

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

_____)	
In re:)	
Atlantic Shores Offshore Wind, LLC,)	Appeal No. OCS 24-01
for the Atlantic Shores Project 1)	
and Project 2)	
)	
)	
EPA Permit No. OCS-EPA-R2 NJ 02)	
_____)	

**ATLANTIC SHORES OFFSHORE WIND, LLC's OPPOSITION TO EPA REGION 2's
MOTION FOR VOLUNTARY REMAND**

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INTRODUCTION

Atlantic Shores Offshore Wind, LLC and Atlantic Shores Offshore Wind Project 1, LLC (“Atlantic Shores”) respectfully request that the Environmental Appeals Board (“EAB” or “Board”) deny the United States Environmental Protection Agency (“EPA”), Region 2’s (“Region 2”) Motion for Voluntary Remand (“Motion”) of the final Outer Continental Shelf (“OCS”) air permit (“Final Permit”) validly issued under the Clean Air Act (“CAA”) for the construction and operation of Atlantic Shores Project 1 and Project 2 (the “Project”). Region 2 has not provided good cause for its Motion, failing to identify any permit condition it seeks to substantively change or any element of the permit decision it wishes to reconsider. Nor does Region 2 identify any provision of the CAA, OCS air regulations, or other statutory or regulatory obligation that would justify a remand. Instead, the Motion relies solely on a recent Presidential Memorandum that, on its face, does not apply to the Final Permit. Nor is voluntary remand in the interests of administrative or judicial efficiency where, as here, the merits have been fully briefed and the petition is ready for a decision by the Board. Accordingly, the Board should deny Region 2’s Motion for Voluntary Remand.

I. The OCS Air Permit Issued to Atlantic Shores

Atlantic Shores submitted an OCS air permit application to Region 2 on September 1, 2022. EPA deemed the permit application complete on August 21, 2023, and issued for public review a draft OCS air permit for the Project on July 11, 2024. EPA solicited public comments on the draft permit for 30 days from July 12, 2024 to August 16, 2024. EPA also held a public meeting on the draft permit on August 12, 2024. On September 30, 2024, Region 2 issued the Final Permit for the construction and operation of the Project. *See* Letter from Richard Ruvo,

Director Air and Radiation Division, EPA Region 2, to Jennifer Daniels, Vice President, Atlantic Shores Offshore Wind, LLC, at 2 (Sept. 29, 2024), Attachment 1 (“Final Permit Letter”).

On October 15, 2024, Save Long Beach Island, Inc. (“SLBI”) filed a petition for review of the Final Permit. On November 5, 2024, Region 2 filed its response in opposition to SLBI’s petition, arguing that the Final Permit was fully supported by the record and issued in accordance with applicable OCS air permitting requirements. *See* EPA Region 2’s Response to Petition for Review, at 6 (Nov. 5, 2024) (“The Region’s OCS permit decision for the Atlantic Shores Project is fully supported by the record, including as detailed in the Response to Comments (RTC) that accompanied the permit.”).¹ On the same day, Atlantic Shores filed a permittee response requesting the Board deny SLBI’s petition on similar grounds. As a result, SLBI’s petition is fully briefed and has been awaiting an EAB decision for nearly four months.

II. The Presidential Memorandum and Motion for Voluntary Remand

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,” Attachment 2 (“Presidential Memorandum” or “Memorandum”). 90 Fed. Reg. 8363 (Jan. 29, 2025).

¹ EPA Region 2’s Response to Petition for Review, In re: Atlantic Shores Offshore Wind, LLC, for the Atlantic Shores Project 1 and Project 2, Permit No. OCS-EPA-R2 NJ 02, EAB Appeal No. OCS 24-01 (Nov. 5, 2024), [https://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/Filings%20By%20Appeal%20Number/A9F3828BDA1D426185258BCC005E47F0/\\$File/EPA%20Region%202%20Atlantic%20Shores%20Petition%20Response%20\(11.5.2024%20fully%20executed\).pdf](https://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/Filings%20By%20Appeal%20Number/A9F3828BDA1D426185258BCC005E47F0/$File/EPA%20Region%202%20Atlantic%20Shores%20Petition%20Response%20(11.5.2024%20fully%20executed).pdf).

