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

In re:	)	
	)	
Shell Gulf of Mexico, Inc.	)	
Shell Offshore, Inc.	)	OCS Appeal Nos. 10-01 to 10-04
Frontier Discovery Drilling Unit	)	
	)	
Permit No. R10OCS/PSD-AK-09-01	)	
Permit No. R10OCS/PSD-AK-2010-01	)	
	)	

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN OPPOSITION TO THE PETITIONS FOR REVIEW

Pursuant to 40 C.F.R. § 124.19(c), the American Petroleum Institute ("API"), the Independent Petroleum Association of American ("IPAA"), and the National Association of Manufacturers ("the NAM") (collectively, "Movants") respectfully move this Board for leave to file the attached *amicus curiae* brief in opposition to the Petitions for Review. The brief is limited to discrete issues relating to greenhouse gases ("GHGs") which are of significance to Movants' members. This motion appears to be Movants' only opportunity to participate in this proceeding at this time given that the Board has not set a schedule for *amicus curiae* participation.

THE MOVANTS

API is a national trade association representing all aspects of America's oil and natural gas industry. It is comprised of over 400 members, ranging from the largest oil conglomerates to the smallest independent oil companies. These members include oil producers, oil refiners, pipeline operators and marine transporters as well as service and supply companies that support all segments of the industry. Many of its member companies are regulated under the Clean Air

Act and require, or may in the future require, Prevention of Significant Deterioration ("PSD") permits governing air emissions from their operations.

IPAA is a national trade association representing the thousands of independent oil and natural gas producers and service companies across the United States. Independent producers develop 90 percent of domestic oil and gas wells, produce 68 percent of domestic oil, and produce 82 percent of domestic natural gas. Like API, many of its member companies require, or may in the future require, PSD permits governing air emissions from their operations.

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

ARGUMENT

The Movants hereby move for leave to file the attached *amicus curiae* brief to further the interests of their members in the reasonable and lawful administration of the PSD permit requirements under the Clean Air Act. The Movants request that the Board consider the attached brief given the absence of a deadline for interested parties to participate as *amici*. Appeals of both PSD permits and Outer Continental Shelf air permits are governed by 40 C.F.R. Part 124. 40 C.F.R. §§ 55.6(a)(3), 52.21(q). Under 40 C.F.R. § 124.19(c) the Board "set[s] forth a briefing schedule for the appeal and shall state that any interested person may file an amicus brief." The Board issued a briefing schedule and subsequently amended that schedule twice.[1] At no time,

[1] *See* Dkt. No. 22, Order Consolidating Petitions for Review and Setting Briefing Schedule (May 14, 2010); Dkt. No. 32, Order Denying Request to Hold Briefing Schedule in Abeyance, Postponing Oral Argument on Petitions For

however, did the Board establish a date for *amici* to file briefs on the Petitions. The Movants are thus moving in good faith to participate in these proceedings before they have advanced so far along as to inconvenience the Board or the other parties.

The Petitioners raise several arguments regarding implementation of the PSD program in which Movants have a significant interest that may differ from EPA Region 10 ("the Region"). Furthermore, the Movants have a wide range of member entities in the oil and natural gas industry, and those members have a broader interest in these proceedings than those represented by Shell Gulf of Mexico, Inc. and Shell Offshore, Inc. Several of the Movants have frequently participated in litigation and commented on EPA rulemakings regarding the Petitioners' now familiar claims that GHGs, including carbon dioxide ("CO_2"), are already "subject to regulation" under the PSD program. *See, e.g., In re: Deseret Power Elec. Coop. (Bonanza)*, PSD Appeal No. 07-03, Dkt. No. 37 (brief of *amici* including API regarding regulation of CO_2 under the PSD program). Several of the Movants are also participating in ongoing litigation regarding EPA's regulation of GHGs under the PSD program. *See*, *e.g.*, *The National Association of Manufacturers et al*. v. *EPA*, No. 10-1044 (D.C. Circuit); *The National Association of Manufacturers et al.* v. *EPA*, No. 10-1127 (D.C. Circuit).

