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

In Re:

US Wind Inc., for the
Maryland Offshore Wind Project

Permit Number: Permit-to-Construct 047-0248;
NSR Approval NSR-2024-01; PSD Approval PSD-2024-01

Appeal No. OCS 25-01

MARYLAND DEPARTMENT OF THE ENVIRONMENT'S RESPONSE TO PETITION FOR REVIEW AND MOTION FOR SUMMARY DISPOSITION

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I. INTRODUCTION

The Maryland Department of the Environment ("MDE") respectfully submits this response to the Petition for Review filed by the Mayor and City Council of Ocean City and the Commissioners of Worcester County, Maryland (collectively, "Petitioners"), regarding the Permit to Construct, Prevention of Significant Deterioration ("PSD") Approval, and Nonattainment New Source Review ("NSR") Approval issued to US Wind Inc. ("US Wind") for the Maryland Offshore Wind Project ("Petition") and moves to dismiss the Petition.[1]

The crux of this dispute is the interaction of the state and federal law applicable to the permitting of air pollution sources off the coast of the State of Maryland. As set forth further herein, the Environmental Appeals Board ("EAB" or "Board") lacks jurisdiction to review the challenged permit and approvals, and even if jurisdiction were proper, Petitioners' substantive arguments are without merit. MDE, acting under delegated authority from EPA and pursuant to its EPA-approved State Implementation Plan ("SIP"), complied with all applicable Clean Air Act ("CAA" or "Act") requirements and relevant federal and state regulations. Therefore, the Petition should be dismissed.

II. FACTUAL BACKGROUND

A. The Federal Clean Air Act

As the courts have noted on numerous occasions, the CAA provides "a cooperative-federalism approach to regulate air quality." *See e.g. U.S. Magnesium, LLC v. EPA*, 690 F.3d 1157, 1159 (10th Cir. 2012); *Myersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301,

[1] The Board's rules do not provide for a motion to dismiss before a responsive pleading is required. Therefore, this filing is stylized as both a Response pursuant to 40 C.F.R. § 124.19(b)(1) and a motion requesting relief in the form of dismissal of the Petition pursuant to 40 C.F.R. § 129.14(f)(1). Given the responsive nature of this filing, MDE has not sought Petitioners' position on its request for dismissal and assumes Petitioners oppose for the reasons set forth in the Petition. 40 C.F.R. § 129.14(f)(2).

1317 (D.C. Cir. 2015). It tasks EPA with establishing national ambient air quality standards ("NAAQS"), which "are standards that say the air can safely contain only so much of a particular pollutant." *Sierra Club de Puerto Rico v. EPA*, 815 F.3d 22, 23 (D.C. Cir. 2016); 42 U.S.C. § 7408(a)(1)(A)-(B). After setting or revising those NAAQS, EPA must designate areas within states as attainment (it meets the EPA-set pollutant level), nonattainment (where it does not meet the EPA-set pollutant level), or unclassifiable. *Ass'n of Irritated Residents v. EPA*, 790 F.3d 934, 937 (9th Cir. 2015). The CAA then delegates to the states "the primary responsibility for assuring air quality." 42 U.S.C. § 7407(a). Specifically, each state must adopt and submit for the EPA's approval a SIP that implements, maintains, and enforces the NAAQS within its designated areas. 42 U.S.C. § 7410(a)(1), (a)(2)(H).

The CAA has specific requirements which must be applied in attainment and in nonattainment areas. To help ensure areas which have attained a particular NAAQS continue to meet that standard, the CAA requires the permitting authority to apply Prevention of Significant Deterioration ("PSD") standards to a potential source of pollution. *See* 42 U.S.C. § 7470 through § 7492. For nonattainment areas, the CAA requires a state to include, among other things, a nonattainment New Source Review ("NSR") permit program in its SIP. *See* 42 U.S.C. § 7502(c)(5), § 7503, § 7410(a)(2)(C). Both programs require permits for the construction and operation of new or modified major stationary sources in the respective area. 42 U.S.C. § 7475(a)(1); § 7502(c)(5). Permits for major sources in attainment areas are referred to as PSD approvals; while permits for sources located in nonattainment areas are referred to as NSR approvals.

The purpose of those two programs is to ensure that economic growth will occur in harmony with the preservation of existing attainment areas and without exacerbating current

nonattainment problems. The PSD and NSR requirements are pollutant specific. For example, a facility may emit many air pollutants, however, depending on the magnitude of the emissions of each pollutant, only one or a few may be subject to the PSD or NSR permit requirements. Also, a source may have to obtain both PSD and NSR permits if the source is in an area where one or more of its emitted pollutants is designated nonattainment while concurrently in attainment with other emitted pollutants.

Section 328 of the CAA applies the requirements of the NSR and PSD programs to sources of pollution located offshore on the Outer Continental Shelf ("OCS") adjacent to all states of the United States along the Pacific, Atlantic and Arctic Coasts, including Florida, but excepting the OCS adjacent to the other states on the Gulf of Mexico and the North Slope Borough of Alaska. 42 U.S.C. § 7627. That section requires EPA to promulgate requirements for all OCS sources that will achieve the attainment and maintenance of federal and state air quality standards. 42 U.S.C. § 7627(a)(1). For OCS sources within 25 miles of the seaward boundary of any covered state, those requirements:

> shall be the same as would be applicable if the source were located in the corresponding onshore area, and shall include, but not be limited to, State and local requirements for emission controls, emission limitations, offsets, permitting, monitoring, testing, and reporting.

Id. In this way, the PSD and NSR permitting programs, among other requirements, are made applicable to any OCS source, as defined by the Act.

