

BEFORE THE ENVIRONMENTAL APPEALS BOARD
FOR THE STATE OF DELAWARE

CAESAR RODNEY INSTITUTE, PAUL)
"WES" TOWNSEND and GEORGE)
MERRICK, NATALIE C.)
MAGDEBURGER, Individually and as)
Mayor of and on behalf of TOWN OF)
FENWICK ISLAND, a municipal)
corporation of the State of Delaware, and)
TOWER SHORES BEACH)
ASSOCIATION, a Delaware non-profit)
corporation,)

Appellants,

v.

THE HONORABLE SHAWN M. GARVIN)
in his official capacity as Secretary of the)
Department of Natural Resources and)
Environmental Control and STATE OF)
DELAWARE DEPARTMENT OF)
NATURAL RESOURCES AND)
ENVIRONMENTAL CONTROL,)

Appellees.

No. _____

On Appeal from Decision of
Shawn M. Garvin, Secretary
of the Delaware Department
of Natural Resources and
Environmental Control
Dated December 9, 2024
Order No. 2024-W-0051
Permit No. SP-043/24
SA Lease No. SL-043/24 and
Permit No. WL-043/24

NOTICE AND STATEMENT OF APPEAL

To: Environmental Appeals Board
89 Kings Highway
Dover, Delaware 19901

PLEASE TAKE NOTICE that the above Appellants, by and through their undersigned counsel, do hereby appeal the Decision of Shawn M. Garvin (hereinafter “Garvin”), Secretary of the Delaware Department of Natural Resources and Environmental Control (hereinafter “DNREC”), dated December 9, 2024, Order No. 2024-W-0051, as well as the issuance of Subaqueous Lands Permit No. SP-043/24, Subaqueous Lands Lease No. SL-043/24, and Wetlands Permit No. WL-043/24, granting applications of US Wind Inc. (“US Wind”) for permits¹ relating to the subaqueous lands of the Indian River Bay and the wetlands adjacent and associated with the Bay, for the reasons set forth below.

BACKGROUND AND THE PARTIES

1. The Maryland legislature passed laws that would advance the utilization of offshore wind turbines for the generation of electric power for the State of Maryland. Maryland entered into an agreement to purchase power from US Wind, Inc., a company which procured a federal lease for the purpose of constructing an offshore wind project to provide electricity. US Wind is currently seeking federal, state and local approvals for the project, titled “Maryland Project” by US Wind (hereinafter “Project”).

¹ Appellants also object to the Secretary’s grant of a permit for Coastal Construction, pursuant to 7 *Del. C.* §6805, (Letter dated Dec. 4, 2024, Appendix E to Decision of Dec. 9, 2024), however jurisdiction over appeal of that permit is not before this Board, and will be appealed to the Superior Court of the State of Delaware. 7 *Del. C.* §6803(d).

2. US Wind proposes to bring the electricity generated by the offshore turbines ashore via multiple high-powered transmission lines. Maryland local governments and subdivisions declined to allow the transmission lines from the turbines to come ashore in their jurisdictions.

3. The Governor of Delaware, John Carney, entered into an agreement of terms (“Term Sheet”) on December 19, 2023, that would allow the transmission lines from the Project to make landfall in and under the lands of the Delaware Seashore State Park, in the Delaware State Park public beach and fishing area, located on the coast of Sussex County, at 3Rs Road.

4. US Wind included several options in their federal application, all in Delaware, for transmitting the electricity generated by the turbines to a proposed substation, to be located on a parcel on the Indian River Bay, purchased by Renewable Redevelopment, LLC, a subsidiary of US Wind.

5. US Wind, however, chose to seek permitting for a preferred route, which would involve installing in excess of 64 total miles of high-powered cables², by horizontally drilling under the 3Rs public beach, under Route 1, and under and through the wetlands and the Bay to the said parcel.

6. Relevant to this appeal, US Wind applied for permits from DNREC specific to the use of subaqueous lands and the use of wetlands.

² See Hearing Officer’s Report, dated Nov. 25, 2024, p. 2.

