

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

In Re:)	
)	
)	
US Wind Inc., for the)	
Maryland Offshore Wind Project)	OCS Appeal No. 25-01
)	
)	
Permit Number: Permit-to-Construct 047-)	
0248; NSR-2024-01; PSD Approval PSD-)	
2024-01)	

**PETITIONERS’ OPPOSITION TO MOTIONS FOR ABEYANCE OF PROCEEDINGS
AND STAY OF ORDER REQUIRING REPUBLICATION OF NOTICE**

Petitioners, the Mayor and City Council of Ocean City and the Commissioners of Worcester County, Maryland (collectively, “Ocean City”), oppose the motions to hold this appeal in abeyance filed by Respondents, Maryland Department of the Environment (“MDE”) and US Wind, Inc. The Board has already determined it has jurisdiction and established a clear path to merits review. An abeyance would delay orderly adjudication, frustrate the Board’s mandate to ensure fair and efficient resolution, and risk prejudice to Ocean City and the public. Movants have not carried their burden to justify the extraordinary relief of a stay or abeyance. The motions should be denied and the case should proceed on the schedule set by the Board.

Factual Background

On December 16, 2025, after full briefing by all parties and EPA Region 3, the Board issued an Order Affirming Board Jurisdiction, concluded that the permits constitute federal action for purposes of EAB review, and required MDE to reissue public notice directing appeals

to the EAB, with merits review to follow within 30 days of the reissued notice.¹ On January 13, 2026, upon MDE’s request for clarification and extension, the Board extended MDE’s deadline to reissue notice to February 12, 2026 and clarified procedures.²

US Wind filed an interlocutory appeal of the Board’s jurisdictional order in the Fourth Circuit Court of Appeals on January 26, 2026, and MDE followed suit by filing its own interlocutory appeal on February 6, 2026.³ Both US Wind and MDE now seek to hold all proceedings in abeyance pending the Fourth Circuit’s resolution of their interlocutory appeals, asserting efficiency and alleged irreparable harm from proceeding in compliance with the Board’s rules.⁴

Legal Standard

The Board may manage proceedings to ensure fair and efficient adjudication.⁵ Stays and abeyances are discretionary and require a clear showing that delay will promote efficiency without prejudicing other parties, and that the moving party faces actual harm absent relief.⁶ The party seeking a stay bears the burden to justify halting duly ordered case steps, particularly where the Board has already determined its own authority to proceed.⁷

¹ Order Affirming Board Jurisdiction (Dec. 16, 2025).

² Order on Motion for Clarification and Setting Deadline to Re-Issue Notice and Briefing Schedule (Jan. 13, 2026).

³ U.S. Wind, Inc.’s Petition for Review, No. 26-1095 (4th Cir. Jan. 26, 2026); MDE’s Petition for Judicial Review, No. 26-1126 (4th Cir. Feb. 6, 2026).

⁴ U.S. Wind, Inc.’s Motion to Hold Case in Abeyance and Stay Order Requiring Republication of Notice (Feb. 9, 2026); MDE’s Motion for Abeyance of Proceedings and Stay of Order Requiring Republication of Notice (Feb. 6, 2026).

⁵ 40 C.F.R. § 22.4(a)(2); 40 C.F.R. § 22.4(c).

⁶ See generally 40 C.F.R. § 124.19.

⁷ See *Rankine v. Levi Strauss & Co.*, 674 F. Supp. 3d 57, 68 (S.D.N.Y. 2023) (“To be sure, the movant bears the burden of establishing its need for a stay.”) (omitting internal citations and quotations).

Argument

1. The Board Has Determined Its Jurisdiction and Should Implement Its Orders

The Board has already affirmed its jurisdiction and established a remedial path to merits review through a unified timeline for petitions and briefing.⁸ US Wind and MDE utterly fail to show any cognizable harm from adhering to the Board’s rules and orders as issued. In contrast, granting abeyance now would undercut the Board’s jurisdictional ruling and its case-management orders. The proper course is to proceed unless and until a court issues a binding directive altering the status quo.

