



November 1, 2011

FILED ELECTRONICALLY

Eurika Durr, Clerk of the Board
Environmental Appeals Board
Ronald Reagan Building, EPA Mail Room
1300 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Re: Response to Shell’s “Notification of Request for Expedited Resolution” of *Shell Offshore, Inc. and Shell Gulf of Mexico Inc.*, Appeal Nos. 11-02 and 11-03 (consolidated); Docket Nos. R10OCS/PSD-AK-2010-01 and R10OCS/PSD-AK-09-01

Dear Ms. Durr:

By this letter, Petitioners Native Village of Point Hope, et al. (“NVPH Petitioners”)¹ respond to a letter submitted to the Environmental Appeals Board (“Board”) by Shell Offshore Inc. and Shell Gulf of Mexico Inc. (together “Shell”) on October 4, 2011, and seek clarification of the schedule for this appeal in a status conference.

Shell, in its letter, anticipated the appeals captioned above and preemptively requested, *inter alia*, that parties to the appeals be limited to a single brief with no reply. Contrary to Shell’s view, NVPH Petitioners believe that a reply brief—and potentially oral argument—would assist the Board, and hereby request a status conference to address the availability of each. Counsel for Shell and counsel for EPA Region 10 (“Region”), the permitting authority, both oppose this request for a status conference as premature. Counsel for petitioners Iñupiat Community of the Arctic Slope and the Alaska Eskimo Whaling Commission indicated that they support the filing of reply briefs in this matter and think a status conference might be beneficial.

In the context of expedited review, it would minimize uncertainty and potential delay if the Board establishes a reasonable reply period at the outset, rather than wait to determine—on the basis of response briefs and subsequent motion(s) and response(s)—whether reply briefs would be helpful to the Board. Likewise, to the extent the parties and Board may determine that oral

¹ The Petition for Review filed by the NVPH Petitioners is designated as OCS Appeal No. 11-02. See Order Consolidating Petitions for Review and Establishing Word Limitations for Responses at 2 n.2, *In re Shell Gulf of Mexico, Inc.*, OCS Appeals Nos. 11-02 & 11-03, 10-12 (Oct. 26, 2011). Petitioners in this appeal include Native Village of Point Hope, Resisting Environmental Destruction of Indigenous Lands, Alaska Wilderness League, Center for Biological Diversity, Natural Resources Defense Council, Northern Alaska Environmental Center, Ocean Conservancy, Oceana, Pacific Environment, Sierra Club, and The Wilderness Society. *Id.* To avoid confusion with prior petitions, the afore-listed petitioners in this appeal refer to themselves as “NVPH Petitioners” in reference to the lead petitioner.

argument is important, as they have in the past, establishing a date now avoids delay in setting an appropriate date later. A status conference could facilitate timely resolution of these issues.

Although the Board issued a standing order in April establishing a presumption against replies in New Source Review program appeals,² consistent with the approach taken in two previous appeals of Outer Continental Shelf (“OCS”) Prevention of Significant Deterioration (“PSD”) permits issued to Shell, NVPH Petitioners believe that it would assist the Board both to allow a reply brief and to resolve that question at this stage in the process rather than defer it until after response briefs are filed.³

A reply brief likely will be helpful to the Board for a number of reasons. First, the Region’s response to comments on the PSD permits provided some legal justification for its decisions here, but the Region may provide additional argument in response to NVPH Petitioners’ petition for review. Second, NVPH Petitioners’ challenges address the inaugural air permits for offshore drilling operations in the Arctic Ocean and raise issues pertaining to the Region’s application of the relatively new 1-hour national ambient air quality standard for nitrogen dioxide; as a consequence, these appeals involve issues of first impression and national importance. Indeed, NVPH Petitioners have been informed that counsel from EPA’s “Cross-Cutting Issues Law Office” will be participating in the appeal. Third, Shell is participating in the appeal and likely will present information and perspectives that differ from the positions adopted by the Region. NVPH Petitioners should be given an opportunity to reply to new arguments raised by Shell. Finally, NVPH Petitioners initiated their appeals without the benefit of a full, final agency record. Accordingly, the Region or Shell may raise or emphasize facts or documents that were previously unknown to NVPH Petitioners, meriting an amended filing or a reply. In light of the foregoing, allowing NVPH Petitioners to file a reply brief is expected to assist the Board in “giving fair consideration to the issues raised” by the petitions.

