

IN THE MATTER OF THE
FEDERAL CONSISTENCY
CERTIFICATION FOR ATLANTIC
SHORES OFFSHORE WIND
SOUTH PROJECT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2743-23

ON APPEAL FROM:

New Jersey Department of
Environmental Protection

File No. 0000-21-00221, CDT210001

Civil Action

APPELLANTS' BRIEF

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TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

COMBINED PROCEDURAL HISTORY AND STATEMENT OF FACTS. 4

a) Regulatory Background..... 5

b) Atlantic Shores’ Application to DEP. 8

 i) Impact on Scenic Resources. 11

 ii) Impacts on Marine Life. 13

c) Impacts on Avian Species..... 15

d) DEP’s Review and Issuance of the Consistency Certification. 16

ARGUMENT 21

POINT I..... 21

 DEP’S CONCLUSION THAT THE ATLANTIC SHORES PROJECT
 SATISFIED ITS COASTAL RULEs WAS ARBITRARY, CAPRICIOUS,
 AND UNREASONABLE. (Pa7-Pa52) 21

a) DEP’s Finding that the Atlantic Shores Project Met the Scenic Resources
 and Design Rule was Arbitrary and Capricious. (Pa47-Pa50) 23

b) DEP’s finding that the Atlantic Shores Project met the Marine Fish and
 Fisheries Rule was Arbitrary and Capricious. (Pa38-Pa45)..... 29

c) DEP’s finding that the Atlantic Shores Project Met the Surf Clam Areas
 Rule was Arbitrary and Capricious. (Pa16-Pa18) 31

e) DEP’s Finding that the Critical Wildlife Habitat Rule was Met was
 Arbitrary and Capricious. (Pa31) 34

POINT II..... 36

 THE POLITICAL PRESSURE PLACED ON DEP RESULTED IN
 IMPERMISSIBLE BIAS AND SHOULD HAVE PRECLUDED DEP’S
 CONSIDERATION OF ATLANTIC SHORE’S APPLICATION. (Pa152-
 Pa153)..... 36

POINT III 39

 DEP IMPROPERLY REJECTED THE SHORE MUNICIPALITIES’
 REQUEST FOR AN ADJUDICATORY HEARING. (Pa94-Pa100) 39

CONCLUSION 43

TABLE OF AUTHORITIES

	Page(s)
Cases	
<u>All American Check Cashing, Inc. v. Corley,</u> 191 F.Supp.3d 646 (S.D. Miss. 2016).....	42
<u>Application of John Madin/Lordland Dev. Int’l for Pinelands Dev. Approval,</u> 201 N.J. Super. 105 (App. Div. 1985).....	47
<u>Cotto,</u> 389 F.3d 212 (1st Cir. 2004).....	42
<u>Czar, Inc. v. Heath,</u> 398 N.J. Super. 133 (App. Div. 2008).....	28
<u>Dragon v. N.J. Dep’t of Env’t Prot.,</u> 405 N.J. Super. 478 (App. Div. 2009).....	28
<u>Ende v. Cohen,</u> 296 N.J. Super. 350 (App. Div. 1997).....	42
<u>Fuentes v. Shevin,</u> 407 U.S. 67 (1972)	45
<u>In re CAFRA Permit No. 87-0959-5 Issued to Gateway Assoc.,</u> 152 N.J. 287 (1997)	27, 28, 33
<u>In re Freshwater Wetlands Gen. Permit No. 16,</u> 379 N.J. Super. 331 (App. Div. 2005).....	27
<u>In re Stream Encroachment Permit,</u> 402 N.J. Super. 587 (App. Div. 2008).....	32, 33
<u>In re Taylor,</u> 158 N.J. 644 (1999)	27

<u>In re Xanadu Project at Meadowlands Complex,</u> 415 N.J. Super. 179 (App. Div. 2010).....	42
<u>Matter of Carberry,</u> 114 N.J. 574 (1989)	41, 42
<u>Matter of Thomas Orban/Square Properties, LLC,</u> 461 N.J. Super. 57 (App. Div. 2019)	27
<u>Medford Convalescent v. Div. of Med. Assistance,</u> 218 N.J. Super. 1 (App. Div. 1985)	28
<u>N.J. Chapter of Nat’l Ass’n of Indust. & Office Parks v. N.J. Dep’t of Env’tl. Prot.,</u> 241 N.J. Super. 145 (App. Div. 1990).....	27
<u>Nicoletta v. N.J. Dist. Water Supply Comm’n,</u> 77 N.J. 145 (1978).....	45
<u>Saccone v. Board of Trustees of Police and Firemen’s Retirement System,</u> 219 N.J. 369 (2014)	45
<u>SMB Assoc. v. N.J. Dep’t of Env’t Prot.,</u> 264 N.J. Super. 38 (App. Div. 1993)	28
<u>University Cottage Club of Princeton New Jersey Corp. v. N.J. Dep’t of Env’t Prot.,</u> 191 N.J. 38 (2007)	26, 27
<u>Van Orman v. Am. Ins. Co.,</u> 608 F.Supp. 13 (D.N.J. 1984).....	28
<u>Yamaha Motor Corp., U.S.A. v. Riney,</u> 21 F.3d 793 (8th Cir. 1994)	41, 42

Statutes

16 U.S.C. 1456(c)(3)(A)	11
16 U.S.C. 1456(c)(3)(B)(iii)	11

16 U.S.C. § 1451	10
16 U.S.C. § 1451(a).....	10
16 U.S.C. § 1451(m).....	10
16 U.S.C. § 1456(c)(1)(A)	11
16 U.S.C 1456(c)(3)(B)	11
N.J.S.A. 12:5-3	11
N.J.S.A. 13:9A-1	11
N.J.S.A. 13:19-1	11
N.J.S.A. 13:19-2	12
N.J.S.A. 52:14B-3.3(a)	45
N.J.S.A. 52:14B-3.3(b).....	45

Regulations

15 C.F.R. § 930.....	11
N.J.A.C. 7:7-1.1	13
N.J.A.C. 7:7-9.26.....	13
N.J.A.C. 7:7-9.37.....	13, 39, 40
N.J.A.C. 7:7-9.3	13, 36, 37
N.J.A.C. 7:7-9.4	13
N.J.A.C. 7:7-1.5	30, 31, 35
N.J.A.C. 7:7-28.1.....	44
N.J.A.C. 7:7-16.2.....	<i>passim</i>
N.J.A.C. 7:7-16.10.....	<i>passim</i>

TABLE OF JUDGMENTS AND ORDERS ON APPEAL

Federal Consistency Certification, dated April 1, 2024.....Pa001

Letter of Intent Between New Jersey Department of Environmental
Protection, Atlantic Shores Offshore Wind Project 1, LLC and
Atlantic Shores Offshore Wind Project 2, LLC, dated April 1, 2024
.....Pa004

Division of Land Resource Protection, Bureau of Coastal Permitting,
Environmental Analysis Report, dated April 1, 2024Pa007

Division of Land Resource Protection Response to Comments, dated
April 1, 2024.....Pa053

Letter Order Denying Third-Party Adjudicatory Hearing Request,
dated June 14, 2024Pa094

TABLE OF APPENDIX

Volume I (Pa1 to Pa177)

Federal Consistency Certification, dated April 1, 2024.....Pa001

Letter of Intent Between New Jersey Department of Environmental Protection, Atlantic Shores Offshore Wind Project 1, LLC and Atlantic Shores Offshore Wind Project 2, LLC, dated April 1, 2024Pa004

Division of Land Resource Protection, Bureau of Coastal Permitting, Environmental Analysis Report, dated April 1, 2024Pa007

Division of Land Resource Protection Response to Comments, dated April 1, 2024.....Pa053

Letter Order Denying Third-Party Adjudicatory Hearing Request, dated June 14, 2024Pa094

Notice of Appeal, dated May 14, 2024Pa101

Amended Notice of Appeal, dated June 19, 2024Pa106

Second Amended Statement of Items Comprising the Record on Appeal, dated October 15, 2024Pa114

