

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

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In re: US Wind Inc. (for the Maryland)	
Offshore Wind Project))	OCS Appeal No. 25-01
)	
Maryland Permit-to-Construct No. 047-)	
0248; PSD Approval No. PSD 2024-01;)	
NSR Approval No. NSR-2024-01)	
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BRIEF OF REGION 3 ADDRESSING THE BOARD’S JURISDICTION

On August 4, 2025, the Environmental Appeals Board (“EAB” or “Board”) issued an order directing Region 3 and the EPA’s Office of General Counsel (“OGC”) to file a brief limited to responding to arguments about the Board’s jurisdiction presented by the Maryland Department of the Environment (“MDE”) and US Wind, Inc. (“US Wind”), as set forth in MDE’s “Response to Petition for Review and Motion for Summary Disposition” filed July 30, 2025, and US Wind’s response to the petition for review filed August 1, 2025. On August 8, 2025, the Board issued an order granting Region 3 and OGC’s unopposed motion for a one-week extension, from August 18 to August 25, 2025, of the deadline to file this brief. Region 3 submits this brief, prepared and signed by attorneys from OGC¹ and Region 3, in response to these orders.

¹ Although the Board’s order suggests that the Office of General Counsel participate as a party to this case, consistent with the Rules of Professional Conduct, OGC is appearing in this case in its role as counselor to and advocate for the identified agency client office.

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I. INTRODUCTION

MDE and US Wind both dispute the EAB's jurisdiction over this permit appeal, citing statutory and regulatory provisions that govern state implementation plan ("SIP") submissions and improperly referring to MDE as an "approved state" under the EPA's procedures for permit issuance in 40 C.F.R. part 124. These arguments misconstrue federal law and misrepresent the role and authority of a delegated state agency under section 328 of the Clean Air Act ("CAA"), 42 U.S.C. § 7627, and the EPA's regulations at 40 C.F.R. part 55. Under the latter framework, which applies here, a permitting decision by MDE for a source located outside the State of Maryland, on the Outer Continental Shelf ("OCS"), is equivalent to action under a delegated Prevention of Significant Deterioration ("PSD") program, rather than action under a PSD program approved into a SIP.

Because this permit pertains to the construction and operation of a source proposing to locate in federal waters on the OCS, it is grounded upon and governed by federal law. The Petitioners correctly describe this legal framework on pages 6-9 of the Petition for Review. The CAA provides a mechanism for application of certain state and local air pollution control requirements from adjacent jurisdictions to air emission sources on the OCS, but only 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. Although MDE implements an EPA-approved PSD program applicable to sources within the State of Maryland, MDE can only obtain authority to apply the requirements of this PSD program to sources on the OCS (outside state jurisdiction) through a delegation of authority from the EPA to implement and enforce federal law. Such delegated authority is the only reason MDE has a role in the permitting process here.

Unlike an “approved state” that implements an EPA-approved PSD program under state law authority to regulate construction of sources within the state, a state exercising “delegated” federal law authority on the OCS under CAA section 328(a)(3) and 40 C.F.R. § 55.11 “stands in the shoes” of the EPA Administrator and issues a federal permit in the same manner as a state exercising delegated PSD program authority under 40 C.F.R. § 52.21(u). No court in Maryland has jurisdiction to review a permit issued under this federal law authority to a facility located on the OCS. The EAB is the proper forum for administrative review of this federal action as a prerequisite to judicial review, which is available only in a United States Court of Appeals under CAA section 307(b), 42 U.S.C. § 7607(b).

II. LEGAL FRAMEWORK

A. Exclusive Federal Jurisdiction on the OCS

The Outer Continental Shelf Lands Act (43 U.S.C. § 1331 et seq.) confirms the federal government’s complete jurisdiction, control, and power of disposition over the OCS,² while giving the states no interest in or jurisdiction over it. 43 U.S.C. §§ 1332(1), 1333(a)(3). Under the 1953 Submerged Lands Act, 43 U.S.C. §§ 1301-1315, coastal states have jurisdiction over the submerged lands, waters, and natural resources located within state waters – in most cases, within three nautical miles off the coastline. Within these offshore boundaries, coastal states have “(1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective states, and (2) the right and power to manage, administer, lease, develop and use

² The term “outer Continental Shelf” means “(1) all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in the Submerged Lands Act, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control or within the exclusive economic zone of the United States and adjacent to any territory of the United States; and (2) does not include any area conveyed by Congress to a territorial government for administration.” 43 U.S.C. § 1331(a).

the said lands and natural resources.” 43 U.S.C. § 1311(a). Accordingly, coastal states may develop offshore resources within their waters and regulate that development.³ But the waters, seabed, and natural resources beyond the states’ seaward boundaries – i.e., on the OCS and extending to the edge of the exclusive economic zone (200 nautical miles from shore) – are exclusively federal. The only law on the OCS is federal law, and Congress has provided that state laws are adopted as federal law only to the extent that they are applicable and not inconsistent with federal law. *Parker Drilling Mgmt. Servs. v. Newton*, 587 U.S. 601 (2019) (holding that federal law governs wage and hour disputes for employees on the OCS, and under 43 U.S.C. § 1333(a)(2)(A) state laws do not apply unless federal law is silent on the issue).⁴

B. Regulation of OCS Sources Under Section 328 of the Clean Air Act

Section 328 of the CAA, 42 U.S.C. § 7627, which was added by the 1990 amendments to the Act, requires the EPA to promulgate regulations to control air pollution from OCS sources by mandating that OCS sources: (1) do not interfere with attainment and maintenance of federal and state ambient air quality standards and (2) comply with the PSD program established in title I of the Act. 42 U.S.C. § 7627(a)(1). The Outer Continental Shelf Air Regulations at 40 C.F.R. part 55 implement CAA section 328 and establish “the air pollution control requirements for OCS sources and the procedures for implementation and enforcement of the requirements.” 40 C.F.R. § 55.1. Under part 55, a new OCS source subject to part 55 requirements may not be constructed without a permit – referred to as an “approval to construct,” a “preconstruction permit,” or an

³ The federal government maintains the authority to regulate commerce, navigation, national defense, power production, and international affairs within state waters. Congressional Research Service, “Controlling Air Emissions from Outer Continental Shelf Sources: A Comparison of Two Programs – EPA and DOI,” Updated November 26, 2012, at 6, 7.

⁴ A series of U.S. Supreme Court cases has confirmed federal control of these offshore areas. *See, e.g., United States v. Texas*, 339 U.S. 707 (1950); *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. California*, 332 U.S. 19 (1947).

“OCS air permit” – that implements the applicable requirements. 40 C.F.R. § 55.6(b), (d). An OCS air permit incorporates various CAA requirements – e.g., requirements of the PSD program, the Nonattainment New Source Review (“NNSR”) program, and/or the minor New Source Review (“minor NSR”) program. 40 C.F.R. § 55.6(b)-(e); 40 C.F.R. § 55.13; 40 C.F.R. § 55.14.

