IN THE MATTER OF THE FEDERAL CONSISTENCY CERTIFICATION FOR ATLANTIC SHORES OFFSHORE WIND SOUTH PROJECT	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-2743-23 **ON APPEAL FROM**: New Jersey Department of Environmental Protection File No. 0000-21-00221, CDT210001 **Civil Action**

APPELLANTS' BRIEF

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PRELIMINARY STATEMENT

This case concerns the installation of one of the largest, densest, and closest offshore wind farms in the world—less than10 miles off the coast of New Jersey – a project that will have devastating impacts on the shore economy and marine life. Deferring to the Governor's aggressive agenda to make New Jersey the epicenter of wind energy, Respondent Department of Environmental Protection (DEP) has effectively abandoned its independent role and rushed to advance the wind project proposed by Respondent Atlantic Shores Offshore Wind (Atlantic Shores) without adequately considering the magnitude of the impacts it will have on coastal communities, the environment, and wildlife.

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

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

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

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

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

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

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

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

COMBINED PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

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

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

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

[2] "Pa" refers to the Shore Municipalities' appendix.

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

a) Regulatory Background.

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

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

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

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

while promoting the economy of the shore communities. See N.J.S.A. 13:19-2. Specifically, the Legislature recognized that:

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

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

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

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

b) Atlantic Shores' Application to DEP.

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

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

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

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

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

either Atlantic Shores' or BOEM's analyses had reflected. (Pa180-Pa181; Pa184-185).[4]

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

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

i) Impact on Scenic Resources.

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

[4] A video simulation of the turbines moving is available at [redacted]vimeo.com/865989588/ed41118942 (last accessed October 25, 2024).

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

> An object/phenomenon with strong visual contrasts that is so large that it **occupies most of the visual field**, and **views of it cannot be avoided except by turning one's head more than 45 degrees from a direct view of the object**. The object/phenomenon is the major focus of visual attention, and its large apparent size is a major factor in its view dominance. In addition to size, contrasts in form, line, color, and texture, bright light sources and moving objects associated with the study subject may contribute substantially to drawing viewer attention. **The visual prominence of the study subject detracts noticeably from views of other landscape/seascape elements**.
>
> (Pa228 (emphasis added); Pa239).

This area of Beach Haven is a "very popular stretch of beach" and "the ocean is an integral part of [the] beach experience" for various forms of recreation, including sunbathing, swimming, walking, and running along the coast. (Pa251). Other locations along LBI, including the Forsythe National Wildlife Refuge in Holgate, Holyoke Avenue in Beach Haven, the Beach Haven Historic District, Ship Bottom Beach, and the LBI Arts Foundation in Long Beach

Township, were also acknowledged by Atlantic Shores to face significant visual impacts from the planned turbines. (Pa239-240). As Atlantic Shore was forced to concede that the turbines "may affect the viewer's perception of a pristine, undeveloped ocean horizon." (Pa251).

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

In their public comments, the Shore Municipalities identified the significant adverse economic impact this degradation of their scenic resources would cause. (Pa161-Pa165). This included studies by the University of Delaware, which DEP had itself credited in its review of an earlier proposed offshore wind project, that found that a significant percentage of beachgoers would choose to visit a different beach if even smaller and shorter turbine projects were constructed closer than 15 miles to shore. (Pa162-Pa165; Pa496; Pa641; Pa707-Pa709). A North Carolina study concluded similarly, finding that 55% of visitors would not re-rent their most recent vacation rental if a 144-

turbine project were constructed 5 to 18 miles offshore. (Pa551-Pa553). A 2017 European study focusing on turbines off the Catalan coast found a "welfare loss" of up to $220 million per season, with tourists choosing instead to visit beaches without turbines. (Pa163-Pa164). A subsequent study performed on behalf of the Shore Muncipalities, and submitted to DEP in support of its request for an adjudicatory hearing, concluded that Ocean County would face a total economic loss of $668.2 million from the Atlantic Shores' project, with 6700 jobs lost. (Pa202; Pa207).

ii) Impacts on Marine Life.

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

Additionally, the DEIS found that:

> [t]he presence of the WTG foundations and associated scour protection, as well as cable protection, would convert existing sand or sand with mobile gravel habitat to hard-bottom, which, in turn, would reduce the habitat for target species that prefer soft-bottom habitat (e.g., surfclams, sea scallops, squid, summer flounder).
>
> [Pa411].

DEP itself made similar findings in its earlier public comment letter to the federal government on the DEIS, explaining that turbines will negatively impact benthic habitat, included the slough and sand ridge complex which "provide habitat for a variety of fish species and benthic infauna." (Pa644). DEP's letter acknowledged that the impacts of the turbines on this habitat "would not be temporary," would alter sand waves that "may be many thousands of years old," that there is not yet scientific literature evaluating the impact of removing this habitat, and "[t]here is no clear evidence that the habitat created by turbine foundations provides similar ecosystem services." (Pa644).

Commercial fisheries in the Shore Municipalities rely upon these offshore habitats for fishing, trawling for flounder and other aquatic species, and passing through to areas further offshore. (Pa182). As DEP itself had previously found, New Jersey's fishing industry operates on "a very small profit margin." (Pa717). Any impact could devastate that industry, sending buyers elsewhere if they are no longer able to purchase sufficient quantities of seafood from the Shore

Municipalities' commercial fishing ports and damaging those business relationships, which took decades to establish, potentially forever. (Pa183).

c) Impacts on Avian Species.

The Atlantic Shores project area is located along the Atlantic Flyway and utilized by many avian species. (Pa302). At least three species of songbirds listed by DEP as endangered have been found to occur in the project area: the red knot, piping plover, and roseate tern. (Pa307). The federal government's DEIS concluded that Atlantic Shores' project may adversely affect red knots, and could also affect the piping plover and roseate tern. (Pa329). Other studies have found piping plovers to fly directly through the project area on migratory flights. (Pa612; Pa621). When offshore wind projects are considered together, rather than through piecemeal analyses, scientific studies reflect that they can cause population-level mortality for migrating birds. (Pa636).

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

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

For example, in late October and early November 2023, DEP corresponded with BOEM concerning the timing of DEP's consistency

determination. (Pa656). BOEM's email made clear it had concern about "the timing of [DEP's] decision **before COP approval**;" indicating that, nearly a full year before the federal government's decision was issued, it was already known that it would be an approval. (Pa656) (emphasis added).

And when it came time for DEP to issue its own decision, the record reflects that DEP was captive to pressure from both Atlantic Shores and BOEM. Throughout the review process, DEP engaged in frequent meetings with Atlantic Shores, and declined to provide any record or notes concerning those meetings. Three weeks before issuing the consistency determination, DEP provided its draft concurrence, including DEP's conditions concerning what was required for Atlantic Shores' project to meet DEP's requirements, to Atlantic Shores for its review, comment, and edits. (Pa659). After Atlantic Shores objected to the inclusion of a recommendation to monitor the visual impact of construction activities, DEP was apparently willing to back down and remove that provision until BOEM advised it would require that condition itself. (Pa663-Pa680). This exchange reflects that DEP's review was not in fact based on what DEP believed was best to protect its coastal resources, but rather dictated by what the federal government and Atlantic Shores wanted.

DEP issued the consistency certification on April 1, 2024, concurring that the project was consistent with New Jersey's Coastal Zone Management

Program. (Pa1). The decision was accompanied by an environmental report detailing DEP's specific findings, and a response to public comments. (Pa7-Pa93). As detailed below, DEP made many unsupportable findings in its analysis.

In discussing the project's impact on scenic resources, protected by N.J.A.C. 7:7-16.10, DEP acknowledged that the rule "discourages new coastal development that is not visually compatible with existing scenic resources in terms of large scale elements of building and site design." (Pa47). DEP acknowledged that the project would have major impacts from turbines 8.7 to 19.4 miles from shore, and "would add to the cumulative viewshed impact posed by multiple proposed offshore wind farms" (which included a second, immediately adjacent project proposed by Atlantic Shores). (Pa48). DEP also acknowledged the Delaware and North Carolina studies finding significant impacts on tourism from turbines and that those turbines were significantly smaller than the Atlantic Shores' turbines. (Pa48-Pa49). DEP attempted to minimize these impacts by claiming the turbines would be visible only during high visibility conditions, but failed to acknowledge that clear days would be the most likely to drive tourists to the beach. (Pa48-Pa49). DEP nonetheless conceded that "the visual impact is predicted to be significant." (Pa50).

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

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

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

Arbitrarily changing its earlier findings of permanent impacts that DEP had made in its public comments on the DEIS, DEP now found that that any impact to the seabed would be short term and, and habitat functions would fully recover. (Pa38). DEP also acknowledged that the conversion of soft-bottom

habitat to hard-bottom habitat around the turbines "would result in the displacement of soft-bottom species (e.g., Atlantic surf clam, squid, winter flounder)" but minimized those losses because they would not rise to the level of "population-level impacts." (Pa39). DEP discussed adverse impacts from pile-driving activities during construction, but similarly ignored them because they would not "cause population-level impacts." (Pa40; Pa41). Nonetheless, DEP conceded that "the habitat conversion resulting from the Project is expected to have localized, long-term impacts that would be adverse for commercial fisheries, and noted that the presence of cables and scour protection would likewise have "long-term adverse impacts on commercial and for-hire recreational fisheries" through anticipated "gear loss or damage, navigational hazards, fish aggregation, migration disturbances, and space-use conflicts." (Pa42). DEP acknowledged that economic losses were anticipated. (Pa44).

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

measures, advising fisherman of the physical locations of cable protection, and a compensation fund. (Pa44-Pa45).

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

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

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

The Shore Municipalities also filed a third-party hearing request with DEP, which the agency denied on June 14, 2024. (Pa94; Pa180). That denial was solely based on DEP's finding that the Shore Municipalities lacked a

constitutional entitlement to a hearing. (Pa97-Pa100). The Shore Municipalities amended their notice of appeal to include that decision as well. (Pa106).

ARGUMENT

POINT I

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

Appellate courts will reverse an agency's decision if "(1) it was arbitrary, capricious, or unreasonable; (2) it violated express or implied legislative policies; (3) it offended the State or Federal Constitution; or (4) the findings on which it was based were not supported by substantial, credible evidence in the record." University Cottage Club of Princton New Jersey Corp. v. N.J. Dep't of Env't Prot., 191 N.J. 38, 49 (2007). Courts will generally defer "to an agency's interpretation of its own regulations, reasoning that 'the agency that drafted and promulgated the rule should know the meaning of that rule. Matter of Thomas Orban/Square Properties, LLC, 461 N.J. Super. 57, 73 (App. Div. 2019) (quoting In re Freshwater Wetlands Gen. Permit No. 16, 379 N.J. Super. 331, 341-42 (App. Div. 2005)).

But "[w]hile [a court] must defer to the agency's expertise, [it] need not surrender to it." N.J. Chapter of Nat'l Ass'n of Indust. & Office Parks v. N.J. Dep't of Envtl. Prot., 241 N.J. Super. 145, 165 (App. Div. 1990). Importantly

"an agency may not use its power to interpret its own regulations as a means of amending those regulations or adopting new regulations." In re Gen. Permit No. 16, 379 N.J. Super. at 342. And "an appellate court . . . is 'in no way bound by the agency's interpretation of a statute or its determination of a purely legal issue.'" Univ. Cottage Club, 191 N.J. at 49 (quoting In re Taylor, 158 N.J. 644, 656 (1999)).

"[A]n administrative agency should follow its own rules and regulations." In re CAFRA Permit No. 87-0959-5 Issued to Gateway Assoc., 152 N.J. 287, 308 (1997). "If an agency wants to amend a rule or regulation, it may do so after expressly providing notice and a hearing." Ibid. "Similarly, an agency that seeks the power to waive its substantive regulations should adopt a regulation pertaining to any such waiver and setting forth appropriate standards to govern agency decision-making." Ibid. "[T]he power to waive CAFRA regulations must be exercised through the adoption of a rule establishing standards for the application of waiver authority." SMB Assoc. v. N.J. Dep't of Env't Prot., 264 N.J. Super. 38, 54 (App. Div. 1993). See also Dragon v. N.J. Dep't of Env't Prot., 405 N.J. Super. 478, 491 (App. Div. 2009) (rejecting DEP's argument that it had "inherent authority to deviate from strict compliance with its regulations").

"Regulations are subject to the same rules of construction as a statute." Medford Convalescent v. Div. of Med. Assistance, 218 N.J. Super. 1, 5 (App.

Div. 1985). "The regulation should be construed in accordance with the plain meaning of its language, and in a manner that makes sense when read in the context of the entire regulation." Ibid. "Moreover, 'regulations within the same regulatory scheme should, where feasible, be read as consistent with each other.'" Czar, Inc. v. Heath, 398 N.J. Super. 133, 139 (App. Div. 2008) (quoting Van Orman v. Am. Ins. Co., 608 F.Supp. 13, 26 (D.N.J. 1984)).

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

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

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

16.10(g). The rule "applies only to developments which by their singular or collective size, location and design could have a significant adverse impact on the scenic resources of the coastal zone." Ibid.

