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	)	
	)	

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

ATLANTIC SHORES OFFSHORE WIND, LLC's MOTION FOR RECONSIDERATION

Pursuant to 40 C.F.R. § 124.19(m), Atlantic Shores Offshore Wind, LLC and Atlantic Shores Offshore Wind Project 1, LLC ("Atlantic Shores"), respectfully submits this Motion for Reconsideration of the Environmental Appeals Board's (the "Board" or "EAB") March 14, 2025 Order ("Order") granting the United States Environmental Protection Agency ("EPA") Region 2's ("Region 2") Motion for Voluntary Remand ("Motion for Remand") of Atlantic Shores' Outer Continental Shelf ("OCS") air permit ("Final Permit"). Petitioner Save Long Beach Island, Inc. and EPA Region 2 oppose this Motion for Reconsideration.

It is hard to overstate the scope of the Order's adverse impact. At stake are hundreds of millions of dollars already invested in Atlantic Shores Project 1 and Project 2 (the "Project"), critical jobs for the state of New Jersey, and a reliable source of energy at a time when EPA's Administrator has emphasized the importance of rolling back regulatory costs and uncertainty to "unleash American energy . . . [and] give power back to [the] [S]tates[.]"[1] If it stands, EAB's decision to remand the Final Permit back to Region 2 for an indefinite period of vaguely-defined reevaluation, untethered to any of the conditions or elements of the Final Permit itself, will exacerbate the EPA's ongoing violation of the one-year permitting action deadline under Clean Air Action ("CAA") Section 165(c), introduce significant uncertainty into the air construction permitting process, and needlessly delay development of energy resources that the nation clearly needs.

Atlantic Shores respectfully requests that the EAB reconsider its Order for three independent but interrelated reasons. First, the Order misinterpreted the unambiguous statutory

[1] U.S. Environmental Protection Agency, EPA Launches Biggest Deregulatory Action in U.S. History (Mar. 12, 2025), available at https://www.epa.gov/newsreleases/epa-launches-biggest-deregulatory-action-us-history.

timeframe in CAA Section 165(c) in determining that the timeframe has no bearing on a voluntary remand. Contrary to that interpretation, the unambiguous statutory language and purpose—to provide certainty in the air permitting process—necessarily constrains both Region 2 in seeking remand and the EAB in granting it.

Second, the Order declines to follow the well-established requirement that a voluntary remand must be predicated on the identification of a permit condition or element of the permit decision that the EPA has decided to change or reconsider, or other legally cognizable rationale for remand. By instead allowing the agency to seek remand whenever it claims to be "reevaluating its permit decision," for any reason—no matter how vague and unsupported—the EAB has disregarded the requirements of reasoned decision-making and due process. *See* Order at 4. Third, by allowing remand based solely on Region 2's desire to implement the Presidential Memorandum on wind power,[2] the Order demonstrates that extraneous factors outside CAA-mandated permitting standards and procedures have influenced the agency's decision-making.

I. Standard of Review

A motion for reconsideration must "set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." 40 C.F.R. § 124.19(m). A motion for reconsideration will be granted where the Board has made a "demonstrable error," such as a mistake of law or fact. *In re Missouri Permit No. MO-G491369*, NPDES Appeal No. 17-01 at 2 (EAB Nov. 2, 2017); *In re Bear Lake Props., LLC*, UIC Appeal No. 11-03 at 2-3 (EAB July 26, 2012) (Order Denying Motion for Partial Reconsideration) (citing cases). The reconsideration process, "should not be regarded as an opportunity to reargue the case in a more convincing fashion." *In re Town of Ashland*

[2] 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).

Wastewater Treatment Facility, NPDES Appeal No. 00-15, slip op. at 2 (EAB Apr. 9, 2001). The Third Circuit[3] further provides that "[t]he purpose of a motion for reconsideration . . . is to correct manifest errors of law or fact or to present newly discovered evidence." *Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999) (quoting *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985))

> Accordingly, a judgment may be altered or amended if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion . . . ; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice.

See also Howard Hess Dental Lab'ys Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 251 (3d Cir. 2010) (citation omitted).

II. Argument

A. EAB Erroneously Concluded that the Unambiguous Mandatory One-Year Deadline Under CAA § 165(c) Does Not Apply to Remand.