7. While each permit is independent and governed by specific regulatory criteria, DNREC elected to consider all permits in one “joint” application process, provided notice for a joint public information session, a joint public hearing, and issued one decision relating to the multiple permits. Thus, Appellants bring this single appeal as to the subaqueous and wetlands permits in question.

8. On July 9, 2024, DNREC held a joint, “virtual” public hearing on all of the aforesaid applications for permits, as well as a Water Quality Certification and Coastal Construction permit, and then continued one public comment period, again relating to all of the permits, which was closed on September 9, 2024. At the July 9, 2024 public hearing, DNREC indicated that the Secretary would make determinations as to whether to grant or deny each of the permits following the close of the public comment period.

9. All the Appellants submitted comments to DNREC during the public comment period raising the issues addressed herein and others. DNREC received over 450 public comments in total.

10. Counsel sent a letter to Garvin on August 15, 2024, before the public comment period expired, alerting Garvin and DNREC that the applications for permits were incomplete and requesting the agency to voluntarily cease processing of the permit applications until such time as they were, respectively, complete.

11. Counsel received no response to the letter, and, as said, the public

comment period expired.

12. To effectuate the Project, US Wind was also required to apply to Sussex County for a conditional use of the aforesaid parcel for construction of a substation, which would receive and distribute the electricity generated by the offshore turbines. This zoning approval would be required regardless of the route by which the electric transmission lines arrived at the substation.

13. Renewable Redevelopment, LLC, a US Wind subsidiary, did apply to Sussex County for conditional use zoning and a hearing was held before the Sussex County Council on July 30, 2024.

14. Following the hearing, the Council closed the record and took the matter under consideration. On December 17, 2024, by a 4-1 vote, the Sussex County Council denied the zoning request. Accordingly, the parcel is not permitted to host the substation, under the Sussex County Zoning Code.

JURISDICTION

15. This Board has subject-matter jurisdiction under 7 Del. Admin. C. Ch. 105, 1.0 to hear any appeal by “any person whose interest is substantially affected by any action of the Secretary.”

PARTIES

16. Appellant Paul “Wes” Townsend has lived on, recreated in, and derived his livelihood from the Indian River Bay for his entire life. His family has done so

for nearly two centuries. He is a commercial fisherman who retrieves his bait for ocean fishing from the Bay, largely with gill netting. His ability to sustain his livelihood will be substantially and detrimentally affected by the installation and presence of high-powered transmission lines and the risks they pose to his ability to continue to fish and retrieve bait in the ocean and bay areas.

17. Mr. Townsend is completely invested in commercial fishing, and therefore is familiar with the impact the installation and presence of high voltage transmission lines have on the environment and the risks they pose to the ocean and bay areas. He is Chairman of the Mid Atlantic Fishing Management Council (one of eight federal fishing councils), and is a member of or serves on: the Tidal Finfish Advisory Council for the State of Delaware; the Large Whale Reduction Team; Responsible Offshore Science Alliance, and the Responsible Offshore Development Alliance.

18. Appellant George Merrick is a commercial clammer for whom the integrity, safety and stability of the seabed in the Indian River Bay is paramount. His livelihood depends on the Bay. He, and others in his business, have been prohibited by DNREC from power dredging to harvest clams because DNREC has recognized that power dredging would destroy the natural ecosystem of the Bay. Merrick also has a back bay charter business that will suffer significantly from the construction and operation of the transmission lines going through the bay bed. He

runs daily charters in season that take hundreds of people, both residents and tourists, to clam, fish, and learn about the Bay and its beauty. Both businesses will be substantially and adversely affected by the installation and presence of the proposed high voltage transmission lines.

19. Appellant Caeser Rodney Institute (“CRI”) is a 501(c)(3) organization that advocates for sound and sensible governmental policies, including those regarding energy, education and the environment. The Director of CRI’s Energy and Environment Division is David Stevenson, a Delaware resident who is a nationally recognized expert on energy, onshore and offshore wind and solar, as well as utility pricing and supply issues. Stevenson has been accepted as an expert witness by the Delaware Public Service Commission, individually and as a paid consultant for the Delaware Public Advocate. He and CRI have taken a position opposing this proposed Project for many reasons, including its impact on the environment and Delaware’s natural resources; the unreliable and intermittent availability of electricity from offshore wind turbines; the significant cost to users of electricity generated by this Project; and the cost to Delaware’s valued treasure of the ocean and bay, as well as associated tourism. Townsend and Merrick are members of CRI.

