

Petitioners Alaska Eskimo Whaling Commission (AEWC), the Inupiat Community of the Arctic Slope (ICAS), and the Center for Biological Diversity (CBD) (hereafter Petitioners) who have all challenged Region 10's failure to require a BACT analysis for CO₂ – the subject of the proposed amicus brief – provide the following response to the motion to submit an amicus brief that was filed by American Petroleum Institute, the Independent Petroleum Association of America, and the National Association of Manufactures (hereafter API). Petitioners respectfully request that the Board deny the motion at this time, because it was untimely filed and would prejudice Petitioners if considered by the Board in deciding whether to grant review of the petitions pertaining to the PSD permits issued to Shell Gulf of Mexico Inc. and Shell Offshore Inc.'s (hereafter Shell). As set forth in 40 C.F.R. § 124.19(c), the proper time for API to file an amicus brief is if and when this Board decides to grant review of the permits at issue. At that time, amicus briefing, if any, can proceed in a manner controlled by the Board's briefing schedule without creating prejudice to Petitioners or resulting in overlapping or duplicative briefs that waste the resources of the parties or the Board.

ARGUMENT

1. API's Motion Should Be Denied As Untimely.

API's motion is far too tardy to be considered by the Board in deciding whether to grant review of the petitions challenging Shell's outer continental shelf (OCS) PSD permits. The Petitions for Review were filed April 30, May 3, and May 12, 2010, respectively. Petitions (Docket Nos. 1, 2, 3, 19.) On May 10, 2010, Shell was permitted to participate in the cases and on May 14, 2010, the Board issued a public order setting forth the briefing schedule for the petitions for review. (Docket Nos. 16, 22.) That schedule was amended on June 2 and on June 4, 2010, after the Administration suspended Shell's operations for the summer. (Docket Nos. 32,

39.) The amended schedule required the filing of responses to the petitions for review on June 7, 2010, and of replies in support of the petitions on June 14, 2010, and delayed the merits hearing pending resolution of motions to vacate and hold in abeyance. (Docket Nos. 32, 39.) The Board's orders regarding the schedule are publicly available and published on the EAB's website.¹ Nevertheless, API did not move to file an amicus brief at any point during the briefing of the merits of the petitions for review.

Leading up to the petitions for review, Region 10 conducted a public notice and comment process on the two air permits, in which Petitioners made their concerns about CO₂ known on two occasions, and which concluded with deadlines for filing petitions for review.² Certainly, this matter is not a secret to the regulated community. There has also been substantial media attention paid to Shell's proposed operations in the Arctic this summer, including the fact that Shell's air permits were before the Environmental Appeals Board. For example, Petroleum News and the Associated Press both ran news articles on the fact that Shell's air permits were challenged. *See* Petro. News, Groups Challenge EPA Air Quality Permits For Shell Arctic

¹ Indeed, for this reason alone API's motion should be denied. The Board established a publicly available schedule for this matter and API elected not to participate during that schedule. In fact, API provides no excuse for its tardy attempt to participate in this matter. Whether an excuse exists or not, if third parties are allowed to file briefs whenever they elect to do so (and Petitioners are afforded some opportunity to respond), this Board could be inundated with a never-ending string of filings. To avoid this slippery slope, publicly set briefing schedules are designed to be followed. As set forth below, once review is granted in a PSD case, the regulations contemplate that the Board will set an appropriate briefing schedule for the parties as well as any potential amici. *See* 40 C.F.R. § 124.19(c). Petitioners submit that the same should hold true when the Board sets a publicly available schedule for considering whether to grant review of a petition.

² *See* EPA, Shell Chukchi Sea Air Permit (available at: <http://yosemite.epa.gov/R10/airpage.nsf/Permits/chukchiap/#epa>) (noting that "Challenges to this permit must be filed with the Environmental Appeals Board by May 3, 2010"); EPA, Shell Offshore Inc. Beaufort Sea Air Permit (available at: <http://yosemite.epa.gov/R10/airpage.nsf/Permits/beaufortap>) (noting that "Challenges to this permit must be filed with the Environmental Appeals Board by May 12, 2010").

