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

In re:)
)
)
Shell Gulf of Mexico Inc.)
Frontier Discoverer Drilling Unit)
OCS Permit No. R10OCS/PSD-AK-09-01) OCS Appeal Nos. OCS 10-01 through
) 10-03 & 10-12
and)
)
Shell Offshore Inc.)
Frontier Discoverer Drilling Unit)
OCS Permit No. R10OCS/PSD-AK-09-02)

**MOTION OF SHELL GULF OF MEXICO INC. AND SHELL OFFSHORE INC.
TO STRIKE DECLARATION OF MEGAN WILLIAMS**

Shell Gulf of Mexico Inc. and Shell Offshore Inc. (collectively, “Shell”) move to strike the Declaration of Megan M. Williams (“Williams Declaration”), which is attached as Exhibit 14 to the petition of Alaska Eskimo Whaling Commission and Inupiat Community of Artic Slope (“AEWC”) for review of Shell’s Chukchi Sea Permit (OCS Appeal No. 10-03) and as Exhibit 17 to the petition of AEWC for review of Shell’s Beaufort Sea Permit (OCS Appeal No. 10-12). As a threshold matter, *any* extra-record material is improper for the Board’s consideration under the regulations which define the scope of EAB review of PSD permitting decisions. 40 C.F.R. Part 124. These regulations define the administrative record for a final permit to include specifically enumerated documents – such as, for example, public comments – and “other documents contained in the supporting file for the permit.” 40 C.F.R. § 124.18. This specifically defined record is underscored by the Board’s May 14, 2010 scheduling order in this consolidated proceeding, which required Region 10 to file with the Board and serve on the parties a certified index to the record “as well as relevant portions of the administrative record.” Docket No. 22 at 3. The record for these permits has been made at Region 10; it is not still being made before the EAB. Because the Williams Declaration does not fall into one of the specifically enumerated categories of documents and because it is not contained in the supporting file for these permits, the Board should not consider the Williams Declaration in its review of the permits.

The Board’s review of final PSD permits is governed by the regulations contained in 40 C.F.R. Part 124. Because the challenged Williams Declaration is not part of the administrative record on review under those regulations, the Board should not consider it on review. *See* 40 C.F.R. § 124.18 (“The Regional Administrator shall base final permit decisions under §124.15 on the administrative record defined in this section.”). The administrative record for any final permit consists of the administrative record for the draft permit, all public

comments, the transcript of any hearings held, any written materials submitted at a hearing, the response to comments, the final permit, and “other documents contained in the supporting file for the permit.” 40 C.F.R. § 124.18. The administrative record for a draft permit – which is incorporated into the administrative record for a resulting final permit – consists of the application and any supporting data furnished by the applicant, the draft permit or notice of intent to deny the application or to terminate the permit, the statement of basis or fact sheet, all documents cited in the statement of basis or fact sheet, and “other documents contained in the supporting file for the draft permit.” 40 C.F.R. § 124.18(b). The challenged Williams Declaration is not part of the administrative record because it does not fall within any of these document categories and is not part of the supporting file. On this basis alone, the Williams Declaration should be stricken.

Even if all the documents cited by Ms. Williams were in the administrative record, Part 124 provides no basis for the insertion of such extra-record “expert” opinion even when partly based on information in the record. *See Native Village of Point Hope et al. v. Salazar*, No. 09-73942, slip op. at 5 (9th Cir. May 13, 2010) (filed in these consolidated permit appeals at Docket No. 20.01) (granting Shell’s motion to strike extra-record declarations, including a declaration from Ms. Williams); *cf. Biodiversity Conservation Alliance et al. v. Bureau of Land Management*, 09-8011, slip op. at 3 (10th Cir. March 23, 2010) (denying motion to supplement record with declaration and map that were not part of administrative record) (Exhibit A). It is a fundamental principle of administrative law that review of the decision of an agency – here, Region 10’s issuance of the Chukchi and Beaufort Permits – should be based on the record that was before the agency when it made the decision. *See Fed. R. App. P. 16(a)* (defining the administrative record for review of an agency’s decision as the agency order, the findings on

which the order is based, and “pleadings, evidence and other parts of the proceeding before the agency”); *Lands Council v. Powell*, 395 F.3d 1019, 1029-30 (9th Cir. 2005) (explaining that judicial review of an agency’s decision is based upon the documents the agency considered at the time of its decision-making and the record it compiled in the course of its action.). The Williams Declaration was simply “not part[] of the proceedings before” Region 10 and, thus, under fundamental principles of administrative law it constitutes prohibited extra-record material.

Finally, Region 10 and Shell would be prejudiced if the Board were to consider the Williams Declaration. Ms. Williams did not provide her opinions during the public comments period, and her views have not been considered by the Region. Nor did Petitioner follow the appropriate course of seeking leave of the Board to supplement the administrative record underlying the Region’s decisions. The Board should emphatically reject such backdoor supplementation of the administrative record at this late date.

For the foregoing reasons, the Williams Declaration should be stricken from the record.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing Shell's Motion to Strike the Williams Declaration to be served by electronic mail upon:

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