

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

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In re Atlantic Shores Offshore Wind, LLC,)	Appeal No. OCS 24-01
For the Atlantic Shores Project 1 and Project 2)	
Permit No. OCS-EPA-R2 NJ 02)	
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**RESPONSE OF ATLANTIC SHORES OFFSHORE WIND, LLC AND
ATLANTIC SHORES OFFSHORE WIND PROJECT 1, LLC
TO PETITION FOR REVIEW**

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INTRODUCTION

On September 29, 2024, the United States Environmental Protection Agency (“EPA”), Region 2 issued an Outer Continental Shelf (“OCS”) permit under the Clean Air Act (“CAA”) to Atlantic Shores Offshore Wind Project 1, LLC (“Atlantic Shores”)¹ to construct and operate two offshore wind projects (Projects 1 and 2) on the OCS approximately 7.6 nautical miles (8.7 statute miles) offshore of New Jersey (collectively referred to as the “Project”). Save Long Beach Island (“Petitioner”) filed a petition with the Environmental Appeals Board (“EAB” or the “Board”) challenging the permit issuance on October 15, 2024 (the “Petition”). Atlantic Shores now timely files its response to the Petition.

The Board should deny the Petition. Petitioner has failed to meet basic procedural requirements laid out in the Board’s regulations. Beyond these procedural shortcomings, Petitioner has fallen well short of its burden to establish that the Permit was based on a clearly erroneous finding of fact or conclusion of law by the EPA, or that the decision involves an important policy consideration that the Board, in its discretion, should review.

In its Petition, Petitioner raises two primary challenges to the Permit. First, Petitioner speculates that air modeling demonstrating compliance with the 24-hour National Ambient Air

¹ Atlantic Shores notes that Petitioner has incorrectly identified Atlantic Shores Offshore Wind, LLC as the permittee. On June 25, 2024, Atlantic Shores Offshore Wind, LLC informed EPA Region 2 that the ownership of the Project was transferred to Atlantic Shores Offshore Wind Project 1, LLC. *See* Letter from Richard Ruvo, Director Air and Radiation Division, EPA Region 2, to Jennifer Daniels, Vice President and Development Director, Atlantic Shores Offshore Wind, LLC (Sept. 29, 2024), Attachment 1. Atlantic Shores Offshore Wind, LLC assigned 100 percent interest in the southern portion of OCS-A 0499 to its project companies: Atlantic Shores Offshore Wind Project 1, LLC and Atlantic Shores Offshore Wind Project 2, LLC. *See* Letter from Jennifer Daniels, Vice President and Development Director, Atlantic Shores Offshore Wind, LLC to Suilin Chan, Chief, Permitting Section, Air Programs Branch, EPA Region 2 (June 25, 2024), Attachment 2.

Quality Standards (“NAAQS”) for fine particulate matter (“PM_{2.5}”) could underestimate the emissions from construction and operation of the wind projects. Petitioner failed to adequately raise certain issues on the PM_{2.5} modeling in its public comments, making Board review of those claims now unavailable. To the extent that Petitioner preserved issues related to the PM_{2.5} modeling, they are meritless as the administrative record clearly shows that modeling for the Project for compliance with the 24-hour NAAQS was overly conservative.

Petitioner also claims that perceived deficiencies with New Jersey’s Regional Haze State Implementation Plan (“SIP”) provide grounds for the Board to set aside the Permit. But Petitioner is wrong again. The Board lacks jurisdiction over claims challenging a SIP or to deny a permit based on such a challenge. Regardless, Petitioner fails to demonstrate that the New Jersey SIP is in fact deficient.

In addition to arguments included in the Petition, Petitioner unexplainably raises additional claims in a separate document that is marked as Exhibit C to the Petition. The Board should disregard these claims given Petitioner’s blatant dismissal for EAB’s basic procedural rules. If, however, these claims are considered, they still lack merit and should be denied for the various reasons described below.

I. LEGAL FRAMEWORK

A. Regulation of OCS Sources.

Under Section 328 of the CAA, EPA is required to “establish requirements to control air pollution from Outer Continental Shelf sources located offshore of the States along the Pacific, Arctic and Atlantic Coasts . . . to attain and maintain Federal and State ambient air quality standards.” 42 U.S.C. § 7627(a)(1). OCS sources “located within 25 miles of the seaward boundary of such States” are subject to the same requirements that “would be applicable if the source were

located in the corresponding onshore area.” *Id.* Specifically, an OCS source is subject to Federal requirements, as well as the state and local requirements of the Corresponding Onshore Area (“COA”). 40 C.F.R. § 55.3(b).

