

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

In Re:

**US Wind Inc., for the
Maryland Offshore Wind Project**

**Permit Number: Permit-to-Construct 047-0248;
NSR Approval NSR-2024-01; PSD Approval PSD-2024-01**

Appeal No. OCS 25-01

**MARYLAND DEPARTMENT OF THE ENVIRONMENT'S REPLY TO THE BRIEF OF
REGION 3 ADDRESSING THE BOARD'S JURISDICTION**

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1. Attachment 1, excerpts from 136 Cong. Rec. S36007 (daily ed. Oct. 27, 1990), pages 36,007, 36,012-019, 36,103-117, and 36,136-37.

I. INTRODUCTION

In a flood of words, Environmental Protection Agency (“EPA”) unnecessarily complicates the Clean Air Act’s (“CAA”) scheme regulating air pollution for the attainment of National Ambient Air Quality Standards (“NAAQS”). EPA suggests an interpretation of the CAA which makes the Maryland Department of the Environment’s (“MDE”) issuance of Prevention of Significant Deterioration (“PSD”) and nonattainment New Source Review (“NSR”) permits pursuant to state adopted regulations a federal action subject to federal review. That interpretation is inconsistent with the language and structure of the statute, legislative history, and the explicit jurisdictional limits placed on the Environmental Appeals Board (“EAB”) by EPA’s own regulations. Through this reply, MDE reiterates and further clarifies its position that the EAB lacks jurisdiction to review the Permit to Construct, PSD Approval, and NSR Approval issued to US Wind, Inc. (“US Wind”) for the Maryland Offshore Wind Project.

II. OCS REQUIREMENTS ARE INTENDED TO BE PART OF AN AREA’S PLAN FOR NAAQS ATTAINMENT

A. The Clean Air Act’s Attainment Scheme

As repeatedly explained, the CAA is the premier example of cooperative federalism, designed to divide the act’s responsibilities between EPA and the states. *See e.g. Texas v. EPA*, 132 F.4th 808, 819 (5th Cir. 2025); *Comm. for a Better Arvin v. EPA*, 786 F.3d 1169, 1173 (9th Cir. 2015) (describing the CAA as a “uniquely important system of cooperative federalism”); *Ctr. for Biological Diversity v. EPA*, 129 F.4th 1266 (10th Cir. 2025). At its core, the CAA requires EPA to establish NAAQS for criteria pollutants at levels that will protect public health and the environment. *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 498 (2014). To ensure the NAAQS are attained and maintained, the CAA establishes preconstruction permitting requirements for certain major sources of air pollution: PSD permits in areas meeting the NAAQS

(i.e. attainment) and NSR permits in areas not meeting those standards (i.e. nonattainment). 42 U.S.C. § 7475 and § 7503, respectively. The CAA also requires operating permits, commonly referred to as Title V permits, to ensure the individual requirements applicable to each source are monitored and enforced during their ongoing operations. 42 U.S.C. § 7661a.

States have the primary responsibility for ensuring areas within their respective borders meet those standards, with the EPA playing a supervisory role. *EME Homer City Generation*, 572 U.S. at 537-38. States are required to “adopt” a State Implementation Plan (“SIP”) following “notice and public hearing” for the “implementation, maintenance, and enforcement” of the NAAQS. 42 U.S.C. § 7410(a)(1). A SIP may include permitting of the NSR, PSD, and Title V programs; or they may decline to do so, leaving those requirements for EPA to implement. *Virginia v. Browner*, 80 F.3d 869, 883 (4th Cir. 1996) (explaining that CAA sanctions for a disapproved portion of a SIP do not violate the Tenth Amendment because a state “may choose to do nothing and let the federal government promulgate and enforce its own permit program” such that “the full regulatory burden will be borne by the Federal Government.”) (internal quotation omitted).

