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

In re: Shell Offshore Inc. OCS Permit No. R10OCS030000	)	OCS Appeal Nos. 11-05 through 11-07

OPPOSITION TO MOTIONS FOR LEAVE TO FILE A REPLY

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Petitioners Resisting Environmental Destruction of Indigenous Lands *et al.* ("REDOIL Petitioners") (OCS Appeal No. 11-06) and Petitioner Inupiat Community of the Arctic Slope ("ICAS") (OCS Appeal No. 11-07) each seek leave to file a reply brief in this matter. Recognizing the "time-sensitive nature" of New Source Review ("NSR") permit appeals,[1] the Board has established a presumption against the filing of a reply. Order Governing Petitions for Review of Clean Air Act New Source Review Permits ("Standing Order") at 2, 3. In the scheduling order issued in the pending *Discoverer* OCS appeals, the Board stated that a petitioner must "demonstrate with specificity why the arguments it seeks to raise in a reply brief overcome" the presumption. Order Denying Requests For Status Conference and Oral Argument and Establishing Filing Deadline (OCS Appeals Nos. 11-02 *et al.*, Nov. 4, 2011) at 5. Petitioners' filings have the appearance of supplemental briefs, essentially seeking leave to expand on the arguments to which each has already devoted almost 14,000 words. Petitioners have not met their burden and Shell Offshore Inc. ("Shell") urges the Board to adhere to the presumption by denying the motions. As the Board knows, Arctic OCS exploration is even more sensitive to delays than onshore NSR permits because of the long lead times for logistical and investment decisions and the seasonal limitations on operations. The Board can and should proceed to decide the Petitions for Review expeditiously on the extensive briefing already before it.

I. REDOIL Petitioners' Motion Should Be Denied.

The REDOIL Petitioners assert that Region 10's Response improperly cites record documents not cited in the Response to Comments to provide additional support for the Region's

[1] NSR appeals include Outer Continental Shelf ("OCS") permit appeals. Standing Order at 1 n.2. Shell cannot construct or operate the *Kulluk* as an Arctic OCS source without the final Title V permit challenged here.

conclusion that emissions from the *Kulluk* will not cause an exceedance of any Prevention of Significant Deterioration ("PSD") increment, *assuming that an increment analysis were required for the Kulluk project*. Petitioners invite the Board to delve into a technical issue that is not relevant and need not be addressed. As explained at length in Region 10's and Shell's Responses to the Petition, REDOIL Petitioners' radical new reading of Section 504(e) of the Clean Air Act should be rejected as a matter of law.[2]

As a threshold matter, Section 504(e) cannot reasonably be interpreted to require temporary minor sources that are not subject to New Source Review nevertheless to demonstrate that their emissions will not exceed applicable increments in order to obtain a Title V permit. Once this legal determination is made, it is unnecessary for the Board to consider whether the *Kulluk*'s emissions would cause an exceedance of the Class II increment for PM_{10} or other pollutants. Clearly, the Region's finding that the *Kulluk* will comply with increments that would apply to major sources in the Beaufort Sea is a supplemental justification. It is distinct from the Region's legal determination that Petitioners' novel reading of Section 504(e) is unsustainable, and would be relevant only if the Board were to reject the Region's "expansive legal argument that it need not conduct an increment analysis." *See* REDOIL Proposed Reply at 3. The Board should affirm the Region's *legal* conclusion and, upon doing so, would not need to consider the argument in EPA's Response on the *factual* issue of increment compliance. The Board should

[2] Neither Petitioner seeks to reply to any of Shell's arguments why Section 504(e) of the Clean Air Act does not require a temporary minor source to demonstrate that its emissions will not cause an exceedance of applicable increments. To the extent that Shell's arguments are different from those advanced by the Region, the proffered briefs do not address Shell's arguments even indirectly. These differences include, *e.g.*, Shell's arguments that (1) "applicable" in Section 504(e) in relation to visibility requirements is best read as referring to "applicable to the source," in further support of the Region's position with respect to increments, Shell Response to Petitions at 5 n.5, and (2) Petitioners' interpretation of Section 504(e) is inconsistent with the recently promulgated Federal Implementation Plan for Indian County, which does not require temporary minor sources to perform an increment analysis as a condition for permit issuance, Shell Response to Petitions at 8-9.

deny REDOIL Petitioners' motion on this issue, because the Region's *legal* argument that no such compliance was required entirely justifies the decision to issue the permit.[3]

The Board should also deny REDOIL Petitioners' attempt to re-argue the issue of the enforceability of emissions limits in the *Kulluk* permit. They object to the citation in the Region's Response to a published EPA decision that supports the Region's permitting rationale, as articulated in the Statement of Basis and Response to Comments, but which was not cited in the Region's record.[4] Though the nature of the showing required to overcome the Standing Order's presumption against a reply is for the Board to determine, the Board should reject the proposition advanced by Petitioners – namely, that if a response to a petition for review cites case law not cited in the Response to Comments, which additional authority provides further support for the permit issuer's well-articulated legal position, that legal citation justifies a reply. Such a rule would eviscerate the presumption in any case where the permit issuer's attorneys undertake normal legal advocacy by performing additional legal research on the issues a petitioner raises.

Petitioners were well aware of the legal position that the Region had taken – that the *Kulluk* permit's emission limitations, combined with testing and monitoring requirements, are practically enforceable – and could have addressed any precedent on this issue in their Petition.

