

**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-2024-001; PSD Approval PSD-
2024-001

)
)
)
)
) OCS Appeal No. 25-01
)
)
)
)
)
)
)

**RESPONSE BRIEF REGARDING THE
ENVIRONMENTAL APPEALS BOARD’S JURISDICTION**

Petitioners, the Mayor and City Council of Ocean City and the Commissioners of Worcester County, Maryland, file this brief in response to the Environmental Appeals Board’s (the Board) directive¹ to address whether this Board has jurisdiction to hear Petitioners’ appeal, as raised in the motion for summary disposition filed by Respondent, the Maryland Department of the Environment, and in the supporting arguments of Respondent, US Wind, Inc.

Respondents argue that the EPA, having delegated its permitting authority under the Clean Air Act (CAA) to the state of Maryland, retains no federal authority to review the Prevention of Significant Deterioration (PSD) approval that Maryland issued to US Wind. Respondents further contend that parties challenging that approval may only seek review of the approval under whatever remedy state law provides—here, filing suit in Maryland Circuit Court. But, as the Supreme Court has held, delegation does not mean abnegation: “It would be unusual,

¹ Order Regarding Briefing Schedule (Aug. 4, 2025).

to say the least, for Congress to remit a federal agency enforcing federal law solely to state court. We decline to read such an uncommon regime into the Act[.]”²

The CAA grants to the EPA Administrator the authority to issue permits.³ And, although section 328 of the Act⁴ authorizes the Administrator to delegate certain authority to states, the implementing regulations clarify that any such delegation does not divest the Administrator of his permitting authority under the Act: “Nothing in this part shall prohibit the Administrator from enforcing any requirement of this part.”⁵ The Administrator, in turn, has delegated (but not relinquished) to the Board the authority to review state-issued PSD permits for activities on the federally-owned outer Continental Shelf: “Appeal from a . . . PSD final permit decision issued under § 124.15 of this part . . . is commenced by filing a petition for review with the Clerk of the Environmental Appeals Board[.]”⁶

1. Maryland Law Does Not Supersede EPA’s Congressionally Granted Authority Under the Clean Air Act

The EPA’s regulations provide that the method of initiating an appeal from issuance of a PSD permit is to file a petition with the Environmental Appeals Board—as Ocean City has done here:

Initiating an appeal. Appeal from a [Resource Conservation and Recovery Act, Underground Injection Control, National Pollutant Discharge Elimination System, or Prevention of Significant Deterioration] permit decision issued under § 124.15 of this part . . . is commenced by filing a petition for review with the Clerk of the Environmental Appeals Board within the time prescribed in paragraph (a)(3) of this section.⁷

² *Alaska Dep’t of Env’t Conservation v. EPA*, 540 U.S. 461, 492 (2004).

³ 42 U.S.C. § 7661a(a).

⁴ 42 U.S.C. § 7627.

⁵ 40 C.F.R. § 55.11(f).

⁶ 40 C.F.R. § 124.19(a)(1).

⁷ 40 C.F.R. § 124.19.

The EPA’s authority to issue this regulation, establishing the PSD appeal procedure, rests squarely on section 328 of the CAA. Respondents’ argument that the Board should disregard the EPA’s authority and dismiss this case because it conflicts with a provision of Maryland law turns the Constitution upside down. Under the Supremacy Clause it is the “Constitution, and the Laws of the United States . . . [that] shall be the supreme Law of the Land.”⁸ And there is no question that “state laws are preempted when they conflict with federal law.”⁹ If, as Respondents argue, Maryland law conflicts with the CAA or the EPA’s CAA regulations, Maryland law must give way: State law is “preempted to the extent of any conflict with a federal statute.”¹⁰

Respondents also erroneously argue that the Administrator’s Part 55 delegation of outer Continental Shelf permitting authority to Maryland somehow deprived the EPA of its statutory authority to challenge U.S. Wind’s state-issued PSD permit. But Respondents point to nothing in the CAA or the EPA’s CAA regulations to support this argument. Further, nothing in the Administrator’s delegation to Maryland even hints that the Administrator did (or legally could) divest himself of his statutorily imposed CAA obligations.¹¹

Just the opposite, CAA section 328,¹² which allowed Maryland to “promulgate and submit to the Administrator regulations for implementing and enforcing the requirements of this subsection,” goes on to provide that “[n]othing in this subsection shall prohibit the Administrator from enforcing any requirement of this section.”¹³

⁸ U.S. Const. art. VI, cl. 2.

⁹ *Arizona v. United States*, 567 U.S. 387, 399 (2012).

¹⁰ *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

¹¹ 80 Fed. Reg. 43088 (July 21, 2015).

¹² 42 U.S.C. § 7627(a)(3).

¹³ *Id.*

The Supreme Court has flatly rejected the argument Respondents make here. In *Alaska Department of Environmental Conservation v. EPA*,¹⁴ the state of Alaska argued that the EPA's challenge to the best available control technology (BACT) provision in its state-issued PSD permit "may be enforced only through state administrative and judicial processes[.]"¹⁵ The Supreme Court disagreed:

Congress, however, vested EPA with explicit and sweeping authority to enforce CAA "requirements" relating to the construction and modification of sources under the PSD program, including BACT. We fail to see why Congress, having expressly endorsed an expansive surveillance role for EPA in two independent CAA provisions, would then implicitly preclude the Agency from verifying substantive compliance with the BACT provisions and, instead, limit EPA's superintendence to the insubstantial question whether the state permitting authority had uttered the key words "BACT."¹⁶

2. The Administrator, Acting Through the Board, Retains Authority to Review this PSD Permit

There is no substance to Respondents' argument that the EPA has no authority to ensure that US Wind's PSD permit complies with the CAA. Created in 1992 to streamline the EPA's decision-making process and to provide a centralized forum for administrative appeals, the Board exercises the powers and duties assigned to it by the Administrator: "Environmental Appeals Board shall mean the Board within the Agency described in § 1.25(e) of this title. The Administrator delegates authority to the Environmental Appeals Board to issue final decisions in . . . PSD . . . permit appeals filed under this subpart[.]"¹⁷

Under the Board's regulations, all PSD permit appeals must be filed with the Board; "[a]n appeal directed to the Administrator, rather than to the Environmental Appeals Board, will

¹⁴ *Alaska Dep't Environmental Conservation v. EPA*, 540 U.S. 461 (2004).

