

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

_____)	
)	
In re:)	
Atlantic Shores Offshore)	
Wind, LLC, for the)	
Atlantic Shores Project 1)	
and Project 2)	OCS Appeal No. CAA 24-11
)	
EPA Permit Number: OCS-EPA-R2 NJ 02)	
_____)	

EPA REGION 2's RESPONSE TO PETITION FOR REVIEW

Table of Contents

FACTUAL AND PROCEDURAL BACKGROUND..... 6

STANDARD AND SCOPE OF REVIEW 7

ARGUMENT 10

 I. The Petition fails to allege or demonstrate that Region 2’s Permit decision is clearly erroneous or based on an exercise of discretion or important policy consideration that the Board, in its discretion, should review, and thus Petitioner fails to meet its burden under 40 C.F.R. § 124.19(a)(4)(i). 10

 II. Additional issues raised in Exhibit C to the Petition were not raised in the Petition itself and should not be reviewed by the EAB..... 11

 III. Petitioner fails to demonstrate clear error or other reason for Board review as to Region 2’s acceptance of the modeling and air quality analysis showing compliance with 24-hour PM2.5 increment. 11

 IV. Petitioner fails to demonstrate Region 2’s clear error or other reason for Board review as to the New Jersey Regional Haze State Implementation Plan (SIP). 18

 V. Petitioner fails to demonstrate Region 2’s clear error or other reason for Board review as to Region 2’s treatment of decommissioning. 21

 VI. Petitioner fails to demonstrate Region 2’s clear error or other reason for Board review as to U.S. Fish and Wildlife Service (FWS) review..... 24

 VII. Petitioner fails to demonstrate Region 2’s clear error or other reason for Board review as to N.J.A.C. 7:27-18.3(c)2. 26

 VIII. Petitioner fails to demonstrate Region 2’s clear error or other reason for Board review as to liability coverage. 29

 IX. Petitioner fails to demonstrate Region 2’s clear error or other reason for Board review as to construction schedules..... 30

 X. Petitioner fails to demonstrate Region 2’s clear error or other reason for Board review as to Coastal Zone Management Act Consistency. 32

CONCLUSION..... 34

TABLE OF AUTHORITIES

Cases

In re Shell Offshore, Inc., 15 E.A.D. 536 (EAB 2012).....	8
In re Powertech (USA) Inc., 19 E.A.D. 23 (EAB 2024).....	8
In re Penneco Envtl. Sols., LLC, 17 E.A.D. 604 (EAB 2018).....	8
In re Seneca Res. Corp., 16 E.A.D. 411 (EAB 2014).....	8
In re GE, 17 E.A.D. 434 (EAB 2018).....	8
In re Avenal Power Ctr., LLC, 15 E.A.D. 384 (EAB 2011).....	8
In re Archer Daniels Midland Co., 17 E.A.D. 380 (EAB 2017).....	8
In re La Paloma Energy Ctr., LLC, 16 E.A.D. 267 (EAB 2014).....	8
In re Panoche Energy Center, LLC, 18 E.A.D. 818 (EAB 2023).....	8
In re City of Lowell, 18 E.A.D. 115 (EAB 2020)	8, 11
In re City of Taunton, 17 E.A.D. 105 (EAB 2016)	8
In re DOE, 18 E.A.D. 797 (EAB 2022).....	8
In re City of Palmdale, 15 E.A.D. 700 (EAB 2012).....	9
In re Ash Grove Cement Co., 7 E.A.D. 387 (EAB 1997).....	9, 11
In re Windfall Oil & Gas, Inc., 16 E.A.D. 769 (EAB 2024).....	9, 15
In re City of Keene, 18 E.A.D. 720, 724 (EAB 2022).....	9
In the Matter of Prairie State Generating Co., 13 E.A.D. 1 (EAB 2006).....	10

Regulations

15 C.F.R. Part 930.....	23
30 C.F.R. Part 585 Subpart E.....	17, 21
40 C.F.R. § 52.21	18
40 C.F.R. § 55.1	17
40 C.F.R. § 55.12	15
40 C.F.R. Part 51, Appendix W.....	17
40 C.F.R. part 55	7, 14, 15, 17, 19
40 C.F.R. § 124.3	18
40 C.F.R. § 124.13.....	7
40 C.F.R. § 124.17.....	20
40 C.F.R. 124.19	8, 9, 10, 14, 15, 16, 18, 19, 21, 23
40 C.F.R. § 51.308.....	18
N.J.A.C. 7:27-18.3(c)(2).....	19, 21

Statutes

42 U.S.C. § 7627.....	6, 16
5 U.S.C. § 706.....	7
16 U.S.C. § 1456.....	22

Other Authorities

88 Fed. Reg. 78650 (Nov. 16, 2023) 22
56 Fed. Reg. 63774 (Dec. 5, 1991) 15
89 Fed. Reg. 57828, 57829 (July 16, 2024)..... 15

Table of Attachments

Attachment 1: Excerpts of Relevant Portions of the Administrative Record

Other Attachments

Attachment 2: Letter from Suilin Chan to Kyle Hilberg dated August 21, 2023 finding the OCS Air Permit Application for Atlantic Shores Project 1 and Project 2 complete (full document)

Attachment 3: Final Permit Application submitted by Atlantic Shores Offshore Wind Project 1, LLC on June 28, 2024 (pages 1-4, 9, 16, 25, 78-80, 132-134, 215, 243, 283-284, 305-311, 332-370 of 460)

Attachment 4: Fact Sheet Accompanying Draft Permit (pages 1, 5, 7-8, 58-59, 64-66)

Attachment 5: Draft Permit Issued July 11, 2024 (page 1)

Attachment 6: Response to Comments Accompanying Final Permit (full document)

Attachment 7: September 30, 2024 Email from Suilin Chan to Jennifer Daniels Issuing Permit (full document)

Attachment 8: Final Permit Issued September 30, 2024 (pages 1, 42-45)

Attachment 9: September 30, 2024 Email from Maya Greally to Commenters (full document)

Attachment 10: September 11, 2023 Letter from Kyle Hilberg to Suilin Chan (full document)

Attachment 11: Supplemental Information Provided by Atlantic Shores to EPA on September 3, 2024, and Requested by EPA Based on Public Comments Received (full document)

Attachment 12: BOEM's July 1, 2024 Joint Record of Decision for the Atlantic Shores Offshore Wind South Project (cover and pages 136-137, 169-172 of 209)

Attachment 13: December 1, 2022 Letter from Suilin Chan to A. J. Jablonowski (full document)

Attachment 14: September 3, 2024 Email from Tim Allen (FWS) to Suilin Chan et al. (EPA) (full document)

Attachment 15: Documents 6.1, 6.2, 6.3, 6.4, 6.5, and 6.6 from the Administrative Record Regarding FWS Review (full documents)

Attachment 16: BOEM's Final Environmental Impact Statement, Volume I (cover and pages 31-44 and 61-143 of 560)

Attachment 17: March 29, 2023 Email Containing Atlantic Shores March 7, 2023 Modeling Memo (Content in Black Italics) and EPA Responses (full document)

Attachment 18: Article by R. Lacal-Arántegua et al. entitled "Offshore wind installation: Analysing the evidence behind improvements in installation time." (first page of article on page 133, and pages 137-39)

INTRODUCTION

The United States Environmental Protection Agency (EPA) Environmental Appeals Board (EAB or Board) should deny the petition for review (the Petition) brought by Save Long Beach Island, Inc. (Petitioner) of the Clean Air Act (CAA or the Act) Outer Continental Shelf (OCS) permit issued by EPA Region 2 (the Region or Region 2) on September 30, 2024, for the construction and operation of the OCS source Atlantic Shores Project 1 and Project 2 (the Atlantic Shores Project or the Project), consisting of two wind farms on the OCS. The Region's OCS permit decision for the Atlantic Shores Project is fully supported by the record, including as detailed in the Response to Comments (RTC) that accompanied the permit. Petitioner has failed to allege or demonstrate that Region 2's permit decision was clearly erroneous or otherwise involves an exercise of discretion that warrants review, and therefore the Board should deny review.