Drilling (Attachment 1) (“On May 3, perhaps to no one’s surprise given the sometimes acrimonious debate around Shell’s planned exploration drilling in Alaska’s Beaufort and Chukchi seas, an appeal against the U.S. Environmental Protection Agency approval of Shell’s air quality permits landed in the office of the Environmental Appeals Board, the panel of judges with final authority over EPA decisions”); AP, Groups Challenge Shell’s Arctic Air Permits (Attachment 2) (“Two other appeals — one by the Center for Biological Diversity and another by the Alaska Eskimo Whaling Commission, the Inupiat Community of the Arctic Slope, a regional tribal government for eight villages. . . — focus on carbon dioxide emissions”).

Thus, even if API was ignorant of the public processes pertaining to Shell’s air permits, was unaware that AEWC, ICAS, and CBD had raised concerns regarding CO₂ during these processes, and did not know about the Board’s website and public dockets, surely the news stories surrounding this case provided timely information if API wished to get involved. *See id.* (publication dates of May 5 and the week of May 9 for the two news stories submitted by petitioners). Nevertheless, despite all this publicly available information regarding this case and Shell’s desire for its speedy resolution, API waited until almost two weeks after briefing was completed (and almost three weeks after the responsive briefs were filed) to file its motion. Under the circumstances, API’s amicus brief is simply too late to be considered by the Board in deciding whether to grant review of the petitions.

2. API’s Motion Should Be Denied As Prejudicial And Wasteful.

Petitioners also urge the Board not to grant the motion because it would be prejudicial to Petitioners. Since the motion was filed almost two weeks after merits briefing was completed in this case, Petitioners will have no opportunity to respond to the legal arguments put forth by API.

Yet, API responds to arguments made in Petitioners' reply briefs in the proposed amicus brief. Consideration of API's brief would thus be prejudicial to Petitioners.³

In addition, allowing API to file its brief would be a waste of the Board and Petitioner's resources. API has not distinguished its position from Shell's (or Region 10's) position in this matter. API's assertion that it has "extensive experience" with the "proposed" regulation of GHGs under the Clean Air Act, API Mtn. at 3 (Docket No. 63), is unsupported: API fails to state what its alleged experience consists of; how, if at all, its experience differs from Shell's or Region 10's experience; or how API has any interest that is not already fully represented by the existing parties. API also fails to explain why Shell, which is a member of API, will not adequately represent the industry's interests in these proceedings, or for that matter why these two aligned parties should be allowed to file what amounts to a sur-reply to the CO₂ arguments presented in Petitioners' reply briefs. Indeed, the proposed amicus brief adds little to these proceedings beyond creating additional work for the Board and Petitioners.

For all these reasons, the Board should deny API's motion to file the proposed amicus brief.

3. Should This Board Grant Review Of The Permits, API Will Have An Opportunity To File An Amicus Brief As Provided By 40 C.F.R. § 124.19(c).

Should this Board grant review of the petitions, API can file its amicus brief under the conditions and schedule set forth by this Board and contemplated by 40 C.F.R. § 124.19(c). As the Board has long recognized:

The rules governing review of PSD permit decisions require public notice of a grant of a petition for review. 40 C.F.R. § 124.19(c). The rule provides that

³ Should the Board nonetheless decide to consider API's amicus brief, Petitioners respectfully request the opportunity to respond to the legal arguments API seeks to assert on behalf of Shell by way of an unauthorized sur-reply – *i.e.*, a late-filed amicus motion.

“public notice shall set forth a briefing schedule for the appeal and shall state that any interested person may file an amicus brief.” *Id.*

In re: West Suburban Recycling and Energy Center, L.P. PSD Permit No. 94100001, 6 E.A.D. 692, 1996 EPA App. LEXIS 19 (EAB 1996). In other words, the rules already provide for the proper time and place for API to file an amicus brief should it desire to do so once review is granted. Following the process provided for by the regulations will ensure an orderly briefing schedule, afford Petitioners an opportunity to respond, and avoid wasting the resources of this Board and the parties that would otherwise result from overlapping or duplicative briefing.

CONCLUSION

For the foregoing reasons, Petitioners AEWC, ICAS, and CBD respectfully request that the Board deny API’s amicus motion at this time.

