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-2024-01; PSD Approval PSD-2024-01**	**Appeal No. OCS 25-01**

US WIND, INC.'S REPLY TO U.S. EPA REGION 3'S AND PETITIONERS' BRIEFS REGARDING JURISDICTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

I. INTRODUCTION

As required by Section 328 of the Clean Air Act ("CAA"), the Maryland Department of the Environment ("MDE") issued an air permit ("the MDE Permit") to US Wind, Inc. ("US Wind") under Maryland's own PSD permitting program upon determining US Wind's application satisfied all CAA requirements. Maryland was authorized to issue this permit after EPA both incorporated MDE's air permitting rules into the 40 C.F.R. Part 55 Outer Continental Shelf ("OCS") Air Regulations and delegated to the state of Maryland any authority EPA has to administer air permits for OCS sources. Those actions not only authorized MDE to issue the MDE Permit under state law, they also authorized MDE to use its own state law administrative procedures to adjudicate appeals of the permit. Since MDE's administrative procedures control, EPA's administrative procedures—including review by the Environmental Appeals Board ("EAB")—do not, and EAB must dismiss this Petition for lack of jurisdiction.

EPA attempts to complicate this simple construct by seizing on the word "delegate" in Section 328 to argue that a "delegation" of OCS permitting authority is just like a "delegated PSD program" under EPA's Prevention of Significant Deterioration ("PSD") rule.[1] But Maryland's OCS program is nothing like a "delegated PSD program" because it relies on Maryland's EPA-approved *state law* framework and a full transfer of EPA's administrative authority to Maryland, not just an agreement that allows Maryland to implement EPA's own federal regulations and administrative procedures (as is the case for delegated PSD programs). In claiming that EPA's delegation of authority to MDE to regulate OCS sources is the "functional equivalent" of a

[1] This brief primarily responds to the EPA's Brief ("EPA Br."). Petitioners Response contained arguments entirely duplicative of EPA's (but less supported) and failed to rebut US Wind's August 1, 2025, Response.

"delegated PSD program," EPA conflates two entirely different uses of the word "delegate" and severely misconstrues Congress's mandate in CAA Section 328.

The fundamental error in EPA's misplaced analogy to "delegated PSD programs" is that states with delegated PSD programs do not have their own PSD rules, but Maryland does. As required by CAA Section 328, MDE relied on its own state rules to issue the MDE Permit just as it would to issue a permit for an onshore source. If the EAB now treated Maryland's OCS program as nothing more than a "delegated PSD program" and asserted jurisdiction over this appeal, the EAB would be ignoring EPA's own Part 55 regulations which direct EPA to delegate *any* authority the Administrator has to the state, including the authority to conduct administrative reviews of issued permits.

The regulatory scheme for EPA to delegate authority to states to issue OCS permits under CAA Section 328 requires EPA to take two actions: first, EPA must adopt a state's rules for onshore sources and apply them to OCS sources located within 25 miles of a state's seaward boundary; and second, EPA must "delegate" *any authority* EPA has to regulate OCS sources to a state if EPA finds the state's regulations are adequate. ***This "delegation" constitutes a full transfer of authority from EPA to a state of both the substantive requirements and administrative procedures to regulate those OCS sources***, just like the substantive and administrative authority states have over onshore sources under an EPA-approved state implementation plan ("SIP").

By contrast, the "delegation" EPA uses to establish "delegated PSD programs" merely provides states that ***lack their own EPA-approved PSD rules*** the authority to issue permits using EPA's federal PSD rule. This "delegation" is much more limited in scope than the delegation contemplated under CAA Section 328, even though the same word is used to describe both. EPA's

PSD regulations at 40 C.F.R. Section 52.21(u) simply provide that states without an EPA-approved PSD permitting program can nonetheless be "delegated" to issue PSD permits on EPA's behalf using the same *federal* PSD regulations and administrative procedures that EPA would use if EPA were to issue the PSD permit itself. As EPA itself notes, such "delegated" states issuing PSD permits "stand in the shoes of EPA" because they do not wield their own permitting authority.[2] But that is far from the "functional equivalent" of MDE's delegated authority under Section 328 to issue the MDE Permit for US Wind because MDE used its own state-specific PSD rules and administrative procedures—the very same state rules MDE applies to its onshore sources.

EPA's other arguments fare no better. Even though EPA retains CAA enforcement authority, as the U.S. Supreme Court has recognized, EPA does not retain permitting authority over the MDE Permit. CAA Section 328 also expressly supersedes the air quality provisions of the Outer Continental Shelf Lands Act ("OCSLA"), thus mooting EPA's argument that OCSLA prevents Maryland's air regulations from applying in federal waters. EPA also fails to explain the jurisdictional relevance of characterizing the MDE Permit as a "federal action." And because the MDE Permit is not an action taken by the EPA Administrator, the exclusive jurisdiction provisions of CAA Section 307 do not apply on their face.

Ultimately, the jurisdictional question before EAB boils down to one undisputed fact: MDE does *not* implement a "delegated PSD program," and therefore the Part 124 procedures for "delegated PSD programs" do not apply to this appeal. Accordingly, EAB does not have jurisdiction over the MDE Permit. EAB therefore must dismiss this appeal and allow it to proceed the same as it would for an onshore source permit issued by a state with a SIP-approved program: via Maryland's own administrative procedures.

