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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
PETITIONERS' MOTION TO VACATE AND REMAND THE AIR PERMITS

Shell Gulf of Mexico Inc. and Shell Offshore Inc. (collectively, "Shell") hereby oppose the motion of Petitioners Natural Resources Defense Council, *et al*., Center for Biological Diversity, and Alaska Eskimo Whaling Commission, *et al*. asking that the Board vacate and remand the Outer Continental Shelf ("OCS") Prevention of Significant Deterioration ("PSD") permits that they have challenged in this matter. Shell further reiterates its continued opposition to EPA's Motion to Hold Matters in Abeyance.

BACKGROUND

Petitioners repeatedly confuse the Administration's moratorium on deepwater drilling with its decision to suspend consideration of authorizations for Shell's shallow water exploratory drilling in the Arctic. The Department of the Interior ("DOI") has implemented a six-month moratorium on the drilling of deepwater wells via *Notice to Lessees and Operators of Federal Oil and Gas Leases in the Outer Continental Shelf Regions of the Gulf of Mexico and the Pacific to Implement the Directive to Impose a Moratorium on All Drilling of Deepwater Wells*, NTL No. 2010-N04 ("Moratorium NTL").[1] The Moratorium NTL specifies that "deepwater" means "depths greater than 500 feet." *Id.* at 1. As the well locations covered by Shell's DOI-approved Exploration Plans are in waters that are less than 150 feet deep, they do not appear to be subject to the Moratorium NTL.[2] However, as discussed in Shell's Opposition to Motion to Hold

[1] Available at http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&PageID=33716.

[2] Indeed, DOI has already issued revised safety information and is allowing shallow water exploration drilling to continue provided that certain safety requirements are met. *See* Department of the Interior News Release, "Interior Issues Directive to Guide Implementation of Stronger Safety Requirements for Offshore Drilling: Deepwater Drilling Moratorium Remains in Place, Shallow Water Drilling May Continue in Compliance with Stronger Safety Requirements," (June 8, 2010), available at

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Matters in Abeyance, a fact sheet released by DOI on May 27, 2010, announced the Administration's intent not to consider Shell's Applications for Permits to Drill the five wells identified in Shell's Chukchi and Beaufort Exploration Plans "until 2011."[3] The Applications for Permits to Drill are the final applications for approvals that Shell must obtain prior to conducting exploratory drilling. 30 C.F.R. § 250.410. Thus, DOI's evaluation of Shell's proposals for exploratory drilling in the Chukchi and Beaufort Seas is proceeding on a separate track from the "moratorium" on deepwater drilling. The details and timing of that Shell-specific track are unclear.

ARGUMENT

I. Vacatur and Remand of the OCS Air Permits Is Not Warranted.

Petitioners raise the specter that when DOI ultimately lifts or resolves its "suspension" of issuance of final authorizations to drill under the Chukchi and Beaufort exploration plans, Shell's OCS air permits may need to be modified in some undefined way. However, Petitioners fail to identify any legal authority supporting their claim that the Board may vacate and remand a permit on which review has been sought – effectively granting a petitioner the very relief (or delay) it seeks on the merits – merely upon the petitioner's request. Indeed, Petitioners have failed to demonstrate that the circumstances in this case meet the standard for remand of a permit even at the permitting authority's request – the only standard the Board has articulated for remand before a review on the merits. Of course, Region 10 has made no such request in this

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http://www.doi.gov/news/pressreleases/Interior-Issues-Directive-to-Guide-Implementation-of-Stronger-Safety-Requirements-for-Offshore-Drilling.cfm.

[3] Available at http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=33566.

case or otherwise exercised its authority under 40 C.F.R. § 124.19(d) to withdraw the permit. The Board should reject the Petitioners' attempt to obtain the relief they seek in their appeals without Board review of the merits.

A. The Regulations Governing EAB Review Do Not Provide for Remand at a Petitioner's Request.

Petitioners cite no legal authority allowing the Board summarily to vacate Shell's permits without any consideration of the merits of Petitioners' appeals. The regulations in 40 C.F.R. Part 124 establish limited options for resolution of a petition for review. Section 124.19(a) requires that a petition for review demonstrate, as appropriate, "(1) A finding of fact or conclusion of law which is clearly erroneous, or (2) An exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review." 40 C.F.R. § 124.19(a). Section 124.19(c) establishes two pathways by which a petition for review may be resolved: it may be granted or denied. The regulations do not contemplate the third option proposed by Petitioners in this case, that upon request by the permit's opponents, the Board would summarily vacate and remand the permit without a review and determination on the merits of the issues raised in the petitions for review.

