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March 22, 2010

EPA Region 10
Shell Beaufort Air Permit
1200 6th Avenue, Suite 900
AWT-107
Seattle, Washington 98101

Subject: Permit Number R10OCS/PSD-AK-2010-01

ConocoPhillips Company (ConocoPhillips) submits these comments on the above-referenced proposed Prevention of Significant Deterioration (PSD) permit ("the Proposed Permit"). The Proposed Permit would authorize Shell Offshore Inc. to conduct oil and gas exploration activities in the Beaufort Sea Outer Continental Shelf (OCS) within 25 miles of Alaska's seaward boundary. These comments address four issues:

- The point of compliance for increment consumption demonstrations for OCS sources;
- The application of stationary source controls to nonroad engines and vessels;
- The interpretation of when the Frontier Discoverer becomes an "OCS Source";
- The inclusion of nonroad engine emissions in the potential to emit of the proposed project.

1. The Proposed Permit unlawfully limits project emissions to attain the PSD increments at the rail of the Frontier Discoverer.

The Proposed Permit is the second Shell OCS PSD permit that Region 10 has proposed for comment in the last two months. In comments on Permit No. R10OCS/PSD-AK-09-01, ConocoPhillips explained that EPA exceeded its authority by requiring Shell to demonstrate attainment of PSD increments at the facility boundary, in that case the rail of the Frontier Discoverer. Although the Beaufort project lies within 25 miles of Alaska's seaward boundary, the point of compliance for the PSD increments for any project located on the Alaska OCS is the nearest boundary of the State of Alaska, not the rail of the vessel. Accordingly, these comments incorporate by reference that portion of ConocoPhillips' February 17, 2010 comments on Shell's Chukchi Project that document EPA's error in forcing Shell to meet PSD increments at the rail of the Frontier Discoverer. See Attachment A, pages 3-7.

2. EPA erroneously applied stationary source controls to nonroad engines and vessels.

The Proposed Permit, like the proposed permit for Shell's Chukchi exploration project, imposes PSD BACT limits on nonroad engines located on the Frontier Discoverer. Accordingly, ConocoPhillips incorporates by reference that portion of its February 17, 2010 comments that document EPA's error in applying stationary source controls to nonroad engines and vessels. See Attachment A, pages 7-10.

3. **EPA should adopt Option 2 of the alternatives proposed on page 12 of the Proposed Permit for when the Discoverer becomes an OCS Source.**

On page 12 of the Proposed Permit, EPA presents two options for defining when the Discoverer becomes an OCS source. For reasons set forth in its February 17, 2010 comments on the proposed PSD permit for Shell's Chukchi exploration project, ConocoPhillips supports Option 2 as the only reasonable selection, and requests that EPA incorporate this option into the final permit. See Attachment A, pages 11-12.

4. **EPA exceeded its authority by including nonroad engine emissions in the potential to emit of the proposed project.**

Section 328(a)(1) of the CAA provides that permitting requirements for OCS sources located within 25 miles of the seaward boundary of a state "shall be the same as would be applicable if the source were located in the corresponding onshore area, and shall include, but not be limited to, State and local requirements for emission controls, emission limitations, offsets, permitting, monitoring, testing, and reporting." To ensure that the requirements imposed on OCS projects mirror those in the Corresponding Onshore Area, Congress directed EPA to "update such requirements as necessary to maintain consistency with onshore regulations." *Id.*

On January 21, 2010 EPA published its latest consistency update to the Alaska OCS rules. 75 Fed.Reg. 3387 (January 21, 2010). The update amends 40 CFR 55.14 to list state rules that apply to OCS sources located within 25 miles of the Alaska seaward boundary. One of the rules that EPA incorporated into §55.14 is 18 AAC 50.100:

The actual and potential emissions of nonroad engines are not included when determining the classification of a stationary source or modification under AS 46.14.130. Nothing in this section exempts nonroad engines from compliance with other applicable air pollution control requirements."

Notwithstanding the foregoing authorities, EPA did not apply 18 AAC 50.100 in processing Shell's permit application. Instead, EPA included nonroad engine emissions in the potential to emit of the OCS source. The Statement of Basis for the Proposed Permit includes generic (and erroneous) statements to the effect that the definition of OCS Source in Section 328 overrides the explicit exemption of nonroad engines from the Section 302(z) definition of "stationary source." But EPA ignores 18 AAC 50.100.

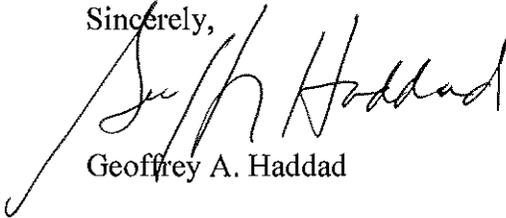
For a project located within 25 miles of state's seaward boundary, Congress could not have spoken more clearly. The requirements of the Corresponding Onshore Area are the applicable requirements for OCS permitting. Had EPA applied 18 AAC 50.100, ConocoPhillips

questions whether the Shell exploration project would even require a PSD permit. EPA must recalculate the potential to emit of Shell's proposed OCS source excluding nonroad engine emissions. If the revised PTE does not exceed major source thresholds, EPA must properly categorize the source as non-PSD. If the revised PTE remains major for any regulated NSR pollutant, the revised PTE must be taken into account in analyzing the air quality impacts of the Proposed Project, and in setting BACT for project emission units.