[2] EPA Br. at 23.

II. MDE ISSUED THE US WIND PERMIT UNDER MARYLAND'S OWN APPROVED PSD AND NSR PROGRAMS, NOT EPA'S PSD PROGRAM.

All parties agree that EAB has no jurisdiction to adjudicate appeals of permits for onshore sources issued by a state under an EPA-approved program.[3] As EPA recognized, "[a]pproved state program permits are regarded as creatures of state law that can be challenged only under the state system of review."[4] The CAA and EPA's regulations direct the same result for the MDE Permit for three reasons: (1) EPA has approved Maryland's PSD and NSR permitting regulations into the Maryland SIP, thus transferring to Maryland full authority to issue PSD and NSR permits for onshore sources in Maryland; (2) EPA approved those very same state regulations for use in permitting OCS sources within 25 miles of Maryland's seaward boundary, as CAA Section 328 requires; and (3) EPA delegated to MDE *any* authority EPA would otherwise have for issuing air permits to those OCS sources—including any administrative and procedural authority. Maryland's administrative procedures, not EPA's, thus control the appeal of the MDE Permit.

A. EPA's Approval of Maryland Air Regulations to Issue the US Wind Permit Requires State Administrative Procedures to Control.

MDE issued an air permit to US Wind pursuant to its own PSD and NSR regulations that were established via state law,[5] approved by EPA into the Maryland SIP for use in permitting onshore sources,[6] and approved again by EPA for Maryland's use in its permitting OCS sources.[7]

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[3] EPA Br. at 8.

[4] *Id.* (quoting *In re Seminole Electric Cooperative, Inc.*, 14 E.A.D. 468, 475 (EAB 2009)).

[5] COMAR 26.11.06.14 ("Control of PSD Sources"); COMAR 26.11.17 ("Nonattainment Provisions for Major New Sources and Major Modifications"); COMAR 26.11.02.12 ("Procedures for Obtaining Approvals of PSD Sources and NSR Sources …").

[6] 40 C.F.R. § 52.1070 (codifying COMAR 26.11.02, COMAR 26.11.06, and COMAR 26.11.17 among the list of "EPA-Approved Regulations" in the Maryland SIP).

[7] *Outer Continental Shelf Air Regulations Consistency Update for Maryland*, 80 Fed. Reg. 65,661 (Oct. 27, 2015) ("2015 Consistency Update for Maryland").

Notably, in codifying its approval of Maryland's PSD and NSR programs for permitting OCS sources, EPA cross-referenced not only the Maryland state law and regulations establishing those programs, but also EPA's own prior approval of the programs into the Maryland SIP, codified in Subpart V of Part 52.[8]

In the preamble for its approval of Maryland's OCS air permitting regulations, EPA made clear that "[t]he intended effect of approving the [MDE's] OCS requirements … is to regulate emissions from OCS sources in accordance with the requirements onshore."[9] In incorporating Maryland's permitting programs into Part 55, EPA recognized that it does not have the authority to make substantive changes to Maryland's PSD or NSR programs, but rather, must approve them even if they differ from EPA's programs.[10] EPA's statement underscores that Maryland's PSD and NSR permitting programs are creatures of state law, not federal law, by recognizing that states are not limited to simply administering EPA's own requirements in issuing PSD and NSR permits.[11]

Most significantly, the preamble to EPA's approval of Maryland's regulations for use in permitting OCS sources recognizes that "EPA will use its own administrative and procedural requirements" *only* if a state has *not* been delegated the authority to implement and enforce Part 55.[12] Conversely, a state that receives such a delegation, as Maryland has, "will use its

[8] *Id.* at 65,663; 40 C.F.R. § 55.14(d)(10)(i).

[9] 2015 Consistency Update for Maryland at 65,661 (emphasis added).

[10] *Id*.

[11] *Id*.

[12] *Id*. at 65,662.

administrative and procedural rules as onshore."[13] With this statement, EPA made clear that the combined effect of its approval of Maryland's PSD and NSR programs into Part 55, along with the delegation of its Part 55 authority to MDE,[14] rendered Maryland's administrative and procedural requirements effective for any permit that MDE issues to an OCS source within 25 miles of Maryland's seaward boundary. Those Maryland administrative procedures supplant the administrative EAB review that would apply if Maryland had not sought and received delegation from EPA.

Contrary to EPA's claims in its brief, EPA's approval of Maryland's PSD and NSR permitting programs, coupled with EPA's full delegation of any and all of its authority to MDE to regulate OCS sources, is far more akin to a SIP-approved program than a "delegated PSD program." As with a SIP, EPA approved Maryland's permitting regulations, incorporating them by reference into Part 55 as the relevant state law for OCS sources, and MDE used those permitting regulations to issue the MDE Permit. And just as MDE exercises its own state law and regulatory power under a SIP rather than "standing in the shoes" of EPA, MDE exercised its state authority under state law and state regulations when it issued the MDE Permit. As with permits issued by MDE to onshore sources under Maryland's SIP, EPA is not the permitting authority for the MDE Permit and the EAB thus has no jurisdiction to hear this appeal.[15]

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[13] *Id*. at n.1.