Consistent with these regulations, the Board's Practice Manual contemplates that EAB remand of a permit should be based on the Board's consideration of the merits of the petitioner's contentions regarding supposed "deficiencies" in the permit issued by the Region, not on collateral concerns about hypothetical changes to the permit:

> After reviewing the response [to a petition for review of a permit], the EAB conducts a thorough analysis of the issues raised by the petition to determine whether the permit suffers any deficiencies. If the EAB identifies any deficiencies, it may . . . remand the permit to the issuer with instructions to correct the deficiencies. If the Board identifies no permit deficiencies, the Board denies review without qualification.

EAB Practice Manual at 30-31. The Board's jurisdiction is "limited to issues related to the 'conditions' of the federal permit that are claimed to be erroneous" and it is petitioner's burden to "show that the condition in question is based on 'a finding or fact or conclusion of law which is clearly erroneous' or 'an exercise of discretion or an important policy consideration which the [EAB] should, in its discretion, review.' 40 C.F.R. 124.19(a)." *Id*. at 39. Nothing in the Manual's discussion of the Board's jurisdiction suggests that the Board is empowered to remand a permit without requiring the petitioner to carry this burden.

Petitioners do not cite a single case in which the Board granted a petitioner's pre-decision motion to vacate and remand a permit. Shell's review of EAB case law finds no such decision or authority that would support a remand upon motion of a petitioner at the current pre-decision stage of this proceeding.

B. The Circumstances Cited by Petitioners Do Not Even Meet the Standard for Voluntary Remand at the Permitting Authority's Request.

Even assuming for purposes of this discussion that the standard for *voluntary* remand at the request of the *permitting authority* could apply to a petitioner's pre-merits motion to remand, the Petitioners cannot meet this standard. As the Board has explained, a "'voluntary remand is generally available where the permitting authority has decided to make a substantive change to one or more permit conditions, or otherwise wishes to reconsider some element of the permit decision before reissuing the permit.'" *In re Desert Rock Energy Co. LLC*, PSD Appeal Nos. 08-03 *et seq*., slip op. at 13 (EAB, Sept. 24, 2009) (quoting *In re Indeck-Elwood, LLC*, PSD Appeal No. 03-04, slip op. at 6 (EAB, May 20, 2004)). In all of the EAB decisions cited in *Desert Rock* and *Indeck-Elwood* in which the Board granted a motion for voluntary remand, the permitting authority had stated its intention to revise the permit at issue or reconsider a specific issue. *See In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 563 n. 14 (EAB 1998) (region intended to further

consider and respond to comments in the record on remand); *In re GMC Delco Remy*, 7 E.A.D. 136, 169 (EAB 1997) (region stated that it would incorporate new language into the permit on remand); *In re City of Hollywood*, 5 E.A.D. 157, 170, 176-77 (EAB 1999) (region requested opportunity to reconsider specific issues on remand).

Here, the Region has not expressly decided to make any changes, substantive or otherwise, to any condition of the permits. Nor has the Region stated any plans to reconsider any elements of the permit decision. In fact, Region 10 has forcefully defended every challenged aspect of Shell's permits. *See* EPA Region 10's Response to Petitions for Review (Docket No. 44). Region 10 has merely stated that it "does not know whether the general [Department of Interior] review to be conducted during the moratorium [sic] will lead to events that could affect the CAA permitting in this case." EPA Motion to Hold Matters in Abeyance at 3 (Docket No. 29). This qualified expression of uncertainty regarding the DOI's future review process is not a statement that the Region intends to revise or reconsider the air permits. In fact, the Region's vigorous defense of the permits suggests quite the opposite.

