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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
A-002581-23

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IN THE MATTER OF THE COASTAL ZONE MANAGEMENT CONSISTENCY  
CERTIFICATION OF ATLANTIC SHORES OFFSHORE WIND SOUTH  
PROJECT BOEM LEASE AREA OCS-A 0499

Appeal From:  
NJDEP

Docket No. Below: CZMA: 0000-21-0022.1, CDT210001

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**BRIEF IN SUPPORT OF APPEAL**

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## **INTRODUCTION**

This brief is submitted in support of Petitioners' appeal of the New Jersey Department of Environmental Protection's (NJDEP) final order dated April 1, 2024 in which the agency made a finding that two offshore wind turbine projects proposed by Atlantic Shores Offshore Wind LLC (Atlantic Shores) are "consistent" with New Jersey's coastal zone management regulations, N.J.A.C. §7.7-1.1, et seq.

By this appeal, appellants ask the Court to vacate the consistency finding and set aside such administrative approval.

## **PROCEDURAL HISTORY**

On September 30, 2021, Atlantic Shores requested that NJDEP certify that its proposed offshore wind turbine Projects 1 and 2 are "consistent" with New Jersey's Coastal Zone Management Program, N.J.A.C. §7:7-1.1 et seq. (Pa6-54).

Atlantic Shores filed the "consistency" request pursuant to Section 307 of the Federal Coastal Zone Management Act (CZMA), 16 U.S.C. § 1452, *et seq.*, a unique federal law that requires the state environmental regulator to certify a federally-approved offshore project as "consistent" with the state's coastal zone management regulations. 16 U.S.C § 1456(c)(3)(A).

Without such certification, the project cannot proceed unless the developer appeals to the Secretary of Commerce who makes a finding that the project is consistent or is in the interest of national security. 16 U.S.C. § 1456(c)(3)(B)(iii).

In May 2023, as a part of the review process, the federal Bureau of Ocean Energy Management (BOEM) issued (and forwarded to NJDEP) a Draft Environmental Impact Statement (DEIS), (Pa103), identifying multiple “major” adverse impacts from the proposed Atlantic Shores projects, including: 1) declines in commercial fisheries and habitats; 2) declines in recreational fisheries and habitats; 3) a major threat to the survivability of the North Atlantic Right Whale and significant threats to marine mammals; 4) permanent harm to the scenic and cultural values of the coastal zone; and 5) injury to New Jersey’s coastal tourism industry.

All of these impacts are prohibited under New Jersey’s coastal zone regulations. N.J.A.C. §7:7-1.1, et seq.

On April 1, 2024, despite BOEM’s findings of “Major” adverse harm, NJDEP issued a final agency decision approving the Atlantic Shores proposals as “consistent” with New Jersey’s coastal zone management regulations. (Pa6-54).

This appeal followed.

**Note to Procedural History:** The Case Manager, by deficiency letter dated December 17, 2024, requested that appellants review the Statement of Items for inclusion of any additional documents in the Appendix. Counsel for Appellants has since conducted such review and notes that there appears to be no identifiable conventional initiating document, i.e., there is no complaint or similar document, and that the DEIS (Pa103), along with DEIS Appendix E (Pa1007), DEIS

Appendix H (Pa1023) and the NJDEP decision dated April 1, 2024 (Pa6; Pa9) are the primary factual documents on which the appeal is based. In addition, the public comments that were submitted to the Agency are *already* in the Appendix and are identified and described in the “NJDEP Response to Comments” (Pa58), so it is not necessary to add the separate public comments from the Statement of Items. Appellants respectfully advise the Court that, based on counsel’s review, additional documents would be extraneous and burden the record with unnecessary appendix volumes.

### **STANDARD OF REVIEW**

In New Jersey, the standard of review over final agency action is whether the agency decision is arbitrary, capricious, unreasonable or unsupported by the record. *Brady v. Bd. of Review*, 152 N.J. 197, 210 (1997). Courts may defer to an agency's expertise on technical matters within its field of expertise. *Campbell v. N.J. Racing Comm'n*, 169 N.J. 579, 588 (2001). "Thus, if substantial credible evidence supports an agency's conclusion, a court may not substitute its own judgment for the agency's even though the court might have reached a different result." *Greenwood v. State Police Training Ctr.*, 127 N.J. 500, 513 (1992).

However, an absence of “necessary findings” will negate any deference owed to the agency, as well as “findings” contrary to or unsupported by the record. *Crema v. New Jersey Dep’t of Environmental Protection*, 94 N.J. 286 (1983).

In addition, it is well-established that “[a]gencies ... have no superior ability to resolve purely legal questions, and that a court is not bound by an agency's determination of a legal issue...” *In re Stream Encroachment Permit, Permit No. 0200-04-0002.1 FHA*, 402 N.J. Super. 587, 597 (App. Div. 2008)(describing generally the standard of review as to NJDEP). A court is not bound by an agency’s “unreasonable interpretation” of a regulation. *Zimmerman v. Sussex County Educational Services Com’n*, 237 N.J. 465, 476 (2019), citing *In re Election Law Enft Comm'n Advisory Op. No. 01-2008*, 201 N.J. 254, 260 (2010).

As argued below, NJDEP’s consistency finding approving the Atlantic Shores projects under the State’ coastal zone regulations is contrary to or unsupported by the DEIS, and should be vacated.

In addition, NJDEP has ignored or overlooked requirements in New Jersey’s coastal zone management rules, N.J.A.C. §7.7-1.1, et seq., matters of law to which the agency is entitled to no deference from the Court.

### **BRIEF STATEMENT OF FACTS**

In 2021, Atlantic Shores was awarded federal Renewable Energy Lease OCS-A 0499 covering an area off the coast of Long Beach Island, Brigantine and Atlantic City. Under the lease, Atlantic Shores will be entitled to construct 200 offshore wind generating turbines (WGTs) to supply electricity to the New Jersey grid. Each turbine will consist of a steel tower 1,046 feet tall, situated in a matrix

approximately .6 miles apart, beginning 8.7 miles off the New Jersey coast. (Pa12-14).

Other facilities will be constructed to support the turbines including up to ten (10) offshore substations, interarray and interlink cables running between towers, stations and the coast, and a permanent meteorological tower. Trenching underseas to a depth of 6.6 feet is required for installation of 1025 miles of cables with disruption of 4942 acres of seabed (Pa704). There will be additional disruption of the seabed at hundreds of locations to construct the base to hold each tower (weighing approximately five million pounds). Compression caused by the turbine towers and their foundation will convert the seabed from soft sand to a hard base, causing species loss and interchange. (Pa712-713).

In May 2023, BOEM released the DEIS analyzing the environmental impact of the Atlantic Shores projects. BOEM prepared the DEIS pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4370f, that requires the agency to prepare an environmental impact statement to analyze the environmental, cultural and economic harm to a state’s coastal zone from any federally-licensed project. (Pa11).<sup>1</sup>

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<sup>1</sup> The federal DEIS is the only environmental study that exists in connection with the proposed Atlantic Shores projects and is the primary record for NJDEP’s consistency review. A Final Environmental Impact Statement (FEIS) was issued by BOEM but was not relied on by NJDEP and is not part of the record.

In the DEIS, BOEM concluded that the turbine structures threaten the food supply of the North Atlantic Right Whale, a critically-endangered species that inhabits the project area and is already “near-extinction”, with only 338 individuals surviving and only 70 breeding females. (Pa511). This threat arises because the turbine structures (roughly equivalent to the height of the Empire State Building) will alter the water flow — the “hydrodynamic pattern” — throughout the turbine field. Distortion of the hydrodynamic pattern threatens the supply of zooplankton, the primary food source of the North Atlantic Right Whale, a baleen whale that lives by straining plankton from the sea. (Pa553-556).

BOEM observed that this intrusion into the food supply and habitat of the North Atlantic Right Whale will be exacerbated by the 2,831 offshore wind turbines proposed in a continuous swath of ocean parallel to New Jersey’s Atlantic coast. (Pa553).<sup>2</sup> This threat to the food source and habitat of a critically endangered and nearly-extinct marine mammal violates New Jersey’s coastal zone regulations that prohibit threats to the life or habitat of federally-listed endangered species. N.J.A.C. §7.7-9.36(b).

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<sup>2</sup> In the DEIS, BOEM uses three alternative figures for the total number of turbine and offshore substation structures proposed off New Jersey’s coast: 2,831, 2,974 and 3,226. (Pa553; Pa717). It is unclear why BOEM has this discrepancy but the total number of structures proposed off of New Jersey’s coast is enormous, between 2831 and 3226, occupying a vast area of the coastal zone. See Figure 3.6.9-1 (Pa941).

BOEM calculates that nearly one-third of the population of the North Atlantic Right Whale has *already* been lost due to fatal vessel strikes and that even non-lethal vessel strikes threaten the species by interfering with its reproductive capacity. Even after “mitigation” measures such as vessel speed “adjustments” have been taken into account, BOEM predicts that the Atlantic Shores project will contribute cumulatively to continued vessel strikes as to the North Atlantic Right Whale with species-threatening consequences to this species. (Pa511; Pa533-536; Pa573-574). BOEM concluded that the “cumulative” effect of offshore wind projects will have “major” “long term” adverse impacts and “severe population-level effects” to the North Atlantic Right Whale. (Pa536; Pa573-574).

Other expected impacts from the turbine structures include the concentration of displaced fishing vessels into the habitat of the North Atlantic Right Whale, increasing interactions and causing entanglement of whales with fishing gear, what BOEM acknowledges as “... a significant cause of death for several mysticete species..., including NARW [North Atlantic Right Whale]...” Pa555.

BOEM found that the matrix of approximately three thousand turbine structures that will line the New Jersey coast (see Figure 3.6.1-2; Pa941) “could have long-term, intermittent impacts on *foraging, migration, and other normal behaviors*” of marine mammals (Pa555)[emphasis added]. These “impacts” will go to the daily life cycle of these species, yet BOEM admits it has *no scientific knowledge as to the degree of risk*: “There is no example of a large-scale offshore

renewable energy project within the geographic analysis area for marine mammals.” (Pa555). In other words, we are flying blind as to the effect of these projects on the marine mammals that inhabit the coastal zone.

Despite these findings, NJDEP approved the Atlantic Shores projects, finding them to be “consistent” with New Jersey’s coastal zone regulations even though those regulations bar actual or threatened harm to listed endangered marine mammals and their habitats. N.J.A.C. §7.7-9.36(a) and (b). This appeal seeks, in part, to set aside the NJDEP findings as contrary to the record and a violation of New Jersey’s environmental regulations.

New Jersey law also prohibits any project that causes adverse impacts to the population, abundance or habitat of maritime fishing stocks. N.J.A.C. §§ 7:7-15.4, 7:7-16.2(b). BOEM has identified “widespread, permanent” economic and ecological injuries to be caused by the turbine structures to commercial and recreational fisheries with a significant risk of “entanglement or gear loss or damage [from the turbines’ undersea structural elements], space-use conflicts and navigational hazards”, (Pa697); “habitat conversion and fish aggregation, migration disturbances,...”(Pa708); and losses to fishing stock caused by the turbine structures in combination with existing impacts. (Pa717). BOEM characterizes these cumulative impacts as “**major**”, meaning long-term, permanent adverse impacts of the turbine structures.

Conversion of seabed from soft to hard bottom by turbine construction will impact areas used for “refuge, spawning, and foraging, and are often identified as primary fishing areas by commercial and recreational fishermen”; these will create “localized, long-term impacts for commercial fisheries...” and species exchange. (Pa712-713). An altered seabed, converted from soft sand to hard bottom, will “reduce the habitat for target species” that form a major part of the fishery including “surfclam, sea scallops, squid, summer flounder.” (Pa702).

This is ecological *and* economic harm, both prohibited under New Jersey’s coastal zone regulations. N.J.A.C. §§ 7:7-15.4, 7:7-16.2(b). BOEM observed that the turbines will cause “uncertainty stemming from changes in fish distribution...”, (Pa699), and “major” and “permanent” adverse impacts and loss to the fisheries and to fish habitat. (Pa717).

Commercial navigation in the fishery will be impeded by the placement of the turbine structures. BOEM reports that operators believe their crews may not be able to navigate safely within the turbine fields. (Pa698). Many fishery participants have reported they will not enter the turbine fields for safety reasons, reducing and shrinking the available fishing ground. (Pa698; Pa709). BOEM

noted permanent long-term impact on the fisheries to be caused by the turbine structures:

Collectively, the reduced area available for fishing and the navigational hazard to fishing vessels posed by the presence of structures associated with planned offshore wind project are expected to have long-term, adverse impacts on commercial and for-hire [recreational] fisheries.” (Pa698).

A large array of economic losses, interference with fishing spaces and increased costs are projected by BOEM from the proposed Atlantic Shore turbines that will materially damage the fishery. (Pa698-700). Navigational hazards and constraints from the structures will force fishery participants to avoid the turbine field and, in many cases, leave the industry entirely. (Pa708-713). Navigational radar will be impaired and impeded by the many turbine towers throughout the matrix that can “obscure small vessels” (Pa709), further encouraging abandonment of the fishery for safety reasons. Scallop vessels, a major part of the fishery, will have difficulty navigating the turbine fields as their north or northwest bearing will be out of alignment with the Atlantic Shores towers. (Pa710).

Displacement of commercial fishers from the turbine field will damage the most valuable fishery in the lease area, i.e., crab, lobster, scallop and surf clam; no mitigation is possible for these losses since there are limited license areas to fish these invertebrates that will be constrained permanently by the turbine structures.

(Pa713). Major impacts are expected to seafood distributors and shore operators, “depending on the fishery in question.” (Pa711). “Collectively”, the DEIS says, there will be “long-term, adverse impacts on commercial and for-hire recreational fisheries.” (Pa713). BOEM has concluded that the impacts will be magnified by thousands of turbines planned for the coastal zone, i.e. “permanent impacts from the presence of structures associated with planned offshore wind projects”. (Pa703-704; Pa717-718).

These adverse impacts violate New Jersey’s coastal zone management rules, N.J.A.C. §§ 7:7-15.4, 7:7-16.2(b), and require vacating NJDEP’s consistency finding, as argued in Point 1, below.

The destruction of the scenic and cultural values of the sea coast and the ocean setting that will arise from the Atlantic Shores turbine structures is equally indisputable. BOEM concluded that the turbine structures will alter the coast and ocean setting off Long Beach Island, Brigantine and Atlantic City, converting it “from natural and undeveloped to a developed wind energy environment characterized by WTGs and OSSs [Wind Turbine Generators and Offshore Facilities].” (Pa988). BOEM thus acknowledges that the turbines will convert a natural seascape to an industrialized ocean environment characterized by utility infrastructure.

Critical harm to the scenic values of the coast will occur at Key Observation Points (KOPs) identified by BOEM. (Pa965)(Table 3.6.9-11); (Pa959)(Table 3.6.9-6) and (Pa960)(Table 3.6.9-7). These KOPs include the primary business and residential areas of Beach Haven, the core of Long Beach Island’s tourist industry, and then south to the Edwin B. Forsythe National Wildlife Refuge, Brigantine and Atlantic City. BOEM identifies “Major” “permanent” “adverse” scenic impacts for Beach Haven, the Edwin Forsythe Reserve, the North Brigantine Natural Area, Atlantic City, among other key visual points. (Pa965); (Pa981)(Table 3.6.9-16). BOEM states: “The presence of structures associated with offshore wind development would have major seascape character, open ocean character, landscape character, and viewer experience impacts...” (Pa984).

BOEM concludes that the turbine structures would be fully visible **50% of the year**, i.e., on “clear” days, (Pa974), a continuous destructive impact on the seascape and ocean setting. BOEM acknowledges that the “*first row* of Atlantic Shores South WTGs...*would be visible* from the nearest shoreline over approximately ***50 percent of the year***”, the “***first two rows would be visible over ... 40 percent of the year***”. (Pa974). Even with the “mitigation” measure of white shaded paint (Pa977), this scenic destruction cannot be avoided. “In clear weather the WTGs and OSSs would be an unavoidable presence in views from the coastline,” (Pa988), a permanent continuing impact ***that cannot be remediated or mitigated***.

Such destruction of the scenic and cultural values of the coast violates New Jersey's coastal zone regulations, N.J.A.C. §§7:7-15.4(b)(5); 7-16.10(c) and requires that the Court vacate NJDEP's consistency finding.

This scenic and cultural destruction will also adversely impact the coastal tourism industry and coastal tourism employment, additional forms of harm prohibited under N.J.A.C. §7.7-15.4(c). As argued at Point 5, *infra*, NJDEP failed to make any analysis as to whether the Atlantic Shore projects will result in a loss of more than 200 coastal tourism jobs, as required under N.J.A.C. §7.7-15.4(c), and for this further reason the "consistency" finding should be vacated.

### **ARGUMENT**

New Jersey's coastal zone management rules prohibit any offshore energy project that adversely impacts the ecology, economy, culture and scenic values of New Jersey's coastal zone. N.J.A.C. §7:7-1.1, et seq. An energy project that creates adverse impacts to the coastal zone can be approved *only* under a "public interest" standard where *two* conditions are met: 1) "mitigating or compensating measures" are available to negate the adverse impacts; *and* 2) these measures will result in a "net gain" to the "coastal resource of concern". N.J.A.C. §7.7-1.5. Other aspects of the coastal zone rules prohibit outright any project that will have adverse impacts on listed endangered marine mammals or their habitat; in such

case, the project is absolutely “prohibited”, regardless of any potential “mitigation”. N.J.A.C. §7.7-9.36(b).

NJDEP’s “consistency” approval was made pursuant to the federal Coastal Zone Management Act (CZMA), that requires any federally-licensed offshore energy project to be certified as “consistent” with the adjoining state’s coastal zone management regulations. 16 U.S.C. § 1452, *et seq.* Without such certification by the state regulator, the project cannot proceed unless the developer appeals to the Secretary of Commerce who makes a finding that the project “is consistent” or is “in the interest of national security”. 16 U.S.C. § 1456(c)(3)(B)(iii).

Empowering state regulators in this way is a fundamental Congressional policy. Congress’s purpose in enacting the CZMA was “to preserve, protect, and restore the nation's coast [] by encouraging and assisting states in the development of coastal zone management programs.” *Department of Env'tl. Protection & Energy v. Long Island Power Auth.*, 30 F.3d 403, 419 (2d Cir. 1994), quoting 16 U.S.C. § 1452(1)&(2); *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 391 (3d Cir. 1987) (noting Congress’s intent to empower states to enforce their own coastal management regulations). NJDEP’s obligation to veto the Atlantic Shores projects where they violate New Jersey’s coastal zone regulations is, therefore, a fundamental part of a major national policy.

As set forth in this brief, the Atlantic Shores project will give rise to “permanent” “major” and “adverse” environmental, economic, cultural and scenic harm in violation of the State’s coastal zone management regulations, as follows:

- 1) permanent losses to New Jersey's commercial and recreational fisheries and marine fish habitats (Pa717-718);
- 2) a permanent and continuing threat to the survivability of the North Atlantic Right Whale arising from a projected threat to its planktonic food supply and vessel strikes and injury to marine mammal habitat (Pa533-536; Pa553-556);
- 3) permanent destruction of the cultural and scenic elements of the coastal zone (Pa974; Pa977-984; Pa988);
- 4) injury to coastal zone tourism (Pa916-921).

All such adverse impacts are prohibited by New Jersey’s coastal zone rules, N.J.A.C. §7.7-1.1, et seq. As such, NJDEP’s consistency finding is in violation of State law and must be vacated.

**1. NJDEP’S CONSISTENCY FINDING IS CONTRARY TO BOEM’S FINDING OF PERMANENT LOSSES TO COMMERCIAL AND RECREATIONAL FISHERIES AND ADVERSE IMPACTS TO FISH HABITAT, IN VIOLATION OF N.J.A.C. § 7.7-15.4. (Pa40-47).**

In the DEIS, BOEM identifies “major” adverse impacts to commercial and recreational fisheries and fish habitats to be caused by the Atlantic Shores turbine projects. (Pa708-713; Pa716-718). A “major” adverse impact is defined in the DEIS as permanent or “indefinite” decline in the particular coastal resource:

“The affected activity or community would experience substantial disruptions, and, once the affecting agent is eliminated, the affected activity or community could retain measurable effects indefinitely, even if remedial action is taken.” (Pa691).

BOEM predicts major ecological harm to the marine fisheries and habitat due to “permanent impacts from the presence of structures associated with planned offshore wind projects.” (Pa717-718). BOEM concludes that the turbine structures will create “major” economic impacts and harm to the way of life of those who earn their living in the fisheries:

The overall impacts on commercial and for-hire recreational fisheries would be **major** because the fishing industry would experience unavoidable disruptions beyond what is normally acceptable, but mitigation, including financial compensation and uniform spacing and layout across adjacent projects, *could* reduce impacts if adopted for planned offshore wind projects.”

(Pa718) [bold in original][italics added]. BOEM concluded that the presence of the turbine structures “would result in *a widespread, permanent navigational risk* to commercial and for-hire recreational fishing vessels...”, along with “displacement” of industry participants and significant economic losses. (Pa697-700)[emphasis added].

These impacts violate New Jersey’s coastal zone management regulations. No offshore energy facility may “adversely impact the natural functioning of

marine fish, including the reproductive, spawning and migratory patterns or species abundance or diversity of marine fish” or “adversely impact any New Jersey based marine fisheries ...” N.J.A.C. §7:7-16.2(b). “[A]ny activity” that results in “adverse impacts” to fisheries, habitats or fish populations is a “discouraged” activity, *id.*, meaning it is prohibited *unless* “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].

As these carefully drawn regulations show, NJDEP’s “discretion” is not unconstrained but “is limited by both statute and regulation.” *Crema v. New Jersey Dep’t of Environmental Protection*, 192 N.J. Super. 505, 511 (App. Div. 1984). An offshore energy project that causes destruction or reduction of marine habitats or fisheries is prohibited under New Jersey’s coastal zone rules *except* where two things happen: 1) “mitigating or compensating measures can be taken”; *and* 2) such measures cause “*a net gain* in quality and quantity of the coastal resource of concern”, in this case the fishery and/or marine habitat, as per N.J.A.C. § 7:7-1.5.

Neither is shown on the present record. At best, BOEM identifies a *possible* reduction in these impacts — i.e., mitigation “*could* reduce impacts”; (Pa718) — but no describes no “*net gain*” in the quality of the habitat or fishery. NJDEP has also failed to apply the “*net gain*” requirement. In its approval of the Atlantic Shores projects, it reasoned there “will not be a *net loss* in the quantity and quality

of the coastal resources of concern.” (Pa47). NJDEP’s ruling ignores entirely the requirement that mitigation must result in a “net *gain*” to the fishery:

“With implementation of the above described minimization and mitigation measures, the NJDEP has concluded that there will ***not be a net loss*** in the quality and quantity of the coastal resources of concern [i.e., the fish population].” (Pa47)(Consistency Finding at 39) [emphasis added].

This is **not** the finding required under N.J.A.C. § 7:7-1.5. By replacing the “net *gain*” requirement with a finding that there will “**not be a net loss**”, NJDEP uses a legal standard that is **not** in the regulations and the consistency finding must be vacated. *In re Steam Encroachment Permit, Permit No. 0200-04-0002..1 FHA*, supra, 402 N.J. Super. at 597 (no deference paid to NJDEP’s departure from legal requirements); see also *Zimmerman v. Sussex County Educational Services Com’n*, supra, 237 N.J. at 476, citing *In re Election Law Enft Comm'n Advisory Op. No. 01-2008*, supra, 201 N.J. at 260 (disregarding agency’s “unreasonable interpretation” of its own regulation).

The “net gain” requirement is not mere verbiage but is a fundamental part of the State’s coastal zone regulations. It is simple logic that if an energy project causes permanent or long-term injury to the marine habitat, a “mitigation measure” that causes no “net *loss*” fails to account for the continued downward pressure on the resource after installation and operation of the turbines. It is for this reason that N.J.A.C. § 7:7-1.5 requires a “net *gain*” in the coastal resource to compensate for a

finding of adverse impact. NJDEP's "no net *loss*" formula is contrary to its regulatory duty.

BOEM projects "major" "adverse" impact to the commercial and recreational fisheries from the turbine structures. (Pa717). It defines a "**major**" "adverse impact" as one that causes "substantial disruptions" to the commercial and recreational fisheries that will persist "indefinitely", even after "remedial action is taken". (Pa691). BOEM acknowledges that pre-existing losses of fish stocks and declines in "abundance" will be exacerbated by the Atlantic Shores project and thousands of other projected turbine structures. (Pa717-718). In other words, "major" "adverse" impacts means *permanent harm to the fishery*.

Such impacts go directly to the biological core of the fishery including "habitat conversion and fish aggregation, migration disturbances, and space-use conflicts". (Pa708). Conversion of the sea bed from soft sand to hard bottom caused by the turbine installation will destroy areas used by fish populations for "refuge, spawning, and foraging, and are often identified as primary fishing areas by commercial and recreational fishermen." (Pa712). BOEM notes that the "project area" is the spawning ground for many commercial and recreational species. (Pa650). Alterations to the marine habitat from the turbine projects will create "long-term impacts for commercial fisheries...", resulting in species

interchange, loss of spawning areas, losses to fish habitat and loss of traditional species fished in the project area such as surfclam, flounder, squid and scallops that will be driven out by conversion of the seabed. (Pa712-713).

The area of the proposed turbines and their foundations that will be converted to “hard-bottom” from “soft” sand is presently the home and habitat of “commercially important” shellfish, including Atlantic surfclam, ocean quahog, bay scallop, and horseshoe crab. (Pa346)(citing BOEM 2021a; Cargnelli et al. 1999). BOEM describes the permanent alteration of this soft bottom habitat:

The presence of the Offshore Project structures would convert soft-bottom habitat to hard-bottom habitat. This would result in permanent losses of soft-bottom habitat, including ecologically important complex sand ridge habitat that is present at some proposed WTG locations within the Project area.

(Pa378-379). This is “permanent” destruction of soft-bottom habit and its benthic features, an “ecologically important complex”, *id.*, built up over untold eons only to be destroyed by the turbines.<sup>3</sup>

All of these are *permanent* and *widespread* losses to the ecology of New Jersey’s fisheries with no “net *gain*” to the “coastal resource of concern”, i.e., the

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<sup>3</sup> The entire project area is deemed Essential Fish Habitat (EFH) for 41 out of the 101 finfish and invertebrate species identified in the project area. EFH means “waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity”. (Pa453)(citing 50 CFR Part 600).

commercial and recreational fish habitat. BOEM says that due to the placement of the offshore wind structures “some invertebrate species could experience minor beneficial impacts, *but not finfish species*”. (Pa496)[emphasis added]. Obviously, there can be no “net gain” to the commercial and recreational fish habitat if BOEM concludes there will be *no* “beneficial impacts...to *finfish*...”, a primary subject of New Jersey’s fisheries. BOEM confirms a loss of fishing habitat for species such as surfclim, squid, scallops and winter flounder that will be driven out by the seabed conversion. Under these facts, there is clearly no “net gain” to the coastal resource and NJDEP’s consistency finding must be vacated.