[14] *Delegation of Authority to Implement and Enforce Outer Continental Shelf Air Regulations to the Maryland Department of the Environment*, 80 Fed. Reg. 43,088 (July 21, 2015) ("2015 OCS Delegation to MDE").

[15] EPA's argument that EAB's 2020 Standing Order supports EAB jurisdiction over the matter is premised on the same faulty argument that EPA's Part 55 delegation to Maryland 55 is the same as a "delegated PSD program." EPA Br. at 26-27. Given that EPA's Part 55 delegations are more like SIP-approved state PSD programs in all relevant respects, the 2020 Standing Order supports EAB dismissing this petition for lack of jurisdiction. *See* US Wind's Initial Response at 19-20.

As it does for its onshore sources, MDE properly relied on its own rules codified at COMAR 26.11.06.14 and COMAR 26.11.17 to issue the US Wind permit in accordance with the Maryland-specific procedures codified at COMAR 26.11.02.12. Maryland's PSD regulations, which incorporate the substantive requirements of EPA's PSD rule, make clear that "[t]he reviewing authority is the Department instead of the [EPA] Administrator" and that "the applicable procedures are those set forth in COMAR 26.11.02," not EPA's Part 124 rules.[16] EPA approved these regulations, which are the exact same rules contained in the SIP, into Part 55, as it was required to do under CAA Section 328.

B. EPA's OCS Air Regulations Confirm That Its Approval of Maryland's PSD and NSR Programs for OCS Sources Has the Same Legal Effect as Its Approval of the Maryland SIP.

EPA's Part 55 regulations further confirm that because EPA delegated regulatory authority over OCS sources to MDE, Maryland's administrative procedures control the issuance and review of any MDE-issued OCS permit. First, 40 C.F.R. Section 55.11, entitled "Delegation," makes clear that to qualify for delegation, a state must "adopt[ ] the appropriate portions of [Part 55] *into State law*"[17] and have "adequate authority *under State law* to implement and enforce the requirements."[18] These references to "State law" confirm that, just like in a SIP, the result is a transfer of federal authority to state law—not the other way around, as EPA's brief suggests.[19]

Next, 40 C.F.R. Section 55.12, entitled "Consistency Updates," states that EPA will "*approve* applicable rules submitted by State or local regulatory agencies for incorporation by

[16] COMAR 26.11.06.14.B.(2).

[17] 40 C.F.R. § 55.11(b)(1).

[18] *Id.* § 55.11(b)(2).

[19] EPA Br. at 1 (asserting that state and local requirements apply to OCS sources "only after the EPA has incorporated such requirements by reference into federal law").

reference into Section 55.14,"[20] confirming the action taken by EPA is similar to a SIP approval. This same terminology carries through into the preambles associated with EPA's consistency updates for various OCS states.[21] And as noted above, EPA's consistency reviews for Maryland's OCS permitting program recognize "[t]he intended effect of *approving* the OCS requirements for the [MDE] is to regulate emissions from OCS sources in accordance with the requirements for onshore sources."[22]

The terms "state law" and "approve" in Part 55 (for OCS permitting) are used the same as in Part 52 (for SIPs), and EPA offers no argument to the contrary. And just as the EAB has no role to play in appeals of PSD and NSR permits issued under state law approved by EPA under Part 52, the EAB has no role to play in the appeal of the MDE Permit issued under state law approved by EPA under Part 55.

C. EPA's Regulations and Rulemaking Preambles Confirm That Maryland Procedures Apply to the MDE Permit.

EPA's contemporaneous statements in the preambles to the proposed and final Part 55 regulations clearly articulate that state administrative and procedural requirements apply when a state is the Part 55 permitting authority. In the preamble to the proposed Part 55 regulations, EPA explains that "[w]here the Administrator delegates the OCS permitting requirements to a state or local agency, that agency must comply with the requirements of Section 55.6 *except for the*

[20] 40 C.F.R. § 55.12(d)(1) (emphasis added).

[21] *See, e.g.*, *Outer Continental Shelf Air Regulations Consistency Update for Virginia*, 76 Fed. Reg. 43,185 (July 20, 2011); *Outer Continental Shelf Air Regulations Consistency Update for Massachusetts*, 73 Fed. Reg. 53,718 (Sept. 17, 2008).

[22] 2015 Consistency Update for Maryland; *Outer Continental Shelf; Consistency Update for Maryland*, 81 Fed. Reg. 62,393 (Sept. 9, 2016); *Outer Continental Shelf Air Regulations; Consistency Update for Maryland*, 84 Fed. Reg. 34,065 (July 17, 2019); *Outer Continental Shelf Air Regulations; Consistency Update for Maryland*, 89 Fed. Reg. 451 (Jan. 4, 2024).

administrative and public participation procedures of the federal rule, for which the agency may substitute its own procedures."[23] In its preamble to the final Part 55 regulations, EPA responded to numerous commenters who asked EPA to more explicitly state in Part 55 what authority a delegated state has to use its administrative procedures. EPA observed that "a state may use any administrative procedure that it has under state law to implement and enforce the requirements of this part. However, as required by the statute, part 55 will only be delegated to a state or local agency that demonstrates that these administrative procedures are adequate to implement and enforce the requirements of this part."[24] In other words, the sheer act of delegation is a recognition by EPA that a state's administrative procedures are adequate and control.