Moreover, Petitioners fail to show that DOI's review is likely to result in modifications of Shell's exploration plans. Further, Petitioners cannot show that any such modifications, should they occur, (i) would be significant; (ii) would have any significant impact on project emissions; or (iii) would affect the issues presented in their petitions for review. Petitioners assert that a "crucial and wide-ranging review of all safety procedures, drilling and spill-response equipment, practices and policies . . . must be in place before Shell's proposed exploration drilling in the Arctic can proceed . . . mak[ing] it likely that there will be substantial changes to Shell's operations that will affect the air permits." Petitioners' Motion at 5. However, Petitioners cite only two potential modifications to Shell's program that could require modifications of the

current permits. First, they note EPA's concern about "'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 Region 10 would need to analyze in light of the CAA permitting requirements.'" Petitioners' Motion at 4 (quoting from EPA's Motion to Hold Proceedings in Abeyance (Docket 29) at 3). Second, Petitioners cite Shell's stated plan to station a second drill ship, the *Kulluk*, in the theater of operations so that it would be available to quickly begin drilling a relief well in the event of a blowout oil spill. *Id*. at 5.

Petitioners do not explain how either of these potential changes, if required by DOI, would so dramatically affect the air permits as to somehow justify summary revocation by the Board. If DOI requires that the *Kulluk* be stationed in the vicinity of drilling operations, as Shell has proposed, there is no reason to assume that DOI would require Shell to locate the *Kulluk* closer than 25 miles from the *Discoverer*. At that distance, emissions from the *Kulluk* would not be considered emissions attributable to the OCS source. Moreover, emergency emissions from any relief well drilling would be addressed, as provided under the Chukchi and Beaufort permits, as enforcement matters under the Agency's excess emissions policy. At most, the *Kulluk* might need to be identified in the permit as an emissions unit, but its emissions when on-station or during emergencies would not be considered in the air quality impact analysis for the permitted activities.

Finally, even if DOI were to require augmentation of the oil spill response ("OSR") fleet,[4] it is not clear that any such changes to the OSR fleet would have meaningful impacts on the air permit. Were DOI to require changes in the OSR fleet, it is possible that some additional

[4] The OSR fleet currently consists of the oil spill response main ship (*Nanuq*), plus three oil spill response work boats. See Chukchi and Beaufort Permits at Table 5.

modeling of the emissions impacts from non-emergency operations of additional OSR vessels within 25 miles of the *Discoverer* might be required, along with some revision of the permit to apply the current or additional operational limits on the OSR fleet to these additional boats.[5] But Petitioners offer no basis for their suggestion that required modifications to Shell's OSR fleet, if any, would be significant, or that additional emissions could not be readily addressed in potential modification of the air permits.

Thus, viewed objectively, there is, as Shell noted in its Opposition to EPA's motion to hold these matters in abeyance, no *a priori* reason to expect that DOI will require changes to Shell's current plans for exploration drilling and oil spill response capabilities. If such changes are required, there is no reason to conclude they will *per se* have any impact on air emissions or that, if they do, that they will substantially affect the analyses that underlie the air permits, or the terms and conditions of the permits. And none of the primarily legal issues that Petitioners seek to litigate in these appeals depends for its resolution on, or implicates, the number of OSR or other associated vessels or their emissions on which the permits were based.

Contrary to Petitioners' claims, it would not be a waste of the Board's or the parties' resources to proceed in the relatively near future to determine the merits of these petitions. Petitioners have already raised questions of law that bear on the permits for Shell's projects regardless of whether the permits are modified or vacated and reissued, and regardless of when Shell is able to commence drilling. Those issues include whether the Region erred in (a) not

[5] The permits already impose the following controls on the OSR vessels: operation of a catalyzed diesel particulate filter on the *Nanuq*; limits on total emissions from the *Nanuq*'s engines and total fuel usage within 25 miles of the OCS source; a requirement that, except during transport of crew and supplies to the *Discoverer* or during emergencies, all OSR vessels operate at least 2000 meters downwind from the *Discoverer*, and requirements for stack testing the *Nanuq*'s engines. *See* Permit Conditions Q.1 through Q.8.

requiring BACT for associated vessels that will operate within 25 miles of the OCS source, but will not attach to it; (b) determining that a drill ship such as the *Frontier Discoverer* is an OCS source only 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; (c) determining that these permits must comply with the standards in effect at the time of issuance, rather than prospective standards; (d) not including emissions from hypothetical situations, such as response to an oil spill in the OCS source's potential to emit for purposes of air quality impact analysis; and (e) concluding that its environmental justice obligations are met by determining that air quality impacts from the source will not cause an exceedance of an applicable national ambient air quality standard.

