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NATIONAL AUDUBON SOCIETY—NATURAL RESOURCES DEFENSE COUNCIL
NORTHERN ALASKA ENVIRONMENTAL CENTER—OCEAN CONSERVATION
RESEARCH—OCEAN CONSERVANCY—OCEANA—PACIFIC ENVIRONMENT
RESISTING ENVIRONMENTAL DESTRUCTION ON INDIGENOUS LANDS
(REDOIL)—SIERRA CLUB—THE WILDERNESS SOCIETY—
WORLD WILDLIFE FUND**

July 19, 2012

VIA EMAIL

Dennis McLerran, Regional Administrator
U.S. Environmental Protection Agency, Region 10
Mail Code RA-140
Seattle, WA 98101
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Re: Application for Revision to Shell Gulf of Mexico Inc.’s Prevention of Significant Deterioration Permit for the Chukchi Sea.

Dear Regional Administrator McLerran:

We are writing to you in response to EPA Region 10’s announcement on July 11, 2012, that Shell Gulf of Mexico Inc. (“Shell”) submitted an application to revise Prevention of Significant Deterioration (“PSD”) Permit to Construct No. R10OCS/PSD-AK-09-01, issued by the Region for operation of Shell’s *Noble Discoverer* drillship and its associated fleet in the Chukchi Sea.

Recognizing that its permit cannot be modified quickly, Shell’s application reveals the company’s intention to emit pollution in excess of its current permit limits during this year’s drilling season. Moreover, the application contradicts Shell’s representation that a modified permit “will not affect compliance with ambient air quality standards.”¹ In fact, as proposed for revision, Shell’s operations would emit fine particulate matter pollution in quantities that would violate the new increment standard that would be applicable to a revised permit.² In light of the full circumstances here, EPA should decline Shell’s reported proposal to negotiate a compliance order that would authorize it to operate this year under a permit it will violate³ and should instead revoke the *Discoverer*’s current PSD permit or otherwise exercise the agency’s enforcement

¹ See Application to Revise OCS PSD Permit to Construct No. R10OCS/PSD-AK-09-01 (“Shell Application”) at 38.

² See *infra* at p. 3-4.

³ See, e.g., Becky Bohrer, *Shell seeks change in permit needed for Arctic drilling*, Anchorage Daily News, July 13, 2012, www.adn.com/2012/07/12/2540495/shell-looks-for-change-in-permit.html.

authority to prevent Shell from undertaking unlawful polluting activities pending successful completion of a permitting process that results in a permit that meets legal requirements.

Shell reports in its permit application that source tests indicate the pollution controls installed on the *Discoverer* and the *Nanuq*, as currently configured, will not reduce emissions to the levels required by the company's current PSD permit.⁴ As a result, were Shell to operate these vessels under the current permit during this year's drilling season, the company necessarily would violate the terms of its permit, which in turn constitutes a violation of the Clean Air Act.⁵

According to Shell, EPA should modify the permit to relax emissions limits because source tests and other sources of "new and better emission unit information"⁶ have revealed that the information included in Shell's original permit application is inaccurate. Where, as here, "[m]aterially inaccurate statements were made in establishing the terms or conditions," Shell's current permit recognizes that EPA has authority to revoke the permit and reissue it later, upon development of new permit terms and conditions that are premised upon accurate information and adopted subject to comprehensive EPA review and public comment.⁷

Revocation of the current PSD permit pending EPA's consideration of Shell's application for a new or modified permit, pursuant to public notice and comment and the other decision-making procedures set forth in 40 C.F.R. part 124, is the proper course of action. First, Shell's requested modifications are not minor but go to the heart of the PSD requirements. Shell's permit application claims that the company must be afforded a three-fold increase in the allowable emissions of nitrogen oxide pollution from the *Discoverer*'s main generators owing to a flawed determination in the current permit of what constitutes the best available control technology ("BACT").⁸ Section 165 of the Act makes plain that the requirement to apply BACT is a critical element of all PSD permits.⁹ As a result, EPA should not allow Shell to operate this season based on the company's assurances that the agency and interested public ultimately will concur later that the current permit limits are technically infeasible and that the drillship's pollution controls, as presently configured, satisfy the technical and legal requirements of BACT. Shell's suggested approach constitutes an end run around the clearly established legal requirement that no major emitting facility may be constructed without first demonstrating that it is indeed "subject to the best available control technology for each pollutant subject to regulation."¹⁰