For OCS sources located within 25 miles of a state’s seaward boundary, such as the proposed US Wind facility, CAA section 328(a)(1) directs the Administrator to establish requirements that are “the same as would be applicable if the source were located in the corresponding onshore area,” including “State and local requirements for emissions controls, emission limitations, offsets, permitting, monitoring, testing, and reporting.” 42 U.S.C. § 7627(a)(1). To implement this mandate, the EPA incorporates by reference into part 55 SIP provisions and other state and local requirements, thereby codifying these state and local requirements as federal law applicable to OCS sources located within this 25-mile zone. 40 C.F.R. §§ 55.12 (consistency updates), 55.14(d), (e) (listing state and local requirements codified as federal law); *see also* 57 Fed. Reg. 40792, 40802 (Sept. 4, 1992) (“before a state or local rule or regulation may be applied to OCS sources, it must be incorporated into part 55 by federal rulemaking” because “Congress did not intend that changes in state or local law would automatically change the content of federal OCS law”). Consistent with CAA section 328(a)(1), state and local rules submitted for incorporation by reference into part 55 must be “rationally related to the attainment and maintenance of Federal or State ambient air quality standards or to the requirements of part C of title I of the Act.” 40 C.F.R. § 55.12(d)(2). The Administrator must periodically update part 55 “as necessary to maintain consistency with the regulations of onshore areas in order to attain and maintain Federal and State ambient standards and comply with part C

of title I of the Act.” 40 C.F.R. § 55.12(a). In addition to state and local requirements incorporated by reference into 40 C.F.R. § 55.14, OCS sources located within 25 miles of a state’s seaward boundary are subject to federal air pollution control regulations listed in 40 C.F.R. § 55.13. *See*, 40 C.F.R. §§ 55.3(b), 55.6(b), (c).

Section 328(a)(3) of the CAA, 42 U.S.C. § 7627(a)(3), allows any state adjacent to an OCS source to “promulgate and submit to the Administrator regulations for implementing and enforcing the requirements of [section 328]” and requires the EPA Administrator to “delegate” his authority “to implement and enforce such requirements” to the state “[i]f the Administrator finds that the State regulations are adequate” for this purpose. The plain meaning of the term “implement” is to “carry out” or “accomplish,”⁵ and the plain meaning of the term “enforce” is “[t]o put into execution; to cause to take effect; to make effective.”⁶ Consistent with this mandate, 40 C.F.R. § 55.11 provides that “[t]he Governor or the Governor’s designee of any State adjacent to an OCS source subject to the requirements of [part 55] may submit a request, pursuant to section 328(a)(3) of the Act, to the Administrator for the authority to implement and enforce the requirements of this OCS program....” 40 C.F.R. § 55.11(a). The Administrator “will delegate implementation and enforcement authority to” such state if the Administrator “determines that the state’s regulations are adequate” and that the state has demonstrated, *inter alia*, that it has adopted the appropriate portions of part 55 into state law and has “[a]dequate administrative procedures to implement and enforce the requirements of [part 55]....” 40 C.F.R. § 55.11(b). Nothing in part 55 prohibits the Administrator from enforcing any requirement of part 55, and the Administrator may withdraw a delegation of authority to implement and enforce

⁵ *Merriam Webster Collegiate Dictionary* 582 (10th ed. 2001) (defining “implement”).

⁶ *Black’s Law Dictionary* 528 (6th ed. 1990) (defining “enforce”).

part 55 requirements if the state agency is not adequately implementing or enforcing these requirements or no longer has adequate regulations. 40 C.F.R. § 55.11(f), (g).

Because a delegation under 40 C.F.R. § 55.11 involves a delegation of federal law authority by an EPA Regional Office, it is the functional equivalent of a delegation under the PSD program regulations at 40 C.F.R. § 52.21(u). Thus, just like under the PSD program, upon delegation of part 55 authority to a state agency, the state agency “stands in the shoes” of the EPA Regional Administrator when it issues a federal permit. *See In re Seminole Electric Cooperative, Inc.*, 14 E.A.D. 468, 473-74 (EAB 2009) (when a state acts as “EPA’s delegate,” “state-issued permits are federal permits”); *see also In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 203 (EAB 2006) (same) and *In re Hillman Power Co.*, 10 E.A.D. 673, 675 (EAB 2002) (same). An OCS air permit issued by a “delegated agency”⁷ must require compliance with part 55 requirements, including the federal requirements listed in 40 C.F.R. § 55.13 and the state and local requirements incorporated by reference into 40 C.F.R. § 55.14, as applicable. *See*, 40 C.F.R. §§ 55.3, 55.6. Additionally, even following delegation, both the applicant and the delegated agency must send copies of the permit application, any required public notice(s), and any preliminary determination and final permit action to the “Administrator”⁸ through the appropriate EPA Regional Office, *see* 40 C.F.R. § 55.6(a)(5). The Administrator remains the final decisionmaker on any request for exemption from a control technology requirement. *See, e.g.*, 40 C.F.R. §§ 55.6(a)(2)(ii), 55.7(c)(5), 55.11(i). These provisions ensure general EPA oversight, as appropriate under a delegated program where the state occupies a posture “more

⁷ 40 C.F.R. § 55.2 (defining “Delegated agency” as “any agency that has been delegated authority to implement and enforce requirements of this part by the Administrator...”).

⁸ *Id.* (defining “Administrator” as “the Administrator of the U.S. Environmental Protection Agency”).

dependent” on the EPA than under a SIP-approved program. *See In re Seminole*, 14 E.A.D. at 474 (“Depending on the capacity – as EPA delegate or SIP-approved – the state stands in a posture of greater or lesser independence of EPA” and “[d]elegated states ‘in the shoes’ of federal regulators naturally occupy the more dependent side of this scale”).

Although a delegated agency under part 55 may use its own “administrative procedures” to issue OCS air permits, *see* 40 C.F.R. § 55.11(b)(4), an OCS air permit is, in any case, a federal action that implements federal law. *See*, 57 Fed. Reg. at 40798 (delegated agencies must implement federal requirements in 40 C.F.R. § 55.6, though they may use their own “administrative and public participation procedures”), 40799 (describing “[p]ermits issued under the OCS regulation” as “federal actions” subject to section 7 of the Endangered Species Act (“ESA”)); *see also* 56 Fed. Reg. 63774, 63783 (Dec. 5, 1991) (noting constitutional concerns raised by delegation resulting in “enforcement of federal law by state officials”). Federal permits, including those issued by a delegated state, “fall within the meaning of federal ‘action’ as that term is used in the ESA” and are thus subject to section 7(a)(2) of the ESA. *Indeck-Elwood*, 13 E.A.D. at 204, 205.⁹ Federal agencies must also consult with the National Marine Fisheries Service on federal action that may result in adverse effects to essential fish habitat identified under the Magnuson-Stevens Fishery Conservation and Management Act (“MSA”), 16 U.S.C. § 1801, and must consider the effect of their “undertakings” on historic properties under section 106 of the National Historic Preservation Act (“NHPA”), 54 U.S.C. § 306108.