As set forth above, DEP acknowledged that the Scenic Resources rule applied to Atlantic Shores' proposal, found that "the visual impact is predicted to be significant," and appeared to acknowledge that Atlantic Shores' proposal constituted "discouraged" development under the rule. (Pa47). And DEP could not have found otherwise, as it is readily apparent that the construction of 200 turbines the size of the Eiffel Tower will substantially, and negatively, alter the pristine view from the shore. Record evidence – acknowledged but minimized by DEP – demonstrates that visual impacts of turbines at such distance would deter tourists that the Shore Municipalities rely upon to support their local economies. Scientific studies of smaller turbines concluded that turbines closer than 15 miles would lead to a substantial decrease in tourism, and DEP itself credited that study on its review of an earlier, subsequently canceled, project by a different developer. (Pa641). The proposed turbines here are nearly twice as tall as the 574-foot turbines in that study, and closer than 15 miles – as close as 8.7 miles to Brigantine. (Pa47; Pa494).

But DEP nonetheless found the project to be in compliance with the rule solely on the basis that the project was in the public interest, and pointing to

purported monitoring plans and claimed efforts at mitigating impacts. (Pa50). That finding was arbitrary capricious, and contrary N.J.A.C. 7:7-1.5 and N.J.A.C. 17:16-10 which required a "**net gain in quality and quantity**" of scenic resources – i.e. beach vistas – for the turbines to be approved. (emphasis added)

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

> means that a proposed use of coastal resources is likely to be rejected or denied as the Department has determined that such uses of coastal resources should be deterred. In cases where the Department considers the proposed use to be in the public interest despite its discouraged status, **the Department may permit the use provided that mitigating or compensating measures can be taken so that there is a net gain in quality and quantity of the coastal resource of concern**.
>
> [N.J.A.C. 7:7-1.5 (emphasis added)]

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

But the plain language of the regulation makes clear that "the coastal resource of concern" for which there must be a "net gain" is the specific resource that is the subject of the rule stating that development "discouraged" – here, scenic resources – and thus a benefit to the public interest alone as relied upon

by DEP is insufficient. Otherwise, the rule would have referred to "coastal resources" generally, or the public interest alone. A finding that a development is in the public interest is thus inadequate and insufficient to approve it despite it being discouraged under a resource protection rule; rather, that is a predicate to allowing approval if, and only if, there are also mitigating or compensating measures that result in a "net gain in quality and quantity of the coastal resource of concern." N.J.A.C. 7:7-1.5.

DEP did not make any finding that any such measures here would result in a net gain in scenic resources. Nor would the record have supported any such finding. The only mitigating measures cited were those involving efforts purportedly to reduce the visual impacts of the project through paint color and through an aircraft detection lighting system to reduce nighttime visibility that Atlantic Shores had not even committed to using at the time of DEP's decision. (Pa49). But these measures at most make the turbines slightly less intrusive. They patently do not result in a "net gain" in scenic resources.

The monitoring efforts relied upon likewise will not result in a "net gain" in scenic resources or even result in a reduction of the impacts this project – as DEP itself so states. (Pa50 ("The DEIS acknowledges that this mitigation measure would not reduce the visual impact of the offshore wind farm."). No requirement is imposed to remove the turbines if monitoring reflects a greater

than anticipated impact. And no monitoring is required to conclude that the turbines will have major visual impacts – the federal government's Draft Environmental Impact Statement concluded as much. (Pa482-Pa483). See also DEP's environmental report ("the visual impact is predicted to be significant"). (Pa50).

This stands in sharp contrast to the circumstances in which this Court previously affirmed DEP's approval of discouraged development in In re Stream Encroachment Permit, 402 N.J. Super. 587, 605 (App. Div. 2008). In that case, DEP had approved the filling of wetlands in connection with the Xanadu project, which was "discouraged" under its regulations. Id. at 605. But there, the applicant had dedicated 587 acres of wetlands for mitigation – as the Court noted, "more than seventy-eight times the area of the filled land" – thus supporting a finding of a "net gain in quality and quantity of the coastal research of concern." Id. at 605-605 and n.3. The same "net gain" simply cannot be found here, as there is no required mitigation that will result in any benefit to scenic resources.

Again, DEP's rules do not allow for approval of "discouraged" development simply because it is in the general public interest. Rather, if DEP desired to apply that standard to approve development that is otherwise inconsistent with specific CZM resource rules, it was required to amend its rules

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

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

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

This rule provides that "[a]ny activity that would adversely impact the natural functioning of marine fish, including the reproductive, spawning, and migratory patterns or species abundance or diversity of marine fish, is discouraged." N.J.A.C. 7:7-16.2(b). "In addition, any activity that would adversely impact any New Jersey based marine fisheries or access thereto is discouraged," unless it complies with certain conditions set forth in the rule.

Ibid.; N.J.A.C. 7:7-16.2(c) (listing exceptions). The rationale for the rule recognizes the importance of fish and fishing to New Jersey, including that "these resources provide significant recreation experiences for residents and interstate visitors" and "also help the State's economy, by leading to expenditure of approximately $1.4 billion per year." N.J.A.C. 7:7-16.2(d). "Commercial landings for all finfish and shellfish in New Jersey during 2010 were 161,831,909 pounds, valued at $177 million dockside" and with a "total ripple effect on the State economy . . . estimated at $2.6 billion." Ibid.

Based on DEP's findings outlined above, Atlantic Shores project must be deemed "discouraged" under this rule. Species will be displaced, DEP acknowledged its earlier comments on the project that turbine construction would cause permanent impacts to the seabed and benthic resources. (Pa644). Commercial fisheries would be significantly adversely impacted. (Pa42). The turbines do not satisfy any of the exceptions of N.J.A.C. 7:7-16.2(c) that would allow them to escape from being discouraged under the rule.

Thus, to find compliance with this rule, DEP was required to make a finding both that the project was in the public interest and that there would be mitigating or compensating measures such that there was a "net gain" in the resource of concern – here, marine fish and fisheries. N.J.A.C. 7:7-1.5. But as with the Scenic Resources & Design Rule, DEP arbitrarily stopped its analysis

at the public interest prong, and did not make a finding that there would be a "net gain" in marine fish and fisheries, only an arbitrary finding that there "will not be a net loss in the quality and quantity of the coastal resources of concern."[5] (Pa45).

The mitigation measures described by DEP do not support finding a net benefit to marine fish and fisheries. Nothing Atlantic Shores had proposed would result in any direct benefit to marine fish, as the measures discussed included only monitoring, scientific studies on impacts, and monetary compensation of fishermen and related businesses, but no efforts at habitat enhancement or the preservation that would result in a gain in marine fish or fisheries. (Pa43-Pa45). The monetary compensation offered to fisheries would make businesses whole only for "negative impacts of a significant nature." (Pa45). There is no finding or explanation that this compensation results in a net gain in the quantity or quality of those businesses. And by drawing an undefined line that a business must suffer "significant" impacts to be entitled to seek compensation, there would in fact almost certainly be a net loss to businesses who are negatively impacted but perhaps not within DEP or Atlantic Shores' definition of "significant."

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

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

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

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

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

That finding was arbitrary, capricious, and unreasonable. The Shore Municipalities do not contest that green energy, including certain offshore wind

projects, could be considered to be in the national interest. But DEP erred in finding that there were no prudent and feasible alternative sites for turbine construction, and that this specific project adequately minimized impacts. (Pa16-Pa18).

Throughout its analysis, DEP took a constrained and unsupported view of alternatives. That is, simply because Atlantic Shores's predecessor in interest elected to bid on this lease area – which was awarded at an extremely low cost of $1,000,240 for a 100-acre area,[6] likely reflecting the risk of non-approval of an offshore wind project in that extremely close-to-shore area – DEP has refused to acknowledge that an offshore wind project could be constructed elsewhere. But BOEM made numerous lease areas available along the east coast, and additional lease sales are anticipated in the coming years.[7] As the Shore Municipalities identified in their public comments, this included the Hudson South lease area, further off the New Jersey coastline. (Pa152). DEP's refusal to consider that Atlantic Shores could seek approval to construct an offshore wind project elsewhere was arbitrary, capricious, and unreasonable.

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[6] [redacted]boem.gov/sites/default/files/documents/oil-gas-energy/OCS-A%200499%20Lease.pdf (last accessed October 29, 2024).

[7] [redacted]boem.gov/renewable-energy/lease-and-grant-information (last accessed October 29, 2024).

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

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

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

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

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

Whether a site contains critical wildlife habitat is to be "considered on a case-by-case basis." N.J.A.C. 7:7-9.37(a)(3). "Development that would directly

or through secondary impacts on the relevant site or in the surrounding region adversely affect critical wildlife habitats is discouraged" unless certain findings can be made including minimizing interference, that "[t]here is no prudent or feasible alternative location" and the use of "appropriate mitigation measures." N.J.A.C 7:7-9.37(b).

DEP concluded the project was not within critical wildlife habitat, apparently considering such habitat to consist only of "patches of woody vegetation which serve a critical role in providing resting and foraging habitat for migratory birds" (Pa31). But this constrained interpretation of the rule ignores express language that critical wildlife habitat also includes "natural corridors for wildlife movement." N.J.A.C 7:7-9.37(a)(1).

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

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

POINT II

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

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

"Administrative due process requires a fair hearing before a neutral and unbiased decisionmaker." Matter of Carberry, 114 N.J. 574, 584 (1989). "Bias can be shown by a finding that the adjudicator prejudged the issues or had a

pecuniary interest in the subject of the action. In general, the test is whether the adjudicator's situation is one 'which might lead him not to hold the balance between the parties nice, clear and true.'" Yamaha Motor Corp., U.S.A. v. Riney, 21 F.3d 793, 798 (8th Cir. 1994).

Although neither "being familiar with the facts of the case through the performance of statutory or administrative duties" nor "announc[ing] an opinion on a disputed issue" automatically require an agency decision-maker to recuse, the mere "probability of actual bias" is sufficient grounds when the decisionmaker has a pecuniary interest or has prejudged the issues. In re Xanadu Project at Meadowlands Complex, 415 N.J. Super. 179, 192 (App. Div. 2010). See Ende v. Cohen, 296 N.J. Super. 350, 362 (App. Div. 1997) (acknowledging mere "risk of bias or prejudgment" may require judicial intervention in administrative proceeding, and recognizing "argument that those who have investigated should not then adjudicate.").

"The probability of actual bias is grounds for disqualification when the decisionmaker has a pecuniary interest in the outcome of the matter. . . ." Matter of Carberry, 114 N.J. at 585; See also Yamaha Motor Corp., 21 F.3d 793 (Commissioner of motor vehicle commission's presence on hearing panel on complaint concerning Yamaha dealer was impermissible because he owned a competing Harley Davidson dealership and thus had a pecuniary interest in

outcome). "[A] pecuniary interest need not be personal to compromise an adjudicator's neutrality." Esso Standard Oil Co. (P.R.) v. Mujica Cotto, 389 F.3d 212, 219 (1st Cir. 2004) (finding structural bias because the adjudicative body would benefit financially from the flow of fines issued to its budget). "Even in the absence of a personal financial interest, when structural infirmities create inherent bias on the part of the adjudicator, due process is compromised." All American Check Cashing, Inc. v. Corley, 191 F.Supp.3d 646, 664 (S.D. Miss. 2016).

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

And the record underlying DEP's decision reflected that. Although DEP paid lip service at times to pushing back on Atlantic Shores' attempts to rush the approval, in the end DEP caved. That is evident from DEP providing its

[8] [redacted] whyy.org/articles/orsted-new-jersey-wind-energy-projects-scrapped/ (last accessed October 29, 2024).

conditions of approval to Atlantic Shores for its review, comment, and edits, and DEP's willingness to accommodate Atlantic Shores' demand to remove a monitoring condition until it learned that the federal government would impose that condition itself. (Pa659-Pa680). DEP's decision documents likewise reflected a lack of an independent review process, instead deferring repeatedly to the federal government's "draft" environmental impact statement that was subject to revision after public comment; and an outright refusal to consider the possibility of Atlantic Shores utilizing another lease area as an alternative to constructing a project with significant adverse impacts so close to shore. (Pa7-Pa52).

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

POINT III

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

DEP also improperly denied the Shore Municipalities' request for a referral of its consistency certification determination to the OAL for an

adjudicatory hearing. That June 20, 2024 order should likewise be reversed, and a hearing held to further develop the factual record concerning the impacts of the Atlantic Shores' project.

DEP's CZM Rules provide for a request for an adjudicatory hearing to contest a DEP decision, so long as that request is consistent with the Administrative Procedure Act. N.J.A.C. 7:7-28.1. The Administrative Procedure Act in turn restricts third parties from appealing, i.e. obtaining hearings in the OAL, to challenge permitting decisions. N.J.S.A. 52:14B-3.3(a). But the statute makes clear that that restriction shall not "be construed as abrogating or otherwise limiting any person's constitutional or statutory rights to appeal a permitting decision." N.J.S.A. 52:14B-3.3(b).

