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 Permit No. OCS-EPA-R2 NJ 02	)	Appeal No. OCS 24-01

ATLANTIC SHORES OFFSHORE WIND, LLC's CONSOLIDATED REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION

TABLE OF CONTENTS

Page

I. EAB's Failure to Honor CAA Section 165(c) Warrants Reconsideration…….1

II. The Board's Elimination of Remand Standards Warrants Reconsideration……..5

III. Reconsideration is Required to Address Undue Political Influence on the Remand…….8

IV. Conclusion…….10

TABLE OF AUTHORITIES

Allentown Mack Sales & Service, Inc. v. NLRB,
522 U.S. 359 (1998) 6

Am. Corn Growers Ass'n v. EPA,
291 F.3d 1 (D.C. Cir. 2002) 4

Am. Waterways Operators v. Wheeler,
427 F. Supp. 3d 95 (D.D.C. 2019) 7

ATX, Inc. v. U.S. Dep't of Transp.,
41 F.3d 1522 (D.C. Cir. 1994) 9

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

In re Bear Lake Props., LLC,
UIC Appeal No. 11-03, 2012 EPA App. LEXIS 27 (E.A.B. July 26, 2012) 2

In re Coastal Energy Corp.,
NPDES Appeal No. 17-04, 2017 EPA App. LEXIS 27 (E.A.B. Nov. 2, 2017), ... 2

In re Deseret Generation & Transmission Coop. Bonanza Power Plant,
CAA Appeal No. 24-01, 2024 EPA App. LEXIS 25 (E.A.B. Nov. 8, 2024) 2

In re Desert Rock Energy Co.,
14 E.A.D. 484 (EAB 2009) 6

Louisiana v. Biden,
622 F. Supp. 3d 267 (W.D. La. 2022) 6

Michigan v. EPA,
576 U.S. 743 (2015) 6

Mississippi River Transmission Corp. v. FERC,
969 F.2d 1215 (D.C. Cir. 1992) 6

Mitchell v. Horn,
318 F.3d 523 (3d Cir. 2003) 4

Murray Energy Corp. v. EPA,
936 F.3d 597 (D.C. Cir. 2019) 4

Rahman v. United States,
149 Fed. Cl. 685 (2020) 6

Thompson v. Real Estate Mortg. Network,
748 F.3d 142 (3d Cir. 2014) 2

Statutes

42 U.S.C. § 7475(c) 4

Other Authorities

40 C.F.R. Part 124, Subpart A 4

40 C.F.R. Part 124, Subpart C 4

40 C.F.R. § 124.15 8

40 C.F.R. § 124.15(a) 4, 7

40 C.F.R. § 124.19(f)(4) 1

40 C.F.R. § 124.19(n) 3

40 C.F.R. § 52.21(a)(2)(iii) 4

40 C.F.R. § 55.6(a)(3) 4

84 Fed. Reg. 66,084 (Dec. 3, 2019) 2

90 Fed. Reg. 8363 (Jan. 29, 2025) 5

S. Rep. No. 94-717 (1976) 5

Atlantic Shores Offshore Wind, LLC and Atlantic Shores Offshore Wind Project 1, LLC ("Atlantic Shores"), respectfully submit this reply in support of reconsideration. 40 C.F.R. § 124.19(f)(4). The United States Environmental Protection Agency ("EPA") Region 2 and Petitioner Save Long Beach Island, Inc. ("SLBI") each filed a response in opposition to Atlantic Shores' Motion for Reconsideration ("Motion") of the Environmental Appeals Board's ("Board") March 14, 2025 order ("Order") granting Region 2's request for voluntary remand.

Atlantic Shores' Motion identified three ways in which the Board's Order clearly erred, mandating reconsideration. *First*, the Order incorrectly concluded that the one-year permitting deadline under Clean Air Act ("CAA") Section 165(c), 42 U.S.C. § 7475(c), does not bind the Board. *Second*, the Order applied an unprincipled remand standard that gave Region 2 *carte blanche* to "reevaluate" Atlantic Shores' permit no matter how vague or ill-defined the basis for the remand. *Finally*, Region 2's remand request was the product of undue political influence that the Board should have rejected. SLBI and Region 2 offer no persuasive response to any of these three arguments. And tellingly, Region 2 does not contest any of them on the merits—including the undue political influence—merely arguing (incorrectly) that Atlantic Shores made or should have made these arguments previously. SLBI at least responds on the merits, but its responses highlight the many ways in which the Order clearly erred. Reconsideration is warranted to correct these errors, and to avoid the extraordinary disruption that the Order would otherwise cause for Atlantic Shores' Project.