The CAA and its implementing regulations allow EPA to delegate permit implementation to a state with an acceptable program. 40 C.F.R. § 51.165 specifies the minimum SIP requirements an NSR permitting program must contain in order to warrant approval by EPA as a revision to a federally enforceable SIP; while 40 C.F.R. § 51.166, specifies the minimum requirements that a

PSD air quality permit program must contain. Similarly, the Act provides that each state adjacent to an OCS source may promulgate and submit to the EPA Administrator regulations for implementing and enforcing the requirements of § 328, and that EPA will delegate that responsibility to the state where its state regulations are deemed adequate. 42 U.S.C. § 7627(a)(3).

B. EPA Delegation to Maryland

For decades Maryland has implemented an EPA-approved permitting program through a federally enforceable SIP, with various amendments to that SIP occurring from time to time. *See* 40 C.F.R. § 52.1070. On January 8, 2014, MDE requested delegation of authority to implement, administer, and enforce EPA's OCS requirements pursuant to state regulations. On April 4, 2014, EPA determined Maryland had adequate state regulations to implement the statutory requirements and sent MDE a letter acknowledging it had been delegated the authority to implement and enforce sections of the OCS air requirements. 80 Fed. Reg. 43088-01 (July 21, 2015). Maryland's onshore and offshore permit-to-construct, NSR, and PSD regulations are codified in Maryland's EPA-approved SIP and in EPA's OCS air regulations. *See* 40 C.F.R. § 52.1070(b); 40 C.F.R. § 55.14(d)(10)(i); 40 C.F.R. § 55.14(e)(10)(i)(A)); 40 C.F.R. Part 55, Appendix A; 89 Fed. Reg. 451 (Jan. 4, 2024). At all times relevant to the permits and approvals at issue in this Petition, Maryland was operating an EPA-approved program pursuant to its SIP.

C. Maryland's Issuance of a Permit to Construct, PSD Approval, and NSR Approval to US Wind

On March 1, 2018, the Bureau of Ocean Energy Management ("BOEM") in the federal Department of the Interior, merged two commercial OCS leases issued to US Wind into a single lease, number OCS-A 490 ("Lease"). On August 17, 2023, US Wind submitted to MDE an air permit application. MDE received a revised application on November 30, 2023, which was deemed administratively complete on January 4, 2024 ("Application"). The Application sought a Permit

to Construct, PSD Approval, and NSR Approval for the construction of up to 121 wind turbine generators, up to four offshore substations, and one meteorological tower located approximately 10 nautical miles at its closet point off the coast of Worcester County, Maryland on the OCS within the defined Lease area ("Project").

On or about December 5, 2024, MDE issued its tentative determination to issue the Permit to Construct, PSD Approval, and NSR Approval. Those determinations were published on December 5, and December 12, 2024, in the Worcester County Times and on MDE's website. A public participation process was held on those tentative determinations pursuant to the requirements of state regulations, COMAR 26.11.02. A public hearing was held on January 9, 2025 to receive public comment on the Department's tentative determination on the draft permits and approvals. The period to receive public written comments, which was initially set to expire on January 13, 2025, was extended through March 17, 2025 following public request for a one-time, 60-day extension. MDE received comments from a number of parties, including the Petitioners.[2] MDE also sent its tentative determination to EPA for its independent review pursuant to its federal oversight. EPA did not object to MDE's tentative determination, commenting only that MDE should ensure a 500-meter public safety zone is established. Attachment 1, All Written Comments Received, at 0044.

On June 6, 2025, following its review and consideration of the comments received during the public comment period, MDE issued a Permit to Construct, a PSD Approval, and an NSR Approval to US Wind for construction of the Project. Pursuant to COMAR 26.11.02.11(M),

[2] Petitioners include at Petition Attachment 4, an excerpt of the comments received, presumably including those comments which they believe to be relevant. For completeness of the record and to assist the Board with its review of this matter, MDE is attaching to this Response a complete copy of the public hearing transcript as Attachment 14 and all written comments received as Attachment 1.

incorporated by reference at 40 C.F.R. § 52.1070, the final determinations included a notice of appeal rights, informing interested persons that they could obtain judicial review of the Permit to construct, PSD Approval, and NSR Approval in accordance with Md Code, Environment Article 1-601(c), in an appropriate state Circuit Court. The notice of hearing rights issued with the Department's final determination identifies the proper venue for appeals as the state circuit court. Attachment 10, Notice of Final Determination Regarding a Permit to Construct, PSD Approval, and NSR Approval for the Construction and Commissioning of the Maryland Wind Offshore Project Submitted by US Wind, Inc.

On or about July 10, 2025, Petitioners filed this Petition for Review of MDE's permitting decision with the Board. On July 10, 2025, MDE received a copy of the Petition via U.S. Postal Service. On July 11, 2025, Petitioners also filed a Petition for Judicial Review of MDE's permitting decision with the Circuit Court for Wicomico County, Maryland. *In the Matter of Mayor and City Council of Ocean City, et al. v. MDE*, No. C-23-CV-25-000184 (Worcester County, MD Circuit Court filed July 11, 2025).

III. JURISDICTION

The Board lacks jurisdiction to review the Permit to Construct, PSD Approval, and NSR Approval issued by MDE. Petitioners contend that the permits for the OCS source issued by Maryland under EPA delegation pursuant to 40 C.F.R. § 55.11 "implements federal Clean Air Act requirements" and therefore are "subject to review by this Board under 40 C.F.R. Part 124." Petition at 9. Petitioners misconstrue federal law and fail to recognize the Board's prior decisions applicable to the PSD and NSR Approvals, which definitively foreclose EAB's jurisdiction in this matter.

As the Board explained in *In re Milford Power Plant*, 8 E.A.D. 670 (EAB Oct. 18, 1999), a major source of air pollution subject to the PSD requirements of the CAA can satisfy the obligation to obtain a PSD preconstruction permit in one of three ways.