20. Appellant, Natalie Magdeburger, was elected to the Town of Fenwick Island’s Town Council in 2021, and has served as Mayor of the Town of Fenwick

Island since 2022. She is also a Maryland attorney. Ms. Magdeburger has recreationally enjoyed the Delaware beaches and bay since childhood, became a part-time resident in 2001 and, in 2020, she and her husband made Fenwick Island their full-time home, where they avidly pursue fishing, crabbing, boating and beach going activities, often traveling into the Indian River Bay via the Little Assawoman canal.

21. Appellant, Town of Fenwick Island (“Town”), is a duly incorporated municipality of the State of Delaware, since 1953. The Town is located at the southeastern tip of Sussex County, Delaware, situated on a narrow peninsula between the Atlantic Ocean and the Little Assawoman Bay, and measures .5 square miles, of which nearly 30% is water. The Town was established as, and remains, a quiet, family-friendly, primarily residential and tourism-based community. Preserving nature is integral to the Town’s character as well as its economy. The Town’s 2024 Comprehensive Plan identified the development of Offshore Wind Energy to be a serious concern for the Town, particularly noting that , in the industry, construction and deployment was proceeding far ahead of capacity for meaningful scientific assessment and management of impacts, including those on coastal industries, local communities, marine mammals, migratory birds and fish and shellfish. Since the inception of the Project, the Town of Fenwick Island has publicly voiced its concerns about the devastating

environmental impacts that the US Wind Project will have on our community, with the latest area being the landing of the electrical cables at 3R's Beach and the disturbance of subaqueous and wetlands in the Indian River Bay and surrounding area. The Town believes that the beach, bays and natural coastal environment in Delaware must be protected from heavy industrialization and threats to the ecosystem so that future generations may enjoy the same pristine natural landscapes. Mayor Magdeburger submitted comments in opposition to the subject permits during the DNREC permitting process, both on behalf of the Town and on her own behalf.

22. Appellant, Tower Shores Beach Association ("TSBA") is a non-profit, non-stock Delaware corporation, which serves as a homeowners' association with nine board members, currently representing 226 homes located in North Bethany Beach, in Sussex County. This private, oceanside community is located directly to the south of 3Rs Road public beach and across Route 1 from, and in view of, the Indian River Bay where the cables will make landfall and traverse through the Bay. Sixty percent of homeowners in Tower Shores rely on short-term rental income from tourism during the summer season. Homeowners and tourists alike enjoy Tower Shores' natural beach and adjacent bay areas, the abundant marine life and the beautiful undisturbed ocean and bay views. TSBA, by its president, Elizabeth Frazee, submitted both written and oral comments in opposition to the subject

permits during the DNREC permitting process.

23. An organization has standing to sue on behalf of its members if “(1) the interests to be protected are germane to the organization’s purpose; (2) neither the claim asserted nor the relief sought requires the participation of individual members; and (3) the organization’s members would otherwise have standing.” *Del. State Sportsmen’s Ass’n v. Garvin*, 196 A.3d 1254, 1263 (Del. 2018); citing *Oceanport v. Wilmington Stevedores*, 636 A.2d 892 (Del. 1994). Here, the organizational appellants seek to protect their members’ interest in matters impacted by the permits, which are germane to the core purposes of the organizations. The participation of individual members is not necessarily required because the claims relate to the failure of DNREC to follow statutes and regulations. However, individual members do have standing and are co-appellants here.

