

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

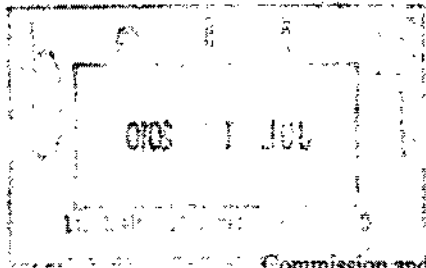
In re:)
)
Shell Gulf of Mexico, Inc.)
Shell Offshore, Inc.) OCS Appeal Nos. 10-01 through 10-04
Frontier Discovery Drilling Unit)
)
OCS Permit No. R10OCS/PSD-AK-09-01)
OCS Permit No. R10OCS/PSD-AK-2010-01)
)

ORDER SCHEDULING ORAL ARGUMENT

On March 31, 2010, Region 10 ("Region") of the U.S. Environmental Protection Agency ("EPA") issued an Outer Continental Shelf ("OCS") Prevention of Significant Deterioration ("PSD") Permit to Construct, Permit Number R10OCS/PSD-AK-09-01 ("Chukchi Permit"), to Shell Gulf of Mexico, Inc. ("SGOMI"). On April 9, 2010, the Region issued a second OCS PSD Permit to Construct, Permit Number R10OCS/PSD-AK-2010-01 ("Beaufort Permit") (collectively, "Permits"), to Shell Offshore, Inc. ("SOI"). In May 2010, the following groups filed petitions for review requesting that the Environmental Appeals Board ("Board") review the Permits' conditions: 1) Center for Biological Diversity ("CBD");¹ 2) EARTHJUSTICE, on behalf of several conservation groups ("EJ Petitioners"),² and; 3) Alaska Eskimo Whaling

¹ CBD's Petition for Review is designated as OCS Appeal No. 10-01. See Petition for Review (Apr. 30, 2010) ("CBD Petition").

² EJ Petitioners' Petition for Review is designated as OCS Appeal No. 10-02. See Petition for Review (May 3, 2010) ("EJ Petition"). The EJ Petitioners include Natural Resource Defense Council, Native Village of Point Hope, Resisting Environmental Destruction of Indigenous Lands ("REDOIL"), Alaska Wilderness League, Audubon Alaska, Center for Biological Diversity, Northern Alaska Environmental Center, Ocean Conservancy, Oceana, Pacific Environment, and Sierra Club.



Commission and Inupiat Community of the Arctic Slope ("AEWC").³ The permits would authorize, subject to conditions, SOI and SGOMI (collectively, "Shell") "to construct and operate the Frontier Discoverer drillship and its air emission units and to conduct other air pollutant emitting activities" in the Chukchi and Beaufort Seas off the North Slope of Alaska for the purpose of oil exploration. OCS PSD permits are governed by 40 C.F.R. part 55 and the procedural rules set forth in 40 C.F.R. part 124. *See* 40 C.F.R. § 55.6(a)(3).

In response to Shell's motion to expedite these proceedings and the Petitioners' responses, the Board held a status conference on Thursday, May 13, 2010, and subsequently issued an order consolidating review of the Permits, setting a briefing schedule, and scheduling oral argument for June 18, 2010. *See* Order Consolidating Petitions for Review and Setting Briefing Schedule (May 14, 2010). On May 27, President Obama issued remarks at a press conference and the Department of the Interior ("DOI") issued a press release, both announcing that Shell's exploratory oil and gas drilling operations in the Chukchi and Beaufort Seas would not go forward this year. The Region filed a motion requesting that the Board hold the above-captioned matters in abeyance pending DOI's further information-gathering and evaluation of oil spill response capabilities for Arctic waters. *See* Motion to Hold Matters in Abeyance (May 28, 2010) at 2-3. Shell filed an opposition to the Region's request, urging the Board to adhere to the previously determined briefing and oral argument schedules, whereas CBD, EJ Petitioners, and AEWC jointly filed a motion requesting that the Board vacate and remand the Permits, or in the

³ AEWC filed a Petition for Review of the Chukchi Permit, designated as OCS Appeal No. 10-03. *See* Petition for Review (May 3, 2010). AEWC subsequently filed a Petition for Review of the Beaufort Permit, designated as OCS Appeal No. 10-12 and subsequently redesignated as OCS Appeal No. 10-04. *See* Petition for Review (May 12, 2010).

alternative, supporting the Region's motion to hold matters in abeyance. *See* Opposition of Shell Gulf of Mexico Inc. and Shell Offshore Inc. to Motion to Hold Matters in Abeyance (June 1, 2010); Petitioners Natural Resources Defense Council, et al., Alaska Eskimo Whaling Commission, et al., and Center for Biological Diversity's Motion to Vacate and Remand the Air Permits, and Response to the Environmental Protection Agency's Motion to Hold These Proceedings in Abeyance (June 2, 2010) ("Motion to Vacate and Remand").