The proposed regulation of GHGs under the Clean Air Act PSD Program is currently the subject of myriad lawsuits, legislative proposals, and regulatory actions. Movants, which have extensive experience representing their members in these matters, could substantially aid the Board in resolving issues that have been raised by the Petitioners regarding the potential application of PSD to GHGs. Specifically, Movants argue that Region 10 appropriately did not

---

Review, and Scheduling Oral Argument on Petitioners' Motion to Vacate and Remand and on Region's Motion to Hold In Abeyance (June 2, 2010); Dkt. No. 39, Order Granting EPA Region 10's Motion For Extention of Time and Establishing the Same Response Schedule For Shell Gulf of Mexico Inc. and Shell Offshore Inc. (June 4, 2010).

require Best Available Control Technology ("BACT") for GHGs like CO_2, because greenhouse gases are not yet "subject to regulation" under the Clean Air Act. Movants show that this question has already been decided by EPA through notice and comment rulemaking that may not be reconsidered by the Board.

The Movants request that their brief be considered at the same time the Board considers the parties' briefs on the merits. The Board has not yet scheduled oral argument on the merits of the Petitions. *See* Dkt. No. 32, Order Denying Request to Hold Briefing Schedule in Abeyance, Postponing Oral Argument on Petitions For Review, and Scheduling Oral Argument on Petitioners' Motion to Vacate and Remand and On Region's Motion to Hold In Abeyance (June 2, 2010). Thus, any prejudice to the Petitioners from the granting of the instant motion is obviated by the fact that they will have ample time to respond to the Movants' arguments during the future oral argument that has yet to be scheduled (or, alternatively, the Board may provide the parties an opportunity to respond in writing). Denial of the motion for leave, however, will preclude any possibility for the Movants to represent the views of their members and to provide aid to the Board in its consideration of the Petitions.

CONCLUSION

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

June 25, 2010

Respectfully submitted,

/s/ Timothy K. Webster
Timothy K. Webster
James W. Coleman
SIDLEY AUSTIN, LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000 (phone)
(202) 736-8711 (facsimile)

Counsel for Movants

Of Counsel

Michele M. Schoeppe
Harry M. Ng
AMERICAN PETROLEUM INSTITUTE
1220 L Street, NW
Washington, DC 20005

Quentin Riegel
Vice President, Litigation & Deputy General Counsel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004-1790

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

In re:	)	
	)	
Shell Gulf of Mexico, Inc.	)	
Shell Offshore, Inc.	)	OCS Appeal Nos. 10-01 to 10-04
Frontier Discovery Drilling Unit	)	
	)	
Permit No. R10OCS/PSD-AK-09-01	)	
Permit No. R10OCS/PSD-AK-2010-01	)	
	)	

BRIEF OF AMICUS CURIAE THE AMERICAN PETROLEUM INSTITUTE *ET AL.* IN OPPOSITION TO THE PETITIONS FOR REVIEW

INTRODUCTION AND SUMMARY

Several petitioners in these consolidated appeals have come before the Environmental Appeals Board with a request the Board lacks authority to fulfill: to exercise its permit review powers to undo and undermine key notice and comment rulemakings promulgated by the Agency. First, these Petitioners take issue with the Environmental Protection Agency's ("EPA's") final rule authoritatively concluding that greenhouse gases ("GHGs") are not "subject to regulation" under the Clean Air Act's ("CAA's") Prevention of Significant Deterioration ("PSD") pre-construction permit program until such time as they are subject to either a provision in the CAA or a regulation adopted by EPA under the CAA that requires actual control of emissions of those pollutants.[1] They believe EPA should have concluded otherwise and found that GHGs *currently* are subject to regulation under the Clean Air Act. But rather than rely on the two avenues legally available to them to dispute EPA's conclusion—petitions for reconsideration before EPA and a petition for review in the D.C. Circuit—Petitioners are asking

[1] Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs ("GHG Reconsideration Rule"), 75 Fed. Reg. 17,004 (April 2, 2010).

