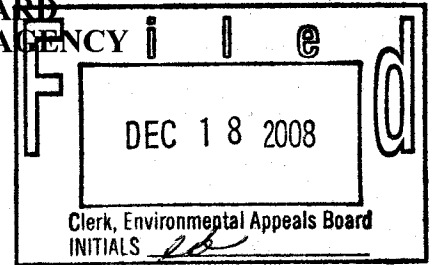


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)
Shell Offshore, Inc.)
Kulluk Drilling Unit)
OCS Permit No. R10OCS-AK-07-01)
(Revised))

OCS Appeal Nos. 08-01, 08-02, & 08-03

ORDER STAYING PROCEEDINGS

On June 18, 2008, U.S. EPA Region 10 (“Region”) issued an Outer Continental Shelf (“OCS”) air regulation minor source permit to Shell Offshore, Inc. (“SOI”), pursuant to Clean Air Act section 328, 42 U.S.C. § 7627, and the applicable regulations governing air emissions from OCS sources at 40 C.F.R. part 55. The permit authorizes SOI to “mobilize, operate, and demobilize” a drilling vessel for placement and anchoring in the Beaufort Sea floor off the North Slope of Alaska, for the purpose of oil exploration. The following three petitioners seek review of the permit: 1) Bill MacClarence, P.E.; 2) The North Slope Borough, Inupiat Community of the Arctic Slope, and the Alaska Eskimo Whaling Commission (collectively: “NSB”); and 3) the Alaska Wilderness League, Center for Biological Diversity, Natural Resources Defense Council, Northern Alaska Environmental Center, Pacific Environment, and Resisting Environmental Destruction on Indigenous Land (collectively: “AWL”).

In a decision issued on November 20, 2008, the U.S. Court of Appeals for the 9th Circuit vacated the Minerals Management Service’s (“MMS’s”) approval of SOI’s exploration plan for proposed drilling operations in the Beaufort Sea. *See Alaska Wilderness League v. Kempthorne*, No. 07-71457, slip op. at 15,589 (9th Cir. Nov. 20, 2008). The court remanded for the MMS “to

prepare a revised [environmental assessment] or, as necessary, an [environmental impact statement].”

Id. In light of the 9th Circuit’s decision, and the uncertainty it casts over the timing and content of the permit challenged by the petitions for review in this matter, the Board cancelled oral argument scheduled for December 4, 2008, and ordered the Region and SOI to show cause by December 15, 2008, why the OCS permit should not be remanded to the Region. Cancellation of Oral Argument and Order to Show Cause (Nov. 21, 2008) (“Show Cause Order”). The petitioners were also invited to submit responses to the Show Cause Order.

The Region filed its response to the Show Cause Order on December 11, 2008. Initial Response to Order the Show Cause and Unopposed Motion to Hold Case in Abeyance (Dec. 11, 2008) (“Region’s Response”). SOI filed its response on December 15, 2008. Shell Offshore Inc’s Preliminary Response to Order to Show Cause (Dec. 15, 2008) (“SOI Response”). Finally, Petitioners NSB and AWL filed a joint reply on December 15, 2008. Petitioners’ Joint Opposition to EPA’s Motion to Hold in Abeyance (Dec. 15, 2008) (“Petitioners’ Response”).

In its response, the Region states that it is currently in the process of consulting with EPA headquarters offices on the effects of the 9th Circuit’s decision on the permit at issue in this case. Region’s Response at 2. The Region states further that both the MMS and SOI are considering whether to seek rehearing of the *Alaska Wilderness League* case. *Id.* The parties have until January 4, 2009, to request rehearing or rehearing en banc from the Ninth Circuit. *Id.* at 2-3. The Region states that:

Given the potential for rehearing of the *Alaska Wilderness League* matter and the possibility that a new decision could issue as a result of such rehearing, * * * Region 10, in consultation with EPA headquarters offices, has determined that it cannot

currently determine if a remand of the [OCS permit] will be necessary or appropriate to address the *Alaska Wilderness League* decision. At this time, Region 10 does not have the information necessary to respond to the Board's [Show Cause Order].

