

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

In re:)
)
) OCS Appeal No. 11-06
Shell Offshore Inc.)
Permit No. R10OCS030000)
)
)
)

MOTION FOR LEAVE TO FILE REPLY BRIEF

Petitioners Resisting Environmental Destruction of Indigenous Lands (“REDOIL”), Alaska Wilderness League, Center for Biological Diversity, Natural Resources Defense Council, Northern Alaska Environmental Center, Oceana, Pacific Environment, Sierra Club, and The Wilderness Society (“REDOIL Petitioners”) move for leave to file a reply to the response brief submitted by Region 10 of the Environmental Protection Agency (“Region”) in the above-captioned appeal. In support of this motion, REDOIL Petitioners state as follows:

1. On November 28, 2011, REDOIL Petitioners petitioned for review of the Permit to Construct and Title V Air Quality Operating Permit, Permit No. R10OCS030000, issued by the Region to Shell Offshore Inc. (“Shell”) on October 21, 2011, for operation of the *Kulluk* conical drilling unit in the Beaufort Sea (“*Kulluk* Permit”).

2. Petitions for review of the *Kulluk* Permit were also filed by Mr. Daniel Lum (OCS 11-05) and the Iñupiat Community of the Arctic Slope (OCS 11-07). On December 1, 2011, the

Board sent a letter to the Region, with a copy sent to Shell, advising each of the three petitions for review of the *Kulluk* Permit and setting a deadline and word limit for responses.¹

3. The Board has not issued an order consolidating the three appeals or addressing any other case management issues.

4. A Standing Order issued by the Board on April 19, 2011, states that the Board will apply a presumption against replies, sur-replies, and oral argument in Clean Air Act “New Source Review” permit appeals, including appeals of air permits issued for Outer Continental Shelf (“OCS”) sources like the *Kulluk*.² The Board has indicated that it would consider accepting a reply brief if presented “with a motion seeking leave to file a reply brief that states with particularity the arguments to which the Petitioner seeks to respond and the reasons the Petitioner believes it is both necessary to file a reply to those arguments . . . and how those reasons overcome the presumption in the Standing Order.”³

5. The Region and Shell each filed a response brief on December 21, 2011.

6. In its response brief, the Region asserts for the first time new reasons to support its position that the *Kulluk* Permit assures that Shell’s operations will comply with “maximum allowable increases” in pollution, 42 U.S.C. § 7473, also known as “increments”. The Region’s response asserts new analysis and justifications not identified or supported previously in the Region’s permitting decision. *Compare* Response to Comments, AR-EPA-J-3 (Attach. 1) at

¹ Letter from Eurika Durr, Clerk of the Board, to Allyn Stern, Regional Counsel, Re: Shell Offshore Inc., Permit No. R10OCS300000, Appeal Nos. OCS 11-05, OCS 11-06 and OCS 11-07 (“Durr Letter”).

² Environmental Appeals Board, Order Governing Petitions for Review of Clean Air Act New Source Review Permits (“Standing Order”) at 1, 3 (Apr. 19, 2011).

³ Order Denying Requests for Status Conference and Oral Argument and Establishing Filing Deadline, *In re Shell Gulf of Mexico Inc. & Shell Offshore Inc.*, OCS Appeal Nos. 11-02, 11-03 & 11-04 at 6 (EAB Nov. 4, 2011).

J000323 with Region Response at 12-14; *see also* Statement of Basis, AR-EPA-H-4 (Attach. 2) at H000148-50 (lacking analysis or citations asserted in Region's response); Technical Support Document, AR-EPA-H-1 (Attach. 3) at H-000006-07 (same).⁴

7. In its response brief at page 13, the Region also relies on two new factual documents in support of its new analysis seeking to conclude that the *Kulluk's* pollution will not violate increments. *See* Region Response at 13 & n.11 (citing two modeling analyses conducted by the Alaska Department of Environmental Conservation ("ADEC"), documents AR-EPA-B-30 and AR-EPA-B-31). Neither of these documents was cited by the Region in its decision. *See* Response to Comments, AR-EPA-J-3 (Attach. 1) at J000319-26 (no mention of ADEC's assessments); Statement of Basis, AR-EPA-H-4 (Attach. 2) at H000148-50 (same); Technical Support Document, AR-EPA-H-1 (Attach. 3) at H-000006-07 (same).

