BEFORE THE ENVIRONMENTAL APPEAL 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 Permit Number: OCS-EPA-R2 NJ 02	Appeal No. OCS 24-01

PETITIONER SAVE LONG BEACH ISLAND'S BRIEF IN OPPOSITION TO ATLANTIC SHORES OFFSHORE WIND LLC'S MOTION FOR RECONSIDERATION

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I. INTRODUCTION

Atlantic Shores predicates its Motion for Reconsideration principally on three reasons, all of which are erroneous, as explained infra. First, the statutory time-frame stipulated by the Clean Air Act Section 165(c) is inapplicable to the instant case. Atlantic Shores' premise that Section 165(c) includes the post-grant period leads to a spurious conclusion. Second, Atlantic Shores misconceives Board precedent and cites inapposite cases, including ones wherein final agency action already occurred – not the case here (final agency action has yet to occur). Third, Atlantic Shores' argument that EPA's remand motion developed as a function of undue political pressure and consideration of improper factors deviates from the reality that EPA is merely responding to a lawful executive directive which is tied to consideration of relevant determinants in the Clean Air Act, Endangered Species Act, inter alia. As fully set forth below, Petitioner Save Long Beach Island, Inc. respectfully requests that the Board deny Atlantic Shores' motion for reconsideration.

II. ARGUMENT

A. Atlantic Shores' Erroneously Applies CAA Section 165(c) to the Instant Matter

The fulcrum of Atlantic Shores' Motion is predicated upon a fundamental misapprehension of the Clean Air Act, 42 U.S.C.§ 7475(c), Section 165(c). It is unequivocal – and apparently undisputed – that final agency action does not occur until administrative review procedures are exhausted, "For purposes of judicial review under the appropriate Act, final agency action on a permit occurs when agency review procedures under this section are exhausted." 40 C.F.R. § 124.19(l)(2). Atlantic Shores appears to concede this fact in their Motion ("Atlantic Shores does not dispute that EAB's regulations *say* that judicially reviewable final agency action does not occur on the permit until the EAB appeal is complete."). Motion at 10. Nonetheless, they incorrectly aver that such regulations are ultra vires or otherwise conflict with Section 165(c).

Atlantic Shores' reliance on the *Avenal Power Ctr., LLC v. EPA*, 787 F. Supp. 2d 1 (D.D.C. 2011) case to support their proposition is misplaced. *Avenal* involved a situation wherein the Plaintiff filed suit to compel an EPA determination on a permit which had already been ponderously delayed for nearly two years.

> "The application was deemed complete on March 19, 2008. Almost *two years later*, however, after an elaborate and exhaustive EPA administrative process, which included a notice and comment period and public hearing, the plaintiff still had no final or foreseeable resolution to its application. As such, the plaintiff brought this action on March 9, 2010, seeking judicial relief **to deal with EPA's continued violation** of Congress's one-year deadline under Section 165(c) (emphasis added)." Id. at 3.

Central to Atlantic Shores' misinterpretation of *Avenal* is their conflation of the initial EPA grant or denial determination and final permit issuance. *Avenal's* pertinence is constrained to the timeliness of the EPA's initial grant/denial determination, as expressed by the Court's conclusion therein, "Accordingly, the Administrator, in this Court's judgment, must issue a truly final **decision**, **either granting or denying** the permit in question as soon as possible (emphasis added)." Id. at 9. Section 165(c)'s statutory timeframe applies precisely to that issue, to wit, the EPA's initial grant or denial of a permit, but **not** the final issuance of that permit.