EPA's final rule preamble explains:

> Upon delegation, the offshore area will be allowed to use its administrative and procedural rules, to the same extent as onshore. The same situation that exists onshore will exist on the OCS; state and local governments can use their administrative procedures, but EPA will disregard any procedures that conflict with federal requirements and can enforce federal law in a delegated program.[25]

So while EPA clearly retains *enforcement authority* (which no party disputes), state administrative procedures control. *See also* Section III(D), below.

EPA's Part 55 regulations confirm that state administrative procedures apply when a state is the delegated permitting authority by explaining the appropriate administrative procedures when EPA has *not* delegated permitting authority to a state. In 40 C.F.R. Section 55.6(a)(3), EPA provides that the "*the Administrator* will follow the applicable procedures of Part 71 [for operating

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[23] *Outer Continental Shelf Air Regulations*, 56 Fed. Reg. 63774, 63,781 (Dec. 5, 1991) ("Proposed Rule Preamble") (emphasis added).

[24] *Outer Continental Shelf Air Regulations*, 57 Fed. Reg. 40,792, 40,801 (Sept. 4, 1992) ("Final Rule Preamble").

[25] *Id.* at 40,803.

permits] or 40 CFR Part 124 in processing applications under this part." EPA's brief wrongly claims that EPA meant "delegated agency" when it referred to "the Administrator" in 40 C.F.R. Section 55.6(a)(3), and that Section 55.6(a)(3) thus "applies to states exercising authority delegated from the Administrator."[26] But it is clear from the rest of Section 55.6 that EPA knew the difference between "the Administrator" and a "delegated agency." All other directions in Section 55.6 explicitly refer to "the Administrator *or* delegated agency," confirming that EPA's instructions in Section 55.6(a)(3) are *only* for EPA.[27] EPA's argument is also circular because 40 C.F.R. Section 124.41 defines "Administrator" and "EPA" to include "delegate agencies" *only* for purposes of its delegated PSD program, which is clearly distinct and different in kind from EPA's delegation of OCS permitting authority. *See* Section II(A), *supra*.

Even more telling, 40 C.F.R. Section 55.14(c) states that "*during periods of EPA implementation and enforcement of this section,*" EPA "will not be bound by 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," but will instead follow the applicable procedures set forth in Part 124.[28] The obvious implication of this provision is that when (as here) EPA is *not* implementing and enforcing this section, including when a delegated state *is*, those state or local administrative and procedural requirements *do* apply.

[26] EPA Br. at 10.

[27] *See, e.g.*, 40 C.F.R. §§ 55.6(a)(1)(i) (regarding submittal of permit applications), 55.6(a)(2) (regarding exemptions), 55.6(a)(4)(iii) (regarding effect of a permit approval), 55.6(b)(7) (regarding written notice to the Federal Land Manager), and 55.6(b)(9) (regarding compliance plans).

[28] *Id.* § 55.14(c) (emphasis added).

EPA's brief even admits that "a delegated agency under part 55 may use its own 'administrative procedures,'"[29] so it is difficult to imagine what role the EAB—an *administrative* body that serves to implement EPA's *administrative* authority—could possibly have in Maryland, when EPA's own regulations provide that state law administrative procedures control.

EPA's brief points to the statement in the Federal Register notice for EPA's 2016 Part 55 consistency update for Maryland that "EPA has excluded administrative and procedural rules."[30] But EPA completely disregards the footnote accompanying that statement, which confirms that "each [agency] that has been delegated the authority to implement and enforce 40 CFR part 55 *will use its own administrative and procedural rules as if onshore*."[31] The boilerplate statement cited by EPA and its associated footnote appear in the Federal Register notices for EPA consistency reviews for OCS states regardless of whether they are delegated states[32] and simply reiterates what EPA made clear in its original Part 55 rulemaking: state administrative and procedural rules govern only in states that are delegated to implement and enforce Part 55. Maryland is just such a state—it has been delegated the authority to regulate OCS sources, along with the authority to issue permits in accordance with MDE's own administrative and procedural rules, which precludes EAB jurisdiction.

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[29] EPA Br. at 7.

[30] *Id.* at n. 35.

[31] *Outer Continental Shelf Air Regulations Consistency Update for Maryland*, 81 Fed. Reg. 62,393, 62,394, n. 1 (Sept. 9, 2016).

[32] *See supra* note 21. In fact, EPA's consistency reviews for Maryland and all other states include the same boilerplate analysis and simply do not discuss whether the state at issue is delegated to implement Part 55 or not. This makes sense, given that consistency reviews are an entirely separate exercise from delegation and must regularly be conducted in all OCS states regardless of whether they have delegated authority to implement Part 55, which few of them do.

Grasping at straws, EPA's brief makes a surprising admission: "EPA views its reference to such regulation(s) in part 55 to have been in error," suggesting that EPA never intended to approve Maryland's administrative procedures. If that is correct, EPA has made this same error repeatedly because EPA's Part 55 regulations and associated preambles, along with EPA's Part 55 consistency reviews, clearly provide that delegated states issue permits in accordance with their own administrative and procedural rules.[33] A more plausible explanation: it is EPA's brief that is wrong, not decades of consistent statements and practice that comport with the best reading of CAA Section 328 and Part 55.