No mitigation measures are known that will remediate the projected harm to the fishery. At best, BOEM considers there “may” or “could” be compensating factors for “recreational” fishers if target species enter converted seabed areas by attraction to the new hard bottom. (Pa712-713). However, BOEM identifies no studies as to the ultimate effect of such “mitigation” or if it is even likely in our coastal zone. In any event, such “benefits” would affect only the recreational fishery, not the commercial fishery. Finally, any “benefit” to recreational fishers from new species entering the turbine complexes is entirely speculative: BOEM

itself concludes that many recreational fishing participants are likely to avoid the turbines due to navigational hazards. (Pa698-713).

Atlantic Shores's proposed "compensation fund" is vague and uncommitted. NJDEP cites no information as to *what* that "fund" will be, *how* it will be funded, *who* will administer it (Atlantic Shores or a neutral party), *how much* will be available or *how* claims will be governed. (Pa46). Nothing is described. Atlantic Shores has made a vague pledge, unsupported by any factual showing or any proposed rule or guidance from NJDEP to give it meaning and structure. Lacking factual information, NJDEP's acceptance of the "compensation fund" as a "mitigating or compensating measure" is the very model of an arbitrary administrative act.

Nor will a "compensation fund" restore the livelihood or way of life of the people in New Jersey's commercial and recreational fisheries. BOEM has identified major areas of structural disruption to the fishery that will persist after construction of the turbines. (Pa708-713). BOEM concludes that many fishing industry participants will be forced out by the turbines because they lack mobility or risk tolerance to adapt to forced changes and will leave the fishery or reduce their participation. (Pa708-713). BOEM has also acknowledged that

compensation won't make up for losses or abandonment of the turbine matrix because of constraints that bar fishing in *other* areas. (Pa713). ***All of these are permanent, non-remediable losses to the fishery and its people.***

Among these, BOEM included: 1) displacement due to “widespread, permanent navigational risk to commercial and for-hire recreational fishing vessels...”; 2) “commercial mobile gear” entangled on undersea structures servicing turbines that “would result in long-term increase in expenses to fishers”; 3) “spacing between [WTGs] may not be enough to operate safely”, preventing fishing within the large geographic areas of the wind turbines; 4) “increased travel time and trip costs” due to “long-term changes in transit routes of fishing vessels”; 5) forced fishing at greater distances due to a “reduced area available”; 6) “long-term” loss of port access due to “port expansion” to service the turbine fleet; and 7) the loss in fish habitat and removal of clam, flounder, squid and scallops that will be forced out and replaced by other species due to conversion of the seabed from a soft to a hard formation. (Pa708-713).

All of this will induce major ecological, economic and cultural damage to an industry hundreds of years old, with thousands of participants earning their living and an untold number of recreational fishers. BOEM notes the Atlantic Shores

projects are to be a part of 3,226 structures to be built along the New Jersey coast that will magnify the destructive impact on the fishery:

“Collectively, *the reduced area available for fishing and the navigational hazards to fishing vessels posed by the presence of structures* associated with planned offshore wind projects *are expected to have long-term, adverse impacts of commercial and for-hire fisheries.*” (Pa698) [emphasis added].

This is unequivocal. Fishery participants will be forced to give up fishing or be excluded from substantial areas of the fishery — in reality, most of the New Jersey coast as seen in Figure 3.6.1-2 (Pa646) — due to the dangers and “risk” of navigation, losses in fish habitat and reduced areas for fishing after the turbines are in place. (Pa708-713). A “compensation fund” for industry participants does not replace their lost way of life or provide the required “net *gain*” to the “quantity and quality” of the fishery, as required under N.J.A.C. §7.7-1.5, et seq.<sup>4</sup>

BOEM has cautioned that adverse impacts from the Atlantic Shores project cannot be viewed in isolation but as part of a much greater impact from the 3,226 wind structures that will occupy the entire New Jersey coastal region, as shown by Figure 3.6.1-2 (Pa646); see also (Pa717-718). It follows that the harm so carefully

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<sup>4</sup> As discussed in later segments of this brief, other forms of adverse impact, i.e., threats to endangered marine mammals, are absolutely “prohibited” under New Jersey regulations, see e.g., N.J.A.C. §7.7-9.36(b), regardless of any proposed mitigation. Point 2, *infra*; see also, n.10, *infra*.

identified in the DEIS as to the Atlantic Shores projects will be magnified by the cumulative effect of thousands of planned wind turbine structures for our coast.

For all of the above reasons, NJDEP's finding that the Atlantic Shores projects are "consistent" with the New Jersey's coastal zone regulations violates N.J.A.C. §7.7-15.4 and should be vacated.

**2. NJDEP'S CONSISTENCY FINDING MUST BE VACATED BECAUSE THE WIND TURBINE STRUCTURES THREATEN THE SURVIVABILITY OF THE NORTH ATLANTIC RIGHT WHALE AND ARE A SOURCE OF SIGNIFICANT HARM TO THE HABITAT OF MARINE MAMMALS, IN VIOLATION OF N.J.A.C. §7.7-9.36. (Pa27-28).**

In the DEIS, BOEM reached a startling conclusion as to the threat posed by the Atlantic Shores projects to the largest marine mammal to make its home in the project area — the North Atlantic Right Whale. This species is universally agreed to be near extinction. BOEM concludes that the Atlantic Shores project will threaten its very existence and survivability, including losses to its planktonic prey, its primary source of food, among other impacts. (Pa511; Pa534-536; Pa553-556; Pa568-569; Pa573-574). Viewed in this way, NJDEP's consistency finding violates New Jersey law and should be vacated.

Protection of endangered marine mammals is a fundamental aspect of New Jersey’s coastal zone management rules. N.J.A.C. §7.7–9.36(b) “prohibits” outright all offshore energy projects that involve development of the habitat of an endangered species. New Jersey’s rule is unequivocal — *all* such development “is prohibited” *unless* no adverse impacts will arise:

***Development of endangered or threatened wildlife or plant species habitat is prohibited unless it can be demonstrated, through an endangered or threatened wildlife or plant species impact assessment as described at N.J.A.C. 7:7-11, that endangered or threatened wildlife or plant species habitat would not directly or through secondary impacts on the relevant site or in the surrounding area be adversely affected.*** N.J.A.C. §7.7-9.36(b).

The regulation applies to listed “endangered or threatened species”, N.J.A.C. §7.7-9.36(a), a description that includes the North Atlantic Right Whale (that is on the federal endangered species list). (Pa515). In the DEIS, BOEM has acknowledged the very type of “direct” and “secondary” impacts the regulation prohibits, i.e., the interference with the North Atlantic Right Whale’s planktonic food supply caused by water pattern changes that will follow turbine installation. (Pa553-556). NJDEP acknowledges its own rule, §7.7-9.36(b), prohibiting such impacts but fails to explain *how* its consistency finding can stand against the

evidence of a “major” threat to the survivability of this species to be caused by the turbine structures. (Pa27-28).

Where a project is “prohibited” under the New Jersey’s coastal zone rules, it is deemed “unacceptable” and NJDEP is required by regulation to “use its legal authority *to reject or deny* the proposal.” N.J.A.C. §7.7:7-1.5 (defining and explaining the term “prohibited”). In such case, NJDEP has no power to ignore harm to the protected resource but *must* use its “legal authority *to reject or deny*” the project. *Id.* In the case of the North Atlantic Right Whale, NJDEP has failed to do so despite the ample evidence of a threat to the species’s very existence from the turbine structures, as discussed at Point 2-B, below. In addition, the federal regulator has reported the turbine projects contain significant risk to the life cycle and habitat of other marine mammals, impacts that are also prohibited under N.J.A.C. §7.7-9.36(b), as discussed in Point 2-A, below.

**A. BOEM acknowledges that marine mammals are at risk from habitat changes and operational noise from the turbine structures and that there is no adequate research to evaluate the harm to these protected species.**

BOEM concluded that marine mammals living in the coastal zone are at risk from the turbine structures due to injury to their habitat and forced displacement. (Pa555-559; Pa568-571). BOEM describes the threatened impact as “avoidance and displacement of marine mammals, which could potentially move them from

preferred habitats into areas with lower habitat value or with higher risk of vessel collision or fisheries interactions.” (Pa555). BOEM cautioned that “the evidence for long-term displacement is unclear...”, that it is still under study but that the effect “**is likely to be negative**”:

“The effect of the increased presences of structures on marine mammals and their habitats *is likely to be negative*, varying by species, *and their significance is unknown.*” (Pa555-556)[emphasis added].

As the DEIS shows, BOEM found there to be a “**likely ... negative**” impact from the turbine structures “on marine mammals and their habitats” *and* it admits to inadequate scientific knowledge as to the extent and scope of such harm. i.e., “their significance is unknown”. *Id.*

BOEM identified other direct adverse impacts to marine mammals, including that the turbine structures threaten normal marine mammal “behaviors” including “foraging” and “migration”:

“Disruption of normal behaviors could occur due to the presence of offshore structures. The presence of structures could have long-term, intermittent impacts on *foraging, migration, and other normal behaviors.*”

(Pa569)[emphasis added].

BOEM concluded that marine mammals will suffer a significant risk of death from “gear entanglement” from the long-lines that will be displaced into more constrained fishing areas after construction of the turbine structures; such entanglement is a major threat to all whales, especially the North Atlantic Right

Whale for which “entanglement in fishing gear is a leading cause of death...” (Pa537; Pa569).

BOEM acknowledges that operational noise from the turbine generators will transmit in the water and along cable lines and be a source of injury to marine mammals, in particular posing a survivability threat to the North Atlantic Right Whale. (Pa543-544). Acoustic masking has been documented as having the “potential for a reduction in effective communication space within wind farm environments for marine mammals”. (Pa544). What this means is that the ability of whales to use sonar and sound within turbine matrixes will be impaired, a threat to their survival and their habitat.

In the face of these conclusions, NJDEP should have denied consistency approval in light of the known risk of harm to marine mammal habitat, as well as the scientific uncertainty as to the extent of these risks. For example, BOEM itself acknowledges that there is little or no research as to the impact of “operational” noise on marine mammals: “Very few empirical studies have looked at the effect of operational wind turbine noise on wild marine mammals.” (Pa544). The limited research that exists has been conducted for *smaller* turbines (not those

proposed off New Jersey’s coast) and “[a]vailable data on large direct-drive turbines are sparse.” (Pa544).

BOEM concluded that current levels of knowledge *are insufficient* as to the impact of operational noise on “behavioral and masking effects” on marine mammals from the large modern turbines Atlantic Shores will be using:

“more acoustic research is warranted to characterize found pressure levels originating from late direct-drive turbines, the potential for those turbines to cause TTS effects, and distances at which behavioral and masking effects are likely as a result of their operations.”

(Pa545). As noted earlier, BOEM concluded that the effect of the turbines on marine mammal habitat is “*likely to be negative, ..., and their significance is unknown.*” (Pa555-556). In other words, the threat is real and data to demonstrate safety is lacking, but NJDEP approved the Atlantic Shores projects (Pa27-28) despite BOEM’s concerns about habitat loss and the threat to marine mammals’ behaviors and life cycle.

In view of BOEM’s findings, NJDEP was obligated under N.J.A.C. §7.7-9.36(b) to use its legal authority to “reject or deny” the Atlantic Shores consistency finding. As such, the NJDEP consistency finding should be vacated.

**B. The turbine structures pose a major threat to the survivability of the North Atlantic Right Whale, a critically endangered species and one of the rarest animals in the world.**

The fragile state of the North Atlantic Right Whale is well known. BOEM has concluded that only 338 individuals of this species are known to survive, (Pa511) and it has already suffered a population loss of nearly 30% due to “vessel strikes and entanglement in fisheries gear”, as the DEIS makes clear:

“The species is considered critically endangered and the Western North Atlantic stock experienced a decline abundance between 2011 and 2020 with an overall decline of 29.7 per cent [citation omitted]. NARW has been experienced an unusual mortality event since 2017 attributed to vessel strikes and entanglement in fisheries gear [citation omitted].” (Pa511).

In the DEIS, BOEM made a finding that the cumulative impacts from the turbine structures “could have **severe population-level effects**” to the North Atlantic Right Whale, including a decline in its primary planktonic food source, (Pa553-556)[emphasis added], and increased deaths and injuries from gear entanglement and vessel strikes, among other factors. (Pa573-574).

As noted in Point 2-A, *supra*, gear entanglement will increasingly threaten the North Atlantic Right Whale, along with other mysticetes, due to forced relocation of marine mammals into more limited feeding areas in competition with commercial and recreational fishers following installation of the turbines. (Pa537;

Pa569).<sup>5</sup> BOEM concludes that wind turbine structures will *increase* this cause of death to the North Atlantic Right Whale: “the increased risk of entanglement associated with the presence of structures could have demographic consequences for this species.” (Pa537). ***This is polite language for an enhanced risk of extinction to the North Atlantic Right Whale to be caused by the turbine structures.***

BOEM agrees that its own estimate of a to-date loss of 29.7% in the population of this species is almost certainly *too* low and that the number of North Atlantic Right Whale deaths is underreported by two-thirds. BOEM points to a study that “between 1990 and 2017, only 36 percent of right whale deaths were detected, suggesting the actual number of deaths could be much higher.” 3.5.6-30 citing Pace, et al (2021). NOAA has reached an identical conclusion. [REDACTED] fisheries.noaa.gov/species/north-atlantic-right-whale (“research demonstrates that only about 1/3 of right whale deaths are documented”) (Pa1257).

When all of the proposed turbine projects are taken into account, a vast area of the North Atlantic Right Whale’s coastal habitat off New Jersey will be occupied

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<sup>5</sup> Large marine mammals are also “more susceptible to vessel strikes than other marine mammals due to their large size, slower travel and maneuvering speeds, lower avoidance capability, and increased proportion of time they spend near the surface [citation omitted].” (Pa535). BOEM concludes that the impact of vessel strikes can be “severe for list[ed] species”, (Pa536), including the North Atlantic Right Whale, the population of which is so small it is vulnerable to *any* mortality. (Pa1253) [REDACTED].boem.gov/environment/protecting-north-atlantic-right-whales-during-offshore-wind-energy-development).

by the turbine fields, dramatically altering the marine habitat, as shown by BOEM’s configuration in Figure 3.6.9-1 (Pa941). For these reasons, BOEM concludes that the “cumulative” effect of the projects threatens the survivability of the North Atlantic Right Whale. (Pa573-576). BOEM also notes that the Atlantic Shores projects are to be built in the migration corridor of these creatures and are centered in a “Biologically Important Area (BIA)” for this species. See Figure 3.5.6-2 (Pa508). Finally, BOEM states that the “NARW migration” corridor “overlap[s]” with the Project Area. (Pa510).

In its January 2024 advisory BOEM states that the species is so much at risk that even *one death* will endanger its ability to survive:

The potential biological removal (PBR) level for the species, for the purposes of the MMPA, defined as the maximum number of animals that can be removed annually while allowing the stock to reach or maintain its optimal sustainable population level, is less than one (Hayes et al. 2023).

(Pa1187)(“BOEM and NOAA Fisheries North Atlantic Right Whale and Offshore Wind Strategy”, January 2024, at 17; [REDACTED] boem.gov/sites/default/files/documents/environment/BOEM\_NMFS\_NARW\_OSW\_0.pdf); accord [REDACTED] [REDACTED] boem.gov/environment/protecting-north-atlantic-right-whales-during-offshore-wind-energy-development (noting that the species is “near extinction”

and that even one loss per year will compromise its ability to survive)  
(Pa1253-1258).<sup>6</sup>

No identified mitigation measures will protect this species. The only “mitigation” measure described in the DEIS, “seasonal” “adjustment” in vessel speed and movement, initiated in 2020, has not succeeded in mitigating risk to this species. BOEM found that while vessel adjustment may have resulted in a decrease in North Atlantic Right Whale mortality, accidents with “serious injuries” that can lead to death have *increased*:

“serious injuries (defined as a 50-percent probability of leading to mortality) *increased* from 2 to 4 ...”.

(Pa534) (parenthetical text in original) [emphasis added].

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<sup>6</sup> NOAA reports there are “fewer than 70 reproductively active females” alive in the world. (Pa1257)([\[REDACTED\].fisheries.noaa.gov/species/north-atlantic-right-whale](https://www.fisheries.noaa.gov/species/north-atlantic-right-whale)). Even this figure is misleadingly optimistic since their lifespan has been reduced from a century to 40 years, meaning that “lifetime calving potential has been reduced from more than a dozen to perhaps just two to three calves” for each female. (Pa1188)(“BOEM and NOAA Fisheries North Atlantic Right Whale and Offshore Wind Strategy” at 8; [\[REDACTED\].boem.gov/sites/default/files/documents/environment/BOEM\\_NMFS\\_NARW\\_OSW\\_2\\_1.pdf](https://www.boem.gov/sites/default/files/documents/environment/BOEM_NMFS_NARW_OSW_2_1.pdf).) Due to this and other factors, “the resilience of this population to stressors affecting their distribution, abundance, and reproductive potential is low” and it “faces a high risk of extinction,...” *Id.*

Obviously, vessel “adjustment” cannot be deemed a “mitigating ... measure” since even after the “adjustments”, the survival of this species is *still* in doubt, as BOEM admits:

“The impacts of traffic on NARW from ongoing activities would be major and long-term because vessel strikes have had and *continue to have population-level effects that compromise the viability of the species.*”

(Pa536)[emphasis added]. BOEM acknowledges that even non-lethal vessel strikes will adversely affect reproductive capacity and threaten survival of the species. (Pa533)(citing *Corkeron et al.*, 2018; *van Der Hoop et al.*, 2012).

All of these are adverse impacts that are prohibited by N.J.A.C. §7.7-9.36(a).

An even graver threat to the North Atlantic Right Whale is the threatened loss to its food supply following construction of the Atlantic Shores projects. In the DEIS, BOEM concluded that “hydrodynamic impacts could alter zooplankton distribution and abundance (van Berket et al 2020).” (Pa553-556). What this means is very simple: the North Atlantic Right Whale, a baleen whale that exists by straining plankton from the sea, will suffer a decline in its primary food source due to changes in water flow — the “hydrodynamic processes” — caused by “the presence of WTGs [wind turbine generators]”, thereby reducing the supply of plankton on which this near-extinct species feeds. (Pa555-556).

Nothing could be clearer: the turbine structures are projected to *reduce the food source of a species already on the brink of extinction*. The threat is not mere speculation but is the product of BOEM’s scientific analysis. The North Atlantic Right Whale’s planktonic food sources “are primarily driven by hydrodynamic processes.” (Pa555-556). BOEM notes that the turbine structures will alter the flow of water movement (the “hydrodynamic patterns”) within 300-400 feet of each turbine and that such changes can diminish the supply of zooplankton on which the whales feed. (Pa555-556). BOEM observed that 2,974 wind turbine structures and 39 sea-based auxiliary structures to be built off New Jersey will exacerbate the threat to this species and the decline in its food supply. (Pa553).

In other words, the North Atlantic Right Whale, already near-extinct, faces catastrophe and an “uncertain” future from this threat to its primary food source:

[B]roadscale hydrodynamic impacts could alter zooplankton distribution, and abundance (van Berkel et al. 2020). This possible effect is primarily relevant to NARWs [North Atlantic Right Whales], as their planktonic prey (calanoid copepods) are the only listed species’ prey in the region whose aggregations are primarily driven by hydrodynamic processes. As aggregations of plankton, which provide a dense food source for NARWs to efficiently feed upon, are concentrated by physical and oceanographic features, increased mixing may disperse aggregations and may decrease efficient foraging opportunities.” (Pa555).

BOEM acknowledges that “ecological” impacts from the turbine structures will cause “considerable uncertainty” in the future of these creatures (and other marine mammals):

There is considerable uncertainty as to how these broader ecological changes will affect marine mammals in the future, and how those changes will interact with other human-caused-impacts. The effect of the increased presence of structures on marine mammals and their habitats is likely to be negative, varying by species, *and their significance is unknown.* (Pa555-556)[emphasis added].

BOEM has thus identified “major” and “severe” species-threatening impacts to the North Atlantic Right Whale from the offshore wind structures. While these impacts can be minor to moderate for *other* whale species, (Pa573-574), impacts to the North Atlantic Right Whale will be “major” and include “**severe population-level effects**”. (Pa574). As BOEM puts it, “remedial or mitigating actions” may protect *other* whale species, but NOT the North Atlantic Right Whale.

Based on the totality of BOEM’s findings, the DEIS documents a “major” and “severe” threat from the Atlantic Shores turbines to the survivability of this already near-extinct species (and a significant risk of harm to other marine mammals, as discussed in Point 2-A, above). As such, NJDEP’s consistency finding violates N.J.A.C. §7.7-9.36(a)-(b) and must be vacated.

**3. NJDEP COMMITTED LEGAL ERROR IN FINDING THAT ENFORCEMENT OF NEW JERSEY’S COASTAL ZONE RULES AS TO THE NORTH ATLANTIC RIGHT WHALE (AND OTHER MARINE MAMMALS) IS PREEMPTED BY SECTION 109 OF THE MARINE MAMMALS PROTECTION ACT, 16 U.S.C. §1379. (Pa27-28).**

In the face of undisputed evidence of species-threatening harm to the North Atlantic Right Whale (and habitat injury to other marine mammals), NJDEP refused to enforce N.J.A.C. §7.7-93.6(a)-(b), New Jersey’s coastal zone regulations protecting marine mammal habitat. NJDEP reasoned that the State’s marine mammal protection rule was “preempted” by Section 109 of the Marine Mammal Protection Act (MMPA) that bars enforcement of state laws “relating to the taking of any species...” (Pa27)(citing 16 U.S.C. §1379). This is legal error and the resulting consistency finding must be vacated.

NJDEP cites no case law applying Section 109 in this way and for good reason: nearly every court that has considered this question has recognized that Section 109 does *not* preempt state policies that *enhance* protection for endangered marine mammals. See e.g. *Friends of the Children’s Pool v. City of San Diego*, 2018 Cal. App. Unpub. LEXIS 3930, 2018 WL 2731698 (4th Appellate Dist., Cal. 2018)(held that city action protecting seals by barring access to park was not preempted by Section 109); *State v. Anariak*, 941 P.2d 154 (Alaska, 1997)(rejecting

Section 109 preemption and holding that state rule barring entry onto public land housing walrus sanctuary was consistent with MMPA's goal of protecting endangered marine mammals); *La Jolla Friends of the Seals v. Nat'l Oceanic & Atmospheric Admin. Nat'l Marine Fisheries Serv.*, 2008 U.S. Dist. LEXIS 102380, \*27, 2008 WL 5273540 (S.D. Cal. 2008)(TRO allowing city to place barrier to protect seals from human contact at beach, rejecting Section 109 preemption).<sup>7</sup>

Each decision rejects NJDEP's claims that Section 109 preempts state laws protecting marine mammals and their habitat. In *State v. Anariak*, the Alaska court relied, in part, on the legislative history of the MMPA that stated that Section 109 was not intended to bar laws that *enhance* protection of marine mammals: "It is not the intention of this Committee to foreclose effective state programs and *protective measures such as sanctuaries . . .*" H.R. Rep. No. 92-707, at 28 (1971), *reprinted in* 1972 U.S.C.C.A.N. 4144, 4161 [emphasis added]. Obviously, Congress did not intend Section 109 to preempt state rules *enhancing* marine mammal protection.<sup>8</sup>

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<sup>7</sup> *La Jolla Friends of the Seals* was later dismissed for lack of subject matter jurisdiction due to the absence of final agency action. 630 F. Supp. 2d 1222 (S.D. Cal. 2009).

<sup>8</sup> Only one decision has preempted a state law *enhancing* marine mammal protection. *UFO Chuting of Haw., Inc.*, 327 F. Supp. 2d 1220, 1222-23 (D.Hawaii 2004), refused to enforce a parasail ban near whales on ground of Section 109 preemption, a decision vacated after Congress intervened and it never reached appellate merits review. *UFO Chuting of Haw., Inc.*, 508 F.3d 1189, 1191 (9th Cir. 2007).

Contrary to NDEP's reasoning, the very existence of the federal CZMA demonstrates Congress's intent to respect state ecological rules affecting the coastal zone. As one federal court has described it, state review under the CZMA is a "kind of *reverse* preemption ... that assures a state that ... federally-sponsored activities affecting the coastal zone will be consistent with the state-created and federally approved coastal management plan." *Connecticut v. United States DOC*, 2007 U.S. Dist. LEXIS 59320, \*9 (D. Ct. 2007)[emphasis added]. As the U.S. Supreme Court has noted, the CZMA "contemplate[s] *cooperative* state-federal regulatory efforts..." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 n.28 (1978) [emphasis added].

In this way, Congress mandates *respect*, not preemption, for state coastal zone regulations such as New Jersey's endangered species rule, N.J.A.C. §7.7-9.36(a)-(b). Moreover, since the federal CZMA gives the state an effective veto over federally-licensed offshore energy projects, it cannot be said that the federal MMPA "so...occupies [the] field" as to preempt state laws that offer enhanced protection for endangered species. Cf., *Cippoline v. Liggett Group*, 505 U.S. 504, 516 (1992), quoting *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230)(explaining preemption when a federal policy occupies the field and bars cognate state laws).

In judging a question of federal preemption, “the purpose of Congress is the ultimate touch-stone”. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), quoting *Cipollone*, 505 U.S. at 516. “[A]ny understanding of the scope of a preemption statute must rest primarily on ‘a fair understanding of congressional purpose’”, to be measured by the “structure and purpose of the statute as a whole”. *Medtronic, supra*, 486, citing and quoting *Cipollone*, 505 U.S. at 530, n.27 (opinion of STEVEN, J.).

From the point of view of Congressional intent, Section 109 narrowly preempts only state laws relating to “takings” of endangered marine mammals, “taking” being defined as intent to “harass, hunt, capture, or kill, or attempt to harass, hunt, capture or kill any marine mammal”. 16 U.S.C. § 1362(13). Section 109 demonstrates Congress’s *limited* preemption of state laws as to deliberate acts that harm endangered marine mammals while, in contrast, New Jersey’s coastal zone management rules *expand* ecological and habitat protection for these creatures. N.J.A.C. §7.7-93.6.

There can be no preemption where these two sources of law — New Jersey’s coastal zone management rules and the MMPA — cover different legislative goals: New Jersey’s rule goes to expanding ecological protection for these creatures and their habitat whereas Section 109 preempts those laws regulating intentional abuse or interference with marine mammals. These different legislative foci must co-exist in the absence of express Congressional repeal of state CZMA powers as to

marine habitat protection. *United States v. Sherman*, 150 F.3d 306, 318 (3d Cir. 1998), citing and quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)(statutes must be deemed to co-exist *unless* there is a specific repeal of a Congressionally-granted power); accord *Southern Pacific Transp. Co. v. California Coastal Com.*, 520 F.Supp. 800, 804-805 (N.D. Cal. 1981)(rejecting preemption of state CZMA powers where Congress did not amend later versions of the Interstate Commerce Act to preempt CZMA review).

Based on the foregoing, Section 109 of the MMPA does *not* preempt New Jersey’s coastal zone regulations and NJDEP’s refusal to apply N.J.A.C. §7.7-9.36 (a)-(b) is legal error and the consistency finding should be vacated and remanded for further hearings as to the adverse impacts of the Atlantic Shores projects on the survivability of the North Atlantic Right Whale and the impact on other marine mammals.