A state must then submit its SIP to EPA for review to ensure the SIP meets the minimum requirements of the CAA. 42 U.S.C. § 7410(k)(3); *Texas*, 132 F.4th 819 (explaining EPA is confined to the ministerial function of reviewing SIPs for consistency with the CAA's requirements and where a SIP meets the statutory criteria “EPA must approve it.”). EPA may adopt the plan in whole or in part.¹ 42 U.S.C. § 7410(k)(3). When EPA approves a plan, it incorporates the SIP into the Code of Federal Regulations, which makes it federally enforceable. *Env't Comm. of Fla. Elec. Power Coordinating Grp., Inc. v. EPA*, 94 F.4th 77, 85 (D.C. Cir. 2024).

¹ Where a state fails to submit or EPA disapproves a SIP, in whole or in part, it is required to promulgate a federal implementation plan (“FIP”) within 2 years to correct those deficiencies. 42 U.S.C. § 7410(c).

In 1990, Congress amended the CAA, adding § 328 which extended preconstruction permitting requirements (i.e. PSD and NSR) to major sources of air pollution located off the coast of certain states on the Outer Continental Shelf (“OCS”), otherwise known as OCS sources. *Resisting Env't Destruction on Indigenous Lands (REDOIL) v. EPA*, 716 F.3d 1155, 1160 (9th Cir. 2013). As previously briefed, this section requires EPA to “establish requirements to control air pollution from [OCS sources] to attain and maintain Federal and State ambient air quality standards and to comply with the [PSD] provisions” of the CAA. 42 U.S.C. § 7627(a)(1). It further states that for OCS sources within 25 miles of the seaward boundary of an applicable state, those requirements “shall be the same as would be applicable if the source were located in the corresponding onshore area, and shall include, but not be limited to, State and local requirements for emission controls, emissions limitations, offsets, permitting, monitoring, testing, and reporting.” *Id.* “Corresponding onshore area” is defined as “the onshore attainment or nonattainment area that is closest to the [OCS] source,” unless EPA determines another area with more stringent requirements may reasonably be expected to be affected by emissions from the OCS source. 42 U.S.C. § 7627(a)(4)(B).

Because the states have the primary responsibility for ensuring attainment under the CAA’s cooperative federalism design and the stated purpose of § 328 is to attain and maintain the NAAQS in the corresponding onshore area, it serves as no surprise that Congress carved a special role for the states:

Each State adjacent to an OCS source included under [§ 7427(a)] may promulgate and submit to [EPA] regulations for implementing and enforcing the requirements of the subsection. If the [EPA] finds the State regulations are adequate, [EPA] shall delegate to that State any authority [EPA] has under this chapter to implement and enforce such requirements.

42 U.S.C. § 7427(a)(3).

In accordance with § 328, EPA promulgated regulations for the federal agency's issuance of PSD permits to OCS sources. 40 C.F.R. Part 55. Those regulations include 40 C.F.R. § 55.11, providing for delegation of EPA's responsibility. As explained by EPA, the CAA's mechanism for applying state and local air pollution control requirements to OCS sources occurs "after the EPA has incorporated such requirements by reference into federal law consistent with the requirements of CAA section 328, through processes established thereunder. Absent such codification, SIP requirements do not apply on the OCS." EPA Brief at 1. Thus, by EPA's own admission, SIP requirements apply on the OCS following federal codification.

B. Maryland's Approved Permitting Programs

As discussed in MDE's Response to Petition, Maryland has implemented an EPA-approved permitting program through a federally enforceable SIP. That SIP, which includes fully authorized PSD, NSR, and Title V permitting programs, is incorporated by reference at 40 C.F.R. § 52.1070 and is federally enforceable. EPA acknowledges that these approved programs are implemented pursuant to state law and appeals of permits issued under those programs are properly considered by the state courts. EPA Brief at 8.