¹⁵ *Id.* at 491–492.

¹⁶ *Id.* at 490.

¹⁷ 40 C.F.R. § 124.2.

not be considered.”¹⁸ Respondents are flat wrong in asserting that the Board lacks authority (jurisdiction) to review this Maryland-issued permit for, as EPA regulations state, “*Permit* means an authorization, license or equivalent control document issued by EPA or an ‘approved State’ to implement the requirements of this part and parts 122, 123, 144, 145, 270, and 271 of this chapter.”¹⁹ And, even without an appeal, the Board has authority to initiate its own review: “The Environmental Appeals Board also may decide on its own initiative to review any condition of any . . . PSD permit decision issued under this part[.]”²⁰

The Administrator, however, retains ultimate authority to decide some cases, and the Board may refer an appeal directly to the Administrator for decision.²¹ That the Administrator has delegated authority to the Board—just like his delegation of authority to Maryland—does not relieve the Administrator of ultimate authority for compliance with CAA requirements.²²

3. Respondents’ Authority is Distinguishable

Respondents argue that Part 124 regulations do not apply to PSD permits, but they misread the regulation on which they rely. That regulation merely states that “[c]ertain procedural requirements set forth in this part must be adopted by States in order to gain EPA approval to operate [Resource Conservation and Recovery Act, Underground Injection Control, and National Pollutant Discharge Elimination System] permit programs”²³—and then clarifies that, concerning SIP approval, “[t]his part does not apply to PSD permits or 404 permits issued by an approved State.”²⁴

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 40 C.F.R. § 124.19(p).

²¹ 40 C.F.R. § 22.4(a)(2).

²² *Avenal Power Ctr., LLC v. EPA.*, 787 F. Supp. 2d 1, 3–5 (D.D.C. 2011).

²³ 40 C.F.R. § 124.1(e).

²⁴ *Id.*

The cases Respondents rely on only superficially seem to support their argument but, on closer examination, fail to do so. *In re Delta Energy Center*²⁵ focused on the difference between Federal Implementation Programs (FIP) and State Implementation Programs (SIP), and the impact on permits when the program changes from a FIP to a SIP. The *Delta Energy* decision gave no analysis to its stated conclusion that the SIP applied, and therefore the Board lacked jurisdiction.²⁶ And *Seminole Electric Cooperative*²⁷ limited its ruling to the case's "novel facts,"²⁸ which are not present here.

Conclusion

For all of these reasons, Petitioners, Mayor and City Council of Ocean City and the Commissioners of Worcester County, Maryland, ask the Board to hold that it has jurisdiction over this appeal.

Respectfully submitted,

/s/ Nancie G. Marzulla
Nancie G. Marzulla
Roger J. Marzulla
Marzulla Law, LLC
1150 Connecticut Ave., NW
Suite 1050
Washington, D.C. 20036
(202) 822-6760
nancie@marzulla.com
roger@marzulla.com
D.C. Bar No. 400985
D.C. Bar No. 394907

Dated: August 25, 2025

Counsel for Petitioners

²⁵ *In re Delta Energy Center*, PSD Appeal No. 17-01, 17 E.A.D. 371.

²⁶ *Id.* at 377.

²⁷ *See In re Seminole Electric Cooperative, Inc.*, PSD Appeal No. 08-09, 14 E.A.D. 468 (2009).

²⁸ *Id.* at 470 ("FDEP seeks summary disposition on the ground that the Board lacks jurisdiction to review a permit issued under state authority, although FDEP also seeks, in a parallel state court action, to bar Sierra Club from obtaining review of the Seminole permit due to Sierra Club's alleged failure to abide by a longstanding state procedure not part of the federal PSD program.").

Certificate of Service

I certify that copies of the foregoing Supplemental Brief Regarding the Board's Jurisdiction in the matter of US Wind, Inc. (for the Maryland Offshore Wind Project, OCS Appeal No. 25-01), 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, on August 25, 2025:

By Email:

For: U.S. EPA, Region 3

Ryan Stephens
Office of Regional Counsel
Stephens.ryan@epa.gov

For Maryland Department of the Environment

Kara A. Dorr
Assistant Attorney General, MDE
kara.dorr@maryland.gov

Michael F. Strande
Assistant Attorney General, MDE
michael.strande@maryland.gov

For: US Wind, Inc.

Toyja E. Kelley, Sr.
Troutman Pepper Locke LLP
toyja.kelley@troutman.com

Josh M. Kaplowitz
Troutman Pepper Locke LLP
josh.kaplowitz@troutman.com

Morgan M. Gerard
Troutman Pepper Locke LLP
morgan.gerard@troutman.com

Carroll Wade McGuffey III
Troutman Pepper Locke LLP
mack.mcguffey@troutman.com

/s/ Nancie G. Marzulla

Nancie G. Marzulla
Roger J. Marzulla
Marzulla Law, LLC
1150 Connecticut Ave., NW
Suite 1050
Washington, D.C. 20036
(202) 822-6760
nancie@marzulla.com
roger@marzulla.com
D.C. Bar No. 400985
D.C. Bar No. 394907