

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

<p><b>In re:</b></p> <p><b>US Wind Inc., for the Maryland Offshore Wind Project</b></p> <p><b>Permit Number: Permit-to-Construct 047-0248; NSR-2024-01; PSD Approval PSD-2024-01</b></p>	<p><b>Appeal No. OCS 25-01</b></p>
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**US WIND, INC.'S MOTION TO HOLD CASE IN ABEYANCE AND STAY ORDER  
REQUIRING REPUBLICATION OF NOTICE**

## **INTRODUCTION**

Just over two months ago, the Environmental Appeals Board (“EAB”) held that it had jurisdiction over legal challenges to certain permits issued by the Maryland Department of the Environment (“MDE”) to U.S. Wind, Inc. (“US Wind”) under the Clean Air Act governing the construction of wind turbines generators on the Outer Continental Shelf (“OCS”). The EAB reached this conclusion despite the fact that MDE issued those permits pursuant to Maryland’s air quality regulations and legal authority, not that of the Environmental Protection Agency. Both U.S. Wind and MDE timely filed Petitions for Review of the EAB’s decision with the United States Court of Appeals for the Fourth Circuit. U.S. Wind now asks EAB to hold these proceedings in abeyance and stay its directive to MDE to re-publish its notice of issuance of the relevant permits until these interlocutory appeals have been resolved. This relief is warranted because the interlocutory appeals ask the Fourth Circuit to determine jurisdiction over appeals of OCS air permits issued pursuant to state law, and therefore a decision by the Fourth Circuit is substantially likely to eliminate the need for EAB review and spare this tribunal and the parties the cost, expense, and harm of litigating in a forum that lacks subject matter jurisdiction.

Pursuant to 40 C.F.R. § 124.19(f), U.S. Wind respectfully moves the EAB for an order holding further proceedings in this case in abeyance pending the resolution of appellate proceedings and staying the order requiring republication of MDE’s notice of permit issuance.

## **BACKGROUND**

This case arises from a challenge by the Mayor of Ocean City, Maryland, and County Commissioners of Worcester County, Maryland (“Petitioners”) to an air quality permit-to-construct, PSD Approval, and NSR Approval (collectively, the “MDE Permits”) issued by MDE to U.S. Wind on June 6, 2025, for a wind energy project consisting of up to 121 wind turbine

generators on the Outer Continental Shelf off the coast of Maryland. Index No. 1. On December 16, 2025, following briefing from the parties, and also from Region 3 of the Environmental Protection Agency (Index Nos. 9, 10, 14, 15), the EAB issued an Order Affirming Board Jurisdiction, in which the EAB concluded that the MDE Permits issued pursuant to Maryland's EPA-approved state regulations constitute federal action. Index No. 16. The EAB's Order also ordered MDE to "re-issue its notice of permit issuance" to direct appeals to be filed with the EAB. Index No.16. Finally, the EAB explained that it would consider the merits of the Petition, along with any other petitions filed with the EAB over the MDE Permits, within 30 days of the reissued public notice of permit issuance. Index No. 16. Following MDE's motion for clarification and extension of deadlines, on January 16, 2026, the EAB extended MDE's deadline for re-issuing its notice of permit issuance to February 12, 2026, and provided further clarification of the publication requirement. Index No. 20.

U.S. Wind filed an interlocutory appeal of the EAB's Order Affirming Jurisdiction with the United States Court of Appeals for the Fourth Circuit on January 26, 2026, seeking a determination as to proper venue for judicial review of the MDE Permits, and MDE filed its own interlocutory appeal of the EAB's Order with the Fourth Circuit on February 6, 2026.

## **ARGUMENT**

The EAB has the authority to "take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal," 40 C.F.R. § 124.19(n), including the authority to hold proceedings in abeyance, *see In Re: Desert Rock Energy Company, LLC*, 14 E.A.D. 484 (EAB 2009); *In Re: Shell Gulf of Mexico, Inc. Shell Offshore, Inc., Frontier Discovery Drilling Unit*, 2010 WL 2882457, at \*2 (E.A.B. July 19, 2010) (inviting argument as to why case should be held in abeyance). Holding a case in abeyance is particularly appropriate where "developments [ ] are likely to render judicial resolution unnecessary," *Ctr. for Biological*