Order on Motion to Consolidate Appeals, dated July 15, 2024Pa150

Order on Motion to Consolidate Appeals, dated August 13, 2024Pa151

Letter from Frank Huttle, Esq. to Janet Stewart, NJDEP, dated June 29, 2023.....Pa152

Volume II (Pa178 to Pa354)

(Continued) Letter from Frank Huttle, Esq. to Janet Stewart, NJDEP, dated June 29, 2023Pa178

Letter from Frank Huttle, Esq. to Janet Stewart, NJDEP, dated October 19, 2023.....Pa180

Adjudicatory Hearing Request, dated April 26, 2024 (Duplicate Exhibits Omitted)..... Pa186

Exhibit A (Reproduced in Full at Pa001 to Pa093Pa195

Exhibit B (Reproduced in Full at Pa152 to Pa179)Pa196

Exhibit C (Reproduced in Full at Pa180-Pa185).....Pa197

Exhibit D, Potential Economic Losses of Reduced Tourism Attributable to Proposed Wind Turbines in Long Beach Island, NJ.....Pa198

Exhibit E, Proof of DeliveryPa211

Constructions and Operations Plan, Visual Impact Assessment (excerpt) Pa213

Atlantic Shores Offshore Wind South, Draft Environmental Impact Statement (excerpt).....Pa301

Volume III (Pa355 to Pa531)

(Continued) Atlantic Shores Offshore Wind South, Draft Environmental Impact Statement (excerpt).....Pa355

Atlantic Offshore Wind Energy Development: Values and Implications for Recreation and Tourism, U.S. Department of the Interior, Bureau of Ocean Energy ManagementPa487

Volume IV (Pa532 to Pa719)

(Continued) Atlantic Offshore Wind Energy Development: Values and Implications for Recreation and Tourism, U.S. Department of the Interior, Bureau of Ocean Energy ManagementPa532

Lutzeyer, S., Phaneuf, D. J., and L. O. Taylor (2017). The Amenity Costs of Offshore Windfarms: Evidence from a Choice Experiment. (CEnREP Working Paper No. 17-017).....Pa545

Pamela H. Loring, James D. McLaren, Holly F. Goyert and Peter W.C. Paton. Supportive wind conditions influence offshore movements of Atlantic Coast Piping Plovers during fall migration, *The Condor* 122 (2020)Pa611

Robin Brabant, Nicolas Vanermen, Eric W.M. Stienen and Steven Degraer. Towards a Cumulative Collision Risk Assessment of Local and Migrating Birds in North Sea Offshore Wind Farms *Hydrobiologia* (2015).....Pa627

Division of Land Resource Protection, Bureau of Coastal Permitting, Response to Public Comments for Ocean Wind Offshore Wind Project (excerpt), April 2023Pa639

Letter from Megan Brunatti, NJDEP, to Karen Baker, BOEM Office of Renewable Energy Programs, dated July 3, 2023Pa643

Email from Kimberly Sullivan, BOEM, to Megan Brunatti and Katherine Nolan, NJDEP, dated November 1, 2023Pa656

Email from Janet Stewart, NJDEP, to Jennifer Daniels, Atlantic Shores Offshore Wind, and Kimberly Sullivan, BOEM, dated March 11, 2024Pa659

Email from Stephanie Wilson, Atlantic Shores Offshore Wind, to Janet Stewart, NJDEP, dated March 25, 2024Pa663

Email from Katherine Nolan, NJDEP, to Sidney Chaky, BOEM, dated March 26, 2024.....Pa669

Email from Lisa Landers, BOEM, to Janet Stewart, NJDEP, dated March 26, 2024.....Pa673

Email from Janet Stewart, NJDEP, to Lisa Landers, BOEM, dated March 26, 2024.....Pa680

Email from Stephanie Wilson, Atlantic Shores Offshore Wind, to Janet Stewart, NJDEP, dated March 27, 2024Pa687

Executive Order No. 8, dated January 31, 2018.....Pa697

Executive Order No. 92, dated November 19, 2019.....Pa700

George R. Parsons, Jeremy Firestone, Lingxiao Yan, & Jenna Toussaint, The Effect of Offshore Wind Power Projects on Recreational Beach Use: A Contingent-Behavior Study on the East Coast of the United States, Energy Policy 144 (2020)Pa704

Department of Environmental Protection, Bureau of Coastal Permitting, Federal Consistency Analysis for Empire Wind 1 and Empire Wind 2 (excerpt).....Pa715

PRELIMINARY STATEMENT

This case concerns the installation of one of the largest, densest, and closest offshore wind farms in the world—less than 10 miles off the coast of New Jersey – a project that will have devastating impacts on the shore economy and marine life. Deferring to the Governor’s aggressive agenda to make New Jersey the epicenter of wind energy, Respondent Department of Environmental Protection (DEP) has effectively abandoned its independent role and rushed to advance the wind project proposed by Respondent Atlantic Shores Offshore Wind (Atlantic Shores) without adequately considering the magnitude of the impacts it will have on coastal communities, the environment, and wildlife.

Despite clear adverse impacts, DEP arbitrarily found the Atlantic Shores project to comply with its Coastal Zone Management rules, and issued a consistency certification under the federal Coastal Zone Management Act permitting the federal government to proceed to issue permits for the project. Having now received all approvals, Atlantic Shores can race forward with construction, forever altering and industrializing New Jersey’s unique coastline. Appellants Long Beach Township, Beach Haven, Ship Bottom, Barnegat Light, Surf City, Harvey Cedars, Brigantine, and Ventnor City (collectively the Shore Municipalities) thus filed this appeal to protect their residents and the pristine shoreline that bring millions of visitors each year, as DEP failed to faithfully

apply its rules and derogated from its duty to protect New Jersey's coastal resources.

Although some of the science concerning the impacts of offshore wind turbines is complex, the errors the Shore Municipalities raise on appeal are not. Rather, DEP repeatedly acknowledged these adverse impacts, but failed to follow clear language in its Coastal Zone Management Rules that would prohibit endorsing development with these negative consequences.

These arbitrary findings include a finding that a readily visible development of 200 turbines, each as tall as the Eiffel Tower and just miles off the coast, complied with DEP's Scenic Resources rule. This project, as DEP conceded, was deemed "discouraged" development under that rule, and without mitigation that will result in a "net gain" in scenic resources, could not be approved. But DEP nonetheless found compliance with the rule, relying solely on its assertion that the project overall was in the public interest.

DEP repeated that same error with other rules, including rules designed to protect marine fish and the New Jersey fishing industry that relies upon them. DEP acknowledged adverse, long-term impacts on fish, shellfish, and fisheries. But again, despite that finding, which meant that Atlantic Shores' project was "discouraged" development, requiring a DEP finding of "net gain" to marine fish and fisheries, DEP made no such finding of "net gain."

DEP similarly arbitrarily found compliance with a rule protecting surf clam areas, without any efforts to minimize impacts from turbine construction as the rule required. And DEP capriciously found the Atlantic Shores project not to have any impact on critical wildlife habitat, ignoring clear evidence that the project area is utilized by numerous avian species as a migratory corridor requiring protection under the rule. These arbitrary findings warrant reversal of the consistency certification.

DEP's approval was the result of political pressure to advance the Governor's agenda without regard to the adverse impacts of specific projects. Due process required a more searching and independent review of Atlantic Shores' application, such as review by an impartial administrative law judge, and such procedural safeguards should be required on remand.

For those same reasons, the Shore Municipalities' post-decision request for an adjudicatory hearing on the consistency certification should have been granted. Contrary to DEP's reasoning in denying that request, the severe impacts that will be felt in the Shore Municipalities indeed confer constitutional standing, and entitled them to an evidentiary hearing concerning the project. Thus, in addition to remanding the consistency certification, this Court should direct that DEP grant the Shore Municipalities' hearing request.