Such an interpretation is corroborated by other cases parsing the provision. For example, saliently, in *Murray Energy Corp. v. Env't Prot. Agency*, 936 F.3d 597 (6th Cir. 2019), the Court explained that the Clean Air Act "does not require that a permit be '*issued'* within one year. It requires only that the permitting authority 'grant *or* deny' completed permit applications within one year." Id. at 626. Furthermore, *Murray* cites to a D.C. Circuit Court decision which held, "nothing in the CAA provides for issuance of a PSD permit as a matter of right." *Am. Corn Growers Ass'n v. Env't Prot. Agency*, 291 F.3d 1, 12 (D.C. Cir. 2002). This strongly accords with the *Murray*

Court that final permit issuance is not temporally constrained by Section 165(c), and contrary to Atlantic Shores' vehement suggestion, there is no one-year permit issuance stipulation. As such, the *Avenal* case is entirely inapposite to the instant matter as *Avenal's* analysis pertained squarely to EPA's initial grant or denial timeliness, which does fall within the general purview of the 165(c). But *Avenal* does not analyze the post-grant, pre-issuance time-frame as is the case here.

Indeed, Atlantic Shores contrives a false dichotomy by asserting that the "EPA cannot have it both ways." Motion at 10. In fact, the verbiage of the EPA air permit itself belies Atlantic Shores' argument. The September 30, 2024 air permit provides, "this final OCS air permit **will become** effective thirty (30) days after the service of notice**, unless a petition for review** is requested under 40 C.F.R. § 124.19. **If a petition for review of the final permit is filed, the permit will not become effective** until after the Environmental Appeals Board ("EAB") renders a decision on the petition."[1] The import of this text is incontrovertible and comports with the aforesaid cited cases (*Murray*, *Am. Corn Growers Ass'n*), namely, the September 30, 2024 event constitutes a permit grant which is not yet issued. This, again, is entirely consonant with the EAB regulations providing that final agency action has not occurred until the terminus of appeal review. 40 C.F.R. § 124.19(l)(2). Atlantic Shores' predicates most of its Motion on the misunderstanding that the permit received on September 30, 2024 was a permit **issuance**, which it was not. Therefore, Section 165(c) neither conflicts with the EAB regulations nor constrains the EAB's post-grant review to one-year.

[1] https://www.epa.gov/system/files/documents/2024-09/cover-letter-for-asow-final-ocs-permit-r-2_0.pdf

B. EAB Remand Standard is Legally Sound and Supported by Precedent

Atlantic Shores appears to propound that EAB precedent demands specificity as a prerequisite to granting remand motions. But Atlantic Shores misconceives the standard and fails to contextualize its citations from *In re Desert Rock Energy Co.*, 14 E.A.D. 484 (EAB 2009). The agency need not explicitly identify specific aspects of the permit it intends to reconsider, rather, the "Board has broad discretion to grant a voluntary remand . . . a voluntary remand is generally available where the permitting authority . . . wishes to reconsider some element of the permit decision before reissuing the permit" (citing *In re Indeck-Elwood, LLC*, PSD Appeal No. 03-04, at 6 (EAB May 20, 2004)). Moreover, "Similarly, the federal courts tend to liberally grant agency motions for remand where an agency seeks to reconsider its prior decision." *Desert Rock*, 14 E.A.D. at 498. Nowhere in the EAB precedent does it stipulate that the aspect(s) of a permit the agency wishes to reconsider must be explicitly identified to the permittee, as Atlantic Shores seems to suggest.

Rather, both the EAB regulations and EAB jurisprudence are abundantly clear. 40 C.F.R. § 124.19(j) affords EPA the authority to withdraw a permit through voluntary remand, and this is supported by precedent; see, e.g., *In re GSP Merrimack, LLC*, 18 E.A.D. 524, 542 (EAB 2021):

> "Under Board regulations, a permit issuer may unilaterally withdraw a permit that is the subject of a petition for review within a specified time during the review proceeding, 40 C.F.R. § 124.19(j), and may request by motion a voluntary remand of the permit (or a portion thereof) at any time after that. *See* 78 Fed. Reg. 5281, 5282 (Jan. 25, 2013) (specifying that '[n]othing in [section 124.19] prevents the Region from seeking to withdraw the permit by motion at any time'). The Board has 'broad discretion' to grant a request for voluntary remand. *In re Desert Rock Energy Co.*, 14 E.A.D. 484, 493 (EAB 2009)."

