to the seabed  
2 then perhaps one could argue they are separate  
3 OCS sources. But we are talking about vessels  
4 that do not attach to the seabed. They are  
5 performing their functions while moving  
6 around. And they do not attach to the  
7 Frontier Discoverer when it is an OCS source.  
8 And I include in that of course, the  
9 icebreaker because I think its entirely  
10 reasonable as the agency concluded that  
11 pulling an anchor line is not an attachment.

12 JUDGE WOLGAST: How does the  
13 service vessel attach?

14 MR. SILER: I beg your pardon?

15 JUDGE WOLGAST: How does the  
16 service vessel attach?

17 MR. SILER: It ties up to the side  
18 of the Frontier Discoverer and delivers  
19 supplies. But what, so its clear that PSD  
20 review and BACT cannot apply to these vessels  
21 by virtue of them being OCS sources or  
22 stationary sources because that's, that

1 requires attachment as Your Honors determined  
2 in Kulluk. So what the petitioners are asking  
3 here is that the board adopt the extraordinary  
4 position of imposing direct regulation  
5 including BACT on mobile sources which to my  
6 knowledge is unprecedented under the Clean Air  
7 Act and is contrary to the clear structure of  
8 the act, under which mobile sources, including  
9 vessels are regulated under Title 2. To be  
10 sure Section 328 directs that vessel emissions  
11 considered to be direct emissions of the OCS  
12 source. But that tells us a couple of things.  
13 Number one, it tells us that they are not part  
14 of the OCS source on this construction and the  
15 statute wouldn't be required. And it tells us  
16 that they are to be attributed to the OCS  
17 source for some purposes. EPA in its Part 55  
18 regulations determined and everyone seems to  
19 agree today that those regulations are not  
20 themselves under challenge, that the direct  
21 emission, that the emissions from these  
22 associated vessels when within 25 miles would

1 be counted as potential to emit for purposes  
2 of determining whether the OCS source is a  
3 major source and for determining air quality  
4 compliance. I believe that the history of  
5 enactment, Section 328, I think it is  
6 instructive to look at where the situation,  
7 vis a vis the regulation of mobile sources was  
8 prior to the enactment of Section 328. Your  
9 Honors know in the case of NRDV v. EPA the DC  
10 circuit was addressing whether EPA had  
11 properly decided it did not have jurisdiction  
12 to regulate emissions from mobile sources,  
13 from vessels. And what had happened there was  
14 in 1980, the agency had promulgated rules  
15 under which vessels which were tied up at a  
16 port would have their emissions counted both  
17 toward the potential emissions from that  
18 facility onshore and for purposes of air  
19 quality compliance and that vessels that were  
20 going to and fro as the court characterized it  
21 from that port would have their emissions  
22 counted for air quality compliance purposes.

1 EPA took a second look at that based on the  
2 1977 amendments, Section 110, where Congress  
3 prohibited the agency from regulating mobile  
4 sources in connection with permitting of  
5 onshore stationary sources. They concluded  
6 they didn't have authority to regulate vessels  
7 and the DC circuit said that was correct with  
8 respect to the vessels that were in transit or  
9 moving around but the EPA had made a mistake  
10 in not considering, in concluding it didn't  
11 have the authority to regulate vessels tied up  
12 at the port in terms of counting their  
13 emissions in PTE. So the situation then was  
14 when Congress came to enact Section 328 in  
15 1990 they were basically simply correcting  
16 part of what the DC circuit had said Section  
17 110 did. In other words, Section 110 said no  
18 regulation of these sources in terms of  
19 counting their emissions, DC circuit said  
20 that's true for in transit vessels. Congress  
21 evidently decided in 1990 that it wanted in  
22 transit vessels or at least those within 25