COMBINED PROCEDURAL HISTORY AND STATEMENT OF FACTS¹

Governor Phil Murphy has taken an unyielding stance to make New Jersey the national leader in offshore wind projects, despite increasing evidence of their detrimental impacts. Within a few weeks of taking office, he signed Executive Order 8, setting “an aggressive offshore wind energy goal.” Exec. Order 8 (Jan. 31, 2018) (Pa697).² He directed DEP, the Board of Public Utilities, and all other State agencies to “take all necessary actions to implement” that agenda. In November 2019, Governor Murphy signed Executive Order 92, making that agenda even more aggressive, with a production goal of 7,500 MW by 2035. Exec. Order 92 (Nov. 19, 2019) (Pa702). The DEP Commissioner has worked to implement Governor Murphy’s agenda, including entertaining and ultimately granting a proposal by Atlantic Shores – the first of two projects for which Atlantic Shores is seeking regulatory approval to construct in the ocean immediately off New Jersey’s coast.

This Atlantic Shores project involves the construction of up to 200 wind turbines, with structures reaching over 1000 feet tall and rotor blades extending more than 900 feet. (Pa11). The proposed installation covers an expansive area

¹ The factual and procedural histories are closely interrelated and are combined for the Court’s convenience.

² “Pa” refers to the Shore Municipalities’ appendix.

just off the pristine beaches of Long Beach Island and Atlantic County, coming as close as 8.7 miles to the shore. (Pa10).

a) Regulatory Background.

Because the turbines are proposed to be constructed more than three miles off the shore, DEP's role in reviewing this massive project has been limited. Nonetheless, under the federal Coastal Zone Management Act (CZMA), 16 U.S.C. § 1451 et seq., New Jersey, through DEP, was authorized to review the project for consistency with its enforceable coastal policies.

The Coastal Zone Management Act (CZMA), 16 U.S.C. § 1451 et seq., is a federal statute designed to promote the “effective management, beneficial use, protection, and development of the coastal zone.” 16 U.S.C. § 1451(a). In the CZMA, Congress recognized that “[b]ecause of their proximity to and reliance upon the ocean and its resources, the coastal states have substantial and significant interests in the protection, management, and development of the resources of the exclusive economic zone that can only be served by the active participation of the coastal states in all Federal programs affecting such resources and, wherever appropriate, by the development of state ocean resource plans as part of their federally approved coastal zone management programs.” 16 U.S.C. § 1451(m).

In furtherance of these goals, the CZMA and its implementing regulations require that federal actions within a state's coastal zone, or which would have reasonably foreseeable coastal effects within a state's coastal zone, be consistent with the enforceable policies of that state's federally-approved coastal management program to the maximum extent possible. 16 U.S.C. § 1456(c)(1)(A); 15 C.F.R. § 930 et seq. The CZMA thus bars federal agencies from approving proposed development affecting the coastal zone "until the state or its designated agency has concurred with the applicant's certification" that the development is consistent with the state's coastal policies. 16 U.S.C. 1456(c)(3)(A); see also 16 U.S.C. 1456(c)(3)(B). If a state objects and finds the project is not consistent with its coastal policies, it may only be approved if the Secretary of the Interior finds the proposal consistent with the objectives of the CZMA or necessary to national security. 16 U.S.C. 1456(c)(3)(A); 16 U.S.C. 1456(c)(3)(B)(iii).

New Jersey has an approved coastal zone management program. Its enforceable policies incorporate the Waterfront Development Law, N.J.S.A. 12:5-3, et seq., the Coastal Wetland Act of 1970, N.J.S.A. 13:9A-1, et seq., and the Coastal Area Facilities Review Act (CAFRA), N.J.S.A. 13:19-1, et seq. CAFRA was enacted to protect New Jersey's coastal resources and to promote development that balanced the need to protect and preserve the environment

while promoting the economy of the shore communities. See N.J.S.A. 13:19-2.

Specifically, the Legislature recognized that:

New Jersey's bays, harbors, sounds, wetlands, inlets, the tidal portions of fresh, saline or partially saline streams and tributaries and their adjoining upland fastland drainage area nets, channels, estuaries, barrier beaches, near shore waters and intertidal natural environmental resources together constitute an exceptional, unique, irreplaceable and delicately balanced physical, chemical and biologically acting and interacting natural environmental resource called the coastal area[.]

[Ibid.]

The Act dedicated the coastal area to “multiple uses which support diversity and are in the best long-term, social, economic, aesthetic and recreational interests of all people of the State[.]” Ibid. The Legislature “recognize[d] the legitimate economic aspirations of the inhabitants of the coastal area and wishe[d] to encourage the development of compatible land uses in order to improve the overall economic position of the inhabitants of that area within the framework of a comprehensive environmental design strategy which preserves the most ecologically sensitive and fragile area from inappropriate development and provides adequate environmental safeguards for the construction of any developments in the coastal area.” Ibid.

Pursuant to the above statutes, DEP adopted the Coastal Zone Management (“CZM”) Rules which contain New Jersey’s enforceable coastal

policies with which coastal development must comply. See N.J.A.C. 7:7-1.1, et. seq. Among other requirements, these rules contain requirements to protect scenic resources, N.J.A.C. 7:7-16.10, threatened and endangered wildlife, N.J.A.C. 7:7-9.26 critical wildlife habitat, N.J.A.C. 7:7-9.37 surf clam areas, N.J.A.C. 7:7-9.3, marine fish and fisheries, N.J.A.C. 7:7-16.2, and prime fishing areas, N.J.A.C. 7:7-9.4.

b) Atlantic Shores' Application to DEP.

Pursuant to the CZMA, Atlantic Shores submitted a request to DEP for a federal consistency certification. (Pa7). During its review, DEP held several public comment periods, including after receipt of the application in fall 2021, after the Bureau of Ocean Energy Management issued its Draft Environmental Impact Statement (DEIS) in spring 2023, and in fall 2023 due to a notice deficiency concerning that second public comment period. (Pa7). The Shore Municipalities submitted two public comment letters, in June 2023 and October 2023. (Pa152; Pa180). Many other organizations and individuals submitted comments in opposition to the project as well. (Pa128-133 (listing comments)).

The Shore Municipalities' initial public comments on the application raised, among other issues, that constructing such large turbines so close to shore would have severe negative visual impacts in violation of DEP's scenic resources rule; that the project would negatively impact fish and fisheries; that

the project would adversely impact endangered marine mammals such as the North American Right Whale; and that the project would negatively impact avian species. (Pa152-Pa179). The Shore Municipalities identified that those impacts meant the project could not meet numerous CZM rules, and thus the project could not be found consistent with New Jersey's enforceable coastal policies. (Pa152-Pa179). The Shore Municipalities also expressed their concern that the Governor's executive orders and political pressure made it impossible for the DEP Commissioner and his staff to impartially review the application for compliance with DEP's rules, and suggested that the DEP refer the application to the Office of Administrative Law for review and the creation of an independent record and recommendations by an impartial administrative law judge.³ (Pa152-Pa153).

The Shore Municipalities' supplemental public comment letter in October 2023 submitted to DEP a visual simulation their expert had performed, that reflected the project visual impact of the turbines would be even worse than

³ After DEP rebuffed that suggestion, the Shore Municipalities filed an action in the Chancery Division seeking to compel DEP to refer the matter to the OAL, and seeking discovery as to DEP's bias. That action was dismissed on jurisdictional grounds, which the Shore Municipalities have appealed under Docket No. A-2738-23. This Court denied DEP and Atlantic Shores' motions to dismiss that appeal, and the appeals have been calendared back-to-back. (Pa150).

either Atlantic Shores’ or BOEM’s analyses had reflected. (Pa180-Pa181). For example, beachgoers in Holgate would experience the following view:⁴



The Shore Municipalities submission also pointed out findings of permanent adverse impacts to oceanic habitat that DEP itself had made in its comments to the federal government concerning the project, and the significant adverse impacts the project would have on commercial fisheries located in the Shore Municipalities. (Pa182-Pa183; Pa644).

The specific adverse impacts relevant to this appeal are outlined below.