5. Conclusion

The errors outlined in these comments will hinder the permitting of not only exploration activities in the Beaufort Sea, but also production activities throughout the Alaska OCS. We ask EPA to re-examine its approach to OCS air permitting and to apply the relevant rules properly and equitably to all leaseholders to ensure that none are prevented by this permit from exercising their lease rights.

Sincerely,

A handwritten signature in black ink, appearing to read "Geoffrey A. Haddad". The signature is written in a cursive style with a long, sweeping underline that extends to the left.

Geoffrey A. Haddad

Enclosures

cc: Rick Albright, EPA Region 10
Doug Hardesty, EPA Region 10
Susan Childs, Shell

ATTACHMENT A



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February 17, 2010

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Subject: OCS PSD Permit Number: R10OCS/PSD-AK-09-01 (Shell Gulf of Mexico Inc.)

ConocoPhillips Company (ConocoPhillips) submits these comments on the above-referenced proposed Prevention of Significant Deterioration (PSD) permit. ConocoPhillips acknowledges and supports several changes EPA has made in the current version of the permit to address practical implementation problems identified by Shell and other commenters on the August 20, 2009 draft of the permit. Nevertheless, the proposed permit still contravenes the Clean Air Act (CAA) in several respects. We support the expeditious issuance of this permit but believe that EPA must correct these flaws before doing so.

The exhibits posted on the Region 10 website in support of the proposed permit include a map of Shell's Chukchi Lease Sale 193 Lease Blocks. The posted map does not depict any of the lease blocks acquired by other companies in Lease Sale 193, but the fact is that in 2008 Shell, ConocoPhillips and four other oil and gas companies paid \$2.7 billion to the United States for the right to explore for and develop oil and gas resources on the outer OCS in the Chukchi Sea.¹ See Map of Chukchi leasehold interests, Attachment 1 to these comments.

Every operator proposing to conduct exploratory drilling in the Chukchi Sea must deploy not only a drill rig but also a fleet of support vessels charged with supporting drilling operations, protecting the environment and protecting the operation from floating ice. Shell's support vessels have a larger potential to emit than the Frontier Discoverer, and their operations require that they constantly reposition themselves over areas far larger than Shell's lease blocks. Icebreakers in particular can be located several miles away from the drillship² and their positions could vary with wind speed and direction.

¹ The U.S. Department of the Interior Minerals Management Service website lists the successful bidders and the dollar value of the leaseholds awarded in Lease Sale 193.
<http://www.mms.gov/alaska/cproject/Chukchi193/193SaleDay/Sale%20193%20Sum%20of%20Co%20Bids%20by%20Co%20Code.pdf>

² Statement of Basls at 44.

Emissions from Shell's exploratory operation were modeled to consume 84 percent of the PM_{2.5} NAAQS and 76.3 percent of the PM₁₀ increment at the rail of the Frontier Discoverer, notwithstanding the incorporation into Shell's permit of "voluntary" operating limitations intended to prevent the models from showing NAAQS and increment violations.³ Were the zone of impact limited to the rail of the Frontier Discoverer, EPA's demands might create operating problems for Shell, but they would not necessarily burden ConocoPhillips and other leaseholders. The mobility of the support fleet, however, coupled with the relative magnitude of Associated Fleet emissions, and the fact that Shell and ConocoPhillips hold many adjoining lease blocks,⁴ means that Shell's operations – all by themselves -- will be modeled to consume substantial portions of the increments and to threaten compliance with the NAAQS at other locations in the Chukchi Sea, including locations within ConocoPhillips' Lease Sale 193 lease blocks.

In February 2010 ConocoPhillips submitted a Part 71 permit application for its own exploratory program to be conducted in ConocoPhillips' Chukchi lease blocks beginning in 2012. ConocoPhillips does not anticipate the need for a PSD permit for the exploration phase of its Chukchi operations. ConocoPhillips will, however, have to demonstrate that its operation will not cause a NAAQS violation. ConocoPhillips may not be able to meet that challenge if Shell's emissions consume large portions of the NAAQS at the location of ConocoPhillips' drilling rig.