FACTUAL AND PROCEDURAL BACKGROUND

On September 1, 2022, Region 2 received an OCS air permit application for the Project pursuant to section 328 of the CAA, 42 U.S.C. § 7627, and 40 C.F.R. Part 55. The application regarded the construction and operation of a wind farm on the OCS approximately 7.6 nautical miles offshore New Jersey. The application was subsequently revised and supplemented with additional information on multiple dates, and was found complete on August 21, 2023. *See* Attachment 2 (August 21, 2023 Region 2 Letter). A final version of the application (the Application) was submitted by Atlantic Shores Offshore Wind Project 1, LLC (Permittee) on June 28, 2024. Attachment 3 (Application); *see also* Attachment 4 at 2¹ (Fact Sheet at 5) (providing procedural background).

¹ Page numbers to attachments denote the page of the pdf file beginning with the first page after the cover page. RTC pages denote page number written on the RTC document itself.

On July 11, 2024, Region 2 issued for public review, under 40 C.F.R. § 124.6, a draft CAA OCS air permit for the Project (the Draft Permit), accompanied by a fact sheet (the Fact Sheet). *See* Attachment 5 (Draft Permit); Attachment 4 (Fact Sheet). Region 2 accepted public comments on the Draft Permit from July 12, 2024 through August 16, 2024, and held a virtual public hearing on August 12, 2024. *See* Attachment 6 (RTC at p. 1). Region 2 received written comments from approximately 611 commenters and 16 commenters provided oral comments during the virtual public hearing. *Id.* The vast majority (over 92%) of the total comments received were supportive of the proposed project. *Id.*

On September 30, 2024, Region 2 issued a final permit (the Permit). Attachment 7 (September 30, 2024 Email from Suilin Chan to Jennifer Daniels Issuing Permit); Attachment 8 (Permit). That day, Region 2 emailed copies of the Permit and an accompanying RTC to commenters, among others. Attachment 9 (September 30, 2024 Email from Maya Grealley to Commenters).

On October 15, 2024, Petitioner filed the Petition with the Board. Petitioner served copies of the Petition on the EPA Administrator, Region 2 Regional Administrator, and Director of the Air and Radiation Division in Region 2, and on Atlantic Shores Offshore Wind LLC. *See* Petitioner's Certificate of Service.

STANDARD AND SCOPE OF REVIEW

The rules governing petitions for review of OCS permits are found in Agency permitting regulations at 40 C.F.R. Part 124; 40 C.F.R. § 55.6(a)(3); 40 C.F.R. § 124.19(a)(1); *In re Shell Offshore, Inc.*, 15 E.A.D. 536, 541-42 & n.4 (EAB 2012). A petitioner appealing a permit decision issued under Part 124 bears the burden of demonstrating review is warranted. *See* 40 C.F.R. § 124.19(a)(4); *see also, e.g., In re Powertech (USA) Inc.*, 19 E.A.D. 23, 30 (EAB 2024).

The Board first evaluates whether the petitioner has met threshold procedural requirements, including, among other things, whether an issue has been preserved for Board review. *See* 40 C.F.R. §§ 124.13, 124.19(a)(2)-(4); *see also In re Powertech (USA) Inc.*, 19 E.A.D. at 30; *In re Penneco Env'tl. Sols., LLC*, 17 E.A.D. 604, 617-18 (EAB 2018); *In re Seneca Res. Corp.*, 16 E.A.D. 411, 412 (EAB 2014). Petitioner bears the burden of demonstrating that the issue was raised previously, as “[i]t is not incumbent upon the Board to scour the record to determine whether an issue was properly raised below.” *In re GE*, 17 E.A.D. 434, 445-46 (EAB 2018) (quoting *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 250 n.10 (EAB 1999)). The Board has explained that “[t]he regulatory requirement that a petitioner must raise issues during the public comment period ‘is not an arbitrary hurdle, placed in the path of potential petitioners simply to make the process of review more difficult; rather, it serves an important function related to the efficiency and integrity of the overall administrative scheme.’” *In re GE*, 17 E.A.D. at 445-46 (quoting *In re Christian Cnty. Generation, LLC*, 13 E.A.D. 449, 459 (EAB 2008)).

The Board has discretion to grant or deny review of a permit decision. 40 C.F.R. § 124.19(a)(4); *see In re Powertech (USA) Inc.*, 19 E.A.D. 23, 30 (EAB 2024); *In re Avenal Power Ctr., LLC*, 15 E.A.D. 384, 394 (EAB 2011); *In re Archer Daniels Midland Co.*, 17 E.A.D. 380, 382-83 (EAB 2017). The petitioner must demonstrate that the permit decision is based on a clearly erroneous finding of fact or conclusion of law or involves an exercise of discretion that warrants review under the law. 40 C.F.R. § 124.19(a)(4)(i)(A)-(B); *see, e.g., In re Powertech (USA) Inc.*, 19 E.A.D. 23, 30 (EAB 2024); *In re La Paloma Energy Ctr., LLC*, 16 E.A.D. 267, 269 (EAB 2014). To meet this standard, it is not enough for a petitioner to simply repeat comments previously submitted on the draft permit. A petitioner must demonstrate why the permit issuer’s response to those objections is clearly erroneous or otherwise warrants review. 40

C.F.R. § 124.19(a)(4)(ii); *In re Panoche Energy Center, LLC*, 18 E.A.D. 818, 820 (EAB 2023); *City of Lowell*, 18 E.A.D. 115, 131 (EAB 2020); see *In re City of Taunton*, 17 E.A.D. 105, 111, 180, 182-83, 189 (EAB 2016) *aff'd*, 895 F.3d 120 (1st Cir. 2018), cert. denied, 139 S.Ct. 1240 (2019).

“When evaluating a challenged permit decision for clear error, the Board examines the administrative record that serves as the basis for the permit decision to determine whether the permit issuer exercised ‘considered judgment.’” *In re DOE*, 18 E.A.D. 797, 799 (EAB 2022) (citing *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 191, 224-25 (EAB 2000)). In considering whether to grant or deny review of a permit decision, the Board is guided by the preamble to the regulations authorizing appeal under part 124, in which the Agency stated that the Board's power to grant review “should be only sparingly exercised,” and that “most permit conditions should be finally determined at the [permit issuer's] level.” *In re Powertech (USA) Inc.*, 19 E.A.D. 23, 30 (EAB 2024) (quoting Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (EAB 2008)).

In reviewing an exercise of discretion by the permit issuer, the Board applies an abuse of discretion standard. See *In re City of Palmdale*, 15 E.A.D. 700, 704 (EAB 2012). The Board will uphold a permit issuer’s reasonable exercise of discretion if that decision is cogently explained and supported in the record. See *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 397 (EAB 1997). A permit issuer must articulate with “reasonable clarity” the reasons supporting its conclusions and the significance of the crucial facts relied on in reaching those conclusions. *Id.* at 417.

On matters that are fundamentally technical or scientific in nature, the Board typically defers to a permit issuer’s technical expertise and experience, as long as the permit issuer adequately explains its rationale and supports its reasoning in the administrative record. *In re*

Windfall Oil & Gas, Inc., 16 E.A.D. 769, 777 (EAB 2024). “The Board does not find clear error simply because the petitioner presents a difference of opinion or alternative theory.” *In re City of Keene*, 18 E.A.D. 720, 724 (EAB 2022).