⁹ Section 7(a)(2) of the ESA requires federal agencies to ensure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of federally-listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat of such species. *See*, 16 U.S.C. § 1536(a)(2).

By contrast, when a permit is issued by a state under a program that is approved into a SIP under CAA section 110, 42 U.S.C. § 7410, the approved state processes PSD permit applications under its own authority, *see In re Milford Power Plant*, 8 EAD 670, 673 (EAB 1999) (citing CAA sections 110, 116, and 161), subject to judicial review in state court. “Approved state program permits are regarded as creatures of state law that can be challenged only under the state system of review.” *In re Seminole*, 14 E.A.D. at 475 (quoting *In re Carlton*, 9 E.A.D. 690, 693 (EAB 2001)). These permits “fall outside the body of federal permits subject to Board review since the state acts under state authority.” 14 E.A.D. at 475. Similarly, when the EPA approves a state title V operating permit program under CAA section 502, 42 U.S.C. § 7661a, the state thereafter processes title V permit applications under state law subject to judicial review in state court. *See* 42 U.S.C. § 7661a(b)(6) (requiring that approved title V programs include procedures for, *inter alia*, “expeditious review of permit applications, ... including an opportunity for judicial review in State court of the final permit action...”); 40 C.F.R. §§ 70.4(b)(3) (x), (xi), (xii), (8)(iv) (requiring provisions for judicial review in state court). Thus, a state permit issued under an EPA-approved SIP or EPA-approved title V program is not a federal action or undertaking subject to the ESA, MSA, or NHPA. *See, e.g., Menominee Indian Tribe of Wis. v. EPA*, 947 F.3d 1065, 1073-74 (7th Cir. 2020) (affirming district court conclusion that state permit at issue was not subject to Section 106 of the NHPA); *The Historic Green Springs, Inc. v. EPA*, 742 F. Supp. 2d 837 (W.D. Va. 2010) (finding a NPDES permit issued under an authorized state program was not subject to section 106 of the NHPA); *Oregon Natural Resources Council v. Hallock*, 2006 US. Dist. Lexis 27687 (D. Or., Apr. 24, 2006) (granting summary judgment on the basis that state-issued NPDES permits do not trigger ESA consultation requirements); *see also Indeck-Elwood*, 13 E.A.D. at 203 n.147 (while a permit

issued by a delegated agency is a federal action for ESA purposes, “OGC/OAR’s analysis would differ for those PSD permits issued by states or eligible Indian tribes under a PSD program approved by EPA in a state or tribal implementation plan”).

C. Judicial Review of EPA-issued Permits Under CAA 307(b)(1)

i. Jurisdiction to Review a “Final Action” under the CAA Lies Exclusively in the United States Courts of Appeals

Section 307(b)(1) of the CAA, 42 U.S.C. § 7607(b)(1), confers exclusive jurisdiction on the U.S. Courts of Appeals to hear challenges to all “final actions” taken by the Administrator under the CAA. *See EPA v. Calumet*, 222 L. Ed. 2d 230, 239 (2025) (CAA section 307(b)(1) “makes all EPA actions [under the CAA] directly reviewable in a federal court of appeals”); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578 (1980) (holding that the phrase “any other final action” in § 7607(b)(1) “is to be construed in accordance with its literal meaning so as to reach any action of the Administrator that is final”); *Dalton Trucking v. EPA*, 808 F.3d 875, 879 (D.C. Cir. 2015) (noting the Supreme Court in *Harrison* was clear that CAA section 307(b)(1) confers jurisdiction on the courts of appeals to review all final actions under the CAA). Under the second sentence of section 307(b)(1), a petition for review of any final action by the Administrator under the CAA “which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit.” 42 U.S.C. § 7607(b)(1).

Any final EPA-issued permit, including any final OCS air permit issued by an EPA Regional Administrator or by a delegated agency under CAA section 328, is a “final action” by the Administrator under the CAA. Consequently, under CAA section 307(b)(1), only the U.S. Courts of Appeals have jurisdiction to review final OCS air permits.

ii. Administrative Review Before the EAB is a Prerequisite to Judicial Review

Part 55 directs that all OCS air permits, whether issued by the EPA or a delegated state agency, be issued consistent with the applicable procedures for issuing PSD permits in 40 C.F.R. part 124. Specifically, 40 C.F.R. § 55.6(a)(3) expressly states that “[t]he Administrator will follow the applicable procedures of 40 C.F.R. part 71 or 40 C.F.R. part 124 in processing applications under this part,”¹⁰ and that, “[w]hen using 40 CFR part 124, the Administrator will follow the procedures used to issue Prevention of Significant Deterioration (‘PSD’) permits.”¹¹ In the procedures for PSD permits that are applicable to OCS permits, 40 C.F.R. § 124.41 defines “EPA” to mean “the delegate agency” and “Regional Administrator” to mean “the chief administrative officer of the delegate agency,” when EPA has delegated authority to administer the federal PSD regulations in 40 C.F.R. § 52.21 to a state agency. Thus, 40 C.F.R. § 55.6(a)(3) applies to states exercising authority delegated from the Administrator. When a delegated agency issues an OCS air permit under part 55, part 124’s references to “EPA” and “Regional Administrator” mean the delegated agency. While part 124 expressly provides that it does not apply to PSD permits issued by an “approved State,” 40 C.F.R. § 124.1(e), a “delegated agency” under part 55 is not an “approved state” under part 124.¹²

¹⁰ 40 C.F.R. part 71 applies to EPA-issued title V operating permits and is not relevant here.

¹¹ With limited exceptions, the Administrator has delegated to the Regional Administrators the authority to “implement the [OCS] rules promulgated at 40 CFR Part 55” and to delegate some of these authorities to states under CAA section 328. *See* EPA, Delegations Manual, “Clean Air Act Delegation 7-69. Outer Continental Shelf Implementation.”

¹² Under 40 C.F.R. § 124.41, “[a]n approved state is one administering an approved program,” and an “approved program” is “a State implementation plan providing for issuance of PSD permits which has been approved by EPA under the Clean Air Act and 40 CFR part 51.” 40 C.F.R. § 124.41. Upon approval by the EPA under the CAA and implementing regulations in 40 C.F.R. part 51, SIP provisions are codified in 40 C.F.R. part 52 (“Approval and Promulgation of Implementation Plans”). State and local regulations submitted for application to OCS sources under CAA section 328, by contrast, are incorporated by reference into 40 C.F.R. part 55. OCS

Under 40 C.F.R. § 124.19(l)(2), for purposes of judicial review, “final agency action on a permit occurs when agency review procedures under this section are exhausted and the Regional Administrator subsequently issues a final permit decision under [section 124.19(l)].” Section 124.19 expressly includes “Outer continental shelf permits issued under 40 CFR part 55” among the types of permits for which the Regional Administrator must “promptly publish notice of any final agency action in the Federal Register” upon completion of EAB review proceedings. 40 C.F.R. § 124.19(l)(3)(ii). Upon exhaustion of these administrative remedies, a final OCS air permit decision is subject to judicial review in the appropriate U.S. Court of Appeals under CAA section 307(b)(1).