the Board to unilaterally expand its authority to undermine the existing regulatory regime. Second, these Petitioners ignore the implication their arguments here have on a second rulemaking, promulgated shortly after the GHG Reconsideration Rule, in which EPA codified its interpretation into the Code of Federal Regulations. *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule ("GHG Tailoring Rule"), 75 Fed. Reg. 31514, 31525 (Jun. 3, 2010). The relief Petitioners seek is nothing short of an attack on the GHG Reconsideration Rule and the GHG Tailoring Rule. For the reasons stated below, the EAB clearly lacks such authority and thus should decline to consider the relevant Petitions.

Under the PSD program, the requirement to adopt the Best Available Control Technology ("BACT") is only applicable to those pollutants that are "subject to regulation" under the CAA. 42 U.S.C. § 7475(a)(4). Thus, pursuant to the Clean Air Act and EPA's final GHG Reconsideration Rule, as codified by the GHG Tailoring Rule, neither EPA Region 10 nor this Board can require BACT controls for GHGs in PSD permits at this time. Nevertheless, Petitioner Center for Biological Diversity ("CBD") devotes its entire 37-page Petition to arguing that Region 10 erred by not including such GHG controls in the PSD permits issued to Shell Gulf of Mexico Inc. for exploratory operations on leases in the Chukchi Sea on March 31, 2010, and to Shell Offshore Inc. for exploratory operations on leases in the Beaufort Sea on April 9, 2010. Furthermore, Petitioners Alaska Eskimo Whaling Commission and Inupiat Community of the Arctic Slope (collectively, "AEWC") also devote a significant portion of their Petition to similar arguments. *See* AEWC Petition § III. The Board lacks jurisdiction to hear the claims as framed by these Petitioners.[2]

[2] The term "Petitioners" when used herein refers only to CBD and AEWC.

In short, it is well settled that, under 40 C.F.R. § 124.19, the express purpose of Board review is to determine a challenged permit's "'compliance with the *federal Clean Air Act and applicable regulations*.'" *In re Tondu Energy* Co., 9 E.A.D. 710, 716–17 (EAB 2001) (quoting *In re Spokane Regional Waste-To-Energy Project*, 3 E.A.D. 68, 70 (Adm'r 1990)) (emphasis in original). The Board's limited jurisdiction *does not* encompass initiation of or review of agency CAA rulemakings. Under the CAA, the former is exclusively the province of the Administrator and the latter is exclusively the province of the United States Courts of Appeals. *See* 42 U.S.C. § 7607. CBD and AEWC improperly assert that the Board can and should act contrary to the final word of Administrator Jackson in the GHG Reconsideration Rule[3] (as well, by implication, as in the GHG Tailoring Rule[4]) and remand the permits to Region 10 for the imposition GHG BACT on the permittees. The Board should reject this proposed abuse of its petition procedures. Furthermore, the Administrator's decision that GHGs are not currently subject to regulation, while unreviewable, is also substantively correct.

[3] At the time the PSD permits here had been issued, Administrator Jackson had publicly announced the GHG Reconsideration Rule. *See* Fact Sheet: Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, *available at* http://www.epa.gov/nsr/documents/psd_memo_recon_fs_032910.pdf (March 29, 2010) ("On March 29, 2010, the U.S. Environmental Protection Agency (EPA) completed its reconsideration of a December 18, 2008 memorandum."). That rule was published in the Federal Register on April 2, 2010. Thus, the rule was issued prior to the issuance of both permits, and it was published in the Federal Register before either CBD or AEWC filed their petitions.

[4] The GHG Tailoring Rule was announced on May 13, 2010, *see* Fact Sheet: Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, *available at* http://www.epa.gov/nsr/documents/20100413fs.pdf (May 13, 2010), and published in the Federal Register on June 3, 2010.