2. Interlocutory Appeals Do Not Justify Halting Administrative Proceedings

Movants rely on the fact they have filed interlocutory appeals to argue that EAB adjudication may prove unnecessary. But speculative judicial outcomes are not a basis to freeze agency adjudication that is already underway.⁹ The possibility that a court could later limit or redirect the forum does not transform efficient, ongoing proceedings into wasted effort; rather, proceeding preserves administrative momentum, protects the public interest in timely resolution, and ensures an adequate record.¹⁰

MDE and US Wind ask the Board to stay all proceedings and await the Fourth Circuit’s decision on what they term a “foundational question of first impression” about the Board’s jurisdiction over appeals from OCS permits issued by a state under 42 U.S.C. § 7627(a)(3).¹¹ US

⁸ Order Affirming Board Jurisdiction (Dec. 16, 2025).

⁹ See *Cephalon, Inc. v. Sebelius*, 796 F. Supp. 2d 212, 218, 218 n.5 (D.D.C. 2011) (“[F]uture outcomes of judicial proceedings are too speculative to provide standing or ripeness,” and a claim cannot “rely on the outcome of a future judicial proceeding to prove that it will suffer immediate harm should the Court fail to act.”).

¹⁰ See *Associated Fisheries of Maine, Inc. v. Evans*, 329 F. Supp. 2d 172, 175 (D. Me. 2004) (rejecting transfer motion concluding that “the interest of justice is best served by allowing Plaintiff’s challenge to proceed to a prompt resolution in its home forum.”).

¹¹ 42 U.S.C. § 7627(a)(3).

Wind also asserts the Fourth Circuit’s decision will determine whether challenges belong in state or federal court.¹² Even accepting that characterization, which Ocean City does not, neither motion identifies a concrete, imminent judicial action—such as a stay or expedited schedule—that would warrant pausing the Board’s implementation of its own orders. Agency adjudications routinely continue absent a court-ordered stay.¹³

3. Proceeding Now Promotes Efficiency and Conserves Resources

Movants claim efficiency favors delay. The opposite is true. The Board will likely decide the merits well before the Fourth Circuit issues an opinion on the preliminary issue of jurisdiction. If the Fourth Circuit affirms the Board’s jurisdiction—as Ocean City is confident it will—a year or more of “abeyance time” will have been wasted. This is valuable time that should instead be spent by the Board deciding the merits of this petition, not waiting for the Fourth Circuit.

Implementing the Board’s December 16, 2025 and January 13, 2026 Orders will enable consolidated merits briefing, preventing piecemeal litigation, creating a complete administrative record, and facilitating any subsequent judicial review.

¹² U.S. Wind, Inc.’s Motion to Hold Case in Abeyance and Stay Order Requiring Republication of Notice at 3 (Feb. 9, 2026).

¹³ See *Nichols v. Alcatel USA, Inc.*, No. 5:05-cv-43-DF, 2007 WL 9724542, at *1 (E.D. Tx. June 19, 2007) (quoting *Taylor v. Sterrett*, 640 F.2d 663, 668 (5th Cir. 1981) (“[W]here an appeal is allowed from an interlocutory order, the district court may still proceed with matters not involved in the appeal.”)); see also *Grauberger v. St. Francis Hospital*, 169 F. Supp. 2d 1172, 1175 n.2 (N.D. Cal. 2001) (“An appeal from an interlocutory order does not, however stay the proceedings, as it is firmly established that an appeal from an interlocutory order does not divest the trial court of jurisdiction to continue with other phases of the case.”) (internal citations and quotations omitted).

The Board already provided the mechanism to consider the merits of Petitioner’s claims.¹⁴ That case-management design promotes efficiency now; postponing it only prolongs uncertainty and multiplies collateral skirmishes.