**4. NJDEP’S CONSISTENCY FINDING IS CONTRARY TO THE DESTRUCTION OF THE SEA COAST AND ITS VISUAL VALUES THAT WILL BE CAUSED BY THE PRESENCE OF THE ATLANTIC SHORES TURBINES, IN VIOLATION OF N.J.A.C. §7:7-16.10. (Pa49-52).**

It is undisputed by BOEM that the Atlantic Shores projects will cause “major” adverse impact to the scenic and cultural values of the New Jersey coastal zone, permanently altering the coast and converting it from a natural seascape to an industrial utility infrastructure. (Pa988). Such a scenario violates New Jersey’s

coastal zone management rules that prohibit destructive visual intrusions to the coastal zone. N.J.A.C. §7:7-16.10.

BOEM acknowledges there will be “cumulative” “major” and “unavoidable” “adverse” impacts to the scenic values of the coastal zone caused by the Atlantic Shores turbine structures that are to line the Atlantic City, Brigantine and Long Beach Island coasts. (Pa988). Visual harm caused by hundreds of turbines, nearly 1,100 feet tall, located as close as 8.7 miles to the New Jersey coast will cause “major” adverse impact to the scenic beauty of the New Jersey shore for at least 50% of the year, as BOEM calculated. (Pa974; Pa988).

The only “mitigation” measure identified by BOEM or NJDEP — the use of shades of white paint for the structures and blades — will *still* render the structures visible at major coat locations *at least 50 per cent of the year*, as BOEM acknowledges. (Pa973-983). Thus, white-shaded painting is not a “mitigating... measure” that can result in a “net gain” to the “coastal resource of concern”, i.e., the scenic value of the shore, as required by N.J.A.C. §7.7-1.5.

NJDEP concedes that Atlantic Shore’s commitment to future light and visibility studies as a “mitigation measure would **not** reduce the visual impact of the offshore wind farm.” (Pa52)[emphasis added]. Thus, the agreement by the developer to study the effect of “meteorological influences”, *id.*, *after* the turbines are installed cannot be a “*mitigating* ... measure” under N.J.A.C. §7.7-1.5. In

essence, New Jersey's coastal zone is to be sacrificed as a "study" zone for *future* wind developments while the Atlantic Shores projects are permitted to destroy the scenic and visual values of LBI, Brigantine and Atlantic City, the heart of the State's coastal tourism industry.

BOEM admits such visual intrusion will be evident **50% of the year**, i.e., on "clear" days, (Pa974), a continuous destructive impact on the seascape and ocean setting. BOEM acknowledges that the "*first row* of Atlantic Shores South WTGs...*would be visible* from the nearest shoreline over approximately **50 percent of the year**", the "*first two rows would be visible over ... 40 percent of the year*" and "portions of the nearest four rows could be visible during approximately **25 percent of the year.**" (Pa947)[emphasis added]. Figure 3.6.9-2 shows the extent of the State's shoreline (including protected natural areas) that will be subject to visual intrusion by the Atlantic Shores (and other) proposed turbine projects. (Pa941).

The DEIS identifies these as "major" and "unavoidable" impacts on the character of the coastal zone; in other words, permanent and non-remediable harm to New Jersey's ocean setting:

"In clear weather, the WTGs and OSSs would be an unavoidable presence in views from the coastline with...major effects on open open character."

\*\*\*\*\*

"The incremental impacts contributed by the Proposed Action to the cumulative impacts on scenic and visual resources would be appreciable.

BOEM anticipates that the impacts associated with the Proposed Action when combined with the impacts for ongoing and planned activities including other offshore wind development would be **major**.” (Pa988)[bold emphasis in original].

There is no ambiguity in BOEM’s assessment. The federal regulator acknowledges the industrialization of the New Jersey coastal zone that will develop from its present “natural” setting, as a result of the presence of the wind turbine structures:

“The daytime presence of offshore WTGs and OSSs, as well as their nighttime lighting, would change perception of ocean scenes from natural and undeveloped to a developed wind energy environment characterized by WTGs and OSSs.” (Pa988).

The conclusion to be drawn is inevitable: New Jersey’s coast will be converted from a “natural and undeveloped” seascape to “a developed wind energy environment”, an offshore utility field no longer characterized by “open ocean character” but “by WTGs and OSSs”, as BOEM openly acknowledges. (Pa988). New Jersey’s unspoiled ocean setting will be destroyed and its citizens and outside tourists burdened by a utility-scarred coastal zone, destroying the natural beauty of the seascape, the reason millions come to the shore every year and why many make it their full-time home. No mitigation is possible, giving rise to BOEM’s characterization of the adverse impacts as “major” and “unavoidable”. (Pa988).

No “consistency” finding by NJDEP should have been possible under these circumstances. To the contrary, BOEM itself describes the scenic intrusion as “a visual character that is *inconsistent* with the character of the unit [i.e., the coastal

zone]...” (Pa969)[emphasis added]. This is not theoretical or speculative. Visual impacts from the Atlantic Shores structures are described by BOEM as “major” and “adverse” with respect to the most developed parts of Long Beach Island beginning with Beach Haven, its most developed municipality and the center of its tourist trade, and moving south to the end of the island to the Edwin B. Forsythe National Wildlife Refuge and continuing to Brigantine and Atlantic City. These impacts are measured by BOEM from Key Observation Points (KOPs) on the LBI, Brigantine and Atlantic City coastal areas. (Pa981)(Table 3.6.9-16); see also (Pa965)(Table 3.6.9-11).

Of unique importance, the DEIS identifies permanent “major” harm to the Forsythe National Wildlife Reserve. The Forsyth Reserve is located south of Beach Haven, past Holgate, and continues to the southernmost end of Long Beach Island and onto the adjacent barrier island. (Pa965; Pa981). As anyone who has been to Forsythe knows, the reserve is an undeveloped portion of Long Beach Island, existing in its original natural state with no development of any kind, fully intact as a natural setting. [REDACTED]/njudubon.org/wp-content/ibba/[REDACTED]njudubon.org/SectionIBBA/IBBASiteGuide5a39.html?sk=3161. (Pa1254).

Like all reserves, Forsythe exists to protect nature but equally to protect the human psyche that requires unspoiled nature as a cure for the industrialized and mechanized world. Every year, millions go to Forsythe and other reserves, such as the North Brigantine natural area, to immerse themselves in as pure a form of

nature as modern society permits. Following installation of the turbines, the Forsythe reserve will no longer front on a “natural and undeveloped” ocean setting but will be fully exposed to a “developed wind energy environment”, an offshore utility field no longer characterized by “open ocean character” but scarred by wind turbine structures, as BOEM graphically described. (Pa988).

BOEM described “Major” impacts of similar nature running from LBI south through North Brigantine, Atlantic City, and even further south. Such impacts will destroy the natural setting of the coast. New Jersey’s beaches, though developed at many places *behind* the dunes, remain unspoiled on their sands looking seaward, a scenic gift that will be permanently lost by industrialization of the inner coast by hundreds of closely situated turbine structures (thousands, once all proposed projects are in place). This is not a matter for the so-called “rich” with beachfront homes but for millions of perfectly ordinary people who every year seek out the shore.

NJDEP acknowledges that the Atlantic Shores project will exacerbate the “cumulative view shed impact posed by multiple proposed offshore wind farms.” (Pa50)(Consistency Finding at 42). In other words, the State admits the Atlantic Shores turbines will contribute cumulatively to the destruction of the ocean setting. A depiction in the DEIS of the proposed projects shows that virtually the entire New Jersey coast is to be lined with the turbine structures. (Pa941)(Figure 3.6.9-2). In these circumstances no “consistency finding” is

possible under any fair or reasonable reading or interpretation of the scenic values requirements of N.J.A.C. §7:7-16.10.

NJDEP acknowledges these “major” “adverse” findings as to the scenic destruction of the coast, (Pa49-51), but identifies **no** mitigation measures *except* to say that the blades of the turbines will be “color treated white or light gray...” to “help reduce potential visibility against the horizon.” (Pa51). This is **not** mitigation. BOEM never concluded that the “color treated” blades will inhibit the visual harm but admits *the opposite*: that the structures will *still* be fully visible in “clear” conditions **at least 50% of the year**, as discussed above. In other words, **NO** known mitigation measures are available, further reason for vacating NJDEP’s consistency finding.

NJDEP also fails to make the required finding under N.J.A.C. §7.7-1.5 that “mitigation” measures would result in a “net *gain*” in the quality and quantity of the coastal resource of concern, i.e., the scenic value of the coastal zone. NJDEP concludes that the Atlantic Shores project is in the “public interest” without making the “net *gain*” finding that is a predicate under §7.7-1.5 for a “public interest” finding. Nowhere does NJDEP describe just *how* a “net *gain*” can possibly arise from the destruction of the scenic values of the coast:

As discussed above, “discouraged” coastal development, as defined in the Coast Zone Management Rules at N.J.A.C. 7:7-1.5, allows for uses that the NJDEP considers to be in the public interest provided mitigating or compensating measures can be taken so that there is a net gain in quality and

quantity of the coastal resource of concern. As discussed in the Project Public Interest section of this report, the construction of Atlantic Shores' offshore wind farms and associated infrastructure is in the public interest.

(Pa49). In other words, NJDEP acknowledges the rule but fails to identify any actual "net gain", as required under N.J.A.C. §7.7-1.5.

While it may be argued that the very nature of the turbine structures means there can be no mitigating measures and no "net gain" possible from the scenic destruction, this is not a basis for approval. Rather, it means that the project cannot be deemed "consistent" with the State's coastal zone rules *and has to be rejected*. No regulation has been adopted allowing NJDEP to "waive" or set aside the "mitigation" and "net gain" requirements of N.J.A.C. §7.7-1.5 to permit "major" and "permanent" destruction of the sea coast. *Cf., In re CAFRA Permit No. 87-0959-5 Issued to Gateway Assocs.*, 152 N.J.J. 287, 308 (1997), cited in *Dragon v. New Jersey Dep't of Environmental Protection*, 405 N.J. Super. 478, 483 (App. Div, 2009) (vacating NJDEP permit that violated agency's CAFRA regulation where no "waiver" regulation had been adopted).

NJDEP's consistency finding is also contrary to the known factual record. NJDEP contends that "high visibility conditions would occur over a period of *less than 23 percent of the daylight hours* in a given year". (Pa51)[emphasis added]. This is contrary to the DEIS that concludes the front row of turbines would be visible at least half of the time ("50%"), *fifty per cent of the year*, with the second

row visible nearly the same (“40%”). (Pa974). NJDEP’s attempt to impose a lower value is directly contrary to the record.

A final comment is in order as to NJDEP’s conclusion that there is no alternative location to avoid the harmful impacts of the Atlantic Shores projects. This arose in response to a comment from a member of the public as to why the turbines cannot be located further out to sea to minimize visual impacts. NJDEP stated that Atlantic Shores was awarded only this particular offshore lease area, so no alternative location is available:

“The received comment also requested that the Projects be moved to a location farther from the State’s shoreline...The Projects are proposed under this Federal Consistency Certification request to be constructed within the limits of the awarded Lease Area. Atlantic Shores does not have access to other parts of the OCS outside of the Lease Area for potential offshore wind farm development. Therefore, there are no other options than sitting o the Projects within this established BOEM Lease Area in order to minimize visual impacts.” (Pa74).

This answer fails to meet NJDEP’s statutory and regulatory duty. Under the federal CZMA, NJDEP was required to consider if visual harm from the project *as proposed* violates the State’s coastal zone management regulations. If the Atlantic Shores project violates the State’s regulations as to scenic harm under N.J.A.C. §7:7-16.10, then the project **must** be rejected regardless of whether the sponsor has no other place to build.

For all of the above reasons, the Atlantic Shores projects violate the prohibition on visual harm to the coastal resource and NJDEP's consistency finding must be vacated.

**5. NJDEP's CONSISTENCY FINDING SHOULD BE VACATED BECAUSE THE AGENCY FAILED TO MAKE THE REQUIRED FINDING UNDER N.J.A.C. §7.7-15.4(C) THAT THE ATLANTIC SHORES PROJECT WILL NOT CAUSE THE LOSS OF MORE THAN 200 JOBS ANNUALLY IN THE "COASTAL TOURISM" INDUSTRY. (Pa38-39; 75).**

Protection of the State's coastal tourism industry is a fundamental goal of New Jersey's coastal zone regulations. BOEM concludes that "[a]nnual tourism in New Jersey's coastal communities is a \$16 billion industry," equal to *one-third* of the \$46.4 billion spent on tourism in New Jersey annually. (Pa905). The "scenic quality" of the coastal zone is the driving force for this vast industry:

"As a result of the proximity of the Atlantic Ocean, as well as the views associated with the shoreline, the New Jersey shore has been extensively developed for water-based recreation and tourism."

(Pa905). New Jersey's public beaches are the "key drivers for recreation and tourism businesses" and are the principal areas to be faced with "impacts of the project," meaning the Atlantic Shores turbine structures. (Pa907).

To protect this vital source of commerce and employment, New Jersey's coastal zone regulations prohibit any offshore energy facility that will result annually "in loss of 200 or more...jobs in New Jersey directly or indirectly *related to the State's coastal tourism industry...*". N.J.A.C. §7.7-15.4(c). NJDEP failed to

apply this standard. Instead, NJDEP approved the projects because “it is not anticipated that the Projects will result in *a net loss of 200 jobs in NJ*”, meaning the State overall. (Pa75)[emphasis added]. However, this is **not** the standard to be applied under N.J.A.C. §7.7-15.4(c) that requires NJDEP to evaluate the loss of jobs “related to ... *coastal tourism*”, not merely a net loss of jobs statewide. NJDEP’s consistency finding thus disregards the requirements of N.J.A.C. §7.7-15.4(c) and must be vacated.

NJDEP’s application of the regulation also makes no logical sense. If the purpose of the coastal zone regulation were to allow an energy project simply because there will be no “net loss of jobs ... *in NJ*”, the rule would not have been constructed to require a loss of no more than 200 jobs “*related to ... coastal tourism*”, as N.J.A.C. §7.7-15.4(c) plainly states. NJDEP’s interpretation is contrary to the “ordinary and commonsense meaning” of §7.7-15.4(c) and is “incongruent” with the regulation as written. *In re Eastwick College LPN-to RN Bridge Program*, 225 N.J. 533, 542 (2016)(court will not defer to agency interpretation that violates “ordinary” or “commonsense” meaning).

NJDEP’s disregard of the requirement is rendered more egregious in view of its acknowledgment that coastal tourism jobs *will* be impacted by the Atlantic Shores projects:

“The Projects do have the potential to impact jobs associated with commercial and recreational fishing and associated land-based support businesses.” (Pa75).

Similarly, NJDEP admits the Atlantic Shores projects will have an uncertain and variable affect upon coastal tourism:

Although the visual impact is predicted to be significant, the overall impact to tourism may vary. Studies and surveys that have evaluated the impacts of offshore wind facilities on tourism have identified variable reactions to offshore wind, with respondents having positive, neutral, or negative views of the effect that offshore wind infrastructure would have on their experience of coastal recreation. (Pa93).

NJDEP thus agrees there *will* be an adverse impact on jobs in coastal tourism, an industry equal to one-third of New Jersey's \$46.4 billion tourist industry. (Pa905). On sheer scale alone, an adverse impact on a coastal tourism industry valued at \$16 billion is certain to cause the loss of 200 or more coastal tourism jobs. NJDEP does not deny such job losses in coastal tourism — it simply ignores the issue in favor of a conclusion that there will be no “net loss” of 200 jobs “*in NJ*” overall, contrary to the required analysis under §7.7-15.4(c).

NJDEP also gives mistaken emphasis to claims that “the Projects are expected to directly create more than 22,290 full time equivalent (FTE) jobs ... throughout their lifecycles”. (Pa75). Such figures are deceptive. A total of 22,290 FTEs over 30 years (the presumed maximum operating life of the projects) amounts to a maximum of **743 actual new jobs *per year*** (by simple division:

22,290 FTEs divided by 30 years equals **743 annual new jobs**).<sup>9</sup> BOEM also acknowledges “many of the jobs ... are temporary construction jobs,...”, 3.6.3-14, so the actual number of permanent new FTE’s is far smaller. NJDEP offers no evidence that these 743 new “FTEs” relate to “the *coastal tourism* industry”, as required by §7.7-15.4(c). Rather, these are jobs installing and servicing the turbines, not jobs in coastal tourism, as required under the regulation.

For the above reasons, NJDEP’s consistency finding fails to make the required analysis under N.J.A.C. §7.7-1.5 and should be vacated.

**6. NJDEP’S CONSISTENCY FINDING IS INVALID BECAUSE THE AGENCY FAILED TO CORRECTLY APPLY THE “PUBLIC INTEREST” REQUIREMENTS OF N.J.A.C. §7.7-1.5. (Pa15-17)**

NJDEP concluded that the offshore wind projects are in the “national, regional, and State of New Jersey’s *public interest*” as they will “contribute to ameliorating [effects of climate change]”. (Pa16)[emphasis added]. In reaching this conclusion, NJDEP failed to adhere to the requirements of N.J.A.C. §7.7-1.5 that a project may be approved in the “public interest” *only* where two requirements are satisfied: 1) there are “mitigating or compensating measures” available to counter adverse impacts of the projects; *and* 2) the mitigating or

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<sup>9</sup> The same math will demonstrate the exaggerated claim to tens of thousands of “indirect” and “induced jobs. (Pa75).

compensating measures must result in a “net gain” to the “coastal resource of concern”. This is clear from the text of §7.7-1.5:

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. By this language, the regulation allows approval of a project “in the public interest” **only** where the “net gain” requirement is satisfied.

NJDEP made no finding that mitigating measures will result in “a net gain in quantity and quality of the coastal resource of concern”, i.e., the fisheries and fish habitat or the scenic qualities of the coastal zone. See Points 1 and 4, *supra*. The consistency finding is silent on any “net gain” to these resources. (Pa16). Such oversight is inexcusable. The “net gain” requirement is not mere surplusage. To prevent against an unrestrained approval power, New Jersey’s coastal zone rules allow approval of a project “in the public interest” **only** where there is to be a “net gain” to the “*quantity and quality of the the coastal resource of concern*”. N.J.A.C. §7.7-1.5, et seq. In this way, the regulation limits NJDEP’s powers

(otherwise virtually unlimited) by requiring the specific findings under §7.7-1.5 *before* the “public interest” can be a factor in consistency approval.<sup>10</sup>

Based on the foregoing, NJDEP has not made the required “net gain” findings under N.J.A.C. §7.7-1.5 and its “public interest” analysis should be vacated by this Court, along with the consistency approval.

### **CONCLUSION**

For the foregoing reasons, NJDEP’s consistency finding for the Atlantic Shores projects should be vacated.

Respectively submitted,

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<sup>10</sup> It should be noted that the “public interest” can allow a project only in case of “discouraged” harms, such as injury to the fishery (N.J.A.C. §7.7-15.4) or the scenic values of the coast (N.J.A.C. §7.7-16.10). In such cases a “discouraged” impact is permitted where the “mitigation” and “net gain” requirements are satisfied under §7.7-1.5. *However*, in cases of injury to protected marine mammals such harms are absolutely “prohibited”. N.J.A.C. §7.7-9.36(b). Thus, even if the “net gain” requirement is satisfied to allow a “public interest” finding as to the fishery or scenic values, the consistency approval must still be vacated because harm to the North Atlantic Right Whale and to marine mammal habitat, Point 2-A and B, *supra*, is always “prohibited” by regulation.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO.: A-2581-23

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IN THE MATTER OF THE  
COASTAL ZONE  
MANAGEMENT  
CONSISTENCY  
CERTIFICATION OF  
ATLANTIC SHORES  
OFFSHORE WIND SOUTH  
PROJECT BOEM LEASE  
AREA OCS-A 0499

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: CIVIL ACTION  
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: ON APPEAL FROM A FINAL  
: DECISION OF THE DEPARTMENT OF  
: ENVIRONMENTAL PROTECTION  
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BRIEF OF RESPONDENT  
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION  
**Date Submitted:** April 30, 2025

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## **PRELIMINARY STATEMENT**

The scope of this appeal is narrow: did the Department of Environmental Protection (“DEP”) properly determine that the Atlantic Shores Offshore Wind South Project (the “Project”), proposed for construction in the Atlantic Ocean off the New Jersey coast, is consistent with the State’s enforceable coastal policies? The answer is simple: yes. DEP correctly issued its consistency determination in accordance with federal and State statutory and regulatory authorities applicable to the consistency determination process. Among other things, DEP considered an extensive substantive record and issued its own environmental analysis explaining its findings that the Project is in the public interest as it would strengthen the State’s response to climate change threats to New Jersey’s people and property, particularly the economies reliant on marine species and ecosystems. Applying its specialized expertise and acting within its delegated authority, DEP found the Project would be consistent with New Jersey’s enforceable coastal zone policies.

Appellants disagree with DEP’s consistency determination. Applying their own regulatory and statutory interpretation, Appellants rely on select portions of the federal decision-making record to support the vast majority of their arguments. Appellants ignore DEP’s reasoned analysis, both as to the record facts and the agency’s interpretation of its own regulations. Appellants’

mere disagreement with DEP's reasoned decision fails to meet their burden to disturb an agency determination. Accordingly, this court should affirm DEP's consistency determination.

### **COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY**<sup>1</sup>

Given the complexity of issues here, a summary of the statutory and regulatory framework that form the basis of DEP's decision and the relevant facts is provided below.

#### **A. Federal and State Regulation of New Jersey's Coastal Zone.**

Several federal and State statutory and regulatory authorities apply to the consistency determination process, starting with the federal Coastal Zone Management Act, 16 U.S.C. §§ 1451–64 (“CZMA”). Since offshore wind structures, such as the Project, are constructed within federal waters, federal law governs. See 43 U.S.C. § 1312 (extending coastal States’ “seaward boundaries to a line three geographic miles distant from its coastline”); Id. § 1333(a)(1)(A) (extending federal jurisdiction to area beyond three-mile line). The CZMA authorizes the regulation of the United States’ coastal zone and resources, including offshore of New Jersey. 16 U.S.C. § 1456. The CZMA’s cooperative federalism approach centers upon coastal States creating comprehensive coastal

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<sup>1</sup> The facts and procedural history are combined for efficiency and the Court’s convenience.

zone management programs, supported by federal grants. Id. §§ 1452, 1454–55. Each participating State’s program must meet criteria such as notice, public comment, and substantive policies that States enact through their statutes and regulations. Id. § 1455(d).

Once the United States Secretary of Commerce agrees that the State’s proposed coastal program meets the CZMA requirements, those State policies become “enforceable policies.” Ibid. The approved program then provides a process to review a federal actions’ impact upon the State’s coastal zones, which must “compl[y] with the enforceable policies of the state’s approved program” and “be conducted in a manner consistent with the program.” Id. § 1456(c)(3)(A); see also 15 C.F.R. § 930.70 (“The provisions of this subchapter are intended to ensure that all federal license or permit activities . . . which affect any coastal use or resource are conducted in a manner consistent with approved management programs.”); 15 C.F.R. §§ 930.4, 930.6, 930.76.

The CZMA thus prevents federal agencies from approving proposed development affecting the coastal zone “until the state or its designated agency has concurred with the applicant’s certification,” but if the state fails to act within six months, “the concurrence is conclusively presumed[.]” 16 U.S.C. § 1456(c)(3)(A). The National Oceanic and Atmospheric Administration (“NOAA”) administers the CZMA, and promulgated CZMA consistency

regulations to guide federal agencies and States regarding federal activities and approvals that may affect a State’s coastal zone, at 15 C.F.R. Part 930 (the “CZMA Rules”). 15 C.F.R. §§ 923.1(a), 930.1(a).

Offshore wind structures are also subject to the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1356 (“OCSLA”), which governs submerged lands three miles offshore seaward of state coastal waters that are under federal jurisdiction. Id. §§ 1331, 1312. Under OCSLA, the Bureau of Ocean Management (“BOEM”) within the United States Department of the Interior administers offshore lease areas and reviews lease area projects, including offshore wind. Id. §§ 1332–1334, 1337(p); 30 C.F.R. § 585.101. BOEM also reviews the project design and must approve the project’s Construction and Operations Plan (“COP”) before project construction. 30 C.F.R. § 585.620. BOEM’s review must comply with the CZMA. 16 U.S.C. § 1456(c)(1)(A); 30 C.F.R. § 585.627(a).

Because BOEM’s COP approval for the Project constitutes a “major action,” BOEM must undertake an environmental review under the National Environmental Policy Act (“NEPA”), before approving the COP. 42 U.S.C. §§ 4321–47. NEPA review consists of an environmental impact statement (“EIS”) that “may make use of any reliable data source” to assess the reasonably foreseeable environmental impacts of proposed agency actions. Id. §§

4336(b)(3)(A), 4332(C); see also 40 C.F.R. § 1502.2(g). An EIS is prepared in two stages: the draft (“DEIS”) and final (“FEIS”) versions. 40 C.F.R. § 1502.9. The DEIS, “to the fullest extent practicable,” must “meet the requirements established for final statements” and assess reasonably foreseeable impacts on physical, biological, socioeconomic, and cultural resources that could result from construction and installation, operations and maintenance, and conceptual decommissioning of the Project. Id. §§ 1502.6, 1502.9(b), 1502.21. The public then comments on the DEIS and the agency considers and responds to comments before issuing an FEIS. Id. §§ 1502.9(c), 1503.

Transitioning from federal to State law, New Jersey’s own coastal management program is approved in accordance with the federal CZMA. DEP implements and coordinates the State’s federally approved coastal zone management program which is expressed in DEP’s Coastal Zone Management rules (“CZM rules”), N.J.A.C. 7:7-1.1 to -29.10. New Jersey retains jurisdiction over its coastal waters, which covers all State tidal waters extending from the mean high-water line waterward to the three-geographical-mile limit, and elsewhere to the interstate boundaries of New York, Delaware, and Pennsylvania. Beyond the three-mile territorial limit and in federal jurisdictional waters, DEP reviews proposed development projects which require federal approval for consistency with its CZM rules.

Specifically, under the CZMA, an applicant for a federal permit or license to conduct activity “affecting any land or water use or natural resource” of a state’s coastal zone must provide in their application “a certification that the proposed activity complies with the enforceable policies of the state’s approved program and that such activity will be conducted in a manner consistent with the program.” 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.70. Accordingly, DEP reviews the applicant’s consistency determination application and decides whether the proposed project is consistent with New Jersey’s enforceable policies in the CZM rules. 16 U.S.C. § 1456. DEP provides public notice and seeks public comments and considers the submissions in making its decision. N.J.S.A. 52:14B-4; N.J.A.C. 7:27-8.10.

DEP may concur, conditionally concur, or object to the consistency certification. 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. §§ 930.4, 930.6, 930.78. A conditional concurrence occurs when the State tells the federal agency that the project must meet certain conditions to be deemed consistent with the State’s policies. 15 C.F.R. § 930.4. If the State conditionally concurs, the State must identify “specific enforceable policies of the management program” and explain why its conditions are “necessary to ensure consistency with [those] specific enforceable policies.” Id. § 930.4(a)(1). If the federal agency rejects the conditions, the conditional concurrence is treated as an objection. Id. §

930.4(b). The Secretary’s decision may then be reviewed in federal court. Ibid.; 16 U.S.C. § 1456(c)(3)(A). Thus, DEP review is limited to finding consistency but not imposing its own conditions without federal approval. 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. §§ 930.70, 930.76.