> First, the program can be run by EPA pursuant to a Federal Implementation Plan (FIP). Second, EPA can delegate its authority to operate the PSD program to a state, in which case the state issues PSD permits as federal permits on behalf of EPA. Third, EPA can approve a state PSD program if it meets the applicable requirements of federal law, in which case the program is incorporated into the state's "State Implementation Plan" (SIP). In this last instance, the state would conduct PSD permitting under its own authority.

Id. at 673 (internal citation omitted).

Under the third form of PSD program administration discussed above, the state program must meet the requirements of 40 C.F.R. § 51.166 to be approved by EPA. When EPA approves a state PSD program, it determines that compliance with the state law by the state permitting authority will be sufficient to ensure compliance with the PSD permitting requirements of the CAA. Upon SIP-approval, the state regulations that are approved as part of the SIP have the force and effect of federal law and are federally-enforceable. 42 U.S.C. §§ 7410; 7413; *see also National Mining Ass'n v. EPA*, 59 F.3d 1351, 1363-64 (D.C. Cir. 1995). Thus, in the case of SIP-approved PSD programs, the federal law and state law governing issuance of construction permits for large air pollution sources are essentially the same, flowing from the state regulations and following the state scheme. *In re Milford Power Plant*, 8 E.A.D. at 673 (state conducts PSD permitting "under its own authority").

For this reason, EPA's regulations granting authority to the EAB place limitations on the Board's ability to conduct PSD reviews. According to the terms of 40 C.F.R. Part 124—the same section from which Petitioners assert EAB draws its jurisdiction here—"Part 124 *does not apply*

to PSD permits issued by an *approved State*."[3] 40 C.F.R. § 124.1(e) (emphasis added). Thus, as the EAB recognized in *In re Milford Power Plant*, "the Board's authority to review PSD permits is not all-encompassing" as Petitioners contend. *Id*. at 673. To the contrary, the Board has no authority to review state programs, like Maryland's, which have been deemed adequate by EPA and incorporated into an approved SIP. *See* Attachment 5, Environmental Appeals Board, *Revised Order Governing Petitions for Review of Clean Air Act New Source Review Permits*, FN 1 (issued Sep. 21, 2020).

The EAB has re-emphasized this conclusion several times in the past. In *In re Delta Energy Center*, 17 E.A.D. 371 (EAB June 20, 2017), the Board evaluated the CAA's statutory text, history, and applicable guidance, leading to its conclusion that the Board lacks jurisdiction to consider any PSD permit, or permit modification, after the date that the EPA has approved an agency's PSD program. *Id*. at 377. Similarly, *In re Seminole Electric Cooperative, Inc.*, 14 E.A.D. 468 (EAB Sept. 22, 2009), stands for the proposition that an approved state is empowered to administer the permitting program under its own authority, including its own judicial review process. The Board explained that permits issued by approved state programs "take an appropriately separate track" from federal permits as they are "'regarded as creatures of state law that can be challenged only under the state system of review.'" *Id*. at 475 (citing *In re Carlton*, 9 E.A.D. 690, 693 (EAB Feb. 28, 2001). The Board further explained that "[a]ny erosion of the clear line preserving to approved states the power to adjudicate appeals of permit decisions under their own authority … creates the potential for injecting unwarranted confusion into the national PSD program with regard to the CAA's carefully structured allocation of federal and state responsibilities." *Id*. at 482.

[3] "An *approved State* is one administering an *approved program.*" 40 C.F.R. § 124.41 (emphasis in original).

The foregoing discussion of EAB's jurisdiction equally applies to permits for OCS sources. 42 U.S.C. § 7627(a)(3) provides that each state adjacent to an OCS source may promulgate regulations for implementing and enforcing the requirements of CAA § 328, and submit them to EPA for approval. "If the Administrator finds that *the State regulations* are adequate, the Administrator shall delegate to that State any authority the Administrator has under this chapter to implement and enforce such requirements." *Id*. (emphasis added). EPA has promulgated regulations implementing this section at 40 C.F.R. Part 55. In particular, 40 C.F.R. § 55.11 provides that:

> the Administrator will delegate implementation and enforcement authority to a State if the State has an adjacent OCS source and the Administrator determines that the *State's regulations* are adequate, including a demonstration by the State that the State has:
>
> (1) Adopted the appropriate portions of this part *into State law*;
>
> (2) Adequate authority *under State law* to implement and enforce the requirements of this part. A letter from the State Attorney General shall be required stating that the requesting agency has such authority;
>
> (3) Adequate resources to implement and enforce the requirements of this part; and
>
> (4) Adequate administrative procedures to implement and enforce the requirements of this part, including public notice and comment procedures.

Id. (emphasis added). MDE administers EPA-approved PSD, NSR, and OCS programs as part of its SIP. *See* 40 C.F.R. § 52.1070(b); 40 C.F.R. § 55.14(d)(10)(i); 40 C.F.R. § 55.14(e)(10)(i)(A)); 40 C.F.R. Part 55, Appendix A. Therefore, Maryland is an "approved state" operating an "approved program" and any challenges to permits issued under this approved program must proceed through available state law procedures, not before this Board. 40 C.F.R. § 124.41 (defining "approved program" as a State implementation plan providing for issuance of PSD permits which has been approved by EPA under the Clean Air Act and 40 CFR part 51); Attachment 5, (explaining 40 C.F.R. Part 124 applies to NSR appeals and OCS permits issued by states that

have *not* adopted an EPA-approved program, otherwise known as "delegated states") (emphasis added); *Sierra Club v. Georgia Power Co.*, 365 F. Supp. 2d 1287, 1291 (N.D. Ga. 2004) ("Challenges to a permit must be made in the administrative process resulting in the permit."). Consistent application of this rule is especially important here, where an improvident grant of jurisdiction could result in conflicting judicial rulings given the Petitioners concurrent filing currently proceeding in the Maryland courts. *In the Matter of Mayor and City Council of Ocean City, et al. v. MDE*, No. C-23-CV-25-000184 (Worcester County, MD Circuit Court filed July 11, 2025).