On January 8, 2014, MDE requested delegation of authority to implement, administer, and enforce EPA's OCS requirements pursuant to state regulations. On April 4, 2014, EPA determined that Maryland's adopted regulations were adequate for this purpose and sent MDE a letter acknowledging it had been delegated the authority to implement and enforce the OCS requirements. 80 Fed. Reg. 43088-01 (July 21, 2015). EPA then incorporated Maryland's regulations into federal law. *See* 40 C.F.R. § 55.14(d)(10)(i) (incorporating Maryland's SIP); 40 C.F.R. § 55.14(e)(10)(i)(A); 40 C.F.R. Part 55, Appendix A. At the time MDE issued the US Wind

permits, Maryland's SIP was approved and all regulations applicable to the challenged permits were appropriately incorporated into federal law.

At this point, MDE and EPA's interpretations of the statute diverge. MDE and US Wind contend that EPA's approval of Maryland's regulations for preconstruction permitting of OCS sources resulted in a delegation authorizing MDE to implement that program pursuant to its state regulations. In effect, EPA's approval extended Maryland's SIP-approved permitting program to OCS sources, authorizing it to issue PSD and NSR permits (whether on or offshore) by applying applicable state law subject to identical procedural and judicial review procedures. EPA, on the other hand, pushes a construction where permits for OCS sources are a wholly separate program whereby the issuing State is an arm of EPA operating under federal requirements and therefore limited to review through the federal courts, while simultaneously admitting the State may deviate from federal procedural requirements. It is EAB's responsibility to determine which interpretation best effectuates the will of Congress. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 395 (2024).

III. MDE ISSUED THE OCS AIR PERMITS UNDER AN EPA-APPROVED PROGRAM

At its simplest, EPA contends the EAB has jurisdiction because Maryland is not an "approved state" for issuance of OCS permits, despite its approval of Maryland's regulations as adequate for implementation and enforcement of those requirements and acknowledging its "approved state" status for other sources. Without adequate explanation, EPA equates MDE's issuance of OCS permits as an "action under a delegated . . . PSD program, rather than action under a PSD program approved into a SIP," despite admitting that "MDE implements an EPA-approved PSD program." EPA Brief at 1. This contention is based solely on the fact that the OCS is federally owned land. *Id.* Regardless, the CAA provides for implementation of state regulations on the OCS, and as the EAB has recognized with regard to onshore PSD permitting, state appellate

procedures apply where permitting programs are implemented under state law pursuant to EPA-approved regulations.

A. Textual Analysis of the CAA Supports EPA-Approved Program Status

Statutory interpretation begins first with the specific text in dispute. *Murphy v. Smith*, 583 U.S. 220, 223 (2018). The EAB must evaluate the normal, plain meaning of the language at issue, construing the statute as a whole, and giving effect to every word, clause, and sentence. *Massachusetts v. Morash*, 490 U.S. 107, 114 (1989). Doing so, it is clear the US Wind permits were issued under state regulations.

The plain language of § 328 requires a state to first promulgate its own regulations to implement the permitting requirements of the section. 42 U.S.C. § 7627(a)(3). Once its regulations are adopted, the state submits them to EPA for an adequacy review. *Id.* “If the Administrator finds that the State regulations are adequate, the Administrator *shall* delegate that State *any authority* the Administrator has *under this chapter* to implement and enforce such requirements.” *Id.* (emphasis added).

First, this language reemphasizes the importance of cooperative federalism, even for OCS sources. As with its review of SIPs, Congress confined EPA to the ministerial function of reviewing a state’s OCS regulations for adequacy with the CAA’s requirements. *Texas*, 132 F.4th at 819. EPA’s attempt to recast the role of the states as implementing federal law at EPA’s behest is wholly inaccurate. Explaining Congress’ intent, Senator Baucus noted “EPA should not withhold [OCS] delegation unless EPA finds that the *onshore air regulatory agency's regulations* are substantially inadequate to meet the requirements of this Act.” Attachment 1, 136 Cong. Rec. S36007, 36,117 (daily ed. Oct. 27, 1990) (emphasis added).