Thus, whether issued by an EPA Regional Administrator or by a delegated agency, an OCS air permit issued under CAA section 328 must first be appealed to the EAB before it may be subject to judicial review in federal court.

iii. Maryland State Courts do not have Jurisdiction on the OCS

Maryland state courts do not have jurisdiction on the OCS, and those courts have recognized this limitation. The same trial court in Maryland to which MDE has directed interested parties to file appeals of the OCS air permit for US Wind previously held that it had no jurisdiction over a mechanics lien claim for construction of an earlier US Wind facility located on the OCS. The Maryland trial court found that the petitioner had failed “to demonstrate that the statute under which they request relief [the OCSLA] provides this Court with jurisdiction with regards to submerged lands in the Atlantic Ocean outside of the Seaward Boundaries of the

rulemaking processes are thus entirely distinct from the processes for approving SIP provisions under CAA section 110 and 40 C.F.R. part 51. *See also In re Seminole*, 14 E.A.D. at 473-75 (distinguishing “delegated” from “approved” PSD programs).

State of Maryland as defined under 43 U.S.C. §1312.” Attachment # 1 Order, *Intermoor, Inc. v US Wind, Inc.*, No. C-23-CV-20-000097 (Md. Cir. Ct. Worcester Cty., Sept. 16, 2020); Attachment # 2, Plaintiff’s Response to Order for Supplemental Lien and Jurisdiction Analysis, *Id.*. This conclusion was affirmed by a state appeals court. *Intermoor, Inc. v. U.S. Wind, Inc.*, No. 0867, 2021 Md. App. LEXIS 801 (Md. Ct. Spec. App., Sept. 10, 2021). The appeals court observed that the plaintiff’s argument that the OCSLA incorporates state law “confuses choice of law with fundamental jurisdiction.”¹³

III. FACTUAL BACKGROUND

A. The EPA’s Delegation of Permitting Authority to Maryland

On January 8, 2014, MDE sent a letter to Region 3 requesting delegation of authority to implement and enforce the requirements of 40 C.F.R. part 55. On April 4, 2014, the EPA Regional Administrator for Region 3 sent MDE a letter acknowledging MDE’s request and stating the EPA’s intent, pursuant to 40 C.F.R. § 55.11, to delegate the authority to implement and enforce part 55 requirements to MDE, effective upon the EPA’s receipt of a notice of intent (NOI) to construct an OCS source adjacent to Maryland. *See* Attachment #3, Letter dated April 4, 2014, from Shawn M. Garvin, Regional Administrator, EPA Region 3, to Robert M. Summers, Secretary, MDE (“2014 Delegation Letter”). Although no delegation agreement was developed in this instance, the Regional Administrator’s delegation letter expressly included the authority to implement and enforce all provisions of 40 C.F.R. part 55 except for sections 55.5, 55.11, and 55.12, which were reserved for the Administrator. *Id.* Thus, the delegation expressly included

¹³ Although the appeals court decision in *Intermoor* is unreported and may not be cited in Maryland courts, this does not prevent the EAB from considering the appeals court’s reasoning in assessing the arguments before the Board about the proper tribunal for review of an OCS air permit.

implementation of 40 C.F.R. § 55.6(a)(3), which states that “[t]he Administrator will follow the applicable procedures of 40 CFR part 71 or 40 CFR part 124 in processing applications under this part.”¹⁴ *Id.* The EPA’s delegation also included section 55.14 and Appendix A to part 55, which together listed all of the MDE requirements that the EPA had incorporated by reference into federal law. *Id.* On July 21, 2015, the EPA published notice of the delegation of authority in the Federal Register. 80 Fed. Reg. 43088.

B. MDE’s Issuance of the OCS Air Permit for US Wind

On August 5, 2022, US Wind submitted an NOI for an air quality permit to the EPA, MDE, and the Delaware Department of Natural Resources and Environmental Control (“DRNEC”). On November 30, 2023, US Wind submitted an air quality permit application to MDE, followed by supplemental submissions in January, September, and November 2024.¹⁵ The application detailed a project consisting of up to 121 wind turbine generators, up to four offshore substations, and one meteorological tower, located approximately 10 nautical miles off the coast of Worcester County, Maryland, within the OCS as defined by statute.¹⁶ MDE issued a tentative determination and published a draft permit for public comment beginning on December 5, 2024,

¹⁴ As of July 1, 2013, the date referenced in the EPA’s April 4, 2014, letter approving MDE’s delegation request, 40 C.F.R. § 55.6(a)(3) referred only to “the applicable procedures of 40 CFR part 124.” The EPA revised the part 55 regulations in October 2016 to also refer to the procedures for issuance of federal title V operating permits in 40 C.F.R. part 71, 81 Fed. Reg. 71613, 71630 (October 18, 2016), which apply when the EPA or a delegated agency issues a title V operating permit for an OCS source.

¹⁵ See Maryland Offshore Wind Project, Information Regarding an Air Quality Permit Application Submitted by US Wind, Inc., (Maryland Offshore Wind – MDE Website), *available at* <https://mde.maryland.gov/programs/permits/AirManagementPermits/Pages/U.-S.-Wind-Maryland-Offshore-Wind-Project-.aspx>.

¹⁶ Maryland Offshore Wind Project, Outer Continental Shelf Air Permit Application at 1-1 (Aug. 2023, Revised Nov. 2023), *available at* <https://mde.maryland.gov/programs/permits/AirManagementPermits/Documents/US%20Wind/USWindAirQualityPermitApplicationAug2023Nov2023.pdf>.

which was extended to March 17, 2025, following a public request for a 60-day extension.¹⁷ To fulfill the requirements of 40 C.F.R. § 55.6(a)(5), MDE sent copies of the permit application, its public notice of the draft permit, and its preliminary determination to the Administrator through the EPA’s Region 3 office.¹⁸

During the comment period, the EPA clearly communicated to MDE its position that any appeal of the final permit must be submitted to the EAB, consistent with the provisions of 40 C.F.R. § 124.19.¹⁹

MDE issued a Notice of Final Determination to issue a Permit to Construct, a PSD Approval, and an NSR Approval to US Wind, effective June 6, 2025.²⁰ Contrary to the EPA’s advice, MDE stated in this notice that any “petition for judicial review must be filed pursuant to Section 1-605 of the Environment Article, Annotated Code of Maryland” in the state Circuit Court for the appropriate county.²¹ At that time, however, MDE’s website stated:

The final determination of the NSR and PSD Approvals may be appealed through the process set forth at 40 CFR 124.19 for appeals of PSD permits, by filing a petition for review with the Clerk of the United State environmental [*sic*] Protection

¹⁷ MDE Final Determination Concerning A Permit-To-Construct, PSD Approval, and NSR Approval Application Submitted By Us Wind, Inc. for the Construction and Commissioning Of The Maryland Wind Offshore Project (including MDE Response to Comments), *available at* <https://mde.maryland.gov/programs/permits/AirManagementPermits/Documents/FinalDeterminationDeptResponseComments.pdf>.