The Board rejected Atlantic Shores' argument that remand impermissibly circumvents the one-year mandatory deadline for granting or denying an air construction permit under CAA Section 165(c), 42 U.S.C. § 7475(c), concluding that "nothing in section 165(c) prohibits the Board from granting a motion for voluntary remand," and that timeliness challenges (i.e., claims that EPA has violated the one-year deadline) under Section 165(c) are outside the scope of Board review. Order at 8. The EAB's refusal to consider the Section 165(c) deadline as a constraint on remand is demonstrable error.

[3] Judicial court precedent is pertinent here as review of EPA and EAB actions are subject to review in Article III courts. *See* 42 U.S.C. § 7607(b) (providing for review of EPA action in the court of appeals); *see also* 42 U.S.C. § 7604(a)(2) (providing for citizen suits to compel mandatory EPA action).

1. CAA Section 165(c) Squarely and Unambiguously Applies.

Contrary to the premise of the EAB's determination, the plain language of Section 165(c) prohibits the action the EAB has taken here.[4] Section 165(c) 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. § 7475(c). Section 165(c) is "patently clear and unambiguous." *Avenal Power Ctr., LLC v. EPA*, 787 F. Supp. 2d 1, 4 (D.D.C. 2011).[5] In light of EAB's determination that issuance of a final permit cannot occur until after EAB's administrative proceedings are exhausted, Order at 7-8, EAB shares responsibility for achieving this one year statutory deadline. EAB, after all, is "within the Agency" charged with CAA enforcement and compliance. 40 C.F.R. § 124.2. The only logical interpretation of Section 165(c) is that Region 2 may not seek, and EAB may not grant, a voluntary remand that violates or exacerbates the violation of the statutory deadline.

Caselaw supports the proposition that EPA cannot evade the plain language of Section 165(c) through the use of its EAB appeals procedures. In *Avenal Power*, a power plant project seeking an air construction permit filed a suit in federal district court to compel the agency to meet its obligations under Section 165(c) and issue a final permit, after waiting two years for EPA to issue a decision on the permit. 787 F. Supp. 2d at 3. The EPA maintained that the court could order

[4] The purpose of the statute also supports this position. Congress adopted Section 165(c) to prevent the air construction permitting program from becoming a vehicle for delaying construction projects. S. Rep. No. 94-717, at 23 (1976) ("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 . . . . *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.*") (emphasis added).

[5] Even if EAB or Region 2 believe that Section 165(c) is ambiguous—an argument the plain language of the statute belies and that the court in *Avenal* squarely rejected—deference to the agency would be inappropriate. *See Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412 (2024) (holding that courts must ensure that an agency acts within its statutory authority and "need not and under the [Administrative Procedure Act] may not defer to an agency interpretation of law simply because a statute is ambiguous.").

EPA to issue that decision, but that the EAB appeals process would then still need to subsequently apply to that decision, further delaying issuance of a permit decision that constituted final agency action. The district court explained that:

> [t]he EPA argues, in effect, that this regulatory [EAB administrative appeals] process trumps Congress's mandate and relieves the Administrator of complying with it until the EAB renders the Agency's final decision. . . In essence, the EPA contends that Congress's statutory mandate is subservient to EPA's regulatory review process[.]

Id. at 4. Indeed, rejecting that argument, the *Avenal* decision exclaimed: "How absurd!" *Id.*

As the *Avenal* Court underscored, "[i]t is axiomatic that an act of Congress that is patently clear and unambiguous—such as this requirement in the CAA [Section 165(c)]—cannot be overridden by a regulatory process created for the convenience of an Administrator[.]" *Avenal Power*, 787 F. Supp. 2d at 4; *see also Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 213–14 (1976) ("The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." (citation omitted)); *Joy Technologies, Inc. v. Secretary of Labor*, 99 F.3d 991, 995 (10th Cir. 1996) (explaining that a regulation should be read, if possible, so as not to conflict with the statute it implements). Thus, "[t]o the extent that a regulatory process frustrates or renders meaningless a Congressional statutory mandate, it must yield to Congress's will." *Avenal Power*, 787 F. Supp. 2d at 4.

Put simply, EPA—including the EAB itself—is under an obligation to ensure that the intent of Congress is not thwarted, and that the agency meets mandatory, unambiguous statutory deadlines, regardless of the EAB's own internal regulations and procedures. EAB's suggestion that only U.S. District Courts may enforce Section 165(c) by compelling the EPA to comply, *see* Order at 8, simply highlights the flaw in its interpretation. That a court can compel nondiscretionary agency action unreasonably delayed, 42 U.S.C. § 7604(a)(2), does not mean that the agency can

ignore its nondiscretionary duties in the first instance. Reconsideration is warranted to enable the EAB to carry out the nondiscretionary requirements of Section 165(c) in evaluating a voluntary remand.