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[3] REDOIL Petitioners' proposed brief includes a lengthy footnote (320 words) of additional argument on the Region's *legal* determination that no increment analysis was required. REDOIL Petitioners Proposed Reply at 2-3 n.1. This footnote consists of nothing but what Petitioners themselves call "further elaboration," *id.*, on arguments REDOIL Petitioners made in their petition. A wish merely to elaborate on arguments presented in the Petition should be deemed inadequate to overcome the Board's presumption against reply briefing.

[4] The decision is *In the Matter of Pope & Talbot*, Petition No. VIII-2006-04 (Adm'r 2007). Regardless of whether this precedent was appropriately adduced in the Response, REDOIL Petitioners say that their "fundamental objection" on this issue is to the accuracy of the emissions factors from which cumulative emissions will be calculated. REDOIL Petitioners' Proposed Reply at 10. On this highly technical issue the Region is entitled to heightened deference, especially with respect to the adequacy of the extensive confirmatory testing it is requiring for sources of all but a tiny fraction of the project emissions.

While the Region always bases its decision to issue a permit on the factual record, that principle does not require the Region also to catalog in the record all relevant legal authorities or case law that do, or could, support its permitting decision. If accepted, Petitioners' argument would mean that a permitting authority must prepare a legal brief in support of its permitting action in anticipation of a possible petition for review that might hypothetically raise certain legal issues. It would also mean that, in order to avoid the delay of reply briefing in an expedited PSD or OCS air permitting process, the permitting authority could rely in its response to a petition for review only on the legal authorities cited in that "brief."

It is well settled that "an agency is [not] barred from providing any additional explanation or amplification of a previously articulated (and record supported) rationale." *Port Authority of New York and New Jersey*, 10 E.A.D. 61, 94 (EAB 2001) (finding permit issuer's *rationale* for requiring permit condition that was provided for the first time on appeal improper). The Region "has always been clear and consistent as to its rationale for" determining that the *Kulluk* permit provides practically enforceable emissions limits. *See Three Mountain Power, LLC*, 10 E.A.D. 39, 55 n.15 (EAB 2001). The Region's citation of a decision that supports the rationale set forth in the Statement of Basis and Response to Comments is consistent with this precedent and is nothing more than standard legal advocacy.

REDOIL Petitioners' motion does not "demonstrate with specificity why the arguments it seeks to raise in a reply brief overcome" the presumption against replies in NSR appeals. Therefore, the Board should deny the motion.

II. ICAS's Motion Should Be Denied.

In its proposed reply, ICAS makes little effort to "demonstrate with specificity" why a reply brief is warranted and, instead, reargues nearly every issue it raised in its Petition. Each of

the grounds ICAS proffers as warranting its proposed reply lacks merit. First, ICAS argues that its reply is necessitated by the fact that Region's response brief cited to additional administrative orders, *i.e.*, published case law.[5] ICAS Motion at 2. As explained above, this argument is not persuasive and, if accepted, could preclude the Region's attorneys from engaging in proper advocacy.

Second, ICAS complains that it did not have the certified agency record at the time it filed its Petition. *Id.* The Board's Standing Order requires only that the permit issuer "include *with its response* relevant portions of the administrative record," Standing Order at 3 (emphasis added), and thus ICAS's argument does not justify a reply. Otherwise, if compliance with the Standing Order by filing the administrative record with the Agency's response justifies a reply, the presumption is a nullity. ICAS says certain documents in the record "are necessary to presenting ICAS's arguments." If that is the case, and knowing that the Standing Order does not require the Region to file the record until after a petition is filed, ICAS could and should have sought those known-to-be-necessary documents before it filed its Petition.[6]

Third, ICAS seeks to provide further argument regarding methane emissions because the Region has supposedly "focused its arguments" on this issue and the record allegedly contains "contradictory evidence." ICAS Motion at 2. On their face these arguments do not merit a reply, and ICAS's proposed reply merely restates its belief that differences between Shell's methane emissions estimates and those provided by ConocoPhillips in a now-withdrawn permit

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[5] Petitioners assert only that the Region's response provided additional case law on the "blanket emissions limit" issue, not any of the other issues for which ICAS seeks a reply. *See* ICAS Proposed Reply at 3 (citing the EPA Response's citation of *In re Pope & Talbot*).

[6] The only record documents that ICAS in fact cites in its proposed reply – aside from the Statement of Basis and Response to Comments – are a public hearing transcript and a hearing sign-in sheet. *See* ICAS Proposed Reply at 6, 7. ICAS does not indicate that it took any steps to request these documents from the Region.

application reveal a supposed error in Region's decision-making. ICAS had the opportunity to fully brief this issue in its Petition and did so in almost five pages of argument. The Board can decide this issue based on the Petition and the detailed Responses.

Finally, ICAS "requests the opportunity to clarify its positions and clear up any confusion caused by the Region's response." *Id.* Rarely will a petitioner to the Board in an NSR permitting matter not feel that, with more words than authorized under the Standing Order (here, almost 3,000 more words), it could explain its arguments more clearly. To accept this stated aim of the proffered "reply" brief would make the presumption meaningless and must be deemed insufficient to overcome the presumption against a reply.

ICAS has failed to meet its burden to "demonstrate with specificity why the arguments it seeks to raise in a reply brief overcome" the presumption against replies in NSR appeals. Therefore, the Board should deny the motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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