¹⁸ See Attachment #4, Communications between MDE and EPA Region 3.

¹⁹ See Attachment # 5, Email dated December 20, 2024, from Gwendolyn Supplee, Senior Permit Specialist, U.S. EPA Region 3, to Suna Sariscak, Manager, Air Quality Permits Program, Maryland Department of the Environment, and Email dated December 20, 2025, from Suna Sariscak, confirming receipt.

²⁰ Although MDE has described these as three separate permits (Permit to Construct No. 047-0248, NSR Approval 2024-01, and PSD Approval 2024-01), Region 3 considers all three permits to collectively comprise the “OCS air permit” for purposes of 40 CFR part 55.

²¹ MDE Notice of Final Determination Regarding a Permit to Construct, PSD Approval, and NSR Approval for the Construction and Commissioning of the Maryland Offshore Project (June 6, 2025) (“Notice of Final Determination”), *available at* <https://mde.maryland.gov/programs/permits/AirManagementPermits/Documents/NoticeofFinalDetermination.pdf>.

Agency's Environmental Appeals Board within the time prescribed in paragraph 124.19(a)(3).²²

Because of the conflicting information provided by MDE to the public in these notifications, Region 3 sent a letter to MDE on July 7 requesting that MDE take back its Notice of Final Determination and communicate only the opportunity to appeal its OCS permitting decision to the EAB.²³ MDE responded on July 17 that it had removed the description of the opportunity to appeal under part 124 from MDE's website. By late July 2025, links to the background section of MDE's website had been revised to state that a previous version of the webpage "also described a separate permit appeals process through the U.S. EPA. The appeals process for this permit is through the State of Maryland only, and the language describing the U.S. EPA appeals process has been removed."²⁴

The permit record clearly indicates that MDE recognized that the OCS air permit for US Wind was a federal action subject to a number of federal statutes, in addition to the CAA. The MDE's "Air Quality Permit to Construct Tentative Determination and Fact Sheet"²⁵ ("Fact Sheet") provides background on the permit and the application process, including a discussion of the ESA, MSA, and NHPA. In the Fact Sheet, MDE describes the OCS air permit as a "federal action" and states that the "EPA has delegated the federal authority to issue the OCS air permit for US Wind to [MDE]," but that the "EPA remains responsible for compliance with ESA, MSA

²² See Attachment # 6, Maryland Offshore Wind – MDE Website, *supra* note 15 (as of June 10, 2025).

²³ See Attachment # 7, Letter dated July 7, 2025, from Amy Van Blarcom-Lackey, Regional Administrator, U.S. EPA Region 3, to Serena McIlwain, Secretary, Maryland Department of the Environment.

²⁴ See Attachment # 8, Maryland Offshore Wind – MDE Website, *supra* note 15 (as of July 25, 2025).

²⁵ MDE, Air Quality Permit to Construct Tentative Determination and Fact Sheet, *available at* <https://mde.maryland.gov/programs/permits/AirManagementPermits/Documents/US%20Wind/AQPermittoConstructFactSheetandDraftPermit.pdf>.

and NHPA.”²⁶ To document compliance with these federal statutes, the Fact Sheet states that the “*EPA* [] intends to rely upon the ESA and MSA consultations completed by BOEM [Bureau of Ocean Energy Management] for its approval of the Construction and Operation Plan (COP),” and that “[t]he BOEM documents relied upon *by EPA* in fulfilling its consultation requirements under ESA, MSA, and NHPA have been included in the permit record for MDE’s proposed air permitting action.”²⁷ Similarly, the MDE Fact Sheet states that the “*EPA* intends to fulfill its NHPA section 106 responsibilities by concurring with the terms of [a Memorandum of Agreement (MOA) signed by BOEM and other entities] prior to the issuance of the final OCS Air Permit by MDE.”²⁸ The EPA became a signatory to the MOA in order to designate BOEM as the lead federal agency to act on its behalf to ensure compliance with section 106.²⁹

IV. THE OCS AIR PERMIT FOR US WIND IS A FEDERAL ACTION SUBJECT TO EAB REVIEW BEFORE JUDICIAL REVIEW UNDER THE CAA

MDE and US Wind overlook a critical and indisputable fact – the US Wind facility is not proposing to construct in the State of Maryland. This foundational fact fundamentally changes the nature of how the requirements of the CAA and state requirements become applicable to this OCS source and how MDE obtains authority to regulate its construction, as compared to a stationary source locating within the state’s boundaries. Although Maryland is an “approved state” under the PSD program as a general matter, this is relevant only with respect to construction of major stationary sources of air pollution that are located or proposing to locate within the state’s jurisdiction. MDE and US Wind have cited ample authority to demonstrate that the EAB would not have jurisdiction over a PSD permit issued by MDE for a facility located

²⁶ *Id.* at 15, 16.

²⁷ *Id.* at 16 (emphases added).

²⁸ *Id.* (emphasis added)

²⁹ *See* Attachment # 9.

in Maryland, but they have not established that any of this authority is material to the action taken here – issuance of permit for construction of a facility that is located *outside* of state boundaries, on the OCS.

A. Maryland is Not an “Approved” State for Sources Located on the OCS

The State of Maryland has no authority under state law to regulate air pollution on the OCS, which is an area of exclusive federal jurisdiction. *See* 43 U.S.C. § 1331. MDE’s authority to implement and enforce air pollution control requirements on the OCS derives entirely from section 328 of the CAA, which authorizes the EPA Administrator to promulgate requirements to control air pollution from OCS sources for specified purposes, codify state and local air pollution control requirements as federal law for these purposes, and delegate the Administrator’s authority under CAA section 328 “to implement and enforce” the requirements of this section to any state adjacent to an OCS source, if the Administrator finds that the State regulations are adequate for this purpose. 42 U.S.C. § 7627(a)(1), (3). Section 328(a)(1) governs the substance of the air pollution control requirements that may apply to OCS sources, limiting such requirements to those that are necessary “to attain and maintain Federal and State ambient air quality standards and to comply with the provisions of part C of [title I of the CAA],” consistent with onshore regulations where applicable. 42 U.S.C. § 7627(a)(1). The terms of CAA section 328(a)(3) then limit a delegated agency to “implementing” and “enforcing” the requirements of section 328. 42 U.S.C. § 7627(a)(3).³⁰ Nothing in these statutory terms allows delegated agencies to promulgate state requirements that supplant federal requirements governing administrative and judicial review of permit decisions under CAA section 328, or to promulgate any other requirement beyond what is necessary to “implement and enforce” federal requirements.