Second, Congress required EPA to delegate all its authority to implement and enforce the OCS permitting requirements where state regulations are adequate. This delegation bears little

resemblance to delegation of PSD permitting authority under 40 C.F.R. § 52.21(u), which only applies to programs whose SIPs have been denied in whole or in part for failure to meet minimum requirements. In those cases, EPA retains its own authority to act, and can enter into a separate PSD Delegation Agreement allowing the state to issue PSD permits under its specific federal regulations. *Wild Equity Inst. v. EPA*, 147 F.Supp.3d 853, 857 (N.D. Cal. 2015). As EPA acknowledges, that has not happened here. EPA Brief at 12.

By approving Maryland's OCS regulations, EPA was required to delegate its authority to implement the OCS permitting requirements. In doing so, EPA's regulations are clear that Maryland is to rely upon its State regulations (not retained federal authority). *See* 40 C.F.R. § 55.11(d) ("If [EPA] finds that the State regulations are adequate, [EPA] will authorize the State to implement and enforce the OCS requirements *under State law*.") (emphasis added); 40 C.F.R. § 55.11(e) ("Upon delegation, a State may use any authority it possesses *under State law* to enforce any permit condition or any other requirement" and "use any authority it possesses *under State law* to require monitoring and reporting and to conduct inspections.") (emphasis added). The application of State law is consistent with Congressional intent. *See* Attachment 1, 136 Cong. Rec. at 36,015 and 36,136-37 (Senators McClure and Symms testifying that the OCS provisions give state and local governments "regulatory authority over Federal territory."). Therefore, a delegation under § 328 is equivalent to PSD permits issued under a SIP, where EPA has determined that plan meets minimum requirements and authorizes the state to act under its own regulations.

Third, by requiring EPA to delegate any authority it has "under the chapter"—as opposed to "the section"—Congress intended the preconstruction permitting requirements of § 328 to be part of the larger SIP implementation/NAAQS attainment requirements of the CAA. Again, Senator Baucus explained: "It is intended that OCS emissions be included in any State

Implementation Plan (for the corresponding onshore area) required under this Act.” Attachment 1, 136 Cong. Rec. at 36,117. This makes sense, as the purpose of extending PSD requirements to OCS sources is to ensure NAAQS attainment in the corresponding onshore area. To ensure consistency, it was intended that issuance and enforcement of the OCS permits would follow the same general substantive and procedural requirements of the onshore programs. *Id.* (Senator Baucus further explaining “EPA should not write a unique set of requirements, but should include the same requirements for emission controls, offsets, *permitting*, monitoring, reporting, and testing, as would apply if the OCS source was located in the *corresponding onshore area.*”) (emphasis added). Because MDE operates an approved program in Worcester County, the corresponding onshore area, MDE’s issuance of the OCS permitting requirements was intended to follow the same processes. EPA’s theory that § 328 is a stand-alone section isolated from the remainder of Maryland’s PSD permitting program requirements is plainly in conflict with the plain language of the statute and Congressional intent.

B. Implementation of OCS Requirements Follow EPA Codification Procedures and are Similar to Other CAA Actions Reviewable by State Courts as State Actions.

There should be no doubt that permits issued by a Maryland agency “under State law” are subject to their corresponding state judicial processes. *See Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 275 (1997) (refusing to find that that state courts lack the authority to answer federal questions because a doctrine “based on the inherent inadequacy of state forums would run counter to basic principles of federalism.”). EPA points to no statutory language that suggests the normal course was intended to be altered here. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (“[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute” (internal quotation marks omitted)). EPA’s identification of certain OCS permitting features does

not change this fact, and in any event, those features are similar to other parts of the CAA where the state judiciary is afforded jurisdiction.

i. Implementation of State Regulations Deemed Adequate to Meet Minimum Federal Requirements Are State Actions.

EPA's determination that the State's regulations adequately implement federal requirements do not turn a state action into a federal one. While the EAB and the federal courts certainly have authority to review permits issued under federal law, that did not happen here. The EAB lacks the authority to review this appeal because MDE acted pursuant to State law, utilizing its EPA-approved PSD procedures incorporated into its federally enforceable SIP. There would be no need for Maryland to promulgate state OCS regulations and submit them for approval otherwise. *Lara-Aguilar v. Sessions*, 889 F.3d 134, 144 (4th Cir. 2018) ("We are to avoid 'interpretations of a statute which would produce absurd results ... if alternative interpretations consistent with the legislative purpose are available.'") (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982)).

