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

In re:	)	
	)	
Shell Gulf of Mexico, Inc.	)	
Shell Offshore, Inc.	)	OCS Appeal Nos. 10-01 to 10-04
Frontier Discovery Drilling Unit	)	
	)	
Permit No. R10OCS/PSD-AK-09-01	)	
Permit No. R10OCS/PSD-AK-2010-01	)	
	)	

REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN OPPOSITION TO THE PETITIONS FOR REVIEW

On June 25, 2010, the American Petroleum Institute ("API"), the Independent Petroleum Association of American ("IPAA"), and the National Association of Manufacturers ("the NAM") (collectively, "Movants") moved this Board for leave to file an *amicus curiae* brief in opposition to the entirety of the petition filed by the Center for Biological Diversity ("CBD"), as well as part of the petition of the Alaska Eskimo Whaling Commission ("AEWC") and the Inupiat Community of the Arctic Slope ("ICAS"). Specifically, Movants urge the Board to reject the attacks of CBD, AEWC, and ICAS (collectively, "the Petitioners") on the Environmental Protection Agency's ("EPA's") final rules authoritatively concluding that greenhouse gases ("GHGs") are not currently "subject to regulation" under the Clean Air Act's ("CAA's") Prevention of Significant Deterioration ("PSD") pre-construction permit program. Movants argue, *inter alia,* that under the Clean Air Act, this claim could only be made in the United States Court of Appeals for the District of Columbia Circuit. 42 U.S.C. § 7607(b).

On July 13, 2010, Petitioners filed a Response opposing Movants' June 25 Motion for Leave to File Amicus Curiae Brief in Opposition to the Petitions for Review. Petitioners argue that the Motion supporting the brief is flawed in two respects: (1) it is untimely—either because it was too late or too early; and (2) it is prejudicial and wasteful. As explained below, each argument is mistaken.

I. The Motion Was Timely

Petitioners argue that, under the Board's rules of procedure, the Motion is too early because "[s]hould this Board grant review of the permits, API [et al.] will have an opportunity to file an amicus brief as provided by 40 C.F.R. § 124.19(c)." Petitioners' Opposition at 4. The problem with this argument is that, given the flexibility of Board proceedings, a rule that forbids amicus filings until after the Board grants review could effectively exclude the amicus filings clearly contemplated by 40 C.F.R. § 124.19(c). As in this case, the Board often considers both whether to grant review of an issue and the merits of a case simultaneously. Indeed, in this case, the Board has not only ordered briefing of the substantive questions raised by the petitions, *see* Dkt. No. 22, Order Consolidating Petitions for Review and Setting Briefing Schedule (May 14, 2010), but has now set oral argument for addressing certain issues on the merits, *see* Dkt. No. 67, Order Scheduling Oral Argument (July 19, 2010); Dkt. No. 73, Order Rescheduling Oral Argument and Allocating the Time for Argument (August 2, 2010). Thus, Petitioners' arguments would effectively preclude participation by amici in Board proceedings in at least some cases, contravening 40 C.F.R. § 124.19(c).

Second, Petitioners also offer the opposite argument—that Movants' submission is too late. Petitioners' Opposition at 1–3. Surely, Movants cannot be both too early and too late. In the absence of any order from the Board detailing when amicus briefs must be filed, Movants'

submission is not too late under 40 C.F.R. § 124.19(c). Furthermore, it was made in a reasonably timely fashion. As Petitioners themselves have noted, it was made before the Board even set a schedule for amicus briefs. As Movants have explained, they did not want to wait for such a schedule due to the possibility that the Board would address the merits without opportunity to consider Movants' submission.

II. The Motion Is Not Prejudicial or Wasteful

Petitioners also argue that Movants' submission is prejudicial and wasteful because they will not have an opportunity to respond to the arguments presented therein and because those arguments are not any different than those offered by Shell Gulf of Mexico Inc. and Shell Offshore Inc., or by EPA Region 10.

These arguments are mutually exclusive. If Movants' submission truly offered no new perspective, there would be no need for Petitioners to respond to it. But Movants' perspective is plainly distinct. Shell is a member of one of the Movants, API. But API has a much wider membership, and represents a wider interest, than just Shell. Moreover, IPAA and the NAM represent even broader interests and constituents. Each of the Movants, unlike Shell, has a particular interest in ensuring that challenges to EPA's regulations are only heard in the proper forum, the D.C. Circuit, because they have filed petitions for review of the principal rules at issue here—the Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs ("GHG Reconsideration Rule"), 75 Fed. Reg. 17,004 (April 2, 2010), and the Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule ("GHG Tailoring Rule"), 75 Fed. Reg. 31,514, 31,525 (Jun. 3, 2010). *See The National Association of Manufacturers* et. al. v. *EPA*, Case Nos. 10-1127, 10-___ (case number not yet assigned). CBD has also challenged both rules. *See Center for Biological*

Diversity v. EPA, Case Nos. 10-1115, 10-1205 (D.C. Circuit). Movants wish to ensure that the fate of those rules is decided in the appropriate forum, where they are parties, and thus oppose Petitioners' attempt to revise those rules in proceedings before the Board.[1]

Finally, Movants' submission will not prejudice Petitioners. Petitioners do not point to any specific argument that prejudices them, or to which they would respond. Petitioners will be allowed to participate in oral argument before the Board, at which they may respond to any issues that they believe are of crucial importance arising from Movants' submission (or, alternatively, the Board may provide the parties an opportunity to respond in writing).

CONCLUSION

For the foregoing reasons, API, IPAA, and the NAM respectfully request that the Board grant their motion and direct the clerk to file the *amicus curiae* brief.

August 2, 2010

Respectfully submitted,

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[1] Furthermore, Movants offer arguments that go beyond the arguments raised by the Shell permittees or EPA Region 10. For example, Movants explained why the very rulemaking that created the Board demonstrates that the Board may not overturn rules promulgated by the Administrator. Brief of Amicus Curiae the American Petroleum Institute *et al*. in Opposition to the Petitions for Review at 5 (citing Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. 5,320, 5,320 (Feb. 13, 1992)).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Movants' REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN OPPOSITION TO THE PETITIONS FOR REVIEW, was sent on August 2, 2010 to the following via U.S. Mail:

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