1 miles that are associated with these projects  
2 on the OCS to be counted as if they were  
3 direct emissions but what was at issue in 1977  
4 and in 1984 in the NRDC case and again in 1990  
5 was what emission, what was on the table was  
6 what emission should be attributed to the  
7 stationary source for purposes of determining  
8 whether it's a major source. There was never  
9 any suggestion that the mobile sources  
10 themselves for the first time should become  
11 subject to BACT. And its not surprising  
12 because when one considers the difficulties  
13 that would arise in determining what would be  
14 BACT for mobile sources, especially vessels  
15 that are owned by third parties or work on a  
16 variety of different projects from year to  
17 year will be involved in projects with totally  
18 different emissions profiles from year to  
19 year. And so we believe its clear that the  
20 model for the regulation of unattached vessels  
21 is mobile source regulation and there's  
22 nothing in Section 328 to suggest that was not

1 Congress' intent. Nor may I just add have  
2 petitioners identified any instance where  
3 mobile sources are subject to BACT.

4 JUDGE WOLGAST: Thank you.

5 JUDGE STEIN: I have one more  
6 question relating to Section 328. Section 328  
7 talks about equipment, activity or facility.  
8 It does that both at what an OCS source  
9 includes and later on after sub three it talks  
10 again about activities. Can you tell, I know  
11 a lot of our discussion is focused on the word  
12 facility, but you can shed any light on what  
13 Congress may have been after with the focus on  
14 equipment and activity?

15 MR. SILER: I can only speculate  
16 based on the overall structure of Section 328  
17 which I've just discussed, which is that  
18 Congress intended to capture all the emissions  
19 units on an OCS source. But that doesn't tell  
20 us what an OCS source is. And an OCS source  
21 is clearly something that is attached, erected  
22 and used for the purpose of exploration. May

1 I just take a moment to talk about the  
2 environmental justice issue Your Honor, unless  
3 you have further questions on these topics?

4 JUDGE WOLGAST: One minute.  
5 Please be very brief. We are over time.

6 MR. SILER: Shell respects that  
7 this is something of a matter for the agency  
8 but we would suggest that there is a prospect  
9 here that if Your Honors depart from the way  
10 we read Kulluk which is that the equivalency  
11 or compliance with NAAQS that is applicable at  
12 the time of permit is issued is by definition  
13 environmental justice. If Your Honors depart  
14 from that and begin to require some additional  
15 inquiry based upon information, additional  
16 information, certainly in the case it was a  
17 rule. But there are all kinds of scientific  
18 information in the universe. It will be  
19 difficult if you depart from that rule to draw  
20 a line as to how much, at what point the  
21 agency is required to begin to take into  
22 account opinions, studies and so forth that

1 might question the adequacy of a given NAAQS  
2 at a given point in time. So we would  
3 respectfully urge that the relevant standard  
4 here for purposes of environmental justice was  
5 the NO2 standard that was in effect when the  
6 permits were issued.

7 JUDGE WOLGAST: Okay, thank you.  
8 Mr. Grafe, you have three minutes.

9 MR. GRAFE: Thank you Your Honor.  
10 I would like to address three points. First,  
11 to be clear NRDC petitioners are not  
12 challenging the regulatory definition of OCS  
13 source. Whether an OCS source includes  
14 associated vessels in its definition or not,  
15 the statute and the regulation are clear that  
16 emissions from associated vessels are direct  
17 emissions from the OCS source. As such,  
18 emissions from associated vessels are  
19 emissions from the OCS source and must be  
20 regulated as such under the PSD program  
21 including the application of BACT.

22 Second, Region 10 suggests that

1 the regulations at 55.2 do not permit the  
2 regulation of associated vessel emissions as  
3 stationary source emissions but in its  
4 briefing at page 27, Region 10 admits that is  
5 in fact applying the PSD program to associated  
6 vessels and its permits do in fact do that.  
7 They apply operational controls and even  
8 technological controls. The only thing they  
9 exempt them from is BACT. This violates the  
10 statute and the regulations as they must be  
11 interpreted in light of the statutory mandate.  
12 The regulations define associated vessels  
13 potential to emit and these are associated  
14 vessels that never attach, that are within 25  
15 miles that are helping the icebreakers, that  
16 are the oil response vessels. They are out  
17 there. The statute says regulate them. Their  
18 emissions are direct emissions of the OCS  
19 source. The statute says, yes we are going to  
20 include those emissions as the potential to  
21 emit of the OCS source, the stationary source.  
22 And then applying the PSD regulations on their