Pursuant to its Section 328 authority, EPA has promulgated regulations at 40 C.F.R. Part 55 that establish “air pollution control requirements for OCS sources and the procedures for implementation and enforcement of the requirements.” 40 C.F.R. § 55.1. A proposed OCS source located within 25 miles of a state’s seaward boundary must obtain a preconstruction air permit that incorporates both federal requirements and the COA requirements incorporated into the federal regulations. *See* 40 C.F.R. §§ 55.13, 55.14. Federal requirements for preconstruction permits are laid out in EPA’s Prevention of Significant Deterioration (“PSD”) regulations. *See* 40 C.F.R. § 52.21.

Among other things, the PSD regulations require that an owner or operator of a proposed source demonstrate that allowable emissions from the proposed source will not cause or contribute to a violation of any NAAQS or “[a]ny applicable maximum allowable increase over the baseline concentration in any area” (i.e., PSD Increments). *See* 40 C.F.R. § 52.21(k). A permit applicant must prepare and submit to EPA an air quality analysis and modeling that confirms the proposed source will not cause or contribute to a violation of NAAQS or PSD increments. 40 C.F.R. §§ 52.21(l)-(m).

B. Regulation to Control Regional Haze.

Section 169A of the CAA establishes a national goal of preventing any future, and remedying any existing, impairment of visibility in Class I areas. 42 U.S.C. § 7491(a)(1). To achieve this goal, the CAA requires EPA to promulgate regulations to “assure . . . reasonable progress toward meeting the national goal” of regional haze reduction, 42 U.S.C. § 7491(a)(4),

and directs states to submit SIPs, including revisions, to EPA on a periodic basis setting forth emission limits and other measures necessary to make reasonable progress toward the national visibility goal. 42 U.S.C. §§ 7410(a), 7491(b)(2).

Under EPA's regional haze regulations, states must submit and periodically revise their SIPs to ensure they adequately address visibility impairment to Class I areas. States were most recently required to submit SIP revisions to EPA by July 31, 2021. 40 C.F.R. § 51.308(f). The next round of SIP revisions are due to EPA by July 31, 2028. 40 C.F.R. § 51.308(f). A state could be required to revise its SIP ahead of the regulatory established deadline only if the Federal Land Manager certifies that a source or small number of sources cause a reasonably attributable visibility impairment. 40 C.F.R. §§ 51.302(a), 51.308(f).

States must include in their Regional Haze SIPs Reasonable Progress Goals ("RPGs") and a long-term strategy to meet visibility goals. 40 C.F.R. §§ 51.308(d)(1), (2). Long-term strategies must include enforceable emissions limits, compliance schedules, and other measures as necessary to meet RPGs. 40 C.F.R. § 51.308(f)(2). The RPGs, however, are only goals and "are not directly enforceable." 40 C.F.R. § 51.308(f)(3)(iii).

EPA will either approve or disprove SIPs, in whole or in part. If EPA disapproves a SIP, it is required to prepare a Federal Implementation Plan ("FIP"). Challenges to EPA's approval or disapproval of a SIP are subject to judicial review and must be brought under Section 307 of the CAA. 42 U.S.C. § 7607(b)(1). Under Section 307, a party may seek judicial review is provided 60 days to seek judicial review of EPA's decision to approve or implement any implementation plan under Sections 110 and 111 of the CAA. 42 U.S.C. § 7607(b)(1).

II. FACTUAL AND PROCEDURAL BACKGROUND

Atlantic Shores seeks to develop two offshore wind energy generation projects (Projects 1 and 2) within the BOEM Lease Area OCS-A 0499² to provide clean, renewable energy to the Northeastern United States (collectively referred to as the “Project”). The Atlantic Shores Project is anticipated to generate nearly 2,500 megawatts of renewable energy. U.S. EPA, Fact Sheet for an Outer Continental Shelf Air Permit to Construct and Operate Atlantic Shores Projects 1 and Project 2 (July 11, 2024), Attachment 3 (hereinafter “EPA Fact Sheet”). The Project will assist both the United States and New Jersey to achieve renewable energy goals. Atlantic Shores Offshore Wind Outer Continental Shelf Air Permit Application, at E-1 (June 2024), Attachment 4.

Atlantic Shores submitted an OCS air permit application to EPA Region 2 on September 1, 2022. Atlantic Shores EPA deemed the permit application complete on August 21, 2023, and issued for public review a draft OCS permit for the Atlantic Shores Project (the “Draft Permit”) on July 11, 2024. EPA solicited public comments on the draft permit from July 12, 2024 to August 16, 2024. EPA also held a public meeting on the draft permit on August 12, 2024.

EPA issued the Final Permit for the Atlantic Shores Project on September 29, 2024. The Permit sets out requirements for controlling air pollution from the construction and operation of the Project. EPA also released a 112-page Response to Comments document (“RTC”), which addresses all substantive comments EPA received on the Draft Permit and provides explanation on the changes EPA made on the Permit based on comments it received. *See*, U.S. EPA, Response to Public Comments Outer Continental Shelf Air Permit EPA Permit Number: OCS-EPA-R2 NJ02

² Atlantic Shores notes that it requested and received approval from BOEM to segregate Lease OCS-A 0499. As a result, Project 1 will be sited within OCS-A 0499, while Project 2 will be sited in the remaining portion of Lease OCS-A 0499, which is now designated as OCS-A 0570.