4. Movants Have Not Shown Irreparable Harm

MDE asserts “irreparable harm” from being “forced to participate” in this proceeding. But participating in proceedings before this Board, as MDE and US Wind are already doing, is not cognizable irreparable harm to support abeyance.¹⁵ Participation in a forum the Board has held proper is an ordinary litigation burden, not an irreparable harm.¹⁶

MDE also claims republication will “restart[] the statute of limitations for appeal” and may invite “additional unwarranted petitions,” creating a “Hobson’s choice” between legal consequences of compliance and potential sanctions for noncompliance.¹⁷ But that contention is moot now that the Board has stayed its order requiring MDE to republish its Notice of Permit Issuance.

5. No Prejudice to Movants; Substantial Prejudice from Delay

MDE argues that Ocean City would not be prejudiced, asserting the permits are stayed during the appeal process. This may or may not be correct.¹⁸ But continued delay prejudices

¹⁴ Order Affirming Board Jurisdiction (Dec. 16, 2025).

¹⁵ MDE’s Mot. for Abeyance of Proceedings and Stay of Order Requiring Republication of Notice at 3 (Feb. 6, 2026).

¹⁶ See *Renegotiation Bd. v. Bannerkraft Clothing Co., Inc.*, 415 U.S. 1, 24 (1974) (establishing the foundational principle that “mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.”).

¹⁷ MDE’s Mot. for Abeyance of Proceedings and Stay of Order Requiring Republication of Notice at 3–4 (Feb. 6, 2026).

¹⁸ 40 C.F.R. § 124.16 (“If a request for review of a RCRA, UIC, or NPDES permit under § 124.19 of this part is filed, the effect of the contested permit conditions shall be stayed and shall not be subject to judicial review pending final agency action. Uncontested permit conditions shall be stayed only until the date specified in paragraph (a)(2)(i) of this section. (No stay of a PSD permit is available under this section.) If the permit involves a new facility or new injection

Ocean City and the public by deferring resolution of the merits and protracting uncertainty regarding compliance and environmental protections. The Board’s timeline already provides orderly, prompt review; abeyance would needlessly postpone it.

6. The Board’s Case-Management Authority Favors Denial

Movants invoke the Board’s broad authority under 40 C.F.R. § 124.19(n) to manage proceedings and cite *Desert Rock*¹⁹ and other authorities to suggest abeyance may promote efficiency. US Wind likewise relies on the Board’s authority and posits that abeyance is appropriate when developments “are likely to render judicial resolution unnecessary.”²⁰ Here, however, the identified “developments” are an uncertain (and, we believe, unmeritorious) Fourth Circuit appeal challenging the Board’s jurisdiction over the appeal of a PSD permit for a facility located wholly on federal land (the outer continental shelf)—a “federal enclave”²¹ which “the Federal Government [has] complete ‘jurisdiction, control, and power of disposition’ over the [Outer Continental Shelf], while giving the States no ‘interest in or jurisdiction’ over it.”²² Contrary to US Wind, no development in the Fourth Circuit is likely to render Board proceedings unnecessary in this case.

Conclusion

The motions should be denied. The Board should enforce its December 16, 2025 and January 13, 2026 Orders and proceed efficiently to merits review on the established schedule.

well, new source, new discharger or a recommencing discharger, the applicant shall be without a permit for the proposed new facility, injection well, source or discharger pending final agency action.”).

¹⁹ *In Re: Desert Rock Energy Company, LLC*, 14 E.A.D. 484 (EAB 2009).

²⁰ US Wind, Inc.’s Mot. to Hold Case in Abeyance and Stay Order Requiring Republication of Notice at 2 (Feb. 9, 2026).

²¹ *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 587 U.S. 601, 612 (2019).

²² *Id.* at 609.

Respectfully submitted,

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Statement of Compliance

I certify that this Response in Opposition to Motions for Abeyance of Proceedings and Stay of Order Requiring Republication of Notice is 1,757 words in length and therefore complies with the word limitation of 7,000 words in 40 C.F.R. § 124.19(d)(3).

/s/ Nancie Marzulla

Certificate of Service

I certify that copies of the foregoing opposition were sent to the following persons by email in accordance with the Environmental Appeals Board’s September 29, 2025 Order on Electronic Service of Documents, on February 17, 2026:

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