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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)	
_____)	

**OPPOSITION OF SHELL GULF OF MEXICO INC. AND SHELL OFFSHORE INC.
TO
MOTION TO HOLD MATTERS IN ABEYANCE**

Shell Gulf of Mexico Inc. and Shell Offshore Inc. (collectively, "Shell") hereby respectfully oppose EPA Region 10's Motion to Hold Matters in Abeyance. For the reasons set forth below, Shell believes that the Environmental Appeals Board should reject this motion and proceed with review of the pending petitions on the schedule set by the Board's May 14, 2010 Order. Shell has invested a huge amount of time and resources in working with Region 10 to obtain the Outer Continental Shelf ("OCS") Prevention of Significant Deterioration ("PSD") permits that are the subject of the petitions in this matter. The issues that are presented in those pending petitions are largely questions of law and have important bearing on the permits for Shell's projects regardless of the year in which drilling commences. The issues presented by Petitioners are ripe for the Board's decision now. It would conserve the Board's and the parties' resources to adhere to the current briefing and hearing schedule, and for the Board to decide those issues relatively quickly, *e.g.*, by September 1, 2010. This would reduce the potential that, when the suspension on Arctic drilling (which does not appear to be related to air emissions) is lifted, if the permits are modified somewhat, these same issues would still be unresolved at that time, and Shell again would need expedited resolution of these issues in order to conduct exploration drilling in the summer of 2011. To proceed on the current schedule, with a decision in the relatively near future, would also ensure that, if the Region does *not* prevail on any of these issues, it will at least be able to address over the course of the remainder of this year any deficiency EAB might identify, rather than waiting until 2011 to even have such a deficiency identified.¹

¹ Shell respectfully suggests that, if the Board is not persuaded by the arguments herein to reject Region 10's motion to hold these proceedings in abeyance, the Board should take the motion under advisement and proceed at least with the current briefing schedule and the hearing. In that way, the Board would

(continued...)

BACKGROUND

The Region seeks to “hold these matters in abeyance pending the conclusion of President Obama’s moratorium on drilling activities on the Outer Continental Shelf.” Motion at 1. As noted in Shell’s Notice of Related Decision, filed on May 28, 2010 (before service of Region 10’s pending motion) President Obama announced on May 27 that the Administration was taking a number of actions in regard to offshore exploration drilling, one of which was that the Administration “will suspend the planned exploration of two locations off the coast of Alaska.” Shell advised the Board that the President’s decision might preclude Shell from conducting any exploratory drilling in the Chukchi and Beaufort Seas during the 2010 summer drilling season.

The contours of this suspension have since become clearer. On May 27, the Department of the Interior (“DOI”) issued a press release stating: “Secretary Salazar said the Administration will continue to take a cautious approach in the Arctic and, in light of the need for additional information about spill risks and spill response capabilities, will postpone consideration of Shell’s proposal to drill up to five exploration wells in the Arctic this summer.”

<http://www.doi.gov/news/pressreleases/Salazar-Calls-for-New-Safety-Measures-for-Offshore-Oil-and-Gas-Operations-Orders-Six-Month-Moratorium-on-Deepwater-Drilling.cfm>. A fact sheet accompanying the Secretary’s report to the President on increased safety measures for OCS drilling provided further information on the Department’s action:

Shell, which has leases in both the Beaufort and Chukchi Seas in the Arctic, had sought to begin drilling 5 exploratory wells in those areas this summer. Secretary Salazar announced on May 27 that Applications for Permits to Drill those 5 wells will not be considered until 2011 because of the need for further information-

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have the benefit of the briefing and argument on the merits in deciding whether to suspend these proceedings.

gathering, evaluation of proposed drilling technology, and evaluation of oil spill response capabilities for Arctic waters.

<http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=33566>.