Section 1 of the Presidential Memorandum temporarily withdraws OCS lease areas from disposition for wind energy development, but states that “[n]othing in this withdrawal affects rights under existing leases in the withdrawn areas.” *Id.*

Section 2(a) of the Memorandum further directs that EPA “shall not issue new or renewed approvals, rights of way, permits, leases, or loans for onshore or offshore wind projects pending the completion of a comprehensive assessment and review of Federal wind leasing and permitting practices.” *Id.* at 8364. “The assessment shall consider the environmental impact of onshore and offshore wind projects upon wildlife, including, but not limited to, birds and marine mammals. The assessment shall also consider the economic costs associated with the intermittent generation of electricity and the effect of subsidies on the viability of the wind industry.” *Id.*

And finally, Section 2(d) provides that “[t]he Attorney General may, as appropriate and consistent with applicable law, provide notice of this order to any court with jurisdiction over pending litigation related to any aspect of the Federal leasing or permitting of onshore or offshore wind projects . . . , and may, in the Attorney General’s discretion, request that the court stay the litigation or otherwise delay further litigation, or seek other appropriate relief consistent with this order, pending the completion of the actions described in [the Memorandum].” *Id.*

On February 28, 2025, Region 2 filed a motion for voluntary remand (“Motion”)² pursuant to 40 C.F.R. § 124.19(j), citing the Presidential Memorandum as the basis for its Motion.

² EPA Region 2’s Motion for Voluntary Remand, In re: Atlantic Shores Offshore Wind, LLC, for the Atlantic Shores Project 1 and Project 2, Permit No. OCS-EPA-R2 NJ 02, EAB Appeal No. OCS 24-01 (Feb. 28, 2025) (“Motion”), [https://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/Filings%20By%20Appeal%20Number/D711AB507E4F0CC885258C3F005CCF2D/\\$File/2025-02-28%20EPA%20Motion%20for%20Voluntary%20Remand%20regarding%20Atlantic%20Shores%20permit%20-%20for%20filing.pdf](https://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/Filings%20By%20Appeal%20Number/D711AB507E4F0CC885258C3F005CCF2D/$File/2025-02-28%20EPA%20Motion%20for%20Voluntary%20Remand%20regarding%20Atlantic%20Shores%20permit%20-%20for%20filing.pdf).

LEGAL STANDARD

The Board's regulations provide that "[t]he Regional Administrator, at any time prior to 30 days after the Regional Administrator files its response to the petition for review . . . , may, upon notification to the [EAB] and any interested parties, withdraw the permit and prepare a new draft permit . . . addressing the portions so withdrawn." 40 C.F.R. § 124.19(j). However, "[i]f the [EAB] has held oral argument, the Regional Administrator may not unilaterally withdraw the permit, but instead must request that the [EAB] grant a voluntary remand of the permit or any portion thereof." *Id.* More than 30 days have passed since Region 2 filed its response to the SLBI's petition, so Region 2 may not unilaterally withdraw the Final Permit and instead, must move for Board approval of its request for voluntary remand. The regulations further provide that the Board is authorized to "do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal[.]" *Id.* § 124.19(n).

This Board has emphasized that it will only grant a motion for voluntary remand if the permitting authority "shows good cause for its request and/or granting the motion makes sense from an administrative or judicial efficiency standpoint." *In re Gasco Energy*, UIC Appeal No. 14-191, slip op. at 2 (EAB Feb. 4, 2015) (quoting *In re Desert Rock Energy Co.*, 14 E.A.D. 484, 497 (EAB 2009)); *see also* 40 C.F.R. § 124.19(f)(2) ("A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support the motion."). Motions for voluntary remand are "generally available where the permitting authority has decided to make a substantive change to one or more permit conditions, or otherwise wishes to reconsider some element of the permit decision before reissuing the permit." *Gasco Energy*, slip op. at 2 (quoting *Desert Rock*, 14 E.A.D. at 493). The Board also can "deny a motion should it conclude that bad faith or frivolousness were the driving force for the Region's request."

Desert Rock, 14 E.A.D. at 498. Moreover, “in cases where significant time has passed following the submission of final briefs by all the parties, the Board may be in a position to issue a final decision at the time of a request for voluntary remand.” *Id.* at 496 (citing *In re Indeck-Elwood*, PSD Appeal No. 03-04, slip op. at 9 & n.16 (EAB May 20, 2004) (declining to remand where EAB had already “made considerable headway in its examination of the record”)).

ARGUMENT

I. The Board Should Deny Region 2’s Motion for Voluntary Remand.

The Board should deny Region 2’s Motion because it does not meet the Board’s standards for voluntary remand. Region 2 has failed to show good cause for its request and has not identified any conditions in the Final Permit that it seeks to substantively change, nor any element of the Final Permit decision it seeks to reconsider before reissuing the Final Permit. In addition, voluntary remand does not make sense from an administrative or judicial efficiency standpoint as SLBI’s petition has been fully briefed for several months and is ready for a Board ruling on the merits. Accordingly, for the reasons discussed below, the Motion should be denied.

A. Region 2 Has Failed to Show Good Cause for Voluntary Remand.

1. Region 2 Has Not Identified Any Substantive Changes to the Final Permit or Any Element of the Final Permit Decision it Seeks to Reconsider.