To the best of our knowledge, the Shell permit will be the first PSD permit issued by EPA for a major stationary source located in the "outer OCS," i.e. more than 25 miles beyond the nearest state seaward boundary. In developing this permit, EPA made at least two erroneous decisions that threaten the viability of future oil and gas exploration projects in the outer OCS, including ConocoPhillips' proposed exploration program for which Region 10 will receive a permit application in February 2010. First, EPA required Shell to show compliance with PSD increments at the rail of the Frontier Discoverer, as opposed to the nearest onshore point in the State of Alaska. This error overstated the ambient impacts of Shell's project. Second, EPA imposed stationary source control strategies (e.g. PSD BACT) on vessels and nonroad engines that are not stationary sources, and that are not easily configured to meet stationary source emission standards.

It is instructive to contrast Region 10's permitting approach with that of the Minerals Management Service's (MMS) permitting approach in the Western and Central Gulf of Mexico (GOM) OCS areas where the MMS has jurisdiction i.e., west of 87.5° longitude. The MMS ably protects onshore air quality by prohibiting exceedances of the National Ambient Air Quality Standards (NAAQS) and by using an air quality regulatory approach that does not stifle exploration and production activities. To obtain authorization in the GOM, a company is required to present its realistic emissions in its Exploration Plan and then, using formulae developed by the MMS, determine whether the emissions are above levels that might cause onshore impacts above very stringent levels. If the impacts are below these levels, the company's air emissions are approved. If above the levels, the MMS requires the company to reduce their

³ Statement of Basis at 110 (Table 5-12).

⁴ See Attachment 1.

emissions by using best available control technology. Of particular importance here is that the process is well-established, easily understood, and does not require an unreasonable amount of time. We acknowledge that the EPA is governed by the CAA but Section 328(b) of the CAA requires the EPA to consult with the Department of Interior to ensure coordination of the air pollution control regulations in the OCS.

In the following comments ConocoPhillips documents the proposed Shell permit conditions that deviate from CAA structure and precedent, and the threat they pose to the development by ConocoPhillips and others of the oil and gas resources in the Chukchi Sea.

1. The proposed permit unlawfully limits project emissions to attain the PSD increments at the rail of the Frontier Discoverer.

The proposed permit includes emission limits and operating restrictions to prevent exceedance of the PSD increments.⁵ In modeling emissions increases against the increments, however, Region 10 erroneously required Shell to demonstrate attainment of the increments at the facility boundary (in this case the rail of the Frontier Discoverer). The Statement of Basis for the proposed permit announces that in an unpublished Region 10 internal memorandum EPA established the first ever Air Quality Control Region and PSD Baseline Area for the Chukchi Sea OCS.⁶ EPA's justification for this invention is that while the legislative history of CAA Section 328 reflects only a concern for the onshore impacts of OCS activity, "Section 328 does not identify a particular area where the requirements to control air pollution from OCS sources located offshore must attain and maintain" NAAQS and increments.⁷

The limits on the geographic scope of the PSD program are found, not in Section 328, but in Title I of the Act. The PSD enabling language in CAA Title I, the history of CAA Section 328 and the rulemaking record supporting 40 CFR Part 55 leave no doubt that the point of compliance for an increment demonstration by a major stationary source operating in the OCS is on shore, not in the OCS.

a. EPA's OCS air rules subject a major stationary source proposing to locate on the Outer OCS to the PSD program codified at 40 CFR 52.21.

EPA's authority to regulate OCS sources derives exclusively from CAA Section 328.⁸ A major objective of Section 328 was to "create a more equitable regulatory environment between

⁵ See Statement of Basis at 46, 49.

⁶ Statement of Basis at 18, 91.

⁷ Statement of Basis at 18.

⁸ Prior to the enactment of Section 328 the Department of the Interior had the sole authority to regulate air quality on the OCS. In 1990 Congress transferred that authority to EPA, except for areas offshore of Alabama, Mississippi, Texas and Louisiana. 56 Fed.Reg. 63775-76 (December 5, 1991), Attachment 2 to these comments; *State of California v. Kleppe*, 604 F.2d 1187, 1194 (9th Cir. 1979).

onshore sources and OCS sources located within 25 miles of states' seaward boundaries."⁹ Local air pollution control districts in California complained that emissions from offshore oil and gas production platforms impaired their ability to achieve the NAAQS. In response Congress established special requirements for OCS sources located within 25 miles of the seaward boundaries of each state. "[S]uch requirements shall be the same as would be applicable if the source were located in the corresponding onshore area, and shall include, but not be limited to, State and local requirements for emission controls, emission limitations, offsets, permitting, monitoring, testing and reporting."¹⁰

Congress was less prescriptive about the standards that govern sources located beyond 25 miles of the states' seaward boundaries ("outer OCS sources").¹¹ Section 328 directed EPA to "establish requirements to control air pollution from Outer Continental Shelf sources . . . to attain and maintain Federal and State ambient air quality standards and to comply with the provisions of Part C of Subchapter I of this chapter." Section 328 directed EPA to establish those requirements by rule.