**B. Federal Review of the Project.**

Atlantic Shores Offshore Wind, LLC (“Atlantic Shores”) sought and received a lease from BOEM to construct the Project in the Atlantic Ocean in Lease Area OCS-A 0499 (the “Lease Area”), which is outside of DEP’s territorial jurisdiction. 43 U.S.C. §§ 1332–1334, 1337(p); 30 C.F.R. § 585.101. (Pa6, 37). The Project includes infrastructure for about 200 wind turbine generators extending to a maximum height of 1,046.6 feet above mean sea level, up to ten offshore substations, one meteorological (“met”) tower, interarray and interlink cables, and up to eight transmission cables making landfall at Atlantic City and Sea Girt. (Pa6, 46, 12–13; Ra91).

The Project is proposed 8.7 miles away from New Jersey’s coastline at its closest point. (Pa12). The structures will be aligned in a uniform grid arranged in multiple lines to “maximize offshore renewable wind energy production while minimizing effects on existing marine uses.” (Ra4). The offshore export cable would be buried below the seabed, cross into DEP’s jurisdiction, and extend onshore to connect with the electric power infrastructure. (Pa13). That portion

of the Project is subject to DEP's direct regulation and requires separate State permits not at issue.

Atlantic Shores submitted its Project COP to BOEM in March 2021, and updated it in May 2023. (Pa12). In connection with its COP, Atlantic Shores also sought an incidental take authorization from the National Marine Fisheries Service (NMFS) under the Marine Mammal Protection Act, 16 U.S.C. § 1361, (MMPA) for the incidental take of marine mammals during Project construction. (Pa131). NMFS is required to review applications and, if appropriate, issue an incidental take authorization under the MMPA. Ibid.; 16 U.S.C. 1371(a)(5)(A) and (D).

On September 30, 2021, Atlantic Shores submitted a consistency certification application to DEP. (Pa9–10). DEP's six-month CZMA review period began on October 1, 2021; the decision deadline was stayed multiple times to allow BOEM and DEP to obtain additional information. (Pa9, 62). DEP solicited public comments on the consistency certification three times between 2021 to 2023. 16 U.S.C. § 1456(c)(3)(A). (Pa9). On May 19, 2023, BOEM issued a DEIS under NEPA, assessing the Project's reasonably foreseeable impacts. (Pa9, 11). BOEM also solicited public comments multiple times and held four public hearings on the DEIS. (Ra6–7).

### **C. DEP Issues the Concurrence.**

DEP issued a final agency decision on April 1, 2024, finding the Project is consistent with the State's enforceable policies (the "Concurrence"). (Pa6, 9). The Concurrence was accompanied by an environmental analysis report detailing DEP's findings. (Pa9–95). DEP's Concurrence analysis considered, among other things, information contained in the consistency certification request, BOEM's DEIS, Atlantic Shores' COP application, and Atlantic Shores' commitments to undertake construction and operation measures to avoid, minimize, and mitigate the Project's reasonably foreseeable effects. (Pa6–8, 11–12).<sup>2</sup> DEP also responded to all public comments it received in a separate response to comments document. (Pa58–98).

DEP began its Project analysis by addressing whether the Project is in the public interest, a finding that is key for several regulations. DEP explained that the New Jersey Global Warming Response Act, N.J.S.A. 26:2C-37 to -68, requires DEP to recommend measures to reduce greenhouse gas emissions, including those associated with energy production. (Pa15). DEP noted that it "is well-settled in the scientific community that climate change is primarily

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<sup>2</sup> While the Concurrence contained mitigation measures, it was not a CZMA conditional concurrence because both BOEM and Atlantic Shores agreed to the measures. 15 C.F.R. § 930.4(a).

driven by increased atmospheric levels of greenhouse gas concentrations,” and that the impacts “pose a threat to New Jersey’s communities, infrastructure, economy, natural resources and way of life.” (Ibid.). DEP determined that the Project is in the public interest because it is an alternative to fossil fuels and would reduce global, national, and regional greenhouse gas emissions. (Pa16). Thus, the Project would strengthen the State’s response to the threats climate change pose to the marine ecosystem and commercial economies—such as fisheries—which rely on marine species vulnerable to climate change. (Pa15). DEP found that the Project will advance renewable energy, improve resiliency for New Jersey and the extended region, improve energy efficiency throughout the region, and support national, regional, and State energy policies. (Ibid.).

DEP then weighed impacts and mitigation measures and explained why the Project would be consistent with the CZM rules, including those that address marine fish and fisheries (Pa40–47), endangered species (Pa26–31), scenic resources and design (Pa49–52), and energy facilities (Pa36–39). First, DEP analyzed the Project’s consistency with the Marine Fish and Fisheries (“MFF”) rule, N.J.A.C. 7:7-16.2(a), which discourages activity that adversely impacts natural functioning of marine fish or New Jersey based marine fisheries. DEP reiterated its finding that the Project is in the public interest by reducing greenhouse gas emissions, strengthening the State’s response to climate change

induced threats to the marine ecosystem, commercial economies, and fisheries. (Pa15; Pa40). For example, climate induced sea level rise could impact “New Jersey coastal communities with fishing businesses that have infrastructure near the shore[.]” (Id.).

DEP noted that the Project could be beneficial to for-hire recreational fisheries, which are also beneficiaries of the MFF rule, N.J.A.C. 7:7-16.2(d), due to the artificial reef effect from the Project’s hard structures resulting in increased fishing activity near the Project. (Pa27; Pa44; Pa67; Pa717). DEP noted that Project construction could cause a variety of other impacts on marine species and fisheries, ranging from short term and minimal to long term and more substantial, but that the latter could be mitigated. (Pa40–47; Pa495–96 (BOEM noting Project impacts ranging from “negligible to moderate adverse and minor beneficial impacts on finfish, invertebrates, and [essential fish habitat]”)).

For example, cable installation activities are expected to alter the seabed, creating localized and short-term impacts which should dissipate over time as moving sand waves fill in the altered seabed profile. (Pa40). Sand ripples on the ocean floor provide habitat for finfish and invertebrates in an otherwise flat seascape. (Id.). Prior to cable installation, Atlantic Shores proposes a method known as “pre-sweeping,” which entails removing sand to create flat sand areas

for approximately thirty percent of the proposed cable corridors, altering the seabed profile and “potentially causing localized, short-term impacts on finfish, invertebrates, and essential fish habitat.” (Id.). However, BOEM anticipates currents to reform most ripple areas “within days to weeks following disturbance” and for habitat function to “fully recover post-disturbance,” even where sand ripples may not recover to pre-disturbance height and width. (Id.).

As another example, installation may cause habitat conversion for certain species, though DEP noted it will not cause population-level impacts. (Pa41). Specifically, tower foundations and cable protection installation would create “hard-bottom” habitat in an otherwise sandy seascape of “soft-bottom” habitat. (Id.). This will benefit some species, as structure-oriented finfish and invertebrates are expected to aggregate around this new hard-bottom habitat. (Id.). While soft-bottom species, such as Atlantic surf clam, would be displaced from such habitat conversion, such displacement will not cause population-level impacts to the soft-bottom species. (Pa41; Pa378–79; Pa712–13 (BOEM noting habitat conversion impacts may range from beneficial to adverse, though “no stock-level effects are expected”)).

DEP also recognized fisherman may experience increased operational costs due to gear entanglement and navigational hazards that may cause fishermen to seek alternative fishing grounds, target species, or gear; expected

impacts depend on the fishery, ranging from 0.04 percent of exposed revenue from sea bass to less than 2 percent of that from surf clams. (Pa45). Fishing vessel operators who are unable to find alternative fishing locations are expected to experience long-term revenue loss. (Id.).

DEP then discussed numerous mitigation measures Atlantic Shores proposed to address such impacts. As one example, Atlantic Shores committed to establishing a compensation fund for fishermen and shoreside businesses, which would be subject to a forty-five-day review and public comment period. (Pa46–47; Pa718). According to BOEM, the fund would compensate commercial and for-hire recreational fishermen for income loss for displacement from fishing grounds due to Project construction and operations, and to shoreside businesses for losses indirectly related to the Project. (Pa47; Pa721–23). The fund would be based on revenue exposure for fisheries and impacts on shoreside seafood businesses located near ports outlined in the DEIS, and BOEM would oversee Atlantic Shores’ analysis and fund operation to ensure it meets 30 C.F.R. § 585. (Pa46–47; Pa722; Pa664). Atlantic Shores executed a Letter of Intent with DEP to establish the fund. (Pa55–57).

Atlantic Shores also developed a gear loss avoidance program and a fisheries communication plan to solicit commercial fishing industry input, and committed to providing cable protection locations to reflect pre-existing

conditions and minimize effects to fishing gear. (Pa46, 68; Pa721–23). Additionally, Atlantic Shores proposed ongoing monitoring and scientific studies to better understand the impacts of offshore wind and climate change on fisheries and more accurately mitigate potential effects. (Pa40–47). DEP noted that one such study, focusing on the surf clam industry, had already been completed. (Pa46). Many other mitigation measures, such as construction timing restrictions to protect marine life, placing cables away from the most sensitive seafloor habitats, and “soft starts” to construction to reduce noise impacts, are not challenged here, yet demonstrate further efforts to address Project impacts. (Pa21, 28).

Accordingly, DEP concluded that Atlantic Shores demonstrated consistency with the MFF rule because the Project is in the public interest, many impacts would be short term and remediated naturally shortly thereafter, some species could see beneficial impacts, and the other impacts would be mitigated through agreed upon measures. (Pa47).

Second, DEP analyzed whether the Project was consistent with the Endangered and Threatened Wildlife or Vegetation Species Habitat (“T&E”) rule, N.J.A.C. 7:7-9.36. DEP began by noting that its GIS Landscape Project mapping for endangered and threatened wildlife or vegetation species habitat—which is one of the primary tools DEP uses to address the T&E rule—does not

extend beyond New Jersey State’s three-nautical mile limit. (Pa26). DEP also acknowledged that Section 109 of the MMPA’s express language preempts DEP from enforcing its T&E rule in the BOEM lease area as to marine mammals. Ibid. Thus, DEP found that the State cannot enforce its T&E rule, as it relates to marine mammals, in the Project area. Ibid.

Even though DEP is preempted under the MMPA and many of the species only exist beyond its jurisdiction, DEP nevertheless took note of potential project impacts on threatened and endangered species identified in the DEIS as occurring in the project area, including marine mammals. Relevant here, these included four federally listed whale species, including the North Atlantic Right Whale (NARW). (Pa27).

BOEM’s analysis on NARW impacts under NEPA considered both the impacts to NARW from all Outer Continental Shelf activities other than the Project as well as the Project’s direct impacts. When citing impacts to NARW, the DEIS considers a “No Action Alternative and six action alternatives (three of which have sub-alternatives).” (Pa166–68). The No Action Alternative describes a scenario where the COP is not approved, the Project does not occur, no additional permits are required, and there are no environmental or socioeconomic impacts or benefits associated with the Project. (Pa136; Pa166; Pa169). When analyzing the impacts of the No Action Alternative on marine

mammals, BOEM considered the impacts of ongoing activities, including non-offshore wind and ongoing offshore wind activities, on the baseline conditions for marine mammals. (Pa522). In analyzing potential impacts from the Project itself, BOEM concluded that “the incremental contributions of the Project to the combined impacts due to the presence of structures associated with ongoing and planned activities would be negligible, and the Proposed Action is not expected to result in population level effects for NARW.” (Pa570).

Based upon findings in the DEIS, DEP observed that certain impacts to marine mammals resulting from the Project may be offset by beneficial effects of those impacts over time. (Pa27). For example, while the artificial reef effect from the structures might increase some fish species, which could increase food supply for certain marine mammal species, the predicted increased recreational fishing could also lead to marine mammal entanglement in fishing debris resulting in potential injury or death. (Pa28). DEP found that the structures also could cause marine mammals to move to areas with lower habitat value or with higher risk of vessel collision or fisheries interactions. (Pa27). Overall, however, DEP concurred that the Project would have minor adverse impacts on odontocetes (toothed whales) and pinnipeds (seals, sea lions, and walruses), with

no stock or population-level impact and to have moderate adverse impacts<sup>3</sup> on mysticetes (baleen whales), such as the NARW. (Pa28).

DEP specifically referenced both the COP and BOEM's lengthy discussion of the NARW's fragile status, the Project's potential for impacts on NARWs, and also the mitigation measures Atlantic Shores must observe to reduce those impacts. (Pa28; Pa77; Ra094–117; Ra18). DEP observed that Atlantic Shores agreed that Project risks such as vessel strikes, noise exposure, and gear entanglement posed to marine mammals can be significantly reduced, if not avoided, by implementing monitoring measures designed to detect marine mammals before they are impacted, and also mitigation techniques to further reduce potential harms. (Pa77).

DEP described mitigation measures addressing each identified factor potentially impacting NARWs. For instance, since whales are more susceptible to vessel strikes due to their size, slower speed and maneuverability, and greater time spent near the surface (Pa77), Atlantic Shores must observe measures such as vessel strike avoidance procedures, training personnel in marine mammal

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<sup>3</sup> BOEM found moderate adverse impacts on individual marine mammals or their habitat would be detectable and measurable, of medium intensity, ranging from short term or long term, and localized or extensive. BOEM found impacts on individuals or their habitat could have population-level effects, but either the population would sufficiently recover to enough habitat would remain functional to maintain species viability. (Pa521).

spotting and identification, and observation reporting protocols. (Pa28). Likewise, Atlantic Shores must follow applicable NOAA Seasonal Management Area & Dynamic Management Area speed restrictions for NARW and, in addition to generally monitoring marine mammal activity, must monitor NOAA NARW-specific notifications and the NOAA Right Whale Sighting Advisory System for NARW activity in the Offshore Project. Ibid. Atlantic Shores must also establish marine protection zones that allow it to halt or modify potentially harmful activities. Ibid.

DEP then described mitigation measures to address adverse impacts to marine mammals of the noise of pile-driving vessels. (Pa78; Pa80). These include monitoring to detect marine mammals before they are exposed to harmful noise levels, deploying passive acoustic monitors, maintaining marine mammal protection zones, implementing equipment operating procedures to control noise, prohibiting significant noise generating activities during low visibility conditions, and using night vision devices during periods of inclement weather and/or nighttime activities. (Ibid.). Atlantic Shores must also follow noise reducing procedures including implementing Noise Abatement Systems during pile driving, and ramping down or shutting down the noise generating equipment if a protected species is seen entering a Monitoring or Exclusion

Zone. (Pa28). Pile driving also has a restricted schedule from May to December to minimize NARW risk. (Ibid.).

To address the potential impact of lost gear, Atlantic Shores will remove marine debris caught on Project structures. (Pa27). Atlantic Shores must also implement marine debris awareness training for appropriate personnel to minimize the risk of marine mammal ingestion of or entanglement in marine debris, regular hauling of sampling gear, and gear identification to improve accountability in the case of gear loss. (Pa80).

DEP finally observed the ongoing assessments and studies to fill in gaps regarding marine mammal distribution and impacts. (Pa79). This includes a comprehensive program of Best Management Practices and new innovations to minimize and avoid to Project impacts. (Pa80). DEP also specified that the full list of BOEM's required mitigating measures were in Appendix G of the DEIS. (Pa28; Ra118).<sup>4</sup> DEP concluded that “[a]fter mitigation measures are implemented, the residual risk of impacts to marine mammals is expected to be significantly reduced. (Ibid.).

Third, DEP analyzed whether the Project was consistent with the Scenic Resources and Design (“SRD”) rule, N.J.A.C. 7:7-16.10, which focuses on

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<sup>4</sup> The FEIS also includes an Appendix G Mitigation and Monitoring.

landward development, rather than oceanward development, to the extent that it applied. (Pa63) (“[P]olicies not applicable to the portion of the Projects in Federal waters may or may not be discussed in the Environmental Analysis Report.”). DEP reviewed BOEM’s visual impact assessment (“VIA”) conducted for the DEIS, which presents the seascape, landscape, and visual impact assessment methodology and findings that BOEM used to identify potential wind turbine visual impacts. (Pa49).

DEP noted that the photo simulations produced to assess impacts “illustrated typical high visibility conditions where the proposed [turbines] would not be obscured by atmospheric haze or fog” and thus represented a “worst-case assessment” of visibility. (Pa50). The VIA found that Project visibility “would vary daily depending on many factors, such as view angle, sun angle, and atmospheric conditions.” (Pa50; Ra194–97; Pa987–88; Pa974).

Specifically, the VIA found that the turbines would likely be visible approximately twenty-five to fifty percent of the year, with the highest visibility in January and the lowest in April. (Pa49–50; Ra198–200; Pa974; Pa981–82). The DEIS also noted that “more than 95 percent” of the turbine “positions likely to be present” in the offshore wind lease area “would be more than 15 miles from coastal locations” with turbine views. (Pa51). DEP considered a 2021 Rutgers study submitted with Atlantic Shores’ COP which also predicted

visibility over the water to vary, ranging from 5 to 12 miles between July and August, and 2.5 to 10 miles from April through June, and that “high visibility conditions would occur over a period of less than 23 [percent] of the daylight hours in a given year.” (Pa51; Ra214). DEP also noted that the turbines’ potential impact on tourism lacked consensus based on studies and surveys finding a range of positive, neutral, or negative views on turbine effects on coastal recreation. (Pa50–52 (discussing 2018 University of Delaware study and 2017 North Carolina State University study); Ra218–75; Ra276–341).

DEP then considered visual impact mitigation. DEP recognized the larger offshore wind substations would be located further offshore to minimize visibility, and the turbines would be color treated to reduce potential visibility while also eliminating need for daytime warning lights or red paint markings. (Pa51). It also looked to the VIA’s analysis of three alternative layouts which moved the nearest turbine to 12.7, 12.8, and 10.6 miles offshore (rather than the proposed 9 miles), respectively, and found that the change in visual impacts under each was negligible. (Pa51). DEP also recognized that Atlantic Shores was considering use of an Aircraft Detection Lighting System (ADLS)—which would only activate wind turbine generator and met tower lighting when aircraft enter a predefined airspace—to “minimize the impact of continuous flashing

warning lights on the viewshed” by “over 99 percent” compared to a traditional continuous hazard lighting system. (Pa51; Pa927).

Atlantic Shores also agreed to prepare and implement a scenic and visual resource monitoring plan that monitors and compares the Project’s visual effects during construction, operation, and maintenance to the VIA’s findings to verify the accuracy of visual simulations. (Pa54). DEP acknowledged that this would not directly reduce visual impacts but would “support the science relevant to simulating and evaluating potential scenic and visual effects associated with offshore wind development.” (Pa52).

DEP also acknowledged that the Project would add to the “cumulative viewshed impact posed by multiple proposed offshore wind farms.” (Pa50). According to BOEM, while the cumulative impacts on scenic and visual resources of all planned activities, including other offshore wind development besides the Project, would be major, BOEM also found that lighting impacts “would be reduced to negligible” if ADLS were implemented and the lights are on off-mode (Pa988, 984).<sup>5</sup> Finally, in response to a public comment asking

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<sup>5</sup> The court may take judicial notice under N.J.R.E. 201(b) that of the offshore wind development included in the DEIS for purposes of BOEM’s cumulative impacts analysis (Pa941), development of Ocean Wind 1 and Ocean Wind 2 has since ceased. (Ra354–57).

why the Project cannot be relocated, DEP responded by explaining that the Project is proposed to be constructed within the Lease Area, and thus Atlantic Shores does not have access to other parts of the outer continental shelf. (Pa74).

Accordingly, DEP concluded that, because the Project's visual impacts would be addressed by minimization and mitigation measures, the Project was consistent with the SRD rule to the extent it may apply. (Pa51–52).

Fourth, DEP analyzed the Project's consistency with the Energy Facilities rule, which addresses standards for new energy facilities, including all associated development activities. N.J.A.C. 7:7-15.4. DEP analyzed the rule's siting requirements—which are governed by OCSLA's leasing process—and provision that “coastal energy facility construction and operation which results in loss of 200 or more person-years of employment in jobs in New Jersey directly or indirectly related to the State's coastal tourism industry in any single year is prohibited.” Id. 7:7-15.4(c).<sup>6</sup> DEP also analyzed the public interest and found the Project was consistent. (Pa36–37).

Based on the COP and DEIS, DEP concluded that the Project will not result in a net loss of 200 jobs in New Jersey. (Pa38, Pa75). DEP cited information in the COP noting the Project is expected to directly create more

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<sup>6</sup> Consistency with the scenic and visual qualities portion of the Energy Facilities rule is discussed at Point I.d., infra.

than 22,290 full time equivalent (FTE) jobs, indirectly create more than 11,810 FTE jobs, and induce over 14,820 FTE jobs throughout the Project’s lifecycle. (Pa38, Ra342-343). The COP further explained that the Project will contribute to the region’s economy by creating new jobs in the upcoming renewable energy sector, and create jobs in construction, manufacturing, professional services like engineering and management, transport, and warehousing. Ibid. Atlantic Shores also estimated in its COP that indirect jobs would be primarily in management services, wholesale trade, and transportation, and may include real estate, finance, insurance and other regional industries. (Ra342-343). DEP thus found the Project consistent with the Energy Facilities rule. (Pa39).

In sum, given DEP’s finding that the Project is in the public interest and that any impacts would be addressed with mitigation and minimization measures, DEP determined that the Project is consistent with the CZM rules. (Pa7–8; Pa9–54).

On April 26, 2024, the Appellants filed the instant appeal.<sup>7</sup>

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<sup>7</sup> The Court may take judicial notice that after DEP issued its Concurrence, BOEM issued its FEIS on May 31, 2024. (Ra363). On July 1, 2024, BOEM issued its Record of Decision (“ROD”) for the Project. (Ra358). BOEM’s ROD noted DEP’s Concurrence with Atlantic Shores’ CZMA consistency certification with agreed-upon measures, and confirmed those measures, including the fisheries mitigation fund, ADLS, and visual monitoring plan, would be made part of Atlantic Shores’ federal permit.

## ARGUMENTS

### POINT I

#### **DEP REASONABLY FOUND THE PROJECT CONSISTENT WITH THE CZM RULES.**

Agency determinations are entitled to deference and should not be disturbed unless the challenger shows it is arbitrary, capricious, or unreasonable. Pullen v. Township of South Plainfield Planning Board, 291 N.J. Super. 1 (App. Div. 1996) (citation omitted)). As an administrative agency fulfills an executive function, the judicial capacity to review administrative actions is “severely limited.” In re Musick, 143 N.J. 206, 216 (1996). Courts intervene only in “those rare circumstances” when agency action is “clearly inconsistent” with statute or policy. Ibid. Courts must consider whether the agency action conforms to expressed or implied legislative policies, whether it is supported by credible evidence in the substantial, and whether, in applying the legislative policies to the facts, the agency clearly erred. Ibid.; L.M. v. State, Div. of Med. Assist. & Health Serv., 140 N.J. 480, 489 (1995).

Courts thus accord agency action a presumption of validity and reasonableness which is the challenger’s burden to overcome. Bergen Pines

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(Ra360). On Oct. 1, 2024, BOEM approved Atlantic Shores’ COP. (Ra361–62).

Hosp. v. Dept. of Human Serv., 96 N.J. 456, 477 (1984). Where the agency’s action requires its inherent expertise, as here, “an even stronger presumption of reasonableness exists.” IFA Ins. Co. v. New Jersey Dept. Ins., 195 N.J. Super. 200, 208 (App. Div. 1984); Shahmoon Indus., Inc. v. N.J. Dept. of Health, 93 N.J. Super. 272, 282–83 (App. Div. 1966) (courts will give weight to agency’s presumed expertise on “technical matters”).

While appellate review is “not simply a pro forma exercise in which [the court] rubber stamps findings that are not reasonably supported by the evidence,” In re Taylor, 158 N.J. 644, 657 (1999) (quotation omitted), as long as an agency acts within its delegated authority, and its decision is supported by the record and not unreasonable, the agency’s action will be upheld. Public Serv. Elec. & Gas Co. v. DEP, 101 N.J. 95, 103 (1985); see also In re Eastwick Coll. LPN-to-RN Bridge Program, 225 N.J. 533, 541 (2016). Here, DEP’s Concurrence was reasonable, grounded in DEP’s scientific analysis of the substantive record, and consistent with DEP’s statutory charge.

As explained above, DEP reviews proposed development projects that require federal approval for consistency with the CZM rules. In re Protest of Coastal Permit Program Rules, 354 N.J. Super. 293, 331 (App. Div. 2002); see also 15 C.F.R. §§ 930.70, 930.76. The subject of this federal consistency review—the proposed wind turbines located within the federal Lease Area—are

beyond New Jersey’s territorial jurisdiction, and are subject to federal jurisdiction which calls for less stringent project review by DEP. 43 U.S.C. § 1333(a); see also Parker Drilling Mgmt. Servs., Ltd. v. Newton, 587 U.S. 601, 604 (2019) (all law on the Outer Continental Shelf is federal). DEP is limited to reviewing the proposed project that is before it, rather than the proposed project combined with all other proposed projects along the Atlantic Ocean’s Outer Continental Shelf—including those within other States’ jurisdictions. See 16 U.S.C. 1456(c)(3) (requiring each OCS activity applicant to obtain consistency certificate); see also N.J.A.C. 7:7-1.2(e) (limiting DEP Federal consistency determination scope of review to the “proposed actions”). And regardless of the consistency standard, the record demonstrates that the Project complies with the State’s enforceable policies.

DEP followed all applicable law in issuing its Concurrence by assessing, among other sources, the COP application and DEIS, responding to all public comments it received, and finding that the Project, subject to certain agreed-upon measures, would be consistent with enforceable CZM policies. (Pa9-54; Pa58–98). Appellants nonetheless challenge DEP’s decision regarding the following CZM rules: (a) the “public interest” requirement of “discouraged” activity, (b) the MFF rule, (c) the T&E rule, (d) the SRD rule, and (e) the Energy Facilities rule. For the following reasons, each argument lacks merit.

**a. DEP Properly Analyzed the Public Interest (Responding to Point 6).**

Under the CZM rules, certain activity is described as “discouraged.” See, e.g., N.J.A.C. 7:7-16.2 (activity that would adversely impact natural functioning of marine fish or fisheries is “discouraged” under the MFF rule). The CZM rules define “discouraged” to mean that “a proposed use of coastal resources is likely to be rejected or denied” because DEP “has determined that such uses of coastal resources should be deterred.” Id. 7:7-1.5. Importantly, DEP may, if it “considers the proposed use to be in the public interest despite its discouraged status,” permit the use if “mitigating or compensating measures can be taken so that there is a net gain in quality and quantity of the coastal resource of concern.” Ibid. Thus, “discouraged” is not the same as “prohibited.” N.J.A.C. 7:7-1.5 (defining “prohibited” as “a proposed use of coastal resources [that] is unacceptable” and that DEP will “reject or deny”).