ARGUMENT

I. The Petition fails to allege or demonstrate that Region 2’s Permit decision is clearly erroneous or based on an exercise of discretion or important policy consideration that the Board, in its discretion, should review, and thus Petitioner fails to meet its burden under 40 C.F.R. § 124.19(a)(4)(i).

Petitioner cites, in a footnote, 5 U.S.C. § 706(2)(A) as the basis for arguing the Board should use an “arbitrarily and capriciously” standard of review. *See* Petition at 2, n.3. Petitioner is incorrect. This provision is in Chapter 7 of the Administrative Procedures Act, which provides rules for judicial review – the chapter is in fact entitled “Judicial Review.”

Instead, as the Board is well aware, the proper standard of review here is found in 40 C.F.R. § 124.19(a)(4)(i). Under that regulation, “[t]he petition must demonstrate that each challenge to the permit decision is based on: (A) A finding of fact or conclusion of law that is clearly erroneous; or (B) An exercise of discretion or an important policy consideration that the Environmental Appeals Board should, in its discretion, review.” Because the Petition relied on an incorrect standard, and fails to allege or demonstrate that the Permit is clearly erroneous or based on an exercise of discretion or important policy consideration that the Board, in its discretion, should review, the Petition is deficient and the Board should deny review of the Permit.²

² Additionally, Region 2 notes that under 40 C.F.R. § 124.19(i)(1), “Every document filed with the Environmental Appeals Board must specifically identify in the caption the permit applicant, the permitted facility, and the permit number.” And, 40 C.F.R. § 124.19(i)(3)(ii) requires service of the Petition on said permit applicant. The caption of the Petition misidentifies the permit applicant as Atlantic Shores Offshore Wind, LLC, and Petitioner has improperly served the Petition on this entity. The final permit application was actually submitted by, and the permit was issued to, Atlantic Shores Offshore Wind Project 1, LLC. *See* Attachment 3 at 2-3, 5 (Application at 2-3, 5); Attachment 8 at 1 (Permit at 1); Attachment 5 (Draft Permit at 1). Region 2 respectfully requests that the Board decline to review the Petition based on these defects as well.

II. Additional issues raised in Exhibit C to the Petition were not raised in the Petition itself and should not be reviewed by the EAB.

Under 40 C.F.R. § 124.19(a)(4)(i), “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.” Petitioner raises a number of issues solely in its Exhibit C to the Petition (Exhibit C) that it does not raise in the Petition itself. Since such issues are not properly raised in the actual Petition, these issues do not meet the threshold for Board review and the Board should decline to review them. *See* Sections V-X, and indicated parts of Sections III and IV, below.

Were the Board to consider claims made only in an attachment to the Petition, and not the Petition itself, it would enable Petitioner to evade the length limitation set forth in 40 C.F.R. § 124.19(d)(3) (limiting a petition for review to 14,000 words). Here, the Petition is certified as containing 1882 words. This certification omits the words used for the arguments that Petitioner has placed in Exhibit C. Petitioner did not provide a count for the words contained in Exhibit C. Were a word count of Exhibit C to show that the Petition and Exhibit C combined do not exceed 14,000 words in this specific instance, the Board should not set a precedent by enabling this petitioner, or future ones, to use this practice.

III. Petitioner fails to demonstrate clear error or other reason for Board review as to Region 2’s acceptance of the modeling and air quality analysis showing compliance with 24-hour PM2.5 increment.

Petitioner argues that Region 2 inadequately “considere[d] the Determinants of PM2.5 24-Hour Values.” Petition at 2 (Argument A). First, the Petition fails to identify where in the RTC these issues were addressed by Region 2, as required by 40 C.F.R. § 124.19(a)(4)(ii).³ Thus,

³ In Exhibit C, Petitioner adds citation to two pages in the RTC.

the Petition does not meet the threshold for the Board's review and the Board should decline review of Argument A on that basis.

In fact, Region 2 discussed compliance with the 24-hour PM_{2.5} increment, or with short-term NAAQS and increment compliance more generally, for more than 17 pages in the RTC. *See, e.g.*, Attachment 6 (RTC Section 5.0 introduction (p. 36), and Comments and Responses 5.2-5.3 (p. 36-39), 5.5-5.8 (p. 40-48), 5.11-5.14 & 5.16 (p. 49-59)). As the RTC made clear, "the modeling is based on conservative assumptions that are intended to reflect a level of activity that is as high or higher than what could reasonably be expected to occur over the relevant period of time." *Id.* (RTC at Section 5.0 introduction, p. 36). The modeling conducted showed that the project would not violate the 24-hour PM_{2.5} increment.

Petitioner does not demonstrate any clear error in this conclusion by Region 2. The Petition focuses on the alleged absence in the record of specific details regarding the manner in which the proposed source is expected to operate and characteristics of the turbine structures. But the Petitioner does not allege a consequence from this omission. Petitioner does not assert that emissions from the facility under these or any other operating conditions will cause or contribute to a violation of the 24-hour PM_{2.5} increment. The Petitioner does not show that, if the facility were to operate as Petitioner alleges it might, that this manner and level of operation would produce air pollutant emissions that cause or contribute to a violation of any increment or NAAQS. The record reflects that the permit applicant and Region 2 evaluated a level of activity that would overestimate the potential emissions from the facility and its impacts onshore, and then demonstrated that emissions at this level would not cause or contribute to a violation. The Petitioner's arguments that Region 2 failed to provide more details about specific operational scenarios or characteristics does not show clear error.

Region 2 notes that on technical matters such as modeling, the Board has long held that it “accord[s] broad deference to permitting authorities with respect to issues requiring the exercise of technical judgment and expertise.” *In the Matter of Prairie State Generating Co.*, 13 E.A.D. 1, 72 (EAB 2006) (citing, e.g., *In re Ash Grove Cement Co.*, 7 E.A.D. at 403, for the proposition that “[a] party wishing to obtain a grant of review of a technical issue must carry a heavy burden in convincing us that the permitting authority’s technical analysis is erroneous.”); *see also In re City of Lowell*, 18 E.A.D. at 148 (citing *City of In re Attleboro*, 14 E.A.D. 398, 411 (EAB 2009) for the notion that “inherently technical determinations” are “technical judgment[s] that fall[] within the Region’s discretion and expertise” and that “[a] petitioner bears a heavy burden in seeking review of issues . . . that are essentially technical in nature.”). Petitioner clearly fails to meet that heavy burden here.

Petitioner expresses concerns regarding the pile driving activities that will occur during the construction and commissioning (C&C) phase of the permitted project. As discussed in the RTC, the 24-hour PM_{2.5} increment modeling for the C&C phase assumed that all emitting sources, including the pile driving activities, would operate and emit simultaneously, 24 hours a day, for three years straight. Attachment 6 (RTC Response 5.2, p. 37). As Atlantic Shores represented to Region 2, “the modeled emission rates 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.” Attachment 10 at 6 (September 11, 2023 Letter from Kyle Hilberg to Suilin Chan at 2). “The short-term 24-hour analysis uses the peak hour emissions [(i.e., the highest hourly emission rate that would occur over the course of a day)] from the model inputs table for each source.” Attachment 11 at 5 (Supplemental Information provided by Atlantic Shores to Region 2 on September 3, 2024). This

modeling then used meteorological data from 2018 to 2020 and examined the impacts of such emissions over the three-year period, to identify the impacts under the worst-case meteorological conditions (those which result in the highest impacts onshore and at the Brigantine National Wilderness Area) during that time. This 24-hour PM_{2.5} increment modeling also modeled all emission sources as if they were 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, even though in reality the sources would be distributed more broadly over the project's lease area.