2. Neither EAB Regulations nor the Presidential Memorandum Can Excuse Noncompliance with Section 165(c).

To the extent the EAB concluded that the EAB's own regulations or the Presidential Memorandum excuse compliance with Section 165(c), this too is clear error. As the court found in *Avenal*:

> [u]nfortunately, when the Administrator created that [EAB appeals] process she failed to build into it the temporal requirement that the EAB's decision be completed within the CAA's statutorily mandated one-year period. *See* 40 C.F.R. § 124.19. As a result, the EPA put in place a review process that can and has, in this case, rendered meaningless this Congressional one-year mandate.

Avenal Power, 787 F. Supp. 2d at 3–4; *see also id.* at 4 n.2 ("The EPA's self-serving misinterpretation of Congress's [one-year] mandate is too clever by half and an obvious effort to protect its regulatory [EAB appeals] process at the expense of Congress's clear intention."). Thus, EAB's view that Section 165(c) does not constrain voluntary remand of a CAA air construction permit would potentially render the EAB administrative appeal regulation *ultra vires* where, as here, it permits and exacerbates an ongoing violation of the Section 165(c) deadline. *See Avenal Power*, 787 F. Supp. 2d at 4 ("Thus, while 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.") (emphasis in original). EAB's interpretation is thus clear error because it interprets its regulations in a manner that contravenes the plain language of a statutory mandate. *Avenal Power*, 787 F. Supp. 2d at 4; *see also Loper Bright Enterprises*, 603 U.S. at 412.

Similarly, EAB's interpretation that the Presidential Memorandum applies to—and justifies remand of—CAA air construction permits (like the Final Permit) that are already well past Section 165(c)'s one-year statutory deadline, is a clear error of law. Both Region 2's and the EAB's conclusion that the recent Presidential Memorandum provides a valid basis for Region 2's Motion for Remand plainly runs afoul of Section 165(c) for the reasons described above. Executive Orders may not override a statute duly passed by Congress. *See, e.g., City & Cnty. of S. F. v. Trump*, 897 F.3d 1225, 1232 (9th Cir. 2018) (citing *Clinton v. City of New York*, 524 U.S. 417, 438 (1998)) (finding Executive Order unconstitutional and explaining that "as the Supreme Court has observed, '[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.'"). No doubt, for this reason, by its own terms, the Presidential Memorandum is limited by applicable law. *See* 90 Fed. Reg. 8363, 8364 (stating that "[t]his memorandum shall be implemented consistent with applicable law . . . ."). *Cf. City & Cnty. of S. F. v. Trump*, 897 F.3d at 1239-40 (finding that a "consistent with law" clause in an Executive Order did not save it from being deemed unconstitutional). EAB's Order constitutes demonstrable error, because it fails to apply the Presidential Memorandum consistent with applicable law.

In sum, reconsideration is merited because the Board erroneously failed to account for, misinterpreted, and violated CAA Section 165(c)'s one-year timeframe for acting on air construction permits. EAB's conclusion that "nothing in section 165(c) prohibits the Board from granting a motion for voluntary remand," Order at 8 (internal quotations omitted)[6]—constitutes clear error warranting reconsideration.

[6] The EAB Order cites to a prior decision in *Desert Rock* for this proposition. *See* Order at 8 (citing *In re: Desert Rock Energy Co., LLC*, 14 E.A.D. 484, 501 (EAB 2009)). However, *Desert Rock* was decided in 2009, two years before the 2011 federal court decision in *Avenal*, raising a serious concern that the EAB is basing its decision in the Order on a prior EAB decision that is no longer good law as it relates to the interpretation of the requirements of Section 165(c). Moreover, the facts of the *Desert Rock* case are easily distinguishable. In *Desert Rock*, EPA Region 9 identified specific

3. As Applied to the Final Permit, the Order Violates Section 165(c).

Based on its erroneous determination that Section 165(c) does not prevent remand and its claim that the timeliness of the EPA's action is "outside the scope of Board review," Order at 8, EAB erred in failing to acknowledge that Section 165(c)'s deadline had already passed as applied to the Final Permit, and that remand would further exacerbate this delay. The procedural history in this case, as well as the EAB's own description of the finality and significance of EPA Region 2's issuance of the Final Permit, reflect this infirmity.

