

**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  
RENEWED MOTION TO COMPEL**

**I. Introduction**

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 May 27, 2025 concerning a Renewed Motion to Compel filed by Appellant. 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); Michael Horsey; Randall Horne; Robert Mulrooney; Guy Marcozzi; 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 an offshore wind farm and to run undersea cables through Delaware's subaqueous lands for electricity generation.

The Letters respond to requests from the Bureau of Ocean Energy Management ("BOEM") and the United States Army Corps. of Engineers ("USACE"). 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.

## II. Procedural History

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.

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”). The Motion to Compel was granted by the Board’s Order of February 19, 2025 (the “2/19/25 Order”).<sup>1</sup>

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<sup>1</sup> At the time, the record produced by DNREC included 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 included 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.

As discussed in the 2/19/25 Order, this 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 associated federal permitting processes to advance. Because of the unusual posture, the parties remain unable to come to an agreement as to how to define the “entire record before the Secretary” for the purpose of the Appeal.

In response to the 2/19/25 Order, DNREC provided to Appellant the names of individuals involved in the process leading to the issuance of the Letters, and a link to the online repository of public documents related to the later issued State permit for subaqueous lands development.<sup>2</sup> Appellant filed his Renewed Motion to Compel on April 21, 2025.

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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).

### **III. Discussion**

#### **A. 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).

7 *Del. C.* §6008(b) states that 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.” The statute also allows parties to the appeal to “produce any competent evidence in their behalf.” *Id.* The Board’s rules, however, states that “[a]ppellants other than permit applicants or an alleged violator may only introduce evidence which was before the Secretary.” 7 *Del. Admin. Code* §105-5.3.

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.” 7 *Del. C.* §6008(b).

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

#### **B. 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.” 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. The individuals and agencies involved in that process have been identified, but Appellant argues that the documents and information relied upon by the Secretary are necessarily part of the “entire record.” 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.

Appellant argues that presentations, meeting notes, correspondence, and analyses created in connection with the Secretary’s decision to issue the Letters should be included in the record on Appeal.

## **2. Appellee**

DNREC counters with a more restricted view as to what constitutes the “entire record before the Secretary” in this Appeal. Appellee cites 7 *Del. C.* §6006(4) defining the record for a public hearing before the Secretary as being more limited than what Appellant seeks by the Renewed Motion to Compel. However, the section

cited applies only to the record in a hearing before the Secretary. It is not related to the Board or to the issue presented in this Appeal.

#### IV. 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 Mulrooney moved to grant the Renewed Motion to Compel. That motion was seconded by Board member Horne. There was no discussion on the motion. By a roll call vote of 6 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 remains insufficient 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 for Federal Consistency Review" required for DNREC and its subordinates to follow when issuing federal consistency responses. DNREC has now identified dozens of individuals who were engaged in that process. Presumably, the Secretary issued the Letters based on information gathered as part of that process created by 7 *Del. Admin. Code* §2201.

The Board holds that the "record before the Secretary" must include:

- Correspondence, e-mails, documents, and meeting notes exchanged between the DNREC Office of the Secretary that concern "Procedures for Federal

Consistency Review” leading to the issuing of the “Letters” on one hand, and, on the other:

1. the identified “networked program partners;”
2. interested members of the public;
3. US Wind;
4. USACE; and
5. BOEM

**IT IS SO ORDERED** this 3rd day of September, 2025.

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

The following 5 Board members, who, with Chairperson Holden constitute a quorum of the Board, concur in this Decision and Final Order:

Date: Aug. 29, 2025                      /s/ Randall Horne (e-singed pursuant to 6 Del. C. §12A-107)  
Randall Horne, Board Member

Date: Sept. 3, 2025                      /s/ Michael Horsey (e-singed pursuant to 6 Del. C. §12A-107)  
Michael Horsey, Board Member

Date: Aug. 28, 2025                      /s/ Robert Mulrooney (e-singed pursuant to 6 Del. C. §12A-107)  
Robert Mulrooney, Board Member

Date: Aug. 26, 2025                      /s/ Guy Marcozzi (e-singed pursuant to 6 Del. C. §12A-107)  
Guy Marcozzi, Board Member

Date: Aug. 26, 2025                      /s/ Deborah Wicks (e-singed pursuant to 6 Del. C. §12A-107)  
Deborah Wicks, Board Member