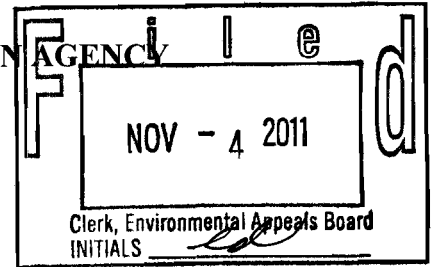


ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)
)
Shell Gulf of Mexico, Inc.)
OCS Permit No. R10OCS/PSD-AK-09-01)
)
&)
)
Shell Offshore, Inc.)
OCS Permit No. R10OCS/PSD-AK-2010-01)
)
Noble Discoverer Drillship)
)

OCS Appeal Nos. 11-02, 11-03 & 11-04

ORDER DENYING REQUESTS FOR STATUS CONFERENCE AND ORAL ARGUMENT AND ESTABLISHING FILING DEADLINE

On September 19, 2011, Region 10 (“Region”) of the U.S. Environmental Protection Agency (“Agency”) issued two Outer Continental Shelf (“OCS”) Prevention of Significant Deterioration (“PSD”) permits (“Permits”) to Shell Gulf of Mexico, Inc. and Shell Offshore, Inc. (collectively, “Shell”) authorizing Shell to construct and operate the Noble Discoverer drillship and its air emissions units, and to conduct other air pollutant emitting activities, within Shell’s lease blocks in the Chukchi and Beaufort Seas.¹ The Environmental Appeals Board (“Board”)

¹ The Region initially issued the two OCS PSD permits in March and April of 2010. Several groups filed petitions for review of the permits before the Environmental Appeals Board (“Board”), and in December 2010 the Board remanded the permits to the Region for further consideration of specific issues. *See In re Shell Gulf of Mexico Inc. & Shell Offshore Inc.*, OCS Appeal Nos. 10-01 to 10-04 (Order Denying Review in Part and Remanding Permits) (EAB Dec. 30, 2010), 15 E.A.D. ____; *see also In re Shell Gulf of Mexico Inc. & Shell Offshore Inc.*, OCS Appeal Nos. 10-01 to 10-04 (Order on Four Additional Issues) (EAB Mar. 14, 2011), 15 E.A.D. ____ . Upon completion of remand proceedings the Region issued the revised Permits that are the subject of the current proceedings.

received three² petitions for review (collectively “Petitions”) of the permits from the following:

(1) Earthjustice, on behalf of several conservation groups (“NVPH Petitioners”);³ (2) Inupiat Community of the Arctic Slope and Alaska Eskimo Whaling Commission (“AEWC Petitioners”);⁴ and; (3) Mr. Daniel Lum (collectively “Petitioners”).

² On November 2, 2011, the Clerk of the Board discovered an email from Daniel Lum dated October 24, 2011, that requested assistance with electronically filing a document using the Central Data Exchange (“CDX”) and that was routed to a spam folder unintentionally. *See* Email from Daniel Lum to Eurika Durr, Clerk of the Board, U.S. EPA (Oct. 24, 2011 8:22 pm EDT) (Dkt. 24) (“Lum Email”); *see generally* Order Authorizing Electronic Filing in Proceedings Before the Environmental Appeals Board Not Governed by 40 C.F.R. Part 22 at 2-4 & nn.4-5 (Jan. 28, 2010) (describing CDX and electronic filing requirements) (“E-filing Order”). In his email Mr. Lum stated that he was unable to submit his document through the CDX system, acknowledged that the document needed to be filed before midnight, and both attached the document to his email and included the contents of the document within his email. *See* Lum Email.

Upon consideration, the Board hereby accepts Mr. Lum’s filing as a timely filed petition for review in the above-captioned matters. *See* Environmental Appeals Board, U.S. EPA, Practice Manual 12-13 (Sept. 2010) (discussing timeliness of electronic submissions and options for parties experiencing difficulty filing with CDX), *available at* <http://www.epa.gov/eab> (click on EAB Guidance Documents) (“Practice Manual”). Mr. Lum’s petition is designated as OCS Appeal No. 11-04. *See* Lum Email (October 24, 2011) (hereafter “Lum Petition”). Mr. Lum is responsible, both for this document and future documents, for ensuring that a certificate of service accompanies the document, and for serving a copy of the document on each party. *See* E-filing Order at 3-4 & n.8. A response to Mr. Lum’s petition must be filed no later than November 16, 2011.