III. EPA MISCHARACTERIZES THE LEGAL AUTHORITY GOVERNING THE MDE PERMIT.

EPA's attempts to rebut the clear statutory and regulatory structure described above misstate the law at every turn. EPA seizes on the word "delegate" as used by Congress in CAA Section 328 and claims it must mean the same thing that EPA meant when it used that word in its own PSD rule at 40 C.F.R Section 52.21(u). But the core of EPA's argument is little more than a semantic sleight of hand—the context of these two uses of the word "delegate" confirms Congress meant something entirely different in Section 328 of the Clean Air Act than EPA meant in 40 C.F.R. Section 52.21(u). EPA's other arguments similarly fail. OCSLA's "exclusive" jurisdiction is explicitly superseded by Section 328 of the CAA. The separate legal question of whether the permit qualifies as a "federal action" under entirely different statutes has no bearing whatsoever on whether state administrative and procedural requirements apply to review of MDE's permit.

[33] *See e.g.*, *Outer Continental Shelf; Consistency Update for North Carolina*, 89 Fed. Reg. 22,087, 22,088, n. 2 (Mar. 29, 2024); *Consistency Update for Virginia*, 88 Fed. Reg. 72,691, 72,692, n. 2 (Oct. 23, 2023); *Outer Continental Shelf Air Regulations; Consistency Update for Alaska*, 85 Fed. Reg. 55,377, 55,378, n. 1 (Sept. 8, 2020); *Outer Continental Shelf Air Regulations; Consistency Update for Delaware*, 84 Fed. Reg. 13,132, 13,133, n. 1 (Apr. 4, 2019); and *Outer Continental Shelf Air Regulations; Consistency Update for Massachusetts*, 87 Fed. Reg. 68,364, 68,365-66, n. 3 (Nov. 15, 2022).

And the CAA's judicial review provision is not relevant to the issue presented here no matter how it is read.

A. Congress's Use of the Term "Delegate" in CAA Section 328 Is Completely Different From EPA's Use of the Term "Delegate" in its PSD Rule.

The term "delegate" means something completely different when OCS permitting authority is delegated to an approved state under CAA Section 328 than it does when permitting authority is delegated under EPA's PSD rule. In CAA Section 328, the word "delegate" appears in a section entitled "State procedures," which mandates that EPA "delegate" "*any* authority [EPA] has" once it determines that a state's regulations are adequate.[34] This use of the word "delegate" is a Congressional command to EPA that applies when a state has adopted *its own regulations* under state law and EPA has found those state regulations to be adequate.

In contrast, EPA's use of the word "delegate" in its PSD rule, in 40 C.F.R. Section 52.21(u), differs in three important ways. First, EPA's delegation provision is discretionary—EPA is *authorized* to delegate to a state, but not *required* to do so.[35] Second, the authority that EPA delegates to a state is far more limited—the Administrator may only delegate "his[or her] responsibility for conducting source review *pursuant to this section*;" *i.e.*, the authority delegated may only be exercised using EPA's PSD rule, not a state's own regulations.[36] Finally, and most importantly, a "delegation" under EPA's PSD rule is only available for states *without* their own SIP-approved state PSD program; otherwise the state's own PSD program would control, as EPA admits.[37] By contrast, MDE issued the MDE Permit under its own PSD and NSR regulations

[34] 42 U.S.C. § 7627(a)(3) (emphasis added).

[35] 40 C.F.R. § 52.21(u)(1) ("The Administrator shall have the authority to delegate …").

[36] *Id*. (emphasis added).

[37] EPA Br. at 8.

codified in Parts 52 and 55, and EPA delegated to MDE *any authority* EPA has to issue or review permits under those programs,[38] including the authority to apply its own administrative procedures to the appeal of the permit.[39]

EPA's use of the word "delegate" in its Part 55 regulations further confirms that the word has a different meaning in the OCS context than it does in EPA's PSD rule. Most notably, the Part 55 provision entitled "Delegation" states that "[t]he Administrator *will* delegate implementation and enforcement authority to a State if the State has an adjacent OCS source and the Administrator determines that *the State's regulations are adequate*, including a demonstration by the State that the State has [a]dopted the appropriate portions of this part *into State law*," has "[a]dequate authority *under State law* to implement and enforce the requirements," and has "[a]dequate *administrative* procedures to implement and enforce the requirements of this part."[40] The italicized text confirms Part 55 delegation is only available to states with their own state law permitting program and adequate administrative procedures, in stark contrast to the delegation under EPA's PSD rule for "delegated PSD programs."

A comparison of EPA's PSD delegation agreements and Part 55 delegation letters further confirms the difference in the "delegation" that occurs under the two programs. EPA's delegation agreements for "delegated PSD programs" under 40 C.F.R. Section 52.21(u) make two key points abundantly clear: (1) the state must implement "federal PSD requirements," and (2) Part 124 administrative procedures control. There are no references in these delegation agreements to any state PSD regulations, because none exist—the delegation agreements rely solely on EPA's federal

[38] 2015 OCS Delegation to MDE.

[39] 2015 Consistency Update for Maryland at 65,662, n.1 and identical statements in all ensuing consistency reviews for Maryland.