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

A "'property interest contemplated by the Fourteenth Amendment may take many forms over and above the ownership of tangible property." Nicoletta v. N.J. Dist. Water Supply Comm'n, 77 N.J. 145, 154 (1978) (citing Fuentes v. Shevin, 407 U.S. 67, 86 (1972)). The chief ingredient in determining a property interest sufficient to trigger the right to protection by procedural due process is "a legitimate claim of entitlement." Id. at 154-55. Among other things, Shore Municipalities have an undeniable property interest in collecting tax revenue – a right that is threatened to be severely hampered by the construction of the proposed project, a well as safeguarding their local economies on behalf of their residents and businesses. The Shore Municipalities are all small towns located within Long Beach Island and just to its south in Atlantic County along the coast of New Jersey and have one important common attribute – the pristine beaches that attract tourism from which the towns derive substantial revenue. (Pa193). The presence of wind turbines as close offshore as proposed by Atlantic Shores will alter the natural seascape and diminish the aesthetic appeal of the coastline – a primary draw for tourists. (Pa193). Construction of massive wind turbines so close to shore inevitably will lead to a decrease in tourist arrivals, affecting businesses and reducing the overall economic activity in the area. (Pa193). A decline in tourism necessarily will result in lower tax revenues from sales and hospitality taxes and diminish property tax revenues, impacting the towns'

budgets and their ability to fund public services and infrastructure improvements. (Pa193). It will further depress property values in those areas. (Pa193). Additionally, the decline in tourism would, in turn, decrease the municipalities' revenue that is derived from beach badges. (Pa193).

An economic study performed on behalf of the Shore Municipalities concluded that Long Beach Island alone would experience $668.2 million in annual economic losses and losses in tax revenues. (Pa199-209). This thus goes beyond mere complaints about visual impact. The Atlantic Shores project would have a devastating impact on the Shore Municipalities, and these impacts are sufficiently grave to warrant an adjudicatory hearing. See, e.g., Application of John Madin/Lordland Dev. Int'l for Pinelands Dev. Approval, 201 N.J. Super. 105, 123 (App. Div. 1985) (holding that municipalities were entitled to a hearing in the context of development approvals within the Pinelands area because their "interest mandates that they have standing to be heard or to challenge the development approval, particularly where the projects reach the magnitude proposed by the developers herein.").

Accordingly, DEP wrongly concluded that the Shore Municipalities' lacked constitutional standing for an adjudicatory hearing in the OAL. DEP's denial should be reversed, and the consistency certification remanded to be

tested by way of an adversarial adjudicatory hearing presided over by a neutral administrative law judge.

CONCLUSION

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

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Long Beach Township, Beach Haven, Ship Bottom, Barnegat Light, Surf City, Harvey Cedars, Brigantine, and Ventnor City

BY: */s/ Michael S. Stein*
Michael S. Stein

Dated: November 4, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

In the Matter of the Federal Consistency Certification for Atlantic Shores Offshore Wind South Project	Docket No.: A-002743-23 Civil Action Appeal from the New Jersey Department of Environmental Protection (File No. 0000-21-0022-0022.1, CDT210001; Office of Legal Affairs File No. T24-0060)

BRIEF OF RESPONDENT ATLANTIC SHORES OFFSHORE WIND, LLC

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Dated: February 5, 2025

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PRELIMINARY STATEMENT

This matter is one of multiple legal challenges by Appellants Long Beach Township, Beach Haven, Ship Bottom, Barnegat Light, Surf City, Harvey Cedars, Brigantine, and Ventnor City (collectively, "Appellants") against Respondent New Jersey Department of Environmental Protection ("DEP" or the "Department") to frustrate the development of offshore wind energy resources to serve New Jersey, specifically the proposed projects of Respondent Atlantic Shores Offshore Wind, LLC and its affiliates (collectively, "Atlantic Shores"). Here, Appellants challenge DEP's concurrence with the Coastal Zone Management Act Consistency Certification that Atlantic Shores voluntarily submitted to DEP. DEP's concurrence with the Consistency Certification should be affirmed, as DEP correctly interpreted its own rules and rendered technical findings that are entitled to deference. Further, DEP appropriately denied Appellants' hearing request and followed its established procedures in its review of the Consistency Certification.

Appellants' challenges to DEP's application of its Coastal Zone Management Rules 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 unreasonably establish an impossible standard that no

mitigating or compensating measures could ever meet and that would effectively prohibit any offshore development that would be visible from their beaches. 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. With respect to the Marine Fish and Fisheries Rule, Atlantic Shores' significant mitigating and compensating measures support DEP's finding of consistency. DEP also correctly found consistency with the Surf Clam Areas Rule, as Atlantic Shores' development is limited to its lease area granted by the federal government and the impacts in that area will be minimized. Likewise, DEP correctly found consistency with its Critical Wildlife Habitat Rule; Atlantic Shores' lease area does not constitute a critical habitat for migrating birds because bird activity is concentrated closer to the coastline, and Appellants simply ignore DEP's finding that the project is not likely to adversely affect endangered bird species. DEP's technical expertise in reviewing the Consistency Certification under these rules and issuing its concurrence is entitled to deference.

Appellants' procedural challenges also fail. The Department appropriately denied Appellants' adjudicatory hearing request, as they do not have a particularized property interest giving them a constitutional right to such a

hearing. Neither speculative losses of tax revenue or the potential collateral economic impacts from diminished scenic views give rise to a right to an adjudicatory hearing. Finally, there is no reason for DEP to deviate from its established procedures for reviewing Consistency Certifications because neither the Department nor its decisionmakers were biased, and they certainly did not derive a financial benefit from the decision on Atlantic Shores' application. For these reasons, Atlantic Shores respectfully requests that the Court affirm DEP's concurrence with the Consistency Certification and its denial of Appellants' hearing request.

COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Atlantic Shores' Lease and the Projects

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 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. Pa8.[2] On June 30, 2021, the New Jersey Board of Public Utilities ("BPU") approved Atlantic Shores' 1,510 megawatt

[1] The Counterstatement of Facts and Procedural History are inextricably related and have been combined to avoid repetition for the Court's convenience.
[2] Pa" and "Pb" refers to the Appellants' appendix and brief, respectively.

project as a qualified offshore wind facility and awarded to Atlantic Shores an Offshore Renewable Energy Credit ("OREC") allowance. Id. 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 that will be developed under this BPU OREC award as "Project 1." Pa8. Atlantic Shores contemplates the development of another wind energy generation facility ("Project 2") within the Lease Area. Pa8. Project 1 and Project 2 are referred to herein collectively as the "Projects."[3]

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 renewable sources of energy. Indeed, former Governor Chris Christie signed OWEDA into law in 2010.

[3] 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"). Pa004. 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."

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

More recently, several 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 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).

Federal and State Regulation of New Jersey's Coastal Zone

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.

To that end, 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 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).[4]

Under the CZMA, New Jersey has defined its coastal zone boundaries, and the New Jersey Department of Environmental Protection ("DEP" or the "Department") has adopted enforceable policies to review development within the designated coastal zone, 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).

Atlantic Shores' Permitting Review and Approval

Over the past decade, Atlantic Shores has secured the various federal and related state approvals required for the 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. Pa010. The COP offers a detailed review of the construction and operation activities, including potential

[4] 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.

impacts associated with the Projects and measures to avoid, minimize, and monitor those impacts.

Among other federal approvals, BOEM also undertook a multi-year environmental review of the Projects in connection with its review of the COP per the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., which included multiple stages of public notice and comment. 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. Pa009.

Relevant to this appeal, 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")[5] is consistent with the enforceable policies of the CZM Rules. Pa010. As noted, 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. Pa007-Pa008.

[5] 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.

Appellants' Public Comments on the Consistency Certification and Hearing Request

DEP held three rounds of comment on the Consistency Certification. Appellants submitted initial public comments to DEP by letter dated June 29, 2023, which made detailed arguments concerning the Projects' alleged impacts, including alleged impacts on the views from the beaches in the Appellant municipalities, alleged loss of revenue from discouraged tourism, alleged impacts on the commercial fishing industry, and alleged impacts on whale and bird species. Pa152-Pa179.

The June 29th comment letter also noted Appellants "concern about DEP's ability to impartially review" the Consistency Certification in light of the State's significant policy encouraging offshore wind development. Pa152-Pa153. Because of those concerns, Appellants noted their "plan to request that the [Consistency Certification] be referred for an adjudicatory hearing" in the Office of Administrative Law ("OAL"). Pa153. By letter dated August 14, 2023, Appellants wrote "to suggest that DEP should refer the application to [the OAL]." ASa1. In response, by letter dated October 12, 2023, DEP stated, "[a]t this time, the Department does not believe that the pending application constitutes a contested case under the Administrative Procedure Act such that a

hearing [i.e., the requested adjudicatory hearing before the OAL] would be appropriate."[6] ASa5.

DEP's Consistency Determination

In accordance with the requirements of the CZMA and its implementing regulations, 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 this fulsome review and analysis, on April 1, 2024, DEP issued its decision concurring with the Consistency Certification. Pa001-Pa003. 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 Pa007-Pa052; (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 Pa053-Pa093; and (iii) a Letter of Intent between DEP and

[6] On December 1, 2023, Appellants filed a Complaint in the Chancery Division seeking an injunction ordering DEP to refer the Consistency Certification to the OAL because of DEP's alleged bias in favor of offshore wind development. By Order dated March 28, 2024, the Chancery Division dismissed the Complaint. Appellants appealed this dismissal under Docket No. A-002738-23.

Atlantic Shores committing Atlantic Shores to certain mitigation measures to provide compensation for potential losses to participants in the fishing industry (the "LOI"), see Pa004-Pa006. (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 mitigation measures for each policy area. Among other sources, DEP relied upon the COP and on BOEM's NEPA review in the DEIS to assess consistency with the relevant enforceable policies of the CZM Rules.[7] Pa009-Pa010.

In connection with the Consistency Determination, DEP determined that the Projects are in the public interest. Pa013-Pa015. 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

[7] Following DEP's issuance of the Consistency Determination, on May 23, 2024, BOEM issued the Final EIS (FEIS) for the Projects. 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. On September 30, 2024, BOEM issued its approval of Atlantic Shores' COP. See boem.gov/renewable-energy/state-activities/atlantic-shores-south.

climate change, including rising sea-levels, increases in temperature and precipitation causing periods of both intense storms and drought, and chronic inundation from flooding." Pa013 (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." Pa013. Finally, DEP recognized that the Projects will reduce greenhouse gas emissions and help combat the adverse impacts of climate change. Pa014. DEP further recognized that the Projects will improve the region's electrical reliability and support New Jersey's renewable energy goals. Pa015.

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

Further Hearing Request and this Appeal from the Consistency Determination

By letter to DEP dated April 26, 2024, Appellants again requested an adjudicatory hearing in the OAL regarding the Consistency Determination. Pa186-Pa212. On May 14, 2024, Appellants filed the Notice of Appeal challenging the Consistency Determination. Pa101. After DEP denied the Hearing Request by letter dated June 14, 2024, see Pa094-Pa100, Appellants

amended their Notice of Appeal to add an appeal from the Hearing Denial. Pa106.

Also on May 14, 2024, Appellants requested that DEP stay the Consistency Determination. ASa6-ASa18. DEP denied the stay request by Order dated July 29, 2024. ASa19-ASa39. Subsequently, Plaintiffs moved in this Court for a stay of the Consistency Determination. ASa40. By Order dated September 10, 2024, this Court denied the motion for stay of the Consistency Determination.[8] ASa43-ASa44.

On May 31, 2024, Appellants moved to consolidate this matter with the related appeal from the Chancery Division bearing Docket No. A-002738-23. Pa149-Pa150; see supra note 6. This Court denied the motion to consolidate by Order dated July 15, 2024, which noted that these appeals will be calendared back-to-back and heard before the same panel. Pa149-Pa150.[9]

[8] In denying a motion for a stay, this Court recognized that the Projects are in the public interest. ASa44 (noting "the public's interest in allowing the unimpeded progression of a project intended to meet the energy consumption needs of the State").

[9] The Consistency Determination is also the subject of another appeal bearing Docket No. A-2581-23. This Court declined to consolidate that appeal with this appeal, but noted that that appeal will also be calendared back-to-back and heard before the same panel. Pa151.

ARGUMENT

I. 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). As noted supra at 8, Atlantic Shores voluntarily submitted its Consistency Certification for the Offshore Project located outside of the New Jersey geographic location description where review of projects for CZMA consistency is required. In considering the Consistency Certification, DEP followed the CZM Rules and applied them to the record evidence, including the scientifically-driven data and information from the COP and BOEM's DEIS and public input, to find that the Offshore Project is consistent with the CZM Rules. In making this 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 substantial expertise as the agency with regulatory responsibility for the coastal zone and resources at issue in this

appeal, including energy facilities, critical wildlife habitats, fisheries and viewsheds. While Appellants may disagree with the result, the Consistency Determination is supported by substantial credible evidence in the record, and DEP's decision 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). "[T]he burden of proving unreasonableness falls upon those who challenge the validity of the action." Smith v. Ricci, 89 N.J. 514, 525 (1982).

Further, courts extend substantial deference to an agency's interpretation of its own regulations. DiMaria v. Bd. of Trs. of Pub. Employees' Ret. Sys., 225 N.J. Super. 341, 351 (App. Div. 1988); 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).

Courts also defer to an agency's expertise on 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"). "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).

Finally, "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). Here, DEP's review of the Consistency Certification and various coastal resources at issue involves these competing considerations and DEP's decision balancing them is entitled to deference. 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 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).