On June 2, 2010, the Board issued an order requiring that the parties adhere to the previously established briefing schedule. *See* 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). The Board stated that it could better evaluate the competing abeyance and remand motions with "the benefit of the merits briefing." *Id.* at 4. In addition, the Board ordered the Region to respond to Petitioners' Motion to Vacate and Remand and to reply to Shell's opposition to the Region's Motion to Hold Matters in Abeyance.⁴ Finally, the Board postponed indefinitely the June 18, 2010 oral argument initially intended to address the merits of the petitions, and instead ordered that on June 18, 2010, oral argument be held on Petitioners' Motion to Vacate and Remand and on the Region's Motion to Hold Matters in Abeyance (and any replies or responses pertaining to those motions).⁵

Upon consideration of the petitions, responses, replies, and the parties' presentations of

⁴ The remaining parties were also granted leave to file a response or reply to the pending motions and responses.

⁵ The Board also issued an order on June 4, 2010, making minor adjustments to the briefing schedule based on the parties' requests for extra time to prepare their briefs.

their views regarding the aforementioned motions at the June 18 oral argument, the Board has decided that oral argument on the merits on certain aspects of the petitions for review is now appropriate and will be of assistance in its deliberations. The Board has made no final determination as to whether to proceed to issue a decision on the merits on these issues, and the parties are invited, in addition to addressing the merits of the issues specified below, to address at the oral argument why any or all of the three issues identified for oral argument should be held in abeyance or directly remanded pursuant to the motions previously filed by EPA and Petitioners, respectively. The Board is particularly interested in hearing further argument on the three issues identified below because they are legal in nature, and thus the analyses set forth in the documentation supporting the Permits are unlikely to be affected by any subsequent DOI announcement of new requirements or mandates pertaining to future exploratory drilling on the OCS.

Accordingly, the parties shall focus their arguments on the following three issues: 1) the Permits' conditions defining when the Frontier Discoverer is an OCS source; 2) the Region's determination that best available control technology ("BACT") is not required for ships supporting the Frontier Discoverer; and 3) the impact of the new 1-hour NO₂ national ambient air quality standard ("NAAQS") on the environmental justice analyses. Specifically, with respect to the Frontier Discoverer becoming an OCS source, the parties should address the intersection of the regulatory definition of an OCS source as set forth in 40 C.F.R. § 55.2, the statutory definition found at 42 U.S.C. § 7627(a)(4)(C), and the analyses presented in the Statements of Basis and Responses to Comments in support of the conclusion that the Frontier Discoverer is an OCS source "between the time the Discoverer is declared by the Discoverer's on-site company

representative to be secure and stable in a position to commence exploratory activity at the drill site until the Discoverer's on-site company representative declares that, due to retrieval of anchors or disconnection of its anchors, it is no longer sufficiently stable to conduct exploratory activity at the drillsite * * * ." AR Ex. L-1 at L000005; AR Ex. PP-2 at PP000169. In addition, regarding the determination that BACT should not be applied to ships supporting the Frontier Discoverer, the parties should focus on the intersection of the statutory and regulatory definitions of OCS source, the regulatory definition of potential emissions, 40 C.F.R. § 52.21(a)(4), the applicability of the PSD program to OCS sources, *see* 40 C.F.R. § 55.13(d), and, the PSD BACT requirements, 40 C.F.R. § 52.21(j), as applied to the question whether BACT is required for support ships that are within 25 miles of the Frontier Discoverer when it is an OCS source. Finally, concerning the intersection of the new 1-hour NO₂ NAAQS and the environmental justice analyses, the parties should speak to whether, in this case, compliance with the existing NO₂ NAAQS as of March 31 and April 9, respectively, is sufficient by itself to demonstrate that Shell's operations will not have "disproportionately high and adverse human health or environmental effects" on North Slope communities when the final rule establishing the new 1-hour NO₂ NAAQS was based on the Administrator's final conclusion, published in the Federal Register on February 9, 2010, that the current standard "alone does not provide adequate public health protection." 75 Fed. Reg. at 6483; *see also id.* at 6490.

The parties are ordered to participate in oral argument on Tuesday, August 17, 2010, beginning at 1 pm Eastern Daylight Time, in the Board's Administrative Courtroom, U.S. Environmental Protection Agency, EPA East Building, Room 1152, 1201 Constitution Avenue NW, Washington, DC 20005. The parties shall notify the Clerk of the Board in writing by

Tuesday, August 3, 2010, of the names of counsel who will present argument. Any party wishing to participate in the oral argument via the Board's video-conferencing equipment located in the Administrative Courtroom will be given an opportunity to do so. Counsel for any of the parties who wish to participate via video-conference shall contact the Clerk of the Board, at (202) 233-0110, by Tuesday, August 3, 2010, to make arrangements for the use of such equipment.

So ordered.

Dated: *July 19, 2010*

ENVIRONMENTAL APPEALS BOARD

By: *Katherine A. Shen & Anna L. Wolgast*
Anna L. Wolgast
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Scheduling Oral Argument in the matter of Shell Gulf of Mexico, Inc., and Shell Offshore, Inc., OCS Appeal Nos. 10-01 through 10-04, were sent to the following persons in the manner indicated:

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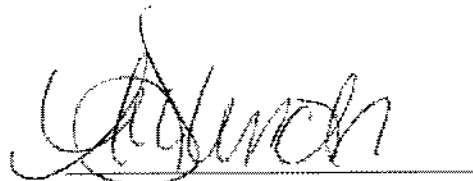
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Dated: **JUL 19 2010**

A handwritten signature in black ink, appearing to read "Annette Duncan", written over a horizontal line.

Annette Duncan
Secretary