[40] 40 C.F.R. § 55.11(b) (emphasis added).

PSD rule and EPA's federal administrative procedures precisely because there is no other law to use. Accordingly, states with "delegated PSD programs" must step into the shoes of EPA to use EPA's permitting program *and* EPA's administrative procedures, including the availability of EAB review for permit appeals.

For example, the Arizona Department of Environmental Quality ("DEQ") implements a SIP-approved PSD program for most pollutants, but only a "delegated PSD program" for greenhouse gases ("GHG").[41] The delegation agreement governing that GHG-only "delegated PSD program" includes the following statements:

EPA – Arizona DEQ Delegation Agreement for a "Delegated PSD Program":

- "ADEQ and EPA hereby enter into this delegation agreement to authorize ADEQ to implement the applicable requirements of 40 CFR 52.21."
- "ADEQ shall issue PSD permits under this delegation agreement in accordance with 40 CFR 52.21 and 40 CFR 124."
- "EPA may review the PSD permit(s) issued by ADEQ to ensure that ADEQ's implementation of this delegation agreement is consistent with federal PSD regulations for major sources and major modifications (40 CFR 52.21)."
- "The permit appeal provisions of 40 CFR 124, including subpart C thereof pertaining to the Environmental Appeals Board (EAB), shall apply to all appeals to the EAB of PSD permits issued by ADEQ under this delegation agreement."

EPA's Part 55 delegation letters for OCS permitting, like the one issued to Maryland in 2014, tell a different story. Most notably, the Maryland delegation letter never mentions Part 124, and there is no reference to EAB hearing permit appeals.[42] Instead, the letter simply makes clear that Maryland has satisfied the requirements for delegation by "adopting the appropriate portions

[41] *See, e.g., U.S. EPA - Arizona [DEQ] Agreement for Delegation of Authority to Issue and Modify [GHG] [PSD] Permits Subject to 40 CFR 52.21* (Mar. 7, 2011).

[42] 2015 OCS Delegation to MDE.

of 40 CFR Part 55 *into state law*," and having "adequate authority *under the state law*," "adequate resources," and "adequate administrative procedures" to implement and enforce the Part 55 regulations.[43] The requirement for a state to have adequate administrative procedures under state law would be nonsensical if EPA's own administrative procedures controlled and required EAB to review any permit appeals.

EPA cites a number of EAB orders to support its claim that Part 55 delegation "is the functional equivalent of delegation under the PSD program regulations" under Part 52.[44] However, none of these orders make the case that permits issued by a Part 55 delegated state under its own state regulations are subject to EAB jurisdiction, and most are completely inapposite because they involve a PSD delegated state under Part 52.[45] As made clear in Section II, *supra*, Maryland issued the US Wind permit under its own state regulations, unlike PSD delegated states, which do not even have their own PSD permitting programs and must rely on EPA's PSD rule.

The other EAB orders cited by EPA involve states that have *approved* PSD programs,[46] like the Maryland SIP-approved PSD program that EPA approved and incorporated by reference in Part 55. *In re Seminole* is particularly on point; it involved appeal of a permit that Florida issued in draft when it only had delegated PSD authority (and thus relied on EPA's PSD rule), but finalized *after* EPA approved Florida's PSD permitting program.[47] EAB denied review based on

[43] *Id.* at 43,089 (emphasis added).

[44] EPA Br. at 6.

[45] *In re West Suburban Recycling and Energy Center, L.P.*, 6 E.A.D. 692 (EAB 1996); *In re Hillman Power Co., LLC* , 10 E.A.D. 673 (EAB 2002); *In re Indeck-Elwood LLC*, 13 E.A.D. 126 (EAB 2006).

[46] *In re Milford Power Plant*, 8 E.A.D. 670 (EAB 1999) (concerning Connecticut's EPA-approved BACT program); *In re Seminole Electric Cooperative, Inc.*, 14 E.A.D. 468 (EAB 2009).

[47] *In re Seminole Electric Cooperative, Inc.*, 14 E.A.D. 468 (EAB 2009).

its lack of jurisdiction, and made clear that a state's authority to issue PSD permits under EPA-approved state rules barred EAB from reviewing the final state-issued permit even though the permitting process began under a *delegated* PSD program, and even though state procedural rules could otherwise block the challengers from obtaining judicial review of the permit.[48] EAB's reasoning could not have been clearer:

> Granting Board jurisdiction of the state-issued Seminole permit would set a precedent for others to claim entitlement to Board review of state permits in the same circumstances. Any erosion of the clear line preserving to approved states the power to adjudicate appeals of permit decisions issued *under their own authority*, an important prerogative of their autonomy, creates the potential for injecting unwarranted confusion into the national PSD program with regard to the CAA's carefully structured allocation of federal and state responsibilities.[49]

So too here, EAB should once again decline to erode the clear line preserving Maryland's power to adjudicate an appeal of a permit issued under MDE's own regulations.

EPA also points to the reservation of EPA authority for certain Part 55 provisions in the delegation letter to MDE as supporting its argument for EAB jurisdiction.[50] However, the only authorities EPA retained in the letter were provisions of Part 55 that only EPA could logically implement, none of which involve the substantive law or administrative procedures for issuing air permits to OCS sources.

