

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

\_\_\_\_\_) )  
In re: ) )  
 ) )  
Shell Offshore, Inc. ) OCS Appeal Nos. 08-01, 08-02, & 08-03  
Kulluk Drilling Unit ) )  
 ) )  
OCS Permit No. R10OCS-AK-07-01 )  
(Revised) )  
\_\_\_\_\_)

**INITIAL RESPONSE TO ORDER TO SHOW CAUSE  
and  
UNOPPOSED MOTION TO HOLD CASE IN ABEYANCE**

EPA Region 10 hereby responds to the Board's November 21, 2008 Order to Show Cause in the above captioned matter and moves to hold this matter in abeyance pending final resolution of the matter addressed in *Alaska Wilderness League v. Kempthorne*, No. 07-71457 (9<sup>th</sup> Cir., Nov. 20, 2008). In support of this motion, EPA Region 10 states the following:

1. On November 20, 2008, the United States Court of Appeals for the Ninth Circuit issued an opinion in a case challenging the Mineral Management Service's (MMS) approval of an exploratory drilling plan submitted by Shell Offshore Inc. (SOI). See *Alaska Wilderness League v. Kempthorne*, No. 07-71457 (9<sup>th</sup> Cir., Nov. 20, 2008). The court vacated MMS's approval of SOI's exploratory drilling plan for the outer continental shelf (OCS) of the Beaufort Sea and remanded for MMS to prepare a revised environmental assessment or to issue an environmental impact statement, as necessary, to address the proposed drilling plan. *Id.*, slip op. at 15589.

2. The Ninth Circuit opinion in *Alaska Wilderness League* is potentially related to the present EAB matter because Petitioners in this case are challenging a Clean Air Act (CAA) permit that EPA Region 10 issued to SOI for the same exploratory drilling activity authorized by MMS and addressed in the Ninth Circuit's opinion.
3. Accordingly, on November 21, 2008 the Board issued an order directing Region 10 and SOI to show cause by December 4, 2008, why the permit should not be remanded in light of the Ninth Circuit's opinion in *Alaska Wilderness League*. Thereafter, in response to an unopposed motion filed by Region 10, the deadline for responding to the show cause order was extended until December 15, 2008. See Extension of Time to Respond to Show Cause Order (Dec. 2, 2008).
4. The Ninth Circuit's opinion raised a number of complex issues potentially related to the status of the CAA permit at issue here. Region 10 is in the process, in consultation with EPA headquarters offices, of determining whether the *Alaska Wilderness League* affects the CAA permit at issue in this case. Additionally, Region 10 has conferred with MMS and SOI regarding the Ninth Circuit opinion in *Alaska Wilderness League* and its potential impact on SOI's exploratory drilling activity in the Beaufort Sea. Region 10 was informed that both MMS and SOI are considering various programmatic and legal options for going forward.
5. Of particular importance to this action and the pending show cause order, both MMS and SOI noted that they are still considering whether to seek rehearing of the *Alaska Wilderness League* case. In accordance with Rule 40 of the Federal Rules of Appellate Procedure (FRAP), in a case in which the United States or a Federal agency – such as MMS – is a party, any party may file a petition seeking

panel rehearing within 45 days after entry of the judgment. The same 45-day time limit also applies to petitions for rehearing en banc under FRAP 35(c).

Accordingly, parties in the *Alaska Wilderness League* case, including MMS and SOI, have until January 4, 2009 to seek panel rehearing or rehearing en banc from the Ninth Circuit.<sup>1</sup>

6. As the Ninth Circuit's mandate in the *Alaska Wilderness League* case has not yet issued, there is not a final resolution of that matter. In accordance FRAP 41(b), unless the court shortens or extends the time, the mandate must issue within 7 calendar days after the time to file a petition for rehearing expires, or within 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. In addition, unless the court orders otherwise, the issuance of the mandate is stayed pending disposition for a petition for rehearing. FRAP 41(d)(1).<sup>2</sup> Accordingly, Region 10 will not know whether the events that could potentially effect the CAA permitting in this case – i.e., vacatur of MMS's approval of SOI's exploratory drilling plan for the Beaufort Sea OCS and remand of the environmental assessment actually remanded to MMS – will actually come to pass until such time as the mandate issues in the *Alaska Wilderness League* case, which would happen in mid-January at the earliest.

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<sup>1</sup> The time period allowed for filing a motion for reconsideration of the *Alaska Wilderness League* decision passed without such a motion being filed. See Ninth Circuit Rule 27-10 (allowing such motions to be filed within 14 days from date of judgment).

<sup>2</sup> The issuance of the mandate can also be stayed pending the filing of a petition for a writ of certiorari in the U.S. Supreme Court. See FRAP 41(d)(2).

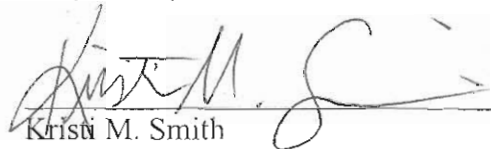
7. Given the potential for rehearing of the *Alaska Wilderness League* matter and the possibility that a new decision could issue as a result of such rehearing, *cf. Alaska Wilderness League v. Kempthorne*, No. 07-71457 (9<sup>th</sup> Cir., Nov. 20, 2008) (C.J. Bea, dissenting), Region 10, in consultation with EPA headquarters offices, has determined that it cannot currently determine if a remand of the Shell CAA 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 order "to show cause why the [SOI] OCS permit should now not be remanded to the Region." Order to Show Cause at 2.
8. Accordingly, Region 10 asks that this case, including final responses to the Order to Show Cause, be held in abeyance until fourteen (14) days after the Ninth Circuit issues the mandate in the *Alaska Wilderness League* case.
9. Counsel for Region 10 have conferred with counsel for the Alaska Wilderness League (AWL) Petitioners, North Slope Borough (NSB) Petitioners, and SOI. Counsel for AWL Petitioners indicated that his clients will file their own document with the EAB regarding the show cause order and take no position on Region 10's motion at this time. Counsel for NSB Petitioners also indicated that his clients do not take a position on Region 10's request to hold this action in abeyance. Counsel for SOI indicated that his clients do not oppose Region 10's request to hold this action in abeyance (including final responses to the show

cause order) until fourteen days after the mandate issues in the *Alaska Wilderness League* case.<sup>3</sup>

WHEREFORE, for the reasons set forward above, Region 10 requests that the Board hold this matter, including the final responses to the Order to Show Cause, in abeyance until fourteen (14) days after the Ninth Circuit issues the mandate in the *Alaska Wilderness League* case.

Date: December 11, 2008

Respectfully submitted,



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<sup>3</sup> Based on communications with counsel for AWL Petitioners, Region 10 Counsel understands that Petitioner Bill MacClarence is still recovering from a serious medical condition, and thus we did not attempt to contact him regarding this motion to hold the case in abeyance.

## CERTIFICATE OF SERVICE

I hereby certify that copies of the Response of EPA Region 10 to the Petitions for Review (OCS Appeal Nos. 08-01 thru 08-03) were served on the following persons via U.S. Mail and electronic mail:

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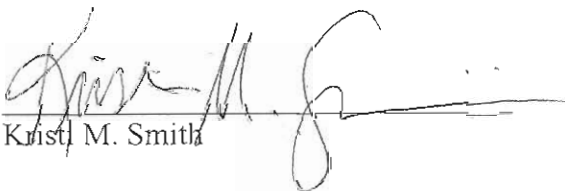
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