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

Appellants challenge DEP's finding that the Offshore Project complied with the Scenic Resources and Design Rule ("SRD Rule"), N.J.A.C. 7:7-16.10. They allege that the Offshore Project is "discouraged" under the SRD Rule and that DEP failed to find any mitigating or compensating measures that would result in a "net gain" to what they allege to be the coastal resource of concern,

their beach vistas. See Pb25 (asserting that the SRD Rule "required a 'net gain in quality and quantity' of scenic resources – i.e. beach vistas – for the turbines to be approved." (citing N.J.A.C. 7:7-1.5 and N.J.A.C. 7:16-10)); Pb27-28 ("there is no required mitigation that will result in any benefit to scenic resources."). Accepting Appellants' position, the Offshore Project could never offer sufficient mitigating or compensating measures because it would be visible from their beaches and thus would effectively be prohibited rather than discouraged.

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 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.

Under the SRD Rule, "[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).[10] "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 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

[10] 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." Pa047–Pa050.

> 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).

Here, DEP found that "the construction of Atlantic Shores' offshore wind farms and associated infrastructure is in the public interest," Pa047, which Appellants do not dispute. Contrary to Appellants' assertion, DEP's analysis did not stop there. Pb26. Rather, 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.

While DEP analyzed the SRD Rule and correctly found that the Offshore Project met the requirements of the Rule, the SRD Rule does not apply to offshore wind development in the first instance. The SRD Rule 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 rule does not apply to the Offshore Project. 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 these 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 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.

Appellants urge this Court to disregard DEP's interpretation of the SRD Rule in favor of their unduly restrictive reading of the Rule that effectively prohibits the Offshore Project. This Court should reject these efforts and defer to DEP's reasonable interpretation of its own regulations.

1. "Discouraged" should not be interpreted so narrowly, such that it effectively prohibits most offshore wind activities.

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 offshore wind development that is visible from the shore. Essentially Appellants argue that there are no mitigating or compensating measures, short of not building the Offshore Project, that Atlantic Shores could

offer to adequately address the alleged impact on scenic resources. 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 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.

Appellants' attempt to analogize this case with In re Stream Encroachment Permit is unavailing. Pb27-Pb28. In that case, this Court upheld wetlands mitigation offered by the developer in connection with the development of the Meadowlands Xanadu project where the developer proposed to preserve 587 acres of wetlands offsite. 402 N.J. Super. at 605-06. Here, Atlantic Shores cannot preserve the resource in the same manner as in the Xanadu project, as there is no mechanism for Atlantic Shores to preserve scenic views in another location. That is, submerged lands under the ocean are under the jurisdiction and ownership of the State and Federal governments and their use cannot be restricted in the same way as privately held land, so Atlantic Shores or other developers do not have the ability to preserve the resource by restricting offshore development in other areas. The term "discouraged" should not be interpreted the same way with respect to wetlands, where in-kind mitigation is possible, and scenic resources, where it is not. N.J.A.C. 7:7-1.1(e) ("interpretations of terms [used in the CZM Rules] may vary depending upon the context of the proposed use, location, and design").

2. "Coastal resource of concern" cannot be read to mean only Appellants' specific beach vistas, so as to negate the mitigating and compensating measures offered by Atlantic Shores to scenic resources generally.

Appellants further argue that the "coastal resource of concern" under the SRD Rule should be read narrowly to mean the ocean views from their beaches, and object to the Offshore Project because of the alleged impact to their beach vistas without any regard for the mitigating and compensating measures offered by Atlantic Shores to the State's overall scenic resources. See Pb25. Appellants' overly narrow interpretation of the phrase "coastal resource of concern" is not supported by the CZM Rules and DEP ultimately interpreted its rules to take a more holistic approach in considering scenic resources generally, i.e., the overall viewshed from the State's waterfront, including beaches from Seaside Park to Cape May Point State Park. Pa047-Pa048. DEP's interpretation of the term "coastal resource of concern" is entitled to deference. DiMaria, 225 N.J. Super. at 351; In re Kenneth Nicosia Flood Hazard Gen. Permit by Certification, 479 N.J. Super. at 377; S.J. v. Div. of Med. Assistance & Health Servs., 426 N.J. Super. at 374.

As discussed further herein at Section II.D, in applying this view of the "scenic resource of concern," DEP recognized that Atlantic Shores will undertake mitigation measures intended to reduce the visual impact of the Offshore Project, as well as studies and monitoring that will benefit the overall

viewshed from the State's waterfront. Pa047-050; Pa068-070. For example, Atlantic Shores committed to a scenic and visual resources monitoring plan, which will compare the visual impacts during construction, operation, and maintenance phases of the project. Pa050; Pa069-070. DEP explained that the plan and associated research will accelerate "the science of accurately simulating and evaluating visual impacts from offshore wind." Pa069-Pa070. DEP's analysis and determination surrounding mitigating and compensating measures is entitled to deference. Campbell, 169 N.J. at 588. Appellants' demand that all impacts be avoided is not contemplated under the law. As such, DEP's finding that the Offshore Project is consistent with the SRD Rule was not arbitrary and capricious.

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 were 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). 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

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.[11]

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

[11] The Projects are an "energy facility" under the EF Rule. N.J.A.C. 7:7-15.4(a); Pa034-Pa037 (DEP's Environmental Analysis discussed the application of the EF Rule to the Offshore Project).

interplay between the SRD Rule and the EF Rule, see Pa068, 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. Pa50. 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. This decision is well supported by the record evidence and entitled to deference. 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. Pa048; Pa068-069. 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. Pa048. 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." Pa048-Pa049. Finally, DEP stated that the Offshore Project "ha[s] been designed to minimize visual impacts to the maximum extent feasible with the limits of Atlantic Shores' acquired Lease Area, preventing further movement from the shoreline." Pa049; Pa068.

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." Pa049; Pa069. In addition, DEP 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. Pa049; see also Pa069. Lastly, DEP 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." Pa050; Pa069-070. DEP recognized that this measure would "support the science relevant to simulating and evaluating potential scenic and visual effects associated with offshore wind development." Pa050; Pa069. 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. Id. DEP correctly

found that all of these efforts taken as a whole will benefit New Jersey's overall scenic resources.

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

Appellants' challenge to DEP's findings regarding the Marine Fish and Fisheries rule must also fail. See Pb29-Pb31. 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). As noted supra at 19, the CZM Rules allow discouraged coastal development that DEP considers to be in the public interest provided mitigating or compensatory measures can be taken. N.J.A.C. 7:7-1.5.

Appellants do not dispute DEP's finding that the Offshore Project is in the public interest. Instead, Appellants again 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.

Contrary to Appellants' attempts to reduce DEP's analysis to a single statement regarding no "net loss" to marine fish and fisheries, see Pb30, DEP devoted significant analysis to the Offshore Project's compliance with the

Marine Fish and Fisheries rule. DEP's findings regarding the Offshore Project's impacts to this resource and its conclusions regarding Atlantic Shores' mitigating and compensatory measures is based on the Department's specialized knowledge and technical expertise and its interpretation of its own regulations and therefore are entitled to deference. See Campbell, 169 N.J. at 588; In re Thomas Orban/Square Props., 461 N.J. Super. at 72.

DEP carefully reviewed the Offshore Project's potential impacts on marine fish and fisheries and acknowledged that the Offshore Project may have certain localized and short term impacts:

- "[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." Pa038.

- Impacts on finfish and invertebrates from the installation of cables would similarly be "short term" and "localized." Pa038-039.

- "Based on empirical evidence and laboratory investigations, the observed impacts to marine biota and ecosystems are considered to be minor or short-term." Pa039.

- "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." Pa041.

- "Given the small scale at which hydrological changes from the Project would occur, BOEM expects impacts on finfish and invertebrates to be negligible." Pa041.

- "[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" Pa041.

While acknowledging certain other long-term impacts, DEP found that the Offshore Project may offer beneficial impacts to some marine fish and fisheries. Pa042; Pa065. For example, DEP 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." Pa042. Further, 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." Pa042; Pa065.

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. Pa045.

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. Pa038; Pa084.

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. Pa066.

DEP also detailed additional specific 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 Pa038; Pa084, measures to avoid, minimize, and mitigate impacts of pile-driving noise on finfish and invertebrates, see Pa041; Pa084, 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 Pa044; Pa067. In addition, DEP noted Atlantic Shores committed to ongoing efforts to communicate with regulatory agencies and industry stakeholders. Pa044; Pa066-067.

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 (discussed further at Section IV. herein). Pa043-044 (referring to the Surf Clam rule section at Pa017 and Pa080). 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. Pa043-044. 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. Pa044. 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." Pa017; Pa080.

Finally, recognizing the need to compensate for 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. Pa044; Pa067. DEP further noted that BOEM is proposing a requirement for Atlantic Shores to conduct an analysis of impacts on shoreside seafood businesses in ports that are expected to be impacted by the Offshore Project. Id.

As noted, notwithstanding DEP's comprehensive findings regarding the mitigating and compensating measures offered by Atlantic Shores, Appellants unsuccessfully attempt to reduce DEP's comprehensive analysis to its one statement that there "will not be a net loss in the quality and quantity of the

coastal resources of concern" 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. See Pb30. 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, DEP offered extensive fact-finding and justification in support of the Offshore Project's compliance with the Marine Fish and Fisheries rule based on its agency expertise and interpretation of its own regulations. Even without uttering magic words, DEP determined that the mitigating and compensating measures offered by the Offshore Project, 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 is entitled to deference.

IV. DEP CORRECTLY FOUND THAT THE OFFSHORE PROJECT IS CONSISTENT WITH THE SURF CLAM AREAS RULE.

Appellants similarly challenge DEP's determination that the Offshore Projects meet the Surf Clam Areas rule. Pb31-33. This argument is equally unavailing.

The CZM Rules regulate development in Surf Clam Areas, which are "coastal waters which can be demonstrated to support significant commercially harvestable quantities of surf clams, or areas important for recruitment of surf clam stocks." N.J.A.C. 7:7-9.3(a). Development resulting "in the destruction, condemnation, or contamination of surf clam areas is prohibited except" when it is in the national interest, "there are no prudent and feasible alternative sites[,] and the impacts to the surf clam area are minimized." N.J.A.C. 7:7-9.3(b).

While Appellants do not dispute that offshore wind projects are in the national interest, Appellants take issue with DEP's findings regarding alternative sites and minimization of impacts. Pb31-33.

First, Appellants assert that DEP failed to "acknowledge that [the Projects] could be constructed elsewhere" and argue that another lease area along the east coast should have been considered as an alternative that would have precluded development in the Lease Area. Pb32. In determining that "there

is no other prudent or feasible alternative to the location of the [Offshore Project],” DEP reasoned:

> The [Offshore Project] must be confined to Atlantic Shores’ Renewable Energy Lease Area OCS-A 0499 designated by BOEM and acquired by Atlantic Shores through a competitive leasing process for offshore wind development. Atlantic Shores does not have the ability to construct the [Offshore Project] outside of the limits of the Lease Area. Pa016-Pa017; Pa079.

DEP’s determination is supported by federal regulations for offshore wind leasing, 30 C.F.R. part 585, and sufficient credible evidence in the record and is consistent with the CZM Rules. The CZM Rules provide that “the interpretation of terms, such as ‘prudent’, ‘feasible’ … as used in a rule or 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). Here, DEP sensibly found that there is no prudent and feasible alternative site to Atlantic Shores’ federally approved Lease Area. Atlantic Shores was awarded the Lease in 2015, holds legally-protected interests in the Lease, and has spent considerable time and resources to develop a plan for construction of the Projects in this Lease Area—bidding, planning, assessing the site, and developing a plan for construction and operation of wind turbines, which culminated in the submission of dozens of federal and state permit applications for the development of the Lease Area. It is infeasible to relocate the Projects, as their current location was determined years ago through the conveyance of federal lease interests to Atlantic Shores. In addition, multiple

offshore wind facilities, not just this one, may be developed off the coast of New Jersey. Precluding development in this Lease Area because, as Appellants' argue, other lease areas might someday be developed at some later date in a location they prefer would imprudently and unwisely reduce the overall supply of renewable energy in New Jersey and delay the development of this important resource.

DEP's interpretation of its own regulations on this point is entitled to substantial deference. DiMaria, 225 N.J. Super. at 351; In re Kenneth Nicosia Flood Hazard Gen. Permit by Certification, 479 N.J. Super. at 377; S.J. v. Div. of Med. Assistance & Health Servs., 426 N.J. Super. at 374. Indeed, deferring to DEP's expertise, this Court upheld a similar finding that there was no prudent or feasible alternative in connection with the issuance of a permit for the development of the Meadowlands Xanadu project as the site was geographically limited. In re Stream Encroachment Permit, 402 N.J. Super. at 593, 604 ("The only alternative is to drastically cut back the project, which the NJDEP has concluded is not prudent or feasible."). Likewise, Atlantic Shores is limited to developing the Offshore Project within the Lease Area and this Court should rely on the expertise of DEP in making this determination.