24. Appellee Garvin is the Secretary of the Delaware Department of Natural Resources and Environmental Control, an Executive Agency of the State of Delaware. Secretary Garvin’s duties include the obligation to “adopt . . . rules or regulations . . . to effectuate the policy and purposes of this chapter. No such rule or regulation shall extend, modify or conflict with any law of this State or the reasonable implications thereof.” 7 *Del. C.* § 6010³. The Secretary has the responsibility to sign all orders granting permits for projects, grants and other action

3 See also 7 *Del. C.* §§ 6601 (Wetlands); 7201 (Subaqueous Lands).

taken by the agency. *See 7 Del. C. § 6003(a).*

25. The Secretary, together and with those under his control and supervision, are responsible for the administration and enforcement of Delaware's environmental laws and regulations, including 7 Delaware Code Chapters 66, 68, and 72, and determining which operations and conduct by individuals and businesses throughout the state should be permitted, and under what terms.

ARGUMENT

The Secretary Erred as a Matter of Law and/or Abused his Discretion by Joining Multiple Applications for Permits into a Single Hearing and Public Comment Period.

26. The Secretary erred as a matter of law, and/or abused his discretion, by directing DNREC to hold a "Joint Permitting" process, which, coupled with a voluminous, technical record, resulted in a lack of meaningful public notice, and the public's right to be heard in a meaningful manner on multiple permits of a highly technical nature.

27. The relevance of various application materials was not designated to each respective permit, nor were citations provided, as to each permit, to guide the public to the various, applicable laws and regulations.

The Secretary Erred as a Matter Of Law and/or Abused his Discretion by Adversely Affecting the Public's Opportunity for Meaningful Input into the Permitting Process.

28. The Secretary erred as a matter of law, and/or abused his discretion, by

failing to consider the subject application within the context of the environmental impacts to Delaware posed by the US Wind Offshore Wind Farm as a whole, and refusing to consider public input on any aspect of the offshore portion of the Project.

29. As a result, Delaware citizens have not been provided with an opportunity to discuss or inform Delaware's elected and appointed officials, who are to be their representatives, of their views of the offshore wind farm and the dangers to Delaware's fish, wildlife, navigation, economy and recreation from the wind farm.

30. The materials available to the public before the end of the public comment period for the permit applications were voluminous, totaling over 4,000 pages and were not indexed or separated by specific permit so that the public could evaluate and be properly informed to comment effectively on each permit application.

31. Significant information, on which the Secretary heavily relied in making his decision and which he declared were "incorporated into" his decision, comprised nearly 500 pages, and was received after the close of the public comment period, and only posted publicly at a time simultaneous with the filing of the final Decision. Those materials addressed, among other issues, mitigation, monitoring of environmental harm, EMF impact, and decommissioning, thus depriving Delaware citizens of the information at a meaningful time, with opportunity for comment regarding some of the most critical aspects of the Project.

32. This information was either not included in the application as required, or was modified before the Secretary made his decision, but without the public's review. This is a violation of procedural due process in that it impaired the public's right to be heard at a meaningful time and in a meaningful manner.

The US Wind Applications Were Not Complete, and Did Not Contain Mandatory Information Required By Statute And Regulations.

WETLANDS PERMIT APPLICATION

33. 7 Delaware Code, Chapter 66 governs and regulates activity affecting the State's wetlands. 7 *Del. C.* § 6604 provides that “[a]ny activity in the wetlands requires a permit from the Department except the activity or activities exempted by this chapter and no permit may be granted unless the county or municipality having jurisdiction has **first approved the activity in question by zoning procedures** provided by law.” (Emphasis added). §6604(b) sets forth specific criteria which the Secretary must consider prior to issuing a permit.

34. Delaware Administrative Code, Chapter 7502 was promulgated to implement 7 Delaware Code, Chapter 66. These regulations, at 8.0, “Application Procedure”, require that “[t]he application **shall contain** the following . . . [8.3.3] **Evidence of local zoning approval**”. (Emphasis added).

35. The power granted to DNREC to issue Wetlands permits “shall not authorize an activity in contravention of county or municipal zoning regulations.” 29

Del. C. § 6618.

36. Additionally, state law requires that Sussex County approve any zoning application before DNREC may issue a wetlands permit: “No permit may be granted **unless the county or municipality having jurisdiction has first approved the activity in question by zoning procedures** provided by law.” *7 Del. C. § 6604(a)*. (Emphasis added).