For these reasons, the Board should dismiss the Petition for lack of jurisdiction.

IV. GROUNDS FOR DISMISSAL ON THE MERITS

Notwithstanding the Board's lack of jurisdiction, Petitioners' substantive arguments are without merit. Petitioners bear the burden of demonstrating that review is warranted by raising specific objections to the permit and explaining how MDE's response to those objections is based on a clearly erroneous finding of fact or conclusion of law. Power Holdings, of Ill., LLC, 14 E.A.D. 723, 725-26 (EAB Aug. 13, 2010). Because they have failed to do so, the Petition should be dismissed.

A. The Permit to Construct Authorizes Only Temporary Operations, and Requires Issuance of a Title V Permit Prior to Full Operations.

Petitioners incorrectly assert that the Permit to Construct authorizes full operations without a Title V Operating Permit in violation of Title V of the Act. As a preliminary matter, Petitioners fail to identify where in the public record this objection was previously raised with specificity. 40 C.F.R. § 124.19(a)(4)(ii). MDE has not been able to independently identify any such comment in the public comments submitted during the extended comment period. This issue, therefore, was not preserved for review, and should be dismissed. 40 C.F.R. § 124.13; Attachment 5, at ¶ 7.

Setting that aside, this Petition involves the issuance of preconstruction permits. Title V permits, on the other hand, are required for the operation of major sources of air pollution once they are constructed. 42 U.S.C. § 7661(c)(a); *see e.g. Sugarloaf Citizens Ass'n v. Ne. Maryland Waste Disposal Auth.*, 323 Md. 641, 647–48 (1991) (noting "PSD approval is the first step in a three stage air quality permit process," where "PSD approval is required before any potential source of air pollution can be located in a PSD area. The next stage in the air quality approval process requires an applicant to obtain a permit to construct, and the final stage requires the applicant to obtain a permit to operate"). In a nutshell, Title V operating permits incorporate and ensure compliance with substantive emissions limitations established under independent provisions, but do not independently establish their own emission standards. *In re Veolia ES Tech. Sols. L.L.C.*, 18 E.A.D. 194, 196 (EAB July 21, 2020).

The issued Permit-to-Construct clearly distinguishes between "Construction & Commissioning" and "Total Operations and Maintenance ("O&M")." The table cited by Petitioners, which includes "Total Operations and Maintenance - Years 2 and beyond" with an "Anticipated Installation/Operation Dates" of "2026," must be read in conjunction with the explicit condition in the permit requiring the Permittee to submit applications for multiple operating permits. Specifically, US Wind must submit, prior to the O&M start date, a report, which includes "a complete application for a temporary permit-to-operate." Petition, Attachment 2, US Wind Permit to Construct, at 22. The permit specifies that "O&M shall not commence until a temporary permit-to-operate is issued." *Id*.

A temporary permit-to-operate issued by the state can last no more than one year. COMAR 26.11.02.04(D). However, as Petitioners correctly point out, US Wind must submit a complete application for a Title V Operating Permit "within twelve months of the commencement of

operation of the Maryland Offshore Wind Project." Petition, Attachment 2, at 16. So long as the Permittee "submits a timely and complete application for a permit . . . the failure to obtain a Part 70 [Title V] permit is not a violation of this chapter and the source may continue to be operated in compliance with a permit issued under this chapter until [MDE] takes final action." COMAR 26.11.03.01(F). In order to cover the potential time between the expiration of the temporary permit-to-operate and the issuance of a Title V permit, the Permittee must obtain a State permit to operate from MDE, the requirements of which are set out in the temporary permit-to-operate, discussed above.

The permit does not authorize on-going operations without a Title V permit. Contrary to Petitioners' assertion, the Permit-to-Construct requires US Wind to obtain a permit-to-operate before beginning commissioning and initial testing. The required operating permits will have provisions to ensure all operations other than construction have the coverage required under state and federal regulations. Finally, the requirement to submit a Title V application within a year of commencing operation ensures that full, long-term operations will be covered by a comprehensive Title V permit. Far from "flagrantly" violating Title V, MDE's pre-construction permits at issue here are consistent with the phased development of large-scale projects and provide a statutorily-recognized pathway to full compliance consistent with the permitting regime for on-shore stationary sources.

B. The Permit and Approvals Were Properly Issued to Correct a Missed Deadline and Avoid Absurd Result.

Petitioners adopt a comment from a Delaware resident arguing that because the CAA imposes a one-year timeline for action on administratively complete permit applications, and MDE issued its final determination after that deadline, the permit should be vacated as ultra vires. Petition at 13; Attachment 1, at 0077-0082. The Board should reject this argument as it is

inconsistent with case law interpreting similar provisions of the Act and would lead to an absurd result.

It is true that 42 U.S.C. § 7475(c) requires that the appropriate permitting authority either grant or deny a permit application for a new or modified major source within one calendar year of its completeness determination. However, nothing in the Act expressly precludes MDE, as the EPA-approved permitting authority, from belatedly acting on the permit applications. While the statute certainly establishes timeframes in which the agency is required to act, it says nothing about automatic denial of a permit application upon failure to meet the one-year permitting deadline. *United States v. Murphy*, 35 F.3d 143, 145 (4th Cir.1994) ("Courts are not to read into the language what is not there, but rather should apply the statute as written."). The absence of such language here is particularly important, as other sections of the Act explicitly address the effect of a missed deadline. *Compare* 42 U.S.C. § 7410(k)(1)(B) (providing that a state implementation plan submitted to EPA which has not received a completeness determination within 6 months "shall on that date be deemed by operation of law to meet such minimum criteria.") *with* 42 U.S.C. § 7475(c); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal citations omitted).

