

**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
OF THE STATE OF DELAWARE**

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EDWARD BINTZ,	:	
	:	
<i>Appellant,</i>	:	
	:	
v.	:	EAB Appeal No. 2024-04
	:	
DEPARTMENT OF NATURAL	:	
RESOURCES AND ENVIRONMENTAL	:	
CONTROL,	:	
	:	
<i>Appellee.</i>	:	
	:	

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**ORDER GRANTING APPELLANT’S MOTION TO COMPEL**

Pursuant to due and proper notice of the time and place of hearing served on all parties in interest, and to the public, the above-captioned Appeal came before the Environmental Appeals Board (the “Board”) on January 28, 2025. The hearing was convened at 89 King’s Highway, Dover, Delaware. A virtual attendance option was also provided.

Members of the Board present and constituting a quorum were: Dean Holden (Chairperson); Randall Horne; Robert Mulrooney, and Deborah Wicks. Deputy Attorney General A. Zachary Naylor represented the Board joined by the Board’s administrative liaisons, Janella Sapp and Brandon Holston.

Appellant Bintz was represented by the Honorable M. Jane Brady.

Appellee, Delaware Department of Natural Resources and Environmental Control (“DNREC”) was represented by Deputy Attorney General Sawyer Traver.

The Appeal challenges 2 conditional concurrence letters issued by the Secretary of DNREC through the Delaware Coastal Management Program (the “Letters”). The Letters address development of an offshore wind farm by U.S. Wind, Inc., the entity seeking to construct the offshore wind farm and to run undersea cables through Delaware’s subaqueous lands for electricity generation.<sup>1</sup>

The Letters respond to requests from the Bureau of Ocean Energy Management and the United States Army Corps. of Engineers. These requests were submitted to DNREC on behalf of U.S. Wind, Inc. The Letters were issued pursuant to 7 Del. Admin. Code §2201 to U.S. Wind, Inc.

In this regard, the Appeal is atypical before the Board because it does not challenge a final permitting or regulatory action by DNREC. The Appeal challenges the Secretary’s decision to issue the Letters, allowing the

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<sup>1</sup> The Board received the Appeal on August 10, 2024. Appellee moved to dismiss the Appeal (the “MTD”) on the ground that the Appeal challenged matters that are not subject to the Board’s jurisdiction. That MTD was denied without prejudice by the Board by Order dated December 9, 2024.

associated federal permitting processes to advance. Because of the unusual posture, the parties disagree as to how to define the “entire record before the Secretary” for the purpose of the Appeal.

Appellant sent a September 10, 2024 letter to the Board requesting that DNREC be required to provide the “entire records for DNREC’s Federal Consistency Certification Conditional Concurrences for the U.S. Wind project.” After the Board denied DNREC’s Motion to Dismiss the Appeal, Appellant renewed his request for the “entire record” by e-mail dated December 9, 2024. On December 19, 2024, DNREC provided 4 additional documents. Thereafter, on January 2, 2025, Appellant filed a Motion to Compel Filing of Entire Record (the “Motion to Compel”).

To date, the record produced by DNREC includes the 2 Letters, a link to DNREC’s website concerning the U.S. Wind Federal Consistency Certifications, and a total of 4 additional documents. These 4 documents include a postcard from the U.S. Army Corps. of Engineers to DNREC; the application from the Bureau of Ocean Energy to DNREC for federal consistency review; a memorandum prepared by U.S. Wind concerning dredging; and a single page transmittal email from U.S. Wind.

## **DISCUSSION**

### **Statute and Regulation**

The Board exists as “a quasi-judicial review board which is constituted to hear appeals of the Secretary [of DNREC].” *7 Del. C. §6007(b)*. Delaware Code provides that on appeal, “the record before the Board shall include the entire record before the Secretary” and places the burden on appellant to “show that the Secretary’s decision is not supported by the evidence on the record before the Board.” *Id.* at §6008(b). The Board’s operating regulation parrots the statute in this regard. *7 Del. Admin. Code §105-5.3*. The regulation adds, “[a]ppellants other than permit applicants or an alleged violator may only introduce evidence which was before the Secretary.” *Id.* Thus, the Appellant’s only source of evidence (both with respect to documents and the identity of potential witnesses) is the “entire record before the Secretary.”

Neither the statute nor regulation define the scope or contents of the “entire record before the Secretary.”