EPA cites to *In re. W. Suburban Recycling & Energy Ctr., L.P.*, 6 E.A.D. 692 (EAB 1996) (hereinafter "*WSREC*"), for the contention that the review of a PSD permit issued under delegated OCS authority is controlled by federal and not state law. EPA Brief at 22-23. But in that case Illinois did not have an approved SIP program for the issuance of onshore PSD permits. It was instead implementing federal regulations under an EPA issued delegation agreement. *Id* at 692. In stark contrast here, Maryland was authorized to implement an OCS preconstruction permitting program under the state regulations it adopted for that purpose, and has an EPA-approved SIP for its PSD program. Furthermore, EPA expressly incorporated into federal law the same PSD permitting requirements for OCS sources as included in Maryland's SIP, including but not limited

to provisions providing for state appeal. *See* 40 C.F.R. Part 55, Appendix A. Therefore, *WSREC*'s finding is inapposite.

EPA admits that Maryland's state procedures for judicial review have been incorporated by reference into federal law as part of its approval of the State's OCS regulations. EPA Brief at 24. EPA's recent contention that those procedures conflict with federal law is misleading, as EPA alleges that Maryland is not an "approved" program. EPA itself and the EAB have previously noted, "[w]here EPA delegates administration of the federal PSD program, the delegate state implements the substantive and procedural aspects of the federal PSD regulations on behalf of EPA pursuant to a negotiated agreement." *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 203 (EAB 2006). This has not happened here. Rather, § 328 and 40 C.F.R. § 55.11 both make clear that MDE is to implement the requirements under its State regulations following EPA approval of their adequacy. MDE issued the OCS permits under State law pursuant to EPA approval. Therefore, the permits "take an appropriately separate track" from federal permits as they are "regarded as creatures of state law that can be challenged only under the state system of review." *In re Seminole Electric Cooperative, Inc.*, 14 E.A.D. 468, 475 (EAB Sept. 22, 2009) (internal citation omitted).

In spite of its codification of Maryland's regulations and its authorization to use them, EPA insists Maryland does not qualify "as an approved state with respect to a stationary source located on the OCS," and that its OCS consistency update "does not reflect an approval of Maryland's regulations for implementing Part 55 and is not equivalent to a SIP-approval." It is unclear what support EPA has for either of these contentions, as it provides none. Moreover, both contentions contradict the statutory language, legislative history, and EPA's previous acknowledgement that SIP requirements apply to the OCS once codified. EPA Brief at 1.

ii. Federal Incorporation By Reference Does Not Change the Nature of the Underlying Regulation.

EPA points to the fact that Maryland's OCS regulations became effective after EPA approval and incorporation by reference into federal law as proof that OCS permits are federal in nature. EPA Brief at 1, 18. But EPA fails to explain why OCS regulations should be treated differently than other CAA actions which become effective after federal action but are still reviewable in state courts.

For example, state regulations for new motor vehicles under CAA § 177 may be adopted in advance of EPA's issuance of a waiver of preemption, but are not effective for enforcement until after that waiver-issuance occurs. 42 U.S.C. § 7507; *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. New York State Dep't of Env't Conservation*, 17 F.3d 521, 534 (2d Cir. 1994) (holding that New York's adoption of state motor vehicle regulations was valid even though it occurred six months before California was granted a waiver). Those regulations remain state law, enforceable under state processes, regardless of the prerequisite federal action making them effective. Similarly, EPA's adoption of a SIP into federal law (making it federally enforceable) does not transform SIP actions into federal ones. Compare 40 C.F.R. § 55.14(d)(10)(i), 40 C.F.R. § 55.14(e)(10)(i)(A)), and 40 C.F.R. Part 55, Appendix A (adopting State OCS laws) with 40 C.F.R. § 52.1070 (adopting SIP). Thus, EPA's adoption of Maryland's OCS laws into federal law does not, on its own, indicate the State's OCS permits are federal in nature.

iii. EPA Oversight Is Not Indicative of Federal Action.