In fact, § 304 of the Act recognizes two distinct causes of action against the EPA (or its delegated permitting authority) for a failure to act. The first is a cause of action for the agency's failure to perform a nondiscretionary duty. 42 U.S.C. § 7604(a)(2). The second is a cause of action to compel action unreasonably delayed. 42 U.S.C. § 7604(a). A claim alleging a failure to perform a nondiscretionary duty requires a plaintiff to give 60-days' notice, 42 U.S.C. § 7604(b)(2), while

a claim to compel agency action unreasonable delayed requires a plaintiff to give 180-days' notice, 42 U.S.C. § 7604(b)(2), during which the permitting agency could presumably cure the defect. There would be no need for either provision if the permitting authority could not act following a missed deadline.

Rather, the courts have developed a bright-line test distinguishing between discretionary and non-discretionary delays. When, as here, a statute sets forth a bright-line rule for agency action "there is no room for debate—congress has prescribed a categorical mandate that deprives EPA of all discretion over the timing of its work." *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C.Cir.1987). This bright-line rule has been echoed by other courts interpreting the Act. *See, e.g., Maine v. Thomas*, 874 F.2d 883, 888 (1st Cir. 1989) (holding that for a duty to be nondiscretionary "the appropriate check is to ask when the duty must be fulfilled"); *NRDC v. Thomas*, 885 F.2d 1067, 1075 (2d Cir.1989) (holding that a provision under the Act requiring the Administrator to act "from time to time" is discretionary because of the absence of an explicitly listed deadline); *Mountain States Legal Found. v. Costle*, 630 F.2d 754, 766 (10th Cir.1980) ("Congress thus restricted citizens' suits to actions seeking to enforce specific non-discretionary clear-cut requirements of the Clean Air Act.").

Sierra Club v. EPA, 762 F.3d 971, 978 (9th Cir. 2014), which involves analysis of the same section of the CAA at issue here, is particularly insightful. There, the Ninth Circuit Court of Appeals considered what to do when EPA failed to either approve or deny a PSD approval by the statutory deadline established by 42 U.S.C. § 7475(c), and where revised air standards had been promulgated subsequent to that deadline. More specifically, the court considered whether EPA should issue the delayed permit using the NAAQS and Best Available Control Technology ("BACT") requirements applicable at the time of the lawsuit, or apply the requirements that existed

during the one-year timeframe during which EPA should have acted. Notably, the court did not rule that EPA had no authority to issue the permit. Instead, it found that EPA was bound to apply the regulations in effect at the time it takes final action, remanding the permit decision to EPA to do so. *Id*. at 983-84. In resolving other deadline lawsuits, other courts have acted similarly. *See e.g. South Carolina v. United States*, 907 F.3d 742, 760 (4th Cir. 2018) (upholding an order from the U.S. District Court for the District of South Carolina directing the Department of Energy to undertake certain actions by a date certain in response to the agency's failure to meet a hard statutory deadline); *General Motors Corp. v. United States*, 496 U.S. 530, 540-41 (1990) (finding that there is nothing in the Clean Air Act that limits EPA's authority to enforce an applicable implementation plan, even where EPA was alleged to have delayed acting within statutory deadlines).

Petitioners cite no authority supporting their flawed position, as allowing the permitting authority to issue a PSD approval after the one-year deadline necessarily makes sense. A contrary ruling would allow an agency to avoid ever having to make a decision on a PSD approval—as the agency could not be forced to act before the statutory deadline, but according to Petitioners would be prohibited from acting thereafter—essentially forcing an applicant into a never-ending cycle of permit submissions that an agency could avoid acting on indefinitely. Statutory interpretations leading to such absurd results are to be avoided. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

Therefore, Petitioners' request to invalidate the permits and approvals as untimely issued is inconsistent with established law and should be denied.

C. MDE Was Not Required to Conduct a Second Analysis of Reasonable Alternatives, and Appropriately Relied on the Comprehensive Analysis Conducted by Other Federal Agencies.

As a preliminary matter, Petitioners fail to identify where in the public record this objection was previously raised with specificity. 40 C.F.R. § 124.19(a)(4)(ii). MDE has not been able to independently identify any such comment in the public comments submitted during the extended comment period. This issue, therefore, was not preserved for review, and should be dismissed. 40 C.F.R. § 124.13; Attachment 5, at ¶ 7.

Petitioners' assertion that MDE failed to conduct the required analysis of reasonable alternatives is inaccurate. As an initial matter, it is critical to recognize the unique jurisdictional context of the Offshore Wind Project. The geographic area where the Project is to be located is on the Outer Continental Shelf, which is owned and managed by the federal government. Petitioners point out that the Outer Continental Shelf is a "federal enclave" with the federal government exercising jurisdiction and control over use of that area. Petition at 7. To that end, BOEM granted the Lease to US Wind to use this specific portion of the OCS. *See* Attachment 3. During the multi-year review process, BOEM, in conjunction with EPA and other federal and state regulatory agencies, conducted its own comprehensive analysis of reasonable alternatives as part of its federal construction and operations processes. *See* Attachment 4, BOEM Record of Decision, Maryland Offshore Wind Project Construction and Operations Plan. This process included a review of alternative sites, sizes, and process. *See id*. at 8-36; *see also* Attachment 8, NSR Final Determination and Fact Sheet[4], at 8-9. BOEM's Record of Decision issued September 4, 2024,

[4] Petitioners include at Petition Attachments 3 and 5, copies of the PSD Approval Final Determination and Fact Sheet and Permit, as well as the NSR Approval Final Determination and Fact Sheet and Permit, essentially merging two documents into each attachment. For clarity and to assist the Board with locating direct evidentiary support in its review of this matter, MDE is attaching the documents individually to this Response. The NSR Approval is labeled as

specifically considered the purpose, need for, and construction alternatives for the Project, including a no construction option, leading to the determination that this project site, size and configuration was best. *See* Attachment 4, Sections 3 and 5. MDE considered BOEM's exclusive jurisdiction over the OCS, its decision to grant US Wind the exclusive right to conduct authorized activity to develop renewable energy in the lease area, and its thorough analysis in ultimately approving the alternative site, size, and production analysis included in US Wind's application. *See* Attachment 8, at 8-9; Attachment 4; Attachment 2, BOEM Approval Letter of US Wind Construction and Operations Plan, December 2024, available at https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/02_MD%20Wind%20OCS-A%200490%20COP%20Approval%20Letter_%20signed.pdf (last visited July 29, 2025).