Region 2 determined that Atlantic Shores' permit application was complete on August 21, 2023. *See* Letter from Suilin Chan, Supervisor Permitting Section, Air Programs Branch, EPA Region 2, to Kyle Hilberg, Permitting Lead, Atlantic Shores Offshore Wind (Aug. 21, 2023).[7] That is the date that is relevant for determining the beginning and the end of the Section 165(c) timeframe, which is measured from the time the application was deemed complete. 42 U.S.C. § 7475(c). Moreover, this completeness determination occurred nearly a year after Atlantic Shores submitted its permit application on September 1, 2022.[8] *See* 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 5 (July 11, 2024). During the year between the submission of Atlantic Shores' application and EPA's completeness determination,

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issues it sought to reconsider on remand, and the EAB actually issued a ruling on the merits. Here, Region 2 has not identified a single permit condition it seeks to reconsider on remand, nor any error in the permitting process.

[7] The August 21, 2023 letter providing the completeness determination also identified additional information required by EPA as a part of its subsequent approval review process. The fact that additional technical information was subsequently provided by Atlantic Shores, and the application was later updated to reflect such information has no bearing on the completeness determination, which itself acknowledged that additional technical information was to be provided.

[8] Even before it submitted its application, Atlantic Shores had worked closely with EPA to provide it with all of the information it needed to evaluate the application. Atlantic Shores started working with EPA towards submission and review of the application in 2021, including an early submission of a proposed modelling protocol on May 31, 2022, prior to its initial application submission on September 1, 2022. *See* U.S. EPA, Region 2, Response to Public Comments, Outer Continental Shelf Air Permit for the Atlantic Shores Offshore Wind Project 1, LLC, Atlantic Shores Project 1 and Project 2, at 61-69, 95 (Sept. 29, 2024).

Atlantic Shores provided additional information in response to EPA's requests and feedback and had extensive discussions with EPA regarding the information it needed to determine the application complete. *See id.* In other words, EPA's completeness determination was not a rubber stamp, but reflected significant consideration by the agency as to whether the application was truly complete for purposes of the agency's regulations. *See* 40 C.F.R. § 124.3(c). This completeness determination was never withdrawn by EPA (and was again referenced in EPA's September 30, 2024 letter issuing the Final Permit),[9] and the EPA subsequently completed all procedures required under its regulations for issuing a draft permit, opening a comment period, holding a public hearing, developing a response to comments, and issuing a "final permit" on September 30, 2024, that was the culmination of Region 2's decision making process. *See* Letter from Richard Ruvo, Director Air and Radiation Division, EPA Region 2, to Jennifer Daniels, Vice President, Atlantic Shores Offshore Wind, LLC, at 1-2 (Sept. 29, 2024) ("Final Permit Letter").

EAB's Order ignores the extensive substantive review and procedural process involved in Region 2's issuance of the Final Permit, improperly concluding that remand is permitted because

[9] While not stating it directly, the EAB's decision appears to suggest that because Atlantic Shores' application was revised to include "additional information and updates" after the deemed completion date, this somehow might affect the one-year Section 165(c) timeframe. Order at 1 n.2. Not so. The application in the record bears the original filing date of September 1, 2022, and of course reflects revisions in response to EPA technical comments. In the August 21, 2023 letter making its completeness determination, EPA itself acknowledged that such technical information would need to be submitted, but still deemed the application complete. EAB's implication that the application was somehow not complete as of the date EPA made its official completeness determination is clearly erroneous under the terms of EPA's regulations and case law. After a completeness determination, EPA may request additional information from an applicant when necessary to clarify, modify, or supplement previously submitted material, and those "[r]equests for such additional information *will not render an application incomplete*." 40 C.F.R. § 124.3(c) (emphasis added). The fact that Atlantic Shores submitted an updated permit application to supplement its initial application in response to changes requested by EPA does not impact Region 2's completeness determination. *Id*., *see also Citizens Against Refinery's Effects, Inc. v. EPA*, 643 F.2d 178, 182 (4th Cir. 1981) (concluding that additional information found necessary after the agency begins to analyze the submission does not mean the application is incomplete, because "[i]f this were the case, no application would ever be complete until EPA received the last morsel of information. To approve such a result would be disruptive of the administrative process and would serve no useful purpose."); *In the Matter of: Transgulf Pipeline Co.*, 1 E.A.D. 735 (E.P.A.), 1982 WL 43353, at *3 (Oct. 4, 1982) (same). To hold otherwise would allow EPA to indefinitely evade the one-year statutory time frame under Section 165(c) by restarting the clock every time additional information was required by the agency to finalize the permit.