Here, DEP found that the Project is in the public interest because it would reduce greenhouse gas emissions, strengthening the State’s response to climate change threats to the marine ecosystem and commercial economies reliant on said ecosystem. (Pa15–16). As further explained below, DEP weighed impacts and mitigation measures and thoroughly explained its findings regarding consistency with the MFF rule, and, to the extent that it applies, the SRD rule,

because the Project is in the public interest, its impacts would be mitigated, and it would result in a net gain in quality and quantity of the coastal resource of concern. See Points I.b. and I.d., infra.

Appellants argue that DEP must make specific findings of mitigation and net gain as a prerequisite to finding that the Project is in the public interest under N.J.A.C. 7:7-1.5. (Pb55–56). However, N.J.A.C. 7:7-1.5. provides that DEP may, if it “considers the proposed use to be in the public interest despite its discouraged status,” permit the proposed use if “mitigating or compensating measures can be taken so that there is a net gain in quality and quantity of the coastal resource of concern.” Therefore, Appellants’ argument is based on a misunderstanding of the rule. While Appellants take issue with DEP’s net gain analysis as to the MFF and SRD rules (Pb55), as further explained below, this argument lacks merit. See Points I.b. and I.d., infra.

**b. DEP Properly Found the Project Consistent with the Marine Fish and Fisheries Rule (Responding to Point 1).<sup>8</sup>**

The MFF rule protects certain marine fish and the catching, taking or harvesting of the fish. N.J.A.C. 7:7-16.2(a). The MFF rule discourages any

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<sup>8</sup> DEP focuses on the MFF rule here, N.J.A.C. 7:7-16.2, rather than the Energy Facilities rule, N.J.A.C. 7:7-15.4, as Save LBI focuses on the MFF rule throughout its substantive argument. (Pb15–25). Nonetheless, DEP explains why its decision under the Energy Facilities rule was proper in Point I.e., infra.

activity that would adversely affect the natural functioning of marine fish or of New Jersey based marine fisheries, subject to certain exceptions. N.J.A.C. 7:7-16.2(b) to (c). The MFF rule's rationale is based on the fact that marine resources help support the State's economy. Id. 7:7-16.2(d) (recreational and commercial fishing combined yielded \$2.6 billion annually as of 2011).

DEP's determination that the Project is consistent with the MFF rule is based on the substantial record and DEP's expertise. DEP found the Project is in the public interest because it will help reduce greenhouse gas emissions and, relevant here, help the State respond to climate change threats to the marine ecosystem and commercial economies, particularly "commercial fisheries" and "coastal communities" that are vulnerable to warming waters, increased storms, or sea level rise and will be "adversely affected" by such impacts without "continuous emissions reductions." (Pa13). DEP also considered the Project's impacts and mitigation measures, such as a fishing industry compensation fund, a gear loss avoidance program, a fisheries communication plan, disclosure of cable protection locations to minimize fishing gear effects, and ongoing monitoring and scientific studies to accurately mitigate potential effects. (Pa40–47; Pa68; Pa718). Because the Project is in the public interest and its impacts

could be mitigated, DEP found that Atlantic Shores demonstrated consistency with the MFF rule. (Pa42).<sup>9</sup>

Although Appellants purport to challenge DEP’s Concurrence, the bulk of their argument focuses on BOEM’s findings in the DEIS, rather than DEP’s Consistency findings on appeal. (Pb15–25). Not only do Appellants effectively ignore DEP’s analysis, but they base their criticism on a misrepresentation of BOEM’s analysis that fails to put its findings into context. (Pb15–25). For instance, Appellants claim “BOEM predicts major ecological harm to the marine fisheries and habitat due to “permanent impacts from the presence of structures associated with planned offshore wind projects.” (Pb16). However, the record shows that BOEM noted that habitat conversion impacts “would be local and range from negligible to moderately beneficial,” “may provide habitat for juvenile lobster, crabs, scup, and other benthic fishes,” and would only occur until structure decommissioning and removal, at which point soft-bottom species “could recolonize.” (Pa378–79). Appellants make similarly misleading comments about the Project’s impact to fisheries and fish habitats. Compare Pb15 (“BOEM identifies ‘major’ adverse impacts to commercial and recreational fisheries and fish habitats to be caused by the [Project].”) with

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<sup>9</sup> The ROD confirms that all proposed mitigation measures would be made part of Atlantic Shores’ federal permit. (Ra360).

Pa713 (BOEM noting Project impact expected to range from “moderate to major” to commercial fisheries and from “minor to moderate” to for hire recreational fisheries) and Pa717 (BOEM noting adverse impacts would vary by fishery and fishing operation due to several factors such as differences in target species abundance and gear type, and that “most fishing vessels would only have to adjust somewhat in response to impacts”).

Moreover, Appellants rely on cumulative impacts of all proposed wind turbine projects in the New Jersey coastal region to argue that DEP’s consistency determination was improper. (Pb24–25). This argument is unavailing. BOEM must consider cumulative impacts as part of its NEPA analysis, 42 U.S.C. § 4332(C). However, DEP’s consistency determination is limited to reviewing the specific project as proposed, rather than reviewing it combined with all other proposed projects along the Atlantic Ocean’s Outer Continental Shelf and within other States’ jurisdictions. See 16 U.S.C. 1456(c)(3).

According to Appellants, BOEM found the Project alone caused impacts, but the record sources they cite are to BOEM’s “Alternative A—No Action” cumulative impacts analysis, which considered the impacts of “planned non-offshore wind activities and planned offshore wind activities (without the [Project]”). (Pa693–704; Pb16; Pb24; Pb21–22). In other words, BOEM

determined many of the cumulative impacts to fisheries discussed would happen regardless of whether the Project is built.

Appellants also argue that the Project does not comply with the rule because it would not result in a “net gain” to marine fish and fisheries. (Pb17–18). They claim DEP applied the wrong legal standard when it concluded that there would be no net loss. (Pb18). This also lacks merit. The MFF rule “discourages” activity that would adversely affect marine fish or fisheries, which means that DEP may, if it “considers the proposed use to be in the public interest despite its discouraged status,” permit the proposed use if “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. 7:7-16.2, -1.5.

As explained above, DEP found that the Project is consistent with the MFF rule because it is in the public interest and includes mitigation measures that address impacts to both marine fish and fisheries, including impacts to the seafloor. Appellants’ reliance on DEP’s use of the language “no net loss” (Pb18) attempts to detract from DEP’s thorough analysis that supports its finding that the Project would result in a net gain to marine fish and fisheries. Specifically, Appellants ignore DEP’s finding that the Project will particularly benefit marine fish and fisheries which DEP found are vulnerable to the effects of climate change, such as increased temperatures, increased storms, and sea level rise.

(Pa15). Moreover, Appellants discount DEP’s finding that the studies on Project and climate change impacts on fisheries and collateral business will improve the quality and quantity of marine fish, fisheries, and coastal resources as a whole. (Pa45–47). To the extent Appellants speculate as to whether the fishing industry mitigation fund will be effective (Pb22), the record shows DEP reasonably found that the fund’s thorough framework, which includes federal government oversight to ensure compliance with 30 C.F.R. § 585, constituted one of a number of adequate mitigation measures. (Pa46–47; Pa722).

Far from supporting their arguments, the cases they cite reinforce why DEP’s judgment here is entitled to deference. See Crema v. New Jersey Dep’t of Environmental Protection, 192 N.J. Super. 505, 511 (App. Div. 1984) (recognizing “DEP is given great deference when it applies its considerable expertise and experience to the difficult balance between development and conservation”); In re Stream Encroachment Permit, Permit No. 0200-04-0002.1 FHA, 402 N.J. Super. 587, 597 (App. Div. 2008) (affirming DEP decision to exercise discretion to permit wetland development based on substantial credible evidence despite “discouraged” status where DEP found project to be in the public interest); and Zimmerman v. Sussex County Educational Services Com’n, 237 N.J. 465, 475–76 (2019) (courts will not upset an agency decision in the absence of a showing that it was arbitrary, lacked fair support in the evidence,

or violated legislative policies). The record demonstrates that DEP's decision complied with the applicable legal standard, is supported by the substantial record, and was reasonable.

Therefore, DEP's MFF rule determination should be affirmed.

**c. DEP Properly Found the Project Consistent with the Endangered Species Rule (Responding to Point V).**

DEP's finding that the Project is consistent with the T&E rule is supported by substantial evidence in the record, bolstered by DEP's expertise regarding species within its jurisdiction. DEP's coastal T&E rule allows proposed development where it can be demonstrated, through an acceptable impact assessment, that endangered or threatened wildlife or plant species habitat would not be adversely affected, either directly or through secondary impacts on the relevant site or in the surrounding area. N.J.A.C. 7:7-9.36(b).

Even setting aside the issue of preemption, addressed under Point II, *infra*, there is ample record support for DEP's determination. It reviewed extensive species habitat impacts analyses in the DEIS based on multiple scenario analyses in the COP, and rendered its conclusions regarding each species, including the NARW. (Pa27–Pa30, Pa76–Pa80). DEP specifically notes mitigation measures BOEM required to address impacts to NARWs, and references Appendix G of the DEIS (not provided in Appellant's appendix) that lists mitigation measures

regarding species and all other impacts at length. (Pa12; Pa28; Ra118). Regarding vessel strikes, the Concurrence reiterates BOEM's mitigation measures including training, NOAA-established speed restrictions for NARWs, monitoring marine mammal activity during all Project phases to ensure that the chances for possible marine mammal strikes are minimized, and monitoring NOAA NARW notifications. (Pa28; Ra134-136). Regarding gear entanglement, Atlantic Shores must implement marine debris awareness training for appropriate personnel, regular hauling of sampling gear, and gear identification to improve accountability in the case of gear loss. (Pa80; Ra134-136; Ra170-171; Ra175). And Atlantic Shores is conducting a study to determine how offshore wind facilities may impact marine mammals across the broader New York Bight, which addresses both marine mammal distribution and any food supply changes. (Pa79).

Appellants mischaracterize the record and selectively refer to BOEM's DEIS statements regarding potential NARW impacts, without referencing BOEM's conclusions and recommendations based on those findings, and insist that DEP should have concluded under those inaccurately characterized facts that the concurrence violates the T&E rule. (Pb25). Most glaringly, similar to its MFF rule arguments, supra Point 1.b., Appellants' record citations are largely to BOEM's "Alternative A—No Action" cumulative impacts analysis, which

considered the impacts of planned non-offshore wind activities and planned offshore wind activities on various resources as if the Project were not approved. (Pa537). This matters.

The No Action Alternative is entirely hypothetical. It describes a scenario where the COP is not approved, and the Project does not occur (Pa136; Pa166; Pa169), requiring BOEM to consider the impacts of all other activities, including non-offshore wind and ongoing offshore wind activities, on marine mammals. (Pa522). That hypothetical has no relevance to DEP's Concurrence, which concerns the limited Project before it in the defined lease area. BOEM analyzed all projects along the Atlantic Outer Continental Shelf waters, including those in other states, and Appellants do not distinguish BOEM's findings with respect to those impacts, and those related to the Project itself. (Pa537–57).

For instance, Appellants' reference to BOEM's findings of negative impacts from displacement (Pb28, citing Pa555–56), noise (Pb29, citing Pa543–44) gear entanglement (Pb29, citing Pa537), and vessel strikes (Pb32, citing Pa535–36) are all references to findings under BOEM's "No Action" analysis. Appellants also omit BOEM's conclusion that even in a no action alternative, there would be moderate to major impacts on NARW, largely due to gear utilization, pile-driving noise, and the presence of structures, and that major impacts would be from vessel strikes should they occur. (Pa557). In other

words, BOEM found that even without the Project, the NARW will be impacted. In fact, BOEM concluded that “the incremental contributions of the Project to the combined impacts due to the presence of structures associated with ongoing and planned activities would be negligible, and the Proposed Action is not expected to result in population level effects for NARW.” (Pa570). Accordingly, the NARW impacts about which Appellants are concerned are predicted to occur regardless of the Project. DEP did not err here.

Appellants also omit the substantial evidence in the record about climate change’s threat to the NARW, which the installment of alternative energy solutions such as offshore wind projects directly address. (Pa15–16). To begin, NMFS lists the long-term changes in climate as a threat for almost all marine mammal species. (Pa518). BOEM found that climate change increases temperatures, alters ocean acidity, raises sea levels and increases the frequency and intensity of storms. (Ibid.). As part of its “No Action Alternative” analysis, BOEM notes that shifts in the abundance of zooplankton prey will affect baleen whales such as the NARW who travel over large distances to feed. (Pa521). Specifically, climate change has already shifted distribution of NARW prey and NARWs have, in turn, shifted their seasonal distribution into areas where they have not been observed regularly for at least the past few decades, including Canada’s Gulf of St. Lawrence. (Pa1188). This shift in distribution has

coincided with increased entanglements in fishing gear and vessel strikes as the NARWs enter areas with fewer protective restrictions in place. (Ibid.). BOEM concluded that offshore wind “must be developed based on responsible science-based decision-making and development and implementation of enduring avoidance, minimization, mitigation, and monitoring approaches to avoid exacerbating the species’ dire status.” Appellants ignore that climate change is already having negative impacts. By contrast, DEP recognized that the Project will help ameliorate those effects and reasonably issued the Concurrence.

As DEP’s Concurrence reasonably considers BOEM’s analyses regarding NARW impacts from the Project itself and directed mitigation measures, it is supported by the record and must be upheld.

**d. DEP Properly Found the Project Consistent with the Scenic Resources and Design Rule (Responding to Point 4).**

The SRD rule encourages coastal development that is “visually compatible with its surroundings in terms of building and site design, and enhances scenic resources.” N.J.A.C. 7:7-16.10(c). On the other hand, the SRD rule “discourages” coastal development that is “not visually compatible with existing scenic resources in terms of large-scale elements of building and site design.” Ibid. The SRD rule explains that “scenic resources” include “views of the natural and/or built landscape,” and defines “large-scale elements of building

and site design” as “elements that compose the developed landscape such as size, geometry, massing, height and bulk structures.” Id. 7:7-16.10(a) and (b). The SRD rule places setback requirements and open view corridor restrictions on new coastal development but explicitly excludes wind turbines from such restrictions. Id. 7:7-16.10(d)(2)(ii).

DEP explained its reasoned analysis regarding the Project’s SRD rule consistency. DEP first noted that the SRD rule excludes wind turbines from its setback requirements and open view corridor restrictions. (Pa49). Nonetheless, DEP continued to analyze the SRD rule to the extent it may apply. (Pa63 (DEP noting “policies not applicable to the portion of the Projects in Federal waters may or may not be discussed”)).

As discussed above, the record shows DEP considered several sources demonstrating visibility variation, including BOEM’s findings, Atlantic Shores’ COP, and additional sources, including a 2021 Rutgers study,<sup>10</sup> a 2018 University of Delaware study, and a 2017 North Carolina State University study, and found that the overall impact to tourism lacked consensus. (Pa50–52). The

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<sup>10</sup> Contrary to Appellants’ representation (Pb49–50), Atlantic Shores’ COP in fact includes a 2021 Rutgers study predicting that visibility over the water would vary throughout the year and that “high visibility conditions would occur over a period of less than 23 percent of the daylight hours in a given year.” (Pa51; Ra214).

record also shows DEP considered Atlantic Shores’ visual impact minimization—including that the larger offshore wind substations would be located further offshore to minimize visibility, ADLS to eliminate continuous aircraft warning lights, color treatment to reduce visibility, and a visual resource monitoring plan. (Pa51–52).<sup>11</sup> Recognizing that none of the Project alternatives BOEM analyzed in the DEIS, including moving the closest proposed turbines farther from the shoreline, would significantly reduce visual impacts, and that the Project is in the public interest as it will help reduce greenhouse gas emissions, DEP found that Atlantic Shores demonstrated the Project was consistent with the SRD rule to the extent that rule may apply. (Pa15–16; Pa51–52).

Appellants criticize DEP’s decision, arguing that it “violates” the coastal zone management rules because “[n]o mitigation is possible.” (Pb42–45). This is both unsupported by the record and misunderstands applicable legal requirements for several reasons. First, DEP properly found consistency with the SRD rule to the extent that it may apply. The plain language of the SRD rule focuses on landward, not oceanward, development by defining scenic resources as “views of [not from] the natural and/or built landscape.” N.J.A.C.

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<sup>11</sup> The ROD confirms that all proposed measures, including ADLS and visual monitoring, would be made part of Atlantic Shores’ federal permit. (Ra360).

7:7-16.10(a) (emphases added); see also 26 N.J.R. 943(a), 949 (Feb. 22, 1994) (explaining the rule “ensure[s] proposed developments do not adversely affect existing views of and access to beaches and waterfront areas” by requiring open view corridors of the waterfront between buildings and a setback to avoid crowding the waterfront) (emphases added); 40 N.J.R. 1836(a), 1839 (Apr. 7, 2008) (the SRD rule “address[es] height limitations and conserve[s] public views of the coast”) (emphasis added). Indeed, DEP explained back in 1978 when the SRD rule was first proposed that “[i]nappropriate design that ignores the coastal landscape and existing patterns and scale of development can degrade the visual environment and appearance of communities” as the State’s “coastal regions have strong architectural traditions which should be encouraged.” (Ra43–44). None of that is applicable to oceanic wind turbines in federal jurisdiction waters. The rule must be construed “in a manner that makes sense when read in the context of the entire regulation,” Medford Convalescent v. Div. of Med. Assistance, 218 N.J. Super. 1, 5 (App. Div. 1985), and Appellants’ interpretation fails that test.

In an abundance of caution, DEP still analyzed the Project’s oceanward visual impacts. (Pa47; Pa63). An agency should not be penalized for going beyond minimum requirements to address public concerns. See Delaware Riverkeeper Network v. N.J. Dep’t of Env’t Prot., 463 N.J. Super. 96, 118–20

(App. Div. 2020) (approving DEP’s stormwater permitting approach which allows municipalities to adopt local regulations to meet community-specific needs because providing such flexibility was within its discretion); see also In re Proposed Xanadu Redevelopment Project, 402 N.J. Super. 607, 640–41, (App. Div. 2008) (consideration of agencies’ recommendations within their expertise, although not required, was consistent with public policy).

Second, Appellants’ interpretation—that new development causing oceanward visual impacts could only be consistent if there is a net benefit to scenic resources (Pb48–49)—would require rewriting “discouraged” into “prohibited” because no new development could meet the more stringent test that Appellants propose. N.J.A.C. 7:7-1.5. Again, DEP may, if it “considers the proposed use to be in the public interest despite its discouraged status,” permit the proposed use if “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.

A “prohibited” activity would flatly bar development, but DEP declined to incorporate that standard for the SRD rule. And it has never been DEP’s intent to use the SRD rule to “prohibit” activity as the long-standing agency SRD rule application shows. See SMB Associates v. Dep’t of Env’tl. Prot., No. 85-16, 1986 N.J. ENV LEXIS \*15, \*38 (Sep. 11, 1987) (finding proposed three story

development in an undeveloped, flat area compatible with SRD rule and rejecting position that “no development can be compatible with undeveloped surroundings” because “[t]hat was not the intent of the regulation”);<sup>12</sup> see also In re Riverview Dev., LLC, 411 N.J. Super. 409, 432–33 (App. Div. 2010) (recognizing waterfront development rules do not create an absolute prohibition against development interfering with views, but rather a qualified goal of protecting scenic views to the maximum extent practicable). The “discouraged” term with accompanying mitigation applies here to the limited extent the SRD rule itself applies. DEP is entitled to deference for this reasonable and long-standing interpretation of its rules applicable to numerous fact-specific situations. In re Eastwick Coll. LPN-to-RN Bridge Program, 225 N.J. at 541. In light of the foregoing, and DEP’s findings of the Project’s benefits, particularly that it will strengthen the State’s response to climate change threats to coastal communities and the marine ecosystem (Pa15–16), DEP reasonably balanced development interests with the preservation of scenic resources.

Third, the CZM rules do not prohibit DEP from making a mitigation finding that would benefit coastal resources by furthering research on future

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<sup>12</sup> Pursuant to R. 1:36-3, SMB does not constitute precedent and is cited for illustrative purposes only. A copy of the SMB opinion is attached hereto for service upon the Court and opposing counsel. (Ra45–90). There are no contrary unpublished opinions known to counsel for DEP.

developmental impacts. (Pb43–44). Appellants ignore that the reporting Atlantic Shores will perform—including the Project’s economic impact on fisheries and collateral business, and visual monitoring to verify the accuracy of visual simulations—will improve development and coastal resources as a whole, resulting in a net benefit. (Pa47; Pa52). DEP recognized that the Project would improve resiliency for New Jersey communities and energy efficiency throughout the region. (Pa15–16). This recognition meets the CZM rules’ broad goals, including effective management of ocean resources, coordinated coastal decision making, comprehensive planning, and research. N.J.A.C. 7:7-1.1(c); see also 40 N.J.R. 1836(a) (the CZM rules “taken as a whole . . . protect the resources of the coastal zone, while allowing for appropriate development”). Furthermore, Appellants ignore the rest of the Project visual impact consideration and minimization, including negligible viewshed impact differences of alternative layouts, that larger offshore wind substations would be located further offshore, and color treatment and ADLS eliminating continuous visual interference. (Pa51). Contrary to the Appellants’ contention (Pb49), DEP’s analysis demonstrates that the Project met all of the regulatory requirements for a Consistency Certification, and thus, DEP did not waive any regulatory requirement. See N.J.A.C. 7:1B-1.1 to -2.4.

Fourth, similar to the MFF rule, Appellants' criticism of DEP's SRD analysis is again based on a mischaracterization of DEP and BOEM's analyses of Project impacts and mitigation measures. To start, rather than focus on DEP's reasoned analysis in the decision on appeal, Appellants continue to focus on select portions of BOEM's findings in the DEIS. (Pb42–51). Appellants mischaracterize those findings, such as those on overall impacts. Compare, e.g., Pb42 (claiming BOEM identifies only “‘major’ adverse impact to the scenic and cultural values of the New Jersey coastal zone, permanently altering the coast”) with Pa987–88 (BOEM noting scenic and visual resource impact would range from “negligible to major” depending on several factors such as weather conditions); compare Pb44 (claiming the DEIS identifies “continuous destructive impact on the seascape and ocean setting”); with Pa974 (BOEM noting visibility would vary throughout the day “depending on whether the [structures] are backlit, side-lit, or front-lit and based on the visual character of the horizon’s backdrop”). Appellants also mischaracterize BOEM's findings as to mitigation. Compare, e.g., Pb44–45 (claiming DEIS identifies “permanent and non-remediable harm”), and Pb48 (“NO known mitigation measures are available”), with Pa927 (BOEM noting that implementation of ADLS would “reduce[] visual impacts”) and Pa984 (BOEM noting that if ADLS were

implemented across all offshore wind projects in the geographic analysis area, nighttime visual impacts from lighting would be reduced to “negligible”).

Additionally, similar to the MFF rule, Appellants’ reliance on DEP and BOEM’s discussion of cumulative impacts, in an attempt to amplify impacts resulting from the Project, is unavailing. (Pb44; Pb47). As previously noted, BOEM is required to consider cumulative impacts as part of its NEPA analysis, 42 U.S.C. § 4332(C), which DEP acknowledged (Pa50). However, DEP’s consistency determination involves review of whether the Project as proposed is consistent with New Jersey’s enforceable policies in the CZM rules. 16 U.S.C. § 1456. Thus, DEP did not err by not considering the visual impacts caused by other, unrelated offshore wind projects.

Fifth and finally, because DEP found that the Project met all regulatory requirements for a Consistency Certification as proposed in the Lease Area, Appellants’ argument that DEP was obligated to reject the Project due to its location (Pb49–50) must fail. See also (Pa74) (explaining Atlantic Shores does not have access to other parts of the outer continental shelf). To the extent that Appellants suggest DEP should have required Atlantic Shores to relocate the project, that position fails because DEP does not have such authority under CAFRA or the SRD rule. But cf. N.J.S.A. 13:9B-10 (establishing rebuttable presumption that there is a practicable alternative to any nonwater-dependent

regulated activity proposed in freshwater wetlands, such as obtaining alternate non-freshwater wetland area). Such authority would have been written into CAFRA and the CZM rules had that been the intent, but it was not. Appellants' argument is thus contrary to DEP's statutory authority. As noted above, BOEM administers lease areas and reviews lease area projects, 43 U.S.C. §§ 1332–1334, 1337(p); 30 C.F.R. § 585.101, which are outside of DEP's jurisdiction, 43 U.S.C. § 1333(a).

As DEP's SRD rule consistency finding is reasonable and supported by the record, it should be affirmed.

**e. DEP Properly Found the Project Consistent with the Energy Facilities Rule (Responding to Point 5).**

DEP applied its regulatory interpretation and coastal resources expertise to the substantial evidence in the record to determine the Project is consistent with the Energy Facilities rule. Among other things, that rule addresses the siting of coastal energy facilities (Pa36), and the scenic and visual impact considerations referenced in the SRD rule. N.J.A.C. 7:7-15.4; see also Point I.c, supra. Though DEP thoroughly addressed these rule aspects and others, Appellants only challenge DEP's findings under the employment provision of the rule. DEP's interpretation of its Energy Facilities rule should be granted deference.

Relevant to Appellants’ challenge, the Energy Facilities rule includes a provision which states that “construction and operation which results in loss of 200 or more person-years of employment in jobs in New Jersey directly or indirectly related to the State's coastal tourism industry in any single year is prohibited.” N.J.A.C. 7:7-15.4(c)(1) (emphasis added). The rationale is that “[w]hen travelers respond to loss of recreational resources by leaving the New Jersey shorefront for alternative recreational opportunities, their expenditures are lost from the New Jersey economy.” N.J.A.C. 7:7-15.4 (c)(2). The CZM Rules are intended to assure that the net employment and economic impact for New Jersey of coastal energy facility development will not be negative and that energy facilities will be located such that impacts on the local tourism industry will not be excessive. Ibid.

The Concurrence correctly determined that the Project is consistent with this portion of the rule because the DEIS and COP demonstrated a net gain in jobs in New Jersey. (Pa38). DEP acknowledged the Project has the potential to impact jobs associated with commercial and recreational fishing and associated land-based support businesses. Ibid. However, the substantial record before it—including the COP which projects that the Project is expected to directly create more than 22,290 FTE jobs, indirectly create more than 11,810 FTE jobs, and induce over 14,820 FTE jobs throughout the Project’s lifecycle—amply

supports DEP's determination that the Project is consistent with the Energy Facilities rule. (Pa38; Ra342-343). As mentioned above, Atlantic Shores will establish a Fund to compensate fishermen and shoreside businesses for losses related to the Project. (Pa38–39; Ra348).

Appellants' quarrel with DEP's analysis under this rule is grounded in speculation and a misreading of the rule. Appellants omit the words "directly or indirectly" and insist that the rule requires no net loss of 200 jobs "related to . . . coastal tourism." (Pb52). However, the express language of the rule states that it prohibits loss of 200 or more "jobs in New Jersey directly or indirectly related to the State's coastal tourism industry." N.J.A.C. 7:7-15.4(c)(1). DEP's interpretation and a plain reading of the rule support its finding that both direct and indirect jobs will increase. While the record suggests certain job sectors may be impacted by the Project, such as jobs associated with commercial and recreational fishing and associated land-based support businesses, the record also shows the Project would result in net gains in employment and overall economic benefit to the state. (Pa75; Ra342-345).

