

**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 Appeal Nos.
Permit No. R10OCS/PSD-AK-09-01	)	11-02, 11-03 & 11-04
	)	
and	)	
	)	
Shell Offshore Inc.	)	
Permit No. R10OCS/PSD-AK-2010-01	)	
	)	
	)	

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**MOTION FOR LEAVE TO FILE REPLY BRIEF**

Petitioners the Native Village of Point Hope, Resisting Environmental Destruction of Indigenous Lands, Alaska Wilderness League, Center for Biological Diversity, Natural Resources Defense Council, Northern Alaska Environmental Center, Ocean Conservancy, Oceana, Pacific Environment, Sierra Club, and The Wilderness Society (“NVPH Petitioners”) move for leave to file a reply to the response briefs submitted by Region 10 of the Environmental Protection Agency (“Region”), and Shell Offshore Inc. and Shell Gulf of Mexico Inc. (together “Shell”), in the above-captioned consolidated appeals. In support of this motion, NVPH Petitioners state as follows:

1. On October 24, 2011, NVPH Petitioners petitioned for review of two air permits issued to Shell: Outer Continental Shelf Prevention of Significant Deterioration Permit to Construct No. R10OCS/PSD-AK-2010-01, Shell Offshore Inc. (Sep. 19, 2011) (“Beaufort

Permit”); and Outer Continental Shelf Prevention of Significant Deterioration Permit to Construct No. R10OCS/PSD-AK-09-01, Shell Gulf of Mexico Inc. (Sep. 19, 2011) (“Chukchi Permit”). The Alaska Eskimo Whaling Commission and the Iñupiat Community of the Arctic Slope (“AEWC Petitioners”) and Mr. Daniel Lum also petitioned the Board for review of these permits.

2. On October 4, 2011, before any petitions for review were filed, Shell submitted a request for expedited resolution of any challenges to the then-anticipated Beaufort Permit and Chukchi Permit.<sup>1</sup> On November 1, 2011, NVPH Petitioners submitted a response to Shell’s request for expedited resolution, requesting that the Board hold a status conference to discuss the scheduling of reply briefs and, potentially, oral argument.<sup>2</sup> On November 2, 2011, AEWC Petitioners also responded to Shell’s letter and requested the opportunity to file a reply brief and that the Board hold a status conference.<sup>3</sup> Shell replied to these requests on November 3, 2011, reiterating its position that reply briefs and oral argument should be disallowed.<sup>4</sup>

3. On November 4, 2011, in response to Petitioners’ requests, the Board entered an order declining to determine in advance whether reply briefs are appropriate, stating that it would consider accepting a reply brief if presented “with a motion seeking leave to file a reply brief that

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<sup>1</sup> Letter from Duane A. Siler, Counsel for Shell Offshore Inc. and Shell Gulf of Mexico Inc., to Eurika Durr, Clerk of the Board, Re: Notification of Request for Expedited Resolution of Anticipated Petitions for Review of Shell Outer Continental Shelf Air Permits R10OCS/PSD-AK-2010-02 and R10OCS/PSD-AK-2020-02 (Oct. 4, 2011).

<sup>2</sup> Letter from Colin C. O’Brien, Counsel for NVPH Petitioners, to Eurika Durr, Clerk of the Board, Re: Response to Shell’s “Notification of Request for Expedited Resolution” of *Shell Offshore, Inc. and Shell Gulf of Mexico Inc.*, Appeal Nos. 11-02 and 11-03 (consolidated); Docket Nos. R10OCS/PSD-AK-2010-01 and R10OCS/PSD-AK-09-01 (Nov. 1, 2011).

<sup>3</sup> Letter from Tanya M. Sanerib, Counsel for AEWC and ICAS, to Eurika Durr, Clerk of the Board, *In re Shell Offshore Inc. & Shell Gulf of Mexico Inc.*, OCS Permit Nos. R10OCS/PSD-AK-2010-01 & R10OCS/PSD-AK-09-01, OCS 11-03 (Nov. 2, 2011).

<sup>4</sup> Letter from Duane A. Siler, Counsel for Shell Offshore Inc. and Shell Gulf of Mexico Inc., to Eurika Durr, Clerk of the Board, Re: *In re Shell Offshore Inc. and Shell Gulf of Mexico Inc.*, Appeal Nos. 11-02 and 11-03 (Nov. 3, 2011).

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.”<sup>5</sup>

4. The Region filed a response brief on November 16, 2011 (“EPA Response”). Shell also filed a response brief on November 16, 2011.