Nor does EPA's oversight authority differentiate OCS delegation from "approved State" status. EPA Brief at 6-7. EPA retains various forms of oversight over a State's SIP without impacting its status as an approved program. For example, EPA can issue a SIP call to amend an inadequate plan, 42 U.S.C. § 7410(k)(5), or issue an order requiring compliance with or bring a

civil action for violation of a SIP, 42 U.S.C. § 7413. Petitioners misconstrue one such case, *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461 (2004), as proof the Maryland courts have no jurisdiction here. Pet. Resp. at 1, 3. There, the Supreme Court found that CAA enforcement orders issued by the EPA were final federal actions reviewable under 42 U.S.C. § 7607(b)(1). There is no dispute the EAB has jurisdiction to review EPA's enforcement actions, which are clearly actions of a federal agency. But that decision does not stand for the proposition that PSD and NSR permits issued by a state agency pursuant to state regulations are federal actions reviewable by federal courts. To the contrary, EAB precedent and EPA itself acknowledge that onshore PSD permits issued pursuant to an approved SIP are reviewable only in state courts. EPA Brief at 8. Therefore, the mere existence of EPA's discretionary oversight does not vest jurisdiction over state action taken pursuant to a SIP-approved program. EPA fails to explain why similar oversight of the OCS requirements is fundamentally different.

C. EPA Regulations and the EAB's Standing Order Supports the Conclusion the OCS Permits Were Issued Under an Approved Program.

As stated above, Congress intended for a state's onshore PSD and NSR programs to be extended to OCS sources, applying the same pollution control and permitting requirements. For the Maryland Offshore Wind Project, EPA specifically authorized MDE to issue PSD and NSR permits to that OCS source, knowing that it had already approved Maryland's PSD and NSR programs under its SIP and specifically incorporating the EPA-approved program regulations into its OCS authorization. In doing so, EPA understood that the OCS permits would be issued under Maryland's approved SIP, as the substantive and procedural requirements of those programs (e.g. required pollution control technologies, offsets, public comment procedures) were contained in the SIP-approved regulations incorporated by reference. *See* 40 C.F.R. § 55.14(c)(4) ("During periods of EPA implementation and enforcement of this section, ... EPA shall not be bound by any State

or local administrative or procedural requirements including, but not limited to, requirements pertaining to hearing boards, permit issuance, public notice procedures, and public hearings.”).

Contrary to EPA’s position, 40 C.F.R. § 55.6 does not require all OCS air permits, whether issued by the EPA or a state, to be issued in accordance with the requirements of 40 C.F.R. Part 124. EPA Brief at 10. It is true that 40 C.F.R. § 55.6(a)(3) expressly requires “the Administrator” to follow the procedures of 40 C.F.R. Part 71 (applicable to federally-issued operating permits) or 40 C.F.R. Part 124 (applicable to federally-issued PSD permits). But that subsection expressly declines to require “delegated agencies” to follow those rules as well. The absence of that language is in stark contrast with other subsections of § 55.6. *See e.g.* 40 C.F.R. § 55.6(a)(2)(i) (“The Administrator or delegated agency shall act on the request for exemption in accordance with the procedures established in § 55.7”); 40 C.F.R. § 55.6(b)(7) (“The Administrator or delegated agency ... shall provide written notice of any permit application from a source....”); 40 C.F.R. § 55.6(b)(9)(i) (“The Administrator or delegated agency shall review the compliance plan and provide written comments to the source within 45 days of receipt of such plan.”). Had EPA intended for a State delegated preconstruction permitting of OCS sources to comply with all requirements of 40 C.F.R. Part 124, it would have expressly said so. *McWilliams v. Latah Sanitation, Inc.*, 149 Fed. Appx. 588, 590 (9th Cir. 2005) (When interpreting a regulation, “we presume the drafters said what they meant and meant what they said.”).