Petitioner argues that it was a “critical dereliction of duty in the Air Permit approval” that “there is no analysis or disclosure of emission concentrations changing as a function of the pile-type and hammer energy level.” Petition at 3.⁴ Petitioner also argues the RTC was deficient by not providing more information regarding foundation type and size, energy needed to drive each pile, and how that compares to the energy input modeled for pile driving. Petitioner is incorrect. Region 2 provided the necessary information to understand the basis for its approach to the 24-hour PM_{2.5} increment modeling.

As background, each pile will be driven into the seabed using a hydraulic hammer powered by a diesel engine or engines. *See* Attachment 3 at 6 (Application at 24). The diesel engine(s) power a hydraulic pump, which pumps high-pressure hydraulic fluid into the hammer's hydraulic cylinder to move a piston up and down, raising a hammer which is then released to create the hammering action. The diesel engine(s) must run harder to raise the hammer higher. Adjusting the flow rate of the hydraulic fluid through the system allows the operator to fine-tune

⁴ Note that neither Petitioner nor other public commenters specifically raised modeling concerns regarding hammer energy in public comments, and thus the Board should deny review of these arguments. However, background and explanation regarding the hydraulic hammer are provided here to explain how the RTC and Administrative Record are adequate on this topic.

the height to which the hammer is raised depending on the task at hand. The Application and Permit identify the size of all the diesel engines required for this work. *See* Attachment 3 at 10-11 (Application at 131-132); Attachment 8 at 6 (Permit at 10).

The modeling done for diesel engine emissions while powering a hydraulic hammer conservatively assumed these engines will all, at all times, be used at 100% load (load factor of 1), or maximum hammer height, when its PM_{2.5} emissions would be highest. Attachment 3 at 15-16 (Appendix B (Model Inputs) of the Air Quality Dispersion Modeling Report, on pages 282-283 of 460 of the Application); *id.* at 12 (Application at 133, providing foundation installation hydraulic hammer power load factor). Then, as it did for all other sources, the modeling assumed that this hammer would be used 24 hours per day, every day, for three years straight, a highly conservative estimate given, among other reasons, that the Record of Decision (ROD) issued by the Bureau of Ocean Energy Management (BOEM) for this project includes limits on pile driving such as 4-hour daily “quiet periods” and does not allow any pile driving from January through April. Attachment 6 (RTC at Responses 5.6 and 5.7, p. 43-45); *see also* Attachment 12 at 3 (ROD at Section 5.12.2).

Further, the Permit contains enforceable daily limits on emissions of PM_{2.5}, among other pollutants, by the facility as a whole that were included to ensure the whole project did not in fact emit at levels higher than those modeled to show compliance with the short-term NAAQS and increment standards. Attachment 8 at 3-6 (Permit at 42-45); Attachment 6 (RTC Response 7.7, p. 82-83) (explaining daily emission limits were set by summing the expected peak hour emission rates for each vessel or emission point modeled to show compliance with short-term NAAQS/increment standards). If many emission sources were to emit more than was assumed in the modeling analysis, the project would have to compensate by reducing emissions from other

sources in order to comply with the daily emission limits in the Permit during the construction and commissioning (C&C) phase of the project.⁵ The Permit's daily emission limit provides operational flexibility while at the same time protecting the environment and is by definition a derivation of the sum of all allowable emissions per day. For this reason, Petitioner does not demonstrate clear error as to the Region 2's supposed failure "to describe whether the peak emission values derived from every device were summed to arrive at the conservative hourly emission rate for pile driving." Petition at 4. Moreover, the Application provided additional information about the parameters used to model each source. See Attachment 3 at 17-23.⁶ Appendix B ("Model of the Air Quality Dispersion Modeling Report, found in the Application at pages 305-311 of 460).

The Petition also claims deficiencies in the consideration of air emissions from major component failures and repair and replacement activities for wind turbines during the operations and maintenance (O&M) phase of the project. Petition at 5. However, as discussed above, for 24-hour PM2.5 increment modeling for O&M, the vessels and engines to be used during O&M are modeled at the load factor (intensity of use) that represents peak emissions for that vessel or engine given the manner in which the project expects to operate.⁷ This modeling then assumes all emission sources are operating simultaneously 24 hours per day, every day for three years,

⁵ Note that Region 2 does not foresee that emissions would approach the daily PM2.5 limit if one or a few sources were to emit more than modeled in a given day, since that limit is based on conservative assumptions and many sources are likely to be operating less than 24 hours a day, and may be emitting at rates below those modeled at least some of the time.

⁶ Region 2 notes that, in addition to listing the emission sources modeled, the RTC directed commenters to this location in the docket, where more information was available about the parameters used to model each source. Attachment 6 (RTC at Response 5.12, p. 51-53) (referencing the Application at 305-311 of 460). Including this level of detail in the RTC itself was not warranted by the comments received, and would have been highly cumbersome for the public reading the document. And, as discussed, the modeling conducted using these assumptions resulted in the daily emission limit with which the source must comply.

⁷ The Petition mentions annual increment in passing. The original comment, which was addressed in the RTC at Comment and Response 5.13 (p. 53-55), does not reference annual increment, and both the original comment and the Petition make unsubstantiated assertions regarding expected maintenance and repair without citations that would allow EPA to evaluate such claims.

rendering moot information regarding how frequently the equipment will actually be used.

Attachment 6 (RTC Response 5.13, p. 54) The O&M emission sources modeled are listed in the RTC, and include emission sources for both routine and heavy repairs.⁸ Attachment 6 (RTC at Response 5.13, p. 54-55). And, as discussed above, facility-wide daily emission limits during O&M (which are numerically different from those during C&C, and calculated based on short-term NAAQS/increment standard modeling for O&M) ensure the project cannot emit PM_{2.5} at levels above those indicated by the modeling. Attachment 8 at 3-6 (Permit at 42-45); Attachment 6 (RTC Response 7.7, p. 82-83). Similarly, this O&M daily emission limit also allows operational flexibility, but if enough of the project's various emission sources were to emit more than was assumed in the modeling analysis during O&M, the project would have to compensate by reducing emissions from other sources in order to comply with the daily emission limits in the Permit.

Petitioner raises additional concerns related to 24-hour PM_{2.5} increment modeling in Exhibit C alone that the Board should decline to review as they are not raised in the Petition itself. *See* 40 C.F.R. § 124.19(a)(4)(i); *see also* supra Section II. Petitioner argues that it is important to know what pile driving activity was modeled at night because the energy required for pile driving varies over a pile driving cycle and night “is the time when atmospheric conditions would be most conducive to better pollutant transport and higher levels at the shore.” However, again, such concern is misplaced since the diesel engine powering the hydraulic hammer conducting pile driving was assumed in the modeling to operate at full capacity 24 hours a day, every day for three years. *See, e.g.*, Attachment 6 (RTC at Response 5.6, page 43).

⁸ Heavy repairs include both major turbine repairs and interarray cable repairs. Attachment 3 at 14 (Application at 243) (in the Air Quality Dispersion Modeling Report).

IV. Petitioner fails to demonstrate Region 2’s clear error or other reason for Board review as to the New Jersey Regional Haze State Implementation Plan (SIP).

The Petition argues that the Permit should not have been issued until after the NJ Regional Haze SIP is revised.⁹ See Petition at 6-7. 40 C.F.R. § 124.19(a)(4)(ii) requires petitioners to “demonstrate, by providing 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[.]” Although Petitioner submitted public comments arguing that this SIP should be revised, neither Petitioner nor any other commenter raised during the public comment period that the Permit should not be issued until after said SIP revision. Arguing that SIP inadequacies require SIP revision is entirely different from arguing that such inadequacies should lead to a permit denial, and comments seeking the first option do not provide notice of the second. Because this issue was not raised during the public comment period, the Board should decline to review it.