Region 2 has failed to show good cause for voluntary remand because it has not identified any condition in the Final Permit it is seeking to substantively change, nor any element of the Final Permit decision it wishes to reconsider before reissuing the permit. *See Gasco Energy*, slip op. at 2. Region 2 acknowledges this standard for seeking a voluntary remand. *See Region 2 Motion* at 4 (citing *Desert Rock*, 14 E.A.D. at 493). Nevertheless, its Motion identifies no permit conditions it seeks to substantively change or elements it seeks to reconsider. The OCS

air permitting regime is intended to establish requirements to control air pollution from OCS sources in order to attain and maintain ambient air quality standards.³ Notably, *nowhere* in the Motion does Region 2 point to air quality requirements or *any* provision of the Clean Air Act, OCS air regulations, or other statutory or regulatory obligation that would justify a remand to reconsider the Final Permit.

In contrast, in one of the EAB decisions cited by Region 2 in its Motion—*Desert Rock*—EPA Region 9 had identified five specific, disputed issues that it sought to reconsider based on concrete statutory and regulatory grounds. *See Desert Rock*, 14 E.A.D. at 488-89. Here, Region 2 identifies no aspect of the permit or decision as deficient or contrary to law. The Motion thus fails to state with particularity, as required by 40 C.F.R. § 124.19(f)(2), the grounds and legal basis for remand.

Indeed, as underscored by Region 2 in the Final Permit Letter and other permitting documents, the Final Permit was validly issued, fully supported, and in accordance with applicable statutes and regulations and notice and comment requirements. *See, e.g.*, Final Permit Letter at 2 (“Enclosed with this letter is the signed final OCS air permit . . . , which the EPA determined meets all applicable requirements of the OCS air regulations at 40 C.F.R. Part 55 and the CAA.”) (emphasis in original); Document A.3 in the Docket, U.S. EPA, Region 2, Response to Public Comments, Outer Continental Shelf Air Permit for the Atlantic Shores Offshore Wind

³ 40 C.F.R. § 55.1 (“Section 328(a)(1) of the Clean Air Act (“the Act”), requires the Environmental Protection Agency (“EPA”) to establish requirements to control air pollution from outer continental shelf (“OCS”) sources in order to attain and maintain Federal and State ambient air quality standards and to comply with the provisions of part C of title I of the Act.”); *id.* (“In implementing, enforcing and revising this rule . . . , the Administrator will ensure that there is a rational relationship to the attainment and maintenance of Federal and State ambient air quality standards and the requirements of part C of title I, and that the rule is not used for the purpose of preventing exploration and development of the OCS.”).

Project 1, LLC, Atlantic Shores Project 1 and Project 2, at 1-2 (Sept. 29, 2024)⁴ (“Response to Comments”) (“After a careful review of all the public comments received, the EPA is issuing the final OCS air permit (“final permit”) for the Atlantic Shores Project.”).

Most notably, in this very proceeding, Region 2 has defended the Final Permit without reservation. *See* EPA Region 2’s Response to Petition for Review, at 6 (“The Region’s OCS permit decision . . . is fully supported by the record, including as detailed in the Response to Comments (RTC) that accompanied the permit.”). It is thus unsurprising that nowhere in its Motion does Region 2 assert that there were any errors in its detailed analysis or any new information or evidence that would justify a withdrawal of the Final Permit. Under the EAB’s well-established remand factors, remand should be foreclosed by Region 2’s failure and inability to identify any condition in the Final Permit it is seeking to substantively change or any element of the Final Permit decision it wishes to reconsider.

2. By Its Terms, the Presidential Memorandum Does Not Provide Good Cause for Remanding the Final Permit.

Region 2’s Motion fails not only because it does not satisfy EAB’s remand standards, but also because its sole stated basis for remand—the Presidential Memorandum—does not require or even allow Region 2 to withdraw or reconsider the Final Permit.

a. Section 2(a) of the Memorandum Does Not Justify Remand.

⁴ The Response to Comments is available at: [https://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/Attachments%20By%20ParentFilingId/24D993DED1978B4985258BCD004807FE/\\$FILE/Attachment%205-%20EPA%20Response%20to%20Comments.pdf](https://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/Attachments%20By%20ParentFilingId/24D993DED1978B4985258BCD004807FE/$FILE/Attachment%205-%20EPA%20Response%20to%20Comments.pdf).

i. The Memorandum Does Not Direct Withdrawal of Already-Issued Permits.

The Presidential Memorandum does not direct federal agencies to withdraw, remand, or re-open already-issued permits. Rather, Section 2(a), states that the EPA “shall not *issue new or renewed . . . permits . . . for onshore or offshore wind projects pending the completion of a comprehensive assessment and review of Federal wind leasing and permitting practices.*” *See* 90 Fed. Reg. at 8364 (emphasis added).