In 1991 EPA proposed rules to implement Section 328.¹² Consistent with the legislative scheme, EPA proposed to subject sources within 25 miles of the seaward boundaries of each state to state and local emission control requirements.¹³ For OCS sources more than 25 miles out, EPA proposed to apply PSD, NSPS and Section 112 requirements "if rationally related to the attainment and maintenance of federal or state ambient air quality standards," with the proviso that 40 CFR part 71 would apply to OCS sources upon promulgation.¹⁴

EPA's final OCS rules follow this approach. 40 CFR § 55.13 lists the requirements that apply to all OCS sources, including the PSD program found in 40 CFR 52.21.¹⁵ EPA concludes that Shell's project requires a PSD permit under 40 CFR 52.21 because the project has the potential to emit more than 250 tons per year of three PSD pollutants.¹⁶

⁹ 56 Fed.Reg. 63775, Attachment 2 to these comments.

¹⁰ CAA § 328(a)(1), 42 U.S.C. § 7627(a)(1).

¹¹ "Section 328 does not mandate the content of the OCS program for OCS sources located beyond 25 miles of states' seaward boundaries." 56 Fed.Reg. 63784 (December 5, 1991), Attachment 2 to these comments.

¹² 56 Fed.Reg. 63774.

¹³ 56 Fed.Reg. 63785.

¹⁴ 56 Fed.Reg. 63784, 63792.

¹⁵ 40 CFR 55.13(d).

¹⁶ Statement of Basis at 24.

b. The point of compliance for an increment demonstration by a major stationary source proposing to locate in the OCS is on shore, not in the OCS.

Congress established the PSD program as an element of each state's applicable implementation plan. CAA Section 163(a) specifies, "each applicable implementation plan shall contain measures assuring that [increments] shall not be exceeded."¹⁷ CAA § 161 declares that "each applicable implementation plan" shall contain emission limitations and such other measures as may be necessary . . . to prevent significant deterioration of air quality in each region (or portion thereof) designated pursuant to section 7407 of this title as attainment or unclassifiable."¹⁸

"Section 7407" (CAA Section 107) directs EPA to designate air quality control regions in each state, in consultation with the state.¹⁹ CAA Section 162 provides initial classifications of Class I areas, and assigns the balance of each State that has not been designated as nonattainment into Class II.²⁰ Section 107 does not contemplate the establishment of air quality control regions outside of State boundaries.

When Congress enacted Part C of Title I in 1977, EPA had no authority to regulate air quality on the OCS, and *Part C includes no mechanism to implement the PSD program on the OCS.*²¹ Congress filled that gap in 1990 with the enactment of Section 328, but Congress did not direct EPA to regulate the increments in the OCS. To the contrary, Section 328 merely directs EPA to adopt rules "to comply with the provisions of Part C . . ."²² This language accomplished the congressional objective of protecting onshore air quality from degradation by OCS sources.²³

This legislative purpose was not lost on EPA when it adopted the Part 55 OCS permitting rules. EPA recognized that the goal of Congress was to protect the air quality of coastal regions:

The intent of Congress in adding section 328 was to protect ambient air quality standards onshore and ensure compliance with the PSD requirements. EPA is to accomplish this by controlling emissions of pollutants for which ambient standards have been set and their

¹⁷ 42 U.S.C. 7473(a).

¹⁸ CAA § 161, 42 U.S.C. § 7471.

¹⁹ 42 U.S.C. 7407(b)-(c).

²⁰ 42 U.S.C. 7472.

²¹ EPA's list of Alaska air quality control regions does not include the OCS. See 40 CFR 81.302.

²² CAA § 328(a)(1), 42 U.S.C. § 7627(a)(1).

²³ "Of primary concern is the fact that OCS air pollution is causing or contributing to the violation of Federal and State ambient air quality standards in coastal regions." . . . This section of the bill is intended to ensure that air pollution from OCS activities does not degrade the air quality in coastal regions of the United States." Report of the Senate Committee on Environment and Public Works on S. 1630, S.Rep. No. 228, 101st Cong., 1st Sess. at 77 (1989), *reprinted in* 1990 U.S. Code Cong. & Ad. News 3463, Attachment 3 to these comments.

precursors (criteria pollutants) from the OCS that can be transported onshore and affect ambient air quality.²⁴

The preambles to the proposed and final Part 55 rules repeatedly emphasize that the goal of Part 55 PSD permitting is to protect increments on shore.²⁵ Neither the Part 55 rules nor 40 CFR 52.21 provide any authority to require increment attainment demonstrations within the OCS.

c. The proposed permit unlawfully limits project emissions in order to demonstrate attainment of the increments at the rail of the Frontier Discoverer.