Moreover, any impacts on tourism and tourism-related jobs are speculative. In its response to comments, DEP describes the anticipated impact to New Jersey's tourism industry resulting from the Project's visibility. (Pa93). As explained above, with mitigation, the long-term visual impacts range from

minor to major on sensitive onshore and offshore viewing locations, based on circumstances, but DEP found the impact is likely to be “limited to individual decisions by visitors to the New Jersey shore and elevated areas, with less impact on the recreation and tourism industry as a whole.” Ibid. DEP also found that noise generated from the Project alone would only have localized, short-term, minor impacts on recreation and tourism. Ibid. Most significantly, DEP explained that studies examining the impacts of offshore wind facilities on tourism “identified variable reactions” such that respondents reported “having positive, neutral, or negative views” and that the Project could engender new tourism opportunities “by attracting recreational fishing and sightseeing.” Ibid. Against this record, Appellants’ bald insistence that “NJDEP failed to make any analysis as to whether the Atlantic Shore projects will result in a loss of more than 200 coastal tourism jobs” falls flat. (Pb13). Nothing in the record supports a finding under N.J.A.C. 7:7-15.4(c)(1) that the Project will result in the net loss of jobs directly or indirectly related to coastal tourism and the Concurrence should be affirmed.

**POINT II:**

**DEP PROPERLY ASSESSED PREEMPTION  
UNDER THE FEDERAL MARINE MAMMAL  
PROTECTION ACT (Responding to Point 3).**

DEP correctly found that Section 109 of the federal MMPA preempts state regulation of marine mammals, including the NARW, because the statutory language expressly says so. 16 U.S.C. 1379. (Pa27).

Federal law may preempt state law in three ways: (1) it may explicitly preempt state law in a given area; (2) it may implicitly preempt state law by dominating regulation in a given area; or (3) state law may actually conflict with federal law. R.F. v. Abbott Labs., 162 N.J. 596, 618 (2000). This appeal concerns explicit, or “express” preemption which occurs where Congress expressly states that it intends to prohibit state regulation in an area. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541 (2001). The MMPA states that

no State may enforce, or attempt to enforce, any State law or regulation relating to the taking of any species (which term for purposes of this section includes any population stock) of marine mammal within the State unless the Secretary has transferred authority for the conservation and management of that species (hereinafter . . . ‘management authority’) to the State under subsection (b)(1).

[16 U.S.C. § 1379(a) (“Section 109”).]

Section 109 further describes the requirements for a State to obtain the authority to regulate marine mammal takings. Id. § 1379(b) to (d).

The T&E rule is preempted by the MMPA in this instance because, like Section 109, the rule functions as a prohibition on acts that might injure or disturb protected species, such as marine mammals by regulating development in T&E habitat. Just as the MMPA charges NOAA with the responsibility of ensuring that marine activities—including proposed development—do not disturb, harm, harass, or kill marine mammals, the T&E rule requires DEP to consider—and prohibit—proposed development in T&E habitat that could “adversely affect” habitat that the species seasonally inhabits or is critical to the species’ life cycle. N.J.A.C. 7:7-9.36(a), (b). DEP has not applied for transfer of authority pursuant to this section and thus correctly found that its coastal T&E rule, as it relates to marine mammals, is non-enforceable in offshore federal jurisdiction waters. (Pa27). While, for the sake of completeness, DEP mentions BOEM’s findings and mitigation requirements with respects to NARWs in its Concurrence, DEP did not exercise its permitting authority so doing. (Pa28).

Even under a de novo review applicable to the preemption issue, In re Reglan Litigation, 226 N.J. 315, 327 (2016), the law and the record demonstrate that DEP correctly determined the MMPA preempts the T&E rule as to this project. If DEP were to assert the authority to regulate “taking” of marine

mammal species under its T&E rule in federal jurisdiction waters, as the Appellants assert that it must, such regulation “relates to” marine mammal taking regulation and would be preempted by the federal MMPA. 16 U.S.C. § 1379; Morales v. TWA, 504 U.S. 374, 383 (1992) (the term “relates to” has “a broad [meaning]—‘to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with’” which “thus express[es] a broad preemptive purpose.”) (quoting Black’s Law Dictionary (5<sup>th</sup> ed. 1979)).

The MMPA’s preemption of state regulation regarding “taking” of marine mammals here is express. Section 109 prohibits state regulations addressing marine mammal takings unless the state has assumed that authority per the MMPA’s detailed procedure. 16 U.S.C. § 1379(a). UFO Chuting of Haw., Inc. v. Young, 327 F. Supp. 2d 1220, 1222 (D. Hawaii 2004). DEP has not undergone the process to assume management authority outlined in 16 U.S.C. 1379(b)(1). DEP regulates endangered and threatened species through the T&E rule, among other rules. Because New Jersey has not assumed federal management authority, the MMPA expressly precludes DEP from applying the T&E rule to marine mammals within the federal lease area miles outside its three-mile offshore coastal jurisdiction. See In re Protest of Coastal Permit

Program Rules, 354 N.J. Super. at 312 (DEP administers CAFRA development permitting authority via its coastal rules).

The CZM rules note at the outset that they apply to “decisions on the consistency” of “proposed actions” by federal agencies “affecting the coastal zone” including federal consistency decisions. N.J.A.C. 7:7-1.2(e). Thus, the focus is on the proposed federal activity and that activity’s impacts. Here, BOEM’s COP approval for the Project is the proposed federal activity being examined. (Pa7). The operative part of the T&E rule states that “[d]evelopment of endangered or threatened wildlife or plant species habitat is prohibited” unless studies show the proposed activity would not adversely affect the habitat. N.J.A.C. 7:7-9.36(b). The rule’s rationale explains that such listed species “are organisms which are facing possible extinction” in part “due to loss of suitable habitat, and past overexploitation through human activities or natural causes.” By regulating development in T&E habitat, the rule also prohibits potential harmful impacts to species without the Department’s authorization.

In comparison, the MMPA—which focuses on individual members of the species rather than their habitat—defines “take” to mean “harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.” 16 U.S.C. 1362(13). The term “harassment” in turn means an act that has the potential “to injure” or “disturb” a marine mammal by disrupting the mammal’s

behavioral patterns. 16 U.S.C. 1362(18)(A)(i)-(ii). Both the MMPA and New Jersey's T&E rule are thus focused on ensuring that a proposed activity, including a new development, will not negatively impact a listed whale species. As MMPA expressly preempts all state regulations regarding marine mammal takings, DEP correctly determined its T&E rule was preempted.

Appellants claim that the Concurrence violates N.J.A.C. 7:7-9.36 due to impacts to NARW described in the DEIS. (Pb25–27). They argue that Section 109 does not preempt state laws that “enhance protection for marine mammals” (Pb38–39). Not only does this argument omit the direct overlap between the MMPA and the T&E rule's regulations that prohibit adverse impact to species, but the cases on which they rely do not support their position because the courts' analyses in those matters did not rely on the protective nature of the state laws. They turned on more mundane governmental police powers to regulate state lands. For instance, Friends of the Children's Pool v. City of San Diego, 2018 Cal. App. Unpub. LEXIS 3930, \*4 (4th Appellate Dist., Cal. 2018)<sup>13</sup> involved a municipal ordinance closing a public beach located on State tidelands property where seals had established a rookery. Rather than focus on the ordinance's

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<sup>13</sup> Under R. 1:36-3, no unpublished opinion shall constitute precedent or be binding upon any court and appellants should have provided a copy of the unpublished opinion on all parties as well as all known contrary unpublished opinions.

protective nature, the court instead found the state ordinance was “not directed to conservation or taking of seals” but rather was a “land use regulation, which falls within a traditional state police power.” Id. at \*19.

Likewise, Appellants note that La Jolla Friends of the Seals v. Nat’l Oceanic & Atmospheric Admin. Nat’l Marine Fisheries Serv., 2008 U.S. Dist. LEXIS 102380 (S.D.CA Dec. 18, 2008), was later overturned for lack of subject matter jurisdiction because there was no direct MMPA action, but they ignore that the original (later overturned) decision also found a State law barring a municipality from installing a guide rope on the beach would prohibit local government from acting “on its own property.” La Jolla Friends of the Seals v. Nat’l Oceanic & Atmospheric Admin. Nat’l Marine Fisheries Serv., 2009 U.S. Dist. LEXIS 55046, \*17 ((S.D. Cal. June 29, 2009); Pb39 fn. 7. And State v. Anariak, 941 P.2d 154 (Alaska, 1997), which addressed charges against someone who entered a state wildlife sanctuary containing walruses and discharged a firearm against state regulations, did not rely on the “protective” theory Appellants present. Instead, the Alaska Supreme Court found the MMPA did not preempt the State’s firearm regulations on state wildlife sanctuaries as that would interfere with the State’s traditional police powers over State lands and potentially result in an unconstitutional inverse condemnation. Id. at 154, 157, 158; see also id. at 158 (finding “[t]he regulation of state lands is a

traditional state function.”). In sum, those cases do not support Appellant’s position because they only examined whether the state properly asserted its police power. The presumption against a finding of federal preemption in areas traditionally regulated by states does not apply when preemption is express. Chamber of Com. of U.S. v. Whiting, 563 U.S. 582, 594 (2011) (when “a federal law contains an express preemption clause, the court focuses on the plain wording of the clause, which necessarily contains the best evidence of Congress’ preemptive intent.”)

In fact, in the only case Appellants cite with somewhat analogous facts to this matter, the court found express preemption. UFO Chuting of Haw., Inc., 327 F. Supp. 2d at 1225 (“The text of § 1379(a) unambiguously preempts any state law relating to the taking of a marine mammal unless authority over that animal has been transferred to that state.”). That matter involved a state seasonal ban on parasailing to protect humpback whale species. Id. at 1221. The court rejected the state’s reading of the MMPA’s intent—which matches Appellants’ arguments here—that the MMPA generally supports and would not preempt any state law whose intent is protective of marine mammals. Ibid. (“General exhortations in the legislative history stating that the MMPA was meant to protect marine mammals cannot override the plain text of the statute.”). Instead, the court specifically referenced cooperative federalism in finding that the

MMPA does not allow for independent acts by the states because, as DEP recognizes in the present matter, “Congress put the federal government in control of matters relating to the taking of marine mammals, recognizing that other policy considerations might at times trump the protection of marine mammals.” Ibid; see also H.R. Conf. Rep. 92-1488, 1972 U.S.C.C.A.N. 4187, \*4190 (1972) (explaining Senate amendment of House bill that allowed federal-State cooperative agreements was substituted into the MMPA language and allows “the Secretary to review State laws” to determine consistency with the MMPA, and only after the Secretary grants a State “authority to implement its laws relating to marine mammals, the State concerned may issue permits, handle enforcement, and engage in research.”). That Congress later acted specifically to amend the MMPA to allow the State of Hawaii’s parasailing ban does not negate, and, in fact supports, the district court’s finding of preemption in that matter. (Pb39, fn. 8); UFO Chuting of Hawaii Inc., 508 F.3d at 1191.

Appellants’ argument that the CZMA’s broad principle of cooperative federalism negates the MMPA preemption clause here is also unavailing. (Pb40). The CZMA requirement that federal agencies work with state agencies does not give states “veto power” over federally-licensed offshore energy projects. Ibid. Cooperative federalism principles built into the CZMA cannot override the preemptive effect of another federal statute, here the MMPA. See

Norfolk Southern Corp. v. Oberly, 822 F.2d 388, 394 (3d. Cir. 1987) (quoting California Coastal Comm’n v. Granite Rock Co., 480 U.S. 572 (1987)) (Congress refused “to use the CZMA to alter the balance between state and federal jurisdiction”) (questioned on other grounds). Instead, by preserving the respective federal and state jurisdiction, the CZMA requires each to respect the other’s jurisdiction—including preemption provisions. 16 U.S.C. § 1456(e)(1) (“[n]othing in this chapter shall be construed (1) to diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, submerged lands, or navigable waters.”). Indeed, the CZMA’s structure wherein a state’s federal consistency objection can be reviewed and overturned by the Secretary of Commerce, which is reviewable in federal court, demonstrates that the CZMA was intended to maintain a careful State and federal jurisdictional balance. Id. § 1456(c)(3)(A); 15 C.F.R. § 930.4(b).

Save LBI asserts that the MMPA does not preclude DEP from regulating marine mammals outside of DEP’s jurisdiction. (Pb38–Pb41). However, the court need not consider that academic question. See Anderson v. Sills, 143 N.J. Super. 432, 437 (1976) (questions that are moot or academic prior to judicial scrutiny generally held improper). The more relevant point is that the Concurrence addressed a project proposed in federal waters, which even the MMPA treats differently

than State waters. See 16 U.S.C. 1362(15) (“waters under the jurisdiction of the United States” definition includes two separate sets of waters: “(A) the territorial sea of the United States” and (B) the waters within a State’s jurisdiction). Appellants’ argument otherwise would require this court to ignore the plain terms of MMPA’s express preemption and allow a State to regulate harms and negative impacts – i.e., takings – to control marine mammal taking beyond the State’s own jurisdiction. DEP reasonably avoided that odd result and addressed a cooperative and concurrent review of the project as the federal CZMA and state CZM rules require.

### **CONCLUSION**

For the foregoing reasons, DEP’s decision should be affirmed.

Respectfully submitted,

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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION**

In the Matter of the Coastal Zone  
Management Consistency Certification of  
Atlantic Shores Offshore Wind South  
Project BOEM Lease Area OCS-A 0499

Docket No.: A-002581-23

Civil Action

Appeal from the New Jersey  
Department of Environmental  
Protection (File No. 0000-21-  
0022.1, CDT210001)

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**BRIEF OF RESPONDENT ATLANTIC SHORES OFFSHORE  
WIND, LLC**

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Dated: April 30, 2025

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**PRELIMINARY STATEMENT**

Appellant’s challenge Respondent New Jersey Department of Environmental Protection’s (“DEP” or the “Department”) concurrence with the Coastal Zone Management Act Consistency Certification voluntarily submitted by Respondent Atlantic Shores Offshore Wind, LLC and its affiliates (collectively, “Atlantic Shores”).

Appellants narrowly assert that DEP’s final decision should be vacated because it is contrary to or unsupported by select statements from the Bureau of Oceanic Energy Management’s (“BOEM”) environmental analysis, which was prepared in accordance with the regulations implementing the National Environmental Policy Act, 42 U.S.C. §§ 4321-47, to assess the potential impacts of Atlantic Shores’ offshore wind development and alternatives. However, Appellants fail to squarely address DEP’s well-reasoned findings regarding the relevant enforceable policies under New Jersey’s Coastal Zone Management Rules, N.J.A.C. 7:7-1.1 et seq. In concurring with Atlantic Shores’ Consistency Certification, DEP used its specialized knowledge and technical expertise to correctly apply its own regulations to the substantial record evidence, which included but was not limited to BOEM’s analysis. Consistent with its statutory charge, DEP appropriately balanced the competing demands of the State’s

coastal resources and reasonably assessed the mitigating and compensating measures offered by Atlantic Shores in support of consistency.

To the extent Appellants challenge DEP's findings, their arguments are unavailing. Appellants' challenge to DEP's finding of consistency with the Scenic Resources and Design Rule fails because this rule does not apply to offshore development. Even if it did, Appellants' narrow interpretation would establish an impossible standard that no mitigating or compensating measures could ever meet and that would effectively prohibit any visible offshore development. Appellants' position also is inconsistent with subsequent legislation and State policy supporting offshore wind development and other sections of the same DEP regulations that specifically permit visible offshore wind development. Further, DEP reasonably found, as with the Marine Fish and Fisheries Rule, that Atlantic Shores proposed significant mitigating and compensating measures to support a finding of consistency. With respect to the Endangered or Threatened Species Habitat Rule, DEP correctly determined that Atlantic Shores' projects would not adversely affect marine mammals or other protected species. DEP's findings regarding job loss under the Energy Facilities Rules are similarly reasonable and well supported by the record. Finally, DEP correctly determined that the Marine Mammals Protection Act, 16 U.S.C. § 1379, preempted consideration of New Jersey Coastal Zone Management Rules

as applied to marine mammals. Appellants’ unsupported contention that “reverse preemption” under the Coastal Zone Management Act should act as an end run around the uniform regulation of marine mammals under federal law must fail.

In concurring with Atlantic Shores’ consistency certification, DEP correctly applied its own regulations. DEP’s decision is supported by substantial credible evidence and is entitled to deference. For these reasons, Atlantic Shores respectfully requests that this Court affirm DEP’s concurrence.

### **COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY**<sup>1</sup>

Atlantic Shores Offshore Wind, LLC was assigned a Commercial Lease from the United States for Submerged Lands for Renewable Energy Development on the Outer Continental Shelf OCS-A 0499 (“Lease”), which was originally awarded in 2015, and vests the leaseholder with development and operational rights in the area of outer continental shelf submerged lands subject to the Lease (“Lease Area”), subject to federal review and approval. Pa<sup>10</sup><sup>2</sup>. On June 30, 2021, the New Jersey Board of Public Utilities (“BPU”) approved Atlantic Shores’ 1,510 megawatt project as a qualified offshore wind facility and awarded to Atlantic Shores an Offshore Renewable Energy Credit

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<sup>1</sup> The Counterstatement of Facts and Procedural History are inextricably related and have been combined to avoid repetition for the Court’s convenience.

<sup>2</sup> “Pa” and “Pb” refers to the Appellants’ appendix and brief, respectively.

(“OREC”) allowance. Pa10. The BPU issued its approval pursuant to the Offshore Wind Economic Development Act of 2010 (“OWEDA”), providing a process and economic incentives for the development of offshore wind projects. See N.J.S.A. 48:3-87.1. Atlantic Shores refers to the project contemplated under this BPU OREC award as “Project 1.” Pa10. Atlantic Shores contemplates the development of another wind energy generation facility (“Project 2”) within the Lease Area. Pa10-Pa11. Project 1 and Project 2 are referred to herein collectively as the “Projects.”<sup>3</sup>

### *Offshore Wind in New Jersey*

New Jersey has long recognized through different administrations that the development of offshore wind generation is necessary to combat the threat of climate change impacts and mitigate the accompanying risks to New Jersey residents and provide for diverse and reliable sources of energy.

OWEDA and the Global Warming Response Act (“GWRA”), N.J.S.A. 26:2C-38 et seq., embody the legislative policy of this State to encourage the development of renewable energy resources, including offshore wind, reduce

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<sup>3</sup> The Lease was “segregated” in 2022, and the Lease for the portion of the Lease Area on which Project 1 is expected to be constructed was assigned to Atlantic Shores Offshore Wind Project 1, LLC (the “P1 LLC”). Pa4. The Lease for the portion of the Lease Area on which Project 2 is expected to be constructed was assigned to Atlantic Shores Offshore Wind Project 2, LLC (the “P2 LLC”). *Id.* Atlantic Shores Offshore Wind, LLC, the P1 LLC, and the P2 LLC are referred to herein as “Atlantic Shores.”

greenhouse gas emissions, and mitigate the effects of climate change. The GWRA was first passed in 2007 and has since been amended to enhance the State's response to climate change.

More recently, several state Executive Orders and other actions have furthered these legislative policies, including, for example, BPU's release of the State's 2019 Energy Master Plan, which outlines key strategies to reach the State's goal of 100 percent clean energy by 2050, including recommendations for the continued development of offshore wind energy as a key component of the State's clean energy portfolio, and culminating in state Executive Order 307, which sets a goal of 11,000 megawatts of offshore wind energy generation by the year 2040. Executive Order No. 307 (2022).

### *Atlantic Shores' Permitting Review and Approval*

The development of offshore wind is governed by federal and state permitting processes designed to ensure the responsible siting, planning, construction, operation, and decommissioning of offshore wind projects.

Atlantic Shores originally submitted its Construction and Operations Plan ("COP") for the Projects to the federal Bureau of Ocean Energy Management ("BOEM") in March 2021, which it subsequently updated over the succeeding years. Pa12. The COP offers a detailed review of the construction and operation

activities, including potential impacts associated with the Projects and measures to avoid, minimize, and monitor those impacts. ASa119.<sup>4</sup>

Among other federal approvals, BOEM also undertook a multi-year environmental review of the Projects in connection with its review of Atlantic Shores' COP per the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq. On May 18, 2023, this review resulted in the issuance of a draft environmental impact statement ("DEIS") assessing the reasonably foreseeable impacts of the Projects. Pa11. The DEIS analyzed the potential environmental impacts of several alternatives, including a no action alternative, the Projects as described in Atlantic Shores' COP (i.e., the proposed action), and several alternatives to the proposed action. Pa135. The DEIS was intended to "inform BOEM's decision on whether to approve, approve with modifications, or disapprove" Atlantic Shores' COP. Pa131.

### *New Jersey's Coastal Zone Regulation*

The federal Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1451 et seq., regulates such development within the United States' coastal zone, including offshore of New Jersey. 16 U.S.C. § 1453(1). The CZMA's purpose is to "preserve, protect, develop, and where possible, to restore or enhance the resources of the Nation's coastal zone..." 16 U.S.C. § 1452(a). The CZMA

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<sup>4</sup> "ASa" refers to Atlantic Shores' appendix submitted with this brief.

strives to balance the competing demands of growth and development with the protection of coastal resources by encouraging states to develop coastal zone management programs, consistent with minimum federal standards, designed to regulate land use activities that could impact coastal resources.

The CZMA and its implementing federal regulations require that federally licensed or permitted activities within a state's coastal zone or within the geographic location descriptions (i.e., areas outside the coastal zone in which activity would have reasonably foreseeable coastal effects) affecting any land or water use or natural resource of the coastal zone be consistent with the enforceable policies of the state's federally approved coastal management program. 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. part 930. Under the CZMA, state concurrence with a permit applicant's federal certification that its project is consistent with the state's federally approved coastal management program is typically obtained before a federal agency will approve a project that affects a coastal zone. 16 U.S.C. § 1456(c)(3)(A).<sup>5</sup>

New Jersey has defined its coastal zone boundaries, and DEP has adopted enforceable policies to review development within the designated coastal zone,

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<sup>5</sup> The state's concurrence is conclusively presumed if the responsible state agency does not object to the applicant's consistency certification within six months. 16 U.S.C. § 1456(c)(3)(A). Further, the Secretary of Commerce may override a state's objection to a consistency certification following an appeal by the applicant. Id.

as embodied in DEP’s Coastal Zone Management Rules (the “CZM Rules”), N.J.A.C. 7:7-1.1 et seq. Federal consistency certification reviews under the CZMA are the responsibility of DEP as the lead State agency implementing the State’s federally approved coastal zone management program. N.J.A.C. 7:7-1.2(e).

*DEP’s Consistency Determination*

On September 30, 2021, Atlantic Shores voluntarily prepared and submitted a certification (the “Consistency Certification”) to demonstrate that the offshore portion of the Projects located beyond the three-geographical mile limit of the coastal waters of the State of New Jersey (the “Offshore Project”)<sup>6</sup> is consistent with the enforceable policies of the CZM Rules. Pa62. This submission was voluntary and not required under federal or state regulations, as the Offshore Project is outside of New Jersey’s designated “geographic location description” where CZMA review would be mandatory. Pa11-Pa12.

In accordance with its statutory charge, DEP deliberated over the Consistency Certification for nearly two and a half years, scrutinizing Atlantic Shores’ submissions, requesting additional materials, and holding several rounds of public notice and comment, in which Appellants participated. After

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<sup>6</sup> Following the Consistency Determination, Atlantic Shores uses the defined term “Offshore Project” for the offshore portion of the Projects that are subject to DEP’s federal consistency review.

this fulsome review and analysis, on April 1, 2024, DEP issued its decision concurring with the Consistency Certification. Pa6-Pa8. DEP’s decision was supported by (i) DEP’s comprehensive 46-page environmental report that detailed how the Offshore Project conforms to each applicable provision of the CZM Rules, minimizing or mitigating negative effects wherever possible (the “Environmental Analysis”), see Pa9-Pa54; (ii) DEP’s Response to Comments consisting of 41 pages addressing all public comments received during the Consistency Certification comment period, including those submitted by Appellants (the “Response to Comments”), see Pa58-Pa98; and (iii) a Letter of Intent between DEP and Atlantic Shores committing Atlantic Shores to certain mitigation measures to provide compensation for potential losses to participants in the fishing industry (the “LOI”), see Pa55-Pa57. (DEP’s April 1, 2024 decision document, the Environmental Analysis, the Response to Comments, and the LOI are referred to collectively as the “Consistency Determination”).

The Consistency Determination detailed how the Offshore Project is consistent with the applicable enforceable policies of the State’s coastal zone management program and thoroughly addressed potential impacts and mitigating and compensating measures for each policy area. In issuing the Consistency Determination, DEP considered the entirety of the agency record, including the consistency certification filed by Atlantic Shores along with public

comments received during the certification request, Atlantic Shores' COP, and BOEM's NEPA review in the DEIS to assess consistency with the relevant enforceable policies of the CZM Rules.<sup>7</sup> Pa11-Pa12.

In connection with the Consistency Determination, DEP determined that the Projects are in the public interest. Pa15-Pa17. Relying on state and federal assessments, DEP found that, without permanent reductions in emissions, "New Jersey's people and their property will experience significant adverse effects of climate change, including rising sea-levels, increases in temperature and precipitation causing periods of both intense storms and drought, and chronic inundation from flooding." Pa15 (internal citations omitted). DEP further explained that "New Jersey has already been disproportionately affected by climate change, sea level rise in particular, at a rate that is more than two times the global average" and these impacts threaten the state's "communities, infrastructure, economy, natural resources and way of life." Pa15. Finally, DEP

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<sup>7</sup> Appellants incorrectly assert that BOEM's DEIS is the "only environmental study" that exists in connection with the Projects. Pb5, n.1. In issuing its Consistency Determination, DEP appropriately relied on the totality of the record, including Atlantic Shores' COP. See Pa11-Pa12. The COP is a comprehensive assessment of the Projects' potential impacts and describes the various measures that Atlantic Shores will employ to avoid, minimize and mitigate these impacts. ASa119. It includes various studies, research and modeling that directly address many of the issues raised in Appellants' appeal. Select portions of Atlantic Shores' COP are included in Atlantic Shores' appendix.

recognized that the Projects will reduce greenhouse gas emissions and help combat the adverse impacts of climate change. Pa16. DEP further recognized that the Projects will improve the region’s electrical reliability and support New Jersey’s renewable energy goals. Pa17.

The specific policies of the CZM Rules at issue in this appeal and DEP’s analysis and findings regarding each policy are discussed herein.

***Subsequent Federal Approvals and Other Litigation Filed***

After considering comments received through the NEPA environmental assessment, on May 23, 2024, BOEM published the Final EIS (FEIS) for the Projects. See [boem.gov/renewable-energy/state-activities/atlantic-shores-south](https://boem.gov/renewable-energy/state-activities/atlantic-shores-south). On July 2, 2024, BOEM issued the Record of Decision (ROD) for the Projects in conjunction with the National Oceanic and Atmospheric Administration, the National Marine Fisheries Service, the U.S. Department of Defense, and the U.S. Army Corps of Engineers. Id. On September 30, 2024, BOEM issued its approval of Atlantic Shores’ COP. Id.