Unless Petitioners are prepared to forebear from raising these issues in seeking review of modified or reissued OCS air permits for Shell's Chukchi and Beaufort explorations programs, Petitioners' claim that they are "hypothetical" rings hollow. *See* Petitioners' Motion at 3. There is every reason to assume that Petitioners will present some or all of these issues to the Board in later proceedings if they are not resolved in the current proceeding. The briefing on the merits of these issues will be complete by the time Petitioners' motion is decided, and thus they are ripe for determination at this time. Judicial efficiency and economy dictate that they be resolved now, when they are ready for disposition on the merits, well in advance of 2011, so as to reduce the potential need for expedited resolution of these same challenges in 2011, which would serve neither the Board's, nor Region 10's, nor Shell's interests.

II. Abeyance Is Not Warranted.

Petitioners argue, in the alternative, in support of EPA's Motion to Hold Matters in Abeyance. Petitioners' Motion at 2. Petitioners argue that the "continuing uncertainty about the exact contours of the moratorium [sic], its duration and final effect on Arctic drilling, the scope

of the various review and their effect on the these permits demonstrates that the issues now raised are hypothetical." Petitioners' claim that the issues they raise in their appeals are now "hypothetical" is not supported by the record.

As discussed in Shell's Opposition to Motion to Hold Matters in Abeyance and as explained above, the issues raised in these petitions are, in many ways, fundamental to OCS development. They relate to EPA's approach to such basic issues as the proper definition of "OCS source" under the regulations. The Board's prompt resolution of these issues, *e.g.* by September 1, 2010, would ensure that, in the likely event that DOI's "consideration" of Arctic exploration in coming months does not significantly affect Shell's PSD permits, Shell would be able to proceed with the existing air permits without the need for reactivation and expedited review at that time. Further, even if some changes to the PSD permits are ultimately required as a result of DOI's evaluation, those changes could be most appropriately handled under the standard permit modification process, thus narrowing the scope of any subsequent appeal.[6]

For these reasons, Shell continues to oppose a stay or abeyance of the Board's review. However, if the Board grants EPA's Motion to Hold Matters in Abeyance, Shell requests that the Board at the same time order regular status updates (*e.g.*, at maximum 30-day intervals). In view of the imprecise terms of DOI's suspension of consideration of Shell's Applications for Permits to Drill, and the possibility that DOI might resume at any time its consideration of Shell's final

[6] The Board does not automatically grant an EPA Region's request to stay a pending permit appeal; rather it examines whether the Region has established "good cause" and examines whether claims that delay will create judicial economy are well-founded. *In re Easley Combined Utilities*, NPDES Permit No. SC0039853, NPDES Appeal No. 06-10 (Nov. 24, 2006) at 2 (denying Region's motion to stay briefing and review of appeal of NPDES permit while Region processed planned and potential modifications to permit) (Attachment A hereto).

permits to drill based on evolving information or policies,[7] such regular status updates will help ensure that, when DOI resumes action on Shell's permits, the parties and the Board can re-activate and promptly resolve these petitions.

CONCLUSION

For these reasons and those discussed in Shell's Opposition to Motion to Hold Matters in Abeyance, Shell respectfully urges the Board to deny Petitioners' request that it summarily vacate and remand the permits without any consideration of the merits of their appeals, or in the alternative to stay the proceedings. In the interests of judicial economy, Shell requests that the Board provide prompt resolution of the matters that stand fully briefed before the Board.

Respectfully submitted,

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[7] Indeed, Secretary Salazar testified yesterday that the moratorium, which was formally implemented via the Moratorium NTL, could be shorter than six months. *See* UPI TopTrack News, "Salazar Explains Deep Water Rig Moratorium" (June 9, 2010), available at http://www.upi.com/Top_News/US/2010/06/09/UPI-NewsTrack-TopNews/UPI-54171276135200/. It is possible that DOI's evaluation of Arctic conditions could similarly be shorter than originally anticipated.

CERTIFICATE OF SERVICE

I herby certify that I have caused a copy of the foregoing Shell's Opposition to Petitioners' Motion to Vacate and Remand the Air Permits to be served by electronic mail upon:

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