As explained in *Desert Rock*, "At this stage, however, the Board cannot predict what the Region may, or may not, do on remand nor is it appropriate for the Board to provide a legal opinion on the merits of these theoretical outcomes."[2]

Additionally, Atlantic Shores misapplies its cased adduced to support its proposition. *Rahman v. United States*, 149 Fed. Cl. 685 (2020) involved a scenario wherein the Plaintiff alleged payment related to immediate contractual rights, "He seeks the active duty pay that he would have received had he been continued on active duty from November 1, 2015, until he was medically retired on May 10, 2018." Id at 688. The "substantial rights" at stake are entirely distinguishable. At issue in Rahman were alleged vested contractual rights. The holding of Rahman is not translatable or applicable here, nor does it impose a universal remand standard demanding enhanced specificity in the EAB context. While Atlantic Shores fulminates about the economic investments in its project, this does not alter the statutory and regulatory reality that a final air permit is not issued until EAB appeal proceedings have reached completion. Further, *Louisiana v. Biden*, 622 F. Supp. 3d 267 (W.D. La. 2022) is inapposite for the primary reason that final agency action had occurred therein (to which, the APA is applicable), while here, final agency action has yet to occur (and here, environmental review **has not concluded** under the Clean Air Act). Atlantic Shores' other cited cases are ostensibly distinguishable.[3]

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[2] See also, *In re Desert Rock Energy Co.,* 14 E.A.D. 484, 516 n.44 (EAB 2009) "Because any amendments to the Permit that the Region deems necessary as a result of the consultation and compliance with its ESA obligations could potentially impact any aspect of the Permit, it is appropriate to grant a remand of the entire Permit on ESA grounds. See Indeck-Elwood 2004 Stay Order at 8 (explaining that it is impossible to predict which conditions of the permit might change as a result of the ESA consultation process).

[3] Congruously, Atlantic Shores also cites to *Mississippi River Transmission Corp. v. FERC*, 969 F.2d 1215 (D.C. Cir. 1992) and *Am. Waterways Operators v. Wheeler*, 427 F. Supp. 3d 95 (D.D.C. 2019). Inter alia, *FERC* involved judicial review post final agency action, whereas here, final

Therefore, EAB's remand standard was not erroneous. The Board's decision was and is supported by jurisprudence, and Atlantic Shores' cited cases are not on point. This is a situation involving post-grant, pre-issuance remand.

C. Undue Influence or Political Pressure Did Not Impact Region 2's Remand Motion

Next, Atlantic Shores propounds the unavailing argument that EPA's remand motion was a function of undue influence via political pressure. But this is counterfactual. Here, we have adherence to a validly issued executive directive, which departs entirely from the fact pattern delineated in *Connecticut v. U.S. Dep't of the Interior*, 363 F. Supp. 3d 45 (D.D.C. 2019). Therein, Plaintiffs alleged the following:

> "…[T]he Secretary had private meetings and conversations with a United States Senator, Dean Heller, and the White House Deputy Chief of Staff, Rick Dearborn, both of whom pressured the Secretary to not approve the proposed Pequot Procedures amendments. Around the same time, according to Plaintiffs, United States Representative Mark Amodei similarly pressured Assistant Deputy Secretary of the Interior James Cason. Plaintiffs note that Senator Heller and Representative Amodei represent the citizens of Nevada, in which MGM is a major employer and political backer. And they state that Mr. Cason told the Tribes that the Department

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agency action has not yet occurred. And therein, FERC's motion stated only that it would like to 'reconsider its ruling in this case in light of its developing policies' (FERC, 969 F.2d at 1217 n.2), whereas here, EPA Region 2's basis for remand involves a concrete executive directive.

And the fact pattern in *Am. Waterways Operators v. Wheeler*, 427 F. Supp. 3d 95 (D.D.C. 2019) is completely distinguishable; there, it had been "almost three years since EPA issued its determination" (Id. at 99) and EPA wanted a "second bite at the apple." Id at 98. That derogates from the fact pattern here as no final permit has even been issued.

And finally, Atlantic Shores cited case, *City & Cnty. of S.F. v. Trump*, 897 F.3d 1225 (9th Cir. 2018) involved an executive order later deemed unconstitutional.