The Final Permit before the EAB in this proceeding is not a “new” permit “issued” after the date of the Presidential Memorandum. To the contrary, in Region 2’s own words, it was a “final permit” issued on September 30, 2024. *See* Final Permit Letter at 2; *see also* EPA Region 2’s Response to Petition for Review at 7 (“On September 30, 2024, Region 2 issued a *final* permit (the Permit.)”) (emphasis added). Consistent with Region 2’s description of the permit as “final,” EPA’s own guidance makes clear that “[u]nder EPA’s procedural regulations, a permit is ‘issued’ when the Regional Office makes a final decision to grant the application, not when the permit becomes effective or final agency action.”⁵ EPA, Off. of Air & Radiation, PSD and Title V Permitting Guidance for Greenhouse Gases (Mar. 2011) at 3 n.6 (“GHG PSD Permitting Guidance”); *see also id.* (“Consistent with its regulations in 40 CFR Part 124, EPA uses the term ‘issued’ to describe the time when a permitting authority issues a PSD permit after public comment on a draft permit . . . the date a permit is issued is not necessarily the same as the date the permit becomes effective or final agency action for purposes of judicial review.”).

⁵ This guidance is available at: <https://www.epa.gov/sites/default/files/2015-08/documents/ghgguid.pdf>. The fact that the Final Permit is not yet judicially reviewable, *see* 42 U.S.C. § 7607(b); 5 U.S.C. § 704; 40 C.F.R. § 124.19(l), does not change the fact that it was a “final permit” issued before the Presidential Memorandum was issued and thus cannot be “new” within the meaning of the Presidential Memorandum.

Thus, the ongoing nature of these EAB appeal proceedings does not change the fact that Region 2 “issued” a “final permit” months prior to the Presidential Memorandum. If the EAB denies SLBI’s petition for review on the merits, the Final Permit will remain intact. The Final Permit is thus not the type of prospective permit action contemplated by Section 2(a) of the Presidential Memorandum—which by its terms applies to “new” permits “issued” after the date of the Memorandum. Remand is thus not appropriate under the terms of the Presidential Memorandum.

ii. The Presidential Memorandum Does Not Encompass the OCS Air Permitting Decision at Issue Here.

The Presidential Memorandum is inapplicable not only because the Final Permit is not “new,” but also because the OCS air permitting decision it reflects is not within the substantive scope of the Memorandum.

As purported support for its Motion, Region 2 points to the direction in the Presidential Memorandum for agencies to complete “a comprehensive assessment and review of Federal wind leasing and permitting practices.” 90 Fed. Reg. at 8364. Region 2 explains that it plans to include the permit in that review, and “[a]s part of this review, Region 2 intends to confer with other executive branch agencies regarding further evaluation of various impacts that may result from the Project, including impacts on birds, wildlife, fishing, and other relevant environmental concerns described in the Presidential Memorandum.” Region 2 Motion at 4.⁶ According to the Presidential Memorandum, this assessment “shall consider the environmental impact of onshore and offshore wind projects upon wildlife, including, but not limited to, birds and marine

⁶ As described herein, the Final Permit is a validly issued final permit and is not covered under the terms of section 2(a) of the Presidential Memorandum. EAB’s evaluation of the merits of SLBI’s petition is thus independent of the Presidential Memorandum and a merits ruling by EAB does not limit EPA’s ability to participate in the assessment for new permits.

mammals . . . [and] economic costs associated with the intermittent generation of electricity and the effect of subsidies on the viability of the wind industry.” 90 Fed. Reg. at 8364.

The Memorandum’s directive calls for assessment of impacts outside the scope of EPA’s air permitting decision. *See In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 161-62 (EAB 1999) (stating that the Board’s jurisdiction, and thus review power, is limited, extending only to those issues that are directly related to permit conditions that implement the federal PSD program.); *see also In re Shell Offshore, Inc., Kulluk Drilling Unit and Frontier Discoverer Drilling Unit*, 13 E.A.D. 357, 405 n.66 (EAB 2007) (citing *Knauf*, 8 E.A.D. at 161-62) (with respect to comments regarding bowhead whale migration patterns and subsistence hunting concluding that “[i]ssues such as impacts on subsistence hunting and fishing are outside the scope of the PSD program and therefore the Board’s jurisdiction. . . . other regulatory programs are in place to address Petitioners’ concerns in this regard.”).