(Sept. 29, 2024), Attachment 5 (hereinafter “RTC”).

In addition to requiring an OCS permit, the Atlantic Shores Project must receive numerous authorizations and approvals from multiple federal agencies to ensure that the Project complies with other relevant statutes, including the Outer Continental Shelf Lands Act (“OCSLA”), the National Environmental Policy Act (“NEPA”), Clean Water Act (“CWA”), Endangered Species Act (“ESA”), and Marine Mammal Protection Act (“MMPA”). The Project is a “FAST-41” Project, meaning that its size and significance qualified it for posting on the FAST-41 dashboard, subjecting it to a strict permitting schedule. *See*, Atlantic Shores South, available at <https://www.permits.performance.gov/permitting-project/fast-41-covered-projects/atlantic-shores-south> (last accessed Nov. 1, 2024).

In addition to obtaining an OCS permit from EPA, Atlantic Shores has received its final approval from the United States Department of the Interior under OCSLA, NEPA, the ESA, and MMPA, with applicable permits from the United States Army Corps of Engineers anticipated by the end of this year. *See* BOEM, Atlantic Shores Offshore Wind South Final Environmental Impact Statement, Appendix A (May 2024), Attachment 6. Atlantic Shores is relying on the timely issuance of all permits, after a robust review and any applicable public review and comment periods, so that it may proceed with the financing and construction of this important project.

III. STANDARD OF REVIEW

The Board’s review of OCS permits is governed by EPA’s permitting regulations at 40 C.F.R. Part 124. *See* 40 C.F.R. § 55.6(a)(3). The preamble to the EAB regulations provides that the Board’s authority to grant review “should be only sparingly exercised,” and that “most permit conditions should be finally determined at the [permit issuer’s] level.” 45 Fed. Reg. 33,290, 33,412 (May 19, 1980). The Board has consistently acknowledged this governing principle in subsequent

decisions. *See, e.g., In re MPLX*, 18 E.A.D. 228, 234 (EAB 2020); *In re Cape Wind Assocs., LLC*, 15 E.A.D. 327, 330 (EAB 2011).

Under Part 124, the petitioner appealing a permit decision bears the burden of demonstrating that review is warranted. *See* 40 C.F.R. § 124.19(a)(4)(i) (requiring petitioners to “identify the contested permit condition or other specific challenge to the permit decision and clearly set forth, with legal and factual support, petitioner’s contentions for why the permit decision should be reviewed.”). “To meet this burden, the petition must satisfy threshold pleading requirements including timeliness, standing, and issue preservation.” *In re Shell Gulf of Mexico, Inc.*, 15 E.A.D. 470, 477-78 (EAB 2012).

A petitioner must demonstrate that EPA’s permitting decision was based on “[a] finding of fact or conclusion of law that is clearly erroneous,” or that the decision involves an important policy consideration that the Board, in its discretion, should review.³ 40 C.F.R. § 124.19(a)(4)(i)(A)-(B). The Board will not find clear error “based merely on a difference of opinion or alternative theory regarding the permit issuer’s technical decisions.” *In re Deseret Generation & Transmission Co-Op.*, CAA Appeal No. 24-01, slip op. at *12 (EAB Sept. 10, 2024) (citing *In re Evoqua Water Techs. LLC*, 17 E.A.D. 795, 799-800 (EAB 2019)).

ARGUMENT

I. Petitioner’s Comments Regarding Air Modeling and Analysis Conducted for the Project Provides No Basis to Grant Review.

Petitioner’s claims regarding air modeling for compliance with the 24-hour PM_{2.5} NAAQS

³ Atlantic Shores notes that Petitioner incorrectly cites to the wrong standard of review throughout the Petition. While Petitioner alleges that EPA’s actions were arbitrary and capricious, the Board will only grant review of a petition if EPA has committed a clearly erroneous finding of fact or conclusion of law.

must fail for multiple reasons. First, Petitioner failed to adequately preserve its arguments with regard to this claim. Second, Petitioner's speculation and difference of opinion regarding this issue are clearly rebutted by the administrative record for the Permit and do not warrant review by the Board.

A. Petitioner Failed to Raise Its Argument Regarding Energy Levels Needed for Pile-Driving Activities.

As a threshold matter, Petitioner's argument that EPA's issuance of the permit is somehow deficient because modeling did not contain "analysis or disclosure of emissions concentrations changing as a function of the pile-type and hammer energy level" has not been preserved for review. *See* Pet. at 3. Petitioner failed to previously raise this issue during the public comment period as required by the EAB regulations. Therefore, the Board is unable to consider the merit of this claim.

