

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

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In re: )

Shell Gulf of Mexico Inc. )  
OCS Permit No. R10OCS/PSD-AK-09-01 )

& )

Shell Offshore Inc. )  
OCS Permit No. R10OCS/PSD-AK-10-01 )

Noble Discoverer Drillship )

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OCS Appeal Nos. 11-02 through 11-04

**OPPOSITION TO MOTIONS FOR LEAVE TO FILE REPLY**

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Inc. and Shell Offshore Inc.

Pursuant to the instruction in the Board’s Order Denying Requests For Status Conference and Oral Argument and Establishing Filing Deadline, (Nov. 4, 2011) (“Scheduling Order”), petitioners Native Village of Point Hope *et al.* (“NVPH Petitioners”) (OCS Appeal No. 11-02), and Inupiat Community of the Arctic Slope (“ICAS”) (OCS Appeal No. 11-03) (NVPH and ICAS are referred to collectively as “Petitioners”) seek leave to file reply briefs.<sup>1</sup> Shell<sup>2</sup> does not wish to burden the Board, but would respectfully note that in the Scheduling Order the Board stated clearly that Petitioners must “demonstrate with specificity why the arguments [they] seek[] to raise in a reply brief overcome” “the presumption applied against the filing of reply briefs in NSR [New Source Review] appeals.” *Id.* at 5. Neither Petitioner has carried its burden, and their motions should be denied.

The Board recognizes that “NSR permits are time-sensitive because new source construction cannot begin prior to receiving a final permit.” Standing Order at 1. As Shell has frequently noted, Arctic Outer Continental Shelf (“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. Avoiding unnecessary delay in the resolution of these petitions is of critical importance to Shell’s 2012 exploration plans.

This is the first petition for review of an OCS air permit since the Board issued the Standing Order. Shell respectfully urges the Board not to abandon the presumptions established

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<sup>1</sup> Mr. Daniel Lum also filed a petition for review challenging the Region’s issuance of these Beaufort and Chukchi permits (OCS Appeal No. 11-04). Mr. Lum has requested oral argument on his Petition and may be deemed to have requested a right to file a reply brief.

<sup>2</sup> Shell includes the OCS permittees, Shell Gulf of Mexico Inc. and Shell Offshore Inc.

in the Standing Order in the very first request to deviate from it. In general, Petitioners complain that the Region's response brief elaborates on the Supplemental Statement of Basis and the Response to Comments.<sup>3</sup> Petitioners claim this is extraordinary and, therefore, a basis for the Board to grant a right of reply. But under EAB's procedures, the foreseeable and intended function of the Region's (or permittee's) brief in response to a petition for review of a PSD (or OCS) permit is precisely that – to respond to the arguments raised by the petitioners, including, as appropriate, to further explain why the Region's conclusions underlying the permit are not clearly erroneous. The fact that the Region's brief has done so in these appeals is not extraordinary and does not provide grounds for disregarding the Board's presumption against replies to such responsive briefs. If it were, the same argument would apply in virtually every case before the Board, thereby rendering the presumption meaningless.<sup>4</sup>

The Board's Standing Order presumes that two-step briefing is adequate for the Board to understand and evaluate a petitioner's claims that the Region has committed clear error. There is

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<sup>3</sup> Neither Petitioner seeks to contest or reply to any of Shell's arguments, presumably because Petitioners are trying to manufacture procedural error by the Region in its brief as their best hope for obtaining remand.

<sup>4</sup> The EAB cases cited by NVPH Petitioners to support their argument that the Region's response brief impermissibly provided supplemental analysis and authority are inapposite because they involved situations where the agency asserted *regulations* as authority for a challenged decision which were cited for the first time on appeal, *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 424 (EAB 1997), *In re Chem. Waste Mgmt. of Ind., Inc.*, 6 E.A.D. 144, 154 (EAB 1995), or where the agency's record lacked *any* explanation of the agency's rationale for its challenged action. *In re Amoco Oil Co.*, 4 E.A.D. 954, 964 (EAB 1993); *In re Port Auth. of N.Y. and N.J.*, 10 E.A.D. 61, 94 (EAB 2001). As the Board observed in *Chemical Waste Management*, the rule which requires that the Region's explanations be subject to public comment does not mean that "an agency is barred from providing any additional explanation or amplification of a previously articulated (and record supported) rationale." *In re Chem. Waste Mgmt. of Ind., Inc.*, 6 E.A.D. at 154.

no legitimate reason to disturb that presumption here. Taken together, the Petitions for Review along with the Region's and Shell's responses are sufficient to enable the Board to expeditiously determine whether the Region committed clear error. This presumptive two-step briefing process is even more appropriate for evaluating, as in this case, a petition for review of permits re-issued by the Region after extensive consideration of the issues remanded by the Board. Given that, under 40 C.F.R. §124.19(f)(1)(iii), the filing of the pending Petitions was permissible only because the Board elected to authorize such come-back appeals in the 2010 Remand Order, it is appropriate for the Board to limit the current briefing in accordance with the Standing Order.

Petitioners have failed to meet their burden to “demonstrate with specificity why the arguments [they] seek[] to raise in a reply brief overcome” the presumption against replies in NSR appeals. Therefore, the Board should deny the motions.<sup>5</sup>

Respectfully submitted,

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Dated: November 28, 2011

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<sup>5</sup> If the Board grants either Petitioner's motion for leave to file a reply brief, Shell would not object to the Board allowing Mr. Lum a reasonable amount of additional time to submit a reply brief, as he has not yet proffered one to the Board.

## **CERTIFICATE OF SERVICE**

I hereby certify that I have caused a copy of the foregoing Opposition to Motions For

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