³ The Petition for Review filed by NVPH Petitioners is designated as OCS Appeal No. 11-02. *See* Petition for Review (October 24, 2011) (“NVPH Petition”). The NVPH Petitioners include Native Village of Point Hope, Resisting Environmental Destruction of Indigenous Lands (“REDOIL”), 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. The Board acknowledges NVPH Petitioners’ request to refer to themselves by the initials of the lead petitioner in order to avoid confusion with prior petitions for review.

⁴ The Petition for Review filed by AEWC Petitioners is designated as OCS Appeal No. 11-03. *See* Petition for Review (October 24, 2011) (“AEWC Petition”).

On November 1, 2011, the NVPH Petitioners submitted to the Board a letter responding to a letter Shell sent to the Board dated October 4, 2011.⁵ Letter from Colin O'Brien, Counsel for NVPH Petitioners, to Eurika Durr, Clerk of the Board, U.S. EPA (Nov. 1, 2011) ("NVPH Letter"). In its letter, NVPH Petitioners request a status conference to discuss whether reply briefs and oral argument might assist the Board in resolving these appeals, and advocate for the Board to establish a date certain by which reply briefs are due prior to the Board's receipt of responses from the Region and Shell in order to "minimize uncertainty and potential delay."⁶ *Id.* at 1-2. NVPH Petitioners aver that a reply brief would likely assist the Board because: (1) NVPH Petitioners can address any additional arguments the Region provides in response to the NVPH Petition; (2) the OCS PSD permits involve "issues of first impression and national importance," and; (3) NVPH Petitioners should be granted an opportunity to reply to new arguments raised in Shell's anticipated response brief. *Id.* at 2. NVPH Petitioners also note that if the Board declines

⁵ Shell's letter, which predated the Board's receipt of any petitions for review of the Permits, requested that the Board conduct an expeditious review of any petitions for review received, and treat those petitions as the highest priority to enable resolution of the appeals "as soon as practicable and certainly by December 31, 2011." Letter from Duane Siler, Counsel for Shell Gulf of Mexico Inc. & Shell Offshore Inc., to Eurika Durr, Clerk of the Board, U.S. EPA 2 (Oct. 4, 2011) ("Shell October Letter"). Shell also favorably cites several provisions in the Board's Standing Order, which contains procedures intended to facilitate expeditious review of new source review permits such as the OCS PSD permits at issue here, including a twenty-one day period for filing response briefs and presumptions against filing reply briefs and holding oral argument. Shell Letter at 2-3 (citing Order Governing Petitions for Review of Clean Air Act New Source Review Permits 2-3, 5 (Apr. 19, 2011) ("Standing Order")); *see also id.* at 3 (requesting the Board issue a preemptive order consolidating review of the Permits and notifying potential petitioners of the word limitations for petitions contained in the Standing Order).

⁶ NVPH Petitioners acknowledge the Board's Standing Order and the presumptions against filing reply briefs and holding oral argument therein, but argue that consistent with the approach taken in the previous appeals of OCS PSD permits issued to Shell, the Board would benefit from allowing reply briefs and establishing a briefing schedule as soon as possible. NVPH Letter at 2.

to establish a schedule for reply briefs, they will nonetheless file a motion for leave to file a reply as appropriate “as soon as possible upon receipt” of responses.” *Id.* at 3 (quoting Practice Manual at 48).