A petitioner must provide "specific citation to the administrative record, including the document name and page number, that each issue being raised in the petition was raised during the public comment period." 40 C.F.R. § 124.19(a)(4)(ii). The burden to show that an issue was properly preserved "rests squarely with the petitioner," as it is "not incumbent upon the Board to scour the record to determine whether an issue was properly raised below." *In re BP Cherry Point*, 12 E.A.D. 209, 216 (EAB 2005) (internal citation omitted).

The Board has previously explained this requirement "is not an arbitrary hurdle" intended to make the review process more difficult. *In re BP Cherry Point*, 12 E.A.D. at 219. Rather, adherence to this requirement is "necessary to ensure that the Region has an opportunity to address potential problems with the draft permit before the permit becomes final, thereby promoting the Agency's longstanding policy that most permit issues should be resolved at the Regional level,

and to provide predictability and finality to the permitting process.” *In re New England Plating Co.*, 9 E.A.D. 726, 732 (EAB 2001). As such, “[t]he Board has frequently rejected appeals where issues that were reasonably ascertainable during the comment period were not raised at that time but instead presented for the first time on appeal.” *In re Russell City Energy Center, LLC*, 15 E.A.D. 1, 10 (EAB 2010).

Here, Petitioner did not raise its concerns regarding energy levels needed for pile-driving activities during the comment period on the Draft Permit. Instead, Petitioner raises this issue in its Petition and Exhibit C for the first time. Petitioner’s failure to present this issue with EPA during the comment period precludes Petitioner from raising it now. *See, e.g., In re Shell Gulf of Mexico, Inc.*, 15 E.A.D. at 507; *In re City of Palmdale*, 15 E.A.D. 700, 721-22 (EAB 2012); *In re New England Plating Co.*, 9 E.A.D. at, 735.

B. Modeling Demonstrating Compliance with the PM_{2.5} 24-Hour Standards Conducted and Appropriately Considered Relevant Factors for Estimating Potential Emissions during Construction.

Even if Petitioner did properly raise this issue in its public comments, it does not merit review by the Board. Petitioner has failed to demonstrate that EPA’s analysis of air quality modeling conducted to determine compliance with the 24-hour PM_{2.5} NAAQS is based on a clearly erroneous finding of fact or conclusion of law. Petitioner offers nothing aside from unsupported statements and opinions to suggest that the air analysis prepared for the Permit was inappropriate.

The Board will generally defer to a permit issuer’s technical expertise and experience on matters that are fundamentally technical or scientific in nature. *In re City of Palmdale*, 15 E.A.D. at 705. The Board recognizes that air quality monitoring is an area that is “technical in nature” and requires “specialized expertise and experience.” *In re Shell Offshore, Inc.*, 13 E.A.D. 357, 397-98 (EAB 2007). “It is axiomatic that a challenge to the fundamental technical expertise of a permit

issuer requires a petitioner to *overcome a particularly heavy burden*, and that a successful challenge to a permit issuer's technical expertise *must consist of more than just a difference of opinion*.” *In re Shell Gulf of Mexico, Inc.* 15 E.A.D. at 501 (emphasis added); *see also In re Three Mountain Power, LLC*, 10 E.A.D. 39, 58 (EAB 2001) (“The Board will not overturn a permit provision based on speculative arguments.”).

Petitioner falls well short of meeting its burden here. Notably, Petitioner does not assert—let alone provide evidence—that the air analysis prepared was incorrect or that the construction or operation of the Atlantic Shores Project will cause or contribute to a violation of the NAAQS or PSD increments. Rather, Petitioner demands that EPA provide information regarding pile-driving activities and simply speculates that emissions from the Atlantic Shores Project *could* be higher than projected, if pile driving requires more energy than assumed in the air analysis. Pet. at 3. Specifically, Petitioner suggests without providing any evidence that “emissions *can* vary by a factor of ten” based on the “pile-type and hammer energy level.” *Id.* (emphasis added). In reality, air modeling was overly conservative as it was based on worst-case scenario assumptions.

Petitioner's highly speculative concerns regarding the underlying assumptions for the air modeling do not demonstrate that EPA's analysis was clearly erroneous. *See In re Cape Wind*, 15 E.A.D. at 338 (holding that the raising of speculative questions about data and air modeling was insufficient to show that EPA's analysis of air quality modeling for a proposed offshore wind farm was based on a clearly erroneous finding of fact or conclusion of law); *In re Shell Gulf of Mexico, Inc.*, 15 E.A.D. at 501 (rejecting argument where petitioner expressed “significant concerns,” without further elaboration, on EPA's supplemental environmental justice analysis for an OCS permit).

Beyond being highly speculative, Petitioner's statements regarding the PM_{2.5} modeling are

factually inaccurate. Petitioner alleges that EPA failed to consider “determinants” that could impact short-term PM_{2.5} emissions from the Project’s construction. The administrative record clearly shows otherwise. As part of its permit application, Atlantic Shores included tables, which provided information it used to calculate emissions from construction and operation of the Project (e.g., engine rated capacity, hours of operation, load factor, and emission factors). *See* Atlantic Shores Offshore Wind Outer Continental Shelf Air Permit Application, Appendix B (June 2024), Attachment 7.