"no final decision on the permit decision has taken place," and that Atlantic Shores "is incorrect when they assert the permit has already been issued." Order at 7-8. EAB must make this conclusion in order to justify its untenable finding that the Final Permit falls within the scope of the Presidential Memorandum, which applies to "new" permits, and remand is thus justified.[10] However, by finding that no permit has yet been issued, EAB essentially admits that EPA has violated the one-year deadline in Section 165(c).

EPA cannot have it both ways. Either, as EAB's Order indicates, no permit has been issued in this case, and EPA—including EAB—have violated and are continuing to violate Section 165(c)'s express requirements. Or, a final permit was issued by EPA Region 2 on September 30, 2024, as Region 2 itself expressly stated,[11] and thus the Presidential Memorandum should not be applicable to the permit, because (i) it is not a "new" permit and (ii) remand would still run afoul of Section 165(c) because the one-year deadline has already passed. Either way, EAB's Order is in error and should be reconsidered as it violates Section 165(c) of the CAA as it applies to the Final Permit.

[10] 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. However, this raises the very real question, as discussed above, as to whether EAB's regulations are legal in the context of air construction permits, where they mandate use of an administrative review procedure that all but ensures Section 165(c) of the CAA is violated. Moreover, courts "do not defer to . . . agencies' interpretation of whether their actions constitute 'final agency action' . . . ." *Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 867 (9th Cir. 2022) (citation omitted). Here, Region 2 issued a permit it described as a "final permit." In light of Section 165(c)'s statutory mandate that permitting decisions be made within one year, one could easily anticipate a court concluding that the EAB review procedures should not be applied in order to deem a CAA air construction permit final.

[11] Indeed, in its own words, Region 2 issued a "final permit" 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).

B. EAB's Conclusion that Remand can be Granted for Any "Reevaluation" Is Erroneous.

The Order also is clearly erroneous because it abandons well-established EAB standards stating voluntary remand is available in circumstances where the EPA has identified conditions or elements of the specific permit at issue that it has decided to change or reconsider. *In re Desert Rock Energy Co.*, 14 E.A.D. 484, 493, 497 (EAB 2009). Rejecting these standards, EAB concludes that remand does not require the agency 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 EPA claims it is "reevaluating its permit decision." Order at 4. This conclusion is contrary to basic requirements of reasoned decision making and due process.[12]

To begin with, the Order cites no authority which allows such standardless remands. The Order, like the Motion for Remand, relies principally on the EAB's own decision in *Desert Rock* for remand requirements. Order at 3-4; Mot. for Remand at 3-4. Yet *Desert Rock* adopted the very standard which the EAB now rejects: "[a] voluntary remand is 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." 14 E.A.D. at 9 (emphasis added; citation omitted); *see id.* at 11 (remand appropriate as a matter of efficiency reasons "***when the Agency is contemplating changes to that permit***." (emphasis added; citation omitted)). That test should govern the EAB's decision in this appeal. Region 2, as the EAB implicitly recognizes, has not identified any "permit conditions" or any "element of the permit decision" that it "has decided" to "change" or "reconsider."

[12] It is also contrary to the requirements of CAA Section 165(c) as applied to air construction permits.

Under basic principles of reasoned-decision making, the mere fact that Region 2 claims to be "reevaluating its permit decision" pursuant to the Presidential Memorandum cannot justify remand and does not satisfy the standards for reasoned agency decision-making. "A command in an Executive Order does not exempt an agency from the APA's reasoned decision-making requirement." *Louisiana v. Biden*, 622 F. Supp. 3d 267, 294–95 (W.D. La. 2022); *see also id*. (rejecting BOEM's cancellation of offshore leases where "[n]o explanation was given, other than an adherence" to an executive order) (internal citations omitted); *Alaska Dep't of Env't Conservation v. EPA*, 540 U.S. 461, 496–97 (2004) ("Because the [CAA] itself does not specify a standard for judicial review in this instance, we apply the familiar default standard of the Administrative Procedure Act . . . whether the Agency's action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'") (citation omitted).

Moreover, the law is clear that remand requires a specifically articulated substantive basis for reconsidering the particular permitting decision in question. *See Rahman v. United States*, 149 Fed. Cl. 685, 690 (2020) (Remand "motions should be treated as with any other motion affecting the substantial rights of the plaintiff, by subjecting the government's position to careful analysis to ensure that the motion is *properly supported and justified."*(emphasis added)).