I. EAB's Failure to Honor CAA Section 165(c) Warrants Reconsideration.

Neither Region 2 nor SLBI provides a valid justification for why the Board should not reconsider its clearly erroneous conclusion that "nothing in section 165(c) prohibits the Board from

granting a motion for voluntary remand," and that claims that EPA has violated the one-year deadline under Section 165(c) are outside the Board's purview. Order at 8. In particular, neither Region 2 nor SLBI disputes that the Board's remarkable conclusion is directly contrary to leading federal court precedent in *Avenal Power Center, LLC v. EPA*, 787 F. Supp. 2d 1, 4 (D.D.C. 2011).[1]

Region 2's contention that Atlantic Shores should have raised *Avenal* in its opposition to Region 2's motion for remand is baseless. *See* Region 2 Resp. at 2-3. Region 2's remand request never even acknowledged Section 165(c), let alone argued that the Board can disregard Section 165(c), as it did in the Order. And, prior to issuance of the Order, Atlantic Shores could not know that the Board would reach such a conclusion. Region 2 cites no authority to support its argument that Atlantic Shores is foreclosed from addressing this—or any of the Order's other novel and unsolicited holdings—by way of a motion for reconsideration that cites case law and authorities directly relevant to the Order's holdings.[2] Indeed, under Region 2's standard, it is not clear *what*

[1] EPA itself has previously acknowledged the applicability of *Avenal* to EPA actions implicating Section 165(c), explaining that "[i]n the case of PSD permits, the *entire process*—from the determination that an application is complete to a *final decision* to grant or deny a permit application—must occur within one year by statutory mandate. 42 U.S.C. 7475(c); *see Avenal Power Center LLC v. EPA*, 787 F.Supp.2d 1 (D.D.C. 2011). Nothing in today's proposal would affect that statutory obligation." Modernizing the Administrative Exhaustion Requirement for Permitting Decisions and Streamlining Procedures for Permit Appeals, 84 Fed. Reg. 66,084, 66,086 (Dec. 3, 2019) (emphasis added). Region 2 is therefore incorrect to the extent it implies that *Avenal* is somehow not applicable precedent that is directly relevant to this case. *See* Region 2 Resp. at 2-3.

[2] In its Response, EPA cites to *In re Deseret Generation & Transmission Coop. Bonanza Power Plant*, CAA Appeal No. 24-01, 2024 EPA App. LEXIS 25 at *2-3 (E.A.B. Nov. 8, 2024), *In re Coastal Energy Corp*., NPDES Appeal No. 17-04, 2017 EPA App. LEXIS 27, at *2 (E.A.B. Nov. 2, 2017), and *In re Bear Lake Props., LLC*, UIC Appeal No. 11-03, 2012 EPA App. LEXIS 27 at *4 (E.A.B. July 26, 2012) for the proposition that a motion for reconsideration is not an opportunity to reargue the case in a more convincing fashion. However, none of these decisions bar a party from offering additional caselaw and authorities to demonstrate that an EAB order is clearly erroneous or has made a mistake of law on an issue that was raised to the EAB. In *In re Bear Lake Props.*, EAB held that petitioners included a new argument in their motion for reconsideration that was not included in their original petition for review. In *In re Deseret Generation & Transmission Coop. Bonanza Power Plant*, EAB similarly held that petitioners had not preserved or raised a statutory interpretation challenge in their petition for review, and thus could not introduce such a challenge in the motion for reconsideration. As to arguments petitioners *had* made in the original petition, EAB held that petitioners offered no additional "legal support" for their arguments. *Id*. at 3. This confirms that additional caselaw and authority can be introduced to support an argument for clear error. *id*.; *Cf. Thompson v. Real Estate Mortg. Network*, 748 F.3d 142, 149, n.6 (3d Cir. 2014) (finding that parties can include additional case citations on appeal and

would be a proper motion for reconsideration under 40 C.F.R. § 124.19(m)—every authority could, in theory, be preemptively deployed in a brief just in case the decision-maker might reach a certain conclusion, but this speculation is not required and would present an unworkable standard for brief writing. The Board should not countenance Region 2's arguments, which would undermine participants' right to a fair, impartial, and informed appeals process. 40 C.F.R. § 124.19(n).

SLBI's arguments similarly miss the mark. SLBI appears to acknowledge that, under *Avenal*, EPA must comply with the Section 165(c) deadline. Yet SLBI contends that EPA satisfied Section 165(c) when Region 2 gave notice of the Final Permit on September 30, 2024—13 months after Atlantic Shores' application was deemed complete. *See* SLBI Resp. at 2.

