

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

IN THE MATTER OF:)	Appeal Nos. PSD 10-03, 10-12/10-04
)	
SHELL OFFSHORE INC.)	PSD Approval Nos.
)	R10OCS/PSD-AK-2010-01
and)	R10OCS/PSD-AK-09-01
)	
SHELL GULF OF MEXICO, INC.)	
)	

AEWC AND ICAS'S OPPOSITION TO SHELL'S MOTION TO STRIKE

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INTRODUCTION

Along with its answering brief, on June 7, 2010 Shell Gulf of Mexico, Inc. and Shell Offshore Inc. (hereafter “Shell”) filed a Motion to Strike the Declaration of Megan Williams that accompanied Alaska Eskimo Whaling Commission’s and the Inupiat Community of the Arctic Slope’s (hereafter AEWWC or Petitioners) petitions for review of the Chukchi and Beaufort air permits issued to Shell by Region 10.¹ The Declaration of Megan Williams both presents issues initially raised by Petitioners in their comments on the two permits and provides a limited response to Region 10’s final permitting decisions and response to comments. *See e.g.*, Williams Decl. ¶ 7 (explaining that all documents relied on in the declaration were submitted to Region 10 during the comment period); *id.* ¶ 5 (noting declarant reviewed draft and final permits and the responses to comments). This declaration should not be stricken from the record of these proceedings for several reasons.

First, the Board has long recognized 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.” *In re Dominion Energy Brayton Point*, 13 E.A.D. ___, slip op. at 15 (Sept. 27, 2007) (citing *In re Metcalf Energy Ctr.*, PSD Appeal Nos. 01-07 & 01-08, at 22 n.13 (EAB Aug. 10, 2001) (Order Denying Review); *see also In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 797 n.65 (EAB] 1995); *In re Three Mountain Power, L.L.C.*, PSD Appeal No. 01-05, at 2-3 (EAB Apr. 25, 2001) (Order Dismissing Portion of Petition for Review)). The Board has also recognized that “the [administrative] appellate review process affords [petitioner] the opportunity to question the validity of the material in the administrative record upon which the Agency relies in issuing a

¹ Ms. Williams declaration is Exhibit 14 to the Chukchi Petition and Exhibit 17 to the Beaufort Petition.

permit.”” *In re Dominion Energy Brayton Point*, 12 E.A.D. 490, 516-517 (EAB 2006) (quoting *In re Caribe Gen. Elec. Prods., Inc.*, 8 E.A.D. 696, 705 n.19 (EAB 2000), *appeal dismissed per stip.*, No. 00-1580 (1st Cir. 2001); *accord In re Am. Soda, L.L.P.*, 9 E.A.D. 280, 299 (EAB 2000); *see In re Ash Grove Cement Co.*, 7 E.A.D. 387, 431 (EAB 1997); *In re Amoco Oil Co.*, 4 E.A.D. 954, 980 (EAB 1993)).

In light of this precedent, Shell’s argument that “because it is not contained in the supporting file for these permits, the Board should not consider the Williams Declaration in its review of the permits,” Shell Motion to Strike at 2, is faulty. More importantly, the Williams Declaration fits well within the Board’s exceptions to review on the record. The declaration provides support for Petitioners’ argument that it was erroneous for Region 10 not to perform an environmental justice analysis in light of the pollutants Shell proposes emitting and the health risks those pollutants pose for Inupiat populations onshore from Shell’s proposed operations. Williams Decl. ¶¶ 8-13. Ms. Williams also describes the need for Region 10 to have considered temperature inversions in deciding not to analyze the formation of secondary PM_{2.5} and recommends models to use for addressing this issue. *Id.* ¶¶ 14-19. For these reasons, it is appropriate for the Board to look beyond the record at her declaration.

Second, federal courts have also long recognized exceptions to the rule of agency review on the record in cases brought under the Administrative Procedure Act (APA) and that precedent is informative here. For example, the Ninth Circuit (where Shell is proposing its operations) has ruled that a court can properly consider extra-record material in an APA case:

(1) if necessary to determine whether the agency has considered all relevant factors and has explained its decision, (2) when the agency has relied on documents not in the record, (3) when supplementing the record is necessary to explain technical terms or complex subject matter, or (4) when plaintiffs make a showing of agency bad faith.

Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv., 450 F.3d 930, 943 (9th Cir. 2006).

Any of these exceptions is sufficient to support admitting extra-record materials. *See e.g., Inland Empire Public Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 760 n. 5 (9th Cir. 1996) (expert declaration admitted “to show that the [agency] overlooked factors relevant to a proper population viability analysis”). Thus, Shell’s argument that “fundamental principles of administrative law” dictate that the declaration “constitutes prohibited extra-record material,” Shell Motion to Strike at 4, is also incorrect.

Again, these exceptions pertain to Ms. Williams’ declaration just as well as the Board’s precedent. The declaration supports Petitioners’ arguments that Region 10 committed clear error by “fail[ing] to consider important aspects of the problem.” *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008). The Williams declaration also fits within the exception allowing extra-record documents where necessary to explain technical terms and complex subject matter. Ms. Williams is an air quality consultant who formerly worked for the U.S. Environmental Protection Agency (Region 8) leading several Clean Air Act implementation programs for the agency and she shed light on several technical matters that pertain to Petitioners’ claims. Williams Decl. ¶¶ 1-4.²

Third, Region 10 has not joined Shell in its motion to strike. Fourth, Shell is relying upon two declarations of its own that were also not presented to Region 10 before it made the challenged permitting decisions, *see* Attachments A and B to Shell’s Response Brief (Docket No. 50); *see also* Shell Response Brief at 1 n.2 (explaining Shell is relying upon the first and

² For these reasons, Petitioners did not move to supplement the Record with this material because it was not before Region 10 when it made the challenged decisions. Instead, Ms. Williams’ declaration helps explain factors Region 10 overlooked in its permitting decision, as well as the potential impacts to local communities (which further supports Petitioner’s argument that an environmental justice analysis was necessary here) and technical matters associated with the permits.

supplemental declarations of Mr. Slaiby). Nor did Shell move to supplement the Record with its declarations.³

CONCLUSION

For all these reasons, Petitioners respectfully request that the Board deny Shell's motion to strike.

Respectfully submitted,

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³ Shell also references the Ninth Circuit case in which Shell's motion to strike was granted. Shell Motion to Strike at 3 (Docket No. 51). However, since little reasoning accompanied that decision it has little if any precedential value here.

CERTIFICATE OF SERVICE

I certify that I have caused a copy of the foregoing to be served by electronic mail upon counsel for the parties to these proceedings this 21st day of June, 2010:

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