Yet, EAB justified granting a remand based on Region 2's mere intentions to "confer with other executive branch agencies" about the Project and its potential impacts on "birds, wildlife, fishing, and other relevant environmental concerns described in the Presidential Memorandum." Order at 5; Mot. for Remand at 4. EAB accepted this as an "example of part of the permit decision [Region 2] seeks to reconsider." Order at 5. However, Region 2's stated basis for remand lacks any specificity or articulation of whether the comprehensive review has even begun, which federal agencies will participate, the timeline of the review, what aspects of the permit it seeks to amend

or alter, or how the review relates to the questions raised by this proceeding or are cognizable under the CAA. By accepting Region 2's vague reasons as justification, EAB has created a remand standard without any limits, increasing regulatory uncertainty and undermining the rights conferred after proper permit processing, as well as the right to expedient permit processing for air construction permits conferred by Section 165(c).

Federal precedent requires EAB to engage in a more searching inquiry into Region 2's motivations and the specificity of Region 2's actions on remand, particularly where the EPA had defended Atlantic Shores' Final Permit in this *very proceeding* merely four months ago, finding no issues regarding birds, wildlife, or other environmental issues, and instead asserting that the Final Permit was fully supported by the record and issued in accordance with applicable 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 . . . .").

> An agency's professed intent to revisit the challenged decision is a necessary condition to obtain remand, but it is not always a sufficient condition. . . . the court must 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.

Am. Waterways Operators v. Wheeler, 427 F. Supp. 3d 95 (D.D.C. 2019) (citation omitted) (denying EPA a "second bite at the apple" where the Agency sought to revisit an "otherwise final decision based solely on its new-found desire" to purportedly "reconsider" certain factors that the agency had already considered in rendering its first decision years prior to the litigation) (internal quotations omitted). Similarly, in *Mississippi River Transmission Corp. v. FERC*, the D.C. Circuit expressed "extreme displeasure" with the Federal Energy Regulatory Commission's ("FERC") obfuscation as to the grounds for its request for remand when FERC "stated only that it would like to 'reconsider its ruling in this case in light of its developing policies[]' and cited, without

explanation, a single case." 969 F.2d 1215, 1217 n.2 (D.C. Cir. 1992). EAB's Order creates an unprincipled standard for granting remand that renders meaningless the guardrails against bad faith and frivolous actions. *See also SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001) ("A remand may be refused if the agency's request is frivolous or in bad faith.").

In asking for a remand based solely on the Presidential Memorandum, Region 2 has failed to articulate a more specific ground for remand than FERC in *Mississippi River Transmission Corporation.* Region 2 merely stating that it will do a "further evaluation" of "impacts on birds, wildlife, fishing, and other relevant environmental concerns" is insufficient, particularly when EAB failed to consider the prejudice to Atlantic Shores and whether the Region's request was frivolous or made in bad faith. As the court acknowledged in *Am. Waterways Operators v. Wheeler,* "EPA's remand request would leave all this in limbo . . . potentially disrupting a years-long initiative," which the State of Washington had initiated after an EPA decision that "the State rightfully understood to be final." 427 F. Supp. 3d 95, 99 (D.D.C. 2019). Here, the remand will have similarly disruptive effects, yet EAB failed to analyze the consequences of the remand on Atlantic Shores—who has invested millions of dollars, fulfilled all of EPA's information requests, and complied with the permitting process in good faith—instead granting the Motion for Remand despite Region 2's abrupt change in position based on specious reasons—*i.e.*, a Presidential Memorandum that on its face does not even apply to this Final Permit and, in fact, cannot apply without contravening applicable law.

EAB also asserts that Region 2's requested review is connected to the Region's Endangered Species Act ("ESA") obligations for the Final Permit, but Region 2 never itself asserted as much in its Motion for Remand. Order at 5-6 n.3. EAB's Order is thus speculating on an argument that Region 2 itself did not make. Moreover, Region 2 has delegated ESA review to the Bureau of