In its RTC, EPA explained that Atlantic Shores informed Region 2 that modeled emission rates for short-term emissions “are the projected emissions based on the maximum rated capacity of the equipment and maximum throughput of the facility, calculated based on detailed plans for each activity, load factors, and emission factors.” RTC at 48. Later in the RTC, EPA provides a list of the sources that were modeled for each activity, and noted that the equipment modeled represented the “the worst-case equipment” for an emissions standpoint that Atlantic Shores could be expected to use for their construction activities. *Id.* at 53. EPA also detailed the other assumptions made during the modeling for compliance with the short-term PM_{2.5} NAAQS and PSD increments:

Instead, in order to ensure that modeling for the short-term standards represented a worst-case scenario (i.e., for this purpose, the highest emissions per 1-hour, 8-hour, or 24-hour period), the modeling assumed that all sources of emissions from all activities that would occur during construction were occurring simultaneously and continuously for 3 years (i.e., 24 hours a day, 365 days a year, for 8760 hours per year or 8784 hours per year in a leap year). The modeling used meteorological data for the 3-year period between 2018-2020, in order to ensure compliance with the short-term standards even if the highest impacts occurred in the worst-case meteorological conditions over that period. The emission sources were also modeled as if they were all placed in the northwest corner of the lease area, closest to the coastline of New Jersey and the Brigantine National Wilderness Area, to represent maximum possible onshore impacts.

Id. at 37.

To the extent that Petitioner seeks information regarding energy magnitudes for foundations installation, this information is not directly relevant to the Permit. Atlantic Shores provided the vessel and engine information that would meet the proposed project design envelope requirements to install the wind farm based on numerous studies and models. The Permit authorizes the ability to operate this specific equipment or similar equipment that results in the same or less emissions. EPA appropriately issued the permit with emission limits and related reporting requirements “to ensure that the Atlantic Shores project is conducted in a manner that aligns with its modeling and, consequently, will not violate the NAAQS or PSD increment.” EPA Fact Sheet at 57.

C. Petitioner’s Remaining Comments on the PM_{2.5} Modeling are Meritless.

Petitioner also alleges that the modeling is deficient because it failed to disclose peak emissions derived from sources during pile driving; failed to compare energy levels required for pile-driving against noise modeling exposure report; and did not consider component failures and repair and replacement activities. Pet. 4-5. Each of these claims lack merit.

As explained above, modeling for compliance with short-term NAAQS and PSD increments were based on worst case scenarios and these modeling inputs were included as Appendix B to the Air Modeling report. Petitioner provides no justification for why EPA or Atlantic Shores should have juxtaposed energy use in air modeling scenarios versus those identified in a noise modeling report, which is unrelated to the permitting action. Nonetheless, Petitioner has not reserved this issue because it failed to raise it in its public comment. *See supra* § I.A. Finally, Petitioner is incorrect that EPA did not consider turbine component failures and repair and replacement activities. EPA explained in the RTC, that both short- and long-term

modeling considered emissions from both minor and major repairs. RTC at 53-54.

Given the deference afforded to EPA on technical issues and the evidence in the administrative record, Petitioner is unable to demonstrate that modeling data provided by Atlantic Shore and EPA's reliance on this data was clearly erroneous. Therefore, the Board should deny review of the EPA's determination that PM_{2.5} modeling for compliance with the 24-hour NAAQS was appropriate.

II. Petitioner's Claims Regarding New Jersey's SIP Are Outside the Board's Jurisdiction and Meritless.

Petitioner's argument that the EPA's permitting decision must be overturned based on perceived issues with New Jersey's SIP is completely unfounded. As a preliminary matter, the Board lacks jurisdiction to review challenges to SIPs. Even if the jurisdictional issues were put aside, the Board would have no basis to deny the Permit because the New Jersey SIP is not deficient.

A. Determining the Adequacy of a State's Regional Haze SIP is outside the Board's Jurisdiction.

The issue of whether New Jersey's Regional Haze SIP is adequate is wholly outside the Board's jurisdiction over permitting decisions. The Board's jurisdiction to review preconstruction permits, including PSD and OCS permits, extends only "to those issues directly relating to permit conditions that implement the federal PSD program." *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 161 (EAB 1999). The permit review process "is not an open forum for consideration of every environmental aspect of a proposed project, or even every issue that bears on air quality." *Id.* at 127. When determining whether the Board has jurisdiction, it will place "considerable reliance on how the issue is framed in the petition for review." *Id.* at 162

In this case, Petitioner does not challenge a condition of the permit or allege that EPA failed to adhere to the relevant regulations. Indeed, Atlantic Shores met all necessary requirements to analyze and account for visibility impacts, including conducting visibility impact analysis as required under 40 C.F.R. § 52.21(o). *See* EPA Fact Sheet at 59. Petitioner instead argues that the Board should set aside the permit because “the currently approved SIP altogether fails to account for the emissions derived from Atlantic Shores’ offshore wind project.” Pet. at 7. Because challenges to a state’s SIP are wholly outside the Board’s jurisdiction, this issue is unreviewable. *Cf In re Tondu Energy Co.*, 9 E.A.D. 710, 715 (EAB 2001) (denying review of petition seeking to challenge adequacy of PM NAAQS).