The first provision for which EPA retains authority in Maryland, 40 C.F.R. Section 55.5, requires EPA to decide which state is designated as the relevant jurisdiction for an OCS source—plainly a decision that must be made by EPA to resolve any disputes between states, not by the individual states involved. The second provision, 40 C.F.R. Section 55.11, requires EPA to

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[48] Put simply, "the door shut to Board review at the moment of [Florida's] program approval." *Id.* at 482-83.

[49] *Id.* at 482 (emphasis added).

[50] EPA Br. at 12-13.

delegate its authority as required by Section 328, which only EPA can do. The third and final provision, 40 C.F.R. Section 55.12, requires EPA to ensure that it adopts state law into the federal code, which again only EPA can legally do. These reservations of authority by EPA say absolutely nothing about the scope of the permitting and administrative authority transferred to states via a delegation letter like the one EPA issued to MDE.

Far from being the functional equivalent of a "delegated PSD program," as EPA argues, the delegation of authority to states in 40 C.F.R. Part 55 is far broader and explicitly relies on state law and administrative procedures. Because state law and administrative procedures control in Maryland, EAB has no jurisdiction over an appeal of the MDE Permit.

B. EPA's and Petitioners' Other Arguments Are Immaterial to Jurisdiction over Petitioners' Appeal of the MDE Permit.

EPA and Petitioners put forth a potpourri of other arguments, none of which refute the core fact that Maryland's procedural regulations apply to the MDE Permit. First, EPA misapplies the Outer Continental Shelf Lands Act ("OCSLA") and the U.S. Supreme Court's *Parker Drilling* ruling to claim states have "no interest in or jurisdiction over" the OCS, that "[t]he only law on the OCS is federal law," and that "[t]he State of Maryland has no authority under state law to regulate air pollution on the OCS."[51] But EPA utterly ignores Congress's pronouncement in CAA Section 328(a) that "[t]he authority of this subsection [328] shall *supersede* section 5(a)(8) of the OCSLA [43 U.S.C. 1334(a)(8)]."[52] Because the CAA supersedes OCSLA in this instance, the legal authority cited by EPA to support the purported supremacy of federal law on the OCS is irrelevant. EPA's characterization of OCSLA also directly contradicts the many references to state law in

[51] *Id.* at 2-3, 17.

[52] 42 U.S.C. § 7627(a)(1).

both the CAA and EPA's Part 55 implementing regulations quoted above, which make clear that for OCS sources located within 25 miles of a state's seaward boundary, state law does in fact control.

EPA also argues that EAB has jurisdiction because MDE Permit has been characterized as a "federal action" for purposes of determining whether it triggers various federal environmental consultation statutes.[53] But this argument is a red herring. To the extent the MDE Permit does constitute a "federal action" for purposes of federal environmental consultations, that simply has no bearing on whether state procedures control the administrative review of the MDE Permit. These are simply independent questions; the answer to one does not affect the other. Indeed, EPA cites no authority for the notion that if MDE Permit was properly characterized as a "federal action," that would in any way abrogate Maryland courts' ability to review it pursuant to its own regulatory authority as adopted into EPA's Part 55 regulations.[54]

Finally, EPA errs in claiming that CAA Section 307[55] requires EAB review of the MDE Permit because it establishes the venue for judicial review for certain EPA actions in federal courts. In making this argument, EPA falsely presupposes that an EPA action occurred here, thus assuming away the very point EPA is trying to prove. The MDE Permit is not an action of the Administrator, but rather an action of the State of Maryland using its state administrative

[53] EPA Br. at 19.

[54] Indeed, it is a time-honored legal principle that state courts can review actions arising out of federal law unless Congress has granted federal courts exclusive jurisdiction. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962) ("nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law. Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule."); *Claflin v. Houseman*, 93 U.S. 130, 136 (1876). Not only is there no applicable exclusive federal jurisdiction provision here, but Congress and EPA have established a statutory and regulatory scheme that explicitly vests *Maryland* with jurisdiction over appeals of the MDE Permit.

[55] 42 U.S.C. § 7607(b)(1).

procedures, just as it would for an onshore source, for which EAB review would be unquestionably inappropriate. As discussed thoroughly above, MDE did not act on behalf of EPA or stand in EPA's shoes to exercise federal law, and EPA clearly did not act to issue the permit directly. With no EPA action to review, CAA Section 307 does not apply nor in any way support EAB jurisdiction over the MDE Permit.

EPA's error is readily apparent from the way it attempts to wedge the MDE Permit into CAA Section 307: EPA claims this appeal should fall into a "catch-all" provision in Section 307 where it clearly does not belong. Section 307(b)(1) contains two lists: one of EPA actions that must be challenged in the U.S. Court of Appeals for the D.C. Circuit,[56] and another of EPA actions that must be challenged in the local U.S. Courts of Appeals. Each one of these lists is prefaced by text making clear that the entire list covers only "action[s] of the [EPA] Administrator." The "catch-alls" themselves are likewise limited to actions "of [or by] the [EPA] Administrator.[57] EPA's brief claims the MDE permit falls within the second catch-all for "any other final action of the Administrator under this chapter,"[58] but neither that catch-all nor the list preceding it is capacious enough to cover a state's issuance of an air permit under its own approved state law and administrative procedures. That state action is nothing like the EPA actions listed in CAA Section 307, rendering that venue-setting provision irrelevant here.