³⁰ *See supra* notes 5 and 6 (discussing meaning of “implement” and “enforce”).

The EPA Region 3 Administrator’s delegation of authority to Maryland to implement and enforce the federal requirements applicable to OCS sources in part 55 is fundamentally different from an approval of a PSD program in a SIP under CAA section 110.³¹ This delegation under a wholly different section of the CAA (section 328) gave MDE the authority to “implement and enforce” the federal law applicable to OCS sources under 40 C.F.R. part 55. Such a “delegation” is so named because it is distinct from an EPA “approval” of the state’s statutes and regulations as meeting the minimum requirements for a PSD permitting program required under CAA sections 110(a)(2)(C) and 165 and EPA’s implementing regulation at 40 C.F.R. § 51.166. Like a PSD “delegation” that authorizes a state to implement the federal law requirements in 40 C.F.R. § 52.21, a delegation under 40 C.F.R. § 55.11 only enables a state to “implement and enforce” the federal law requirements for OCS sources under 40 C.F.R. part 55. The federal law applicable on the OCS under these provisions incorporates state air pollution control laws, but only because EPA incorporated them in federal rulemaking pursuant to CAA section 328. That the EPA-incorporated state regulations include provisions pertaining to MDE’s EPA-approved PSD program does not mean Maryland qualifies as an “approved state” with respect to a stationary source located on the OCS. The EPA’s 2016 Consistency Update regulation for Maryland under the Part 55 does not reflect an “approval” of Maryland’s regulations for implementing Part 55 and is not equivalent to a SIP-approval.³² This 2016 action is separate and distinct from the EPA’s 2014 delegation.

³¹ See *supra* Section II.C.ii and note 12 (explaining that “delegated agency” under part 55 is not an “approved state” under part 124).

³² See, 81 Fed. Reg. 62393 (Sept. 9, 2016) (“EPA may be incorporating rules into 40 CFR part 55 that do not conform to all of EPA’s state implementation plan (SIP) guidance or certain requirements of the Act.”)

B. The Issuance of an OCS Permit to US Wind is a Federal Action

Because the OCS is an area of federal jurisdiction, the air permit that MDE issued to US Wind on June 6, 2025, can only be, and was in fact, issued pursuant to this delegation of the Administrator's federal law authority under CAA section 328. This makes the permit decision a federal action subject only to federal law and to judicial review in federal court under CAA section 307(b). MDE's permitting decision is not a state action grounded on organic state-law authority to regulate construction of stationary sources of air pollution within Maryland.

MDE's actions during its development of the permit, and its statements in the permit record, show that it previously understood its role as the Administrator's "delegate" issuing a federal permit under part 55. Consistent with the requirements of 40 C.F.R. § 55.6(a)(5), MDE sent copies of the permit application, its public notice of the draft permit, and both its preliminary determination and its final permit action to the Administrator through the appropriate EPA Regional Office, i.e., Region 3. MDE's Fact Sheet supporting the draft permit explicitly described the OCS air permit for US Wind as a "federal action" and recognized the EPA's responsibility as the permit issuer to comply with the ESA, MSA, and NHPA. MDE's permit record for the OCS air permit included the BOEM documents that the EPA relied upon in fulfilling its consultation obligations under these federal statutes. Finally, MDE's website stated until very recently that any appeal of the OCS air permit for US Wind must be filed before the EAB. MDE revised its website to direct permit appeals to state court only after this dispute began. Thus, many of MDE's statements indicate it understood that issuance of the OCS air permit would be a federal action.

C. A Petitioner Seeking to Challenge the OCS Air Permit for US Wind Must First Exhaust Administrative Remedies under 40 CFR part 124 Before Judicial Review in Federal Court

Under part 55, the federal law that Maryland is authorized to implement directs that all OCS air permits be issued consistent with “the applicable procedures” for issuing PSD permits in 40 C.F.R. part 124. Under 40 C.F.R. § 124.19(l)(2), for purposes of judicial review, “final agency action on a permit occurs when agency review procedures under this section are exhausted and the Regional Administrator subsequently issues a final permit decision under [section 124.19(l)].” Section 124.19 expressly includes “Outer continental shelf permits issued under 40 CFR part 55” among the types of permits for which the Regional Administrator must “promptly publish notice of any final agency action in the Federal Register” upon completion of EAB review proceedings. 40 C.F.R. § 124.19(l)(3)(ii).

Upon completion of these procedures, the issuance of an air permit to US Wind would be, and could only be, a final action of the Administrator under the CAA. Because CAA section 307(b)(1) confers exclusive jurisdiction on the U.S. Courts of Appeals to hear challenges to all final actions taken by the Administrator under the CAA, the OCS air permit for US Wind, once “final,” is subject to judicial review only in a U.S. Court of Appeals.

D. State Requirements Cannot Displace Federal Law Under a Delegated Program

US Wind argues that because the EPA has found Maryland’s administrative procedures to be adequate and delegated permitting authority to the state, MDE is authorized “to implement and enforce the OCS requirements *under [Maryland] law*” and to “use *its own procedures*.” US Wind Brief at 18 (citing 40 C.F.R. §§ 55.11(d), 55.7(f)(1)). But nothing in these part 55 regulations suggests that the state procedures referenced here may include state procedures for judicial review; rather, the referenced procedures relate to permit development. In writing part

55, the EPA described its intention as follows: “where the Administrator delegates the OCS permitting requirements to a state or local agency, that local agency must issue permits in accordance with the requirements of § 55.6, except for the administrative and public participation requirements, for which the agency may substitute its own procedures.” 57 Fed. Reg. at 40798. This does not suggest any intent to allow states to apply state *judicial* review procedures – nor could there be such intent, as the EPA cannot by regulation alter a statute conferring jurisdiction on the federal courts.

Furthermore, a delegated agency may apply its own “administrative and public participation requirements” under sections 55.7(f) and 55.11 only after the EPA has found the state regulations to be adequate. 40 C.F.R. § 55.11(d). The state’s authority must be adequate “to implement and enforce the requirements of this part [55].” *Id.* Thus, the standards for the adequacy of state procedures are those found in part 55, including section 55.6(a)(3) and the referenced procedures in 40 C.F.R. part 124. There are no other procedural requirements in part 55 that may be used to assess the adequacy of Maryland’s procedures. MDE argues its procedures for implementing part 55 preclude review of its permitting decision by the EAB under 40 C.F.R. § 124.19, but that interpretation cannot stand as part 55 requires exhaustion of administrative remedies under § 124.19 as a prerequisite to judicial review in the appropriate U.S. Court of Appeals under CAA section 307(b)(1). Any state procedure that conflicts with these federal requirements would not be adequate to implement and enforce the requirements of part 55.³³

³³ In light of MDE’s position with respect to EAB review in this matter, the EPA may need to reassess its 2014 delegation of part 55 authorities to MDE based on the EPA’s prior conclusion that the state has “[a]dequate administrative procedures to implement and enforce the requirements of [part 55].” 2014 Delegation Letter at 2.