Any challenge to EPA’s approval of New Jersey’s SIP, should have been brought under Section 307(b)(1). Under that provision, a petitioner is provided 60 days to seek judicial review of EPA’s decision to approve or implement any implementation plan under Sections 110 and 111 of the CAA. 42 U.S.C. § 7607(b)(1). The 60-day window to challenge New Jersey’s SIP has long expired as EPA approved New Jersey’s Regional Haze SIP on November 16, 2023. *See* 88 Fed. Reg. 78650 (Nov. 16, 2023).

B. Regardless, New Jersey Has No Obligation to Update Its Regional Haze SIP at this Time.

Even if Petitioner’s claim regarding the New Jersey SIP was properly before the Board, it is meritless because New Jersey has no current obligation to update its SIP. Under the regional haze regulations, states are required to periodically revise their SIPs as set out by EPA’s regulations. As part of that revision, states must select sources that may impact visibility to Class I areas and determine if controls must be imposed on those sources. Absent a finding from the affected Federal Land Manager that a source or small number of sources cause a reasonably

attributable visibility impairment, states are not required to revise its regional haze SIP more frequently than the deadlines set out by the regulations. 40 C.F.R. §§ 51.302(a), 51.308(f).

The last deadline for submitting regional haze SIP revisions to EPA for approval was July 31, 2021, and states' next revisions are not due until to July 31, 2028. 40 C.F.R. 51.308(f). New Jersey submitted its last regional haze SIP revision ahead of the July 31, 2021 deadline, and as noted above, was approved by EPA in 2023. *See* 88 Fed. Reg. at 78650. At the time of the SIP submission, New Jersey could not account for offshore wind sources that did not exist or that were not poised to be constructed. Indeed, the Atlantic Shores' OCS air permit application was submitted to EPA Region 2 on September 1, 2022, and EPA deemed the permit application complete on August 21, 2023. *See* Attachment 1.

Moreover, the Federal Land Manager—in this case the United States Fish and Wildlife Service (“USFWS”)—has not made a finding that the Atlantic Shores Project or offshore wind generation facilities generally will reasonably attribute to visibility impairment in the Brigantine Wildlife Area. Therefore, New Jersey is not required to update its SIP ahead of the July 31, 2028 deadline.

Nonetheless, the Federal Land Manager's review of the Brigantine Wilderness area includes consideration of haze impacts and Atlantic Shores will be required to adopt mitigation measures as part of that review to counteract any anticipated impacts. *See* BOEM, Atlantic Shores Offshore Wind South Final Environmental Impact Statement, Appendix G at G-57 (May 2024), Attachment 8. Specifically, Atlantic Shores must develop a framework that includes a description of “existing conditions and monitoring objectives; description of preventative and compensatory mitigation measures; identification of the avoidance or offset values for each measure; . . . the mechanism for the transfer of funding from the [Atlantic Shores] to USFWS; and reporting to

demonstrate completion of implementation.” *Id.*

III. The Board Should Disregard All Additional Comments Made in Petitioner’s Exhibit C.

Without explanation, Petitioner attempts to raise additional claims outside its Petition. For that reason alone, those claims do not warrant review. Even if Petitioner appropriately included these issues in the Petition, however, Board review of these claims would be inappropriate for various reasons.

A. All Issues Raised Solely in Petitioner’s “Exhibit C” Should Not Be Considered by the Board.

Petitioner raised additional arguments, not included in its Petition, in a separate document included as an exhibit to the Petition. The Exhibit C document is marked as “Draft” and titled “SLBI Response to Response to Public Comment Document.” *See* Pet. Ex. C. Because these issues were not raised in an actual petition for review, the Board should disregard them.

EAB regulations establish that “*a petition for review* must identify the contested permit condition or other specific challenge to the permit decision and clearly set forth, with legal and factual support, petitioner’s contentions for why the permit decision should be reviewed.” 40 C.F.R. § 124.19(a)(4)(i) (emphasis added). The regulations do authorize parties to submit attachments, but attachments should only be “[p]arts of the record to which the parties wish to direct the [Board’s] attention” to. 40 C.F.R. § 124.19(d)(2).

Exhibit C, however, is an entirely new document and not part of the administrative record. Furthermore, Petitioner provided no explanation as to why it prepared this separate document or why it could not incorporate the claims made in this document into its petition for review.