EPA's increment consumption analysis for the Shell permit begins with the assertion that "the area covered by Shell's leases in Lease Sale 193 is a Class II area."²⁶ The Statement of Basis goes on to explain that "EPA considers the 'baseline area' for purposes of 40 CFR 52.21 to be the area bounded on the shoreward side by a parallel line 25 miles from the State's seaward boundary; on the seaward side by the boundary of U.S. territorial waters; and on the other two sides by the seaward extension of the onshore Air Quality Control Region boundaries."²⁷ These boundaries came from recommendations contained in a July 2, 2009 memo from EPA Senior Policy Advisor David C. Bray to Director Rick Albright, Region 10 Office of Air, Waste and Toxics. As Mr. Bray recognized, "The definition of 'baseline area' in the federal PSD rules relies on the existence of intrastate areas designated as attainment or unclassifiable under section 107(d) of the Act."²⁸ Despite this fact and contrary to the definition in the PSD rules, EPA Region 10 established a baseline area in an internal agency memorandum.

Each step in this analysis contradicts or ignores the plain language of the CAA and the PSD rules:

- The area covered by Shell's leases in the Lease Sale 193 area is *not* a Class II area. CAA Section 162(b), the section of the CAA that EPA cites as authority for this conclusion, defines as Class II areas only areas "in such State" that are not established elsewhere as Class

²⁴ 56 Fed.Reg. 63775 (December 5, 1991), Attachment 2 to these comments.

²⁵ 56 Fed.Reg. 63778:

EPA is proposing that sources located more than 25 miles beyond state boundaries be subject to the requirements for PSD. NSPS and NESHAPS will apply to the extent they are rationally related to protection of ambient air quality standards. . . . The application of these requirements will allow EPA to protect onshore air quality from the impacts of emissions produced by OCS sources more than 25 miles beyond state seaward boundaries.

²⁶ Statement of Basis at 87.

²⁷ Statement of Basis at 91.

²⁸ Memorandum of July 2, 2009 from David C. Bray to Rick Albright at 3, Attachment 4 to these comments.

I areas. Section 162(b) provides no mechanism for designating portions of the OCS under the PSD class designation scheme.

- The PSD definition of “baseline area” applies, as Mr. Bray acknowledged, only to “any intrastate area . . .” Neither the PSD rules nor the CAA provide any mechanism to designate a baseline area in the OCS. The proposed permit establishes a baseline area in a location that cannot so be designated under the definition of that term.
- The Bray memo and the Statement of Basis overlook the fact that Congress established the PSD program to prevent significant deterioration in air quality control regions designated as attainment pursuant to CAA Section 107,²⁹ and that Section 107 plainly limits the establishment of air quality control regions to “any interstate area or major intrastate area” deemed appropriate for attainment of the NAAQS.³⁰

EPA should revise its increment consumption analysis and delete all permit limits based on that analysis. The decision to apply the PSD increments at the rail of the Frontier Discoverer is prejudicial in ways that impact not only Shell but also ConocoPhillips. First, the emission limits in the proposed permit unlawfully restrict Shell’s operations to achieve the increments at locations where they do not apply.³¹ Second, ConocoPhillips and other Chukchi Sea lessees likely will require PSD permits to develop and produce the oil and gas reserves in the Chukchi Sea. Historically, oil and gas production operations generate higher emissions than seasonal exploration projects. The decision to establish a PSD baseline area and to establish a point of compliance for the PSD increments on the OCS as opposed to on shore will preclude EPA from permitting the mix of exploration and production activities that must be performed to enable the holders of MMS leasehold interests to explore for, develop and produce mineral resources for which they acquired rights from the United States, at an aggregate cost of \$2.7 billion. EPA’s current actions may preclude the exercise of lease rights contrary to the terms of the leases and the statutes and regulations incorporated in the leases. As the holder of 98 Chukchi Sea leasehold interests acquired in Lease Sale 193, ConocoPhillips is profoundly concerned that EPA’s misapplication of the PSD increment consumption rules will prohibit the exploration and development of the oil and gas resources on its leases, while allowing Shell to explore and develop its leases.

2. EPA erroneously applied stationary source controls to nonroad engines and vessels.

The proposed permit imposes PSD BACT limits on the Frontier Discoverer generator engines (FD 1-6), the MLC compressor engines (FD 9-11), the HPU engines (FD 12-13), the

²⁹ CAA § 161, 42 U.S.C. § 7471.

³⁰ CAA §107(c), 42. U.S.C. § 7407(c).

³¹ Statement of Basis at 46.

deck cranes (FD 14-15) and the cementing unit and logging winch engines (FD 16-20).³² These are all nonroad engines.

The proposed permit imposes capacity limits, operating limits, fuel consumption limits, fuel sulfur limits and control technology requirements on icebreakers, oil spill response vessels and other support vessels.