Next, Appellants contend that DEP's discussion of the minimization measures do not sufficiently address what Appellants allege to be permanent

impacts from turbine installation. Pb33. Appellants further allege that "the remainder of the measures discussed consisted only of monitoring and studies on impacts, but no measures to address the impacts of this specific project." Id. While Appellants may disagree with DEP on the sufficiency of these measures, DEP's interpretation of its regulation is entitled to deference. Additionally, DEP is shown "great deference" in applying its expertise when balancing development and conservation. In re Stream Encroachment Permit, 402 N.J. Super. at 597. Here, DEP thoroughly discussed numerous actions Atlantic Shores will take to minimize the impacts of the Offshore Project. See Pa016-018; Pa078-081. Specifically, DEP recognized that Atlantic Shores will use "low impact installation techniques that limit substrate disturbance and sediment suspension" when installing electric transmission cables. Pa017; Pa079. Further, as noted in Section III. infra, DEP highlighted that Atlantic Shores had committed to groundbreaking and important research monitoring and scientific studies to contribute to a better understanding of the resource and the potential impacts of offshore wind activities. Pa017; Pa080. In addition, DEP noted that Atlantic Shores committed to comprehensive monitoring that would document baseline environmental conditions and continue to monitor conditions throughout construction and installation, O&M, and decommissioning of the Projects. Id. Specific to surf clams, DEP also recognized that Atlantic Shores

committed to implement a Hydraulic Clam Dredge Survey to analyze the potential effects of the Projects and a monitoring program for the purpose of identifying significant changes to the resource before and after construction as set forth in the COP. Pa017-018; Pa080.

Collectively these activities will help minimize the impacts of the development of offshore wind in the Lease Area, which is what the rule requires. Contrary to Appellants' arguments, where, as here, there is no prudent and feasible alternative to the development, impacts of turbine installation can be minimized in compliance with the rule even if they are not eliminated. As such, Appellants have not shown that DEP's determination that the impacts from the Offshore Project are minimized is arbitrary.

V. DEP CORRECTLY FOUND THAT THE OFFSHORE PROJECT IS CONSISTENT WITH THE CRITICAL WILDLIFE HABITAT RULE.

Appellants' arguments with respect to the Critical Wildlife Habitat rule ignore the Department's well-supported findings on the Offshore Project's potential impact on birds and their habitats and instead rely on information outside of the record. See Pb35.

Critical wildlife habitats are "specific areas known to serve an essential role in maintaining wildlife, particularly in wintering, breeding, and migrating."

N.J.A.C. 7:7-9.37(a). Whether a site contains critical wildlife habitat is determined on a case-by-case basis. N.J.A.C. 7:7-9.37(a)(3).

DEP's Environmental Analysis provides:

> Critical wildlife habitat within the coastal zone consists of patches of woody vegetation along the Atlantic seaboard to serve a critical role in providing resting and foraging habitat for migratory birds. Within the coastal zone mainland, patches of woody vegetation (i.e., trees, scrub-shrub, etc.) equivalent to 20 acres in size and greater function as migratory bird stopover habitat. Pa031.

DEP correctly determined that "no activities are proposed within defined critical wildlife habitat" as described above. Id. It further found that the Offshore Project does not contain any ecotones, or edges between two types of habitats or rookeries for colonial nesting bird species. Id.; see N.J.A.C. 7:7-9.37(a)(1), (2). To the extent that birds may pass through the Lease Area, the Department noted that the federal government selected "the OCS offshore wind lease areas [including Atlantic Shores' Lease Area] to minimize impacts on all resources, including birds" and that "much of the bird activity [within the Atlantic Flyway] is concentrated along the coastline," not further offshore within the Lease Area. Pa031. These determinations fall squarely within DEP's technical expertise and should be upheld. See Campbell, 169 N.J. at 588; In re Thomas Orban/Square Props., 461 N.J. Super. at 72.

Appellants argue, based on evidence outside the record, that DEP erred when it failed to identify the Lease Area as a "natural corridor for wildlife

movement" under the Critical Wildlife Habitat rule because certain bird species may migrate through this area. Pb35. In support of this argument, Appellants rely on studies that were referenced, but not submitted for DEP's consideration, in connection with their June 29, 2023 comments to DEP. Pa177. These studies are not identified on DEP's Statement of Items Comprising the Record and do not constitute part of the record on appeal pursuant to R. 2:5-4. To the extent Appellants now seek to inappropriately rely on these studies for the first time on appeal, this Court should disregard them. See State v. Golotta, 178 N.J. 205, 211-12 (2003) (declining to consider material outside the appellate record especially because the party proffering the material had "ample opportunity … to present it at the proper forum" but did not).

Nevertheless, DEP's decision that the Offshore Project complies with the Critical Wildlife Habitat rule is well supported by record evidence. As noted, the Department found that the Lease Area was chosen to "minimize" impacts on birds and that much of the bird activity within the Atlantic Flyway occurs closer to the coast. Pa031; Pa077. Having found that the impacts on birds would not be significant, even though "birds may pass through the area," DEP acted well within its discretion in determining that the Lease Area does not "serve an essential role" as a habitat for migrating birds and thus is not a critical wildlife habitat. Id.; N.J.A.C. 7:7-9.37(a).

DEP's findings regarding the Critical Wildlife Habitat rule are further supported by its extensive findings regarding endangered bird species in its consideration of the Endangered or Threatened Wildlife or Plant Species Habitats rule (N.J.A.C. 7:7-9.36). Pa028-Pa029; see also Pa031 (cross-referencing discussion regarding endangered bird species). There, DEP found that any activity of these protected species in the area of the Offshore Project was minimal and, relying on the DEIS, recognized that the Offshore Project was unlikely to adversely affect these bird species. Pa028-Pa029; see also Pa076. DEP also recognized the comprehensive measures Atlantic Shores proposed "to avoid and/or minimize potential impacts to bird species:" limiting lighting during offshore operations, using perch deterrents, reducing the number of hours FAA lighting will be illuminated, removing marine debris caught on project structures, and developing and implementing an avian post-construction monitoring plan to assess any Project impacts on bird species. Pa029. Notably, Appellants have not challenged DEP's application of the Endangered or Threatened Wildlife or Plant Species Habitats rule nor the Department's determination that the Offshore Project is "not likely to adversely affect" endangered bird species. Id.

As the agency charged with making consistency determinations under the CZMA, DEP, in consultation with BOEM and USFWS, has the discretion and

agency expertise to evaluate the available scientific and ecological data and information and make the appropriate findings regarding the Offshore Project's impact on bird species and their habitats. See Mercer County Deer Alliance v. Dep't of Envtl. Prot., 349 N.J. Super. 440, 449 (App. Div. 2002) ("It was clearly within the discretion of the [agency] to evaluate the available scientific literature and professional opinion and to determine which of various theories and approaches to adopt."). DEP's conclusion that the Lease Area is not a critical wildlife habitat is well within its technical expertise and entitled to deference.

VI. DEP CORRECTLY DENIED APPELLANTS' HEARING REQUEST.

DEP denied Appellants' request that the Consistency Determination be referred to the OAL for an adjudicatory hearing because Appellants do not have a constitutional right to such a hearing. Specifically, DEP found that (1) municipalities do not have a constitutionally protected right to maintain a certain amount of tax revenue, and (2) economic losses of any kind, including speculative losses of tax revenue, arising from the aesthetic visual impacts of a development are not a constitutionally protected property interest. Pa098-Pa099. Appellants' brief fails to rebut DEP's application of this well-settled law. The Hearing Denial should be affirmed.

A matter is a "contested case" under the Administrative Procedure Act requiring an adjudicatory hearing only where the Constitution or a statute

requires such a hearing. N.J.S.A. 52:14B-2 (definition of "contested case"); In re Request for Solid Waste Util. Customer Lists, 106 N.J. 508, 517 (1987); In re Xanadu Project at Meadowlands Complex, 415 N.J. Super. 179, 193 (App. Div. 2010). Appellants do not assert a statutory right to an OAL hearing. See Pb38-Pb42. To have a constitutional right to an adjudicatory hearing, third-parties like Appellants seeking to challenge an agency permit must have a "particularized property interest" at stake. In re Riverview Dev., LLC, 411 N.J. Super. 409, 426 (App. Div. 2010); see also Application of Rockland Elec. Co., 231 N.J. Super. 478, 490 (App. Div. 1989).

Appellants claim that they "indeed hold a particularized property interest … that entitles them to an adjudicatory hearing," relying on their "property interest in collecting tax revenue" and asserting an interest in "safeguarding their local economies on behalf of their residents and businesses." Pb39-Pb40. Citing their own Hearing Request, Appellants speculate that construction of the Projects "inevitably" will decrease tourism at the popular beaches of Long Beach Island, which could depress economic activity and property values, which in turn will reduce their tax collections. Pb39.

These arguments ignore the well-established authority, cited by DEP in its Hearing Denial, holding that the Due Process Clause "is no protection against inequality of tax burdens." B & L Motor Freight, Inc. v. Heymann, 120 N.J.

Super. 270, 282 (Ch. Div. 1972) (citing Gomillion v. Lightfoot, 364 U.S. 339, 343 (1960)), overruled on other grounds, Private Truck Council v. State, 221 N.J. Super. 89 (App. Div. 1989); see also Camden v. Byrne, 82 N.J. 133, 158 (1980) ("even though local government might find itself handcuffed by statutory fiscal limitations, this Court is powerless to remove these handcuffs"); Pa098 (DEP Hearing Denial citing the foregoing authority). Loss of tax revenue is not a "particularized property interest."

Further, this Court has held that feared economic losses that might result from visual impacts of a development seeking a DEP permit are not a particularized property interest creating a constitutional right to an adjudicatory hearing on that permit. In re Riverview Dev., LLC, 411 N.J. Super. 409, 426 (App. Div. 2010).

> [T]he collateral economic impacts upon surrounding properties caused by the siting of an otherwise-lawful building are part and parcel of the social compact. They result from the unavoidable interrelatedness of living in a world surrounded by other persons and by other things.
>
> If we were to hold that such collateral economic impacts automatically entitled neighboring property owners to a formal hearing in the OAL each time a State permit is issued for, say, a sewerage treatment plant, a group home, a new prison, or some other building that could depress surrounding property values, the construction of those and other important structures might be thwarted or unduly delayed, at great cost to the public. That surely would be contrary to the interests of the citizens as a whole. The Legislature recognized this problem by adopting strict limitations on third-party hearing rights in the APA.

Id. at 435-36. The Court in Riverview held that the appellants' expert report estimating a 20% reduction (on average) in their home values resulting from visual impacts of a proposed development that would block their view of the Hudson River and New York City skyline did not establish a particularized property interest requiring an OAL hearing. Id. at 429. Here, too, Appellants' similar claim projecting a 25% reduction in tourist visits because of a changed view from the beach is insufficient. Pa203. Under Riverview, these speculative economic losses do not entitle Appellants to an adjudicatory hearing—whether those losses allegedly will be suffered by Appellants themselves in the form of reduced tax revenues or whether Appellants seek a hearing to vindicate indirectly the property rights of their citizens.[12]

The sole authority on which Appellants rely to support their claim of entitlement to an adjudicatory hearing—In re Application of John Madin/Lordland Development International, 201 N.J. Super. 105 (App. Div. 1985) ("Madin")—is inapposite. Pb41. In Madin, the court held that municipalities had a right to a hearing regarding Pinelands Commission approvals of development located in those municipalities. Madin, 201 N.J.

[12] Appellants provide no support for their claim of entitlement to an OAL hearing "on behalf of their residents and businesses." Pb40. To the contrary, "it has been held that a municipality may not attack the actions of other state agencies solely on the thesis that it represents its citizen taxpayers." Cty. of Bergen v. Port of N.Y. Auth., 32 N.J. 303, 315 (1960).

Super. at 123-28, 136-37. Here, on the other hand, the Offshore Project is located outside of the Appellant municipalities in an area of exclusively federal jurisdiction over which Appellants cannot exercise land use controls. See id. at 134 (granting municipalities an OAL hearing with respect to Pinelands Commission decision because Commission action was "generally akin to land use regulation."). And the court in Madin did not rely on the impacts of the proposed development on the municipalities' tax revenues as a basis for finding a hearing right. DEP correctly found that Appellants lacked a particularized property interest that would have required an adjudicatory hearing on the Consistency Determination.

VII. DEP APPROPRIATELY FOLLOWED ESTABLISHED PROCEDURES TO REVIEW THE CONSISTENCY CERTIFICATION NOTWITHSTANDING APPELLANTS' COMPLAINTS OF PECUNIARY BIAS.

Point II of Appellants' brief vaguely claims that "DEP should have been precluded from considering Atlantic Shores' application" because "Governor Murphy's executive agenda created an impermissible pecuniary bias." Pb36. However, DEP cannot be "precluded" altogether from rendering a determination on an applicant's consistency certification. DEP is the agency designated to render consistency determinations in New Jersey under federal law—the CZMA—pursuant to the New Jersey's federally-approved Coastal Management Plan. 16 U.S.C. § 1456(c)(3)(A); N.J.A.C. 7:7-1.2(e).

Carrying Appellants' argument to its logical conclusion would mean that no decision on the Consistency Certification could ever be rendered.[13] As demonstrated below, Appellants have failed to demonstrate any bias on the part of DEP; however, even if any bias existed, the rule of necessity would have permitted DEP to render a decision on this issue of public importance. See In re P.L. 2001, Chapter 362, 186 N.J. 368, 393 (2006) ("The rule of necessity forbids the disqualification of the entire judiciary from hearing a case even if there is some perception that the result may be tinged by self-interest."); Cranberry Lake Quarry Co. v. Johnson, 95 N.J. Super. 495, 518-21 (App. Div. 1967) (upholding local ordinance under the rule of necessity notwithstanding potential conflict of interest of a majority of the township committee members).