1 face as they apply regularly that means that  
2 according to 52.21(j)(2) which requires that  
3 a new major stationary source applied BACT to  
4 all the pollutants which has the potential to  
5 emit. That means that you apply BACT to the  
6 emissions from the associated vessels just as  
7 you do to the emissions from the OCS source.  
8 They are the same. The statute says that and  
9 the reg carries that through.

10 With respect to, my final point is  
11 with respect to Shell's claim that somehow  
12 Congress in passing 328 didn't mean what it  
13 said that it was trying to correct something  
14 and it wasn't trying to regulate mobile  
15 sources. It wasn't trying to subject their  
16 emissions to PSD. They cite NRDC v. EPA which  
17 is a case that preceded Section 328. There's  
18 nothing in the legislative history. Shell  
19 doesn't point to it. There isn't anything  
20 that addresses NRDC, that case. And if  
21 anything the case which limited what could be  
22 regulated under stationary sources, supports

1 the idea that in promulgating Section 328  
2 while it meant what it said. Apply PSD to  
3 emissions from OCS sources and include as  
4 direct emissions in those sources, emissions  
5 from associated vessels. There are statements  
6 in the legislative history confirm this and  
7 they are cited in our brief. One of the  
8 sponsors, the key sponsors of the bill  
9 expressed concern about uncontrolled  
10 operational missions from OCS platform and  
11 associated marine vessels can exceed 500 times  
12 of oxide, of nitrogen and 100 times reactive  
13 hydrocarbons annually. Existing pollution  
14 control technology can significantly reduce  
15 these pollution levels. To give meaning to  
16 328, our case dramatically demonstrates why  
17 BACT needs to apply to associated vessels.  
18 That's where the pollution is coming from. If  
19 we want to regulate as Congress did, pollution  
20 from OCS activities, then it needs to apply  
21 BACT to where that pollution is coming from.  
22 In this case, the associated vessels. Thank

1       you very much.

2                   JUDGE WOLGAST: Thank you.

3                   MS. SANERIB: Thank you. I am  
4 going to touch upon a couple of the new  
5 developments that Shell raised in their  
6 comments and just provide petitioners' view on  
7 those briefly before responding to a few  
8 points. Counsel for Shell mentioned that the  
9 company has submitted a permit to drill for  
10 the Beaufort for 2011. I just want to stress  
11 as we talked about in June of this year that  
12 there are still several other permits that  
13 Shell must obtain before it can go out to  
14 drill and there are new regulatory  
15 requirements. So while Shell may plan to go  
16 forward in 2011 in the Beaufort, that does not  
17 mean that will in fact occur. And if the  
18 Board is contemplating a remand it is  
19 essential to think about the facts that there  
20 are many other ducks that need to get lined  
21 up, including the air permits. In terms of  
22 the --

1                   JUDGE REICH: Can I ask if its  
2 still AEWC's position that the Board should  
3 stay issuing a decision on these issues or any  
4 other issues before it?

5                   MS. SANERIB: Our position is that  
6 these permits should be remanded in full to  
7 the EPA and if the Board decides to rule on  
8 any of the issues that were, these three  
9 issues identified or any of the other issues  
10 in the petition. We still request that full  
11 remand to EPA so they can deal with the  
12 changed circumstances which we understand at  
13 least includes a new drill ship, that will  
14 become part of these permitted activities.  
15 And we talked a lot about the OCS source  
16 today, how that was defined for these permits.  
17 We think adding in a second drill ship, that  
18 will undoubtedly drop an anchor on the OCS is  
19 a question that needs to be graffled with by  
20 Region 10 in the first instance considered and  
21 described and explained in terms of how that  
22 changes the definition of OCS source. So we