B. Petitioner’s Claims Raised in Exhibit C Would Not Warrant Review, Even if Properly Included in the Petition.

Even if the Board were to consider the additional claims in Exhibit C, Atlantic Shores maintains that none of them would provide a basis to grant review of the Petition for the reasons described below.

Comments re Regional Haze SIP – Petitioner comments that EPA and New Jersey failed to address the issue that the New Jersey SIP had to be revised to account for offshore wind sources. Pet. Ex. C at 3. For the reasons provided above, this issue is outside of the Board’s jurisdiction; nonetheless, New Jersey had no affirmative obligation to revise its SIP to account for the Atlantic Shores Project. *See supra* § II. Petitioner also argues that the issuance of the Permit will interfere with RPGs. Pet. Ex. C at 3. RPGs, however, are not enforceable standards, but merely interim goals to achieve long-term improvements in visibility at Class I areas. *See* 40 C.F.R. § 51.308(f)(3)(iii). Nonetheless, as explained above, Atlantic Shores is working with the Federal Land Manager to ensure visibility impacts are mitigated.

Comments re 24-hour PM_{2.5} Modeling – Review of Petitioner’s arguments regarding the PM_{2.5} modeling in Exhibit C should be disregarded for the same reasons described above to the extent they are largely the same as what is presented in the Petition. *See supra* § I. Additional arguments raised solely in Exhibit C should also be disregarded. Specifically, Petitioner argues that the administrative record should include information regarding the amount of construction activities that would occur at night. Pet. Ex. C. at 5. EPA explained that modeling for the short-term NAAQS and increment standards, construction activities were “modeled as work conducted during each hour, all 24 hours of the day, to ensure that all possible air impacts were captured . . . [t]his includes at night, where stable conditions could potentially lead to higher concentrations.” RTC at 43. As previously explained, modeling was overly conservative, thus, Petitioners cannot

show modeling assumptions were clearly erroneous.

Comments re Operations and Maintenance Emissions – Petitioner alleges that the RTC did not address consideration of operation and maintenance emissions. Pet. Ex. C. 6-7. This is inaccurate. In the RTC, EPA discusses the consideration of operation and maintenance (“O&M”) emissions, describes supplemental information it received from Atlantic Shores describing preventive maintenance activities, and outlines how O&M emissions were conservatively modeled. RTC at 54-55.

Comments re Decommissioning – Petitioner states it believes it is inappropriate for EPA to not consider emissions from decommissioning as part of this permitting decision. Pet. Ex. C at 7-8. EPA appropriately explained that decommissioning of the Project is outside the scope of the permitting action under the CAA because the permit does not authorize any decommissioning activities and will be addressed through a separate process. RTC at 88-90. While Petitioner may disagree, Petitioner has not shown that EPA’s legal position is clearly erroneous.

Comment re USFWS Confirmation – Petitioner argues that the administrative record should include USFWS’s opinion on the air quality impact analysis for the Brigantine Wildlife Area. Pet. Ex. C at 8. EPA did provide this in its RTC on the Permit. RTC at 69. Thus, the claim should be denied.

Comments re Alternative Sites, Sizes, and Processes – Petitioner argues that no alternative sites analysis was prepared as required under New Jersey law. Pet. Ex. C. at 8-9. This is factually untrue. EPA explained in the RTC that Atlantic Shores “fulfilled its N.J.A.C. 7:27-18.3(c)(2) requirement to conduct an alternative site analysis in Section 3.9.3 of the revised application,” which included consideration of 21 alternative sites within Atlantic Shores’ OCS lease. RTC at 93. EPA further explained that consideration of alternatives sites onshore were infeasible given

the Project's size and scope. *Id.* EPA also noted that BOEM had gone through an extensive process for determining suitable offshore wind development lease areas and relied on BOEM's analysis of alternative sites. While Petitioner may disagree with the ultimate findings in the alternative analysis, Petitioner has not shown that EPA committed a clear error in refraining from conducting further analysis. *In re Sutter Power Plant*, 8 E.A.D. 680, 689 (EAB 1999) (finding no clear error in EPA's decision to defer to alternative sites to other agencies that evaluated the project in that regard).

Comments re Liability – Petitioner argues that the Permit should include conditions that indicate that Atlantic Shores has “sufficient financial resources or backing to pay for the environmental damages” that may occur. Pet. Ex. C. at 9. There is no basis under the CAA or EPA's regulations to require such a condition in an OCS permit. EPA appropriately explained to Petitioner that this comment is outside the scope of the permitting action. RTC at 95. Thus, this claim should be denied.

