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

In re:	)	
Shell Gulf of Mexico Inc.	)	OCS Appeal Nos. 10-01 through 10-04
Shell Offshore Inc.	)	
Frontier Discoverer Drilling Unit	)	
OCS Permit No. R10OCS/PSD-AK-09-01	)	
OCS Permit No. R10OCS/PSD-AK-2010-01	)	

SHELL GULF OF MEXICO INC.'S AND SHELL OFFSHORE INC.'S

REPLY IN SUPPORT OF

MOTION TO STRIKE DECLARATION OF MEGAN WILLIAMS

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Neither the Environmental Appeals Board nor Ninth Circuit case law cited by Petitioners AEWC and ICAS (collectively, "AEWC") in their Opposition to Motion to Strike supports the Board's consideration of the Declaration of Megan Williams. Shell Gulf of Mexico Inc. and Shell Offshore Inc. (collectively, "Shell") therefore urge the Board to strike Ms. Williams' Declaration.

AEWC's opposition to Shell's Motion to Strike the Declaration of Megan Williams rests on a fundamental misunderstanding of the Board's case law. Petitioners claim that the Board has "long recognized that it can consider new materials submitted by petitioners when those materials support petitioners' 'assertion that the Region's conclusions are erroneous or that the Region erred in failing to take into account such materials.'" AEWC and ICAS's Opp. to Shell's Mot. to Strike at 1. For this proposition Petitioners cite numerous cases, none of which supports the unlimited right to introduce extra-record materials at will that would be necessary to admit Ms. Williams' Declaration.

The cases Petitioners cite generally refer to the narrow circumstance where the Region adds information to the administrative record after the public comment period has closed and petitioners seek, on appeal, to submit evidence responsive to the additions made after the close of public comment. *In re Dominion Energy Brayton Point, L.L.C.*, NPDES Appeal No. 07-01 (EAB, Sept. 27, 2007), is illustrative. In that case, the petitioner sought to "supplement" the record with information responsive to "substantial new questions" raised in the Region's Determination on Remand which was not open to public comment. *Id.*, slip op. at 10-11. The Board explained that, because the information had not been before the Region, it did not meet the regulatory definition of "administrative record," but that the Board could nevertheless review the information in certain circumstances:

> Nevertheless, as noted above, we have observed that the appellate review process can serve as a petitioner's first opportunity to question the validity of material added to the administrative record in response to public comment, or in this case, in response to a remand order. . . . In such cases, where a petitioner submits documents in response to comments or on remand, and where the Board's task is to review the record and the Region's rationale for its final decision, it seems logical if not necessary that the Board consider the petitioner's proffer of evidence in support of its assertion that the Region's conclusions are erroneous or that the Region erred in failing to take into account such materials.

Id., slip op. at 15. *Dominion Energy Brayton Point*, like most of the other EAB cases cited by Petitioners, provides support only for the limited proposition that petitioners may proffer extra-record materials on appeal in response to information added to the administrative record after the close of public comment. *See e.g., In re American Soda, LLP*, 9 E.A.D. 280, 299 (EAB 2000) (citing *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 431 (EAB 1997), for proposition that "[t]he purpose of the response to comment and any supplementation of the administrative record at that time is to ensure that interested parties have full notice of the basis for final permit decision and *can address any concerns regarding the final permit in an appeal to the Board*" (emphasis added)); *In re Metcalf Energy Ctr.*, PSD Appeal Nos. 01-07 & 01-08 , slip op. at 22 n.13 (EAB Aug. 10, 2001) (allowing inclusion of evidence not before the decision maker because the appeal was the first opportunity for interested parties to present evidence on that particular topic); *In re Three Mountain Power, L.L.C.*, PSD Appeal No. 01-05, slip op. at 2-3 (EAB Apr. 25, 2001) (same).[1]

[1] Several of the cases cited by Petitioners are inapposite because they involve formal motions to supplement the record, an action Petitioners explained they chose not to take (Opp. to Mot. to Strike at 3 n.2), acknowledging that the Williams Declaration was not before Region 10 when it made its decision and therefore cannot properly be part of the administrative record. *See In re Dominion Energy Brayton Point*, 12 E.A.D. 490, 512-17 (addressing formal motions to supplement the record, not information proffered by petitioners outside of the administrative record); *In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 797 n.65 (EAB 1995) (same).

AEWC has made no argument that the Williams Declaration is responsive to information added to the administrative record after the public comment periods closed. Indeed, there appears to be no reason that Petitioners could not have presented the information in her declaration to Region 10 during public comment periods.[2] Petitioners simply seek to evade the requirement in 40 C.F.R. § 124.13 that "all persons . . . who believe any condition of a draft permit is inappropriate . . . must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period." Petitioners have provided no explanation why Ms. Williams' declaration was not timely presented to Region 10. Thus, it should be excluded from the Board's consideration.

Petitioners' invocation of the Ninth Circuit standard for supplementation of the record is unavailing. Regardless of whether the Williams Declaration satisfies one of the exceptions to the bar on extra-record testimony in federal appellate review,[3] the rules in Part 124 specifically mandate that an interested party provide all relevant information to the Region during the public comment period. To the extent that AEWC believed that Ms. Williams' expertise would assist Region 10, either through explanations of complex or technical terms, or by identifying "important aspects of the problem," it had a duty to present that information during the public comment period. Its decision not to do so cannot be made the basis for inclusion of that material in the Board's review at this late date.

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[2] Petitioners submitted a substantially similar declaration from Ms. Williams dated March 4, 2010, to the Ninth Circuit. The public comment period on the Beaufort Permit closed March 22, 2010, giving AEWC ample time to properly submit the information in Ms. Williams' declaration to Region 10 if it chose to do so.

[3] The Ninth Circuit struck Ms. Williams' declaration dated March 4, 2010, strongly indicating that Ms. Williams' current declaration would also fail to meet one of the Ninth Circuit exceptions, were that test applied to the current declaration.

For the reasons above and provided in its Motion to Strike, Shell urges the Board to strike the Declaration of Megan Williams.

Respectfully submitted,

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Dated: June 24, 2010

CERTIFICATE OF SERVICE

I herby certify that I have caused a copy of the foregoing Shell's Reply in Support of Motion to Strike Declaration of Megan Williams to be served by electronic mail upon:

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