The Statement of Basis opines that New Source Performance Standards and NESHAPs apply to nonroad engines and other emission units located on vessels, although EPA defers the imposition of these requirements to a future Title V permit.³³

The statutory definition of “stationary source” in CAA Section 302(z) excludes nonroad engines. The PSD definition of stationary source exempts vessels.³⁴ CAA Sections 111 and 112 plainly limit the application of NSPS and NESHAP requirements to stationary sources. None of these programs authorize EPA to apply stationary source controls to vessels or nonroad engines. Of particular relevance to the draft permit, the PSD program does not authorize EPA to establish BACT limits for nonroad engines or vessels.³⁵

In the Statement of Basis for the Shell permit EPA acknowledges these limitations, but argues that they do not apply in the OCS, because Congress included nonroad engines and vessels in the Section 328 definition of “OCS Source:”

Drill ships and other vessels contain many emission sources that otherwise meet the definition of “nonroad engine” as defined in Section 216(10) of the Clean Air Act. However, based on the specific requirements of CAA Section 328, emissions from these otherwise nonroad engines on drillships and subject support vessels are considered as “potential emissions” from the OCS source, notwithstanding the fact that Section 302(z) of the CAA specifically excludes nonroad engines from the definition of “stationary source.” Similarly, nonroad engines that are part of the OCS source are subject to regulation as stationary sources. . . . *Simply put, the exclusion of nonroad engines from the general definition of “stationary source” in Section 302(z) of the CAA is overridden by the more specific provisions in Section 328 of the CAA and 40 C.F.R. §55.2.*³⁶

³² Proposed Permit Conditions C.3, F.2, G.2-3, H.2-3 and I.2-3.

³³ Statement of Basis at 26.

³⁴ “Stationary source” is defined as a “building, structure, facility or installation,” which in turn is defined to exclude vessels. 40 CFR 52.21(b)(5) and (6). In *NRDC v. EPA*, 725 F.2d 761 (D.C.Cir. 1984) the Court of Appeals largely upheld the exclusion of vessels from the PSD definition of a stationary source, with exceptions not relevant to Shell’s permit.

³⁵ *In re Cardinal FG Company*, PSD Appeal No. 04-04, EPA Environmental Appeals Board, 2005 WL 701329, *14 (Mar. 22, 2005), Attachment 5 to these comments.

³⁶ Statement of Basis at 22-23 (emphasis added).

This interpretation misconstrues the language of Section 328, and ignores a recent decision of the EPA Environmental Appeals Board. ConocoPhillips agrees with EPA that nonroad engines are part of the OCS Source and emissions from vessels within 25 miles of the OCS Source count as direct emissions from the OCS Source for purposes of ambient impact assessment. The definition of OCS Source in Section 328(a)(4)(C) so provides. But there is a huge leap between classifying equipment as part of an “OCS Source” and concluding that any equipment within an OCS Source is subject to stationary source controls. In 2007 a coalition of environmental appellants invited the EAB to take that leap, arguing that “where an OCS source has the potential to emit more than 250 tons per year of any air pollutant, the PSD permitting requirements apply to that source notwithstanding any more restrictive applicability standard that might apply under the PSD regulation’s definition of “stationary source.”³⁷ The EAB, with support from Region 10, refused to “override” the jurisdictional boundaries of the PSD program just because the equipment was part of an “OCS Source.” The *Kulluk* decision squarely addresses this issue:

We find that the Region correctly concluded that, once it determines an emissions source located on the OCS is properly classified as an “OCS source,” then that emissions source becomes subject to the requirements of 40 C.F.R. part 55. Further, the permitting programs and other requirements to which the OCS source is subject through part 55, including the PSD permitting program, then apply to the OCS source based on the regulations that define the scope of those programs. Specifically, simply because EPA has identified an OCS source as regulated under the CAA, and subject to the requirements of part 55, does not mean it can avoid the next necessary step of determining the scope of the “stationary source” for PSD purposes.

This interpretation is further supported by applicable legislative history. One of Congress’ purposes in giving EPA authority to regulate air pollution sources on the OCS was to require similar treatment of onshore and offshore pollution emitting activities by “applying the same air quality protection requirements as would apply if the OCS sources were located within the corresponding onshore area.” The regulatory definition of “stationary source” establishes the basic unit of analysis – i.e., what emissions units must be included as part of a single source – for determining whether the PSD program’s minimum PTE thresholds are exceeded and a PSD permit is required. There is nothing in the plain language of the statute that indicates Congress intended to replace the unit of analysis used for determining onshore applicability of PSD permitting with the new concept of “OCS source” when determining PSD applicability offshore. To the contrary, the statute demonstrates that where Congress intended the “OCS source” to be the unit of analysis for determining applicability of a permitting program it did so expressly.