Comments re Uncertainty in Construction Schedules – Petitioner argues that there is uncertainty surrounding installation times for foundations, casting doubt on estimates regarding underwater noise modeling and resulting take impacts. Pet. Ex. C. at 11. EPA addressed Petitioner's concerns and explained that it received supplemental information from Atlantic Shores showing that foundation installation is expected to take 1.5 days per foundation, and wind turbine generators (“WTGs”) are expected to take 2.6 days per WTG to install. RTC 41-42. EPA explained that these estimates were based on foundation installation times at a similar offshore wind project, which began construction in May 2024. Atlantic Shores also disagrees with Petitioner speculation that foundation and WTG installations could not proceed in parallel. Pet. Ex. C. at 11. As shown in its modeling report appendices, Atlantic Shores intends to use different vessels for its foundation

and WTG installation. *See* Attachment 7. Thus, Petitioner has not shown that the construction estimates were clearly erroneous, and therefore, this claim should be denied.

Comments re Coastal Zone Management Act Consistency – Petitioner adopts almost verbatim statements made in its comments on the Draft Permit, which allege that the Project cannot be consistent with New Jersey’s Coastal Zone Management Act (“CZMA”) rules. *Compare* Pet. Ex. A at 17-18 *with* Pet. Ex. C at 11-12. This is insufficient to warrant review by the Board. *See* EAB, Revised Order Governing Petitioners for Review of Clean Air Act New Source Review Permits at ¶ 7 (Sept. 21, 2020) (requiring a petition to cite to “where in the response to comments document the permit issuer responded to the comment and [] *explain why the permit issuer’s response to the comment is inadequate.*”) (emphasis added); *see also In re Peabody W. Coal Co.*, 12 E.A.D. 22, 33 (EAB 2005) (“petitioner may not simply reiterate comments made during the public comment period, but must substantively confront the permit issuer’s subsequent explanations.”).

Nonetheless, EPA explained the New Jersey Department of Environmental Protection (“NJDEP”) has already determined that the project is consistent with New Jersey’s Coastal Zone Management Plan. RTC at 97. The Board lacks jurisdiction to review a challenge to this state determination of consistency. *See, e.g., Skokomish Indian Tribe v. Fitzsimmons*, 982 P.2d 1179, 1184 (Wash. Ct. App. 1999) (“Here, the Tribe is suing a state agency because it failed to enforce state law according to its delegated authority. This claim clearly belongs in state court.”).

Furthermore, federal agencies are generally entitled to rely on a state’s concurrence determination. *See, e.g., Matter of Defend H20 v. Town Board of the Town of East Hampton*, CV 15-cv-2349 (ADS)(AYS), CV 15-cv-5735 (ADS)(AYS), 2015 WL 12564207, at *11 (E.D.N.Y. Oct. 15, 2015) (“Where a State expresses its concurrence with a Federal consistency determination,

the Federal agency is, and must be, entitled to rely on the State's expression of concurrency and go forward with the planned project."); *Enos v. Marsh*, 616 F. Supp. 32, 64 (D. Haw. 1984) ("In any event, there can be no violation of the CZMA when the consistency determination is approved by the state, since the Corps is entitled to rely upon the state's agreement with the determination."). Because Petitioner has not shown that EPA's reliance on NJDEP's concurrence was a clearly erroneous legal conclusion, this claim should be denied.

CONCLUSION

For the foregoing reasons, Atlantic Shores respectfully asks the Board to deny review of the Petition.

Date: November 5, 2024

Respectfully submitted,

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STATEMENT OF COMPLIANCE WITH WORD COUNT

I hereby certify that Atlantic Shores' Response to the Petition for Review contains 6,238 words, as calculated using Microsoft Word word-processing software.

/s/ Hilary Tompkins

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing response to Petition for Review were served by email on the following persons, this 5th day of November 2024:

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Table of Attachments

- 1) Attachment 1: Letter from Richard Ruvo, Director Air and Radiation Division, EPA Region 2, to Jennifer Daniels, Vice President and Development Director, Atlantic Shores Offshore Wind, LLC (Sept. 29, 2024)
- 2) Attachment 2: *See* Letter from Richard Ruvo, Director Air and Radiation Division, EPA Region 2, to Jennifer Daniels, Vice President and Development Director, Atlantic Shores Offshore Wind, LLC (June 25, 2024).
- 3) Attachment 3: U.S. EPA, Fact Sheet for an Outer Continental Shelf Air Permit to Construct and Operate Atlantic Shores Projects 1 and Project 2 (July 11, 2024).
- 4) Attachment 4: Excerpt of Atlantic Shores Offshore Wind Outer Continental Shelf Air Permit Application (June 2024)
- 5) Attachment 5: U.S. EPA, Response to Public Comments Outer Continental Shelf Air Permit EPA Permit Number: OCS-EPA-R2 NJ02 (Sept. 29, 2024)
- 6) Attachment 6: BOEM, Atlantic Shores Offshore Wind South Final Environmental Impact Statement, Appendix A (May 2024)
- 7) Attachment 7: Atlantic Shores Offshore Wind Outer Continental Shelf Air Permit Application, Appendix B (June 2024)
- 8) Attachment 8: BOEM, Atlantic Shores Offshore Wind South Final Environmental Impact Statement, Appendix G (May 2024)