> was receiving political pressure to not approve the proposed Pequot Procedures amendments." Id. at 64.

The Court therein found that the first prong was satisfied, "political pressure was applied to the agency's decisionmakers" as what Plaintiffs alleged is tantamount to illicit lobbying. But here, the EPA is responding to a lawful executive directive, not capitulating to illicit lobbying. Moreover, as to the second prong of the test, namely consideration of improper factors, Plaintiffs in *Connecticut* alleged that political pressure caused the Secretary to render a decision unfounded in the Indian Gaming Regulatory Act. Conversely, here, the remand is inextricably connected to relevant factors in the Clean Air Act and Endangered Species Act.[4]

Accordingly, Atlantic Shores cannot demonstrate that EPA's remand request was a function of political pressure or consideration of improper factors.

D. The EAB Should Avoid Rendering an Advisory Opinion

Finally, Atlantic Shores' insistence that the EAB render a determination on the merits belies the jurisprudential directive to obviate advisory opinions. The Board "cannot predict what the Region may, or may not, do on remand nor is it appropriate for the Board to provide a legal opinion on the merits of these theoretical outcomes." *Desert Rock*, 14 E.A.D. at 507. See also, *In re GSP Merrimack L.L.C.*, 18 E.A.D. 524, 544 (EAB Aug. 3, 2021), "In these circumstances, GSP

[4] See, EAB Order at 5, n.3, "The scope of EPA's permitting decision includes an evaluation of the impact of the project's air emissions on the environment, and it appears this would be part of the environmental impact review Region 2 seeks to undertake and is grounded in the applicable law. In addition, one of the examples of the review the Region intends to conduct involves impacts to fish, wildlife, and other species and habitat which is required by the Region's obligations to comply with the Endangered Species Act (the "ESA") in issuing CAA PSD permits. Motion at 4; see also ESA § 7(a)(2), 16 U.S.C. § 1536 (requiring each federal agency "to insure that action authorized by * * * [the] agency * * * is not likely to jeopardize the continued existence of any endangered [] or threatened species" or destroy critical habitat)."

Merrimack's suggested course of action essentially invites the Board to issue an advisory opinion, something the Board does not do."

III. CONCLUSION

For the aforementioned reasons, Petitioner Save Long Beach Island, Inc. respectfully requests that the Board deny Atlantic Shores' Motion for Reconsideration.

Respectfully Submitted,

By*: /s/ Thomas Stavola Jr. Esq.* Dated: 3/31/2025

Thomas Stavola Jr. Esq.
NJ Bar ID number: 380012022
Law Office of Thomas Stavola Jr. LLC
209 County Road 537
Colts Neck, NJ 07722
tstavolajr@stavolalaw.com
732-539-7244
Counsel for Petitioners

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

Plaintiffs' Brief in Opposition to Atlantic Shores' Motion for Reconsideration is 2,376 words in length as calculated using Microsoft Word word-processing software and complies with the word limitation of 14,000 words in 40 C.F.R. § 124.19(d)(3).

/s/ Thomas Stavola Jr. Esq.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioner's Brief in Opposition to Atlantic Shores Offshore Wind, LLC's Motion for Reconsideration was electronically filed with the Clerk of the Environmental Appeals Board using the EAB eFiling System, and was served via electronic mail on the parties to this case:

Hilary Tompkins

hilary.tompkins@hoganlovells.com

Brian Malat

brian.malat@hoganlovells.com

Hayley Fink

hayley.fink@hoganlovells.com

Liliana Villatora

villatora.liliana@epa.gov

Sara Froikin

froikin.sara@epa.gov

Robert DeLay

delay.robert@epa.gov

Brian Doster

doster.brian@epa.gov

By: */s/ Thomas Stavola Jr. Esq.* Dated: 3/31/2025

Thomas Stavola Jr. Esq.
NJ Bar ID number: 380012022
Law Office of Thomas Stavola Jr. LLC
209 County Road 537
Colts Neck, NJ 07722
tstavolajr@stavolalaw.com
732-539-7244
Counsel for Petitioners