ARGUMENT

I. These Permit Appeals Are Not The Proper Forum For CBD's and AEWC's Challenges to EPA's GHG Reconsideration Rule and GHG Tailoring Rule

The purpose of review by this Board is to determine whether a permit has been granted in compliance with the applicable EPA regulations. *In re Tondu Energy* Co., 9 E.A.D. at 716–17. Thus, the Board has long and consistently held that it will not entertain challenges to EPA's regulations themselves in the context of a permit challenge or enforcement proceeding. *See Id.* at 716 n.10; *In re City of Port St. Joe and Florida Coast Paper Co.*, 7 E.A.D. 275, 286 (EAB 1997) ("A permit appeal proceeding is not the appropriate forum in which to challenge either the validity of Agency regulations or the policy judgments that underlie them."); *In re Woodkiln Inc.*, 7 E.A.D. 254, 269 (EAB 1997); *In re Suckla Farms, Inc.*, 4 E.A.D. 686, 699 (EAB 1993); *In re Ford Motor Co.*, 3 E.A.D. 677, 688 n.2 (Adm'r 1991).[5] *See also In re Norma J. Echevarria*, et al., 5 E.A.D. 626 (EAB 1994) (refusing to second-guess asbestos work practice regulations issued under the CAA). Here, there are two principal reasons that the Board cannot take up either CBD's or AEWC's GHG claims.

First, it would be inappropriate for the EAB to entertain a challenge to a final rule, like the GHG Reconsideration Rule, or to collaterally attack final regulations, like those promulgated in the GHG Tailoring Rule, that had recently been issued by the Administrator herself. Although

[5] In its recently-filed reply brief, CBD attempts to rebut these decisions by citing allegedly contradictory EPA decisions from the early 1980s. *See* CBD Reply at 7–8 (citing *In the Matter of 170 Alaska Placer Mines, More or Less*, 1 E.A.D. 616 (Nov. 10, 1980) and *In re Transportation, Inc.* Docket No. CAA (211) – 27 *et al.*, 1982 WL 43367 (Feb. 25, 1982)). To the extent these decisions ever stood for the proposition CBD ascribes to them, they have been long overruled. *In re Tondu*, 9 E.A.D. at 716 n.10; *In re City of Port St. Joe and Florida Coast Paper Co.*, 7 E.A.D. at 286. These outdated decisions are inapposite because they were issued by the Administrator and his office rather than the Environmental Appeals Board, which was not created until 1992. Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. 5,320, 5,320 (Feb. 13, 1992). Furthermore, both concern enforcement procedures, not substantive rulemakings.

the EAB is independent of other bodies within EPA, it is a staff office of and answers to the Administrator. *In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 795 (EAB 1995), *aff'd*, 81 F.3d 1371 (5th Cir. 1996), *cert. denied*, 519 U.S. 1055 (1997); *see also* 40 C.F.R. § 1.25(e) (the Board is a staff office of the Administrator with jurisdiction to hear matters delegated to it). In fact, when the Board was created in 1992, these principles (including the limited nature of the Board's jurisdiction) were made clear in the Federal Register: "The final rule delegates to the new Environmental Appeals Board *the Administrator's authority to hear appeals of permit and penalty decisions*." Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. 5,320, 5,320 (Feb. 13, 1992) (emphasis added). The Administrator has not delegated CAA rulemaking authority to the Board. CBD's implied request that Region 10 and the Board defy and overrule the Administrator's conclusions regarding a final rulemaking is thus entirely inappropriate. The Board has no delegation from the Administrator to alter the Administrator's final decision as expressed in any rulemaking.

Second, the exclusive forum for CBD's attempt to seek judicial review of the GHG Reconsideration Rule is the D.C. Circuit, based on the CAA section that lays out the procedures for judicial review of EPA rulemaking activities and grants jurisdiction to the United States Courts of Appeals to hear those challenges. 42 U.S.C. § 7607(b). That same section specifies that the D.C. Circuit, in particular, shall hear challenges to CAA rules of national applicability, like the GHG Reconsideration Rule. *See* 75 Fed. Reg. at 17023 ("This action is a nationally applicable final action under section 307(b) of the Act. As a result, any legal challenges to this action must be brought to the United States Court of Appeals for the District of Columbia Circuit by June 1, 2010."). The D.C. Circuit, of course, does not answer to the Administrator, and so may review the validity of the GHG Reconsideration Rule itself. It is the *exclusive* forum for