Petitioners acknowledge MDE's consideration and reliance on the siting decisions made by those federal agencies, but contend that reliance is a "fundamental failure to evaluate whether emissions could be avoided or reduced, as required by the Act." Petition at 15. But the Act does not prohibit the permitting authority from considering and relying on alternative evaluations conducted by other entities. *See In re Campo Landfill Project*, 6 E.A.D. 505, 520-22 (June 19, 1996) (upholding EPA's review of and reliance upon an environmental impact statement prepared by the U.S. Department of the Interior as satisfying EPA's obligation to evaluate alternative sites under 42 U.S.C. § 7503(a)(5).)

Furthermore, COMAR 26.11.17.03(B)(6), the regulation EPA approved into Maryland's SIP as adequately implementing such requirements, provides that MDE may issue a permit or

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Attachment 7, the NSR Final Determination and Fact Sheet as Attachment 8, the PSD Approval as Attachment 11, and the PSD Final Determination and Fact Sheet as Attachment 12.

approval for a major source or modification where "*[a]n analysis* of alternative sites, sizes, production processes, and environmental control techniques for a proposed source demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification." *Id*. (emphasis added). That regulation does not require any particular analysis be redone or be submitted by a particular party. Petitioners' argument again inappropriately reads words into both the statute and implementing regulations that aren't there. *Murphy*, 35 F.3d at 145.

Reliance on the federal analyses already completed with regard to the Project makes particular sense here, where MDE, a state agency operating under an EPA-approved program, does not have the authority to independently require the use of "alternative locations for offshore structures, cable routes, vessel operations, or construction methods" for OCS sources, as Petitioners demand. Rather, MDE's role with regard to OCS sources is to determine whether the emissions from the federally-approved project at the federally-approved location, would be sufficiently low to comply with applicable air quality standards and regulations in the corresponding on-shore area. As such, MDE appropriately relied on the federal government's prior alternatives analysis for site selection and focused its review on the proposed project's compliance with air quality requirements. Attachment 8, at 8-9; *see also* Petition, Attachment 1, at 22.

D. MDE Conducted Sufficient Public Notice and Comment.

Petitioners' argument that the permits must be remanded because they contain provisions never subjected to public notice and comment is unfounded. Petitioners again fail to provide specific citations to the administrative record, identify the contested permit condition, or otherwise describe with particularity what specific failures of the notice and comment process are alleged. 40 C.F.R. § 124.19(a)(4)(i) and (ii). Petitioners reference "numerous" comments about

"completeness and accuracy of US Wind's emissions estimates," citing specifically to oral comment from Delegate Wayne Hartman. Petition at 15, FN53. In addition, Petitioners reference revised modeling and emissions data, citing to MDE's response to Comments #1 and #4, generally, as the basis for their claim. Petition at 16. These references fail to identify any particular estimates or changes to which they object. Such claims are not sufficient to determine whether a particular finding of fact or conclusion of law was clearly erroneous. This issue, therefore, was not preserved for review, and should be dismissed. 40 C.F.R. § 124.13; Attachment 5, at ¶ 9.

Moreover, Petitioners' allegations that MDE accepted new data and amended the application after the closing of the comment period is erroneous. Petition at 16. MDE only accepted new information during the comment period, as contemplated by the public participation process, and never amended the permit application before it. Petitioners further cite to 40 C.F.R. § 70.7(h), as the statutory basis for their position, an inapplicable law with requirements for Title V operating permits, not for permits-to-construct, or PSD or NSR approvals.

Without better explanation as to their objections, it is impossible to respond to Petitioners' claims. MDE followed adequate procedures for public notice including holding a public hearing and taking public comment, even extending the comment period at the public's request. Petitioners themselves acknowledge their participation in this process. Far from a "bait and switch," it is common practice for tentative determinations to be adjusted in a final permit. It is understood that the intended purpose of the public notice and comment process is for the permitting agency to obtain additional information and data, to consider any such relevant information, and incorporate updated data or refined analyses in response to public comments where appropriate. *See e.g. Westvaco Corp. v. EPA*, 899 F.2d 1383, 1386 (4th Cir. 1990) (noting EPA "must consider the additional data and information received during the public comment period" when reviewing

Individual Control Measures under the Clean Water Act). Based on the citation at footnote 54, Petitioners could be objecting to the final accounting of the number of emissions offsets (also known as emissions reduction credits or ERCs) required by the NSR Approval based on the final emissions from the materials used in its operations and maintenance and/or types of marine support vessels US Wind is ultimately able to secure. *See* Petition, Attachment 1, at 6-7. If so, the NSR Approval's requirement for updated potential to emit calculations based on the vessels ultimately contracted is an appropriate and reasonable approach, given that the availability of the type of boats used for operation and maintenance are not currently known. Attachment 8, at 11. This approach was applied in MDE's tentative determination on the NSR Approval and was reviewed by EPA without objection. Attachment 9, NSR Tentative Determination and Fact Sheet, at 11. Petitioners had every opportunity to comment on the accounting during the public comment period or present their own data regarding the Offshore Wind Project, but failed to do so.