⁴ A video simulation of the turbines moving is available at <https://vimeo.com/865989588/ed41118942> (last accessed October 25, 2024).

i) Impact on Scenic Resources.

As the Shore Municipalities identified in their public comment letters, the Atlantic Shores project will have a devastating visual impact on their communities. The project will include 200 turbines, each 1,064 feet tall with blades spanning 900 feet in diameter, constructed as close as 8.7 miles to the shore. (Pa7; Pa153). At the time BOEM initially studied offshore wind for the New Jersey coastline to designate lease areas including the lease area on which Atlantic Shores bid, turbines were significantly shorter, with rotor diameter well under 100 meters. Atlantic Shores' turbines will be 3 times that size. (Pa154).

Atlantic Shores and BOEM both acknowledged that the project would have a severe visual impact. Atlantic Shores prepared a Visual Impact Assessment in support of its application, in which it conceded that onshore impacts would be "significant." (Pa239; Pa277). For example, the view from Beach Haven on Long Beach Island received the highest possible visual impact score of "6", which means:

An object/phenomenon with strong visual contrasts that is so large that it **occupies most of the visual field**, and **views of it cannot be avoided except by turning one's head more than 45 degrees from a direct view of the object**. The object/phenomenon is the major focus of visual attention, and its large apparent size is a major factor in its view dominance. In addition to size, contrasts in form, line, color, and texture, bright light sources and moving objects associated with the study subject may contribute substantially to drawing viewer

attention. **The visual prominence of the study subject detracts noticeably from views of other landscape/seascape elements.**

(Pa228 (emphasis added); Pa239).

This area of Beach Haven is a “very popular stretch of beach” and “the ocean is an integral part of [the] beach experience” for various forms of recreation, including sunbathing, swimming, walking, and running along the coast. (Pa251). Other locations along LBI, including the Forsythe National Wildlife Refuge in Holgate, Holyoke Avenue in Beach Haven, the Beach Haven Historic District, Ship Bottom Beach, and the LBI Arts Foundation in Long Beach Township, were also acknowledged by Atlantic Shores to face significant visual impacts from the planned turbines. (Pa239-240). As Atlantic Shore was forced to concede that the turbines “may affect the viewer’s perception of a pristine, undeveloped ocean horizon.” (Pa251).

The federal government, in its review of Atlantic Shores’ construction and operations plan, likewise concluded that the project provides “no beneficial impacts on scenic and visual resources.” (Pa461). A highly valued open ocean vista, like those in the Shore Municipalities, “would reach the maximum level of change to its features and characters from formerly undeveloped ocean to dominant wind farm character by approximately 2030 and result in major impacts.” (Pa482).

In their public comments, the Shore Municipalities identified the significant adverse economic impact this degradation of their scenic resources would cause. (Pa161-Pa165). This included studies by the University of Delaware, which DEP had itself credited in its review of an earlier proposed offshore wind project, that found that a significant percentage of beachgoers would choose to visit a different beach if even smaller and shorter turbine projects were constructed closer than 15 miles to shore. (Pa162-Pa165; Pa496; Pa641; Pa707-Pa709). A North Carolina study concluded similarly, finding that 55% of visitors would not re-rent their most recent vacation rental if a 144-turbine project were constructed 5 to 18 miles offshore. (Pa551-Pa553). A 2017 European study focusing on turbines off the Catalan coast found a “welfare loss” of up to \$220 million per season, with tourists choosing instead to visit beaches without turbines. (Pa163-Pa164). A subsequent study performed on behalf of the Shore Municipalities, and submitted to DEP in support of its request for an adjudicatory hearing, concluded that Ocean County would face a total economic loss of \$668.2 million from the Atlantic Shores’ project, with 6700 jobs lost. (Pa202; Pa207).

ii) Impacts on Marine Life.

It is also undisputed that the turbines would impact marine life, including fish and shellfish, and would adversely impact commercial and recreational

fishers that depend on, or pass through, the Atlantic Shores turbine area. As the Shore Municipalities pointed out in their public comment letter, the federal government's DEIS acknowledged that the turbines "could have several impacts on commercial and for-hire recreational fisheries, including through gear loss or damage, navigational hazards, habitat conversion and fish aggregation, migration disturbances, and space-use conflicts" (DEIS 3.6.1-64) and "[f]ishing vessel operators who are displaced from fishing grounds within offshore wind areas and are unable to find alternative fishing locations would experience long-term revenue losses." (Pa169; Pa417; Pa419)

Additionally, the DEIS found that:

[t]he presence of the WTG foundations and associated scour protection, as well as cable protection, would convert existing sand or sand with mobile gravel habitat to hard-bottom, which, in turn, would reduce the habitat for target species that prefer soft-bottom habitat (e.g., surfclams, sea scallops, squid, summer flounder).

[Pa411].

DEP itself made similar findings in its earlier public comment letter to the federal government on the DEIS, explaining that turbines will negatively impact benthic habitat, included the slough and sand ridge complex which "provide habitat for a variety of fish species and benthic infauna." (Pa644). DEP's letter acknowledged that the impacts of the turbines on this habitat "would not be temporary," would alter sand waves that "may be many thousands of years old,"

that there is not yet scientific literature evaluating the impact of removing this habitat, and “[t]here is no clear evidence that the habitat created by turbine foundations provides similar ecosystem services.” (Pa644).

Commercial fisheries in the Shore Municipalities rely upon these offshore habitats for fishing, trawling for flounder and other aquatic species, and passing through to areas further offshore. (Pa182). As DEP itself had previously found, New Jersey’s fishing industry operates on “a very small profit margin.” (Pa717). Any impact could devastate that industry, sending buyers elsewhere if they are no longer able to purchase sufficient quantities of seafood from the Shore Municipalities’ commercial fishing ports and damaging those business relationships, which took decades to establish, potentially forever. (Pa183).

c) Impacts on Avian Species.

The Atlantic Shores project area is located along the Atlantic Flyway and utilized by many avian species. (Pa302). At least three species of songbirds listed by DEP as endangered have been found to occur in the project area: the red knot, piping plover, and roseate tern. (Pa307). The federal government’s DEIS concluded that Atlantic Shores’ project may adversely affect red knots, and could also affect the piping plover and roseate tern. (Pa329). Other studies have found piping plovers to fly directly through the project area on migratory flights. (Pa612; Pa621). When offshore wind projects are considered together,

rather than through piecemeal analyses, scientific studies reflect that they can cause population-level mortality for migrating birds. (Pa636).

d) DEP’s Review and Issuance of the Consistency Certification.

The record provided by DEP in connection with this appeal makes clear that DEP’s review was not independent, but rather that the outcome of both DEP and BOEM’s review of the Atlantic Shores’ projects was predestined and the result of political pressure.

For example, in late October and early November 2023, DEP corresponded with BOEM concerning the timing of DEP’s consistency determination. (Pa656). BOEM’s email made clear it had concern about “the timing of [DEP’s] decision **before COP approval;**” indicating that, nearly a full year before the federal government’s decision was issued, it was already known that it would be an approval. (Pa656) (emphasis added).

And when it came time for DEP to issue its own decision, the record reflects that DEP was captive to pressure from both Atlantic Shores and BOEM. Throughout the review process, DEP engaged in frequent meetings with Atlantic Shores, and declined to provide any record or notes concerning those meetings. Three weeks before issuing the consistency determination, DEP provided its draft concurrence, including DEP’s conditions concerning what was required for Atlantic Shores’ project to meet DEP’s requirements, to Atlantic Shores for its

review, comment, and edits. (Pa659). After Atlantic Shores objected to the inclusion of a recommendation to monitor the visual impact of construction activities, DEP was apparently willing to back down and remove that provision until BOEM advised it would require that condition itself. (Pa663-Pa680). This exchange reflects that DEP's review was not in fact based on what DEP believed was best to protect its coastal resources, but rather dictated by what the federal government and Atlantic Shores wanted.