Ocean Energy Management ("BOEM"). *See* Atlantic Shores Opp'n to Motion for Remand at 12. In full compliance with the ESA's Section 7 consultation requirements, BOEM, along with the National Marine Fisheries Service ("NMFS") and United States Fish and Wildlife Service ("FWS") completed consultation and issued final Biological Opinions finding that the Project is not likely to jeopardize the continued existence of any listed or threatened species or destroy or adversely modify designated critical habitat.[13] *See* NMFS, Endangered Species Act Section 7 Consultation Biological Opinion Construction, Operation, Maintenance, and Decommissioning of the Atlantic Shores South Offshore Energy Project (Lease OCS-A 0499) at 434 (Dec. 18, 2023); FWS, Biological Opinion on the Effects of the Atlantic Shores Offshore Wind South Energy Projects, Offshore Atlantic County, New Jersey on Three Federally Listed Species at 64 (Dec. 2023). Region 2 has provided no indication that BOEM, NMFS, or FWS are considering reevaluating the final Biological Opinions such that Region 2's previous reliance on those determinations might be impacted.

Indeed, EPA has not provided any rational basis, supported by evidence, that would warrant a remand of Atlantic Shores' Final Permit and EAB's attempt to create such a rationale on behalf of EPA falls short. *See Louisiana v. Biden*, 622 F. Supp. 3d at 294–95. EAB's speculation as to the nature of Region 2's review under remand is erroneous.

A bare recitation that an agency will "review" the permit at issue for general environmental concerns, without giving *any* indication of how its previous review may have been deficient or without grounding its request in specifics, would enable EAB to "grant [motions for remand],

[13] NMFS and FWS' Biological Opinions ("BiOps") are available at: https://repository.library.noaa.gov/view/noaa/66052 (NMFS) and https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Atlantic%20Shores%20South%20BO_20231201.pdf (FWS). The BiOps are final agency action. *See Bennett v. Spear*, 520 U.S. 154, 178 (1997).

perhaps repeatedly . . . without regard to the interests of finality[.]" *Keltner v. United States*, 148 Fed. Cl. 552, 566 (2020); *see also id.* at 566-567 (remanding due to lack of reasonable justification provided by government and in the interests of finality, and explaining that "in the total absence of any meaningful justification for a remand — and the attendant further delay that would result — the remand request is quite difficult to fathom.").

Such a standard is clearly erroneous, particularly in the context of air construction permits for which Section 165(c) requires agency action to occur within a one-year timeframe, as described above *supra* Section II.A. Indeed, although EAB's Order states that when reviewing a motion for remand, "[t]he applicable regulation, its history, and Board precedent is the opposite of restrictive," Order at 4; however, the Board does cite to any regulatory provision or EAB precedent that provides the Board with unbounded discretion. *See In re Bryan K. Clark*, CERCLA Appeal No. 23-01, slip op. at 2 (EAB Sept. 29, 2023) (stating that the Board's authority is "limited by the statutes, regulations, and delegations that authorize and provide standards" for review) (quoting *In re Carlton, Inc. North Shore Power Plant*, 9 E.A.D. 690, 692 (EAB 2001)). Section 165(c) is one such statute that limits the Board's authority. Indeed, the EAB's Order reflects the very regulatory cost and delay that the EPA Administrator has condemned in his recent deregulation announcement.[14]

Therefore, EAB's standard for evaluating Region 2's Motion for Remand was clearly erroneous and EAB should therefore grant Atlantic Shores' Motion for Reconsideration.

[14] *See supra* note 1.

C. EAB's Order Indicates that Non-Permitting Factors Influenced Region 2's Motion to Remand.

Reconsideration also is necessary because the EAB's Order indicates that Region 2's Motion was motivated at least in part by political pressure. "Agency action must be set aside, of course, if found to be motivated in whole or in part by political pressures." *Noble Energy, Inc. v. Salazar*, 691 F. Supp. 2d 14, 21 (D.D.C. 2010) (citing *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1972)). Such action violates the well-established rule that the agency "must reach [its] decision strictly on the merits and in the manner prescribed by statute, without reference to irrelevant or extraneous considerations." *Volpe*, 459 F.2d at 1246-48. "This rule exists for the obvious reason that '[political] interference so tainting the administrative process violates the right of a party to due process of law.'" *Noble Energy*, 691 F. Supp. at 21 (quoting *ATX, Inc. v. U.S. Dep't of Transp.*, 41 F.3d 1522, 1527 (D.C. Cir. 1994).

Undue influence may be found if, first, "political pressure was applied to the agency's decisionmakers" and, second, "the pressure caused those decisionmakers to rely on improper factors." *Connecticut v. U.S. Dep't of the Interior*, 363 F. Supp. 3d 45, 64–65 (D.D.C. 2019) (citing, *inter alia*, *ATX*, 41 F.3d at 1528-1529). The EAB Order and other evidence demonstrate that these elements are satisfied here.