5. In its response brief, the Region asserts for the first time a new reason to support its decision to exclude from “ambient air” the area within a radius of 500 meters from the *Discoverer* drillship. According to the Region, an area may be exempted from the “ambient air” based, in part, on “natural physical features such as rivers or rugged terrain” that may “preclude public access.” EPA Response at 20. This rationale was not identified or supported in the course of the Region’s permitting decisions. *See generally* Supp. Response to Comments, AR-EPA-SSS-4 (Attach. 1) at SSS000303-07; Supp. Statement of Basis, AR-EPA-QQQ-3 (Attach. 2) at QQQ00193, QQQ000208-09.

6. In its response brief, the Region also cites three new authorities in support of this new argument. The authorities cited on page 20 of the Region’s response brief were not cited by the Region in its decision. *Compare* EPA Response at 20 *with* Supp. Response to Comments, AR-EPA-SSS-4 (Attach. 1) at SSS000303-07; Supp. Statement of Basis, AR-EPA-QQQ-3 (Attach. 2) at QQQ00193, QQQ000208-09.

7. The new authorities relied upon by the Region were not disclosed to NVPH Petitioners at the time they filed their petition for review. NVPH Petitioners’ petition was due on

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<sup>5</sup> Order Denying Requests for Status Conference and Oral Argument and Establishing Filing Deadline, *In re Shell Offshore Inc. & Shell Gulf of Mexico Inc.*, OCS Appeal Nos. 11-02, 11-03 & 11-04 (Nov. 4, 2011).

October 24, 2011,<sup>6</sup> and the Region did not produce a certified index to the Administrative Record, nor the Administrative Record itself, until November 7, 2011.<sup>7</sup> NVPH Petitioners had submitted a Freedom of Information Act (“FOIA”) request to the Region, and received a response after the date of permit issuance but prior to the deadline for NVPH Petitioners’ petition, but the Region’s FOIA response did not include the new authorities relied upon by the Region on page 20 of its brief.<sup>8</sup>

8. NVPH Petitioners request leave to reply to the new argument and new authorities offered by the Region in its response brief, for the first time, to justify its delineation of a 500 meter ambient air boundary. Denial of this motion would deprive NVPH Petitioners of the ability to rebut the Region’s new-found explanation 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.”<sup>9</sup> But NVPH Petitioners were afforded no such opportunity here, as the Region’s response brief offers

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<sup>6</sup> EPA Notice of Final Air Permits Issued to Shell (Discoverer) for oil-gas exploration, Beaufort and Chukchi Seas, AR-EPA-SSS-1 (Sept. 19, 2011).

<sup>7</sup> Notice Re: Submission of Certified Index to the Administrative Record, *In re Shell Offshore Inc. & Shell Gulf of Mexico Inc.*, OCS Appeal Nos. 11-02, 11-03 & 11-04 (Nov. 7, 2011).

<sup>8</sup> *Compare* Letter from Julie Vergeront, EPA Region 10, to David Hobstetter, Earthjustice, Re: Supplemental Freedom of Information Act Request Number 10-FOI-00313-11 (excerpt attached as Attach. 3) at 11-12 (Sept. 28, 2011) *with* Notice Re: Submission of Certified Index to the Administrative Record, *In re Shell Offshore Inc. & Shell Gulf of Mexico Inc.*, OCS Appeal Nos. 11-02, 11-03 & 11-04 (excerpt attached as Attach. 4) at 14-16 (Nov. 7, 2011) (identifying eight record documents not disclosed in the Region’s FOIA response—including AR-EPA-BBB-150, AR-EPA-BBB-151, and AR-EPA-BBB-152—all three of which were cited in EPA’s Response Brief). The Region submitted a revised certified index on November 16, 2011 addressing clerical errors not relevant here. *See* Notice Re: Submission of Revised Certified Index to the Administrative Record, *In re Shell Offshore Inc. & Shell Gulf of Mexico Inc.*, OCS Appeal Nos. 11-02, 11-03 & 11-04 (Nov. 16, 2011).

<sup>9</sup> Order Denying Requests for Status Conference and Oral Argument and Establishing Filing Deadline, *In re Shell Offshore Inc. & Shell Gulf of Mexico Inc.*, OCS Appeal Nos. 11-02, 11-03 & 11-04 (Nov. 4, 2011) (referencing Environmental Appeals Board, Order Governing Petitions for Review of Clean Air Act New Source Review Permits (“Standing Order”) at 3 (Apr. 19, 2011)).

a non-record argument, supported by previously undisclosed authorities, notwithstanding NVPH Petitioner's effort to obtain relevant documents from the Region. As the NVPH 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.