### **The Parties’ Positions**

#### **1. Appellant**

Appellant Bintz argues that the “record” thus far produced by DNREC in the Appeal does not reflect the “entire record before the Secretary.” In

support, he cites the Letters which refer to a process in which DNREC engaged, between and amongst the Delaware Coastal Management Program and other Delaware State agencies (referred to in regulation as “networked program partners”) resulting in the imposition of a set of conditions set forth in the Letters. No documentation of this process has been included in the “record” as it now exists in this Appeal. In addition, the record on appeal does not include information sufficient to identify those individuals from such State agencies who were involved in the engagement.

Appellant argues that presentations, meeting notes, correspondence, and analyses created in connection with the Delaware Coastal Management Program’s creation of the Letters, and the identities of individual participants in the federal consistency process, should be included in the record on Appeal.

Appellant concedes that the Board’s controlling statutes and rules do not specify what must be included in the “entire record before the Secretary,” but urges the Board to be guided by the Federal Administrative Procedures Act, which he argues provides additional guidance as to the materials properly included in the “whole” record. 5 *U.S.C.* §556.

## **2. Appellee**

DNREC counters with a more restricted view that only the Letters and the other documents required to be submitted by U.S. Wind are necessary to meet the “entire record before the Secretary” standard based on the language of 7 *Del. Admin. Code* §2201-3.0. Further, DNREC represents that the Letters provide the relevant outcomes of the required consistency process between and among DNREC, the Delaware Coastal Management Program, and other “networked program partners.”

DNREC offered that it could provide documentation to identify the individuals who engaged in the inter- and intra-agency process with respect to the issuance of the Letters. *See* Hearing Transcript at 30:3-31:17; 33:1-34:8; 35:18-36:5. However, Appellee could not provide clarification as to whether meeting notes or other documentation of that process exists or in what form.

## **CONCLUSION**

Following the argument, the Board entered executive session as permitted by 7 Del. C. §6008(a) to receive legal advice and deliberate. Upon conclusion of executive session, Board member Wicks moved to grant the Motion to Compel. That motion was seconded by Board member Mulrooney.

There was no discussion on the motion. By a roll call vote of 4 in favor, with 0 opposed, the Board determined to so act.

Upon consideration of Appellant's Motion to Compel, the Board concludes that the record provided by DNREC to Appellant and to the Board is not sufficient to constitute the "entire record before the Secretary."

The Letters were issued pursuant to the requirements of 7 *Del. Admin. Code* §2201. Section 3.0 of that regulation defines the procedures required for DNREC and its subordinates to follow when issuing federal consistency reviews.

Review of consistency certifications and supporting documentation will be conducted by the [Delaware Coastal Management Program] in coordination with networked program partners. **If a State permit is required for the same activity, the State permitting agency's review of the permit applications will become part of the [Delaware Coastal Management Program's] review.**"

7 *Del. Admin. Code* §2201-3.2.3.2 (emphasis added). Based upon this regulation, the Board enters this Order that the "entire record before the Secretary" necessarily includes the entire record from the State's related permitting action.<sup>2</sup> The Letters confirm that there was a process in which at

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<sup>2</sup> DNREC issued Secretary Order No. 2024-W-0051 on December 9, 2024 approving a subaqueous lands permit, subaqueous lands lease, wetlands permit, and coastal construction permit associated with the U.S. Wind, Inc. project. That Order has been separately appealed to the Board (*Caesar Rodney Institute, et. al. v. Garvin, et. al.*, EAB Appeal 2024-07).

least multiple State agencies were engaged. During the hearing, DNREC confirmed that it could provide information sufficient to identify the agencies and individuals who engaged in the process, but was not, at that time, able to confirm what documentation existed memorializing those efforts.

**IT IS SO ORDERED** this 19th day of February, 2025.

/s/ Dean Holden (e-singed pursuant to 6 Del. C. §12A-107)  
Dean Holden, Chairperson

The following 3 Board members, who, with Chairperson Holden constitute a quorum of the Board, concur in this Decision and Final Order:

Date: 2/19/25 /s/ Randall Horne (e-singed pursuant to 6 Del. C. §12A-107)  
Randall Horne, Board Member

Date: 2/19/25 /s/Robert Mulrooney (e-singed pursuant to 6 Del. C. §12A-107)  
Robert Mulrooney, Board Member

Date: 2/19/25 /s/ Deborah Wicks (e-singed pursuant to 6 Del. C. §12A-107)  
Deborah Wicks, Board Member

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The Board encourages the parties to this Appeal to propose an appeal management stipulation contemplating practical, efficient coordination with EAB Appeal 2024-07 for the purpose of establishing the record, identifying witnesses, and other pre-hearing matters. The distinct legal basis for each of the appeals (and related arguments and defenses) can be appropriately bifurcated in such a stipulation.