reviewing either or both the GHG Reconsideration Rule, the GHG Tailoring Rule,[6] and the core propositions contained therein (thus, the Administrator could not delegate that authority to the Board, even if she wanted to). Indeed, CBD already has taken advantage of this opportunity for review, filing a petition for review of the GHG Reconsideration Rule on May 28, 2010. *Center for Biological Diversity v. EPA*, Case No. 10-1115 (D.C. Circuit). The time for filing petitions to review the GHG Tailoring Rule has not yet run, but CBD may choose to challenge that rulemaking too. Neither CBD nor AEWC may directly or collaterally attack either the GHG Reconsideration Rule or the GHG Tailoring Rule here.[7]

CBD's argument that these permitting actions raise important policy considerations warranting review by the Board is misplaced. *See* CBD Petition 14. Amici do not dispute that incorporating GHGs into the PSD program raises significant policy concerns. But that is precisely why the key decisions on this point should be made by the Administrator through public notice and comment rulemaking with opportunity for judicial review in the D.C. Circuit, rather than in Board review of Region 10 permit decisions. In fact, the policy implications of

[6] The GHG Tailoring Rule is likewise a rule of national applicability that can only be challenged in the D.C. Circuit. *See* GHG Tailoring Rule, 75 Fed. Reg. at 31605 ("Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit by August 2, 2010."). Thus, if there were any doubt that review of the GHG Reconsideration Rule's substance was subject to the limitations of CAA § 307(b)(1), it was removed when that substance was codified in the GHG Tailoring Rule.

[7] In its reply, CBD cites *In re Echevarria*, 5 E.A.D. 626 in support of the proposition that the Board may use the guise of a permit appeal to sit in judgment of the Administrator's final decision in the GHG Reconsideration Rule—and, by implication, the GHG Tailoring Rule. CBD Reply at 5–6. While that decision included some *dicta* regarding the "rule of practicality," it fundamentally held the opposite of what CBD would have liked: "[CAA] § 307(b) establishes a presumption of nonreviewability." *Id*. at *6. To put it another way, as the Board did in *Echevarria*, "[o]nce the rule is no longer subject to court challenge by reason of the statutory preclusive review provision, the Agency is entitled to close the book on the rule insofar as its validity is concerned." 5 E.A.D. 626, *5 (citation omitted). The limited possible exceptions that the Board noted in *dicta*, *see id*. at *5 n.13, are not applicable here.

applying PSD regulations to GHGs is one of the reasons that this Board suggested that EPA address this issue in the first instance: "all parties would be better served by addressing it in the context of an action of nationwide scope rather than in the context of a specific permit proceeding." *In Re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03 (EAB, Nov. 13, 2008), 14 E.A.D. ___, Slip Op. 9–10. The GHG Reconsideration Rule *is* the Administrator's final answer to the Board's request, and the rule is now before the D.C. Circuit. Furthermore, as noted above, the interpretation in that rule has now been codified by the Administrator in the GHG Tailoring Rule, which is also subject to review by the D.C. Circuit. *See* 75 Fed. Reg. at 31,525 ("We are also codifying in this definition EPA interpretations discussed in our recent [GHG Reconsideration Rule]."). Petitioners' arguments that the Board should question the Administrator's GHG Reconsideration Rule are nothing more than an invitation to the Board to usurp authority vested in the Administrator and the D.C. Circuit.

CBD's argument that it "must bring its [GHG] claims to the EAB in order to exhaust its administrative remedies, a statutory prerequisite to preserving them for judicial review," CBD Reply at 1, is wholly circular. The Court of Appeals would no more be able to hear challenges to the GHG Reconsideration Rule or the GHG Tailoring Rule in the context of a petition to review the Board's decision here than the Board, for the same reasons discussed above. CBD cannot "bootstrap" its way into the appellate review it ultimately seeks by raising inappropriate issues before the Board. Such review can only occur before the D.C. Circuit in the context of direct challenges to the rules at issue.