Second, allowing Shell to operate this season under a permit with conditions Shell admits it cannot meet is particularly inappropriate given that Shell is responsible for the last-minute nature of the request. Shell acknowledges in its new permit application that the company was aware in

⁴ Shell Application at 3, 4-13, 40-43.

⁵ See PSD Permit to Construct No. R100CS/PSD-AK-09-01 ("Chukchi Permit"), section A.2 (stating that a failure to comply with all requirements of the permit "shall be considered a violation of Section 111(e) and 165 of the [Act]").

⁶ Shell Application at 1-2.

⁷ Chukchi Permit, section A.6.2.

⁸ See Shell Application at 1, 3, 21-25.

⁹ 42 U.S.C. § 7475(a)(4).

¹⁰ *Id.*

2010 that the nitrogen oxide emission limits for the drillship's generators could not be achieved using the technology that Shell proposed and EPA approved for the current permit.¹¹ Shell did not come forth with this information for nearly two years, however, and neither EPA nor the public was apprised during the 2011 permit proceedings of any need to revisit the BACT determination for the *Discoverer*. Shell concedes in its application, as it must, that "the post-remand permit offered an opportunity to request emission limit revisions."¹² Having chosen to forego the decision-making process required for a new BACT determination in 2011, Shell must be required to forego operations until the agency and public review process mandated by the Act and EPA's implementing regulations for a new or modified permit is complete. To not do so is to undercut the fundamental policy of the air quality control program that adequate permits be in place before emissions can occur, and would create a dangerous precedent encouraging similar tactics from other companies in the oil and gas and other industries.

Third, Shell's permit must be revoked because, contrary to Shell's assertions in its permit application, the emissions limits and pollution controls that the company proposes for adoption in a new or modified permit are not adequate to assure compliance with all ambient standards that will be applicable to such a permit. Under section 165 of the Act, the owner or operator of a source seeking a PSD permit must demonstrate that its operations will not cause or contribute to a violation of a national ambient air quality standard or increment.¹³ Here, Shell's application indicates that the revised permit conditions it seeks are insufficient to prevent violations of the allowable increment for fine particulate matter pollution. According to Shell's own modeling, under the terms proposed in its permit application, emissions from the *Discoverer* and its associated vessels will increase 24-hour fine particulate matter concentrations by more than 12 $\mu\text{g}/\text{m}^3$.¹⁴ This increase exceeds the now-effective 24-hour fine particulate matter increment limit of 9 $\mu\text{g}/\text{m}^3$.¹⁵

Shell's current permit was not subject to the fine particulate matter increment because it was issued on September 19, 2011, just one month prior to the effective date of the new standard on October 20, 2011.¹⁶ However, a decision by EPA to issue a new or modified permit will occur after the increment's effective date. It is well-established that "permitting and licensing decisions of regulatory agencies must reflect the law in effect at the time the agency makes a

¹¹ Shell Application at 5.

¹² Shell Application at 2.

¹³ 42 U.S.C. § 7475(a)(3); 40 C.F.R. § 52.21(k).

¹⁴ Shell Application, Appendix I, at 10, Table 2a (indicating "Max. Modeled Shell Conc. Without Background" of 12.7 $\mu\text{g}/\text{m}^3$); *see also id.* at 44 (asserting that Shell will comply with certain coarse and fine particulate matter standards but making no representation of compliance with the 24-hour fine particulate matter increment).

¹⁵ Prevention of Significant Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers (PM_{2.5})—Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration, 75 Fed. Reg. 64,864, 64,865 (Oct. 20, 2010).