In the context of a delegated federal permitting program, an EPA finding that state procedures are adequate to implement federal requirements does not mean the state rules displace or supersede federal law. In the PSD program, the EAB has long recognized that federal regulations continue to govern the action of a state agency that is exercising delegated federal authority under state laws that authorize the state to implement federal requirements. *See In re W. Suburban Recycling & Energy Ctr., L.P.*, 6 E.A.D. 692, 704-707 (EAB 1996) (“*WSREC*”). Consistent with this, for the OCS program, 40 C.F.R. § 55.11(a)(1) requires as a condition of OCS program delegation that states adopt “appropriate portions of this part [55] into state law.” Further, the state must have “[a]dequate authority under state law to implement and enforce the requirement of this part [55].” 40 C.F.R. § 55.11(b)(2). This does not mean state law supplants federal law. It means state law must give the delegated state agency the authority to implement and enforce federal law.

In the *WSREC* case, the EAB rejected a delegated state’s contention that its review of a PSD permit application was controlled by the substantive and procedural review requirements of state law. 6 E.A.D. at 704. The Board reasoned that the delegation agreement between the state and the EPA Regional Office plainly limited the state’s delegated powers to exercising federal authority. The Board also observed that the Illinois Environmental Protection Agency’s reading of the agreement would inappropriately equate the state’s authority with that of a state with an approved PSD program in its SIP. *Id.* Illinois had asserted that a provision in the delegation agreement that allowed the state to process PSD permit applications as “an integral part of the Illinois construction permit program” meant that the state could base its federal PSD permit decision on substantive criteria in state law. *Id.* at 703. The EAB held that nothing in the agreement abrogated the delegatee’s responsibility to base its PSD permitting decision on the

federal regulations. *Id.* at 707. The delegation agreement in that case expressly required that the state apply the federal regulations. *Id.*

The EPA Region 3 Administrator’s 2014 delegation to MDE likewise expressly delegates only authority to implement and enforce federal provisions in 40 C.F.R. part 55. This includes the requirements of 40 C.F.R. § 55.6, including § 55.6(a)(3), which incorporates the procedural requirements in 40 C.F.R. part 124 applicable to PSD permits. The delegation to MDE excludes sections 55.5, 55.11, and 55.12 on the grounds that “authority for these sections is reserved for the Administrator.” 2014 Delegation Letter at 2. But the delegation does not carve out section 55.6(a)(3) on these grounds, which would have been appropriate if this provision applied only to the Administrator and was “irrelevant,” as US Wind contends. Thus, like the delegation agreement in *WSREC*, the EPA’s delegation to MDE does not enable state procedures that may apply under sections 55.7(f) or 55.11 to override the federal procedures required by section 55.6(a)(3). Nothing in these part 55 provisions suggests that the application of state procedures abrogates MDE’s obligation to also comply with the procedural and substantive requirements in 40 C.F.R. parts 55 and 124 that the state requirements must be adequate to implement. This is the essence of what it means for a delegated agency to “stand in the shoes” of an EPA Regional Administrator who is charged with meeting the requirements in 40 C.F.R. parts 55 and 124.

Furthermore, as the Supreme Court recognized in 2019, under the OCSLA, the only law on the OCS is federal law, and state laws are adopted as federal law only “to fill gaps in federal law” and to the extent that they are “applicable and not inconsistent with federal law.” *Parker Drilling*, 587 U.S. at 615-16 (“[I]f a federal law addresses the issue at hand, then state law is not adopted as federal law on the OCS”). Accordingly, under the OCSLA, state administrative and judicial review procedures may apply to OCS sources only to fill gaps in federal law and to the

extent they are “applicable” and “not inconsistent with” the CAA and the EPA’s implementing regulations in 40 C.F.R. parts 55 and 124.

The EPA has included Maryland’s procedural regulations at COMAR Sec. 26.11.02.11 (“Procedures for Obtaining Permits to Construct Certain Significant Sources”) among the state regulations listed in part 55.³⁴ However, to the extent any of these procedural regulations preclude administrative review under part 124 or judicial review in federal court under CAA section 307(b)(1) – either by their terms or according to an interpretation by the state – the EPA views its reference to such regulation(s) in part 55 to have been in error.³⁵ COMAR Sec. 26.11.02.11(M) states that “a petition for judicial review shall be filed with the circuit court for the county where the application for the permit states that the proposed activity will occur.” COMAR Sec. 26.11.02.11(M) (“Judicial Review”). This provision is clearly in conflict with the CAA’s judicial review provision in section 307(b)(1), which directs challenges to any “final action” by the Administrator under the CAA to the U.S. Courts of Appeals. The CAA leaves no gap on the locus of judicial review for state law to fill, and Maryland’s regulations, even if incorporated into part 55, cannot alter Congress’s conferral of exclusive jurisdiction on the U.S. Courts of Appeals to review OCS air permits. Even if the CAA’s judicial review provision were not so clear, COMAR Sec. 26.11.02.11(M) would not be “applicable” on the OCS, because there is no “circuit court for [a] county” in Maryland “where the application for the permit states that the proposed activity will occur,” which is in federal waters on the OCS. *See Intermoor, Inc. v. U.S. Wind, Inc.*, 2021 Md. App. LEXIS at 810 (Md. Ct. Spec. App., Sept. 10, 2021) (“InterMoor

³⁴ See 40 C.F.R. part 55, Appendix A (listing, *inter alia*, Maryland state regulations applicable to OCS sources).

³⁵ In the preamble to the 2016 Consistency Update rule for Maryland, EPA said that it “has excluded administrative and procedural rules.” 81 Fed. Reg. 62393, 62934 (Sept. 9, 2016).

has not pointed us to any Maryland legal authority for the proposition that the circuit court may exercise in rem jurisdiction over a property located outside of the county in which the court sits”).

The EPA’s regulations in 40 C.F.R. parts 55 and 124 explicitly require EAB review as a prerequisite to judicial review of a federal OCS air permit and leave no gap for state procedures to fill on this matter. *See, Parker Drilling*, 587 U.S. at 614-16. Maryland’s administrative review procedures therefore cannot override the applicable provisions of these federal regulations. Moreover, it would make no sense to require exhaustion of administrative remedies through appeal to the EAB *only* when an EPA Administrator issues an OCS air permit, while allowing for OCS air permits issued by delegated agencies who “stand in the shoes” of the Administrator to skip this administrative process and be challenged directly in the U.S. Court of Appeals.