8. One of these documents was not disclosed to REDOIL Petitioners at the time they filed their petition for review. REDOIL Petitioners' petition was due on November 28, 2011,⁵ but the Region did not produce a certified index to the Administrative Record, nor the Administrative Record itself, until December 21, 2011, the same day it filed its response.⁶

⁴ In both the Response to Comments and Statement of Basis, the Region offered a lengthy defense of its *legal* position that neither the *Kulluk* Permit nor its supporting air quality analysis need assure compliance with increments. *See* AR-EPA-J-3 (Attach. 1) at J000319-26; AR-EPA-H-4 (Attach. 2) at H000148-50. By contrast, only one sentence in the Response to Comments analyzed the *factual* question of whether the *Kulluk's* emissions will result in a violation of increments. AR-EPA-J-3 (Attach. 1) at J000323 ("However, as shown in the Technical Support Document and confirmed by the comments of the North Slope commenters', the modeling analysis for this project shows that the allowable emissions would not cause or contribute to a violation of any increment where the minor source baseline has already been triggered.") (internal citations omitted).

⁵ *See* EPA Press Release, EPA issues final air permit to Shell Offshore Inc. for Arctic oil and gas exploration (Oct. 21, 2011), AR-EPA-J-7 (Attach. 4).

⁶ *See* Submission of Certified Index to the Administrative Record, *In re Shell Offshore Inc.*, OCS Appeal Nos. 11-05, 11-06 & 11-07 (Dec. 21, 2011).

REDOIL Petitioners submitted a Freedom of Information Act (“FOIA”) request to the Region, and received a final response on October 4, 2011, but the Region’s FOIA response only included one of the two ADEC analyses upon which the agency now relies.⁷

9. REDOIL Petitioners request leave to reply to the new arguments and documents offered by the Region in its response brief, for the first time, to support its assertion that emissions from the *Kulluk* and its associated fleet will not violate increments. REDOIL Petitioners also seek to address briefly, in a footnote, a mischaracterization of REDOIL’s Petitioners’ argument and a related legal point raised by the Region for the first time. Denial of this motion would deprive REDOIL Petitioners of the ability to rebut the Region’s new-found explanations and justifications for its decision. The Standing Order’s presumption against reply briefs is premised upon the Board’s understanding that petitioners ordinarily have “the opportunity to raise arguments based on the administrative record.”⁸ But REDOIL Petitioners were afforded no such opportunity here, as the Region’s response brief offers non-record argumentation, supported by a previously undisclosed factual document, notwithstanding REDOIL Petitioners’ effort to obtain relevant documents from the Region. As the REDOIL Petitioners’ first opportunity to confront the Region’s new rationale will come on reply, the presumption of the Standing Order does not apply and the Board should grant leave for such a reply.

⁷ See Letter from Richard Albright, EPA Region 10, to David Hobstetter, Earthjustice, Re: Freedom of Information Act Request Number 10-FOI-00214-11 (“FOIA Response”) (excerpt attached as Attach. 5), Administrative Record Index at 3-4 (Oct. 4, 2011) (*not* listing ADEC Air Permits Program, Technical Analysis Report for Air Quality Control Minor Permit No. AQO181MSSO4, BP Exploration (Alaska) Inc. (BPXA) Endicott Production Facility, AR-EPA-B-30).

⁸ See Order Denying Requests for Status Conference and Oral Argument and Establishing Filing Deadline, *In re Shell Gulf of Mexico Inc. & Shell Offshore Inc.*, OCS Appeal Nos. 11-02, 11-03 & 11-04 (Nov. 4, 2011) (referencing Standing Order at 3).

10. In addition to its new factual arguments and citations pertaining to increments, the Region introduces a previously unacknowledged authority in defense of the *Kulluk* Permit's blanket emissions limits for nitrogen oxides and carbon monoxide. On page 17 of its response, the Region cites a decision of the Administrator addressing a petition for objection to a Title V permit. Region Response at 17 (citing *In the Matter of Pope and Talbot, Inc.*, AR-EPA-B-24). This document was not cited by the Region in its decision. See Response to Comments, AR-EPA-J-3 (Attach. 1) at J000242-47 (no mention of *In re Pope & Talbot*). Further, this document was not provided to REDOIL Petitioners in response to their FOIA request and therefore was not disclosed to them at the time they filed their petition for review.⁹ Since REDOIL Petitioners' first opportunity to confront this new authority comes on reply, the presumption of the Standing Order is inapplicable. REDOIL Petitioners therefore request leave to offer a short reply.