Presumably, Appellants instead are arguing that an interim determination should be rendered by an administrative law judge in the OAL before DEP makes its final determination. See N.J.S.A. 52:14B-10(c) (APA provides that agency head makes final decision after ALJ's initial decision); Pb38 (suggesting "referral of the application to a[n unnamed] neutral tribunal"). This Court has rejected referral to the OAL as a remedy for the supposed bias of an agency

[13] If DEP were in fact "precluded" from rendering a decision on the Consistency Certification as Appellants posit, DEP's concurrence would be conclusively presumed. 15 C.F.R. § 930.62(a) ("Concurrence by the State agency shall be conclusively presumed if the State agency's response is not received within six months following commencement of State agency review.").

decisionmaker who had supported a particular policy. In re Application of N.J. Bell Tel. Co., 291 N.J. Super. 77, 97-98 (App. Div. 1996) ("transmission to the [OAL] for hearing as a contested case, was, simply, unsuited for the purpose" of curing alleged bias). Thus, the decision on a federal consistency certification ultimately must rest with DEP.

In any event, DEP's established procedures for rendering decisions on consistency certifications were entirely appropriate here. Appellants fail to demonstrate bias requiring referral to the OAL or the use of any different procedure. They argue that government decisionmakers should be disqualified where there is an "impermissible pecuniary interest." See Pb35. The cases cited by Appellants found such a pecuniary interest when either (1) the government decisionmaker stands to reap a personal financial benefit from the decision in question, or (2) there is a "structural" pecuniary bias in the absence of a personal financial benefit because the decision may result in the agency itself receiving money that would be a material source of its funding. Yamaha Motor Corp., U.S.A. v. Riney, 21 F.3d 793, 796-98 (8th Cir. 1994) (personal benefit to decisionmaker); All Am. Check Cashing, Inc. v. Corley, 191 F. Supp. 3d 646, 664 (S.D. Miss. 2016) (structural bias); Esso Standard Oil Co. (P.R.) v. Mujica Cotto, 389 F.3d 212 (1st Cir. 2004) (structural bias); see also Pb36-Pb37 (citing the foregoing cases).

Appellants fail to identify a pecuniary bias here like the bias that was present in those distinguishable cases. That is, Appellants do not argue that DEP decisionmakers individually or the agency itself will receive any *financial* benefit from a decision for or against Atlantic Shores on the Consistency Certification. Rather, they make conclusory allegations that "DEP faced obvious and significant political pressure" regarding Atlantic Shores' application "[g]iven Governor Murphy's strong public positions and administrative directives" generally favoring the development of offshore wind energy resources. Pb37. But merely doing one's job in accordance with governing statutes and regulations under speculated "political pressure" is not a pecuniary benefit and does not present a disqualifying bias.

Indeed, it is well settled that there is no disqualifying bias even when the decisionmaker has expressed a view on the policy issues implicated by the decision. Matter of Carberry, 114 N.J. 574, 585 (1989); Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268, 280-82 (1965). As our Supreme Court held,

> [T]his is the democratic process; and it would be contrary to the basic principles of a free society to disqualify from service in the popular assembly [with respect to a disputed ordinance] those who had made pre-election commitments of policy on issues involved in the performance of their sworn legislative duties. Such is not the bias or prejudice upon which the law looks askance.

Wollen v. Borough of Fort Lee, 27 N.J. 408, 421 (1958). Thus, the fact that the Governor has adopted policy initiatives in support of offshore wind, and state

agencies within the executive branch are required by law to exercise permitting authority over development that would support that initiative, does not amount to biased conduct. Appellants cannot overcome this well-settled law by mischaracterizing their complaints about the Governor and DEP as a pecuniary bias, when it is really a political disagreement with the State's lawfully established energy policy.

The aspects of the record to which Appellants point consist largely of disagreements with the result DEP reached and certainly do not establish a pecuniary bias or disqualifying bias. See Pb37-Pb38. DEP reasonably relied on the analysis of BOEM's extensive DEIS. See Pa301-Pa486 (Appellants' appendix includes lengthy excerpts from DEIS). The extraordinary remedy of disqualification is not warranted simply because DEP did not reach Appellants' desired result—precluding Atlantic Shores from developing on its Lease Area because Appellants would prefer the Offshore Project be located somewhere else. See Pb38 (criticizing DEP's "refusal" to use a different lease area unavailable to Atlantic Shores as an alternative). Finally, cooperation among Atlantic Shores, DEP, and BOEM in establishing conditions on the Consistency Determination is not untoward. See Pb37-Pb38 (criticizing DEP for "providing

its draft conditions of approval to Atlantic Shores for its review").[14] To the contrary, federal regulations *encourage* "the applicant and the State agency … to agree upon conditions, which, if met by the applicant, would permit State agency concurrence" with a consistency certification and also envision consultation with the federal agency on appropriate conditions for state concurrence. 15 C.F.R. § 930.62(d). Further, DEP is a cooperating agency in BOEM's NEPA process to prepare the EIS. 43 C.F.R. § 46.225(c). No pecuniary bias existed here, and, under well settled law, remand to DEP to follow some different procedure would be wholly inappropriate and unnecessary.

[14] Appellants' exaggerated characterization of this coordination as somehow inappropriate is disingenuous. The record reflects that Atlantic Shores merely "suggest[ed] some minor change to the language of [a] condition to eliminate the construction from the scenic and visual resource monitoring plan," while remaining committed to providing a scenic and visual resource monitoring plan that compares the visual effects of the actual operation and maintenance phase of the Offshore Project, recognizing that any visual impacts during the construction phase would be temporary and transient. See Pa666-67; Pa680-84.

CONCLUSION

For the foregoing reasons, the Appellate Division should affirm the DEP's Consistency Determination and its denial of Appellants' hearing request.

Respectfully submitted,

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Steven T. Senior

Date: February 5, 2025

4908-3581-4407, v. 21

	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-2743-23
IN THE MATTER OF THE FEDERAL CONSISTENCY CERTIFICATION FOR ATLANTIC SHORES OFFSHORE WIND SOUTH PROJECT	CIVIL ACTION ON APPEAL FROM A FINAL DECISION OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION

BRIEF OF RESPONDENT
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

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[1] "Pa" refers to the Appellants' appendix.

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"), which is proposed for construction in the Atlantic Ocean off the New Jersey coast, is consistent with the State's enforceable coastal policies? DEP properly issued its consistency determination in accordance with the 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 because it will 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, DEP found that the Project would be consistent with New Jersey's enforceable coastal zone policies. DEP acted within its delegated authority and its decision is reasonable and supported by the record.

Appellants are eight municipalities—Long Beach Township, Beach Haven, Ship Bottom, Barnegat Light, Surf City, Harvey Cedars, Brigantine, and Ventnor City (the "Municipalities")—who disagree with DEP's consistency determination. The Municipalities' mere disagreement with DEP's reasoned

decision fails to overcome the presumption of validity granted to a properly issued agency determination. Likewise, their claim that the entire DEP was too biased to consider the consistency application is not supported by the record or the law, and their argument that possible reduced tax revenue constitutes a particularized property interest sufficient to require an administrative hearing is speculative.

Accordingly, this court should affirm DEP's consistency determination and adjudicatory administrative hearing request denial.

COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY[2]

Given the complexity of issues here, a summary of the statutory and regulatory framework that form the basis of DEP's decision as well as 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. 43 U.S.C. § 1312 (extending coastal States' "seaward boundaries to a line

[2] The facts and procedural history are intertwined and combined here for efficiency and the Court's convenience.

three geographic miles distant from its coastline"); 43 U.S.C. § 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 zone management programs, which the federal government supports through grants. 16 U.S.C. § 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 enforeceable 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[.]" Id. § 1456(c)(3)(A). The National Oceanic and Atmospheric Administration ("NOAA") administers the CZMA, 15 C.F.R. § 923.1(a) 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"). Id. § 930.1(a).

Offshore wind structures are also subject to the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 to 1356 ("OCSLA"), which governs submerged lands lying three miles offshore seaward of state coastal waters that are under federal jurisdiction. 43 U.S.C. § 1331, 1312. Under OCSLA, the Bureau of Ocean Management ("BOEM") within the United States Department of the Interior administers offshore lease areas for various activities and reviews lease area projects, including offshore wind projects. 43 U.S.C. §§ 1332 to 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 the project may be constructed. 30 C.F.R. § 585.620. BOEM's offshore wind project 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 also undertake an environmental review under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321–4347, before approving the COP. NEPA review consists of an environmental impact statement ("EIS") that "may make use of any reliable data source," 42 U.S.C. § 4336(b)(3)(A), to assess "the environmental impact of proposed agency actions." 40 C.F.R. § 1502.2(g). An EIS is prepared in two stages: the draft ("DEIS") and final ("FEIS") versions. Id. § 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 the 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 the comments before issuing an FEIS. 40 C.F.R. §§ 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 is the lead State agency that 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. These rules regulate activities under three statutes: the Waterfront Development Act, N.J.S.A. 12:5-1 to

-11, the Wetlands Act of 1970 ("Wetlands Act"), N.J.S.A. 13:9A-1 to -10, and the Coastal Area Facility Review Act ("CAFRA"), N.J.S.A. 13:19-1 to -51.

New Jersey's coastal waters, over which New Jersey retains jurisdiction, cover all State tidal waters extending from the mean high-water line waterward to the three-geographical-mile limit of the New Jersey territorial sea, 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 own 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); see also 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 prior to making a final decision, and then considers the received submissions. 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 determination. 16 U.S.C. § 1456(c)(3)(A); see also 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. Id. § 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, however, the federal agency rejects the conditions, the concurrence is treated as an objection. Id. § 930.4(b). The Secretary's decision may then be reviewed in federal district court. Ibid.; see also 16 U.S.C. § 1456(c)(3)(A). Thus, DEP review is limited to finding consistency. 16 U.S.C. § 1456(c)(3)(A); see also 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 to 1334, 1337(p); 30 C.F.R. § 585.101. (Pa1; Pa35).[3] The Project

[3] "Pb" refers to the Appellant Municipalities' brief in support of their appeal. "Pa" refers to the Appellant Municipalities' appendix. "Ra" refers to DEP's appendix submitted with this brief in opposition to the appeal.

includes infrastructure for about 200 total wind turbine generators extending to a maximum height of approximately 1,046.6 feet above mean sea level, up to 10 offshore substations, one meteorological ("met") tower, interarray and interlink cables, and up to eight transmission cables making landfall at Atlantic City and in Sea Girt. (Pa1; Pa10–11). See also Atlantic Shores South, Project Overview, BOEM, [redacted]boem.gov/renewable-energy/state-activities/atlantic-shores-south (last visited Feb. 7, 2025). The Project is proposed 8.7 miles from the New Jersey shoreline at its closest point. (Pa10). The structures will be aligned in a uniform grid arranged in multiple lines, designed 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 and cross into DEP's jurisdiction, and then extend onshore to connect with electric power infrastructure. (Pa11). That portion of the Project is subject to DEP's direct regulation and requires separate State permits.

Atlantic Shores submitted its Project COP to BOEM in March 2021, and updated it in May 2023. (Pa10). On September 30, 2021, Atlantic Shores submitted a consistency certification application to DEP to demonstrate that the Lease Area and the oceanic portion of the Project east of New Jersey's jurisdictional three mile limit would be consistent with the enforceable policies of the CZM rules. (Pa7–8). DEP's six-month CZMA review period began on October 1, 2021, and the decision

deadline was stayed multiple times to allow BOEM and DEP to obtain additional Project information. (Pa7; Pa57). DEP solicited public comments on the consistency certification three times: from October 20, 2021 through December 18, 2021; June 1, 2023 to June 30, 2023; and September 20, 2023 to October 19, 2023. 16 U.S.C. § 1456(c)(3)(A). (Pa7). On May 19, 2023, BOEM issued a DEIS under NEPA, assessing the reasonably foreseeable impacts that could result from the Project's lifespan. (Pa7; Pa9). BOEM also solicited public comments multiple times and held four public hearings on the DEIS. (Ra6–7).

The Municipalities submitted public comments to DEP on June 29, 2023, and October 19, 2023, opposing the consistency certification and alleging that DEP is conflicted from issuing a decision based on bias allegations. (Pa152–79; Pa180–85). Long Beach Township and Brigantine also submitted DEIS comments, opposing the Project and alleging similar concerns that BOEM is biased. (Ra10-38).[4]

[4] On December 1, 2023, the Municipalities filed an action in the Chancery Division seeking to compel DEP to refer the Consistency Certification to the Office of Administrative Law, and seeking discovery as to DEP's alleged bias, which the Chancery Division dismissed on March 28, 2024. On May 13, 2024, the Municipalities appealed the dismissal under Docket No. A-2738-23, which is calendared consecutively with this appeal.

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"). (Pa1; Pa7). The Concurrence was accompanied by an environmental analysis report detailing DEP's findings and its responses to public comments. (Pa7–93). DEP's Concurrence analysis considered, among other things, the information contained in the consistency certification request, BOEM's DEIS, Atlantic Shores' COP, and Atlantic Shores' commitments to undertake construction and operation measures to avoid, minimize, and mitigate the Project's reasonably foreseeable effects. (Pa2; Pa9–10). 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) (parties "should cooperate with State agencies to develop conditions that, if agreed to during" the consistency process "would allow the State agency to concur with the federal action.").