37. Application had been made to the Sussex County Council, and was pending at the time of the Secretary’s decision, for zoning approval for a conditional use that would have permitted the construction and operation of a substation to receive the transmission lines from the offshore field and regulate the electric current in order to transmit the electricity into the electric grid for Maryland’s use. Without the conditional use approval, under Sussex County’s Zoning Code, the subject parcel is not permitted to host a substation. Sussex County Zoning Code, §115-113.

38. As of US Wind’s filing of applications for these permits, DNREC’s notice of the public information session, the conduct of a virtual public hearing, and the closing of the time for public comment on the US Wind Project, no such zoning approval had been issued by Sussex County. Indeed, on December 17, 2024, the zoning application was denied.

39. US Wind and the Secretary identified the substation as an essential part of the application for permits, without which the Project, as submitted, cannot

proceed. *See* Decision p. 2; TRM, 11/7/24, p. 2. Accordingly, the permits issued on Dec. 9, 2024 must be reversed as the substation portion of the Project is prohibited by local zoning.

40. With regard to a permit for wetlands, 7 *Del. C.* § 6604 requires as follows, in relevant part:

(b) The Secretary shall consider the following factors prior to issuance of any permit:

(1) Environmental impact, including but not limited to, likely destruction of wetlands and flora and fauna; impact of the site preparation on tidal ebb and flow and the otherwise normal drainage of the area in question, especially as it relates to flood control; impact of the site preparation and proposed activity on land erosion; effect of site preparation and proposed activity on the quality and quantity of tidal waters, surface, ground and subsurface water resources and other resources;

(2) Aesthetic effect, such as the impact on scenic beauty of the surrounding area;

(3) The number and type of public and private supporting facilities required and the impact of such facilities on all factors listed in this subsection;

(4) Effect on neighboring land uses, including but not limited to, public access to tidal waters, recreational areas and effect on adjacent residential and agricultural areas;

(5) State, county and municipal comprehensive plans for the development and/or conservation of their areas of jurisdiction;

(6) Economic effect, including the number of jobs created and the income which will be generated by the wages and salaries of the jobs in relation to the amount of land required, and the amount of tax revenues potentially accruing to the state, county and local governments.

41. The Secretary failed to address and make findings with regard to these issues specifically as required.

42. An Environmental Summary which includes an evaluation of the Project in relation to the factors listed in Section 12.0 subheadings, which include environmental impact, habitat impact, and value and economic impact, was not included as required. The specific subsections of §6604(b) and Regulation Section 12.0 were not considered and addressed as required by Code.

SUBAQUEOUS LANDS PERMIT APPLICATION

43. Delaware Administrative Code, Chapter 7504, relating to subaqueous lands, at § 3.1.2.5 states the applicant “shall attach evidence of zoning approval for the Project. The Department may defer consideration of the application if it determines that substantive questions regarding the validity of the county’s or municipality’s actions are raised in an appeal of that action.”

44. The power granted to the Secretary to issue permits, including use of subaqueous lands permits and leases, such as the ones sought for this Project, provides that “[n]o permit may be granted unless the county or municipality having jurisdiction has **first approved the activity by zoning procedures** provided by law.” 7 Del. C. § 6003(c)(1). (Emphasis added).

45. Again, the matter of zoning approval for the subject parcel was under consideration of the Sussex County Council at the time of the Secretary’s decision,

but no evidence of zoning approval was attached to, or contained in, US Wind's application in this matter, making it incomplete. The Secretary, therefore, granted the permits in disregard for the law and regulations.

46. Subsequent to the issuance of the Secretary's decision, the application for zoning was denied by the Sussex County Council, on December 17, 2024.

47. When an agency enacts a regulation, the agency is bound to comply with the regulation unless and until it is properly amended in accordance with the *Delaware Administrative Procedures Act*. *Baker v. Del. Dep't of Nat. Res. & Env'tl. Control*, 2015 WL 5971784 *13 (Del. Super. Oct. 7, 2015), *aff'd* 137 A.3d 122 (Del. 2016); see also, *Culver v. State*, 956 A.2d 5 (Del. 2008) (probation officer failed to follow procedure to determine reasonable suspicion).

48. Zoning approval is a mandatory component of both the wetlands and subaqueous lands application and permitting process. Absent that approval, the Project, as proposed, cannot go forward.