11. The Standing Order's presumption against replies is also premised on the Board's desire to "facilitate expeditious resolution" of PSD permit appeals.¹⁰ REDOIL Petitioners seek leave to file a reply that is limited in scope, avoids repetition and new arguments, and is short in length (less than 3,500 words). The REDOIL Petitioners' reply, narrowly focused and prepared for submission within one week of the Region's and Shell's respective responses, during the holidays, will not delay the proceedings or otherwise prevent expeditious resolution of these consolidated appeals. For this additional reason, the Standing Order's presumption against reply briefs is overcome.

For the foregoing reasons, the Board should grant leave for the REDOIL Petitioners to file the reply brief described herein.

⁹ See FOIA Response, (Attach. 5), Administrative Record Index at 3-4 (Oct. 4, 2011) (*not listing In re Pope & Talbot*).

¹⁰ Standing Order at 2.

Respectfully submitted,

/s/ Colin O'Brien

Colin O'Brien
Eric Jorgensen
EARTHJUSTICE
325 Fourth Street
Juneau, AK 99801
T: 907-500-7134
F: 907-463-5891

Erik Grafe
EARTHJUSTICE
441 W. 5th Avenue, Suite 301
Anchorage, AK 99501
T: 907-277-2500
F: 907-277-1390

Attorneys for REDOIL Petitioners

DATED: December 28, 2011

CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2011, copies of the foregoing MOTION FOR LEAVE TO FILE REPLY BRIEF in the matter of *Shell Offshore Inc., Permit No. R10OCS030000*, OCS Appeal No. 11-06, were served by electronic mail on the following persons:

Julie Vergeront Alexander Fidis Office of Regional Counsel U.S. Environmental Protection Agency, Region 10	Vergeront.Julie@epa.gov Fidis.Alexander@epa.gov
David Coursen Office of General Counsel U.S. Environmental Protection Agency	Coursen.David@epa.gov
Duane A. Siler Sarah C. Bordelon Tony G. Mendoza Crowell & Moring LLP	dsiler@crowell.com sbordelon@crowell.com tmendoza@crowell.com
Tanya Sanerib Christopher Winter Crag Law Center	tanya@crag.org chris@crag.org
Daniel Lum	eskimo.whaler@yahoo.com

/s/ Colin O'Brien

Colin O'Brien
EARTHJUSTICE
325 Fourth Street
Juneau, AK 99801
T: 907-500-7134
F: 907-463-5891

Attorney for REDOIL Petitioners

TABLE OF ATTACHMENTS

<u>Attachment No.</u>	<u>Administrative Record No.</u>	<u>Description</u>
1	AR-EPA-J-3	U.S. Environmental Protection Agency (EPA) Region 10, Response to Comments for Outer Continental Shelf Permit to Construct and Title V Operating Permit, Conical Drilling Unit Kulluk, Shell Offshore Inc. Beaufort Sea Exploration Drilling Program Permit No. R10OCS030000 (Oct. 21, 2011) (excerpts)
2	AR-EPA-H-4	EPA Region 10, Statement of Basis for the Draft Outer Continental Shelf Permit to Construct and Title V Air Quality Operating Permit No. R10OCS030000, Shell Offshore Inc., Beaufort Sea Exploration Drilling Program (July 22, 2011) (excerpts)
3	AR-EPA-H-1	EPA Region 10, Technical Support Document, Review of Shell's Ambient Air Quality Impact Analysis for the Kulluk OCS Permit Application, Permit No. R10OCS030000 (July 18, 2011) (excerpts)
4	AR-EPA-J-7	EPA, Press Release, EPA issues final air permit to Shell Offshore Inc. for Arctic oil and gas exploration (Oct. 21, 2011)
5		Albright, Richard, Director, Office of Air, Waste and Toxics, Letter to David Hobstetter, Earthjustice, Re. Freedom of Information Act Request Number 10-FOI-00214-11 (Oct. 4, 2011)
6	AR-EPA-B-24	Order, <i>In the Matter of Pope and Talbot, Inc., Lumber Mill, Spearfish, South Dakota</i> , Petition No. VIII-2006-04 (Mar. 22, 2007) (excerpts)