¹⁶ *See* EPA, Supplemental Response to Comments for OCS PSD Permits Noble Discoverer Drillship ("Supplemental Response to Comments") (Sept. 19, 2011) at 99 ("Because these permits are issued prior to October 20, 2011, there is no requirement that the air quality analysis ... must include a demonstration with respect to the PM_{2.5} increments.").

final determination on a pending application,”¹⁷ and under EPA regulations a “final permit decision” includes decisions to issue or modify a permit.¹⁸ Indeed, EPA has acknowledged during proceedings for Shell’s current permit that permit revisions necessitate compliance with any newly applicable standards.¹⁹

Shell’s admission that it cannot comply with the terms of its current permit, coupled with the fact that the company’s permit application demonstrates a violation of a standard that will be applicable to any future final permit decision, compels a conclusion that EPA must revoke the current permit to prevent Shell from drilling unlawfully. EPA should revoke the permit now, before Shell’s vessels are positioned at the drill site and before operations that necessarily will violate the permit and the Act commence. EPA subsequently may issue a new or modified permit, but only to the extent any such new final permit decision reflects lawful limits developed through the agency review and public comment procedures set forth in 40 C.F.R. part 124.

Section 167 of the Act offers EPA additional authority to prevent Shell from commencing operations and emitting pollution unlawfully.²⁰ Section 167 affords the agency authority to issue a compliance order or to initiate a civil action to halt construction or to prevent the operation of a source that will operate in a manner not consistent with a validly issued permit. For the same reasons that justify revocation of Shell’s current PSD permit, EPA instead could issue an order directing Shell not to undertake any drilling operations in the Chukchi Sea until the agency, consistent with the requirements of 40 C.F.R. part 124, issues a new final permit decision.

According to statements made by a representative of Shell to the media, Shell apparently is seeking to negotiate with EPA a compliance order that would authorize drilling operations this season under the current permit despite the admitted violations of the permit that will occur.²¹ There is no basis for such an order here. Shell has created an artificial sense of urgency by deciding not to raise what Shell itself then perceived was a need for more lenient permit limits during earlier proceedings, and may not now circumvent the permitting process by obtaining an

¹⁷ *Id.* (citing *Ziffrin v. United States*, 318 U.S. 73, 78 (1943)); see also *In re Russell City Energy Center, LLC*, PSD Appeal Nos. 10-01 – 10-05, 15 E.A.D. ___, 108 n.98 (EAB 2010) (stating that an agency must “apply the [] statute and implementing regulations in effect at the time the final permit decision is made”) (quoting *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 478 n.10 (EAB 2002) (quotation marks omitted)).

¹⁸ 40 C.F.R. § 124.15(a) (stating that a “final permit decision” includes not only the original decision on a permit but any “final decision to issue, deny, modify, revoke and reissue, or terminate a permit”).

¹⁹ See *In re Shell Gulf of Mexico Inc.*, OCS Appeal Nos. 10-01 – 10-04, 15 E.A.D. ___, 8-9 (Dec. 30, 2010) (noting EPA’s obligation, on remand, to apply new standards with applicability to be determined based “upon the date on which the Region issues its final permit decision under 40 C.F.R. § 124.15(a) upon conclusion of the remand proceedings”); Transcript of Oral Argument at 52-53, *In re Shell Gulf of Mexico Inc.*, OCS Appeal Nos. 10-01 – 10-04 (June 18, 2010) (statement of Region 10 counsel that if PSD permit was withdrawn or voluntarily remanded, newly adopted standards would apply to subsequently issued permit).

²⁰ 42 U.S.C. § 7477.

²¹ See Bohrer, *supra* note 3.

order that authorizes unlawful pollution. Further, such a “compliance” order is particularly unjustified here, where the operations envisioned in Shell’s application do not meet a standard that will apply to any new or modified permit that may be issued by the agency.

In sum, Shell is unable to comply with its current permit or the Act this drilling season and its permit application likewise offers no basis for lawful operations. EPA, therefore, must exercise its authority to prevent Shell from operating until a new or modified permit is issued consistent with all substantive and procedural requirements of the Act and implementing regulations.

Sincerely,

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