49. State agencies are required to allow local governments, to which zoning authority has been granted by law, to resolve zoning matters independently, and cannot supersede that authority. *DNREC v. Sussex County*, 34 A.2d 1087 (Del. 2011), *Hayward v. Gaston*, 342 A.2d 760 (Del. 1988).

50. The regulations clearly anticipate agency compliance with all the requirements in the regulations, and that the agency will secure all the information

that needs to be provided by the Applicant to complete its applications, including zoning approval. If they did not, there would not be a provision specifically permitting DNREC to defer action if an appeal of a zoning decision is active. That language assumes the initial zoning decision has been made before the Department considers action on the State permit applications. 7 Del. Admin. Code 7504, § 3.1.2.5.

51. Engaging in the public hearing process and taking other action before the application is complete, or before procedural prerequisites have been satisfied, is a futile effort that wastes time and money. Literally, hundreds of people have attended information sessions and/or public hearings (at which many DNREC staff were in attendance), and submitted comments on this Project, and yet, these subject applications were not, and still are not, complete.

The Secretary Erred as a Matter Of Law and/or Abused His Discretion Because His Decision Did Not Include Findings Required To Be Made By Law And Regulation, Was Not Supported By The Record, and Indeed, Was Directly Contradicted By The Record In Some Respects.

52. The Secretary failed to address the significant concerns of the respective and interested federal agencies which had advised against the use of the subaqueous lands to allow cables to be buried under the Indian River Bay, noting its unique and important role in the ecology of the region.

53. In the federal review process, the US Environmental Protection Agency

(hereinafter “EPA”), cautioned against running wind power cables through the Indian River Bay, saying “EPA strongly recommends that BOEM [Bureau of Ocean Energy Management] **avoid impacts to the Indian River Bay,**” and notes that the Delaware Inland bays are “**estuary[ies] of national significance . . . [with] highly productive estuarine environments support[ing] many species of birds, fish, mammals and other wildlife as well as robust economic activity. The inland bays are particularly sensitive to environmental change,** as they are shallow and poorly flushed by tidal movement.” (Emphasis added.)

54. Similarly, the National Oceanic and Atmospheric Administration (“NOAA”) and National Marine Fisheries Service (“NMFS”), in their comments to BOEM, recognized that the offshore (ocean) waters are “sensitive ecological areas provid[ing] valuable natural habitat for . . . marine resources,” and that **the Indian River Bay is “particularly vulnerable to impacts” and is “already stressed.”** See BOEM FEIS, Appendix O, p. O-20. (Emphasis added.)

55. The Secretary’s approval of the subaqueous lands permit/lease constitutes an error of law and/or an abuse of discretion, as US Wind’s Project is a Prohibited Dredging Project, pursuant to 7 Del. Admin. Code 7504, §4.11.4.1.⁴ The

⁴ 4.11.4 *Prohibited Dredging Project. The following types of dredging projects are prohibited.*

4.11.4.1 Dredging of biologically productive areas, such as nursery areas, shellfish beds, and submerged aquatic vegetation, if such dredging will have a significant or lasting impact on the biological productivity of the area.

permits must be denied for this reason alone.

56. The Secretary also failed to address the fact that the Applicant had originally offered several alternative means of transporting the electricity from offshore to the substation, which alternatives would have avoided the wetlands and subaqueous lands entirely. The Secretary is required to consider “alternatives to the proposed action which would reduce or avoid environmental damage.”

57. The Secretary abused his discretion by leasing and ceding control of public recreational lands and state park lands, including waterways declared “estuaries of national significance” by the EPA, to a private entity for a risky and novel project, when such public lands have been statutorily declared to be utilized chiefly for recreation and conservation.

58. The Secretary’s decision to grant the permits was not supported by substantial evidence of record, as the application materials did not provide sufficient information or data regarding the Project’s safety and compliance with statutes and regulations governing the subaqueous lands and wetlands.