Taken together, these actions indicate that DOI apparently will not consider issuing final permits to Shell for exploration drilling in the Chukchi and Beaufort Seas until next year based on the focused review of drilling technology and response capabilities for oil spills. Significantly, the information on the suspension does not appear to address any issues related to air emissions from exploratory drilling.²

ARGUMENT

Region 10 argues that “[t]he moratorium on OCS drilling activities raises a number of complex issues potentially related to the status of the CAA permits at issue here.” Motion at 3. The Region says it “does not know whether the general review to be conducted during the moratorium will lead to events that could affect the CAA permitting in this case — e.g., the addition of extra emergency response vessels to Shell’s proposed operations, the emissions for which EPA would need to analyze in light of CAA permitting requirements.” *Id.* at 3-4. The Region also expresses concern that it “cannot currently determine if a remand and/or withdrawal

² We are assuming, for purposes of Region 10’s motion, that the President has authority to issue a suspension/moratorium on permits already issued and final or that, as in Shell’s case, DOI has properly followed applicable law and procedure in delaying issuance of final permits for drilling. For the reasons explained herein, even assuming the legality of the current suspension/ moratorium, there is ample reason for the Board to hear these OCS air permit appeals. We have not yet seen a legal order effectuating the suspension/moratorium and there is a possibility that such actions may be challenged and held unlawful. In view of that uncertainty, the rationale for the Board to hear these appeals now is even more compelling.

of the Shell permits will be necessary or appropriate to address the concerns that prompted the moratorium.” *Id.* at 4.³

Even setting aside the fact that the “concerns that prompted the moratorium” appear to have nothing to do with air emissions from OCS exploration drilling in general (and may not even apply to the apparently independent “suspension” of Arctic exploration drilling permits), Region 10’s stated concerns do not withstand scrutiny. At the outset, it must be emphasized that there is no *a priori* reason to assume that DOI will require modifications to Shell’s exploration plans. The conditions relevant to the potential for oil spills in the shallow-water locations where Shell will explore in the Chukchi and Beaufort Seas are profoundly different from those in the mile-deep water and high-pressure formations in the Gulf of Mexico.⁴ It is entirely possible, and perhaps even likely, that DOI will again conclude that Shell’s well designs are sound and its oil spill prevention and response plans are exemplary.

Further, as noted above, the DOI review during the suspension period appears focused on drilling technology and response capabilities for oil spills — it is far from some nebulous

³ EPA has a statutory obligation to take final action on a completed permit application within one year of submission of that completed application. 42 U.S.C. § 165(c). The necessary result of EPA’s motion is potentially to delay Shell’s PSD permits indefinitely, in violation of this statutory provision.

⁴ These differences include:

1. Shell’s Chukchi and Beaufort Sea wells will be drilled in approximately 150’ of water; the BP well being drilled in the Gulf of Mexico was in approximately 5000’ of water.
2. Shell’s Chukchi and Beaufort Sea wells will be drilled to approximately 10,000’; the BP well being drilled in the Gulf of Mexico went to 18,000’.
3. Maximum pressures at Shell’s proposed Chukchi and Beaufort Sea wells are approximately 3500 psi; maximum pressures at the well being drilled in the Gulf of Mexico were approximately 12,500 psi.
4. Because of the factors listed above, BP’s well required very different and much more complex combinations of well-control strategies, equipment, and material. Shell’s proposed wells, drilled in shallow water, to shallower depths and involving lower pressures, will not involve these additional complexities.

“general” review of the entirety of Shell’s Arctic drilling program, which seems to lead the Region to cite to some seemingly large and vague uncertainty here. It is true that emissions from exploration drilling may change if DOI requires additional safety measures to prevent and respond to a potential oil spill, such as additional oil spill response vessels that would, *e.g.*, conduct drills within 25 miles of the *Frontier Discoverer* when it becomes an OCS source and thus be considered to contribute emissions to the OCS source. In that event, those emissions may need to be included in the analysis of project emissions on air quality to demonstrate compliance with NAAQS. However, none of the issues presented in Petitioners’ appeals depends on the number of associated vessels or their emissions on which the permits were based. The pending appeals present the following primarily legal issues:

- Whether as a matter of law the Board has jurisdiction to consider Petitioners’ challenge to the Administrator’s final rulemaking decision on when CO₂ will be “subject to regulation” under the Clean Air Act and whether the Region erred in following the Administrator’s final decision in deciding that these PSD permits need not require BACT for CO₂. (CBD; AEWC)
- Whether as a matter of law the Region erred in not requiring BACT for vessels that are not OCS sources and that will operate within 25 miles of the OCS source, but will not attach to it. (EarthJustice)
- Whether the Region’s determination that the *Frontier Discoverer* is an OCS source when it is stabilized and ready to drill at a drill site, and thus that its propulsion engine and associated fleet vessels are not part of the OCS source, is inconsistent with the regulatory and statutory definitions of “OCS source.” (AEWC)
- Whether Region 10 erred in determining that these permits must comply with the standards in effect at the time of issuance, rather than standards that would be effective at some future date. (AEWC)