In addition, the provisions in CAA section 328 that direct the Administrator to make certain state requirements applicable to OCS sources located within 25 miles of state seaward boundaries do not make state judicial review procedures applicable in lieu of federal procedures. The first sentence in section 328(a)(1) is limited to “requirements to control air pollution.” 42 U.S.C. § 7627(a)(1). When the second sentence in this paragraph directs that “such requirements shall be the same as would be applicable if the source were located in the corresponding onshore area,” it is clearly referring to the “requirements to control air pollution” described in the first sentence. *Id.* This sentence does not mean that permitting or licensing decisions for an OCS source shall be subject to the same judicial review requirements as if the source were located within the adjacent state. The state laws that are made applicable on the OCS under section 328(a)(1) are only those pertaining to requirements to control air pollution.

Thus, whether issued by an EPA Regional Administrator or by a delegated agency, an OCS air permit issued under CAA section 328 must first be appealed to the EAB before it may be subject to judicial review in a U.S. Court of Appeals under CAA section 307(b)(1).

E. The EAB's 2020 Standing Order Supports Its Review of OCS Permits Issued by Delegated States

US Wind and MDE argue that the Board's September 21, 2020, standing order, entitled "Revised Order Governing Petitions for Review of Clean Air Act New Source Review Permits" ("2020 Standing Order") confirms their view that the EAB lacks jurisdiction to review MDE's permitting decision. But the opposite is true. In the 2020 Standing Order, the Board clearly recognized that it has the 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." 2020 Standing Order at 1, n. 1, 2. The former is supported by footnote 2, which defines NSR permits to include OCS permits. *Id.* at n. 2. The latter is supported by the first sentence of footnote 1 of the standing order, which describes the nature of a delegated program. *Id.* at n. 1. US Wind focuses only on the second sentence in footnote 1, which cites 40 C.F.R. § 124.1(e) and states that part 124 does not apply to PSD permits issued by states under an EPA-approved SIP. *See* US Wind Brief at 20, n. 94. This second sentence is inapplicable here because, for sources located on the OCS, MDE does not issue permits under an EPA-approved SIP; instead, MDE only has "delegated [] authority to issue permits on behalf of the EPA." 2020 Standing Order at n. 1; *see also* Section II.C.ii and n. 12, *supra* (explaining that part 124 does not apply to PSD permits issued by an "approved State," 40 C.F.R. § 124.1(e), but a "delegated agency" under part 55 is not an "approved state" under part 124). Nothing in the Board's discussion of delegated PSD programs in footnote 1 suggests that the Board intended to exclude delegated OCS programs from the

scope of this order. In any case, the Board retains the authority described in paragraph 13 of the order to modify this order and its procedures as appropriate. 40 C.F.R. § 124.19(n).

V. CONCLUSION

For the reasons provided above, the OCS air permit that MDE issued to US Wind on June 6, 2025, was an action of the Administrator subject to judicial review only in a U.S. Court of Appeals. This federal permit was subject to the applicable procedures in 40 C.F.R. part 124, which require that petitioners exhaust their administrative remedies under part 124 before the permit becomes final for purposes of judicial review. Accordingly, the EAB is the proper forum for administrative review of this permit before it may be challenged in federal court.

DATE: August 25, 2025

Respectfully submitted,

/S/

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TABLE OF ATTACHMENTS

EPA Attachment #	Document Name
Attachment 1	Order, <i>Intermoor, Inc. v. US Wind, Inc.</i> , Case No. C-23-CV-20-000097 (Md. Cir. Ct. Worcester Cty., Sept. 16, 2020).
Attachment 2	Plaintiff’s Response to Order for Supplemental Lien and Jurisdiction Analysis (Aug. 10, 2020), <i>Intermoor, Inc. v. US Wind, Inc.</i> , Case No. C-23-CV-20-000097 (Md. Cir. Ct. Worcester Cty.)
Attachment 3	Letter dated April 4, 2014, from Shawn M. Garvin, Regional Administrator, EPA Region 3, to Robert M. Summers, Secretary, Maryland Department of the Environment (“2014 Delegation Letter”).
Attachment 4	(1) Email dated August 17, 2023, from Suna Sariscak, Manager, Air Quality Permits Program, Maryland Department of the Environment, to Air and Radiation Division Personnel, U.S. EPA Region 3; (2) Letter dated August 17, 2023, from Laurie Jodziewicz, US Wind, Inc., to Suna Sariscak; (3) Email dated December 5, 2024, from Suna Sariscak, to Air and Radiation Division Personnel, U.S. EPA Region 3; (4) Letter dated December 5, 2024, from Suna Sariscak, to Mary Cate Opila, Chief, Permits Branch, Air and Radiation Division, U.S. EPA Region 3, with attachment; (5) Email dated June 6, 2025, from Shannon Heafey, Public Participation Coordinator, Maryland Department of the Environment, to Gwendolyn Supplee, Senior Permit Specialist, U.S. EPA Region 3, with attachments.
Attachment 5	Email dated December 20, 2024, from Gwendolyn Supplee, Senior Permit Specialist, U.S. EPA Region 3, to Suna Sariscak, Manager, Air Quality Permits Program, Maryland Department of the Environment, and Email dated December 20, 2025, from Suna Sariscak, confirming receipt.
Attachment 6	Maryland Offshore Wind Project, Information Regarding an Air Quality Permit Application Submitted by US Wind, Inc., (Maryland Offshore Wind – MDE Website) (as of June 10, 2025, via https://web.archive.org/).

Attachment 7	Letter dated July 7, 2025, from Amy Van Blarcom-Lackey, Regional Administrator, U.S. EPA Region 3, to Serena McIlwain, Secretary, Maryland Department of the Environment.
Attachment 8	Maryland Offshore Wind Project, Information Regarding an Air Quality Permit Application Submitted by US Wind, Inc., (Maryland Offshore Wind – MDE Website) (as of July 25, 2025, via https://web.archive.org/).
Attachment 9	(1) Email dated December 11, 2024, on behalf of Cristina Fernandez, Air & Radiation Division Director, US EPA Region 3, to Sarah Stokely, Lead Historian and Section 106 Chief, BOEM, and US Wind Memorandum of Agreement Signatories, and attached letter; (2) Email Response dated January 10, 2025, from Sarah Stokely, BOEM; (3) Email Response dated January 16, 2025, from Christopher Daniel, Program Analyst, Advisory Council on Historic Preservation; and (4) Cristina Fernandez, US EPA Region 3 Signature Page of MOA.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Brief of Region 3 Addressing the Board's Jurisdiction in the matter of US Wind, Inc. (for the Maryland Offshore Wind Project), OCS Appeal No. 25-01, were filed with the Environmental Appeals Board through its e-filing system on August 25, 2025, and were sent to the following persons by email in accordance with the Environmental Appeals Board's September 21, 2020 Revised Order Authorizing Electronic Service of Documents in Permit and Enforcement Appeals:

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