Region 2 itself emphasized over-and-over again in its Response to Comments on the Final Permit that issues related to wildlife, fishing, navigational safety, national security, and economic and commercial issues, are *not* within scope of Region 2’s OCS permitting action under the CAA, and/or had already been properly considered in a final decision by the Bureau of Ocean Energy Management (“BOEM”) as lead agency for the Project in the form of a final Record of Decision (“ROD”) adopting the National Environmental Policy Act (“NEPA”) review and authorizing approval of the Project’s Construction and Operations Plan (“COP”).⁷ For

⁷ Pursuant to the Outer Continental Shelf Lands Act (“OCSLA”), BOEM must approve an OCS developer’s COP and is responsible for conducting an environmental review and issuing the ROD on the resulting final Environmental Impact Statement (“EIS”) under NEPA prior to the construction of an offshore wind project. 30 C.F.R. §§ 585.601(b), 585.620, 585.628(b); Document 1.3 in the Docket, U.S. EPA, Region 2, Fact Sheet for an Outer Continental Shelf Air Permit to Construct and Operate Atlantic Shores Offshore Wind Project 1, LLC, Atlantic Shores Project 1 and Project 2, at 63 (July 11, 2024) (“Fact Sheet”). In May 2024, after an extensive, multi-year environmental review, BOEM published a final EIS (“FEIS”) under NEPA. 89 Fed. Reg. 47,174 (May 31, 2024). In

instance, in response to comments regarding impacts to wildlife, including marine mammals, EPA repeatedly explained that these issues were outside the scope of its decision to issue the OCS air permit, and/or that final actions by BOEM and other relevant agencies had already analyzed those impacts.⁸ And, Region 2’s Response to Comments similarly hammered this same point with respect to the other issues referenced by the Presidential Memorandum—that fishing, navigational safety, national security, and economic and commercial concerns were outside the scope of Region 2’s decision on the OCS air permit, and had been already analyzed by BOEM in final agency decisions.⁹

July 2024, BOEM issued a ROD documenting its adoption of the FEIS, its decision to approve the COP, and its findings as to other statutory requirements. 89 Fed. Reg. 55,977, 55,977-78 (July 8, 2024). BOEM formally approved the COP on October 1, 2024. BOEM has already fully and finally considered the Project’s impacts on wildlife, fishing, navigational safety, transportation, national security, and economic and commercial issues, issues through its NEPA analysis and its COP approval under OCSLA, which requires BOEM to consider a myriad of interests, including safety, environment, national security, and competing uses. 43 U.S.C. § 1337(p)(4). BOEM’s Record of Decision is available at <https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Atlantic%20Shores%20South%20ROD.pdf>. EPA’s Fact Sheet on the Final Permit is available at: [https://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/Attachments%20By%20ParentFilingId/2CFA4B4C41304B7E85258BCD004806A7/\\$FILE/Attachment%203%20-%20EPA%20Fact%20Sheet.pdf](https://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/Attachments%20By%20ParentFilingId/2CFA4B4C41304B7E85258BCD004806A7/$FILE/Attachment%203%20-%20EPA%20Fact%20Sheet.pdf).

⁸ See Response to Comments at 13 (noting that “[t]he protection of marine mammals falls under the jurisdiction of the National Marine Fisheries Services (NMFS)” and that BOEM’s FEIS and ROD contain information as to how “NMFS has addressed its responsibilities with respect to the protection of marine mammals and sea turtles.”); *id.* at 14 (in response to comment regarding impacts to birds, whales, and sea life, stating that “[t]he issues raised by the commenter are addressed in the Record of Decision (ROD)”); *id.* at 15 (with respect to impacts on marine fish and mammals and damage to onshore wildlife, “[i]t is not clear how these comments pertain to this permitting action. . . . BOEM’s FEIS and ROD include discussions of potential impacts on marine mammals, and requirements relate to mitigating impacts. . . .”); *id.* at 29 (with respect to bird collisions, “[t]his comment is also outside the scope of this permitting action under the Clean Air Act. However, EPA notes that BOEM’s Record of Decision requires the project to have plans to minimize adverse effects to birds”); *id.* at 27 (“An environmental analysis of the project (including components subject to the OCS air permit . . .) has been conducted by BOEM, including analysis of air impacts and impacts on birds and other wildlife.”).

⁹ See Response to Comments at 14 (“Shellfish habitat protection is under the jurisdiction of the US Army Corp of Engineers and specific conditions related to shellfish can be found in . . . BOEM’s Record of Decision . . . ; shellfish impacts are also discussed in BOEM’s FEIS.”); *id.* at 14 (in response to comment regarding “damage to our ecosystems, fishing industries, sea life, navigation difficulties, etc.”, explaining that “[t]hese issues are outside the scope of EPA’s action on Atlantic Shores’ OCS permit application under the Clean Air Act. . . . many of these issues are discussed and addressed in BOEM’s FEIS and Record of Decision”); *id.* at 17-18 (with respect to comment regarding livelihoods, vessel traffic, water quality, and property values, the “[e]xpected and possible impacts from the project of the types raised by the commenter are discussed and addressed in BOEM’s [FEIS] and the [ROD].”); *id.* at 21 (in response to comments regarding tourism and the economy, “[t]he issues raised by the commenter do not