DEP issued the consistency certification on April 1, 2024, concurring that the project was consistent with New Jersey's Coastal Zone Management Program. (Pa1). The decision was accompanied by an environmental report detailing DEP's specific findings, and a response to public comments. (Pa7-Pa93). As detailed below, DEP made many unsupportable findings in its analysis.

In discussing the project's impact on scenic resources, protected by N.J.A.C. 7:7-16.10, DEP acknowledged that the rule "discourages new coastal development that is not visually compatible with existing scenic resources in terms of large scale elements of building and site design." (Pa47). DEP acknowledged that the project would have major impacts from turbines 8.7 to 19.4 miles from shore, and "would add to the cumulative viewshed impact posed by multiple proposed offshore wind farms" (which included a second,

immediately adjacent project proposed by Atlantic Shores). (Pa48). DEP also acknowledged the Delaware and North Carolina studies finding significant impacts on tourism from turbines and that those turbines were significantly smaller than the Atlantic Shores' turbines. (Pa48-Pa49). DEP attempted to minimize these impacts by claiming the turbines would be visible only during high visibility conditions, but failed to acknowledge that clear days would be the most likely to drive tourists to the beach. (Pa48-Pa49). DEP nonetheless conceded that "the visual impact is predicted to be significant." (Pa50).

DEP discussed potential measures that could be taken to reduce impacts to scenic resources, including painting the turbines light grey and using Aircraft Detection Lighting Systems rather than continuous flashing lights at night. (Pa49). DEP also found that Atlantic Shores had agreed to prepare and implement a scenic and visual resource monitoring plan, but acknowledged "that this mitigation measure would not reduce the visual impact of the offshore wind farm." (Pa50).

But despite the serious adverse effects DEP acknowledged, DEP found that, because the project was in the public interest, and because of those "mitigating measures to lessen visual impacts" it was consistent with the scenic resources rule. (Pa50).

DEP also found the project to comply with the Marine Fish and Fisheries rule, N.J.A.C. 7:7-16.2(b). (Pa37-Pa45). As DEP acknowledges, this rule “discourages any activity that would adversely affect the natural functioning of marine fish and discourages any activity that would adversely affect any New Jersey based marine fisheries or access thereto.” (Pa37).

Arbitrarily changing its earlier findings of permanent impacts that DEP had made in its public comments on the DEIS, DEP now found that that any impact to the seabed would be short term and, and habitat functions would fully recover. (Pa38). DEP also acknowledged that the conversion of soft-bottom habitat to hard-bottom habitat around the turbines “would result in the displacement of soft-bottom species (e.g., Atlantic surf clam, squid, winter flounder)” but minimized those losses because they would not rise to the level of “population-level impacts.” (Pa39). DEP discussed adverse impacts from pile-driving activities during construction, but similarly ignored them because they would not “cause population-level impacts.” (Pa40; Pa41). Nonetheless, DEP conceded that “the habitat conversion resulting from the Project is expected to have localized, long-term impacts that would be adverse for commercial fisheries, and noted that the presence of cables and scour protection would likewise have “long-term adverse impacts on commercial and for-hire recreational fisheries” through anticipated “gear loss or damage, navigational

hazards, fish aggregation, migration disturbances, and space-use conflicts.” (Pa42). DEP acknowledged that economic losses were anticipated. (Pa44).

To find compliance with the rule, DEP again relied upon purported mitigation. (Pa43-Pa44). That mitigation consisted of commissioned, but largely not yet completed, studies on impacts. (Pa44). The study that had been completed, concerning socioeconomic impacts of offshore wind on the Atlantic surf clam fisheries, reflected “the vulnerability of this fishery to offshore wind.” (Pa44). The other mitigating measures consisted of using cable protection measures, advising fisherman of the physical locations of cable protection, and a compensation fund. (Pa44-Pa45).

Despite concluding that “the Project impacts to marine fish and New Jersey based fisheries will range from short term and minimal to longer term and more substantial,” DEP found the project in the public interest and the mitigation proposed sufficient to find compliance with the Rule. (Pa45).

DEP also found the project to comply with its rule designed to protect surf clam areas, despite DEP’s acknowledgement the project would adversely impact surf clams. (Pa16-Pa18). DEP additionally found the project to comply with its critical wildlife habitat rule, claiming that the project did not contain any critical wildlife habitat, even though the project area is indisputably used as a migratory corridor by several bird species. (Pa31).

As explained further herein, each of these findings is arbitrary, capricious, and unreasonable. Moreover, they only further evidence of DEP’s bias in its review of this project, and that procedural safeguards were required to ensure true independent review of it. The Shore Municipalities thus filed this appeal on May 14, 2024. (Pa101).

The Shore Municipalities also filed a third-party hearing request with DEP, which the agency denied on June 14, 2024. (Pa94; Pa180). That denial was solely based on DEP’s finding that the Shore Municipalities lacked a constitutional entitlement to a hearing. (Pa97-Pa100). The Shore Municipalities amended their notice of appeal to include that decision as well. (Pa106).

ARGUMENT

POINT I

DEP’S CONCLUSION THAT THE ATLANTIC SHORES PROJECT SATISFIED ITS COASTAL RULES WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE. (Pa7-Pa52)

Appellate courts will reverse an agency’s decision if “(1) it was arbitrary, capricious, or unreasonable; (2) it violated express or implied legislative policies; (3) it offended the State or Federal Constitution; or (4) the findings on which it was based were not supported by substantial, credible evidence in the record.” University Cottage Club of Princeton New Jersey Corp. v. N.J. Dep’t of Env’t Prot., 191 N.J. 38, 49 (2007). Courts will generally defer “to an agency’s

interpretation of its own regulations, reasoning that ‘the agency that drafted and promulgated the rule should know the meaning of that rule. Matter of Thomas Orban/Square Properties, LLC, 461 N.J. Super. 57, 73 (App. Div. 2019) (quoting In re Freshwater Wetlands Gen. Permit No. 16, 379 N.J. Super. 331, 341-42 (App. Div. 2005)).

But “[w]hile [a court] must defer to the agency’s expertise, [it] need not surrender to it.” N.J. Chapter of Nat’l Ass’n of Indust. & Office Parks v. N.J. Dep’t of Env’tl. Prot., 241 N.J. Super. 145, 165 (App. Div. 1990). Importantly “an agency may not use its power to interpret its own regulations as a means of amending those regulations or adopting new regulations.” In re Gen. Permit No. 16, 379 N.J. Super. at 342. And “an appellate court . . . is ‘in no way bound by the agency’s interpretation of a statute or its determination of a purely legal issue.’” Univ. Cottage Club, 191 N.J. at 49 (quoting In re Taylor, 158 N.J. 644, 656 (1999)).

“[A]n administrative agency should follow its own rules and regulations.” In re CAFRA Permit No. 87-0959-5 Issued to Gateway Assoc., 152 N.J. 287, 308 (1997). “If an agency wants to amend a rule or regulation, it may do so after expressly providing notice and a hearing.” Ibid. “Similarly, an agency that seeks the power to waive its substantive regulations should adopt a regulation pertaining to any such waiver and setting forth appropriate standards to govern

agency decision-making.” Ibid. “[T]he power to waive CAFRA regulations must be exercised through the adoption of a rule establishing standards for the application of waiver authority.” SMB Assoc. v. N.J. Dep’t of Env’t Prot., 264 N.J. Super. 38, 54 (App. Div. 1993). See also Dragon v. N.J. Dep’t of Env’t Prot., 405 N.J. Super. 478, 491 (App. Div. 2009) (rejecting DEP’s argument that it had “inherent authority to deviate from strict compliance with its regulations”).

“Regulations are subject to the same rules of construction as a statute.” Medford Convalescent v. Div. of Med. Assistance, 218 N.J. Super. 1, 5 (App. Div. 1985). “The regulation should be construed in accordance with the plain meaning of its language, and in a manner that makes sense when read in the context of the entire regulation.” Ibid. “Moreover, ‘regulations within the same regulatory scheme should, where feasible, be read as consistent with each other.’” Czar, Inc. v. Heath, 398 N.J. Super. 133, 139 (App. Div. 2008) (quoting Van Orman v. Am. Ins. Co., 608 F.Supp. 13, 26 (D.N.J. 1984)).

a) DEP’s Finding that the Atlantic Shores Project Met the Scenic Resources and Design Rule was Arbitrary and Capricious. (Pa47-Pa50).