On November 2, 2011, AEWG Petitioners also submitted to the Board a letter responding to Shell’s October 4 letter. Letter from Tanya Sanerib, Counsel for Alaska Eskimo Whaling Commission and Iñupiat Community of the Arctic Slope, to Eurika Durr, Clerk of the Board, U.S. EPA (Nov. 2, 2011) (“AEWG Letter”). Similar to the NVPH Petitioners, AEWG Petitioners request “the opportunity to expeditiously file a reply brief,” and note that while the Standing Order indicates presumptions against filing reply briefs and holding oral argument, AEWG Petitioners believe a reply brief is nonetheless warranted and that the Board may benefit from hearing oral argument on the issues raised in AEWG’s Petition. *Id.* at 1. AEWG Petitioners’ reasoning for why the circumstances surrounding these Permit appeals augur in favor of the Board allowing Petitioners to file reply briefs is similar to NVPH Petitioners’. Specifically, AEWG Petitioners maintain that reply briefs are warranted because: (1) Petitioners did not have access to the complete administrative record prior to the deadline for filing petitions for review, in particular information Shell used to calculate its methane emissions; (2) AEWG Petitioners would like an opportunity to reply to Shell’s anticipated response brief, and; (3) the Permits are precedent-setting for offshore oil and gas permitting in the Arctic. AEWG Letter at 2. AEWG Petitioners also suggest that the Board hold a status conference after receiving response briefs from the Region and Shell to discuss a schedule for filing reply briefs and, should the Board desire, holding oral argument. *Id.*

On November 3, 2011, Shell submitted a letter replying to the NVPH Petitioners’ and

AEWC Petitioners' letters. Letter from Duane Siler, Counsel for Shell Gulf of Mexico Inc. & Shell Offshore Inc., to Eureka Durr, Clerk of the Board, U.S. EPA (Nov. 3, 2011) ("Shell November Letter"). Shell urges the Board to reject NVPH Petitioners' and AEWB Petitioners' requests to hold a status conference, allow for filing of reply briefs, and hold oral argument. *Id.* at 2. In support of its position Shell refers to the Standing Order's purpose of expediting time-sensitive new source review ("NSR") appeals, and notes that the Board has "deemed a single round of briefing presumptively adequate." Shell November Letter at 2. Shell continues that petitioners who seek additional briefing must overcome or rebut the Standing Order's established presumption, and submits that Petitioners have not made a showing sufficient to overcome the presumption against additional briefing. *Id.* Finally, Shell notes that allowing additional briefing or holding oral argument will only elongate the decision-making process, which may in turn negatively impact Shell's ability to prepare for Arctic OCS exploration. *Id.*

Upon consideration of the aforementioned letters, the Board is not persuaded that a status conference is necessary at this time, or that oral argument will assist the Board in resolving these appeals. The Board hereby denies Petitioners' requests for a status conference and to hold oral argument.

In light of the presumption applied against the filing of reply briefs in NSR appeals, *see* Standing Order at 3, a Petitioner seeking leave to file a reply brief must demonstrate with specificity why the arguments it seeks to raise in a reply brief overcome this presumption. In other words, a Petitioner must detail why, despite the opportunity to raise arguments based on the administrative record in its petition for review, the Board should nonetheless grant the Petitioner leave to file a reply to the responses. A reply brief is not an opportunity to reiterate the

arguments in the petition for review in a more convincing fashion. A Petitioner may not raise any new issues in its reply brief. *See, e.g., In re Russell City Energy Ctr.*, PSD Appeal Nos. 10-01 to 10-06, at 1 (EAB May 6, 2010) (Order Establishing Requirements for Motions to File a Reply Brief and Oppositions Thereto). The Board will deny a Petitioner's request for leave to file a reply brief if the Petitioner fails to rebut the presumption. *See Standing Order* at 3.

This high threshold cannot be satisfied in the abstract, but only 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, *See Russell City* at 1, and how those reasons overcome the presumption in the Standing Order. A Petitioner seeking leave to file a reply brief should simultaneously file the reply brief, which should not exceed 7,000 words.⁷ Any motion for leave to file a reply brief and accompanying reply brief must be received no later than Wednesday, November 23, 2011.

Henceforth, communications to the Board shall be styled and submitted as motions.

So ordered.

Dated:

November 4, 2011

ENVIRONMENTAL APPEALS BOARD

By:

Anna L. Holquist
for Kathie A. Stein
Environmental Appeals Judge

⁷ Reply briefs shall include a statement of compliance with the word limitation. In lieu of a word limitation, parties may instead comply with a 15-page limit. *See Standing Order* at 2 n.5 (detailing what parts of a brief filed in an NSR appeal count and do not count toward the word limitation).

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Consolidating Petitions for Review and Establishing Word Limitations for Responses in the matter of Shell Gulf of Mexico Inc., and Shell Offshore Inc., OCS Appeal Nos. 11-02 & 11-03, were sent to the following persons in the manner indicated:

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Dated: 11/4/2011


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Secretary