Moreover, to the extent certain environmental effects of Region 2’s action to issue an OCS air permit for the Project are subject to consultation requirements pursuant to statutes like the Endangered Species Act (“ESA”) and the Magnuson-Stevens Fishery Conservation and Management Act (“MSA”), this also does not support remand, as Region 2 designated BOEM as the lead Federal agency for purposes of fulfilling its consultation obligations under these statutes and such consultation is completed and final.¹⁰ See Fact Sheet at 63-64; see also Response to Comments at 33-34.¹¹

In other words, Region 2 is now seeking a voluntary remand of the Final Permit to purportedly consider the *very same issues* that Region 2 previously (and correctly) concluded were *outside* the scope of its permitting decision under the Clean Air Act and/or that have already been analyzed in a final agency action by the lead agency—BOEM. Accordingly, remanding the

fall under the purview of the Clean Air Act”); *id.* at 22 (“This comment regarding the cost of electricity is outside the scope of EPA’s action on Atlantic Shores’ OCS permit application under the Clean Air Act.”); *id.* at 23 (in response to economic concerns, “EPA’s role is to ensure that the proposed project meets all applicable Clean Air Act requirements. The Clean Air Act does not regulate the issues raised by this commenter.”); *id.* at 24 (“Commenter expresses generalized concern about the environmental, economic, and wildlife impacts of this project. . . . EPA notes that EPA’s role in this proceeding is to ensure that the proposed project meets all applicable Clean Air Act requirements. The remainder of this comment . . . is outside the scope of the Clean Air Act.”); *id.* at 104 (with respect to concern regarding the intermittency of wind energy, “[t]his comment is not under the purview of the Clean Air Act and this OCS air permit”). *Cf. id.* at 20 (“To the extent the commenter seeks an immediate moratorium on all offshore wind development, this comment is beyond the scope of the current permitting action.”).

¹⁰ For instance, BOEM consulted on the Project with both the National Marine Fisheries Service (“NMFS”) and the U.S. Fish and Wildlife Service (“USFWS”) and prepared biological assessments for listed species and designated critical habitat under their respective jurisdictions. Consultation with NMFS and USFWS pursuant to Section 7 of the ESA, 16 U.S.C. § 1536, concluded with the issuance of final Biological Opinions from each agency in December 2023. See BOEM, FEIS, App. A at A-6, available at https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/AtlanticShoresSouth_AppA_Required%20Permits%20and%20Consultations_FEIS.pdf. The fact that ESA consultation was conducted and final before the issuance of the Final Permit distinguishes this proceeding from ones—such as *Desert Rock*—in which EAB found it was appropriate to remand for failing to conduct consultation under the ESA. See *Desert Rock*, 14 E.A.D. at 507-508.

¹¹ “The ESA regulations at 50 C.F.R. § 402.07, the MSFCMA regulations at 50 C.F.R. § 600.920(b), and the NHPA regulations at 36 C.F.R. § 800.2(a)(2) provide that where more than one federal agency is involved in an action, the consultation requirements may be fulfilled by a designated lead agency on behalf of itself and the other involved agencies.” Fact Sheet at 64.

Final Permit on those grounds would be futile for those very same reasons: Region 2 either lacks authority to consider those issues in issuing the permit and/or those issues have already been considered in final decisions by BOEM or other agencies. Thus, it would be improper to remand the Final Permit when the scope of Region 2's analysis under the CAA does not fall under the scope of issues identified in the Presidential Memorandum.¹² Accordingly, the assessment required by Section 2(a) of the Memorandum does not provide good cause for granting the Motion.

b. Section 2(d) of the Memorandum Does Not Justify Remand.

Section 2(d) of the Presidential Memorandum also does not present a basis for remand in this appeal.¹³ As support for its Motion, Region 2 explains that “Section 2(d) of the Presidential Memorandum allows for the Attorney General of the United States to, as appropriate and consistent with applicable law, provide notice of the Presidential Memorandum to any court with jurisdiction over pending litigation related to any aspect of the Federal permitting of offshore wind projects and seek appropriate relief consistent with this order, pending the completion of the assessment described in Section 2(a).” Motion at 4-5.

¹² And, as discussed above, *infra* Argument Section I.A.2.a.i, as already issued final approvals, neither the Final Permit nor any final decision by BOEM fall under the scope of the Presidential Memorandum, which only applies to issuance of “new” or “renewed” permits.