This appeal is one of multiple legal challenges to DEP’s Consistency Certification and Atlantic Shores’ Projects more broadly. On or about April 4, 2023, Appellants and others filed a complaint in a matter now pending in federal court asserting claims for violation of the Marine Mammals Protection Act (“MMPA”) and National Environmental Policy Act (“NEPA”) with respect to

the Incidental Harassment Authorizations (“IHA”) and other federal approvals under MMPA previously issued to Atlantic Shores. ASa506-ASa508.<sup>8</sup> On January 10, 2025, Appellants and others filed a separate complaint in another matter also now pending in federal court challenging numerous federal approvals granted to Atlantic Shores (e.g., BOEM’s approval of the COP and its FEIS) and DEP’s Consistency Determination. ASa3.<sup>9</sup> Atlantic Shores is committed to defending its federal approvals at issue in that federal litigation, as well as its state approvals at issue in this matter and other related appeals now pending before this Court.

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<sup>8</sup> This matter is captioned Save Long Beach Island, et al. v. U.S. Dep’t of Commerce, et al., Civ. Act. No. 23-01886 (D.N.J.) (the “IHA Litigation”).

<sup>9</sup> This matter is captioned Save Long Beach Island, et al. v. U.S. Dep’t of Commerce, et al., Civ. Act. No. 25-240 (D.N.J.) (“COP Litigation”). This Court may take judicial notice of the pleadings in the IHA Litigation and the COP Litigation, which are “records of [a] federal court sitting for this state.” N.J.R.E. 201(b)(4).

## ARGUMENT

### I. LEGAL STANDARD

#### A. DEP'S Consistency Determination is Entitled to Deference.

DEP is the designated agency authorized to conduct CZMA consistency reviews to ensure that federally-permitted activities are consistent with the enforceable policies of the New Jersey Coastal Management Program found in the CZM Rules. N.J.A.C. 7:7-1.2(e). Consistent with the CZMA, DEP followed the CZM Rules and applied them to the record evidence, including the scientifically-driven data and information from the COP, BOEM's DEIS and public input. In issuing the Consistency Determination, DEP has the specialized knowledge and technical expertise to apply the CZM Rules and balance the competing demands of growth and development with the protection of coastal resources. See N.J.A.C. 7:7-1.1(d) (explaining that the CZM Rules seek to balance "various conflicting, competing, and contradictory local, State, and national interests in coastal resources and in uses of coastal locations"). The Consistency Determination reflects DEP's expertise as the agency with regulatory responsibility for the coastal zone and resources at issue in this appeal. DEP's decision is supported by substantial credible evidence in the record and is entitled to deference.

“A strong presumption of reasonableness accompanies an administrative agency’s exercise of statutorily-delegated responsibility.” Gloucester Cty. Welfare Bd. v. State Civil Serv. Comm’n, 93 N.J. 384, 390 (1983). Indeed, judicial review of administrative action is limited, and an agency’s decision should only be reversed when “it is arbitrary, capricious or unreasonable or it is not supported by substantial credible evidence in the record as a whole.” Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980) (citation omitted). A reviewing court may “not substitute its judgment ... for that of [the] administrative agency.” In re Young, 202 N.J. 50, 70 (2010). In reviewing an agency decision, the court “may not vacate an agency determination because of doubts as to its wisdom or because the record may support more than one result,” but is “obliged to give due deference to the view of those charged with the responsibility of implementing legislative programs.” In re N.J. Pinelands Comm’n Resolution PC4-00-89, 356 N.J. Super. 363, 372 (App. Div. 2003). Where substantial evidence in the record supports more than one conclusion, the agency’s choice prevails. Flanagan v. Civil Serv. Dep’t, 29 N.J. 1, 12 (1959).

Similarly, courts defer to agencies’ “interpretation of statutes and regulations within [their] implementing and enforcing responsibility.” Bueno v. Bd. of Trs., 422 N.J. Super. 227, 234 (App. Div. 2011) (citations omitted); see also In re Kenneth Nicosia Flood Hazard Gen. Permit by Certification, 479 N.J.

Super. 360, 377 (App. Div. 2024) (deferring to DEP’s interpretation of its own regulation and holding that “courts generally afford substantial weight to an administrative agency’s own interpretation of its delegated functions”) (citation omitted). “This deference comes from the understanding that a state agency brings experience and specialized knowledge to its task of administering and regulating a legislative enactment within its field of expertise.” In re Election Law Enforcement Comm’n Advisory Op. No. 01-2008, 201 N.J. 254, 262 (2010); see also In re Freshwater Wetlands Gen. Permit No. 16, 379 N.J. Super. 331, 341-42 (App. Div. 2005) (deference to an agency’s interpretation of its own rules is warranted because “the agency that drafted and promulgated the rule should know the meaning of that rule.”) (citations omitted). “A reviewing court must defer to such interpretation unless [it] is plainly unreasonable.” S.J. v. Div. of Med. Assistance & Health Servs., 426 N.J. Super. 366, 374 (App. Div. 2012) (citations omitted).

Agency deference is particularly important with respect to technical matters within the agency’s field of expertise. Campbell v. N.J. Racing Comm’n, 169 N.J. 579, 588 (2001); In re Thomas Orban/Square Props., 461 N.J. Super. 57, 72 (App. Div. 2019) (deference is heightened where the agency “has been delegated discretion to determine the specialized and technical procedures for its tasks”). Relevant here, “DEP is given great deference when it applies its

considerable expertise and experience to the difficult balance between development and conservation.” In re Stream Encroachment Permit, 402 N.J. Super. 587, 597 (App. Div. 2008) (citation omitted). “The party who challenges DEP’s decision to permit development of a certain location has the burden of demonstrating, not that the agencies’ action was merely erroneous, but that it was arbitrary.” In re Stream Encroachment Permit, 402 N.J. Super. at 597 (citation omitted).

**B. Appellants Do Not Challenge the Consistency Determination under the Applicable CZM Rules.**

In challenging DEP’s Consistency Determination, Appellants do not address DEP’s decision under the applicable consistency standards established in the CZM Rules and fail to address DEP’s analysis of the substantive record. Instead, Appellants rely on select statements from BOEM’s DEIS, a step in the NEPA review process that involves different environmental considerations under a separate federal regulatory scheme. Under NEPA, BOEM’s charge is to evaluate the reasonably foreseeable adverse environmental effects of the proposed action [the Projects], as well as a reasonable range of alternatives that may reduce or eliminate those effects, without regard for a specific result or outcome. 42 U.S.C. § 4332(2)(C). Under the CZM Rules, DEP is required to consider those same impacts but must also balance environmental protection with the Projects that are in the public interest using the framework provided

therein. See N.J.A.C. 7:7-1.1(c) (establishing the broad goals under the CZM Rules). As noted, the CZM Rules were developed to strike the appropriate balance between “various conflicting, competing, and contradictory local, State, and national interests in coastal resources and in uses of coastal locations.” N.J.A.C. 7:7-1.1(d). DEP’s review involves the application of the relevant enforceable policies of the CZM Rules and consideration of the entire record, not just the select statements in BOEM’s DEIS relied on by Appellants, and including specific mitigating and compensating measures to minimize and/or mitigate the Projects’ impacts on environmental resources. N.J.A.C. 7:7-1.1(c).

DEP’s Consistency Determination falls squarely within the scope of the CZM Rules. The decision is reasonable and grounded in DEP’s technical analysis of the substantive record and is entitled to deference.

**II. DEP CORRECTLY FOUND THAT THE OFFSHORE PROJECT IS CONSISTENT WITH THE MARINE FISH AND FISHERIES RULE.**

Relying on select BOEM findings in the DEIS regarding the Offshore Project’s potential impacts, Appellants assert that these impacts violate the Marine Fish and Fisheries Rule under the CZM Rules. Pb15-Pb16, Pb19 (relying on BOEM’s definition of a “major” adverse impact); Pb15-Pb25 (relying on BOEM’s predictions regarding the Projects’ impacts). Appellants, however, fail

to address DEP's reasoned application of the applicable standard under the CZM Rules to the record evidence regarding this Offshore Project.<sup>10</sup>

The Marine Fish and Fisheries 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” as well as “any activity that would adversely impact any New Jersey based marine fisheries or access thereto” is discouraged. N.J.A.C. 7:7-16.2(b). Under the CZM Rules “discouraged” is defined as:

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 uses 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. As evidenced by the language above, discouraged uses are not prohibited and can be permitted by DEP if they are in the public interest and

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<sup>10</sup> Appellants' reference to the potential cumulative impact “from the 3,226 wind structures that will occupy the entire New Jersey coastal region” is irrelevant. Pb24. DEP's Marine Fish and Fisheries Rule does not require an analysis of cumulative impacts of other projects on marine resources. See N.J.A.C. 7:7-16.2(b). This again illustrates Appellants' improper conflation of DEP's role implementing the CZM Rules with BOEM's role implementing NEPA. See supra Section I.B.

mitigating or compensating measures are employed. In re Stream Encroachment Permit, 402 N.J. Super. at 605.

The CZM Rules also provide that terms of art like “discouraged” that are used in multiple provisions of the rules should be interpreted flexibly, with due respect for the Department’s expertise in balancing the competing interests involved in coastal development:

Decision-making on proposed actions involves examining, weighing, and evaluating complex interests using the framework provided by this chapter. The [CZM] Rules provide a mechanism for integrating professional judgment by Department officials, as well as recommendations and comments by applicants, public agencies, specific interest groups, corporations, and citizens into the coastal decision-making process. In this process, interpretations of terms ... as used in a rule or a combination of rules, may vary depending upon the context of the proposed use, location, and design.

N.J.A.C. 7:7-1.1(e).

Appellants do not dispute DEP’s finding that the Offshore Project is in the public interest. Instead, Appellants appear to take issue with DEP’s determination that Atlantic Shores offers mitigating or compensating measures such that there is a “net gain” in the resource of concern. Pb17-Pb19.

Here, DEP carefully reviewed the totality of the record evidence, and not only the select portions of the DEIS cited by Appellants, to assess consistency with the relevant enforceable policy under the CZM Rules. DEP concluded that

the Offshore Project’s potential impacts on marine fish and fisheries would be short term and localized:

- “[T]he impacts of seabed profile alterations on finfish, invertebrates, and EFH [i.e., essential fish habitat] would be localized and short term, dissipating over time as mobile sand waves fill in the altered seabed profile.” Pa21; Pa481.
- Impacts on finfish and invertebrates from the installation of cables would similarly be “short term” and “localized.” Pa21; see also Pa486 (BOEM stated that “impacts from injurious sound are expected to be short term and localized.”).
- “Based on empirical evidence and laboratory investigations, the observed impacts to marine biota and ecosystems are considered to be minor or short-term.” Pa41.
- “Because of the relatively small footprint and short duration of injurious sound and the ability of most fish to swim away from noise sources, BOEM does not expect injurious noise from pile driving to cause population-level impacts on fish.” Pa486.
- “Given the small scale at which hydrological changes from the Project would occur, BOEM expects impacts on finfish and invertebrates to be negligible.” Pa486.
- “[N]oise from operating WTGs [i.e., wind turbine generators] is not expected to produce impacts on finfish and invertebrates. However, if the larger WTGs installed for the Project produce sound levels that exceed these thresholds, WTG noise may result in minor impacts on finfish and invertebrates.” Pa487.

DEP further found that impacts associated with the installation of scour protection and cable protection may have a beneficial impact on marine fish “depending on the species and location.” Pa44. In addition, relying on the DEIS, DEP found that the habitat conversion may have “localized, long-term impacts

that would be adverse for commercial fisheries and beneficial to for-hire recreational fisheries.” Pa44; Pa712-Pa713.

With these impacts in mind, DEP next analyzed the mitigating and compensating measures proposed by Atlantic Shores to avoid, minimize or mitigate the Offshore Project’s potential impacts and determined that these measures, collectively, satisfied the Marine Fish and Fisheries rule. Pa47.

At the outset, DEP recognized that Atlantic Shores had taken or committed to take proactive avoidance and conservation measures to mitigate any impacts to marine fish and fisheries, including efforts to site the offshore export cable routes to minimize overlap with sensitive benthic habitats and avoid boulders and other hard-bottom habitat to the extent feasible. Pa40; Pa89. DEP noted that the Projects were similarly designed to minimize effects to commercial and for-hire recreational fishing by using a layout that will facilitate ongoing transit and fishing activities. Pa71.

DEP also detailed additional mitigating measures Atlantic Shores committed to take, including: seasonal work window restrictions and use of cable installation tools to minimize the area and duration of sediment suspension, see Pa40; Pa89; measures to avoid, minimize, and mitigate impacts of pile-driving noise on finfish and invertebrates, see Pa43; Pa89; and cable protection measures that better reflect pre-existing conditions and will be

designed to minimize effects to fishing gear, to the maximum extent practicable, see Pa46; Pa70. In addition, DEP noted Atlantic Shores committed to ongoing efforts to communicate with regulatory agencies and industry stakeholders. Pa46; Pa71-Pa72.

Notably, DEP further recognized that “monitoring is an important component for mitigating impacts to marine fish and fisheries” and referred to the research efforts discussed under the Surf Clam Areas rule. Pa45-Pa46 (referring to the Surf Clam Areas rule section at Pa19 and Pa85). DEP highlighted that Atlantic Shores has commissioned “informative and rigorous scientific studies to understand the resources and potential impacts of offshore wind on the fishing industry,” and specifically the potential socioeconomic impacts of offshore wind development. Pa45-Pa46. DEP noted that this research will examine the impacts of not only the Offshore Project and other offshore wind development, but also of climate change on the distribution and abundance of surf clams and the economics of this resource within the greater Mid-Atlantic Bight. Pa46. Importantly, DEP stated that it “welcomes such novel research to model and quantify potential impacts upon the commercial fishing industry, especially since existing research and guidance materials have been primarily focused on ecological concerns.” Pa19; Pa85.

Finally, recognizing the need to compensate for any economic losses to the industry, DEP also acknowledged that BOEM required Atlantic Shores to establish a fund to compensate commercial and for-hire fishermen for the loss of income due to displacement from fishing grounds and to shoreside businesses for losses indirectly related to the Offshore Project. Pa46; Pa72. Appellants baselessly assert that this compensation fund is “vague and uncommitted.” Pb22. Contrary to Appellants’ protestations, BOEM is identified as the enforcing agency and the parameters of the fund are clearly established.<sup>11</sup> ASa454-ASa455; Pa721-Pa722. The DEIS further references BOEM’s Guidance for Mitigating Impacts to Commercial and Recreational Fisheries on the Outer Continental Shelf adopted pursuant to 30 C.F.R. part 585, which outlines

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<sup>11</sup> BOEM issued a Record of Decision for Atlantic Shores Offshore Wind South Project on July 1, 2024, which included a condition that Atlantic Shores “establish and implement a direct compensation program to provide monetary compensation to commercial and for-hire fishermen and shoreside support services impacted by the Project.” The conditions related to Commercial Fisheries and For-Hire Recreational Fishing also include additional information about the development of the programs and how the compensation will be calculated. See [boem.gov/sites/default/files/documents/renewable-energy/state-activities/Atlantic%20Shores%20South%20ROD.pdf](https://boem.gov/sites/default/files/documents/renewable-energy/state-activities/Atlantic%20Shores%20South%20ROD.pdf). This Court may take judicial notice of the Record of Decision, which are “specific facts and propositions of generalized knowledge which are capable of immediate determination by resort to sources whose accuracy cannot reasonably be questioned.” N.J.R.E. 201(b).

recommended measures to mitigate the impact of offshore wind development to commercial and recreational fisheries. ASa454-ASa455; Pa721-Pa722.

Instead of responding to DEP's specific findings supporting consistency, Appellants rely on select statements from the DEIS and reduce DEP's decision to a single statement regarding no "net loss" to marine fish and fisheries and argue that DEP's decision is somehow arbitrary and capricious simply because it failed to make a finding that there would be a "net gain" for marine fish and fisheries. Pb18. It is well established that where an agency's factual findings support its decision, that decision should be upheld even if the agency does not recite particular language of the regulatory standard. Garland v. Ming Dai, 593 U.S. 357, 369 (2021) (unanimously holding that an agency need not "follow a particular formula or incant 'magic words'" because "a reviewing court must uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned") (citing Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974)); Del. Riverkeeper Network v. U.S. Army Corps of Eng'rs, 869 F.3d 148, 161 (3d Cir. 2017) (upholding decision "of less than ideal clarity" because the agency's "omission of [a] singular word is not fatal"). As discussed above, even without uttering magic words, DEP offered extensive fact-finding and justification based on substantial record evidence in support of the Offshore Project's compliance with the Marine Fish and Fisheries rule.

Specifically, DEP determined that the compensating and mitigating measures offered by Atlantic Shores, including novel and extensive research and monitoring, certain avoidance and conservation measures, and monetary compensation for economic impacts, would result in a “net gain” for this coastal resource. While Appellants may disagree with the end result, DEP’s determination based on DEP’s specialized knowledge and technical expertise and its interpretation of its own regulations are entitled to deference. See Campbell, 169 N.J. at 588; In re Thomas Orban/Square Props., 461 N.J. Super. at 72.

**III. DEP CORRECTLY FOUND THAT THE OFFSHORE PROJECT IS CONSISTENT WITH THE ENDANGERED OR THREATENED WILDLIFE OR PLANT SPECIES HABITAT RULE, WHERE NOT PREEMPTED BY THE MARINE MAMMAL PREEMPTION ACT.**

**A. The Federal Marine Mammal Protection Act Preempts the State’s CZM Rules as Applied to Marine Mammals.**

DEP correctly found that the State’s Endangered or Threatened Wildlife or Plant Species Habitat Rule (“Habitat Rule”), N.J.A.C. 7:7-9.36, as applied to marine mammals, is preempted by Section 109 of the Marine Mammal

Protection Act (“MMPA”). Pa27.<sup>12</sup> The plain language of the MMPA compels this conclusion.

“Congress may pre-empt, i.e., invalidate, a state law through federal legislation.” Oneok, Inc. v. Learjet, Inc., 575 U.S. 373, 376 (2015) (citing U.S. Const., art. IV, cl. 2). The three types of federal preemption are express, field, and conflict preemption. Murphy v. NCAA, 584 U.S. 453, 477 (2018). “Express preemption is determined by an examination of the explicit language used by Congress.” Gonzalez v. Ideal Tile Importing Co., 184 N.J. 415, 419 (2005). Express preemption turns on “statutory intent” and proceeds from “the assumption that the ordinary meaning of [the statutory] language accurately expresses the legislative purpose.” Morales v. TWA, 504 U.S. 374, 383 (1992).

The MMPA statute provides:

No State may enforce, or attempt to enforce, any State law or regulation relating to the taking of any species ... of marine mammal within the State unless the Secretary has transferred authority for the conservation and management of that species (hereinafter referred to in this section as “management authority”) to the State under [16 U.S.C. § 1379(b)(1)].

16 U.S.C. § 1379(a) (hereinafter, “MMPA Section 109(a)"). To “take” a marine mammal is defined as “to harass, hunt, capture, or kill, or attempt to harass,

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<sup>12</sup> Atlantic Shores has obtained the required authorizations for the Projects under the MMPA. See ASa4. Appellants have challenged these MMPA authorizations in the IHA Litigation and COP Litigation. See ASa78-ASa79; ASa507-ASa508.

hunt, capture, or kill any marine mammal.” 16 U.S.C. § 1362(13). Harassment is defined as:

any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.

16 U.S.C. § 1362(18)(A).

The MMPA preempts state law that relates to actions that may injure marine mammals or disturb marine mammal migration, feeding, or sheltering, among other things. The purpose of MMPA Section 109(a) is to “establish a unified integrated system of management for the benefit of animals [that] can only be achieved through federal-state cooperation, not independent state regulation.” UFO Chuting of Haw., Inc. v. Young, 327 F. Supp. 2d 1220, 1225 (D. Haw. 2004) (citing legislative history of MMPA).

Under the CZM Rules, the Habitat Rule prohibits development in endangered or threatened wildlife or plant species habitats unless it can be demonstrated that the habitat would not directly or through secondary impacts on the relevant site or the surrounding area be adversely affected. N.J.A.C. 7:7-9.36(b).<sup>13</sup> This regulation clearly “relates to” the taking of marine mammals, as

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<sup>13</sup> “Endangered or threatened wildlife or plant species habitats” include “aquatic ... areas known to be inhabited on a seasonal or permanent basis by or to be

it restricts development that may disturb the migration, feeding, or sheltering of these species in their habitats; therefore, it is expressly preempted by MMPA Section 109(a).

The Hawaii federal district court found express preemption of state law in a similar situation in UFO Chuting of Hawaii, Inc. v. Young, 327 F. Supp. 2d 1220 (D. Haw. 2004). There, a Hawaii statute prohibited parasailing in certain areas off the coast of Maui between December 15 and May 15 of each year; the court held that the “primary intent of, and justification for, the parasailing restriction [was] to prevent the harassment of whales” by motorboats towing parasailers. Id. at 1221, 1223 & n.2. This legislative intent to protect marine mammals showed that the state law “relate[d] to” the taking of marine mammals, notwithstanding that “the State considered other justifications as well when it adopted the restriction.” Id. at 1223. In finding express preemption, the court rejected the argument, advanced by Appellants here, that the MMPA “was not intended to preempt state measures protecting marine mammals.” Id. at 1224-25; Pb38-Pb39 (arguing that MMPA “does not preempt state policies that enhance protection for endangered marine mammals” (emphases in original)).

Because MMPA Section 109(a) “unambiguously” preempts state laws “relating

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critical at any stage in the life cycle of any wildlife or plant identified as ‘endangered’ or ‘threatened’ species on official Federal or State lists of endangered or threatened species....” N.J.A.C. 7:7-9.36(a).

to the taking of a marine mammal,” and the Habitat Rule plainly relates to the taking of the North Atlantic Right Whale, the plain language of the federal law compels preemption here. UFO Chuting of Haw., Inc., 327 F. Supp. 2d at 1225.<sup>14</sup>

Appellants mischaracterize the cases on which they rely to claim that MMPA Section 109(a) does not preempt state policies that enhance protection of marine mammals. See Pb38-Pb39. For example, in State v. Arnariak, 941 P.2d 154 (Alaska 1997), the Alaska Supreme Court held that Alaska’s prohibition on entering and discharging firearms within a state-owned island wildlife sanctuary was not preempted. That case is distinguishable, however, because the Alaska court held that interpreting federal law (i.e., the MMPA) to preempt the restrictions and require Alaska to permit people to enter land the state owned would be an unconstitutional taking, and so construed “relating to” in MMPA Section 109(a) somewhat narrowly to avoid this constitutional infirmity. Id. at 156-58. Friends of the Children’s Pool, an unpublished

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<sup>14</sup> Appellants acknowledge that the UFO Chuting decision undercuts their argument and supports DEP’s position. Pb39 n.8. The fact that that decision was vacated after Congress passed a new statute permitting Hawaii to “enforce any State law or regulation with respect to the operation in State waters of recreational and commercial vessels, for the purpose of conservation and management of humpback whales, to the extent that such law or regulation is no less restrictive than Federal law” further undercuts Appellants’ argument. UFO Chuting of Haw., Inc. v. Young, 380 F. Supp. 2d 1166, 1168-69 (D. Haw. 2005). If Appellants here were correct that state legislation that enhances marine mammal protection is not preempted, then no such Congressional action would have been necessary.

California case on which Appellants rely, also is distinguishable for the same reason. Friends of the Children’s Pool v. City of San Diego, 2018 Cal. App. Unpub. LEXIS 3930, at \*19 (Cal. Ct. App. June 7, 2018) (“Nothing in the MMPA, and specifically in [16 U.S.C. § 1379(a)], manifests an express congressional intent to preempt the state’s ability to exercise its police powers to regulate access to its own property.”).<sup>15</sup> Here, and unlike in those cases, there is no conflict between the state’s proprietary authority over its own property and MMPA Section 109(a).<sup>16</sup>

Finally, Appellants wrongly rely on a Connecticut court’s passing description of the CZMA as creating “reverse preemption” in their attempt to overcome the clear express preemption provided for under the MMPA. See Pb40 (citing Connecticut v. U.S. Dep’t of Commerce, No. 3:04-cv-1271, 2007 U.S.

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<sup>15</sup> Pursuant to R. 1:36-3, a copy of this decision is included in Atlantic Shores’ appendix at Asa479.

<sup>16</sup> The final case on which Appellants rely, La Jolla Friends of the Seals, also is totally inapposite. There, the court issued a TRO and found that a state court order prohibiting the City of San Diego from roping off a portion of a public beach to prevent harm to seals was likely to be preempted by the MMPA where the responsible federal agency, NOAA, “[had] advised the City to install a guideline rope ... to minimize these takings [of seals]” and took the position that the state court order prohibiting that measure “relates to the taking of seals” under MMPA Section 109(a) and, thus, was expressly preempted. La Jolla Friends of the Seals v. NOAA Nat’l Marine Fisheries Serv., No. 08-cv-1847, 2008 U.S. Dist. LEXIS 102380, at \*18-\*19, \*28-\*30 (S.D. Cal. Dec. 18, 2008). This finding that the MMPA preempted a less stringent state law does not logically compel Appellants’ desired conclusion that the MMPA does not preempt a more stringent state law.

Dist. LEXIS 59320, at \*9 (D. Conn. Aug. 15, 2007)). “Reverse preemption” is a descriptive shorthand phrase employed by one court to describe the effect of a state objection to an applicant’s CZMA consistency certification for a federal permit, where the state objection may prevent the federal government from issuing a permit. 16 U.S.C. § 1456(c)(3)(A) (in general, “[n]o license or permit shall be granted by the Federal agency until the state ... has concurred with the applicant’s certification or until, by the state’s failure to act, the concurrence is conclusively presumed”). This is the reverse of a typical federal preemption scenario, where a federal objection may prevent the state from taking some action. Neither the Connecticut case that mentions “reverse preemption” nor any other case Appellants cite hold that the CZMA allows state law to overcome the express preemption provision of the MMPA, or any other federal statute providing for preemption. In fact, under the CZMA, the Secretary of Commerce may, on their own initiative or on appeal by the applicant, override a state’s objection to a federal activity if it finds “that the activity is consistent with the objectives of [the CZMA] ... or is otherwise necessary in the interest of national security.” 16 U.S.C. § 1456(c)(3)(A).

“There is a strong presumption against repealing statutory provisions by implication,” and Appellants have not offered any “clear and compelling evidence” of Congress’ intent in the CZMA to implicitly repeal MMPA Section

109(a) that would be required to override the clear MMPA express preemption provision. Voss v. Tranquilino, 206 N.J. 93, 95 (2011) (citation omitted). Indeed, allowing the CZMA to undo the MMPA express preemption provision would lead to nonsensical results. That is, for an activity where CZMA consistency review was not required, the MMPA would preempt state regulations relating to the taking of marine mammals. Yet, under Appellants' interpretation, the state would apply that same otherwise preempted regulation for an activity subject to CZMA consistency review. Surely Congress did not intend for such inconsistent results where the purpose of the MMPA is to create a "unified integrated system" of marine mammal management. UFO Chuting of Haw., Inc., 327 F. Supp. 2d at 1225 (citing MMPA legislative history). DEP's finding that the MMPA preempts the Habitat Rule as applied to marine mammals should be affirmed.