The CZM Rules expressly protect scenic resources such as the ocean view from the Shore Municipalities’ pristine beaches. See N.J.A.C. 7:7-16.10. “Scenic resources include the views of the natural and/or built landscape.” N.J.A.C. 7:7-16.10(a).

“New coastal development that is visually compatible with its surroundings in terms of building and site design, and enhances scenic resources is encouraged.” N.J.A.C 7:7-16.10(c). On the other hand, “[n]ew coastal development that is not visually compatible with existing scenic resources in terms of large-scale elements of building and site design is discouraged.” Ibid. The stated rationale for this rule is that “[a] project which is of a scale and location that has significant effect on the scenic resources of a region is considered to have a regional impact and to be of State concern.” N.J.A.C. 7:7-16.10(g). The rule “applies only to developments which by their singular or collective size, location and design could have a significant adverse impact on the scenic resources of the coastal zone.” Ibid.

As set forth above, DEP acknowledged that the Scenic Resources rule applied to Atlantic Shores’ proposal, found that “the visual impact is predicted to be significant,” and appeared to acknowledge that Atlantic Shores’ proposal constituted “discouraged” development under the rule. (Pa47). And DEP could not have found otherwise, as it is readily apparent that the construction of 200 turbines the size of the Eiffel Tower will substantially, and negatively, alter the pristine view from the shore. Record evidence – acknowledged but minimized by DEP – demonstrates that visual impacts of turbines at such distance would deter tourists that the Shore Municipalities rely upon to support their local

economies. Scientific studies of smaller turbines concluded that turbines closer than 15 miles would lead to a substantial decrease in tourism, and DEP itself credited that study on its review of an earlier, subsequently canceled, project by a different developer. (Pa641). The proposed turbines here are nearly twice as tall as the 574-foot turbines in that study, and closer than 15 miles – as close as 8.7 miles to Brigantine. (Pa47; Pa494).

But DEP nonetheless found the project to be in compliance with the rule solely on the basis that the project was in the public interest, and pointing to purported monitoring plans and claimed efforts at mitigating impacts. (Pa50). That finding was arbitrary capricious, and contrary N.J.A.C. 7:7-1.5 and N.J.A.C. 17:16-10 which required a “**net gain in quality and quantity**” of scenic resources – i.e. beach vistas – for the turbines to be approved. (emphasis added)

“Discouraged” is a defined term, which according to the CZM regulations

means that a proposed use of coastal resources is likely to be rejected or denied as the Department has determined that such uses of coastal resources should be deterred. In cases where the Department considers the proposed use to be in the public interest despite its discouraged status, **the Department may permit the use provided that mitigating or compensating measures can be taken so that there is a net gain in quality and quantity of the coastal resource of concern.**

[N.J.A.C. 7:7-1.5 (emphasis added)]

DEP failed to faithfully apply this regulation, as it made no finding of “net gain” to scenic resources. Instead, DEP found only that “the Project is in the public interest, has incorporated mitigating measures to lessen visual impacts, and has proposed on-going monitoring to assess the visual impacts.” (Pa50).

But the plain language of the regulation makes clear that “the coastal resource of concern” for which there must be a “net gain” is the specific resource that is the subject of the rule stating that development “discouraged” – here, scenic resources – and thus a benefit to the public interest alone as relied upon by DEP is insufficient. Otherwise, the rule would have referred to “coastal resources” generally, or the public interest alone. A finding that a development is in the public interest is thus inadequate and insufficient to approve it despite it being discouraged under a resource protection rule; rather, that is a predicate to allowing approval if, and only if, there are also mitigating or compensating measures that result in a “net gain in quality and quantity of the coastal resource of concern.” N.J.A.C. 7:7-1.5.

DEP did not make any finding that any such measures here would result in a net gain in scenic resources. Nor would the record have supported any such finding. The only mitigating measures cited were those involving efforts purportedly to reduce the visual impacts of the project through paint color and through an aircraft detection lighting system to reduce nighttime visibility that

Atlantic Shores had not even committed to using at the time of DEP's decision. (Pa49). But these measures at most make the turbines slightly less intrusive. They patently do not result in a "net gain" in scenic resources.

The monitoring efforts relied upon likewise will not result in a "net gain" in scenic resources or even result in a reduction of the impacts this project – as DEP itself so states. (Pa50 ("The DEIS acknowledges that this mitigation measure would not reduce the visual impact of the offshore wind farm.")). No requirement is imposed to remove the turbines if monitoring reflects a greater than anticipated impact. And no monitoring is required to conclude that the turbines will have major visual impacts – the federal government's Draft Environmental Impact Statement concluded as much. (Pa482-Pa483). See also DEP's environmental report ("the visual impact is predicted to be significant"). (Pa50).

This stands in sharp contrast to the circumstances in which this Court previously affirmed DEP's approval of discouraged development in In re Stream Encroachment Permit, 402 N.J. Super. 587, 605 (App. Div. 2008). In that case, DEP had approved the filling of wetlands in connection with the Xanadu project, which was "discouraged" under its regulations. Id. at 605. But there, the applicant had dedicated 587 acres of wetlands for mitigation – as the Court noted, "more than seventy-eight times the area of the filled land" – thus

supporting a finding of a “net gain in quality and quantity of the coastal research of concern.” Id. at 605-605 and n.3. The same “net gain” simply cannot be found here, as there is no required mitigation that will result in any benefit to scenic resources.

Again, DEP’s rules do not allow for approval of “discouraged” development simply because it is in the general public interest. Rather, if DEP desired to apply that standard to approve development that is otherwise inconsistent with specific CZM resource rules, it was required to amend its rules to allow it to do so. It cannot simply reinterpret or waive longstanding and clear regulatory language to approve a project that does not meet its rules. In re CAFRA Permit No. 87-0959-5 Issued to Gateway Assoc., 152 N.J. 287, 308 (1997). DEP’s rules as presently enacted mandate that DEP may not approve such discouraged development absent a “net gain” in both the quality and quantity of the resource at issue, here scenic resources. No such “net gain” exists in connection with the Atlantic Shores project. DEP’s finding that compliance with N.J.A.C. 7:7-16.10 had been demonstrated was thus arbitrary, capricious, and unreasonable, and the consistency certification should be reversed and vacated.

b) DEP’s finding that the Atlantic Shores Project met the Marine Fish and Fisheries Rule was Arbitrary and Capricious. (Pa38-45).

For similar reasons, DEP’s conclusion that the Atlantic Shores project satisfied the Marine Fish and Fisheries Rule, N.J.AC. 17:16-2, was arbitrary, capricious, and unreasonable, and should be reversed on appeal.

This rule provides that “[a]ny activity that would adversely impact the natural functioning of marine fish, including the reproductive, spawning, and migratory patterns or species abundance or diversity of marine fish, is discouraged.” N.J.A.C. 7:7-16.2(b). “In addition, any activity that would adversely impact any New Jersey based marine fisheries or access thereto is discouraged,” unless it complies with certain conditions set forth in the rule. Ibid.; N.J.A.C. 7:7-16.2(c) (listing exceptions). The rationale for the rule recognizes the importance of fish and fishing to New Jersey, including that “these resources provide significant recreation experiences for residents and interstate visitors” and “also help the State’s economy, by leading to expenditure of approximately \$1.4 billion per year.” N.J.A.C. 7:7-16.2(d). “Commercial landings for all finfish and shellfish in New Jersey during 2010 were 161,831,909 pounds, valued at \$177 million dockside” and with a “total ripple effect on the State economy . . . estimated at \$2.6 billion.” Ibid.