¹³ Assuming, *arguendo*, that the Presidential Memorandum directs EPA to remand validly issued final permits (which Atlantic Shores strongly disagrees with), the Presidential Memorandum is *ultra vires* as applied by EPA Region 2 because it has the effect of requiring remand for reasons outside the scope of the CAA OCS air permitting decision. Further, as discussed below, *infra* Argument Section I.A.3., that the Presidential Memorandum would require the remand of a validly issued permit without any articulated legal basis within the scope of the CAA or OCS air regulations, effectively circumvents the CAA's one-year statutory deadline specifically designed to prevent EPA from delaying air construction permits.

As with the other provisions of the Presidential Memorandum, Section 2(d) does not provide good cause for voluntary remand of the Final Permit. Section 2(d) *permits* the *Attorney General* “as appropriate and consistent with applicable law” to provide notice of the Presidential Memorandum to a court with jurisdiction over pending litigation, and *permits* the *Attorney General*, in his discretion, to seek a stay of litigation or “other appropriate relief” pending the actions identified elsewhere in the Presidential Memorandum. 90 Fed. Reg. at 8364. Section 2(d) does not authorize, let alone require, any other agency of the United States to seek a stay of litigation and it does not, by its terms, apply to administrative proceedings (as acknowledged by Region 2). Contrary to Region 2’s argument, Section 2(d) does not justify its Motion for Remand.

3. Moving For Voluntary Remand Without Good Cause Has the Effect of Circumventing The Statutory Timeframe Provided in Section 165(c) of the CAA and Contravening the Terms of Atlantic Shores’ Lease.

Without a basis for remand that is legally cognizable under the CAA, Region 2’s Motion (1) has the improper effect of circumventing the strict timeline included in the CAA for EPA action on air construction permits, and (2) also contravenes the government’s obligations under the terms of Atlantic Shores’ OCS lease.

First, Section 165(c) of the CAA provides that “[a]ny completed permit application . . . for a major emitting facility . . . shall be granted or denied not later than one year after the date of filing of such completed application.” 42 U.S.C.A. § 7475(c).¹⁴ Congress included Section

¹⁴ Section 328(a) of the CAA, 42 U.S.C. § 7627(a), required the EPA Administrator to establish, by rule, requirements to control air pollution from OCS sources to attain and maintain Federal and State ambient air quality standards and comply with the provisions of part C of title I of the Act. Part C of title I of the Act contains the PSD requirements. *See also* 40 C.F.R. § 55.6(a)(3) (“The Administrator will follow the applicable procedures of 40 CFR part 71 or 40 CFR part 124 in processing applications under this part. When using 40 CFR part 124, the Administrator will follow the procedures used to issue Prevention of Significant Deterioration (“PSD”) permits.”).

165(c) as part of the 1977 Amendments to the CAA to address concerns that the PSD program could otherwise become a vehicle for delaying construction projects. In the Senate Committee on Public Works Report, a key part of the legislative history of the 1977 Amendments, Congress stated:

Inherent in any review-and-permit process is the opportunity for delay. The Committee does not intend that the permit process to prevent significant deterioration should become a vehicle for inaction and delay. To the contrary, the States and Federal agencies must do all that is feasible to move quickly and responsibly on permit applications and those studies necessary to judge the impacts of an application. *Nothing could be more detrimental to the intent of this section and the integrity of this Act than to have the process encumbered by bureaucratic delay.*

S. Rep. No. 94-717, at 23 (1976) (emphasis added).¹⁵ EPA acknowledged this statutory requirement in its Response to Comments: “EPA is obligated under the Clean Air Act (CAA) to make a final permit decision (grant or deny) on a submitted permit application within one year of the determination that the application is complete. . . . If it meets the applicable requirements, EPA must issue the permit.” Response to Comments at 19.

Here, Region 2 has identified no basis for concluding the Final Permit does not comply with the CAA or the OCS air regulations. It is thus inappropriate to remand the Final Permit without cause—citing only vague, inapplicable policy reasons not grounded in the applicable legal authority—in order to effectively circumvent the clock on the statutorily mandated one-year permit review period. Indeed, the lack of support in Region 2’s Motion raises the specter of other motivations to improperly delay and/or jeopardize this Project for reasons that are not

¹⁵ See *In re Energy Answers Arecibo, LLC*, 16 E.A.D. 294, 324 n.20 (EAB 2014) (rejecting request to reopen public comment period because, “[a]s the Board has previously explained, PSD permit appeals are time-sensitive in light of the one year deadline in section 165(c) of the Clean Air Act, 42 U.S.C. § 7475(c)”); see also *Hawaiian Elec. Co. v. U.S. E.P.A.*, 723 F.2d 1440, 1446 (9th Cir. 1984) (“In fact, Congress attempted to avoid excessive bureaucratic contention by requiring EPA to make a decision on all PSD permit applications within one year.”).

cognizable under the CAA. This is precisely the type of impermissible agency action that Section 165(c) of the CAA was intended to prevent.