But *Avenal* itself squarely rejects SLBI's theory that EPA complies with Section 165(c) by providing notice of a "final permit" under 40 C.F.R. § 124.15 within the one-year deadline. Calling this theory "oh so clever, but **unsupportable**," *Avenal* found that "EPA's promise of a 'final permit decision' under 40 C.F.R. § 124.15 was **inherently disingenuous**. It actually was only a promise to render, in effect, an 'interim decision' subject to appeal before the EAB." 787 F. Supp. 2d at 3 (emphasis added and citations omitted). Contrary to SLBI's argument, as well as the Board's Order, *Avenal* held that the EAB appeals process cannot justify noncompliance with Section 165(c): "[W]hile the Administrator is welcome to avail herself of whatever assistance the EAB can provide her *within the one-year statutory period,* she cannot use that process as an excuse, or haven, to avoid statutory compliance." *Avenal*, 787 F. Supp. 2d at 4.

Relatedly, SLBI argues that notice of a "final permit" under 40 C.F.R. § 124.15 qualifies as a permit "grant" under Section 165(c) even when, due to EAB review, the permit is "issued"

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are not limited to precise arguments made below as long as those arguments support a claim that was presented to the lower court).

much later. SLBI Resp. at 1-3. Never mind that *Avenal* forecloses this theory; it also finds zero support in the cases SLBI cites. SLBI's lead case, *Murray Energy Corp. v. EPA*, 936 F.3d 597 (D.C. Cir. 2019), addressing Section 165(c)'s requirement that "the permitting authority 'grant[ ] *or* den[y]' completed permit applications within one year," simply stated the obvious: if the permit is not "'issued' within one year . . . EPA or a state permitting authority can comply with the timeliness requirement of section 165(c) by denying the application." *Id.* at 626 (citing 42 U.S.C. § 7475(c)). Nothing in the case supports sidestepping Section 165(c) by distinguishing between the "grant" and "issuance" of a permit.[3] To the contrary, *Murray* reinforces that a final, binary decision to "grant" or "deny" the permit must be made within one-year. That, of course, is precisely what Atlantic Shores seeks: a final agency decision granting or denying its permit, not one that holds the permit in limbo in violation of Section 165(c)'s clear terms.[4]

SLBI's erroneous reading of Section 165(c) would "produce[] a result 'demonstrably at odds with the intentions of its drafters,' [and lead to] an outcome 'so bizarre that Congress could not have intended it[.]'" *Mitchell v. Horn*, 318 F.3d 523, 535 (3d Cir. 2003) (internal citations omitted). Congress made clear in enacting Section 165(c) that "[n]othing could be more detrimental to the intent of this section and the integrity of this Act than to have the process

[3] Certainly, no such distinction exists in the Clean Air Act or EPA regulations. Neither the Board's regulations, Outer Continental Shelf air regulations, nor the Prevention of Significant Deterioration ("PSD") regulations reference "granting" a permit. *See, e.g.*, 40 C.F.R. § 52.21(a)(2)(iii) (noting that EPA "has the authority to *issue*" pre-construction PSD permits) (emphasis added); *id*. § 55.6(a)(3) (stating that for OCS air permits, EPA "will follow the procedures used to *issue* [PSD] permits") (emphasis added); *id*. § 124.15(a) (referring to the "issuance" of a permit); *see also generally* 40 C.F.R. Part 124, Subparts A, C (EAB procedures).

[4] SLBI also cites *American Corn Growers Ass'n v. EPA*, 291 F.3d 1, 12 (D.C. Cir. 2002) for the proposition that "nothing in the CAA provides for issuance of a PSD permit as a matter of right" to support its contention that "final permit issuance is not temporally constrained by Section 165(c)." SLBI Resp. at 2-3. But *American Corn Growers* does not in any way stand for that proposition or analyze Section 165(c) in any way. It merely makes this statement in passing in the context of an alleged conflict of other various Clean Air Act statutory provisions.

encumbered by bureaucratic delay." S. Rep. No. 94-717, at 23 (1976). Yet that is what both SLBI's position and the Board's Order achieve: Allowing EPA to tie up Atlantic Shores' permit in an indeterminate and bureaucratic delay—a result that should have been deemed impermissible had the Board not erroneously failed to consider the constraints imposed on EPA by Section 165(c). The Board should grant reconsideration to avoid that result.