Based on DEP’s findings outlined above, Atlantic Shores project must be deemed “discouraged” under this rule. Species will be displaced, DEP

acknowledged its earlier comments on the project that turbine construction would cause permanent impacts to the seabed and benthic resources. (Pa644). Commercial fisheries would be significantly adversely impacted. (Pa42). The turbines do not satisfy any of the exceptions of N.J.A.C. 7:7-16.2(c) that would allow them to escape from being discouraged under the rule.

Thus, to find compliance with this rule, DEP was required to make a finding both that the project was in the public interest and that there would be mitigating or compensating measures such that there was a “net gain” in the resource of concern – here, marine fish and fisheries. N.J.A.C. 7:7-1.5. But as with the Scenic Resources & Design Rule, DEP arbitrarily stopped its analysis at the public interest prong, and did not make a finding that there would be a “net gain” in marine fish and fisheries, only an arbitrary finding that there “will not be a net loss in the quality and quantity of the coastal resources of concern.”⁵ (Pa45).

The mitigation measures described by DEP do not support finding a net benefit to marine fish and fisheries. Nothing Atlantic Shores had proposed would result in any direct benefit to marine fish, as the measures discussed included only monitoring, scientific studies on impacts, and monetary compensation of

⁵ DEP’s use of the phrase “coastal resources of concern” in this context belies any assertion DEP may make that the term refers to coastal resources generally, rather than the specific resource protected by the rule at issue.

fishermen and related businesses, but no efforts at habitat enhancement or the preservation that would result in a gain in marine fish or fisheries. (Pa43-Pa45). The monetary compensation offered to fisheries would make businesses whole only for “negative impacts of a significant nature.” (Pa45). There is no finding or explanation that this compensation results in a net gain in the quantity or quality of those businesses. And by drawing an undefined line that a business must suffer “significant” impacts to be entitled to seek compensation, there would in fact almost certainly be a net loss to businesses who are negatively impacted but perhaps not within DEP or Atlantic Shores’ definition of “significant.”

DEP’s finding of compliance with N.J.A.C. 7:7-16.2, notwithstanding the project’s “discouraged” status, was thus contrary to that regulation, and should be reversed.

c) DEP’s finding that the Atlantic Shores Project Met the Surf Clam Areas Rule was Arbitrary and Capricious. (Pa16-Pa18).

N.J.A.C 7:7-9.3 protects surf clam areas, which are areas that “can be demonstrated to support significant commercially harvestable quantities of surf clams (*Spisula solidissima*), or areas important for the recruitment of surf clam stocks.” “Development which would result in the destruction, condemnation, or contamination of surf clam areas is prohibited” unless, relevant to the Atlantic Shores project, the “[d]evelopment is of national interest;” “[t]here are no

prudent and feasible alternative sites;” and “[i]mpacts to surf clam area are minimized.” N.J.A.C. 7:7-9.3(b).

DEP acknowledged that the Atlantic Shores project would be constructed in surf clam areas, and “that the sand bottom habitat that supports this population would be altered permanently by offshore wind turbine foundations and scour protection and temporarily by cable installation.” (Pa16). DEP nonetheless found the rule satisfied because it found the exceptions of N.J.A.C. 7:7-9.3(b) to be met.(Pa16-18).

That finding was arbitrary, capricious, and unreasonable. The Shore Municipalities do not contest that green energy, including certain offshore wind projects, could be considered to be in the national interest. But DEP erred in finding that there were no prudent and feasible alternative sites for turbine construction, and that this specific project adequately minimized impacts. (Pa16-Pa18).

Throughout its analysis, DEP took a constrained and unsupported view of alternatives. That is, simply because Atlantic Shores’s predecessor in interest elected to bid on this lease area – which was awarded at an extremely low cost of \$1,000,240 for a 100-acre area,⁶ likely reflecting the risk of non-approval of

⁶ <https://www.boem.gov/sites/default/files/documents/oil-gas-energy/OCS-A%200499%20Lease.pdf> (last accessed October 29, 2024).

an offshore wind project in that extremely close-to-shore area – DEP has refused to acknowledge that an offshore wind project could be constructed elsewhere. But BOEM made numerous lease areas available along the east coast, and additional lease sales are anticipated in the coming years.⁷ As the Shore Municipalities identified in their public comments, this included the Hudson South lease area, further off the New Jersey coastline. (Pa152). DEP’s refusal to consider that Atlantic Shores could seek approval to construct an offshore wind project elsewhere was arbitrary, capricious, and unreasonable.

So too for DEP’s finding that Atlantic Shores had adequately minimized impacts. DEP’s discussion identified only measures taken to minimize the temporary impacts of cable installation, and none to minimize what DEP acknowledged would be permanent impacts to surf clam areas from turbine installation. (Pa17). The remainder of the measures discussed consisted only of monitoring and studies on impacts, but no measures to address the impacts of this specific project. (Pa17-18).

Accordingly, the exceptions to permit otherwise prohibited development that will disrupt and destroy surf clam areas were not satisfied. DEP’s finding to the contrary was arbitrary, capricious, and unreasonable.

⁷ <https://www.boem.gov/renewable-energy/lease-and-grant-information> (last accessed October 29, 2024).

e) DEP’s Finding that the Critical Wildlife Habitat Rule was Met was Arbitrary and Capricious. (Pa31).

DEP additionally acted arbitrarily and capriciously in finding that the Atlantic Shores project satisfied its Critical Wildlife Habitats rule.

The Critical Wildlife Habitats rule protects “specific areas known to serve an essential role in maintaining wildlife, particularly in wintering, breeding, and migrating.” N.J.A.C. 7:7-9.37(a). This includes “[r]ookeries for colonial nesting birds, . . . stopovers for migratory birds, . . . and natural corridors for wildlife movement.” N.J.A.C. 7:7-9.37(a)(1).

Whether a site contains critical wildlife habitat is to be “considered on a case-by-case basis.” N.J.A.C. 7:7-9.37(a)(3). “Development that would directly or through secondary impacts on the relevant site or in the surrounding region adversely affect critical wildlife habitats is discouraged” unless certain findings can be made including minimizing interference, that “[t]here is no prudent or feasible alternative location” and the use of “appropriate mitigation measures.” N.J.A.C 7:7-9.37(b).

DEP concluded the project was not within critical wildlife habitat, apparently considering such habitat to consist only of “patches of woody vegetation which serve a critical role in providing resting and foraging habitat for migratory birds” (Pa31). But this constrained interpretation of the rule

ignores express language that critical wildlife habitat also includes “natural corridors for wildlife movement.” N.J.A.C 7:7-9.37(a)(1).

DEP’s own analysis acknowledges that numerous species of birds pass through the project area, including several threatened and endangered species, land birds, coastal waterbirds, and marine birds. (Pa31). A study of 150 tagged migrating piping plover, an endangered species, reflected several crossing directly through the Atlantic Shores lease areas. (Pa621). As the Shore Municipalities identified in their public comment letter, studies reflect that offshore wind farms can cause significant, population level, mortality events for migrating birds. (Pa177; Pa631).

By failing to consider whether the birds’ use of the project area qualified it as a natural corridor entitled to protection under the Critical Wildlife Habitats rule, DEP failed to consider these impacts and whether the exceptions to the rule allowing the project that the project in compliance could apply. Consequently, DEP’s finding Atlantic Shores’ proposal satisfied N.J.A.C. 7:7-9.37 was arbitrary and capricious, and should be reversed.

POINT II

THE POLITICAL PRESSURE PLACED ON DEP RESULTED IN IMPERMISSIBLE BIAS AND SHOULD HAVE PRECLUDED DEP'S CONSIDERATION OF ATLANTIC SHORE'S APPLICATION. (Pa152-Pa153)

DEP should have been precluded from considering Atlantic Shores' application and issuing the consistency certification absent some process to ensure a neutral review. Governor Murphy's executive agenda created an impermissible pecuniary bias in DEP as a decisionmaker on offshore wind energy development applications which caused DEP to pre-judge Atlantic Shore's application, because the jobs of the Commissioner and staff almost certainly depended on their approval of the ASOW project.