Notwithstanding, any argument that the NJ Regional Haze SIP requires revision is irrelevant to Region 2’s issuance of the Atlantic Shores permit. The Regional Haze Rule, codified at 40 C.F.R. § 51.308, requires that states develop and periodically submit SIP revisions to address the pollution that causes visibility impairment in mandatory Class I Federal areas, such as the Brigantine National Wilderness Area. New Jersey most recently submitted a NJ Regional Haze SIP for Region 2’s review on March 26, 2020, and received Region 2 approval for said SIP on November 16, 2023, *see* 88 Fed. Reg. 78650 (Nov. 16, 2023), corrected by 88 FR 83828 (Dec. 1, 2023) (correcting “Staet” to “State”). The review and approval of SIP revisions follows a designated process, and Petitioners’ arguments that such regulations are deficient should have

⁹ Note that although Petitioner indicates in the Petition that it raised issues related to the NJ Regional Haze SIP in its public comments, neither the Petition nor Exhibit C provide a page number citation as required by 40 C.F.R. § 124.19(a)(4)(ii).

been set forth during the recent approval of the NJ Regional Haze SIP itself, or may be raised when the SIP is next updated – not in this Permit action. Further, alleged flaws in the approval of the SIP and whether the state has any obligation to revise or update its state plan are unrelated to whether Region 2 has clearly erred in issuing an OCS air permit on the basis of its determination that the proposed activity complies with the requirements of CAA § 328 and 40 C.F.R. part 55. And, the Petition does not assert that this Permit itself violates any specific provision of the Regional Haze SIP, and indeed it does not violate any such provision.

In fact, even if state rules do not meet the requirements for SIP approval, EPA must apply them to regulated OCS sources if they are incorporated by reference into Part 55. The OCS air regulations at 40 C.F.R. part 55 incorporate by reference federal and state/local onshore rules for application within 25 miles of a state’s seaward boundaries, which then apply to OCS sources regulated under that subpart. EPA conducts “consistency updates” to keep those incorporated rules up to date, 40 C.F.R. § 55.12, and lacks discretion, in pertinent part, regarding whether or how to incorporate such rules – even regarding language that EPA would not otherwise approve into a SIP. In the preamble to the Federal Register notice proposing part 55, EPA explained that “Consistency updates may result in the inclusion of State or local rules or regulations into part 55 that will ultimately be disapproved as part of the SIP. Inclusion in the OCS rule does not imply that a regulation meets the requirements of the Act for SIP approval, nor does it imply the regulation will be approved by EPA for inclusion in the SIP.” *See* 56 Fed. Reg. 63774 (Dec. 5, 1991); *see also* 89 Fed. Reg. 57828, 57829 (July 16, 2024) (describing in a proposed consistency update that “EPA must incorporate by reference into part 55 all relevant state rules in effect for onshore sources, so they can be applied to OCS sources located offshore.”) Therefore, Petitioner

fails to establish that Region 2 clearly erred by issuing the Permit before requiring any revision to the NJ Regional Haze SIP that is allegedly needed.

For the reasons discussed above, Petitioner's arguments that the Permit does not account "for the significant visibility impairments derived from outer-continental shelf wind turbine construction (and from decommissioning) in respect to satisfying NJ's haze goals" fail. Petition at 6. Petitioner argues that "[t]he project's Air Permit must be set aside until such time as the NJ SIP is amended to incorporate offshore emission sources, thereby complying with the regulations." *Id.* at 7. But, as shown above, Petitioner fails to establish how Region 2 has clearly erred in issuing the Permit simply by following the parameters of the existing federal and state/local regulations.

In Exhibit C, Petitioner argues that Region 2's RTC did not address the issue that the current Regional Haze SIP is not adequate because it does not address OCS air pollutant emissions. *See Ex. C* at 3.¹⁰ First, Petitioner failed to raise this issue in the Petition itself, so the Board should deny review on that basis. 40 C.F.R. § 124.19(a)(4)(ii). Second, this comment was not significant because it sought revision of the Regional Haze SIP, an agency action squarely outside the scope of this permitting action. It did not raise any concern about the draft permit or the support for it, and thus it did not require a Region 2 response. 40 C.F.R. § 124.17(a)(2). Third, to the extent the public comment seeking SIP revision¹¹ was not addressed, such failure is harmless error because, as explained above, SIP deficiencies cannot be corrected through the OCS air permitting process and Region 2 could not have changed its final permit decision based on any alleged deficiency in the SIP. Harmless error occurs when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of the decision

¹⁰ Exhibit C to the Petition does not contain page numbers, so pdf page numbers are used throughout this document.

¹¹ Again, no public comment asked that permit issuance be delayed until after revision of the Regional Haze SIP.

reached. *In re Windfall Oil & Gas, Inc.*, 16 E.A.D. 769, 777 (E.A.B. 2015) (quoting *Chemical Mfrs. Ass'n v. U.S. EPA*, 870 F.2d 177, 202 (5th Cir. 1989), clarified, 885 F.2d 253 (5th Cir. 1989) and citing Black's Law Dictionary 622 (9th ed. 2009) ("A harmless error is an error that does not affect a party's substantive rights or a case's outcome").¹²

V. Petitioner fails to demonstrate Region 2's clear error or other reason for Board review as to Region 2's treatment of decommissioning.

In Exhibit C, Petitioner argues that a) an air quality analysis and b) an analysis of the technical and economic feasibility of removing and disposing of or recycling the wind turbines should have been conducted for the eventual decommissioning of the wind farm. *See Ex. C at 7-8.* The Board should decline to review Petitioner's arguments regarding decommissioning due to several procedural failures. First, this argument is not raised in the actual Petition. Petitioner's failure to include this argument in the Petition means it does not meet the threshold for the Board's review. *See* 40 C.F.R. 124.19(a)(4)(i). Second, Petitioner fails to identify where in the Administrative Record these comments were raised during the public comment period, or where in the RTC they were addressed by Region 2. Under 40 C.F.R. § 124.19(a)(4)(ii), Petitioner was required to do both. Region 2 is not aware of any public comment that explicitly sought an air quality analysis for decommissioning. Other comments related to decommissioning were raised during the public comment period, and are addressed mostly in RTC Section 8.0 ("Decommissioning Issues"), as well as in other Comments and Responses. *See, e.g.,* Attachment

¹² Petitioner, in Exhibit C, page 4, argues that EPA should not have delegated OCS permitting and enforcement authority to the state until after the NJ Regional Haze SIP is revised. No commenter raised this argument during the public comment period, so the exhibit's argument was not preserved for substantive review by the EAB. Further, the argument is not raised in the Petition itself, is raised without a citation to the Administrative Record, and is irrelevant to the Board's review of this permitting action. EPA has not delegated OCS permitting authority to the State of New Jersey, and such action was not considered or taken as part of issuing the Atlantic Shores permit.

6 (RTC Comments and Responses 10.12 and 10.22, p. 100 and 106). Petitioner also does not explain how the RTC regarding decommissioning were clearly erroneous.

This Permit authorizes the construction and operation of the project's two wind farms; as the RTC makes clear, it "does not authorize any decommissioning/dismantling of the project." Attachment 6 (RTC Response 8.1, p. 88). The RTC also explains that a "decommissioning plan will be developed and implemented at the end of the operational life of the project, which has an expected 30-year life span, at which time regulatory requirements may have changed and/or new technologies and equipment may be available. Potential air emissions will then be assessed and the applicability of regulatory requirements in effect at that time will be determined, including the requirements of any needed OCS air permit." *Id.* at 89; *see also* Attachment 4 at 4-5 (Fact Sheet at 7-8). The Fact Sheet and RTC further explain that "offshore vessel technology is currently changing and is expected to continue to change into the future. It would not be appropriate for [Region 2] to issue an OCS air permit containing terms and conditions applicable to unspecified decommissioning activities that may not occur for thirty years." Attachment 6 (RTC Response 8.6, p. 90-91); *see also* Attachment 4 at 4-5 (Fact Sheet at 7-8).