If Petitioners' citation at footnote 55 is an objection to MDE's consideration of additional modeling provided by US Wind, their argument also fails. *See* Petition, Attachment 1, at 3-4. First, the changes to the daily construction limits were explicitly contemplated in MDE's tentative determination. Attachment 13, PSD Tentative Determination and Fact Sheet, at 13 (providing "only vessels for one of the following operations may be operated simultaneously unless the Permittee can demonstrate, by conducting additional emissions modeling approved by the Department, compliance at other operating conditions"). MDE appropriately analyzed modeling submitted by US Wind in consideration of its public comments, and established emissions limitations therefrom consistent with the CAA's requirements demonstrating compliance with the applicable NAAQS. *See* Attachment 12, PSD Final Determination and Fact Sheet, at 9-28; Attachment 8, at 4-8. These changes are permissible as a logical outgrowth of the public comment

process because they use the same modeling protocol and the same analytical methodology as the proposed permit to demonstrate NAAQS maintenance for simultaneous operations. *Compare* Attachment 13, at 9-24 *with* Attachment 12, at 9-25; *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079 (D.C. Cir. 2009) (A final rule "need not be identical: an agency's final rule need only be a 'logical outgrowth' of its notice.") (internal citation omitted).

E. The Permit Requires NOx Emissions Offsets Based on the Potential to Emit from the OCS Source During Operations and Maintenance.

Petitioners next claim that the NSR Approval fails to require adequate NOx emissions offsets. Specifically, Petitioners assert that MDE violated the Act by failing to require offsets for an additional 1,355 tons of NOx that will be emitted during construction and early operations of the Project. Petition at 17. Again, Petitioners misunderstand the Act's requirements.

Petitioners again fail to identify where in the public record this objection was previously raised with specificity. 40 C.F.R. § 124.19(a)(4)(ii). MDE has not been able to independently identify any comment discussing the specific number of offsets required for the Project which was submitted during the extended comment period. This issue, therefore, was not preserved for review, and should be dismissed. 40 C.F.R. § 124.13; Attachment 5, at ¶ 7.

Setting procedure aside, Petitioners' substantive claims are equally defective. The EPA and state permitting authorities implementing EPA-approved NSR programs have interpreted the Act's NSR requirements as only requiring offsets for a project's operating emissions following construction. This interpretation is consistent with § 173 of the Act, which provides that an NSR program shall provide the permits to construct and operate if "the permitting agency determines that by the time the source is to *commence operation*, sufficient offsetting emissions reductions have been obtained …." 42 U.S.C. 7503(a)(1)(A) (emphasis added). This section further directs that those emissions offsets "shall be, by the time a new or modified source commences operation,

in effect and enforceable…." 42 U.S.C. 7503(c)(1). This specific language has informed EPA's interpretation and implementation of the offset requirement, such that emissions from the construction of sources (whether on land or the OCS) are not included for purposes of offsets. *See e.g.* 40 C.F.R. Part 51, Appendix S; Attachment 6, EPA, Offshore Renewable Wind Energy Development Response to Comments on EPA Draft Permit Number: OCS-R1-05, Response to Comment B.5, available at https://www.epa.gov/system/files/documents/2023-10/revolution-wind-llc-response-to-comments.pdf (last visited July 29, 2025); 89 Fed. Reg. at 452 ("To comply with [the] statutory mandate [of 42 U.S.C. 7627(a)(1)], EPA must incorporate applicable onshore rules into 40 CFR part 55 as they exist onshore.").

MDE followed this established procedure. As explained in MDE's NSR Approval Final Determination and Fact Sheet, offsets are required for emissions associated with the Project's operations and maintenance, at a ratio of 1.15 to 1 in Worcester County. Attachment 8, at 8. The annual potential to emit NOx from the operations and maintenance phase of the Project is 25 tons NOx, and therefore 29 tons of NOx offsets are required. *Id*. at 4, 7-8; *see also* Attachment 15, US Wind Air Quality Permit Application (August 2023, revised November 2023), available at https://mde.maryland.gov/programs/permits/AirManagementPermits/Documents/US%20Wind/USWindAirQualityPermitApplicationAug2023Nov2023.pdf, at Table 2-4 (last visited July 29, 2025). Petitioners' calculation of 1,380 tons of NOx emissions inappropriately includes emissions from equipment and vessels used for construction activities and therefore, their request for an additional 1,355 tons of offsets is in conflict with federal law. 40 C.F.R. § 55.2 (defining "potential emissions" as "the maximum emissions of a pollutant from an *OCS source* operating at its design capacity.") (emphasis added).

A facility is required to obtain the proper amount of Emission Reduction Credits ("ERCs") to offset the emissions which will occur from the operations of the facility *following* construction. 42 U.S.C. § 7503(a)(1)(A) (emphasis added); 42 U.S.C. § 7503(c)(1); ; 40 C.F.R. Part 51, Appx S, Paragraph II.A.3 (noting "secondary emissions" means emissions which would occur as a result of construction but do not come from the major stationary source itself, and "do not count in determining the potential to emit of a stationary source."). The emissions associated with the *construction* phase of a project, particularly from mobile sources like trucks or marine vessels, are often treated differently under air quality regulations than emissions from the stationary source's long-term operation. 40 C.F.R. Part 51, Appx S, Paragraph II.A.8 (noting that "[s]econdary emissions do not include any emissions which come directly from a mobile source, such as emissions from the tailpipe of a motor vehicle, from a train, or from a vessel."); 40 C.F.R. § 51.165(a)(1)(iii) (explaining potential-to-emit means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design) (emphasis added); 40 C.F.R. § 55.2 (defining OCS source to include vessels only when they are "permanently or temporarily attached to the seabed and erected thereon and used for the purpose of exploring, developing, or producing resources therefrom" or "physically attached to an OCS facility, in which case only the stationary sources aspects of the vessels will be regulated."); *but see id*. (explaining that emissions from vessels servicing or associated with an OCS source shall be considered direct emissions from such source while at the source, and while enroute to or from the source when within 25 miles of the source.).