1 think a full remand of the permits is  
2 warranted whether the board reaches any of  
3 these legal issues or any of the other issues  
4 raised in the petitions or not. We encourage  
5 the Board to do that full remand and I think  
6 one of the other reasons we encourage that is  
7 we talked about in June is the fact that the  
8 Department of Interior is considering  
9 regulatory changes. We want EPA to be in a  
10 position to also consider regulatory changes  
11 outside of the context of these specific  
12 permits. We feel like if the permits are sent  
13 back to the agency in full it will be in the  
14 best position to decide what it should do in  
15 light of the information that they have  
16 gathered from the Gulf of Mexico and the  
17 catastrophe that's ongoing there. And I do  
18 want to stress the fact that the Department of  
19 Interior is contemplating regulatory changes.  
20 We have a different view. We think that those  
21 regulatory changes will in fact have  
22 implications for air permitting. And I also

1 want to stress that in addition to thinking  
2 about oil spills and how to respond to those  
3 events, the Secretary of Interior went to  
4 Alaska, had a panel discussion in Anchorage  
5 and went to the North Slope and heard concerns  
6 about drilling in the OCS in the Arctic.

7 Those concerns are incredibly unique. The  
8 secretary indicated that he understood them  
9 full and clear and so we are also awaiting an  
10 outcome from that process that occurred in  
11 Alaska. And for that reason we think that a  
12 full remand is warranted.

13 I want to touch on a few, just  
14 respond to a few points that were raised in  
15 terms of the environmental justice analysis.  
16 When the first Chukchi permit was issued in  
17 draft form in 2009, AEWG, ICAS and the North  
18 Slope are asked for an environmental justice  
19 analysis. That analysis was never provided.

20 In terms of the definition of the  
21 OCS source, I can think of absolutely nothing  
22 in the record that demonstrates that Shell is

1 going to rush to declare the drill ship to be  
2 secure, stable and ready to drill. And we've  
3 talked about that a lot today. I don't recall  
4 there being a single thing in the record to  
5 support what EPA has said to the Board today  
6 on that score.

7 I also think its really important  
8 in terms of the intersection of the Clean Air  
9 Act and OCSLA to look at the statutory  
10 language in Section 328, because Congress  
11 defined as one of the three criteria for an  
12 OCS source, activity, equipment or facility  
13 that are regulated or authorized under OCSLA.  
14 It didn't say that it was covered by the OCSLA  
15 jurisdictional provision but said it was the  
16 activities that are actually being regulated  
17 or authorized under OCSLA. And it is our  
18 position that language is far broader than the  
19 language the EPA relied on in creating the  
20 regulatory definition.

21 Now as I said earlier if the Board  
22 finds for petitioners on any of the three

1 issues, we ask for a full remand of these  
2 permits. We think that's because these are  
3 important issues to these permits. They have  
4 the potential to ultimately change them. And  
5 we also think that the changed factual  
6 circumstances here warrant that.

7           And I have just one further point.  
8 We talked a little bit about the hearing on  
9 June 18 about the equities here and the fact  
10 that if there is a full remand will Shell now  
11 have to comply with new law, with the new  
12 NAAQS for NOx, with the new PSD increments.  
13 I just want to say that they should. They  
14 absolutely should because the question before  
15 the Board is should Shell have to comply with  
16 the law as it stands if there is a full remand  
17 or should the Inupiats, the Alaskan natives on  
18 the North Slope bear the burden of the poor  
19 air quality from Shell not complying with the  
20 new law? And we think that they shouldn't.

21 Thank you.

22           JUDGE WOLGAST: Thank you. Thank

1       you all for arguments today. The case is now  
2       submitted. All rise. The session of the  
3       Environmental Appeals Board now stands  
4       adjourned.

5                       (Whereupon the above-entitled  
6       hearing was concluded at 3:05 p.m.)

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