Petitioner has not shown that Region 2 clearly erred by not including decommissioning in the air quality analyses for this project. 40 C.F.R. Part 51, Appendix W ("Guideline on Air Quality Models") provides guidelines for how to conduct the air emissions modeling under the PSD program to show that a project will not cause violations of NAAQS or increment. Section 9.2.2(a) of Appendix W explains (emphasis added): "Under the PSD permitting program, an air quality analysis for criteria pollutants is required to demonstrate that emissions from the *construction or operation* of a proposed new source or modification will not cause or contribute to a violation of the NAAQS or PSD increments." Petitioner has not identified any other OCS

source on the OCS (including oil and gas sources) that has been required to model decommissioning.

With regards to the technical and economic feasibility of decommissioning, first, Petitioner provides no support other than raw conjecture that decommissioning would not be technically feasible. Regarding economic feasibility, BOEM's Final Environmental Impact Statement (FEIS) makes clear that "Atlantic Shores would have to submit financial assurance (e.g., a bond) prior to installation that would be held by the U.S. government to cover the cost of decommissioning the entire facility in the event that Atlantic Shores would not be able to decommission the facility, as outlined under 30 C.F.R. Part 585 Subpart E." Attachment 6 (RTC Response 8.3, p. 89 (citing FEIS at 86)). Petitioner thus again fails to show clear error.

In Exhibit C, Petitioner claims that one potential end-of-life outcome of Region 2's permit is that the wind farm will "decay into the ocean with debris washing up on shores similar to what has already occurred from the Vineyard wind (*sic*) project off of Nantucket," and therefore argued that Region 2 should "exercise its NEPA oversight role" to require BOEM to revise its Environmental Impact Statement (EIS) to address these supposed impacts. *See* Ex. C at 8. Petitioner's concerns are unrelated to Region 2's action. First, Region 2's Part 55 permitting action is not subject to NEPA review, and BOEM's FEIS underwent a separate public comment process that was the proper forum for Petitioner to raise these concerns. Second, the CAA requires EPA "to establish requirements to control air pollution from [OCS] sources . . . to attain and maintain Federal and State ambient air quality standards[.]" CAA § 328(a), 42 U.S.C. § 7627(a). To meet these requirements, EPA enacted a regulation that "establishes the air pollution control requirements for OCS sources and the procedures for implementation and enforcement of the requirements[.]" 40 C.F.R. § 55.1. Petitioner's argument regarding what amounts to the

adequacy of BOEM's EIS is unrelated to the Permit, and Petitioner fails to establish how Region 2's role in establishing air pollution control requirements relates to it. Petitioner therefore also fails to establish how Region 2 clearly erred here.¹³

VI. Petitioner fails to demonstrate Region 2's clear error or other reason for Board review as to U.S. Fish and Wildlife Service (FWS) review.

In Exhibit C, Petitioner raises arguments regarding FWS review related to the Permit. *See* Ex. C at 8 ("U.S. Fish and Wildlife Confirmation"). The Board should decline to review Petitioner's arguments regarding FWS review due to several procedural failures. First, these arguments are not raised in the actual Petition, so they do not meet the threshold for the Board's review. *See* 40 C.F.R. § 124.19(a)(4)(i). Second, Petitioner fails to identify where in the Administrative Record these comments were raised during the public comment period, or the location where they were addressed in the RTC, both of which Petitioner is required to do under 40 C.F.R. § 124.19(a)(4)(ii), likewise falling below the threshold for Board review.

For this Permit, the FWS serves as the Federal Land Manager (FLM) for the Brigantine National Wilderness Area, a Class I area, and its role in this OCS air permit is governed by 40 C.F.R. § 52.21(p). The FLM is charged with protecting air quality related values (AQRV) (including visibility) for the Brigantine National Wilderness Area, and Region 2 must consider any findings by the FLM of adverse impact on the air quality-related values and/or visibility. 40 C.F.R. § 52.21(p)(1), (3), & (4); *see also* Attachment 4 at 6-7 (Fact Sheet at 58-59).

Exhibit C repeats Petitioner's public comment nearly verbatim, and does not address any of the discussion of FWS review found in Section 6.0 of the RTC ("Class I Area Impact Review Conducted by the US Fish and Wildlife Service (US FWS)"), pages 69-70. *See* Attachment 6.

¹³ To the extent it is relevant, the Vineyard Wind incident is addressed in the RTC at Comment and Response 4.20. *See* Attachment 6 (RTC p. 18-19). Region 2 stands by its Response.

Petitioner cites a letter (which it does not provide the Board) from December 1, 2022, well before the Application was found complete in August 2023. Although Petitioner does not provide the letter, Region 2 believes Petitioner refers to a letter from Region 2 to the applicant informing the applicant that its application at that time was incomplete. Attachment 13 (Letter: Region 2 Dec 1 2022 Comments on October 28 2022 AS Submittal).

Petitioner argues that, in the December 2022 letter, Region 2 “indicated that the application would not be complete pending confirmation from the [FWS].” Ex. C at 8. However, the RTC includes a quote from FWS itself stating, “On August 18th, 2023, the [FWS] sent an email message to the Environmental Protection Agency, Region 2 air quality staff stating that we considered the Atlantic Shores - South air quality permit application complete.” Attachment 6 (Comment and Response 6.1, p. 69); *see also* Attachment 2 at 7-8 (8-21-2023 Region 2 Completeness Determination on Atlantic Shores South, pages 6-7); Attachment 14 (Sept. 3, 2024 FWS Email to Region 2). As RTC Response 6.1 explains, FWS then requested additional information following the finding of completeness, which Region 2 and FWS then received from the applicant; such additional requests are contemplated by the relevant regulations. *See* Attachment 6 (RTC Response 6.1, p. 69); *see also* 40 C.F.R. § 124.3(c) (“After the application is completed, the Regional Administrator may request additional information from an applicant but only when necessary to clarify, modify, or supplement previously submitted material. Requests for such additional information will not render an application incomplete.”). Atlantic Shores’ final AQRV submittal is included in the Application, and materials FWS provided Region 2 regarding the FWS review of the complete Atlantic Shores application are included in the Administrative Record for this action. *See* Attachment 3 at XX-YY (Application at 332-370); Attachment 2 at 7-8 (Completeness Letter at 6-7); and Attachment 15 (Administrative Record

documents with index numbers 6.1 to 6.6). Petitioner fails to establish clear error regarding FWS review for this Permit.

VII. Petitioner fails to demonstrate Region 2’s clear error or other reason for Board review as to N.J.A.C. 7:27-18.3(c)2.

In Exhibit C, Petitioner argues that the requirements of N.J.A.C. 7:27-18.3(c)2 were not met. *See* Ex. C at 8-9 (“Alternative Sites, Sizes and Processes”). The Board should decline to review Petitioner’s arguments regarding these requirements due to several procedural failures. First, these arguments are not raised in the actual Petition, so they do not meet the threshold for the Board’s review. *See* 40 C.F.R. § 124.19(a)(4)(i). Second, Petitioner fails to identify where in the Administrative Record these comments were raised during the public comment period, as required by 40 C.F.R. § 124.19(a)(4)(ii), likewise falling below the threshold for Board review.