“Administrative due process requires a fair hearing before a neutral and unbiased decisionmaker.” Matter of Carberry, 114 N.J. 574, 584 (1989). “Bias can be shown by a finding that the adjudicator prejudged the issues or had a pecuniary interest in the subject of the action. In general, the test is whether the adjudicator's situation is one ‘which might lead him not to hold the balance between the parties nice, clear and true.’” Yamaha Motor Corp., U.S.A. v. Riney, 21 F.3d 793, 798 (8th Cir. 1994).

Although neither “being familiar with the facts of the case through the performance of statutory or administrative duties” nor “announc[ing] an opinion

on a disputed issue” automatically require an agency decision-maker to recuse, the mere “probability of actual bias” is sufficient grounds when the decisionmaker has a pecuniary interest or has prejudged the issues. In re Xanadu Project at Meadowlands Complex, 415 N.J. Super. 179, 192 (App. Div. 2010). See Ende v. Cohen, 296 N.J. Super. 350, 362 (App. Div. 1997) (acknowledging mere “risk of bias or prejudgment” may require judicial intervention in administrative proceeding, and recognizing “argument that those who have investigated should not then adjudicate.”).

“The probability of actual bias is grounds for disqualification when the decisionmaker has a pecuniary interest in the outcome of the matter. . . .” Matter of Carberry, 114 N.J. at 585; See also Yamaha Motor Corp., 21 F.3d 793 (Commissioner of motor vehicle commission’s presence on hearing panel on complaint concerning Yamaha dealer was impermissible because he owned a competing Harley Davidson dealership and thus had a pecuniary interest in outcome). “[A] pecuniary interest need not be personal to compromise an adjudicator’s neutrality.” Esso Standard Oil Co. (P.R.) v. Mujica Cotto, 389 F.3d 212, 219 (1st Cir. 2004) (finding structural bias because the adjudicative body would benefit financially from the flow of fines issued to its budget). “Even in the absence of a personal financial interest, when structural infirmities create inherent bias on the part of the adjudicator, due process is compromised.” All

American Check Cashing, Inc. v. Corley, 191 F.Supp.3d 646, 664 (S.D. Miss. 2016).

Given Governor Murphy's strong public positions and administrative directives, see, e.g., Pa697; Pa700, DEP faced obvious and significant political pressure to approve offshore wind energy projects, and approval was virtually a foregone conclusion from the public's perception. That was even more so given the failure of the Ocean Wind projects previously endorsed by DEP, as a failure to approve the Atlantic Shores' project would land a fatal blow to the Governor's agenda.⁸

And the record underlying DEP's decision reflected that. Although DEP paid lip service at times to pushing back on Atlantic Shores' attempts to rush the approval, in the end DEP caved. That is evident from DEP providing its conditions of approval to Atlantic Shores for its review, comment, and edits, and DEP's willingness to accommodate Atlantic Shores' demand to remove a monitoring condition until it learned that the federal government would impose that condition itself. (Pa659-Pa680). DEP's decision documents likewise reflected a lack of an independent review process, instead deferring repeatedly to the federal government's "draft" environmental impact statement that was

⁸ <https://whyy.org/articles/orsted-new-jersey-wind-energy-projects-scrapped/> (last accessed October 29, 2024).

subject to revision after public comment; and an outright refusal to consider the possibility of Atlantic Shores utilizing another lease area as an alternative to constructing a project with significant adverse impacts so close to shore. (Pa7-Pa52).

Absent procedural protections that were not utilized by DEP, such as referral of the application to a neutral tribunal, principles of due process should have precluded DEP from issuing a decision on it. Thus, the consistency certification should be vacated and remanded to DEP for reconsideration with full due process safeguards.

POINT III

DEP IMPROPERLY REJECTED THE SHORE MUNICIPALITIES' REQUEST FOR AN ADJUDICATORY HEARING. (Pa94-Pa100)

DEP also improperly denied the Shore Municipalities' request for a referral of its consistency certification determination to the OAL for an adjudicatory hearing. That June 20, 2024 order should likewise be reversed, and a hearing held to further develop the factual record concerning the impacts of the Atlantic Shores' project.

DEP's CZM Rules provide for a request for an adjudicatory hearing to contest a DEP decision, so long as that request is consistent with the Administrative Procedure Act. N.J.A.C. 7:7-28.1. The Administrative Procedure

Act in turn restricts third parties from appealing, i.e. obtaining hearings in the OAL, to challenge permitting decisions. N.J.S.A. 52:14B-3.3(a). But the statute makes clear that that restriction shall not “be construed as abrogating or otherwise limiting any person’s constitutional or statutory rights to appeal a permitting decision.” N.J.S.A. 52:14B-3.3(b).

DEP’s sole stated rationale for denying Shore Municipalities’ hearing request was its conclusion that the Shore Municipalities lacked a constitutional right to a hearing. (Pa99-Pa100). That legal conclusion is entitled to no deference on appeal. See Saccone v. Board of Trustees of Police and Firemen’s Retirement System, 219 N.J. 369, 380 (2014) (“when an agency’s decision is based on the agency’s interpretation of a statute or its determination of strictly legal issues” it is “subject to de novo review”). This Court should conclude that the Shore Municipalities indeed hold a particularized property interest impacted by the Atlantic Shores project that entitles them to an adjudicatory hearing.

A “property interest contemplated by the Fourteenth Amendment may take many forms over and above the ownership of tangible property.” Nicoletta v. N.J. Dist. Water Supply Comm’n, 77 N.J. 145, 154 (1978) (citing Fuentes v. Shevin, 407 U.S. 67, 86 (1972)). The chief ingredient in determining a property interest sufficient to trigger the right to protection by procedural due process is “a legitimate claim of entitlement.” Id. at 154-55. Among other things, Shore

Municipalities have an undeniable property interest in collecting tax revenue – a right that is threatened to be severely hampered by the construction of the proposed project, as well as safeguarding their local economies on behalf of their residents and businesses. The Shore Municipalities are all small towns located within Long Beach Island and just to its south in Atlantic County along the coast of New Jersey and have one important common attribute – the pristine beaches that attract tourism from which the towns derive substantial revenue. (Pa193). The presence of wind turbines as close offshore as proposed by Atlantic Shores will alter the natural seascape and diminish the aesthetic appeal of the coastline – a primary draw for tourists. (Pa193). Construction of massive wind turbines so close to shore inevitably will lead to a decrease in tourist arrivals, affecting businesses and reducing the overall economic activity in the area. (Pa193). A decline in tourism necessarily will result in lower tax revenues from sales and hospitality taxes and diminish property tax revenues, impacting the towns' budgets and their ability to fund public services and infrastructure improvements. (Pa193). It will further depress property values in those areas. (Pa193). Additionally, the decline in tourism would, in turn, decrease the municipalities' revenue that is derived from beach badges. (Pa193).

An economic study performed on behalf of the Shore Municipalities concluded that Long Beach Island alone would experience \$668.2 million in

annual economic losses and losses in tax revenues. (Pa199-209). This thus goes beyond mere complaints about visual impact. The Atlantic Shores project would have a devastating impact on the Shore Municipalities, and these impacts are sufficiently grave to warrant an adjudicatory hearing. See, e.g., Application of John Madin/Lordland Dev. Int'l for Pinelands Dev. Approval, 201 N.J. Super. 105, 123 (App. Div. 1985) (holding that municipalities were entitled to a hearing in the context of development approvals within the Pinelands area because their “interest mandates that they have standing to be heard or to challenge the development approval, particularly where the projects reach the magnitude proposed by the developers herein.”).

Accordingly, DEP wrongly concluded that the Shore Municipalities’ lacked constitutional standing for an adjudicatory hearing in the OAL. DEP’s denial should be reversed, and the consistency certification remanded to be tested by way of an adversarial adjudicatory hearing presided over by a neutral administrative law judge.

CONCLUSION

For all the foregoing reasons, the Shore Municipalities respectfully submit DEP's April 1, 2024 consistency certification and June 14, 2024 denial of the Shore Municipalities' hearing request should be reversed and remanded.

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