It has already been nearly two and a half years since Atlantic Shores applied for the OCS air permit and over eighteen months since Region 2 determined Atlantic Shores permit application was complete.¹⁶ As Congress wisely recognized in enacting Section 165(c), permitting certainty and realistic timeframes for agency action on construction permits are essential to avoid encumbering projects with improper obstacles and bureaucratic delays.

Furthermore, a remand here would be contrary to the terms of Atlantic Shores' lease for the Project, which obligates the United States to grant approvals otherwise permitted by law when necessary to enable Atlantic Shores to engage in COP approved activities. *See* Lease Number OCS-A 0499, §§ 2(a), 6 (the "Lease"); *see also* 30 C.F.R. § 585.200 (describing rights granted with a lease issued under OCSLA).

Atlantic Shores' ability to exercise its fully vested Lease rights depends on permit certainty and timely approvals of the various actions Atlantic Shores must take to implement and comply with the COP, the Lease, and the laws incorporated by reference therein. A policy of remanding validly issued, final approvals when they are otherwise permitted or required by law would effectively repudiate the United States' contractual obligations under the Lease. *See Mobil Oil Expl. & Producing Se., Inc. v. United States*, 530 U.S. 604, 607-08, 620-21 (2000); *Metcalf Constr. Co., v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014) ("[A]cts or omissions that, though not proscribed by the contract expressly, are inconsistent with the contract's purpose and

¹⁶ Document 2.3 in the Docket, Letter from Suilin Chan, Supervisor Permitting Section, Air Programs Branch, EPA Region 2, to Kyle Hillberg, Permitting Lead, Atlantic Shores Offshore Wind (Aug. 21, 2023).

deprive the other party of the contemplated value” violate the implied covenant of good faith and fair dealing) (citations omitted). Such a policy would have disastrous consequences for all concerned, including the United States, by jeopardizing completion of the Project and creating a cloud of uncertainty over all energy permitting.

In sum, granting a remand here would contravene the plain language of the CAA and Congress’ express intent that air construction permitting not be used as a vehicle to delay or kill projects, as well as breach fully-vested leasehold interests.

B. The Motion is Not in the Interest of Administrative or Judicial Efficiency.

Region 2’s Motion is not in the interest of administrative or judicial efficiency given that SLBI’s petition has been fully briefed before the Board as of November 5, 2024. The Board has stated that “in cases where significant time has passed following the submission of final briefs by all the parties, the Board may be in a position to issue a final decision at the time of a request for voluntary remand.” *Desert Rock*, 14 E.A.D. at 496. Courts have also found that last-minute motions for remand are not in the interest of administrative efficiency. *Lutheran Church-Missouri Synod v. F.C.C.*, 141 F.3d 344, 349 (D.C. Cir. 1998) (denying agency’s “novel, last second motion to remand” based on new post-argument agency policy statement that was intended to apply prospectively). That is exactly what Region 2 seeks in this proceeding.

In the past four months, the Board has had the opportunity to make headway in reviewing SLBI’s petition, and the merits are ready for a final decision at this time. Particularly where, as here, Region 2 has identified no specific issue within the scope of its CAA review that it seeks to change or reconsider, administrative and judicial efficiency would be best served by the Board issuing a ruling on the merits rather than remanding to Region 2. Under these circumstances, it is inappropriate to reopen and indefinitely delay a validly issued OCS air permit that is ripe for a

ruling on the merits by the Board. A remand in this context would be contrary to EPA's regulations that provide the Board "do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal" 40 C.F.R. § 124.19(n).

In the interests of judicial and administrative efficiency, Region 2's Motion for Voluntary Remand should be denied.

CONCLUSION

For the foregoing reasons, Atlantic Shores respectfully requests that the Board deny the Motion and rule on the merits of SLBI's petition based on the administrative record and the fully-briefed issues before the Board. No additional briefing is required for the Board to render its decision.

Date: March 7, 2025

Respectfully submitted,

/s/ Hayley Fink

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STATEMENT OF COMPLIANCE WITH WORD COUNT

I hereby certify that Atlantic Shores Offshore Wind, LLC's Opposition to EPA Region 2's Motion for Voluntary Remand contains 6,222 words, as calculated using Microsoft Word word-processing software.

/s/ Hayley Fink _____
Hayley Fink

Table of Attachments

- 1) Attachment 1: Letter from Richard Ruvo, Director Air and Radiation Division, EPA Region 2, to Jennifer Daniels, Vice President, Atlantic Shores Offshore Wind, LLC (Sept. 29, 2024)
- 2) Attachment 2: 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” issued on January 20, 2025

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

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Atlantic Shores Offshore Wind, LLC’s Opposition to EPA Region 2’s Motion for Voluntary Remand was electronically filed with the Clerk of the Environmental Appeals Board using the EAB eFiling System, and was served via electronic mail on:

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