If nothing else, EPA's references to the judicial review jurisdictional provisions of CAA Section 307 place the cart before the horse. The issue presented here is whether jurisdiction is

[56] *Id*. (separately assigning venue for "… review of action of the Administrator …" that are nationally applicable and "… review of the Administrator's action …" that is locally or regionally applicable).

[57] *Id*. (separately assigning venue for "… or any other nationally applicable regulations promulgated, or *final action taken, by the Administrator* …" and "any other *final action of the Administrator* under this chapter …").

[58] EPA Br. at 9.

appropriate at *the EAB*—an administrative body only capable of exercising administrative, not judicial authority—not which federal court venue would be appropriate for judicial review of an EAB decision. The question of venue for appealing an EAB decision, or any other action of the EPA Administrator, is irrelevant.

C. Petitioners' Argument that EPA's Enforcement Authority Allows EAB Review Would Direct *Every* PSD Permit Appeal to the EAB.

Finally, Petitioners argue that if EPA retains enforcement authority over a permit, the EAB has jurisdiction over a permit appeal. But Petitioners provide no authority to connect these dots. No party disputes that EPA may initiate enforcement for violations of the CAA, but EPA has not taken any enforcement action relevant to this case. Petitioners seem to be arguing that the existence of EPA's enforcement authority is sufficient to expand EAB jurisdiction to this case. But that cannot be right because EPA also retains enforcement authority over permits issued under SIP-approved programs, and yet appeals of those permits unquestionably go through state procedures, not the EAB. The EAB has affirmed this and EPA itself admitted this in its brief.[59]

Indeed, the very Supreme Court decision Petitioners cite in support of their argument is the most compelling reason why it fails. In *Alaska Department of Environmental Conservation v. EPA* ("*ADEC*"), 540 U.S. 461 (2004), the Court extensively reviewed EPA's exercise of its enforcement authority over the state-issued PSD permit's compliance with the CAA.[60] But the permit at issue in *ADEC was not subject to EAB jurisdiction*. Indeed, EPA appears to never have asserted that EAB had jurisdiction over that permit despite the agency's clear stance it retained the

[59] *In re Milford Power Plant*, 8 E.A.D. at 673; *In re Seminole*, 14 E.A.D. at 475. *See also* EPA Br. at 8.

[60] 540 U.S. at 485-489 (2004).

authority to enforce that permit's compliance with the CAA.[61] EPA's authority to enforce does not include the authority to adjudicate appeals.

In other words, EPA's enforcement authority allows EPA to act as a plaintiff or a prosecutor if it determines a state-issued permit violates the CAA, as EPA did in *ADEC*, but that authority does not make EPA the judge or arbiter of third-party appeals of state-issued permits. If EPA's ability to enforce the CAA requirements for a permit meant that EAB had jurisdiction over a permit, every PSD permit issued by EPA and every PSD permit issued by every state—whether SIP-approved or under a "delegated PSD program"—would go to EAB. This absurd result would upend the cooperative federalism structure inherent in the CAA and be completely untenable by thrusting every permit appeal filed in the country before the EAB.[62]

IV. CONCLUSION

For the foregoing reasons, Maryland courts have jurisdiction over any appeals of the MDE Permit, and EAB must thus dismiss the Petition for lack of jurisdiction.

[61] U.S. Wind reviewed the ADEC's and EPA's briefs in the Ninth Circuit Court of Appeals proceedings below and found no arguments by EPA that EAB had authority over the permit dispute. *Alaska v. United States EPA*, 298 F.3d 814 (9th Cir. 2002).

[62] Petitioners also make flatly false statements mischaracterizing US Wind's and MDE's arguments. For example, they say "Respondents argue[] Maryland law conflicts with the CAA or the EPA's CAA regulations" (Petitioners Br. at 3), but neither MDE nor US Wind allege a conflict of state and federal law. Petitioners also allege "respondents … argue that the Administrator's Part 55 delegation of outer [sic] Continental Shelf permitting authority to Maryland somehow deprived the EPA of its statutory authority to challenge U.S. Wind's state-issued PSD permit." *Id*. Also not so—US Wind and MDE recognize EPA retains enforcement authority, but that authority has not been exercised, and its mere existence does not give EAB jurisdiction over this third-party appeal.

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Respectfully submitted,

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STATEMENT OF COMPLIANCE

I certify that this Reply to Petitioners' and EPA's Response is 6,979 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 September 12, 2025, and was served on the following parties in the manner indicated.

By first-class U.S. mail to Lee Zeldin, Administrator of the United States Environmental Protection Agency, at Environmental Protection Agency, Office of the Administrator 1101A, 1200 Pennsylvania Avenue, NW, Washington, D.C. 20460 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 19103-2029, on September 12, 2025;

By first-class U.S. mail to the Maryland Department of the Environment, at 1800 Washington Blvd., Baltimore, Maryland 21230, on September 12, 2025; and

By first-class U.S. mail to counsel for Petitioners, Nancie G. Marzulla and Roger J. Marzulla of Marzulla Law, LLC at 1150 Connecticut Ave., NW, Suite 1050 Washington, D.C. 20036 on September 12, 2025.

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