II. The Administrator's Determination That Greenhouse Gases Are Not Subject to Regulation under the CAA, Though Not Subject To Review Here, Is Substantively Correct

Although it would be inappropriate for the Board to review the propriety of the Administrator's GHG Reconsideration Rule, the Administrator is correct that greenhouse gases are not currently subject to regulation under the CAA for purposes of PSD. Indeed, three times in the past 18 months EPA has comprehensively explained why greenhouse gases are not subject to regulation under the CAA so long as those substances are not subject to a CAA provision or regulation establishing actual control of emissions of those substances.

EPA's Administrator first authoritatively determined that greenhouse gases are not currently subject to regulation in a memorandum issued by the Administrator on December 18, 2009 in response to the Board's request in *Deseret* that the Agency opine on this issue. *See* Memorandum from Stephen Johnson, EPA Administrator, to EPA Regional Administrators, Re: EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program (Dec. 18, 2008) ("Johnson Memorandum"); *see also* 73 Fed. Reg. 80,300 (December 31, 2008) (notice of Johnson Memorandum). On February 17, 2009, EPA granted a Petition for Reconsideration of the Johnson Memorandum but did not stay the effect of the Memorandum. But when EPA issued a public notice on October 7, 2009 seeking comment on this reconsideration, it proposed to confirm the Johnson Memorandum's conclusion that GHGs are not subject to regulation. *See* Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program, 74 Fed. Reg. 51,535 (Oct. 7, 2009). Finally, on April 2, 2010, the Administrator issued EPA's GHG Reconsideration Rule, confirming that greenhouse gases are not subject to regulation under the Act until such time as they are subject to actual control of

emissions pursuant to a CAA provision or regulation. 75 Fed. Reg. 17,004. EPA further codified this interpretation as part of its GHG Tailoring Rule. GHG Tailoring Rule, 75 Fed. Reg. at 31,525.

In these actions, the Administrator carefully examined and rejected in detail Petitioners' principal arguments that GHGs are currently subject to regulation. The Administrator properly found that GHGs are not subject to regulation due to EPA's rules for monitoring and reporting greenhouse gas emissions. *See* CBD Petition 19–26; AEWC Petition 50–51; GHG Reconsideration Rule, 75 Fed. Reg. at 17,009–11 ("This approach would lead to the perverse result of requiring emissions limitations under the PSD program while the Agency is still gathering the information necessary to conduct research or evaluate whether to establish controls on the pollutant."); *see also In re Deseret Power Elec. Coop.*, PSD Appeal No. 07-03 (EAB, Nov. 13, 2008), slip op. at 9–10, 63–64 (rejecting this argument). Nor, the Administrator held, are greenhouse gases made subject to regulation by State Implementation Plans approved by EPA, or by EPA's issuance of a waiver for new motor vehicle standards under CAA § 209(b). *See* CBD Petition 28–30 & n.8; AEWC Petition 51; 75 Fed. Reg. at 17,011–14 ("the SIP interpretation would improperly limit the flexibility of States to develop and implement their own air quality plans" and the waiver argument "is inconsistent with the fundamental principle of cooperative federalism embodied in the CAA."). Finally, EPA's endangerment determination for GHGs does not subject GHGs to regulation. *See* CBD Petition 28–30; AEWC Petition 50; 75 Fed. Reg. at 17,012–13 ("waiting to apply PSD requirements at least until the actual promulgation of control requirements that follow an endangerment finding is sensible").