1. Extraneous Pressure Was Applied to the EPA.

The Order by its terms indicates that pressure extraneous to CAA substantive and procedural requirements has been applied to the permitting process. The Order rejected Atlantic Shores' argument that the Presidential Memorandum does not apply to the Permit, concluding instead that "[t]he Presidential Memorandum's scope and direction is broad" and applies to the EPA's review of the Permit. Order at 5-6 & n.2. The Presidential Memorandum is not part of any CAA statutory or regulatory permitting procedure, but instead reflects well-known positions

regarding offshore wind.[15] The Memorandum thus may be considered an "irrelevant or extraneous consideration[ ]" that falls outside "the merits and . . . the manner prescribed by statute" for assessing CAA permits. *Volpe*, 459 F.2d at 1246-48. This is especially true considering application of the Memorandum in this case violates the timeframe prescribed by Section 165(c).

2. Extraneous Pressure Impacted Region 2's Motion.

The Order, as well as the Motion, also indicate that the second element of undue influence—*i.e.*, that extraneous pressure influenced the agency action—is satisfied. The Motion asserts, and the EAB in the Order accepts the assertion, that Region 2 sought remand to "implement the Presidential Memorandum." Mot. for Remand at 4; *see* Order at 5 ("the Region has clearly stated its intent to reconsider the Project and permit decision in light of the Presidential Memorandum").

The timing of the Motion likewise demonstrates that it was influenced in whole or in part by extraneous pressure. "If the decision maker were suddenly to reverse course or reach a weakly-supported determination," this would support the inference "that pressure did influence the final decision." *ATX*, 41 F.3d at 1529; *Press Broad. Co., Inc. v. FCC*, 59 F.3d 1365, 1370 (D.C. Cir. 1995) (agency's "quick reinstatement of [a competitor's] permit on the basis of flawed reasoning . . . falls squarely within the holding of *ATX* "); *Connecticut*, 363 F. Supp.3d at 64-65 ("allegation that the Secretary 'suddenly reversed course' creates the plausible inference that political pressure may have caused the agency to take action it was not otherwise planning to take").

Here, Region 2 submitted the Motion on February 28, 2025, less than four months after it vigorously defended Atlantic Shores' Final Permit, concluding: "The Region's OCS permit decision for the Atlantic Shores Project is fully supported by the record, including as detailed in

[15] *See, e.g.*, https://x.com/Congressman_JVD/status/1882445240050790629.

the Response to Comments (RTC) that accompanied the permit." EPA Region 2's Response to Petition for Review, at 6 (Nov. 5, 2024). As the Order implicitly recognizes, Region 2's Motion does not identify any substantive basis of any kind for reversing that determination. Under the case law, the absence of any justification reinforces the conclusion that political pressure played a role.

The possibility that Region 2 may have also considered permissible factors does not affect the analysis. An agency action influenced by political pressure "would not be immunized merely because [the agency] also considered some relevant factors." *Volpe*, 459 F.2d at 1247–48. Thus, the EAB's speculation that the Region may intend to conduct analyses under the Endangered Species Act or "may choose not to rely on those other agencies' analyses," Order at 5-6 n.3, is not sufficient to ameliorate the effect of undue influence.

D. On Reconsideration, the EAB Should Decide the Merits of the Appeal.

If EAB agrees that reconsideration is warranted for any of the reasons described above, Atlantic Shores respectfully submits that an appropriate remedy would be for the EAB to vacate the Order and decide the fully-briefed appeal on the merits. Remand would not only exacerbate the EPA's noncompliance with Section 165(c), but would be inconsistent with requirements for addressing undue influence. "[I]n cases where politics threatened to or did, as here, intrude on intermediate agency decisions," courts hold that the agency should "successfully insulate[ ] its final decisionmaker from the effects of political pressure." *Aera Energy LLC v. Salazar*, 642 F.3d 212, 220–21 (D.C. Cir. 2011).

CONCLUSION

For the foregoing reasons, Atlantic Shores respectfully requests that the Board grant this Motion for Reconsideration and correct the clear legal errors in its decision.

Date: March 24, 2025

Respectfully submitted,

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STATEMENT OF COMPLIANCE WITH WORD COUNT

I hereby certify that Atlantic Shores Offshore Wind, LLC's Motion for Reconsideration contains 6,662 words, as calculated using Microsoft Word word-processing software.

/s/ Hayley Fink
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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 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:

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