Respectfully submitted,

s/ Tanya Sanerib

Tanya Sanerib
Christopher Winter
CRAG LAW CENTER
917 SW Oak Street, Suite 417
Portland, OR 97205
tanya@crag.org
chris@crag.org

s/ Vera P. Pardee

Vera P. Pardee
Kevin P. Bundy
CENTER FOR BIOLOGICAL DIVERSITY
351 California Street, Suite 600
San Francisco, CA 94104
vpardee@biologicaldiversity.org
kbundy@biologicaldiversity.org

Dated: July 13, 2010

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:

Kristi M. Smith
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW (2344A)
Washington, DC 20460
Smith.kristi@epamail.epa.gov

Crowell & Moring LLP
1001 Pennsylvania Avenue NW
Washington, DC 20004
dsiler@crowell.com
smathiascheck@crowell.com
sbordelon@crowell.com

Julie Vergeront
Juliane R.B. Matthews
Office of Regional Counsel
U.S. Environmental Protection Agency,
Region 10
Suite 900
1200 Sixth Avenue, OCR-158
Seattle, WA 98101
Vergeront.julie@epa.gov
Matthews.juliane@epa.gov

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

Duane A. Siler
Susan M. Mathiascheck
Sarah C. Borelon

Eric P. Jorgensen
EARTHJUSTICE
325 Fourth Street
Juneau, AK 99801
T: (907) 586-2751
F: (907) 463-5891

and the following by first class mail:

Timothy K. Webster
James W. Coleman
SIDLEY AUSTIN, LLP
1501 K Street, N.W.
Washington, D.C. 20005

s/ Tanya M. Sanerib
Tanya M. Sanerib
Crag Law Center
917 SW Oak Street, Suite 417
Portland, OR 97205
(503) 525.2722
tanya@crag.org

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Groups challenge EPA air quality permits for Shell Arctic drilling

On May 3, perhaps to no one's surprise given the sometimes acrimonious debate around Shell's planned exploration drilling in Alaska's Beaufort and Chukchi seas, an appeal against the U.S. Environmental Protection Agency approval of Shell's air quality permits landed in the office of the Environmental Appeals Board, the panel of judges with final authority over EPA decisions.

An appeal to the board is an essential precursor to any appeal through the court system over an EPA action.

Major permits

Shell hopes to use the drillship Frontier Discoverer to drill two wells in the Beaufort Sea and up to three wells in the Chukchi Sea during the 2010 open water season. The company has applied for and received EPA approval for major air quality permits for its drilling operations.

But the Native Village of Point Hope, the tribal government for the Chukchi Sea coastal village of the same name, has joined with eight environmental organizations, including Resisting Environmental Destruction on Indigenous Lands (or REDOIL), to launch the May 3 appeal, saying that the drilling operations will cause "substantial air



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pollution” in a region where “rapid changes being wrought by industrialization and global warming are already straining the Arctic ‘web of life.’”

The permits cover operations by the Frontier Discover while the drillship is secured at a drill site in a configuration that enables drilling to take place. The permits also cover operations by vessels in the drillship’s support fleet, including icebreakers, oil spill response vessels and a supply ship, when those vessels are within 25 miles of a drilling operation.

Support fleet

And the essence of the appeal is a claim that EPA has not required best available emissions control technology for vessels in the support fleet, despite the fact that the permits do stipulate this control technology standard for the drillship itself.

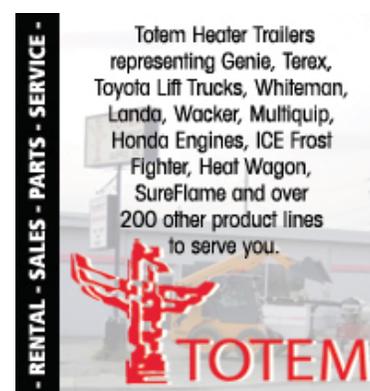
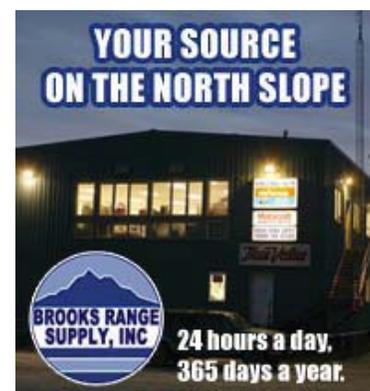
“Over 90 percent of the air pollution from Shell’s drilling operations would come from Shell’s icebreakers and other associated vessels,” Pacific Environment, one of the organizations launching the appeal, said May 4. “However, the permits challenged yesterday would only apply control technology limits to Shell’s drillship, a relatively minor source of pollution from Shell’s operations, and not to these associated vessels and icebreakers.”