Furthermore, EPA has comprehensively explained why no recent developments make GHGs subject to regulation under the CAA. For instance, in 2007 two district courts found that

state automobile GHG standards were "motor vehicle standards of the government'' under the Energy Policy and Conservation Act (EPCA). *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1165–1173 (E.D. Cal. 2007); *Green Mountain Chrysler v. Crombie*, 508 F. Supp. 2d 295, 350 (D. Vt. 2007). In its proposed GHG Reconsideration Rule, however, EPA explained that these decisions did not stand for the proposition that state regulations constitute federal Clean Air Act standards. 74 Fed. Reg. at 51,544–45 n.7 (the "holdings are properly limited to interpretation of EPCA's preemption provisions and are not binding on our present consideration of whether the California standards should be considered federal standards under the provisions of the CAA, in particular, provisions such as the PSD program"). Similarly, although EPA's rule for GHG emissions from cars has now been published, Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010), EPA has comprehensively explained why mere promulgation of the rule does not currently subject GHGs to regulation under the Clean Air Act. 75 Fed. Reg. at 17,015–19.

In short, EPA has determined that, in order to be "subject to control," a pollutant must be "subject to either a provision in the CAA or regulation promulgated by EPA under the CAA that requires actual control of emissions of that pollutant." GHG Reconsideration Rule, 75 Fed. Reg. 17,007. As EPA's final rule noted, CBD's argument that GHGs are currently subject to regulation would undercut EPA's goal of ensuring an "orderly and manageable process for incorporating new pollutants." GHG Reconsideration Rule, 75 Fed. Reg. at 17,007.

Amici disagree with the Administrator's determinations, *inter alia*, that GHGs become "subject to regulation" under the PSD program as early as January 2, 2011, *see* GHG Reconsideration Rule, 75 Fed. Reg. at 17,019; GHG Tailoring Rule, 75 Fed. Reg. at 31,606, and

they reserve their rights to prosecute petitions for review of those final agency actions in the D.C. Circuit. However, there can be no doubt that, under any formulation, GHGs are not *currently* "subject to regulation," and Region 10 could not have included them in the BACT analysis for the permits at issue.

CONCLUSION

For the foregoing reasons, API, IPAA, and the NAM respectfully request that the Board deny the CBD petition for review in its entirety, and the AEWC petition for review to the extent that it seeks to impose GHG BACT on permittees.

June 25, 2010

Respectfully submitted,

/s/ Timothy K. Webster
Timothy K. Webster
James W. Coleman
SIDLEY AUSTIN, LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000 (phone)
(202) 736-8711 (facsimile)

Counsel for Amici Curiae

Of Counsel

Michele M. Schoeppe
Harry M. Ng
AMERICAN PETROLEUM INSTITUTE
1220 L Street, NW
Washington, DC 20005

Quentin Riegel
Vice President, Litigation & Deputy General Counsel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004-1790

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

In re:	)	
	)	
Shell Gulf of Mexico, Inc.	)	
Shell Offshore, Inc.	)	OCS Appeal Nos. 10-01 to 10-04
Frontier Discovery Drilling Unit	)	
	)	
Permit No. R10OCS/PSD-AK-09-01	)	
Permit No. R10OCS/PSD-AK-2010-01	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of Movant's MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN OPPOSITION TO THE PETITIONS FOR REVIEW, along with the attached proposed BRIEF OF AMICUS CURIAE THE AMERICAN PETROLEUM INSTITUTE ET AL. IN OPPOSITION TO THE PETITIONS FOR REVIEW, was sent on June 25, 2010 to the following via U.S. Mail:

Duane A. Siler
Susan M. Mathiascheck
Sarah C. Bordelon
Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Tanya Sancrib
Christopher Winter
Crag Law Center
917 S.W. Oak Street, Suite 417
Portland, OR 97205

Vera P. Pardee
Kevin Bundy
Center for Biological Diversity
351 California Street, Suite 600
San Francisco, CA 94104

David R. Hobstetter
Erik Grafe
EARTHJUSTICE
441 W. 5th Avenue, Suite 301
Anchorage, AK 99501

Eric. P. Jorgensen
EARTHJUSTICE
325 Fourth Street
Juneau, AK 99801

Julie Vergeront
Juliane R.B. Matthews
U.S. EPA, Region 10, Suite 900
1200 Sixth Avenue, ORC-158
Seattle, WA 98101

Kristi M. Smith
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (2344A)
Washington, D.C. 20460

/s/ James W. Coleman
James Coleman