9. The Region also asserts in its response brief that two of NVPH Petitioners' claims were not preserved by public comments for appeal. According to the Region, NVPH Petitioners did not preserve their claims that: (a) the Region failed to require Shell to demonstrate compliance with the 1-hour maximum allowable concentration for nitrogen dioxide (NO<sub>2</sub>) pollution, as required by section 165 of the Clean Air Act; and (b) the Region arbitrarily allowed Shell, in its compliance demonstration, to utilize a modeling approach that improperly discounts background pollution levels. *See* EPA Response at 21-23; 29-30.

10. NVPH Petitioners' petition for review, consistent with the requirement of 40 C.F.R. § 124.19(a), identified the basis for NVPH Petitioners' objections in the public comments submitted by NVPH Petitioners. *See* Petition for Review at 7-8. NVPH Petitioners satisfied this pleading requirement but the Region's response brief makes detailed arguments that this requirement was not met. NVPH Petitioners should be afforded an opportunity to respond to the Region's arguments, which could not have been anticipated and addressed in the petition for review. As the NVPH Petitioners' first opportunity to confront the Region's arguments about the sufficiency of NVPH's public comments will come on reply, the presumption of the Standing Order does not apply and the Board should grant leave for such a reply. Additionally, a reply addressing the NVPH Petitioners' entitlement to raise these important substantive arguments may assist the Board in determining the merits of those substantive issues.

11. The Standing Order's presumption against replies largely is based on the Board's desire to "facilitate expeditious resolution" of PSD permit appeals.<sup>10</sup> NVPH Petitioners seek leave to file a reply that is limited in scope, avoids repetition and new arguments, and is relatively short in length (less than 5,000 words). The NVPH Petitioners' reply, narrowly focused and prepared for submission within one week of the Region's and Shell's respective responses, will not delay the proceedings or otherwise prevent expeditious resolution of these consolidated appeals. For this reason, the Standing Order's presumption against reply briefs is overcome.

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

Respectfully submitted,

*/s/ Colin O'Brien*

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*Attorneys for NVPH Petitioners*

DATED: November 23, 2011

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<sup>10</sup> Standing Order at 2.

**CERTIFICATE OF SERVICE**

I hereby certify that on November 23, 2011, copies of the foregoing MOTION FOR LEAVE TO FILE REPLY BRIEF in the matter of *Shell Gulf of Mexico Inc., Permit No. R10OCS/PSD-AK-09-01 and Shell Offshore Inc., Permit No. R10OCS/PSD-AK-2010-01*, OCS Appeal Nos. 11-02 through 11-04, were served by electronic mail on the following persons:

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*/s/ Colin O'Brien*

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## TABLE OF ATTACHMENTS

<u>Attach. No.</u>	<u>Administrative Record No.</u>	<u>Description</u>
1	AR-EPA-SSS-4	U.S. Environmental Protection Agency Region 10, Supplemental Response to Comments for Outer Continental Shelf Prevention of Significant Deterioration Permits, Noble Discoverer Drillship, Shell Offshore Inc., Beaufort Sea Exploration Drilling Program, Permit No. R10OCS/PSD-AK-2010-01, Shell Gulf of Mexico Inc., Chukchi Sea Exploration Drilling Program, Permit No. R10OCS/PSD-AK-09-01 (Sept. 19, 2011) (excerpts)
2	AR-EPA-QQQ-3	U.S. Environmental Protection Agency Region 10, Supplemental Statement of Basis for Proposed Outer Continental Shelf Prevention of Significant Deterioration Permits Noble Discoverer Drillship, Shell Offshore Inc., Beaufort Sea Exploration Drilling Program, Permit No. R10OCS/PSD-AK-2010-01, Shell Gulf of Mexico Inc., Chukchi Sea Exploration Drilling Program, Permit No. R10OCS/PSD-AK-09-01 (July 6, 2011) (excerpts)
3		Letter from Julie Vergeront, U.S. Environmental Protection Agency Region 10, to David Hobstetter, Earthjustice, Re: Supplemental Freedom of Information Act Request Number 10-FOI-00313-11 (Sept. 28, 2011) (excerpts)
4		U.S. Environmental Protection Agency Region 10, Submission of Revised Certified Index to the Administrative Record (Nov. 16, 2011) (excerpts)