We thus specifically reject NSB’s and REDOIL’s argument that the reference to “any other source” in CAA section 169(1), 42 U.S.C. § 7479(1), requires the “OCS source” to be treated as the unit of analysis used to determine applicability of the PSD

³⁷ *Shell Offshore Inc., Kulluk Drilling Unit and Frontler Discoverer Drilling Unit, Order Denying Review In Part and Remanding In Part*, 13 E.A.D. ___ (September 14, 2007), Slip Opinion at 31-32 (hereafter cited as “*Kulluk* decision”).

permitting program on the OCS. This interpretation, if adopted, would make inapplicable to the OCS the regulations EPA promulgated specifically defining “stationary source” as the unit of analysis for determining PSD applicability. This result would be contrary to Congress’s objective of “applying the same air quality protection requirements as would apply if the OCS sources were located within the corresponding onshore area.” In particular, neither the statutory text nor the legislative history indicates that Congress intended “OCS source,” used to identify the emissions units over which EPA has regulatory jurisdiction on the OCS, to replace or bar the analysis of which emissions units must be combined together and treated as a single “stationary source” for determining whether a PSD permit is required. Accordingly, we hold that the Region correctly concluded that it must determine the scope of the applicable “stationary source” in order to determine whether SOI must obtain a PSD permit before commencing construction of its OCS sources [references removed].³⁸

PSD BACT, NSPS standards and MACT standards apply only to stationary sources, in the OCS as on land. EPA has no authority to impose BACT limits on nonroad engines or vessels. The Shell permit must be revised to delete the approval conditions that impose BACT limits on these categories of equipment.

3. The draft permit misapplies the definition of OCS Source to include vessels that are not performing stationary source activities.

Several conditions of the draft permit limit the operations of vessels to prevent them from being classified as part of the OCS source. For instance, Condition Q6 states: “At no time shall the Nanuq or the Kvichak work boats be attached to the Discoverer.” Conditions N.8 and O.10 prohibit attachment of the ice breakers to the Discoverer.

The Statement of Basis explains that these conditions are necessary in order to prevent support vessels from “becoming part of the OCS Source.”³⁹ These restrictions should be deleted, however, because they are based on a misreading of the 40 CFR Part 55 definition of OCS Source:

This definition [of OCS source] shall include vessels only when they are:

- (1) Permanently or temporarily attached to the seabed and erected thereon and used for the purpose of exploring, developing or producing resources therefrom, . . . or
- (2) Physically attached to an OCS facility, in which case only the stationary source aspects of the vessels will be regulated.⁴⁰

³⁸ *Id.* at 32-34

³⁹ Statement of Basis at 46.

⁴⁰ 40 CFR 55.2.

The draft permit overlooks the proviso that when vessels attach to the Frontier Discoverer “only the stationary source aspects of the vessels will be regulated.” This limitation derives directly from the D.C. Circuit holding in *NRDC v. EPA*.⁴¹ But the vast majority, if not all, of emissions associated with the Shell support fleet that might attach to the Frontier Discoverer are not “stationary source activities” as the *NRDC* decision, and later, the published EPA position regarding the El Paso Energy Bridge,⁴² explained that concept. Supply vessels and oil spill response vessels, for example, do not perform stationary source activities. There is no justification to prohibit or limit the attachment of these vessels to the Discoverer, and all conditions in the permit that impose prohibitions or restrictions on attachment of support vessels to the Discoverer should be deleted.

4. **EPA should adopt Option 2 of the two provisions proposed in Condition 5 of the draft permit for when the Discoverer becomes an OCS Source.**

On page 5 of the draft permit, EPA presents two options for defining when the Discoverer becomes an OCS source. We support option 2 as the only reasonable selection given the plain language of 40 CFR 55.2⁴³ and request that EPA incorporate this option into the final permit.

⁴¹ 57 Fed.Reg. at 40793-94 (September 4, 1992):

Only the vessel’s stationary source activities may be regulated, since when vessels are in transit, they are specifically excluded from the definition of OCS source by statute. In addition, only the stationary source activities of the vessels at dockside will be regulated under title I of the Act (which contains NSR and PSD requirements), since EPA is prohibited from directly regulating mobile sources under that title. See *NRDC v. EPA*, 725 F.2d 761 (D.C. Cir. 1984). Part 55 thus will not regulate vessels en route to or from an OCS facility as “OCS sources,” nor will it regulate any of the non-stationary source activities of vessels at dockside.

⁴² Charles Sheehan, Regional Counsel, EPA to Mr. Michael Cathey, El Paso Energy Bridge Gulf of Mexico, LLC and Diana Dutton, Akin, Gump, Strauss, Hauer, and Feld, LLP, October 28, 2003

In this letter, EPA argued that external combustion engines, as they relate to the Port's function, may be counted as a "stationary source activity." Of note is that EPA expressly excluded nonroad (internal combustion) engines from the category of "stationary source activities" in presenting this case.

⁴³ OCS source is defined in 40 CFR 55 as any equipment, activity, or facility which:

- (1) Emits or has the potential to emit any air pollutant;
- (2) Is regulated or authorized under the Outer Continental Shelf Lands Act (“OCSLA”) (43 U.S.C. §1331 *et seq.*); and
- (3) Is located on the OCS or in or on waters above the OCS.