Id. at 4. The Region therefore requests that the Board hold this matter in abeyance until fourteen days after the Ninth Circuit issues its final mandate. *Id.* at 4-5. SOI concurs in the Region's request.

According to SOI:

If rehearing is granted, the Ninth Circuit's current decision will not be operative and could have no effect on Shell's OCS air permit at issue here until rehearing is complete (and then only if affirmed) and a mandate issued. If the Court denies a rehearing request (or no party requests it), then the question of whether remand of this permit is appropriate can be considered following the issuance of [the] mandate at that time. Therefore, SOI believes that it is premature now to consider the implications of *Alaska Wilderness League*, if any, on this appeal.

SOI requests that * * * the parties to this appeal be required to file response to the Board's Order to Show Cause fourteen (14) days after the Ninth Circuit issues the mandate in *Alaska Wilderness League*, whether the mandate issues following the expiration of time in which to file a request for rehearing, the Court's rejection of any such rehearing requests, or the Court's decision on rehearing. Under any of these scenarios, the Ninth Circuit will have issued a final decision that will enable the parties in these appeals to respond meaningfully to the Order to Show Cause.

SOI Response at 2-3.

Petitioners oppose the Region's and SOI's request for abeyance of the proceedings.

According to Petitioners:

The Board should reject * * * EPA's request for an indefinite abeyance of the proceedings. The decision of the Ninth Circuit has been issued, and the EPA has the capacity to interpret the decision and provide a response to the order to show cause. There is no need for EPA to wait an indefinite period of time before providing the Board with its position on the impact of the Ninth Circuit's opinion.

Petitioners' Response at 2 (footnote omitted).

Upon consideration, the Board has decided to stay these proceedings until such time as the Ninth Circuit has issued its final mandate in the *Alsaka Wilderness League* matter, whether that mandate follows the expiration of time in which to file a request for rehearing, the Ninth Circuit's rejection of any rehearing requests, or the Ninth Circuit's decision on rehearing. Absent such a final determination and clarification by the Ninth Circuit of the status quo, any action by this Board would be premature and an inefficient use of the Board's and the parties' resources. Within five (5) calendar days after issuance of the Ninth Circuit's final mandate in this matter, the Region shall notify the Board of such action.¹ In addition, within fourteen (14) calendar days after issuance of the Ninth Circuit's final mandate, SOI, the Region, and Petitioners shall file² with the Board a substantive response to the Board's Show Cause Order.

So ordered.

Dated: *December 18, 2008*

ENVIRONMENTAL APPEALS BOARD

By: *Charles J. Sheehan*
Charles J. Sheehan
Environmental Appeals Judge

¹ The Region shall serve this notice on SOI and all petitioners.

² Documents are "filed" with the Board on the date they are *received*.

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Staying Proceedings in the matter of Shell Offshore, Inc., OCS Appeal Nos. 08-01, 08-02, & 08-03, were sent to the following persons in the manner indicated:

First Class Mail:

Christopher Winter
Crag Law Center
917 SW Oak Street, Suite 417
Portland, OR 97205

Eric Jorgensen
EARTHJUSTICE
325 Fourth Street
Juneau, AK 99801

Peter Van Tuyn
Besseney & Van Tuyn, L.L.C.
310 K. St #200
Anchorage, AK 99507

Duane A. Siler
Susan Mathiascheck
Patton Boggs LLP
2550 M Street N.W.
Washington, D.C. 20037

Thomas Llewellyn
Thomas, Sayre, Llewellyn
1215 17th Street, NW
Washington, DC 20036

First Class Mail:

Bill MacClarence, P.E.
10840 Glazanof Drive
Anchorage, Alaska 99507

Interoffice Mail:

Elliot B. Zenick
Kristi M. Smith
Air and Radiation Law Office
Office of General Counsel

Pouch Mail:

Juliane R. B. Matthews
Assistant Regional Counsel
Office of Regional Counsel (ORC-158)
U.S. EPA, Region 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98110

Margaret B. Silver
Associate Regional Counsel
Office of Regional Counsel (ORC-158)
U.S. EPA, Region 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98110

Dated: DEC 18 2008



Annette Duncan
Secretary