N.J.A.C. 7:27-18.3(c)2 is a state provision that is incorporated by reference into 40 C.F.R. part 55. The provision requires an “analysis of alternative sites within New Jersey, and of alternative sizes, production processes, . . . and environmental control techniques . . . demonstrating that the benefits of the newly constructed . . . equipment significantly outweigh the environmental and social costs imposed as a result of the location, construction . . . and operation of such equipment.”¹⁴

The Permittee provides this analysis on pages 77-79 of the Application (*see* Attachment 3 at 7-9), and Region 2’s RTC indicates that “[t]he applicant 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.” Attachment 6 (RTC Response 10.1, p. 93). As discussed in the RTC, Region 2 relied on a

¹⁴ This state law requirement mirrors the federal requirement for permitting sources in nonattainment areas under section 173 of the Clean Air Act (42 U.S.C. § 7473(a)(5)). However, by virtue of its location, the latter is not applicable to this facility. New Jersey has elected to make this element of nonattainment NSR permitting applicable more broadly under state law.

combination of BOEM's Wind Energy Commercial Leasing Process and BOEM's FEIS to satisfy the section 18.3(c)2 requirement for an analysis of alternatives. *See id.*

The proposed wind farm project can only be built in designated offshore lease areas under the jurisdiction of BOEM, and BOEM is more technically equipped to properly evaluate the various offshore sites analyzed. BOEM's leasing process examined wind energy lease sites over a large geographic expanse of the ocean. The RTC explained that "BOEM has gone through an extensive consideration of offshore sites before issuing its offshore wind development leases." Attachment 6 (RTC, p. 93). BOEM's ROD explains its offshore wind leasing process in more detail. *See* Attachment 12 at 7-8 (ROD at 171-172).¹⁵ The ROD explains that in this process, BOEM considered issues such as protection of ecologically sensitive areas, minimization of user conflicts, and areas unsuitable for development based on features such as physical obstructions and usages, the presence and density of biological resources (including avian populations and aquatic habitat), and traffic and navigation issues. *Id.*

As discussed in the RTC, BOEM's process resulted in the issuance of offshore wind leases for various specific sites, including the Atlantic Shores lease site, that were each sold to wind energy developers. Attachment 6 (RTC, p. 93). Petitioner has not raised any specific site that it believes was not examined.

Region 2 relied on BOEM's FEIS analysis because BOEM likewise went through an extensive process to develop its FEIS, considering 21 project alternatives. *See* Attachment 16 at 3-10, 17-99 (FEIS at Sections ES.4 and Chapter 2) (describing alternatives considered). This

¹⁵ In the ROD, BOEM notes that it identified a Wind Energy Area (WEA), which was published in a Federal Register notice on April 20, 2011 (76 Fed. Reg. 22,130). After BOEM's "reviews, analyses, and revisions to the WEA, BOEM held a competitive lease sale in November 2015, pursuant to 30 C.F.R § 585.211, for certain lease areas within the New Jersey WEA. The lease sale resulted in BOEM's issuance of Commercial Lease OCS-A 0499 to US Wind Inc. The lease became effective on March 1, 2016." *See* Attachment 12 at 7-8 (ROD at 171-172).

process sought public comment on a Notice of Intent, soliciting public input on the significant resources and issues, impact-producing factors, reasonable alternatives, and potential mitigation measures to analyze in the EIS, as well as on a draft EIS. *See* Attachment 16 at 3 (FEIS at 4). Contrary to Petitioner’s assertion, the FEIS’s analysis addressed size as it included alternatives with alternative layouts/equipment locations and fewer wind turbines and/or offshore substations. *See, e.g., id.* at 7-9 (FEIS discussions of Alternatives C, D, and E at 35-37). Petitioner shows no error in Region 2’s reliance on BOEM’s FEIS to meet the New Jersey alternatives analysis requirement here.

The Permittee’s wind lease area OCS-A 0499 covers a total area of 183,253 acres (approximately 286 square miles), and the project will be located on 102,124 of those acres. Attachment 3 at 5 and 13 (Application at 15 and 214); Attachment 4 at 4 (Fact Sheet at 7). Petitioner claims that the alternative site analysis is flawed because it did not include alternative sites on the onshore areas of the state of New Jersey, and that Region 2’s RTC “erroneously stated” that alternative production processes such as “onshore nuclear[,] natural gas, solar and wind projects” were not available. But it is Petitioner’s claim that is flawed – in fact, analysis was undertaken here, which Region 2 noted in the RTC when it stated that “an additional analysis of alternative sites or energy production processes within onshore New Jersey cannot be conducted as envisioned by the commenter, since construction of this type of project, with its proposed size and scope, is not technically and regulatorily feasible within the land occupied by the state of New Jersey.” Attachment 6 (RTC at Response 10.1, p. 93). The Application specifically provides that Petitioner was seeking the Permit because “[t]he State of New Jersey recognized the value of offshore locations for energy production in issuance of the New Jersey Offshore Wind Economic Development Act (OWEDA). Atlantic Shores is developing the

Project[] in response to New Jersey *offshore wind energy solicitations. Development onshore would not respond to these solicitations.*” Attachment 3 at 7 (Application at 77) (emphasis added). Alternative onshore sites were thus inapplicable to the Project, as were alternative non-wind production processes. And, the Application explains that “Atlantic Shores has sited the Projects’ facilities and developed the Project Design Envelope (PDE) to maximize renewable energy production, minimize environmental effects, minimize cost to ratepayers, and address stakeholder concerns.” Attachment 3 at 7 (Application at Section 3.9.3). Petitioner has also failed to identify an alternative site in the state of New Jersey where this kind of project, with its size and magnitude can reasonably be built.

As such, Region 2 did not clearly err in relying on the extensive analyses of alternatives conducted by BOEM throughout multiple extensive processes involving public comment to satisfy the N.J.A.C. requirement to assess alternatives.

VIII. Petitioner fails to demonstrate Region 2’s clear error or other reason for Board review as to liability coverage.

In Exhibit C, Petitioner argues that the Permit should have included conditions related to liability coverage. The Board should decline to review Petitioner’s argument due to several procedural failures. See Ex. C at 9 (“Liability”). First, these arguments are not raised in the actual Petition. Petitioner’s failure to include these arguments in the Petition means they do not meet the threshold for the Board’s review. *See* 40 C.F.R. § 124.19(a)(4)(i). Second, Petitioner failed to identify where in the Administrative Record these comments were raised during the public comment period, or the location where they were addressed in the RTC, as required by 40 C.F.R. § 124.19(a)(4)(ii), likewise falling below the threshold for Board review.

As explained in the RTC, such liability concerns are outside the scope of the CAA requirements for this permit. *See* Attachment 6 (Comment and Response 10.3, p. 94-95). There

would not be a basis in the CAA for including a requirement that the project hold “insurance policies, surety bonds, letters of credit or other mechanisms” of liability coverage as a condition in this OCS air permit – and the Board should take note of Petitioner’s failure to identify any such basis. Further, regarding the costs of decommissioning, the RTC notes that “the Conceptual Decommissioning Plan in page 86 of 560 of BOEM’s FEIS states: If the [Construction and Operations Plan] is approved or approved with modifications, Atlantic Shores would have to submit financial assurance (e.g., a bond) prior to installation that would be held by the U.S. government to cover the cost of decommissioning the entire facility in the event that Atlantic Shores would not be able to decommission the facility, as outlined under 30 CFR Part 585 Subpart E.” Attachment 6 (RTC Response 8.3, p. 89). Thus, Region 2 has not clearly erred in not including a liability coverage permit condition in the Permit.

IX. Petitioner fails to demonstrate Region 2’s clear error or other reason for Board review as to construction schedules.

In Exhibit C, Petitioner raises arguments related to how long it will take to install each wind turbine foundation and the “topside” of the wind turbine that goes on top of the foundation. Ex. C at 9-11 (“Uncertainty in Construction Schedules”). The Board should decline to review Petitioner’s arguments regarding decommissioning due to several procedural failures. First, these arguments are not raised in the actual Petition. Petitioner’s failure to include these arguments in the Petition means they do not meet the threshold for the Board’s review. *See* 40 C.F.R. § 124.19(a)(4)(i). Second, Petitioner also fails to identify where in the Administrative Record these comments were raised during the public comment period, as required by 40 C.F.R. § 124.19(a)(4)(ii), likewise falling below the threshold for Board review.