This definition shall include vessels only when they are:

- (1) **Permanently or temporarily attached to the seabed and erected thereon** and used for the purpose of exploring, developing or producing resources therefrom, within the meaning of section 4(a)(1) of OCSLA (43 U.S.C. §1331 *et seq.*); or
- (2) Physically attached to an OCS facility, in which case only the stationary sources aspects of the vessels will be regulated. [emphasis added]

Option 1 of the draft permit addresses only the "permanently or temporarily attached to the seabed" clause of the OCS Source definition:

Option 1: For the purpose of this permit, the Discoverer is an "OCS Source" during all times between the placement of the first anchor on the seabed to removal of the last anchor from the seabed at a drill site.

The definition in 40 CFR 55.2 requires that a vessel must be both attached to the seabed and erected thereon. It is not an OCS source if either one of these conditions is not satisfied.

In further support of Option 2, we offer some specific information as it relates to the type of OCS operation in which we plan to engage; using a temporary drilling rig, or jack-up rig. In this case, the "erected thereon" clause should clearly be interpreted to refer only to when the rig is in place, its three feet set on the seabed, and it is fully erected and ready to commence operation. The principal reason for this is that much activity occurs over a fairly lengthy period of time before an operator considers the rig "erected thereon" and ready for its intended activity.

Below are the general steps involved in deploying a jack-up rig and readying it for operation:

1. Off load the jack-up from the heavy lift vessel. This takes 8-12 hours since the lift vessel has to take on water and partially submerge to allow the rig to float off;
2. Using 3 vessels, tow the rig to the drilling location.
3. All three boats hold the rig in location for about 2 hours as the rig jacks up to the minimum air gap.
4. The rig then takes on water to load for the purpose of testing foundational stability (pre-loading). This takes 7 to 10 hours to fill the tanks and then the load is held for an additional hour;
5. During this pre-load period, one to three vessels remain attached to the rig
6. If all is deemed safe and successful, the rig is jacked to its drilling height (1 hour);
7. Then the cantilever, from which the drilling actually occurs, is extended (2 to 3 hours);
8. At this point, the rig is ready to take on fuel and supplies

12 to 16 hours may transpire between the time a leg hits the seabed and when the rig is "erected thereon." Except for the last 2 or 3 hours, there could be much vessel activity occurring immediately around the rig. But the principal point is that an OCS source does not exist, as we read the definition, until the cantilever is extended since the action of erecting the rig is not complete until then and the rig is not being used for the purpose of exploring, developing, or producing resources. This practical consideration supports the language proposed as option 2.

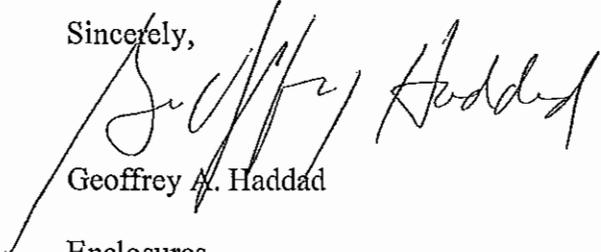
A jack-up rig may need to be moved if sea ice encroaches in the drilling area. In this case, the rig legs would be lifted and the rig towed to a pre-approved location away from the ice, perhaps even away from the Devil's Paw prospect, to await better (i.e., ice-free) conditions over the drilling area. While it waits, the legs will be lowered and the deck lifted. Some emissions will occur since the rig engines will run for raising and lowering the legs and to sustain a hotel load, and the tending vessels' activity could be substantial – particularly when positioning and stabilizing the rig at a location. The rig should not be defined as an OCS Source during these

safety-driven relocations, when no exploration activity is performed. But the language in Option 1 could be construed to define a rig in storage mode as an OCS source. Defining the OCS source as one in existence when the first anchor attaches to the seabed or, in our case, when the first leg touches, creates scenarios where equipment not being "used for the purpose of exploring, developing, or producing resources" is subject to 40 CFR Part 55. We do not believe this was the intent of that rule for vessels like the Frontier Discoverer, a jack-up rig, or any other mobile and temporary OCS exploration-related equipment.

5. Conclusion

In evaluating the concerns raised in these comments, EPA should look a short distance into the future, when (1) EPA promulgates PM 2.5 increments (expected in the spring of 2010), (2) MMS leaseholders other than Shell apply to permit exploration projects in other lease blocks in the Lease Sale 193 area that they will share with Shell's support fleet and (3) MMS leaseholders propose to explore for, produce and develop mineral resources in the Chukchi Sea. The errors outlined in these comments will hinder the permitting of not only exploration activities in lease blocks adjoining Shell's, but also production activities throughout the Chukchi Sea and the rest of the OCS. We ask EPA to re-examine its approach to OCS air permitting and to apply the relevant rules properly and equitably to all leaseholders to ensure that none are prevented from exercising their lease rights by this permit.

Sincerely,



Geoffrey A. Haddad

Enclosures

cc: Rick Albright, EPA Region 10
Doug Hardesty, EPA Region 10
Susan Childs, Shell
John Goll, MMS, Alaska Region
Edward S. Itta, Mayor, NSB