59. The Secretary erred as a matter of law and abused his discretion by relying, purportedly to address public concerns on potential electromagnetic field (EMF) dangers, on modeling contained in a technical report by a US Wind consultant, which report was not part of the public record in this case – even including the items submitted and accepted into the record after the public comment

period had closed and published with the decision on Dec. 9, 2024. The Secretary used this non-record data and report to set a required burial depth for the cables – one of the most critical elements of the Project.⁵

60. US Wind, in its Delaware application materials, failed to meet its burden of providing DNREC and the public with data and evidence addressing all of the required elements and regulatory criteria for each application. Accordingly, the Secretary’s grant of the applications was not supported by substantial evidence and is erroneous as a matter of law.

61. US Wind, in its Delaware application materials, failed to meet its burden to provide DNREC with data and evidence addressing safety concerns. The only information provided, and then solely in a conceptual way, in the “Emergency Response Plan (ERP) – Delaware Version 1a” submitted on October 24, 2024, well after the public record had closed.

62. The Secretary’s decision fails to meet requisite statutory and regulatory criteria, and accordingly is not supported by substantial evidence, as it does not contain, and US Wind acknowledges in the proposal itself, that vital studies have not yet been conducted on the impact of this Project on key marine species and other wildlife, some of which find unique sanctuary in and around Delaware waters – such as the critical horseshoe crabs, commercial and recreational fish populations, bats

⁵ See Technical Response Memorandum, November 7, 2024, p.8.

and endangered migratory birds.

63. The Secretary's approval of these permits constitutes an abuse of discretion, by approving a permit with inadequate and unspecified bonding, "or similar mechanism," to be determined at an unknown future date, including for decommissioning and removal of Project components. In addition, the only information supplied regarding bonding at all was provided by US Wind after the public record had closed, and the public never had an opportunity to review or comment on such provisions.

64. The Secretary's decision was not supported by substantial evidence and constituted an abuse of discretion, when the Agency approved Applicant's "Mitigation Plan," which consisted simply of monies to be paid by the Applicant to the Agency and/or other State entities, to support various environmental projects and programs, unrelated or only tangentially related to the direct adverse environmental harms caused by the US Wind Project itself.

65. The Secretary's decision was not supported by substantial evidence and constituted an abuse of discretion, when the Agency approved Applicant's "Monitoring Plan," which failed to contain any details or specifications of required "monitoring", but instead said that such details "would be provided" at a future date.

The Secretary Erred as a Matter Of Law and/or Abused his Discretion, as he Did Not Consider How the Project Implicates The Coastal Zone Act.

66. The Secretary erred as a matter of law by failing to deny the permits as in violation of the Delaware Coastal Zone Act, Title 7, Delaware Code, Chapter 70, as the Project constitutes a prohibited bulk product transfer facility.

67. In the alternative and without waiver of Appellant's argument, even if the Project was not deemed a bulk product transfer facility, as it involved intensive sub-marine, subterranean and sub-wetland drilling and pipelines, the Secretary should have required review for a Coastal Zone Permit, as the entire Delaware portion of the proposed US Wind Project lies in the Delaware Coastal Zone (*7 Del. C. §7002(i)*).

The Secretary Erred as a Matter Of Law and/or Abused His Discretion Because He Did Not Act Independently and in the Sole Interest of the Public.

68. The Governor's December 2023 "Term Sheet" Agreement, including proposed financial consideration, between the State of Delaware and the Applicant, US Wind, created a conflict of interest, or at least the appearance of impropriety in the Agency's independent consideration of these applications, seeking permits for the Project which was the subject of the Term Sheet.

69. The Secretary's decision to grant the permits was not supported by substantial evidence of record, as the application materials which constituted the

record for public comment did not provide sufficient information or data regarding the Project's safety and compliance with statutes and regulations governing the beach/marine lands, subaqueous lands and wetlands.

70. US Wind, in its Delaware application materials, failed to meet its burden of providing DNREC with data, and evidence addressing all of the required elements and regulatory criteria for each application.⁶ Accordingly, the Secretary's grant of the applications was not supported by substantial evidence, and is erroneous as a matter of law.

71. The Secretary's approval of these permits constitutes an abuse of discretion, as alternatives exist (including overland routes or Delaware declining to host the onshoring of power cables for the exclusive benefit of a Maryland offshore wind Project) which would be far less detrimental to Delaware's natural resources.