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. (Pa13). DEP noted that it "is well-settled in the scientific community that climate change is primarily

driven by increased atmospheric levels of greenhouse gas concentrations," the impacts of which "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 will reduce global, national, and regional greenhouse gas emissions. (Pa14). Thus, the Project will ultimately strengthen the State's response to the threats that climate change poses to the marine ecosystem as well as commercial economies—such as fisheries—reliant on climate change vulnerable marine species. (Pa13). DEP found that the Project will help 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 thoroughly explained its finding that the Project would be consistent with the CZM rules, including those that address scenic resources and design, N.J.A.C. 7:7-16.10 (Pa47–50), marine fish and fisheries, N.J.A.C. 7:7-16.2 (Pa38–45), surf clam areas, N.J.A.C 7:7-9.3 (Pa16–18), and critical wildlife habitat, N.J.A.C. 7:7-9.37 (Pa31).

First, DEP analyzed whether the Project was consistent with the Scenic Resources and Design ("SRD") rule, N.J.A.C. 7:7-16.10. DEP reviewed BOEM's visual impact assessment ("VIA") conducted for the DEIS, which presents seascape,

landscape, and visual impact assessment methodology and findings that BOEM used to identify potential wind turbine visual impacts. (Pa47). The VIA found that visibility "would vary daily depending on many factors, such as view angle, sun angle, and atmospheric conditions." (Pa48; see also Pa239–40, Pa251–52, Pa482). Specifically, the VIA found that the turbines would be visible approximately twenty-five to fifty percent of the year, with the highest visibility in January and the lowest in April. (Pa47–48; see also Pa266–67, Pa274). 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. (Pa48). The DEIS also found 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. (Pa49).

DEP also considered a 2021 Rutgers study which predicted that visibility over the water would 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." (Pa49; see also Pa229–31). 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).

DEP then considered whether the visual impacts could be minimized. It looked to the VIA which analyzed 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 alternative was negligible. (Pa49). DEP further noted that the larger offshore wind substations would be located further offshore to minimize visibility, and that the turbines would be color treated to reduce potential visibility while also eliminating the need for daytime warning lights or red paint markings. (Pa49). DEP also recognized that Atlantic Shores is 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. (Pa49). 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. (Pa50). DEP acknowledged that this would not directly reduce visual impacts but "will support the science relevant to simulating and evaluating potential scenic and visual effects associated with offshore wind development." (Pa50). 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. (Pa49–50).

DEP then 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 any New Jersey based marine fisheries. To start, DEP reiterated its finding that the Project is in the public interest for New Jersey, the region, and the nation. (Pa38). Specifically, DEP noted that the Project will help reduce greenhouse gas emissions, ultimately strengthening the State's response to the climate change threats posed to the marine ecosystem, commercial economies, and fisheries that rely "on marine species that are vulnerable to" climate change. (Pa13). For example, climate induced sea level rise could impact "New Jersey coastal communities with fishing businesses that have infrastructure near the shore[.]" (Pa13).

DEP found that Project construction would cause a variety of impacts on marine species and fisheries, ranging from short term and minimal to long term and more substantial, with the latter being mitigated. (Pa38–45). 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. (Pa38). Specifically, 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 found it will not cause population-level impacts. (Pa39). Specifically, tower foundations and cable protection installation would create "hard-bottom" habitat in an otherwise sandy seascape with "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, squid, and winter flounder, would be displaced from such habitat conversion, DEP found such displacement will not cause population-level impacts to the soft-bottom species. (Id.). Habitat conversion may affect fisheries, but mitigation includes ongoing monitoring and scientific studies to better understand the impacts of offshore wind and climate change on fisheries and more accurately mitigate potential effects.

(Pa38–45). DEP noted that one such study has already been completed, which focuses on effects on the surf clam industry. (Pa44). Moreover, DEP noted that while the Project may adversely impact commercial fisheries, it could be beneficial to for-hire recreational fisheries, both of which are 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. (Pa25; Pa42; Pa65).

DEP further recognized that Atlantic Shores proposed numerous mitigation measures to address these impacts. For instance, Atlantic Shores developed a gear loss avoidance program as well as a fisheries communication plan to solicit input from the commercial fishing industry, and committed to providing cable protection locations that reflect pre-existing conditions and minimize effects to fishing gear. (Pa44; Pa66). Atlantic Shores also 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. (Pa44–45; Pa430–32).

According to BOEM, the fund should 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. (Pa45; Pa430–32). The fund will be based on the revenue exposure for fisheries and impacts on shoreside seafood businesses located near

ports outlined in the DEIS and BOEM will be overseeing Atlantic Shores' analysis and fund operation to ensure it meets 30 C.F.R. § 585. (Pa44–45; Pa431; Pa373).

DEP further noted that Atlantic Shores had agreed to an MOU with DEP through a Letter of Intent to establish the fund. (Pa4–6; Pa46). Accordingly, DEP concluded that, because the Project is in the public interest, many impacts would be short term and remediated naturally shortly thereafter, and the other impacts would be mitigated through agreed upon measures, Atlantic Shores demonstrated consistency with the MFF rule. (Pa45).

Next, DEP considered the Project's consistency with the Surf Clam Areas ("SCA") rule, N.J.A.C 7:7-9.3(a). DEP recognized that while Project construction is not expected to threaten the overall surf clam population, turbine foundations and infrastructure protection will alter surf clam habitat. (Pa16). Additionally, cable installation will temporarily alter surf clam habitat and likely cause a one-time mortality event. (Id.). DEP balanced such impacts against the public interest in reducing greenhouse gas emissions through the Project. (Pa14–15; Pa16). DEP found the Project cannot occupy any other prudent or feasible alternative location because the Project must be confined to the federal Lease Area Atlantic Shores acquired through the competitive leasing process for offshore wind development. (Pa16); see also 43 U.S.C. § 1337(p) (Outer Continental Shelf renewable energy leasing program). As DEP

explained, "Atlantic Shores does not have the ability to construct the" wind turbines and affiliated infrastructure "outside of the limits of the Lease Area." (Pa16); see also 43 U.S.C. §§ 1334(a), 1333(a), 1337(p)(5); 30 C.F.R. § 585.104. DEP further explained that offshore wind projects are water-dependent, benefitting from the higher speed of ocean winds and lack of physical interferences that can be encountered on land. (Pa16–17). Moreover, the Project requires expansive areas that cannot be accommodated on land in New Jersey. (Pa17).

DEP found that Atlantic Shores is taking steps to minimize and mitigate impacts to surf clams and their habitats. (Pa17; Pa79). For example, the proposed electric transmission cables will be installed using low impact installation techniques that limit seabed disturbance. (Pa17). Additionally, Atlantic Shores is working closely with the surf clam industry to better understand how climate change is influencing surf clams within the Lease Area and the greater Mid-Atlantic Bight. (Pa17). DEP found that such research is an important mitigation component, and Atlantic Shores has commissioned informative scientific studies to better characterize the resources and potential impacts of offshore wind activities as to both ecological concerns and the commercial fishing industry. (Pa17).

Similar to the MFF rule, DEP explained that Atlantic Shores will conduct comprehensive monitoring of fisheries and benthic habitat conditions throughout the Project's life cycle phases, allowing Atlantic Shores to measure Project related disturbances and monitor habitat and biological community recovery. (Pa17; Pa43–44). For example, Atlantic Shores will implement a hydraulic clam dredge survey to identify significant changes to the presence and size of ocean quahogs and Atlantic surf clams within the Lease area, as well as an extensive benthic habitat monitoring program to identify potential changes in benthic macroinvertebrate communities and benthic habitat before and after construction. (Pa17). Accordingly, having determined that the Project is in the public interest, that there is no feasible alternative location, and impacts will be minimized, DEP found that Atlantic Shores demonstrated consistency with the SCA rule. (Pa16–17).

The final rule relevant to this appeal that DEP considered was the Critical Wildlife Habitat ("CWH") rule, N.J.A.C. 7:7-9.37(a). At the outset, DEP found that the potentially most relevant critical wildlife habitat as defined by the CWH rule, which consists of "patches of woody vegetation which serve a critical role in providing resting and foraging habitat for migratory birds," is not present in the Project area. (Pa31). DEP also noted that other categories of critical wildlife

habitat, such as rookeries for colonial nesting birds or ecotones (edges between two habitat types) are also not present in the Project area. Id.

Nonetheless, DEP noted that certain birds may pass through the Project area, but recognized that the lease area locations were selected to minimize all resource impacts, including birds. (Pa31). Specifically, the majority of bird activity is concentrated along the coastline. This makes sense because, as DEP explained "patches of woody vegetation (i.e., trees, scrub-shrub, etc.) equivalent to 20 acres in size and greater, are valued as stopover habitat for migratory birds because they offer critical cover and food resources[.]" (Pa31). DEP also found some federally protected bird species may pass through the portion of the Project located in Federal waters, but only during spring and fall migration. (Pa31). The species were "rarely" observed near the Project's wind turbine area, and passage through the area was "extremely minimal." (Pa28–29).

DEP further noted BOEM's conclusion that due to several mitigation measures, including limited lighting to minimize bird attraction, perch deterrents, debris removal, and monitoring, "the Project would not likely adversely affect" Endangered Species Act ("ESA") protected birds. (Pa29; Ra41–42 (noting Atlantic Shores' ongoing consultation and research to implement surveys, studies, and monitoring); Ra40 (noting BOEM's ESA

compliance)).[5] In response to comments it received, DEP further explained that DEP and BPU recently awarded $1.3 million to research efforts to expand an existing regional network that tracks the bird and bat movements, improving data assessing species migration routes to and through New Jersey airspace and offshore wind lease areas. (Pa77). Since the Project did not propose activity within the critical wildlife habitat and any impacts to birds flying through the Project area would be minimal and would be mitigated, DEP found that Atlantic Shores demonstrated that the Project is consistent with the CWH rule. (Pa31).

In sum, given the finding that the Project is in the public interest and that any impacts will be addressed with mitigation and minimization measures, on April 1, 2024, DEP determined that the Project is consistent with the CZM rules. (Pa2–3, Pa7–51). DEP also responded to all public comments it received throughout the review period in a separate response to comments document, which included responses to the Municipalities' unfounded allegation that DEP is conflicted from issuing the Concurrence. (Pa60–62).

On April 26, 2024, the Municipalities requested an adjudicatory hearing on the Concurrence. (Pa94). On May 14, 2024, the Municipalities filed the instant

[5] Pursuant to N.J.R.E. 201(b), the Court may take judicial notice that on July 1, 2024, after DEP issued its Concurrence, BOEM issued the Record of Decision ("ROD") for the Project, finding that Project is not likely to "adversely modify critical habitat." (Ra92).

appeal. On June 14, 2024, DEP denied the Municipalities' request for an adjudicatory hearing. (Pa94–100). On June 19, 2024, the Municipalities amended this appeal to incorporate the hearing denial as well. (Pa106). The Municipalities subsequently sought a stay from this Court, which was denied on September 10, 2024.

Also on April 26, 2024, three concerned citizen groups and two members from those organizations separately appealed the Concurrence, docketed as A-2581-23. On August 13, 2024, the court denied consolidation of the appeals, but noted that the appeals would be heard back to back and that the parties may elect to file a combined merits brief that addresses the issues in both appeals. Unfortunately, given the timing differences between the two appeals' briefing schedules, DEP was not able to file a combined merits brief.[6]

[6] Pursuant to N.J.R.E. 201(b), the Court may take judicial notice that after DEP issued its Concurrence, BOEM issued its FEIS on May 31, 2024. See Atlantic Shores Offshore Wind South Final Environmental Impact Statement (FEIS) for Commercial Wind Lease OCS-A 0499, [redacted]boem.gov/renewable-energy/state-activities/atlantic-shores-offshore-wind-south-final-environmental-impact (last visited Feb. 6, 2025). Additionally, BOEM's ROD noted DEP's Concurrence with Atlantic Shores' CZMA consistency certification with agreed-upon measures, and confirmed those measures, including the visual monitoring plan, ADLS, and the fisheries mitigation fund, would be made part of Atlantic Shores' federal permit. (Ra93). On Oct. 1, 2024, BOEM approved Atlantic Shores' COP. (Ra94–95).

ARGUMENTS

POINT I:
DEP REASONABLY FOUND THAT THE PROJECT IS CONSISTENT WITH THE CZM RULES BASED ON THE SUBSTANTIAL EVIDENCE IN THE RECORD (Responding to Point I, Pb21).

Determinations of an administrative agency such as DEP are entitled to deference to the agency's broad discretion and should not be disturbed unless the challenger can show 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 can intervene only in "those rare circumstances" when agency action is "clearly inconsistent with its statutory mission or other state policy." Ibid. Courts must consider whether the agency's action conforms to expressed or implied legislative policies, whether it is supported by substantial credible evidence in the record as a whole, and whether "in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors." Musick, 143 N.J. at 216; L.M. v. State, Div. of Med. Assist. & Health Serv., 140 N.J. 480, 489 (1995).