Using selective quotations out of context, EPA argues that EAB’s 2020 Standing Order supports its claim that the EAB has exclusive authority “to review (1) OCS permits and (2) permits issued by states that ‘have been delegated the authority to issue permits on behalf of the EPA.’” EPA Brief at 26. That Order, when read in full, makes no such claims. While invoking footnote 2 in support of its contention, EPA fails to credit the note’s full text, which provides:

Such New Source Review permits include PSD permits and Outer Continental Shelf ('OCS') permits. See 40 C.F.R. §§ 124.19; 55.6(a)(3). OCS permits may be issued as nonattainment new source permits, PSD permits, *state-law minor source permits*, or a combination of these. See CAA § 328(a)(1), 42 U.S.C. § 7627(a)(1)."

Standing Order, FN 2 (emphasis added). As this language acknowledges, an OCS permit may include state-law minor source permits applicable through an EPA-approved SIP, to the extent such permits are similarly required for sources in the corresponding onshore area. In this context, it should be clear that OCS permits may be issued pursuant to EPA-approved SIPs, not exclusively through EPA delegation of federal authority. Otherwise, state-law minor permits, which exist exclusively in state law without federal counterpart, could only be reviewed in federal courts. There is no reason to believe this absurd result was the intent of Congress or the EAB's Standing Order. *Griffin*, 458 U.S. at 575.

EPA admits that Maryland has an EPA-approved PSD program for purposes of onshore permitting. Therefore, pursuant to the language of footnote 1, Maryland is *not* a delegated state as defined by the Standing Order. This conclusion is consistent with the plain language of 40 C.F.R. § 124.1(e) ("Part 124 *does not apply* to PSD permits issued by an *approved State*.")² (emphasis added). And it is also consistent with 40 C.F.R. § 52.21(a) ("The provisions of [§ 52.21] are applicable to any *State implementation plan* which has been *disapproved* with respect to prevention of significant deterioration of air quality in any portion of any State where the existing air quality is better than the national ambient air quality standards.") (emphasis added). Again, Maryland's PSD program was fully approved and codified in its SIP at all times relevant to the permitting action. Thus, 40 C.F.R. § 52.21(u) and 40 C.F.R. Part 124 are inapplicable here.

² "An *approved State* is one administering an *approved program*." 40 C.F.R. § 124.41 (emphasis in original).

IV. THE SOURCE'S LOCATION DOES NOT REMOVE STATE COURT JURISDICTION OVER A STATE AGENCY'S PERMITTING DECISION ISSUED UNDER STATE REGULATIONS

EPA contends that MDE's issuance of the US Wind Permit is a federal action because the OCS source will be located outside Maryland's jurisdictional bounds on the OCS. EPA Brief 11-12, 16-17. While there is no dispute that the OCS is property subject to federal control, CAA § 328 expressly supersedes a portion of the Outer Continental Shelf Lands Act ("OCSLA"), making EPA responsible for preconstruction air quality permitting of OCS sources unless a state with a corresponding onshore area has implemented state regulations which are adequate to implement that Section's requirements. 42 U.S.C. § 7627(a). This statutory delegation is constitutional because it "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *Gundy v. United States*, 588 U.S. 128, 135 (2019) (alterations in original). Maryland's action is not extraterritorial because the CAA provides Maryland with authority to issue the permit, in accordance with EPA's prior approval of its regulations. *See United States v. Transocean Deepwater Drilling Inc.*, 936 F. Supp. 2d 818, 830 (S.D. Tex. 2013), *aff'd*, 767 F.3d 485 (5th Cir. 2014).