72. The Secretary's approval of these permits constitutes an abuse of discretion, in the face of inadequate and unspecified bonding "or similar mechanism," at an unknown future date, including for decommissioning and removal of Project components. In addition, the only information supplied regarding bonding at all was provided by US Wind after the public record had closed, and the public never had an opportunity to review or comment on such provisions.

⁶ *i.e.* 7 Del. Admin. C. 5102, §§4.5; 5.3 (Beach Protection); 7 Del. Admin. C. 7502, §§7.0; 8.4, 12.0 (Wetlands); 7 Del. Admin. C. 7502, §§4.0 (Subaqueous Lands).

73. The Secretary erred as a matter of law, and/or abused his discretion, by failing to consider the subject permit applications within the context of the entire Project's environmental impacts to Delaware, including its offshore components, and in stating that public comments and concerns pertaining to offshore impacts would not be considered by DNREC. *See* Decision at p. 21; Public Hearing Transcript, pp. 15-16.

CONCLUSION

In sum, this Project, while Appellants maintain that it should have been entirely implemented in Maryland, could have been implemented in Delaware in an alternative manner, without impacting the inland bay or wetlands. DNREC failed to consider the alternatives as required by law and regulation, failed to assure the applications were complete as statutorily required and failed to allow for meaningful public information, review and comment.

DNREC is charged with protecting, conserving and acting in the interests of Delaware's natural resources. *7 Del. C. §6801* provides that:

“Beaches of the Atlantic Ocean and Delaware Bay shoreline of Delaware are hereby declared to be valuable natural features which furnish recreational opportunity and provide storm protection for persons and property, as well as being an important economic resource for the people of the State.”

Similarly, *7 Del. C. §7201* recognizes that:

“Subaqueous lands within the boundaries of Delaware constitute an

important resource of the State and require protection against uses or changes which may impair the public interest in the use of tidal or nontidal waters.”

By approving these permits, the Secretary failed to meet his duties to the people of Delaware and the vital, natural resources we hold in trust for future generations.

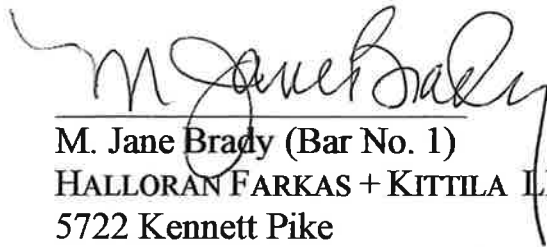
WHEREFORE, Appellants respectfully request that this Board vacate the subject permits, and rule that:

1. The permits must be reversed and vacated, as the zoning approvals which are necessary have been denied, and the permits are therefore invalid.
2. The permits must be reversed and vacated, as Secretary erred as a matter of law and abused his discretion as described in detail herein.
3. The permits must be reversed and vacated, as Secretary’s decision as to each of the permits is not supported by substantial evidence of record, as described in detail herein.
4. The permits must be reversed and vacated, as Secretary erred as a matter of law and abused his discretion by relying on critical materials in making his decisions to grant the permits, which were never made part of the pre-decision public record, thereby precluding public comment on substantial and dispositive Project information.

WITNESSES, HEARING AND RECORD

Appellants expect to call approximately six (6) witnesses at a hearing on the merits, and estimate hearing time to be one full day. Appellants reserve the right to call or examine any witnesses identified by DNREC, including DNREC staff who worked on evaluating the subject applications. Appellants request that DNREC designate, file and provide appellants with a copy of the full chronology and record, indexed by permit, of all materials that comprise the record upon which the permits were decided, no later than 30 days prior to the pre-hearing conference.

Appellants have enclosed a \$50.00 deposit for costs with this Notice of Appeal, in accordance with the Board's regulations.



M. Jane Brady (Bar No. 1)
HALLORAN FARKAS + KITTLA LLP
5722 Kennett Pike
Wilmington, Delaware 19807
302-542-1268
mjb@hfk.law
Counsel for Appellants

Dated: December 30, 2024