**B. DEP Correctly Found that the Offshore Project is Consistent with the Habitats Rule, Including as It Pertains to the North Atlantic Right Whale.**

Even if the MMPA is not preempted, Appellants cherry pick select statements from the DEIS to argue the Offshore Projects threaten the survivability of the North American Right Whale and harm marine mammal habitat in violation of the Habitat Rule. Pb25-Pb27.

The Habitat Rule evaluates the impact of development on endangered or threatened wildlife or plant species habitats, which include:

terrestrial and aquatic ... areas known to be inhabited on a seasonal or permanent basis by or to be critical at any stage in the life cycle of any wildlife or plant identified as “endangered” or “threatened” species on official Federal or State lists of endangered or threatened species, or under active consideration for State or Federal listing.

N.J.A.C. 7:7-9.36(a). The Habitat Rule further provides that:

development of endangered or threatened wildlife or plant species habitat is prohibited unless it can be demonstrated, through an endangered or threatened wildlife or plant species impact assessment as described in N.J.A.C. 7:7-11, that endangered or threatened wildlife or plant species habitat would not directly or through secondary impacts on the relevant site or the surrounding area be adversely affected.

N.J.A.C. 7:7-9.36(b).<sup>17</sup> “Secondary impacts are the effects of additional development likely to be constructed as a result of the approval of a particular proposal”, which can include “traffic increases, increased recreational demand and any other offsite impacts generated by activities which affect the site and surrounding region.” N.J.A.C. 7:7-14.3(a).

Appellants offer select statements made by BOEM in the DEIS describing potential impacts to marine mammals, including the NARW, without responding to DEP’s analysis and findings under the Habitat Rule. Here, DEP acknowledged

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<sup>17</sup> DEP explained that “the DEIS is equivalent to a habitat impact assessment described at N.J.A.C. 7:7-11 and required per this rule at 9.36(b).” Pa26.

these impacts and conducted a significant analysis of the Offshore Project's compliance with the Habitat Rule. Its findings and conclusions regarding the impacts to the habitat of endangered species are grounded in the record and based on the Department's specialized knowledge and technical expertise. See Campbell, 169 N.J. at 588; In re Thomas Orban/Square Props., 461 N.J. Super. at 72.

DEP appropriately evaluated the measures proposed by Atlantic Shores to address any impacts to marine mammals, including the NARWs. For example, DEP highlighted the development of a Marine Mammal Monitoring Plan and explained that "Atlantic Shores will also be implementing a comprehensive program of best management practices (BMP)s to minimize and avoid the Projects' impacts, while exploring new innovative minimization/avoidance approaches." Pa79-Pa80. Additionally, DEP discussed how these potential impacts could be avoided:

- "Atlantic Shores has proposed to remove marine debris caught on Offshore Project structures to reduce the risk of marine mammal entanglement in lost fishing gear." Pa27. Additionally, marine debris awareness training will be required "for all vessel operators, employees, and contractors." Pa28; see also ASa455.
- To avoid vessel collisions, "Atlantic Shores intends to follow federal guidelines to avoid vessel interactions with whales and adhere to all NOAA-mandated Seasonal Management Areas (SMA) or Dynamic Management Areas (DMA)" and "monitor marine mammal activity during all phases of Projects to ensure that the changes for possible collisions are minimized." Pa77.

- “Pile driving will follow a proposed schedule from May to December to minimize risk to NARW.” Pa27.
- “Noise Abatement Systems (NAS) will be implemented during impact pile driving to decrease the propagation of potentially harmful underwater noises; soft starts will be considered for impact pile driving, ramp-up procedures whereby the sound source level is increased gradually before full power will be used; and a ramp down and shutdown of activities such as pile driving and/or HRG survey equipment that has the potential to cause harm or harassment to marine mammals will occur if an animal is seen approaching or entering a Monitoring or Exclusion Zone.” Pa28; ASa421.
- “Compliance with Letter of Authorization (LOA) requirements.” Pa80.

Additionally, BOEM considered the impacts of the Projects on marine mammals including NARWs. BOEM found that the Projects will only have incremental contributions to the impacts from vessel traffic and the implementation of vessel strike avoidance measures is not expected to cause stock or population level impacts to NARW. Pa571. BOEM also explained that there could be beneficial impacts on odontocetes and pinnipeds from the presence of structures due to habitat conversion and prey aggregation. Pa573.

Appellants allege that these mitigation measures will not protect the NARWs. Pb34. Specifically, Appellants point to BOEM’s finding that vessel adjustment resulted in a decrease in mortality but an increase in serious injuries and concludes that “vessel ‘adjustment’ cannot be deemed a ‘mitigating ... measure’ since even after the adjustments,’ the survival of this species is still in doubt.” Pb34-Pb35. But Appellants omit BOEM’s clarification that the increase

in injuries could be a result of increased monitoring levels and BOEM's finding that vessel adjustment "results indicated that while it is not possible to determine a link, the mortality and serious injury incidents on a per-capita basis suggest a downward trend in recent years." Pa534. DEP correctly found that "with implementation of the above measures, adverse impacts to threatened or endangered species will be avoided or minimized to the extent practicable" and consistency has been demonstrated. Pa33. Appellants' arguments challenging DEP's consistency determination amount to nothing more than a disagreement with the end result. DEP's findings are supported by substantial credible evidence and are entitled to deference. "[The Court] may not vacate an agency determination because of doubts as to its wisdom or because the record may support more than one result." In re New Jersey Pinelands Comm'n Resolution, 356 N.J. Super. at 372.

**IV. DEP CORRECTLY FOUND THAT THE OFFSHORE PROJECT IS CONSISTENT WITH THE SCENIC RESOURCES AND DESIGN RULE.**

Appellants' challenge to the Scenic Resources and Design Rule similarly relies on select findings from BOEM's DEIS regarding the Offshore Project's visual impacts, see, e.g., Pb42-Pb43, but fails to analyze DEP's reasoned findings in the Consistency Determination established by the applicable standard under the CZM Rules.

Under the CZM Rules, “[s]cenic resources include the view of the natural and/or built landscape.” N.J.A.C. 7:7-16.10(a). The SRD Rule provides:

new coastal development that is visually compatible with its surroundings in terms of building and site design, and enhances scenic resources is encouraged. New coastal development that is not visually compatible with existing scenic resources in terms of large-scale elements of building and site design is discouraged.

N.J.A.C. 7:7-16.10(c) (emphasis added).<sup>18</sup> As noted at Section II, discouraged uses are not prohibited and can be permitted by DEP if they are in the public interest and mitigating or compensating measures are employed. N.J.A.C. 7:7-1.5; In re Stream Encroachment Permit, 402 N.J. Super. at 605. Under the CZM Rules, terms of art like “discouraged” should be interpreted flexibly, with due respect for the Department’s expertise in balancing the competing interests involved in coastal development. See N.J.A.C. 7:7-1.1(e).

Appellants allege that there can be no mitigation simply because the Offshore Project will be visible. Appellants’ argument must fail because (i) the SRD Rule does not apply to the Offshore Project; (ii) Appellants offer an overly narrow interpretation of the SRD Rule that is unsupported and contrary to DEP’s reasoned interpretation of its own regulations; (iii) Appellants’ interpretation of

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<sup>18</sup> Atlantic Shores responds to Appellants’ arguments regarding discouraged uses, even though DEP did not find that the Offshore Project is in fact a discouraged use, i.e., DEP did not find that the Offshore Project is “not visually compatible with existing scenic resources in terms of large-scale elements of building and site design.” Pa49–Pa52.

the SRD Rule is inconsistent with more recent legislation and State policy supporting offshore wind development as well as other sections of the CZM Rules that specifically permit offshore wind development; and (iv) DEP correctly determined that Atlantic Shores offered sufficient mitigating and compensating measures and satisfied the SRD Rule.

DEP found that “the construction of Atlantic Shores’ offshore wind farms and associated infrastructure is in the public interest,” Pa49, which Appellants do not dispute. In accordance with the CZM Rules, DEP carefully balanced the visual compatibility of the Offshore Project with scenic resources. The specific mitigating and compensating measures considered by DEP are discussed herein at Section II.D.

**A. The Scenic Resources and Design Rule Does Not Apply to Offshore Wind Development.**

Appellants argue that the Offshore Project will “destroy the natural setting of the coast” and “seaward” view from New Jersey beaches. Pb47. The SRD Rule, however, is intended to preserve views of the ocean by limiting *development on land* along the waterfront, rather than regulating views from the

coast and limiting *in-water development* on the OCS within areas of federal jurisdiction. Thus, the SRD Rule does not apply to offshore wind development.<sup>19</sup>

The plain language of the regulations supports this reading. See N.J.A.C. 7:7-16.10(d) (establishing height and orientation restrictions for “new coastal development *adjacent to* a bay or ocean or bayfront or oceanfront, beach, dune or boardwalk”) (emphasis added) and exempting wind turbines from certain restrictions); see also *id.* at (e) and (f) (including similar language regarding development “adjacent to the waterfront”) and N.J.A.C. 7:7-16.10(g) (encouraging development *on land* in “areas of low scenic quality, such as abandoned port facilities and blighted urban areas”).

DEP’s rulemakings further support this interpretation, as they state that the Rule is intended to ensure that development “do[es] not adversely affect existing *views of* and access to *beaches and waterfront areas.*” 26 N.J.R. 943(a), 949 (Feb. 22, 1994) (emphases added); see also 41 N.J.R. 3168(a), 3180 (Sept. 8, 2009) (when proposing SRD Rule amendment to address renewable energy facilities on land, DEP stated that “the rule calls for visually compatible uses and requires ... that open view corridors of the waterfront be maintained and

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<sup>19</sup> Notwithstanding the fact that the SRD Rules does not apply to offshore wind development, DEP analyzed the Rule and correctly found that the Offshore Project met the requirements of the Rule.

that structures be separated from the beach, dune, boardwalk, or waterfront, whichever is further inland”); 49 N.J.R. 2122(a), 2135 (July 17, 2017) (when proposing new requirements for ocean and bayfront areas, DEP also stated that the requirements “are intended to preserve ocean and bay views and public enjoyment of coastal waters” and “ensure visual access to the water for urban residents.”). To the extent that there is any ambiguity in the applicability of the SRD Rule, these statements illustrate that DEP intended it to ensure that development along New Jersey’s waterfront land does not limit ocean views. See U.S. Bank, N.A. v. Hough, 210 N.J. 187, 199 (2012) (considering “the history of the rulemaking process” in construing regulation). Thus, the SRD Rule addresses the view *of* the ocean *from land* and does not apply to development *in* the water within federal jurisdiction. Appellants’ improperly attempt to apply a rule intended to regulate onshore development under State jurisdiction to the Offshore Project within an area of federal jurisdiction.

**B. Appellants Advocate for an Overly Narrow Interpretation of the SRD Rule that is Unsupported and Contrary to DEP’s Well-Reasoned Interpretation of its Own Regulations.**

Even if the SRD Rule were read to apply to in-water development, Appellants’ application of the term “discouraged” incorrectly would function as a prohibition on any development, including offshore wind, that is visible from the shore. Relying on BOEM’s assessment that the Projects will be visible *at*

*times*, Appellants baldly state that “[n]o mitigation is possible” that could adequately address the alleged impact on scenic resources. Pb43-Pb45; Pb48.<sup>20</sup> Put another way, Appellants argue that the Offshore Project “cannot be deemed ‘consistent’ with the State’s coastal zone rules *and has to be rejected.*” Pb49 (emphasis in original).

This reading is contrary to the CZM Rules which clearly distinguish between activity that is discouraged and activity that is prohibited. As discussed supra at Section II, discouraged activity may be permitted if it is in the public interest and where mitigating or compensating measures can be taken. N.J.A.C. 7:7-1.5. Conversely, the term “prohibited” means that “a proposed use of coastal resources is unacceptable and that the Department will use its legal authority to reject or deny the proposal.” Id.

Appellants fail to recognize this critical distinction. Importantly, if DEP had wanted to prohibit development that has impacts on ocean views, it would have done so. See Estate of Campagna v. Pleasant Point Props., LLC, 464 N.J. Super 153, 176 (App Div. 2020) (finding that “if a regulation includes particular

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<sup>20</sup> Acknowledging that visibility of the Offshore Project “would vary depending on many factors,” DEP appropriately evaluated all record evidence, including information in BOEM’s DEIS and a 2021 Rutgers study in the COP that “high visibility conditions would occur over a period of less than 23 percent of the daylight hours in a given year.” See ASa184. While Appellants object to DEP’s reliance on this study, Pb49, DEP’s technical review and application of the record evidence to the CZM Rules are entitled to deference.

language in one section but omits it in another, it is generally presumed that [the state agency] acts intentionally and purposely in the disparate inclusion or exclusion”) (citation omitted). DEP chose not to. Instead, the CZM Rules recognize that such development, even if visible, may be permitted with mitigating or compensating measures. N.J.A.C. 7:7-16.10. As noted, Appellants’ narrow interpretation of the SRD Rule would mean that no mitigating or compensating measures could be taken by Atlantic Shores or any other developer to meet this standard under the CZM Rules and would effectively prohibit such development.

**C. The SRD Rule Must be Read Consistently with State Legislation Encouraging Offshore Wind Development and Other Parts of the CZM Rules Contemplating that Visible Offshore Wind Development Will Occur.**

Assuming arguendo that the SRD Rule is read to apply to in-water development, the SRD Rule must be read consistently with more recent legislation encouraging offshore wind development and other provisions of the Rule which specifically permit offshore wind development that may be visible from the shoreline.

The Legislature has expressly encouraged the development of offshore wind generation projects, including the Projects planned by Atlantic Shores. In 2010, our Legislature enacted OWEDA “to permit[] the development of an offshore wind energy program in New Jersey.” In re Petition of Fisherman’s Atl.

City Windfarm, No. A-3932-13T3, 2015 N.J. Super. Unpub. LEXIS 1265, at \*3 (App. Div. May 29, 2015) (citing L. 2010, c.57).<sup>21</sup> OWEDA was subsequently amended in 2021, and again in 2023, to help the State meet its clean energy goals. Specifically, OWEDA, as currently codified, directs the BPU to “establish an [OREC] program to require that a percentage of the kilowatt hours sold in this State ... be from offshore wind energy in order to support at least 3,500 megawatts of generation from qualified offshore wind projects.” N.J.S.A. 48:3-87(d)4. It further recognizes that “offshore wind, as a source of clean, renewable energy, provides opportunities for New Jersey to reduce dependence on fossil fuels that contribute to climate change, while significantly expanding and securing the State’s economy for the short and long term.” N.J.S.A. 48:3-87.2a(1)a.

The SRD Rule must be read consistently with this more recent legislation. Well established principles of statutory interpretation require that “[s]tatutes and regulations *in pari materia* are to be construed together when helpful in resolving doubts or uncertainties in the ascertainment of legislative intent.” Czar, Inc. v. Heath, 398 N.J. Super 133, 139 (App. Div. 2008) (citations omitted). Further, it is well settled that subsequent legislation can be used as an

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<sup>21</sup> Pursuant to R. 1:36-3, a copy of this decision is included in Atlantic Shores’ appendix at Asa494.

aid in interpreting an earlier enactment, i.e., the SRD Rule. Varsolona v. Breen Capital Services Corp., 180 N.J. 605, 623 (2004). This Court should not countenance Appellants' interpretation of the SRD Rule that would negate the goals set forth in subsequent legislation like OWEDA.

Appellants' reading of the SRD Rule is also inconsistent with the CZM Rules as a whole, including the Energy Facilities Rule (the "EF Rule"), see N.J.A.C. 7:7-15.4.<sup>22</sup> Significantly, the main purpose of the CZM Rules, including the SRD Rule and the EF Rule, is to regulate development in the "coastal zone" of waters under State jurisdiction, that is, waters "out to the three-geographical-mile limit of the New Jersey territorial sea." N.J.A.C. 7:7-1.2(b)(2). The EF Rule specifically addresses wind energy generation and contemplates the construction of wind energy facilities within less than three miles from shore, where they certainly would be visible. N.J.A.C. 7:7-15.4(r)(1)(viii) (establishing standards for construction of wind energy facilities in "tidal waters"). The EF Rule provides that such development "is conditionally acceptable provided that such facilities do not *significantly detract* from scenic or recreational value." N.J.A.C. 7:7-15.4(r)(1)(vi) (emphasis added). DEP clearly acknowledged the interplay between the SRD Rule and the EF Rule, see

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<sup>22</sup> The Projects are an "energy facility" under the EF Rule. N.J.A.C. 7:7-15.4(a); Pa34-Pa37 (DEP's Environmental Analysis discussed the application of the EF Rule to the Offshore Project).

Pa73, and the SRD Rule must be read together with the EF Rule's more specific provisions permitting the siting of offshore wind development where it would be visible from the beach so long as it does not "significantly detract" from scenic resources.

Appellants, however, advocate a constrained reading of the SRD Rule and ignore the EF Rule altogether. This interpretation is contrary to well established principles of statutory interpretation which hold that "regulations within the same regulatory scheme should, where feasible, be read as consistent with each other." Czar, Inc., 398 N.J. Super. at 139 (citation omitted). When interpreting regulations or statutes, courts "consider not only the particular [provision] in question, but also the entire ... scheme of which it is a part, notwithstanding the contrary implication of a provision read 'literally,' as opposed to 'sensibly' in context." Birmingham v. Travelers N.J. Ins. Co., 475 N.J. Super. 246, 262 (App. Div. 2023) (citing Roig v. Kelsey, 135 N.J. 500, 515-16 (1994)). Here, DEP correctly read the CZM Rules as a whole and harmonized the SRD Rule with the EF Rule in recognizing that the Offshore Project, while visible, offered mitigating and compensating measures to satisfy the SRD Rule. Pa52. As discussed further at Section II.D. herein, DEP's finding of consistency with the SRD Rule is entitled to deference. See In re Election Law Enforcement Comm'n Advisory Op. No. 01-2008, 201 N.J. at 262.

**D. DEP’s Determination Regarding the Sufficiency of the Mitigating and Compensating Measures Offered by Atlantic Shores is Supported by the Record and Entitled to Deference.**

Underlying DEP’s consistency determination is its finding that the mitigating and compensating measures offered by Atlantic Shores were sufficient to satisfy the SRD Rule. While Appellants focus on limited findings from the DEIS regarding the Projects’ “major” adverse impact to the scenic views of the coastal zone and focus on certain locations identified by BOEM (Pb42-43), DEP’s application of the SRD Rule to the mitigating and compensating measures offered by Atlantic Shores is reasonable and well supported by the record evidence. In the Consistency Determination, DEP closely analyzed the visual impacts of the Offshore Project. DEP explained that the visibility of the turbines depends on numerous factors, including view and sun angles, atmospheric conditions, disturbance from the turbines, elevation of the view, and lighting of the turbines, and visibility would vary daily. Pa50; Pa73-Pa74. Further, DEP stated that the photo simulations found in the DEIS depict the conservative worst-case scenarios and “the actual visual impact is anticipated to be less” such that over the course of a day there may be periods of negligible to major impacts depending on the lighting conditions and atmospheric perspective. Pa50. While wind turbines would likely be visible at 15 miles, “more than 95 percent of the [turbines] ... would be more than 15

miles ... from coastal locations.” Pa50-Pa51. Finally, DEP stated that the Offshore Project “ha[s] been designed to minimize visual impacts to the maximum extent feasible within the limits of Atlantic Shores’ acquired Lease Area, preventing further movement from the shoreline.” Pa73; see also Pa51.

DEP next discussed the mitigating or compensating measures to be undertaken by Atlantic Shores. DEP explained that the turbines will be either white or light gray to reduce visibility against the horizon and “eliminate the need for daytime warning lights or red paint marking of the blade tips.” Pa51; Pa74; see also Pa977. Contrary to Appellants’ assertion, this is not “[t]he only mitigation measures identified by BOEM or DEP. Pb43. DEP further noted that “Atlantic Shores is considering use of an FAA-approved Aircraft Detection Lighting Systems ... which ... would only activate [turbine] and met tower lighting when aircraft enter a predefined airspace,” and could reduce the amount of time the lighting system is activated by 99 percent when compared to the always-on obstruction lighting system. Pa51; see also Pa74; Pa970.

DEP also discussed how Atlantic Shores will “prepare and implement a scenic and visual resources monitoring plan that monitors and compares the visual effects of the Project during construction, operation and maintenance phases ... to the finding in the Visual Impact Assessment ... and verifies the accuracy of the visual simulations.” Pa7: Pa52; Pa74. DEP recognized that this

measure would “support the science relevant to simulating and evaluating potential scenic and visual effects associated with offshore wind development.” Pa52; Pa74. While DEP acknowledged that these measures would not reduce the visual impact of the development, these commitments offered significant compensating value and were relied on in DEP’s determination regarding consistency with the SRD Rule. Pa52; Pa74; see also Pa990. DEP correctly found that all of these efforts taken as a whole will benefit New Jersey’s overall scenic resources. Thus, DEP evaluated mitigation measures and correctly applied its own regulations regarding scenic resources, and Appellants’ claim that the Department improperly “waive[d]” its rules must fail. See Pb49.

**V. DEP CORRECTLY FOUND THAT THE OFFSHORE PROJECT IS CONSISTENT WITH THE ENERGY FACILITIES RULE, INCLUDING THE REQUIREMENTS RELATED TO EMPLOYMENT.**

Appellants challenge to DEP’s finding of consistency with the Energy Facilities Rule (N.J.A.C. 7:7-15.4) merely because DEP did not explicitly find that the Offshore Project will not result in a loss of more than 200 jobs related to the State’s coastal tourism industry annually is unsupported by the record and without merit. See Pb51-Pb54.

The Energy Facilities Rule provides that “coastal energy facilities construction and operation shall not directly or indirectly result in net loss of

employment in the State for any single year.” N.J.A.C. 7:7-15.4(c). The EF Rule further requires that:

Coastal energy facility construction and operation which results in loss of 200 or more person-years of employment in jobs in New Jersey directly or indirectly related to the State’s coastal tourism industry in any single year is prohibited. N.J.A.C. 7:7-15.4(c)1.

In applying this Rule, DEP found that “[i]t is not anticipated that the Project will result in a net loss of 200 jobs in New Jersey.” Pa38. Appellants do not dispute DEP’s finding as to the first part of the Rule regarding no net loss of employment *in New Jersey* for any single year under N.J.A.C. 7:7-15.4(c). However, Appellants argue that DEP did not make the requisite findings regarding job loss, i.e., not more than 200 jobs in a single year, to *the coastal tourism industry* under N.J.A.C. 7:7-15.4(c)(1). Pb52.

Relying on BOEM’s statements regarding the scale of the coastal tourism industry, Appellants baldly assert that an adverse impact on the coastal tourism industry “is certain to cause the loss of 200 or more coastal tourism jobs.” Pb53. In making this declaration, Appellants ignore or misconstrue DEP’s findings supporting its consistency determination.

Here, DEP acknowledged that the Projects will impact the industry,

however, reasonably concluded that the Rule was satisfied.<sup>23</sup> Unlike Appellants' baseless assertion, DEP's determination is reasonable and supported by substantial evidence in the record.

For example, in response to comments, DEP stated that the Offshore Project is likely to impact "individual decisions by visitors to the New Jersey shore and elevated areas, with less impact on the recreation and tourism industry as a whole." Pa93. Further, DEP found that studies regarding the impact to the tourism industry were inconclusive "with respondents having positive, neutral, or negative views of the effect that offshore wind infrastructure would have on their experience of coastal recreation." Pa93.

In addition, while DEP acknowledged that the Offshore Project may impact jobs associated with commercial and recreational fishing and associated land-based support businesses, DEP recognized that the COP predicts that the

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<sup>23</sup> Appellants' argument that DEP somehow misinterpreted its regulation in finding that "it is not anticipated that the Projects will result in a net loss of 200 jobs in NJ," instead of to the coastal tourism industry, is a red herring. Pb52-Pb53. As discussed herein, DEP's findings regarding both net job loss in New Jersey and the extent of any job loss in the coastal tourism industry are reasonable and well-supported by the record. The fact that DEP inadvertently failed to explicitly state that its findings were specific to the coastal tourism industry does not invalidate its determination. An agency is not required to "follow a particular formula or incant 'magic words'" to have its decision upheld on appeal. Garland, 593 U.S. at 369; Del. Riverkeeper Network, 869 F.3d at 161 (upholding a decision "of less than ideal clarity" because the agency's "omission of [a] singular word is not fatal").

Projects will create not only 22,290 full-time equivalent jobs directly, but also indirectly create 11,810 jobs and 14,820 induced jobs. Pa38. While Appellants allege, without any support, that these jobs are “jobs installing and serving the turbines, not jobs in coastal tourism,” the COP explains that indirect jobs include jobs related to transportation, while induced jobs include jobs in the accommodation and food services sectors, which are part of the coastal tourism industry under any reasonable interpretation. ASa137; Asa205.<sup>24</sup>

DEP also recognized that the construction of new offshore structures could present new offshore tourism opportunities attracting recreational fishing and sightseeing and creating a beneficial impact to tourism. Pa93. Additionally, a study by Parsons et al. documented “large increases in the number of trips to the shoreline to view offshore wind projects in parts of Europe.” ASa250.

Notably, Appellants do not present any evidence in the record regarding any potential job loss to the coastal tourism industry, let alone the loss of more than 200 jobs annually prohibited under the CZM Rules. Appellants’ fear or

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<sup>24</sup> Atlantic Shores’ analysis in the COP does not explicitly distinguish between jobs directly or indirectly related to coastal tourism industry but instead divides employment impacts based on sector. See Asa205. The term “coastal tourism industry” is not defined in the CZM Rules, but the National Oceanic and Atmosphere Administration (NOAA) considers the coastal tourism and recreation economy to include: “restaurants, hotels, aquariums, and marinas to boat manufacturers and sporting goods stores.” [coast.noaa.gov/states/fast-facts/tourism-and-recreation.html](https://coast.noaa.gov/states/fast-facts/tourism-and-recreation.html).

speculation regarding such job loss, without any support in the record, is not sufficient to overturn DEP's findings regarding consistency. Appellants' arguments amount to mere disagreement with DEP's decision. It is not for Appellants or this Court to question the wisdom of DEP's decision. In re New Jersey Pinelands Comm'n Resolution, 356 N.J. Super. at 372.

**VI. DEP Correctly Applied the CZM Rules Applicable to Marine Fish and Fisheries and Scenic Resources Rules.**

Appellants rehash similar arguments in asserting that DEP failed to apply the “public interest” requirements under N.J.A.C. 7:7-1.5 for the Marine Fish and Fisheries Rule and Scenic Resources Rule. It appears that Appellants misconstrue the required proofs under the applicable CZM Rules. Under the CZM Rules, where DEP considers the proposed use to be in the public interest, DEP “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.” Appellants do not dispute DEP's findings that the Projects serve the public interest. As set forth in Sections II and IV, DEP reasonably found that the mitigating and compensating measures offered by Atlantic Shores satisfied the requirements of the CZM Rules applicable to these coastal resources.

**CONCLUSION**

For the foregoing reasons, the Appellate Division should affirm the DEP's Consistency Determination.

Respectfully submitted,

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By:                   s/ Steven T. Senior                    
  Steven T. Senior

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