Petitioner raises concerns regarding the time estimated for installation of a wind turbine foundation, and generally how that would impact determination of compliance with annual

NAAQS, annual increment, and, in the context of BOEM’s FEIS, underwater noise impacts.

Region 2 notes that any inaccuracies in the FEIS should have been raised and addressed in the separate process developing that document.

In the RTC to the OCS permit, Region 2 explains that both the application before Region 2 when it was deemed complete on August 21, 2023, and the final application submitted on June 28, 2024, provide an installation schedule of up to 1.5 days per foundation, and 2.6 days to install the wind turbine on top of that foundation. Attachment 6 (RTC Comments and Responses 5.4 and 5.5, p. 38-43). The “change” Petitioner refers to (Ex. C, top of 10) was an update made by the applicant on March 7, 2023 in early drafts of the application. *See id.*; *see also* Attachment 17 (providing text from Atlantic Shores’ March 7, 2023 communication in black italics). For a given wind turbine, foundation installation will occur first, followed by installation of the wind turbine’s “topside,” though different vessels can work on installing the foundation of one turbine and the topside of another simultaneously.

Petitioner cites outdated information that was not relied on for the Permit, and Petitioner fails to show that Region 2 clearly erred in relying on the Application’s estimate that each foundation installation may take up to 1.5 days. Petitioner points to a visual diagram of plotted data that was provided during the public comment period and addressed in the RTC. As is evident to the reader, the newest data points in that table are over 6 years old. And the diagram comes from an article that indicates a downward trend over time in the length of time needed to install turbine foundations. Attachment 18 at 4-5 (“Offshore wind installation: Analysing the evidence behind improvements in installation time”, Lacal-Aránateguia *et al.*, pages 138-39 & Table 3). Moreover, even for the older projects shown, again contrary to Petitioner’s assertion, it does not indicate that larger projects had higher installation times per foundation; no such trend

is discernable based on the three sizes of projects shown in that diagram. As Region 2 discussed in the RTC, Region 2 instead relied on data from a more recent offshore wind project, the Coastal Virginia Offshore Wind Project, which is using similar monopile and transition piece foundations. Attachment 6 (RTC Comment and Response 5.5, p. 40-43). Petitioner discusses this comparison, asserting without citation or evidence the difference in pile sizes between the projects, and that such a difference must mean pile driving for Atlantic Shores will take longer. Petitioner has failed to establish that Region 2 clearly erred in its finding.

Petitioner also asserts entirely without support that the foundation of one wind turbine cannot be installed in parallel with the topside of another wind turbine because the project will not be able to hire enough vessels to conduct both types of work at the same time. Region 2 is not aware of any basis for this assertion, it was not raised by any commenter in the public comment period, and Part 124 does not require that Region 2 seek out answers to rebut each unsupported claim made in a petition.

Petitioner appears to acknowledge that the estimates used in the Application match those used in the Biological Opinion (BO) and the EIS (noting that the latter also use an estimate of 1.5 days per foundation).¹⁶ See ex. C at 10. To the extent Petitioner objects to the use of this estimate in the BO or EIS, such objections should have been raised elsewhere such as in the process developing the FEIS.

X. Petitioner fails to demonstrate Region 2’s clear error or other reason for Board review as to Coastal Zone Management Act Consistency.

In Exhibit C, Petitioner raises compliance with the Coastal Zone Management Act (“CZMA”). Ex. C at 11-12 (“Coastal Zone Management Act Consistency”). The Board should

¹⁶ The FEIS (Attachment 16 at 99-100) discusses the Biological Opinion at 178-79, and provides a link to access the Biological Opinion itself at <https://www.fisheries.noaa.gov/s3/2024-02/GARFO-2023-01804.pdf>.

decline to review Petitioner’s arguments regarding decommissioning due to several procedural failures. First, these arguments are not raised in the actual Petition. Petitioner’s failure to include these arguments in the Petition means they do not meet the threshold for the Board’s review. *See* 40 C.F.R. § 124.19(a)(4)(i). Second, Petitioner also fails to identify where in the Administrative Record these comments were raised during the public comment period, or where in the Response to Comments it was addressed by Region 2, as required by 40 C.F.R. § 124.19(a)(4)(ii), likewise falling below the threshold for Board review.

In fact, Exhibit C simply repeats Petitioner’s public comment in full, with two additional sentences: “We recognize that the State is responsible for the consistency finding. However, the USEPA cannot simply adopt a flawed finding without at a minimum, addressing the comments raised above.” Exhibit C at 11-12; Petitioner’s Exhibit A at 17-18 (Petitioner’s public comments dated July 31, 2024). As the RTC explains and Petitioner acknowledges, Region 2 properly relied on the New Jersey Department of Environmental Protection (NJDEP) to determine whether the proposed activity is consistent with New Jersey’s Coastal Zone Management Plan and 15 C.F.R. Part 930. *Id.* (RTC Comment and Response 10.5, 96-97).

Under section 307(c)(3) of the Coastal Zone Management Act of 1972, 16 U.S.C. § 1456(c)(3), for issuance of any federal license or permit such as this Permit, “[n]o license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant’s certification” *See also* 15 C.F.R. §§ 930.62(c), 930.64. As explained in the Fact Sheet and the RTC at Comment and Response 10.5, NJDEP concurred here. Attachment 4 at 8-10 (Fact Sheet at 64-66) and Attachment 6 (RTC p. 96-97). New Jersey’s concurrence underwent a separate public comment period, and any challenge to that concurrence

should have been made through the state's own legal procedures. Petitioner therefore fails to establish how Region 2 clearly erred as to the CMZA.

CONCLUSION

For all of the foregoing reasons, Region 2 respectfully requests that the Board deny review of Region 2's final OCS air permit for Atlantic Shores Project 1 and Project 2.

Respectfully submitted,

Robert DeLay
Assistant Regional Counsel
U.S. EPA Region 2
290 Broadway
New York, New York 10007
Delay.Robert@epa.gov
212-637-3214

Sara Froikin
Assistant Regional Counsel
U.S. EPA Region 2
290 Broadway
New York, New York 10007
Froikin.Sara@epa.gov
212-637-3263

Of Counsel:

Brian Doster
Air and Radiation Law Office
EPA Office of General Counsel

(MC 2344A)

1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460
Doster.Brian@epa.gov
202-564-7606

STATEMENT OF COMPLIANCE WITH WORD COUNT

I hereby certify that Region 2's Response to Petition for Review (exclusive of the Table of Contents, Table of Authorities, Table of Attachments, this Statement of Compliance, and the attached Certificate of Service) contains 9647 words, as calculated using Microsoft Word word-processing software.

Robert DeLay

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

)	
)	
In re:)	
Atlantic Shores Offshore)	
Wind, LLC, for the)	
Atlantic Shores Project 1)	
and Project 2)	EPA Appeal No. CAA 24-11
)	
EPA Permit Number: OCS-EPA-R2 NJ 02)	
)	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Region 2’s Response to Petition for Review, Region 2’s Certified Index of the Administrative Record, and Region 2’s Excerpts of Record, and other accompanying attachments were filed electronically with the Clerk of the Environmental Appeals Board using the EAB eFiling System, and were served via electronic mail on:

Thomas Stavola Jr. Esq.
Law Office of Thomas Stavola, Jr., LLC
tstavolajr@stavolalaw.com

Attorney for Petitioner

Hilary Tompkins
Hogan Lovells US LLP
hilary.tompkins@hoganlovells.com

Alexander Woo
Hogan Lovells US LLP
alexander.woo@hoganlovells.com

Attorneys for Atlantic Shores Offshore Wind, LLC

Robert DeLay