The permit's application to activities on the OCS is no different than other PSD, NSR, and Title V permits applicable on federal property which MDE issues and enforces pursuant to its EPA-approved SIP. *See* 42 U.S.C. § 7418 (requiring under the CAA that the federal government, having jurisdiction over any property, comply in the same manner and to the same extent as any non-governmental entity). For example, Maryland issues air quality construction and operating permits to military bases, despite those properties being a military enclave. *See e.g.* Part 70 Operating Permit No. 24-021-00131 and Fact Sheet, issued to the U.S. Army Garrison at Fort Detrick, available at

<https://mde.maryland.gov/programs/permits/AirManagementPermits/Test/Fort%20Detrick%20Is>

[sued%20Title%20V%20Permit.pdf](#) (last accessed Sept. 10, 2025), at 109 (discussing PSD evaluation for greenhouse gas requirements). EPA does not contend Maryland’s courts lack jurisdiction to review the PSD, NSR, or Title V permits applicable to onshore federal properties, and provides no reason why OCS sources are somehow different.

EPA inaccurately states that the Maryland courts have already concluded they do not have jurisdiction in this matter. EPA Brief at 11-12; 24. To the contrary, *Intermoor, Inc. v. U.S. Wind, Inc.*, No. C-23-CV-20-000097, 2021 WL 4130752 (Md. App. Sept. 10, 2021) considered whether Maryland courts had jurisdiction pursuant to OCSLA, 43 U.S.C. § 1333(a)(2)(A), to apply a Maryland mechanic’s lien to property located on the OCS. As EPA notes, the court ultimately found it did not have jurisdiction in that particular dispute. But that decision is inapplicable here for two reasons. First, that case was an *in rem* proceeding—one “taken directly against property” (i.e. the *res*) for the disposition of the property, without reference to the title of individual claimants. *Pennoyer v. Neff*, 95 U.S. 714, 734 (1877). The court noted that its jurisdiction is set by the State Constitution “unless enlarged by statute”. *Intermoor, Inc.*, 2021 WL 4130752, *3. While the plaintiff in *Intermoor* failed to identify an applicable statute extending the State’s jurisdiction to place a mechanic’s lien on property located outside its boundaries, § 328 clearly provides authority for the State to implement and enforce its PSD and NSR permits for OCS sources pending EPA approval of its State regulations. Additionally, the State Constitution already provides jurisdiction over final permitting decisions of the State agencies located within its borders. The litigation currently pending with the Worcester Circuit Court does not require extraterritorial reach into the OCS. It is a question of whether a State agency properly issued a permit pursuant to State regulations. That action occurred entirely within the State’s borders. There is no legitimate question that Maryland courts have jurisdiction over the actions of its executive agencies.

V. CONCLUSION

For the foregoing reasons, the Maryland Department of the Environment respectfully reiterates its position that the Environmental Appeals Board lacks jurisdiction to hear this appeal, and again requests dismissal of the Petition for Review.

Dated: September 11, 2025

Respectfully submitted,

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STATEMENT OF COMPLIANCE W/ WORD LIMITATION

I certify that the forgoing Reply to the Brief of Region 3 Addressing the Board's Jurisdiction, excluding the parts of the brief that do not count toward the word limit, contains 5,177 words.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Reply to the Brief of Region 3 Addressing the Board's Jurisdiction, were sent to the following persons in the manner indicated:

By first-class U.S. mail to Petitioners Mayor and City Council of Ocean City, Maryland and Commissioners of Worcester County, Maryland through their attorneys of record, Nancie G. Marzulla, and Roger J. Marzulla, at 1150 Connecticut Ave., NW, Suite 1050, Washington, D.C. 20036, on September 12, 2025;

By first-class U.S. mail to Amy Van Blarcom-Lackey, Regional Administrator of Region 3 of the Environmental Protection Agency, at 4 Penn Center, 1600 JFK Blvd., Philadelphia, PA 19103, on September 12, 2025;

By first-class U.S. mail to US Wind Inc., the permit applicant, at World Trade Center Baltimore, 401 East Pratt Street, Suite 1810, Baltimore, MD 21202, on September 12, 2025;

By e-filing system to the Environmental Appeals Board on September 11, 2025.

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