II. The Board's Elimination of Remand Standards Warrants Reconsideration.

The Board should also reconsider its conclusion that remand does not require the region to identify "specific substantive changes to the final permit or specific elements of the permit decision it seeks to reconsider," but instead is allowed whenever the region claims it is "reevaluating its permit decision." Order at 4. Region 2 again makes no attempt to defend the Board's conclusion on the merits, merely claiming that "a lack of specificity in Region 2's motivation for remand, including its reliance on the Presidential Memorandum . . . were includ[ed] in Atlantic Shores'" opposition to the remand request.[5] Region 2 Resp. at 3. Region 2 misses the point. The issue for reconsideration is not that Region 2's remand request failed to specify which permit changes or elements were at issue, but rather that the Board concluded for the first time—contrary to the very authority on which Region 2 based its remand request—that no such specificity was required.

For its part, SLBI cannot persuasively distinguish caselaw requiring that requests for remand must be based on legally cognizable rationales and the product of reasoned decision-making. SLBI Resp.at 1; *id*. at 4-5. SLBI offers no interpretation of that precedent that can spin the Board's "broad discretion" to grant a remand to the level of unfettered discretion adopted by

[5] On January 20, 2025, the President issued a Presidential Memorandum entitled "Temporary Withdrawal of All Areas on the Outer Continental Shelf from Offshore Wind Leasing and Review of the Federal Government's Leasing and Permitting Practices for Wind Projects," ("Presidential Memorandum" or "Memorandum"). 90 Fed. Reg. 8363 (Jan. 29, 2025).

the Order, contrary to what all parties agree is the previously controlling precedent as it relates to the voluntary remand standard: *In re Desert Rock Energy Co.*, 14 E.A.D. 484, 493, 497 (EAB 2009). As *Desert Rock Energy* shows, the Board's discretion to grant a remand is bounded by EPA's obligation to articulate, with a degree of specificity, a rational basis for remand that is legally cognizable under the Clean Air Act—not just a nebulous statement that the agency plans to reevaluate because its policies have changed.

SLBI argues that authority such as *Louisiana v. Biden*, 622 F. Supp. 3d 267 (W.D. La. 2022) and *Mississippi River Transmission Corp. v. FERC,* 969 F.2d 1215 (D.C. Cir. 1992)—which hold presidential actions and vague policies cannot justify delays or remands that are not supported by reasoned decision-making—involve judicially reviewable final agency actions. SLBI Resp. at 5-6 & n.3. But it is not clear what difference that distinction makes—the requirement to engage in reasoned decision making is not limited to the agency's final immediately appealable decision, but also to the agency's processes and actions that precede that result. *See Michigan v. EPA*, 576 U.S. 743, 750 (2015) (quoting *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998)) ("Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational."). Moreover, the Board itself has relied on federal caselaw concerning voluntary remands (which also involves final agency actions) and has noted that the Board's process requiring EPA to seek permission from the Board for voluntary remand "is similar to the practice in federal courts." *In re Desert Rock Energy Co.*, 14 E.A.D. at 496.

SLBI tries to distinguish *Rahman v. United States,* 149 Fed. Cl. 685, 690 (2020), on the ground that it involves different substantive rights, but that does not alter *Rahman*'s clear holding that a remand motion must be "properly supported and justified." *See* SLBI Resp. at 5. SLBI

contends that *American Waterways Operators v. Wheeler*, 427 F. Supp. 3d 95 (D.D.C. 2019), is distinguishable because it involved a three-year delay, SLBI Resp. at 6 n.3, but the court's clear command to "consider whether remand would unduly prejudice the non-moving party and whether the agency's request appears to be frivolous or made in bad faith" did not turn on the length of delay. 427 F. Supp. 3d 95, 99 (quotations omitted). In any event, as a result of the Order, Atlantic Shores now faces indeterminate further delays—on top of a year-and-a-half delay at this point[6]—before it will obtain a final permit decision. It is precisely the unbounded nature of the remand, with no indication when the alleged reevaluation will occur, what its scope will be, what process Atlantic Shores will be asked to participate in, or when EPA will make a final decision, that highlights the Order's failure to observe basic requirements for reasoned decision-making.

The standardless remand undermines the integrity of EPA's permit process. That process assures participants that, following extensive analysis and public comment, the EPA will issue "a final permit decision," which "means a final decision to *issue*, deny, modify, revoke and reissue, or terminate a permit." 40 C.F.R. § 124.15(a) (emphasis added). This is precisely what Region 2 did when announcing its September 30, 2024 permit decision, which referred to that decision as "final" and an "issuance." Yet the Order, attempting to justify its conclusion that Atlantic Shores' permit was "new or proposed" within the meaning of the Presidential Memorandum, effectively revokes the Region 2 decision and ignores the plain language of 40 C.F.R. § 124.15, claiming "Atlantic Shores is incorrect when they assert the permit has already been issued." Order at 8; *see also* SLBI Resp. at 3. By treating EPA's "final permit decision" as a nullity and allowing it to be withdrawn for no reason specific to the permit itself, the Order eliminates any confidence among

[6] Atlantic Shores' permit application was deemed complete by EPA on August 21, 2023.

participants in a wide variety of industries that any "final permit decision" is worth the paper it's written on. This uncertainty is especially untenable in light of Section 165(c)'s command to act within a defined one-year timeframe.