The permit appropriately addresses the emissions for which offsets are required under the NSR program based on the applicable regulations and the nature of the emissions sources. Attachment , at 7-8. Therefore, Petitioners' claim should be denied.

F. The Preconstruction Permits Set Emissions Limits Based on Accepted Methodologies Evaluating the Project's Potential to Emit.

Petitioners object that the permit is based "not on verified emissions data, but on generic hypothetical vessel configurations." Petition at 18.

Petitioners again fail to identify where in the public record this objection was previously raised with specificity. 40 C.F.R. § 124.19(a)(4)(ii). MDE has not been able to independently identify any comment discussing MDE's use of representative vehicles to estimate emissions and set emissions limits for the Project which were submitted during the extended comment period. This issue, therefore, was not preserved for review, and should be dismissed. 40 C.F.R. § 124.13; Attachment 5, at ¶ 7.

Furthermore, Petitioners' objection is flawed on its face, as it would be impossible to base permit requirements on "verified emissions data" when a facility has not yet been built and the fleet of vessels to be used has not been contracted. The CAA requires that permits be based on factual evidence, but it does not demand absolute certainty regarding every single piece of equipment or vessel that will be used over the life of a project. Instead, it requires a reasonable and conservative estimate of potential emissions. *See e.g. Rise St. James v. Louisiana Dep't of Env't Quality*, 383 So.3d 956, 966 (1st Cir. 2024) (A proposed facility must demonstrate it will not cause or contribute to a NAAQS exceedance using "estimates of the ambient concentrations [which] shall generally be based on the applicable air quality models, databases, and other requirements."). As with all permits-to-construct, NSR, and PSD approvals (which are pre-construction permits), the issuing agency evaluates a proposed project based on the project specification and potential-to-emit estimates. *See* 40 C.F.R. §§ 51.165(a)(iii) (defining potential-to-emit as the maximum capacity of a stationary source to emit a pollutant "under its physical and operational design" (emphasis added); 51.165(a)(xii)(D) ("For any emissions unit that has not

begun normal operations on a particular date, actual emissions shall equal the potential to emit of the unit on that date."). This is a widely accepted and reasonable methodology for estimating potential emissions when exact specifications are not yet finalized. Emissions are then limited to appropriate values complying with the NAAQS in the construction permits.

For projects involving a dynamic fleet of marine vessels that may not be fully contracted at the time of initial permitting, the use of "representative vessels and marine engines to calculate the project's potential emissions" is not only reasonable, but is consistent with previous OCS permits issued by EPA. *See* Attachment 6, Response to Comment 3, available at https://www.epa.gov/system/files/documents/2023-10/revolution-wind-llc-response-to-comments.pdf (last visited July 29, 2025). This approach is further supported by the fact that the construction of the Project will be spread over several years such that the particular vessels contracted for use may change over time. MDE's approval based on "representative" vessels and marine engines ensures that the Project's emissions as they have been evaluated for NAAQS compliance are not exceeded. *See* Petition, Attachment 1, at 18-19; Attachment 8, at 7.

Additionally, to ensure compliance with the modeled limits, MDE is requiring the Permittee to submit an updated report, defining each vessel contracted, each anticipated representative vessel, and each marine and non-marine engine to be used during Construction and Commissioning and O&M. Petition, Attachment 2, at 21-22. The Permit to Construct prohibits US Wind from beginning construction until that report has been received and approved by the Department in writing. *Id*. at 22. Therefore, the Permit to Construct includes conditions that will ensure compliance once actual vessels are identified. This approach is not arbitrary or capricious, and Petitioners fail to demonstrate that it is clearly erroneous under the law. Rather, it is a practical

and legally sound method for permitting complex industrial projects which is consistent with the requirements of the Act or the State's EPA-approved SIP.

V. CONCLUSION

For the foregoing reasons, the Maryland Department of the Environment respectfully requests that the Environmental Appeals Board dismiss the Petition for Review for lack of jurisdiction. In the alternative, should the Board determine it has jurisdiction, MDE requests that the Board deny the Petition on the merits, as Petitioners' arguments are based on misinterpretations of the permit, the law, and the permitting process.

Dated: July 30, 2025

Respectfully submitted,

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STATEMENT OF COMPLIANCE W/ WORD LIMITATION

I certify that the forgoing Response to Petition for Review and Motion for Summary Disposition in the matter of US Wind Inc., for the Maryland Offshore Wind Project, Permit-to-Construct 047-0248; NSR-2024-01; PSD Approval PSD-2024-01, excluding the parts of the brief that do not count toward the word limit, contains 7,961 words.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Response to Petition for Review and Motion for Summary Disposition in the matter of US Wind Inc., for the Maryland Offshore Wind Project, Permit-to-Construct 047-0248; NSR-2024-01; PSD Approval PSD-2024-01, were sent to the following persons in the manner indicated:

By first-class U.S. mail to Petitioners Mayor and City Council of Ocean City, Maryland and Commissioners of Worcester County, Maryland through their attorneys of record, Nancie G. Marzulla, and Roger J. Marzulla, at 1150 Connecticut Ave., NW, Suite 1050, Washington, D.C. 20036, on July 30, 2025;

By first-class U.S. mail to Amy Van Blarcom-Lackey, Regional Administrator of Region 3 of the Environmental Protection Agency, at 4 Penn Center, 1600 JFK Blvd., Philadelphia, PA 19103, on July 30, 2025;

By first-class U.S. mail to US Wind Inc., the permit applicant, at World Trade Center Baltimore, 401 East Pratt Street, Suite 1810, Baltimore, MD 21202, on July 30, 2025;

By e-filing system to the Environmental Appeals Board on July 30, 2025.

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