- Whether Region 10 should have included emissions from hypothetical situations, such as response to an oil spill, in the OCS source's potential to emit, rather than excluding such hypothetical emissions from emergency events from the calculation of potential to emit, reserving its enforcement discretion to address such emissions, should they occur. (AEWC)
- Whether Region 10's environmental justice obligations regarding consideration of impacts of an OCS source's on environmental justice communities are, as a matter of law, met by air quality impact analyses demonstrating that emissions from the source will not cause an exceedance of an applicable national ambient air quality standard, as the Board held in *In re Shell Offshore, Inc., Kulluk Drilling Unit and Frontier Discoverer Drilling Unit*, 67-68 (EAB 2007). (AEWC)⁵

The temporary suspension of DOI permitting for Shell's wells until 2011 does not affect the Board's ability to determine these primarily legal issues in 2010. To do so would be efficient and would conserve the Board's and the parties' resources, as well as reduce the potential that Shell will need to seek expedited briefing and decision again in the future. Assuming for purposes of argument that DOI may require changes to Shell's exploration plans that increase the number or amount of emissions that must be considered in PSD permitting, those changes can be addressed most efficiently by modifications to the permits, which could be undertaken by the Region in due course. Such modifications would conform to the permitting procedures in 40 C.F.R. Part 124, including potential review of any new permit conditions by the EAB.

⁵ The remaining issues, raised by AEWC, are highly technical ones, *i.e.*, whether Region 10 erred in approving Shell's analysis of background ambient levels of PM_{2.5} based on less than one year's monitoring data, as validated by a Quality Assurance Program Plan approved after monitoring commenced, and whether Shell should have considered secondary emissions of PM_{2.5} resulting from the asserted transformation of other pollutants or instead the Region reasonably concluded that adequate scientific protocols do not exist to predict such transformation. These highly technical issues can certainly be reviewed now.

The Board should carry on with resolution of the pending appeals of the permits in their current form, and resolve the mainly legal issues raised by Petitioners. With these issues resolved, and assuming that the Board affirms the permits, the Board's consideration of petitions for review of such modifications as the Region may make — if any — in 2011 would entail a narrower, more focused, and less time-consuming review. Moreover, given the short seasonal window for Arctic drilling and the lengthy permit issuance and review process, any permitting in 2011 following a lifting of the suspension will need to proceed on a tight schedule, as did the permits at issue here. Proceeding now to resolve the issues identified above will reduce the potential for a need for expedited review of these permits in 2011. With the narrowing of issues that would result from the Board's review of the pending petitions, review of any modifications to the permit would be less complex and time-consuming. This will conserve EAB's resources and enable Shell to have OCS permits in place in the near term, recognizing that they could (but by no means is it certain they will) be ultimately modified to accommodate any potential additional emissions related to possibly augmented oil spill response resources. Again, it bears noting that, with the possible exception of such additional contingency planning and drills, the suspension does not appear focused on air emissions or CAA permits. Alternatively, if the Board were to remand the permits on any of these issues, and do so by September 1, 2010, there might then be time for Region 10 to revise the permits to correct any remanded deficiencies and reissue them well in advance of a 2011 summer drilling season.

By contrast, if the Board's review is suspended for six months or more, it may be difficult for the Board to later resolve these petitions in a timeframe that will support Shell's and the Region's continued permitting efforts for a 2011 drilling season. Thus, resolution of the pending appeals in a reasonable timeframe during 2010, *e.g.*, by September 1, 2010, following briefing

and argument under the current schedule, is of significant importance to Shell. Continuing on the current briefing schedule would not prejudice Petitioners, who have agreed to the current schedule and already filed their petitions, nor would it prejudice EPA Region 10, which has already addressed the major challenges in its issuance of the permits and need not await more developments to defend its permitting decisions.

CONCLUSION

In order to maximize the viability of Shell's and Region 10's investment of time and resources in the Chukchi and Beaufort permits and to reduce the potential for another expedited EAB proceeding in mid-2011 on issues that could be resolved now, Shell respectfully urges the Board to reject Region 10's motion and (a) retain the current schedule for briefing and oral argument in this consolidated proceeding and (b) decide the petitions on a reasonably expedited basis during 2010.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing Shell's Opposition to EPA Region 10's Motion to Hold in Abeyance to be served by electronic mail upon:

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