*Diversity v. EPA*, 56 F.4th 55, 71 (D.C. Cir. 2022), such as where a jurisdictional determination implicates the merits of a case, see *Nat'l Wildlife Fed'n v. Browner*, 237 F.3d 670, 672 (D.C. Cir. 2001) (referencing prior decision to bifurcate case and “hold[] the merits in abeyance pending resolution of the jurisdictional issue”); *Park v. I.N.S.*, 252 F.3d 1018, 1021 (9th Cir. 2001), *overruled on other grounds by Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (referencing prior decision to hold appeal “in abeyance until certain jurisdictional issues were resolved in” a related case); *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 198 (3d Cir. 2003) (same); *Boissonneault v. Brown*, 14 Vet. App. 312 (Vet. App. 1994) (unpublished) (appellate motions “held in abeyance pending resolution of [a] jurisdictional question”).

Here, good cause exists to hold these proceedings in abeyance and stay MDE’s deadline to re-issue its notice of permit issuance because it will promote the “efficiency” of these proceedings and protect U.S. Wind from irreparable harm. See 40 C.F.R. § 124.19(n). U.S. Wind and MDE’s Petitions for Review directly implicate the EAB’s jurisdiction over this case. See *Nat'l Wildlife Fed'n*, 327 F.3d at 672; *Park*, 252 F.3d at 1021; *USX Corp.*, 345 F.3d at 198. Specifically, those Petitions raise a foundational question of first impression concerning the nature of permits issued by states through authority delegated to them under 42 U.S.C. § 7627(a)(3), and the Fourth Circuit’s answer to that question will determine whether challenges to the MDE Permits are properly adjudicated in Maryland state court, or in federal court. Of course, it is axiomatic that “without jurisdiction [a] court cannot proceed at all in any case,” *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 94 (1998) (citation omitted), so the Fourth Circuit’s resolution of this important jurisdictional question will determine whether EAB has the authority to preside over the case at all—or whether it must be instead heard in Maryland state court. Indeed, a decision from the Fourth Circuit in U.S. Wind and MDE’s favor would divest the EAB of jurisdiction and end this

entire case. Therefore, holding this case in abeyance will promote the efficiency of these proceedings and preserve the resources of the EAB and all parties, while also sparing U.S. Wind from being forced to litigate in a form that lacks jurisdiction. *See Steel Co.*, 523 U.S. at 94; *see also Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 194 (7th Cir. 2015), *as amended* (Dec. 14, 2015) (in the context of sovereign immunity, holding that a party is irreparably harmed by being “forced to litigate before . . . a court that likely lacks jurisdiction” (citation omitted)). Staying MDE’s deadline to re-issue its notice of permit issuance will also protect U.S. Wind from irreparable harm because, in the absence of a stay, the MDE Permits issued to U.S. Wind could be subject to additional legal challenges as a result of an artificially extended appeal deadline. This, in turn, could create additional and undue uncertainty for U.S. Wind by expanding the timeframe and increasing the expense of litigating the appeal of the MDE Permits. *See* 40 C.F.R. § 124.19(a).

### **CONCLUSION**

For the foregoing reasons, U.S. Wind respectfully requests that EAB stay its January 16, 2026 order and hold this case in abeyance until the Fourth Circuit has issued a final order or otherwise disposed of the pending interlocutory appeals. Pursuant to 40 C.F.R. § 124.f(2), counsel for U.S. Wind contacted counsel for the Petitioners, EPA Region 3, and MDE to ascertain their position on the relief requested in this Motion. Petitioners oppose the relief requested herein. MDE consents to this motion and has filed its own motion seeking the same relief. EPA Region 3 takes no position as to the relief requested herein.

Dated: February 9, 2026

Respectfully submitted,

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**STATEMENT OF COMPLIANCE**

I certify that this Motion to Hold Case in Abeyance and Stay Order Requiring Republication of Notice is 1,285 words in length and therefore complies with the word limitation of 7,000 words in 40 C.F.R. § 124.19(d)(3).

*/s/ Toyja E. Kelley* \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing in the matter of US Wind Inc., for the Maryland Offshore Wind Project, Permit-to-Construct 047-0248; NSR-2024-01; PST Approval PSD-2024-01, was filed with the Environmental Appeals Board through its e-filing system on February 9, 2026, and was served on the following parties by first-class U.S. Mail:

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