In the end, a vague re-assessment under an undefined timeframe regarding general "wind leasing and permit practices" does not warrant pulling back a final issued air permit, 40 C.F.R. § 124.15, that was granted under long-standing policies and regulations in existence at the time.[7] A reasoned basis for remand must be articulated with some level of rationality, especially when that remand unwinds years of extensive, comprehensive analysis by EPA Region 2 of Atlantic Shores' permit since that application was submitted in September 2022, and where EPA vigorously defended and endorsed the permit a mere five months ago. Under these circumstances, reconsideration is warranted.

III. Reconsideration is Required to Address Undue Political Influence on the Remand.

Region 2—which conspicuously does not dispute Atlantic Shore's showing of undue influence—merely asserts that Atlantic Shores should have raised its allegation of undue influence in opposition to Region 2's remand request. Region 2 Resp. at 3. But the Board's Order was the first determination in this proceeding that the Presidential Memorandum actually applied to Atlantic Shores' permit and justified Region 2's decision to seek remand. Order at 5. Although Region 2 sought a remand based on the general purpose to "implement the Presidential Memorandum," it remained unclear why EPA believed the Presidential Memorandum even applied to the Permit. Region 2 Mot. for Remand at 4. Once the Board held that Atlantic Shores' permit was not "final" (despite the plain language of 40 C.F.R. § 124.15) and therefore the Presidential

[7] Neither SLBI nor Region 2 explain how the Board's rationale that permitting decisions are best made at the regional level is consistent with a remand decision based on a directive from the White House, which has no expertise in rendering decisions on Clean Air Act permits.

Memorandum encompassed the permit, the undue influence applied to the remand request became clear.

There is no basis for Region 2's suggestion that, prior to the Order, Atlantic Shores should have known of that influence and raised the argument in opposing remand. On the contrary, Atlantic Shores' arguments in its opposition to Region 2's motion for remand made clear that the true reasons for that motion remained a mystery given the inapplicable nature of the Presidential Memorandum. Adding to its puzzlement resulting from the abrupt change in EPA's position abandoning the defense of the permit, Atlantic Shores explained that the Presidential Memorandum, by its express terms, did not even apply to the final permit, and thus could not justify the remand request. Atlantic Shores further noted the EPA's "[m]otion raises the specter of other motivations to improperly delay and/or jeopardize this Project for reasons that are not cognizable under the CAA." Atlantic Shores Opp'n to Mot. for Remand at 15-16, 17. What *was* the specter of improper decision-making at the time of EPA Region 2's abrupt abandonment of its defense of Atlantic Shores' permit has *now* become a bona fide reality, as a result of the Board's conclusion that the Presidential Memorandum actually applied to the Permit, thus blessing Region 2's remand request.

As discussed more fully in Atlantic Shores' Motion for Reconsideration, the EPA's abrupt reversal in position, without any substantive change to the underlying scientific and technical analysis of the original permit decision, and the Board's determination that this reversal was in fact appropriate under the Presidential Memorandum—which on its face does not apply—readily establish the elements of undue influence. Atlantic Shores Mot. for Reconsideration at 17-19; *ATX, Inc. v. U.S. Dep't of Transp.*, 41 F.3d 1522, 1529 (D.C. Cir. 1994). Region 2 does not contend otherwise. The Board should therefore grant reconsideration.

IV. CONCLUSION

For the foregoing reasons, and those set forth in the Motion for Reconsideration, the Board should reconsider its Order and deny the motion for voluntary remand to Region 2.

Date: April 10, 2025

Respectfully submitted,

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STATEMENT OF COMPLIANCE WITH WORD COUNT

I hereby certify that Atlantic Shores Offshore Wind, LLC's Consolidated Reply in Support of Motion for Reconsideration contains 3353 words, as calculated using Microsoft Word word-processing software.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Atlantic Shores Offshore Wind, LLC's Consolidated Reply in Support of Motion for Reconsideration was electronically filed with the Clerk of the Environmental Appeals Board using the EAB refiling System, and was served via electronic mail on:

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