Shell avers in its letter to the Board dated October 4, 2011, that “Arctic operations have very long lead times” and the company needs to make “irrevocable commitments” soon.⁴ Such economic interests may justify high prioritization by the Board and an expedited schedule. However, Shell’s economic interests are secondary to NVPH Petitioners’ right to a fair hearing of their claims and the Board’s obligation to give the issues in the appeal fair consideration. Shell’s declared intention to begin operations in 2012 notwithstanding, the drilling season is still approximately nine months away and the company itself acknowledges that it has not yet

² Environmental Appeals Board, Order Governing Petitions for Review of Clean Air Act New Source Review Permits at 3 (Apr. 19, 2011).

³ See Order Consolidating Petitions for Review and Setting Briefing Schedule at 2-3, *In re Shell Gulf of Mexico, Inc.*, OCS Appeal Nos. 10-01 through 10-03 & 10-12 (May 14, 2010) (establishing schedule for response briefs, replies, and oral argument); Order Setting Briefing Schedule at 3-4 & n.8, *In re Shell Offshore, Inc.*, OCS Appeals Nos. 07-01 & 07-02, (July 20, 2007) (setting schedule including reply briefs at the outset of expedited review and reserving a date for oral argument though declining to reach a final determination regarding whether argument would be held).

⁴ Letter from Duane A. Siler, Counsel for Shell Offshore Inc. and Shell Gulf of Mexico Inc., to Eurika Durr, Clerk of the Board, Re: Notification of Request for Expedited Resolution of Anticipated Petitions for Review of Shell Outer Continental Shelf Air Permits R10OCS/PSD-AK-2010-02 and R10OCS/PSD-AK-2020-02 at 2 (Oct. 4, 2011).

secured all approvals necessary to drill.⁵ Significantly, for the 2010 drilling season, the company planned to drill even though air permits were not issued until late March and early April of the same year—just three months before the planned commencement of operations.⁶ With expedited briefing already underway, there is sufficient time for the Board to consider Shell’s interests and still have reasonable opportunity for reply and, if necessary, oral argument.

As noted above, NVPH Petitioners believe that it would minimize uncertainty and delay if the Board held a status conference and developed a schedule that establishes a reasonable reply period and date for oral argument. However, if the Board is disinclined to hold a status conference or to establish a schedule for reply briefs and oral argument at this time, consistent with the practice outlined in the EAB Practice Manual, NVPH Petitioners will file a motion for leave to file a reply as appropriate “as soon as possible upon receipt” of the responses.⁷

For the foregoing reasons, NVPH Petitioners hereby request a status conference to discuss the scheduling of a reply brief and, potentially, oral argument. In the alternative, NVPH Petitioners request that the Board withhold any determination on the availability of a reply and/or oral argument until NVPH Petitioners have been afforded an opportunity, following receipt of the final record and responses, to file a motion addressing the need for a reply and argument.

Thank you for your consideration of these requests.

Sincerely,

/s/ Colin C. O’Brien

Colin C. O’Brien

Counsel for NVPH Petitioners

⁵ *Id.* (“Shell is diligently pursuing other approvals it will need for the 2012 drilling season and expects to have those approvals in early 2012.”)

⁶ The PSD permits that were subject to review by this Board last year were issued on March 31, 2010, and April 9, 2010, respectively. *See In re Shell Gulf of Mexico, Inc.*, OCS Appeal Nos. 10-01 – 10-04, 15 E.A.D. __, 3-4 (Dec. 30, 2010). Despite this late issuance date, Shell still planned to commence drilling in July of the same year. *See Urgent request of Shell Gulf of Mexico, Inc. and Shell Offshore, Inc. for leave to participate and motion for expedited and combined review at 4, 6-7, 13, In re Shell Gulf of Mexico, Inc.*, OCS Appeals Nos. 10-01 through 10-03 (May 5, 2010) (stating Shell’s intention to drill beginning in early July of 2010).

⁷ EPA, *The Environmental Appeals Board Practice Manual* at 48 (Sept. 2010).

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2011, copies of the foregoing RESPONSE TO SHELL’S “NOTIFICATION OF REQUEST FOR EXPEDITED RESOLUTION” in the matter of *Shell Gulf of Mexico Inc., Permit No. R10OCS/PSD-AK-09-01 and Shell Offshore Inc., Permit No. R10OCS/PSD-AK-2010-01*, OCS Appeal Nos. 11-02 and 11-03, were served by electronic mail on the following persons:

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