Shell, for its part, has argued that it has taken all necessary steps to limit the emissions from its drilling fleet.

“We have worked exceptionally hard to ensure our emissions footprint in the Arctic is as small as possible,” Shell spokesman Curtis Smith told Petroleum News May 4. “Even without an air permit in hand, Shell made the decision to retro-fit our drilling rig, the Frontier Discoverer, with best available emissions control technology at a cost of \$25 million. That upgrade, combined with the use of ultra-low sulfur diesel fuel on all of our vessels, means Shell is not only meeting emissions requirements for operating in the Arctic, but far exceeding them.”

When Shell originally planned a multiyear drilling program for the Beaufort Sea, slated to start in 2007, that program ran into as yet unresolved litigation over minor air quality permits for the drilling operations, in addition to an appeal against government approval of its exploration plan. The company subsequently scaled down its drilling plans and applied for major air quality permits rather than for minor permits.

—Alan Bailey



Attachment 1

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Groups challenge Shell's Arctic air permits

May 5th, 2010

by [John Donovan](#).



By DAN JOLING (AP) 5 MAY 2010

ANCHORAGE, Alaska — Alaska Native and conservation groups have filed challenges to clean air permits the Environmental Protection Agency granted Shell Oil for drilling exploration wells in the Beaufort and Chukchi seas.

“Shell’s drilling threatens to pollute the air we breathe, and EPA needs to regulate the emissions more strongly,” said Caroline Cannon, president of the Native village of Point Hope, in a prepared statement. Point Hope is an Inupiat Eskimo village of 713 on the coast of the Chukchi Sea, 330 miles southwest of Barrow.

One appeal, filed Monday with the Environmental Appeals Board by 11 groups, including Cannon’s, said the permits allow Shell’s drill ship and support vessels to emit tons of pollutants into the Arctic environment off Alaska’s north and northwest coast, harming Inupiat people and wildlife and contributing to climate change.

Mark MacIntyre, an EPA spokesman in Seattle, said the agency had not seen the appeals and it was the agency’s policy not to comment on them.

Shell Alaska spokesman Curtis Smith said in an e-mail reply to questions that the company believes its permits will be upheld.

“We have worked exceptionally hard to ensure our emissions footprint in the Arctic is as small as possible,” he said.

Even without an air permit in hand, he said, Shell decided to retrofit its drilling ship with best available emissions control technology at a cost of \$25 million.

“That upgrade, combined with the use of ultra-low sulfur diesel fuel on all of our vessels, means Shell is not only meeting emissions requirements for operating in the Arctic, but far exceeding them.”

Shell wants to drill three exploratory wells in the Chukchi Sea on acreage it leased in a 2008.

In granting that permit, EPA officials said requiring the Shell drilling ship to burn ultra low-sulfur diesel fuel and other conditions would reduce particulate emissions by 72 percent and sulfur dioxide emissions by 99 percent, from 181 tons per year to 2 tons.

The requirements don’t go far enough, according to the groups appealing. They claim Shell operations will produce more than 1,000 tons of nitrogen oxides per year and hundreds of tons of fine particulate, with 75 to 96 percent produced by support vessels. They called for best available technology on all support vessels — two ice breakers, a supply vessel and four or five spill response boats.

Two other appeals — one by the Center for Biological Diversity and another by the Alaska Eskimo Whaling Commission, the Inupiat Community of the Arctic Slope, a regional tribal government for eight villages, and the North Slope Borough — focus on carbon dioxide emissions.

Attachment 2

Smith said delays in the appeal process could adversely affect Shell drilling plans.

“Without air permits, we cannot drill in 2010,” he said. “As a result, we not only require a favorable outcome from the EAB to proceed, but also a timely one.”

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Attachment 2