Courts thus accord agency actions a presumption of validity and reasonableness which the challenger bears the burden to overcome. Bergen Pines 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), certif. denied, 99 N.J. 218 (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 the ambit of delegated authority, and its decision is supported by the record and is not unreasonable, the agency's action will be upheld. Public Service Electric & Gas Co. v. DEP, 101 N.J. 95, 103 (1985); N.J. Ass'n of Health Care Facilities v. Finley, 83 N.J. 67, 80 (1980); N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 561 (1978).

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. A key point here is that the subject of this Federal Consistency review—the proposed wind turbines located within the Lease Area—are beyond New Jersey's territorial jurisdiction. (Pa1; Pa35). They 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). Thus, in its limited role, DEP only concurs, conditionally concurs, or objects to the consistency determination, which it reviews for consistency with the CZM rules. 16 U.S.C. § 1456(c)(3)(A); see also 15 C.F.R. §§ 930.4, 930.6, 930.70, 930.76. 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 and DEIS (Pa9–10), responding to all public comments it received, and finding that the Project, subject to certain agreed-upon measures, would be consistent with the enforceable CZM policies. (Pa53–93). The Municipalities nonetheless challenge DEP's decision regarding four CZM

rules: (1) the SRD rule, (2) the MFF rule, (3) the SCA rule, and (4) the CWH rule. For the following reasons, each argument lacks merit.

a) DEP Properly Found that the Project is Consistent with the Scenic Resources and Design rule (Responding to Point I.a.).

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).

Other CZM rule elements informed DEP's SRD rule analysis. For instance, the term "discouraged" means 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 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." Ibid.

DEP explained its reasoned analysis regarding the Project's SRD rule consistency. To start, DEP noted that the SRD rule excludes wind turbines from the rule's setback requirements and open view corridor restrictions. (Pa47). Nonetheless, DEP continued to analyze the SRD rule to the extent it may apply. As noted above, supra at 11–14, the record shows DEP considered BOEM's findings on visibility variation (Pa47–49) and found that the overall impact to tourism lacked consensus (Pa50). The record shows DEP also considered Atlantic Shores' visual impact minimization, including color treatment to reduce visibility, ADLS to eliminate continuous aircraft warning lights, and a visual resource monitoring plan. (Pa49–50).[7] Recognizing that none of the other Project alternatives, 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

[7] As noted above, the ROD confirms that all proposed measures, including the visual monitoring plan and ADLS, would be made part of Atlantic Shores' federal permit. (Ra93).

that Atlantic Shores demonstrated the Project was consistent with the SRD rule. (Pa13–14; Pa49–50; Pa68–70).

The Municipalities criticize DEP's decision, arguing that DEP should not have found rule "compliance" because it did not require that any measure result in a "net gain in quality and quantity" of scenic resources under the "discouraged" definition. (Pb23–29). This is both unsupported by the record and misunderstands the requirements of the applicable law.[8]

First, DEP had to evaluate whether the Project is consistent with the CZM rules. 16 U.S.C. § 1456(c)(3)(A); see also 15 C.F.R. §§ 930.4, 930.6, 930.70, 930.76. Even if DEP objected to the Project, it is unknown whether BOEM would "attempt to resolve" the issue with DEP, or "utilize dispute resolution mechanisms," or "proceed" with the activity that is "discouraged" but not prohibited. 15 C.F.R. § 930.43(d) to (e); see also Weaver's Cove Energy, LLC v. Rhode Island Coastal Res. Mgmt. Council, 589 F.3d 458, 463 (1st Cir. 2009) (noting Secretary's ability to override state objection). DEP is reviewing a project that remains under federal jurisdiction and requires federal approval. The federal government can override the State's determination for reasons

[8] Indeed, the Municipalities grasp at sources used in DEP's prior review of unrelated projects to bolster their concern regarding tourism, distracting from the applicable standard. (Pb12 & Pb24). This ignores that DEP found that, contrary to the Municipalities' position, the overall impact to tourism lacked consensus. (Pa50).

including national interests. 16 U.S.C. § 1456(c)(3)(A), (B)(iii); see also Town of Southold v. Wheeler, 48 F.4th 67, 80–82 (2d Cir. 2022) (affirming Environmental Protection Agency's consistency determination over state's objection to waste disposal site based on overall balance of considerations). Therefore, DEP properly found consistency with the SRD rule to the extent it applies.

Second, 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. 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) (emphasis 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 the Municipalities' interpretation fails that test.

Though the Municipalities attempt to insert "ocean view" into the SRD rule (Pb23), it contains no such language. In an abundance of caution, DEP analyzed the Project's oceanward visual impacts to the extent that the rule may apply. (Pa47; see also Pa63 ("policies not applicable to the portion of the Projects in Federal waters may or may not be discussed in the Environmental Analysis Report.")). But 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).

Third, the Municipalities' interpretation—that new development causing oceanward visual impacts could only be consistent if there is a "net benefit to

scenic resources"—would effectively turn "discouraged" into "prohibited" because no new development could meet the more stringent test that the Municipalities' propose. A "prohibited" activity would flatly bar development, N.J.A.C. 7:7-1.5, but DEP declined to incorporate that standard. That has never been DEP's intent as the long-standing agency SRD rule application shows. See SMB Associates v. Dep't of Envtl. 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").[9] DEP is entitled to deference for its reasonable interpretation of its rules. In re Eastwick Coll. LPN-to-RN Bridge Program, 225 N.J. 533, 541 (N.J. 2016).

The Municipalities rely on In re Stream Encroachment Permit, Permit No. 0200-04-0002.1 FHA, 402 N.J. Super. 587 (App. Div. 2008), to support their position, but that case is irrelevant. (Pb27). There, the court affirmed DEP's approved additional land preservation to mitigate a development's wetlands impacts, based on a prior definition of mitigation that contemplated "one-to-one

[9] 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.

acre replacement." Id. at 605–06; see also id. at 606 n.3. The Municipalities' analogy fails because the impacted resources vastly differ. The Municipalities' argument would mean that Atlantic Shores must preserve a swath of ocean view to mitigate for the Project. Not only is this impossible, that would impose a requirement that is not in the SRD rule or elsewhere in the CZM rules.

A case that is more on point is 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). And the "discouraged" term with accompanying mitigation applies here to the limited extent the SRD rule itself applies. In light of the foregoing, as well as DEP's findings of the Project's benefits to the ecological function and value of scenic resources, particularly that it will strengthen the State's response to climate change threats to coastal communities and the marine ecosystem (Pa13–14), DEP reasonably balanced development interests with the preservation of scenic resources under the consistency standard.

Fourth and finally, the CZM rules do not prohibit DEP from making a mitigation finding that would benefit coastal resources by furthering research on future developmental impacts. The Municipalities 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. (Pa45; Pa50). DEP recognized that the Project would improve resiliency for New Jersey communities and energy efficiency throughout the region. (Pa14–15). 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, the Municipalities ignore the rest of the Project visual impact consideration and minimization, including negligible viewshed impact differences of alternative layouts, and that larger offshore wind substations would be located further offshore, in addition to color treatment and ADLS eliminating continuous visual interference. (Pa49–50). Contrary to the Municipalities' contention (Pb28), 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.

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

b) DEP properly found that the Project is consistent with the Marine Fish and Fisheries rule (Responding to Point I.b.).

The MFF rule protects certain marine fish as well as the catching, taking or harvesting of the fish. N.J.A.C. 7:7-16.2(a). The MFF rule discourages any activity that would adversely affect the natural functioning of marine fish or of New Jersey based marine fisheries, subject to certain enumerated 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 as a whole and DEP's own expertise. As noted above, supra at 10–11, 14–17, 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 short term and long term impacts and mitigation measures, such as ongoing monitoring and scientific studies to accurately mitigate potential effects, a gear loss avoidance

program, a fisheries communication plan, disclosure of cable protection locations to minimize fishing gear effects, and a compensation fund. (Pa38–45; Pa66; Pa430–31). Because the Project is in the public interest and its impacts would be mitigated, DEP found that Atlantic Shores demonstrated consistency with the MFF rule. (Pa45).[10]

The Municipalities' criticize DEP's findings regarding the MFF rule, arguing that the Project does not comply with the rule because it will not result in a net benefit to marine fish and fisheries. (Pb29–31).[11] That lacks merit. As with the SRD rule, the MFF rule "discourages" activity that would adversely affect marine fish or fisheries, N.J.A.C. 7:7-16.2, 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," id. 7:7-1.5.

[10] As noted above, the ROD confirms that all proposed mitigation measures would be made part of Atlantic Shores' federal permit. (Ra93).

[11] The Municipalities again grasp at old sources unrelated to the instant record in an attempt to bolster their argument regarding the fishing industry's profit margin, again distracting from the applicable standard. (Pb14). DEP thoroughly weighed the overall impact to marine fish and fisheries against mitigation measures under the consistency standard. (Pa50).

As explained above, DEP found that Atlantic Shores was consistent with the MFF rule because the Project is in the public interest and includes mitigation measures that address impacts to both marine fish and fisheries, including impacts to the seabed and benthic resources. The Municipalities 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. (Pa13). Moreover, the Municipalities discount DEP's finding that the reporting 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. (Pa43–45). To the extent the Municipalities speculate as to whether the mitigation fund will be effective (Pb30), the record shows DEP reasonably found that the fund's thorough framework, which includes a public notice and comment period, constituted one of a number of adequate mitigation measures. (Pa44–45).

Therefore, DEP's MFF rule determination is reasonable and supported by the record and should be affirmed.

c) DEP properly found that the Project is consistent with the Surf Clam Areas Rule (Responding to Point I.c.)

The SCA rule protects coastal waters that support commercially harvestable quantities of surf clam or areas important for surf clam stocks.

N.J.A.C 7:7-9.3(a). The SCA rule prohibits development which would result in destruction, condemnation, or contamination of surf clam areas, subject to certain exceptions. N.J.A.C 7:7-9.3(b). One such exception arises where the development is of national interest, provided (i) there are no prudent and feasible alternative sites, and (ii) impacts to surf clams are minimized. N.J.A.C 7:7-9.3(b)(1).

The record supports DEP's expert conclusion that the Project is consistent with the SCA rule. As discussed above, supra at 17–19, DEP recognized that protected surf clam habitat will be temporarily or permanently altered and Project construction is likely to cause a one-time mortality event to surf clams in the Project's cable corridors. (Pa16). DEP weighed these impacts with its public interest findings, with the reality that there is no other alternative location to avoid these impacts because the Project is confined to the Lease Area, and Atlantic Shores will minimize and mitigate surf clam impacts by implementing low impact installation techniques and research monitoring. (Pa14–17, Pa79). DEP, therefore, found Atlantic Shores demonstrated consistency with the SCA rule's exceptions. (Pa16–17).

The Municipalities criticize DEP's decision, arguing that Atlantic Shores should be required to obtain a different lease area. (Pb32). Contrary to other statutory regimes potentially addressing this, neither CAFRA nor the SCA rule

contain such a requirement. But cf. N.J.S.A. 13:9B-10 (establishing a rebuttable presumption that there is a practicable alternative to any nonwater-dependent regulated activity proposed in a freshwater wetland, 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. The Municipalities' interpretation is thus contrary to DEP's statutory authority and could hardly be considered reasonable. Rather, as noted above, BOEM administers lease areas and reviews lease area projects, 43 U.S.C. §§ 1332 to 1334, 1337(p); 30 C.F.R. § 585.101, which are outside of DEP's jurisdiction, 43 U.S.C. § 1333(a).

Even if DEP had such authority to require alternative locations on federal lands, which it does not, the SCA rule does not require the Municipalities' result that the Lease Area must change. After all, the exception does not merely ask whether there are any other alternative locations at all, but locations that are "prudent and feasible." N.J.A.C 7:7-9.3(b)(1)(i). The Project is confined to the Lease Area which Atlantic Shores obtained after a lengthy federal open bidding process. 43 U.S.C. §§ 1344, 1334(a), 1333(a), 1337(p)(5); 30 C.F.R. § 585.104. Thus, DEP appropriately found that "Atlantic Shores does not have the ability to construct the components of the WTA outside of the limits of the Lease Area."

(Pa79). To require Atlantic Shores to obtain a new federal lease would hardly be "prudent and feasible."

The Municipalities also argue that there are no mitigation measures to address permanent impacts to surf clam areas from wind turbine installation. (Pb33). Again, the Municipalities' dissatisfaction with DEP's comprehensive analysis provides no basis to disturb the DEP's conclusions. The Municipalities acknowledge that DEP "identified . . . measures taken to minimize the temporary impacts of cable installation," but merely discount the impact of monitoring and studies as mitigation measures to support their position that there are "none" to address permanent impacts. (Pb33). The CZM rules do not prohibit DEP from making a mitigation finding that would benefit coastal resources by furthering research on future developmental impacts. The Municipalities ignore that DEP found the rigorous scientific studies and extensive benthic habitat research monitoring Atlantic Shores will perform—such as fisheries and benthic habitat conditions monitoring throughout the Project's life cycle—are important components of mitigation, and will better characterize the potential impacts of offshore wind activities. (Pa17; Pa43–44). The SCA rule exception is met where, among other things, "impacts to surf clams are minimized." N.J.A.C 7:7-9.3(b)(1). Given DEP's discussion of a number of mitigation measures—including installation techniques to limit disturbance, rigorous studies, and

extensive research monitoring—balanced against its finding that the Project is in the public interest, its finding of consistency with the SCA rule is reasonable.

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

d) DEP properly found that the Project is consistent with the Critical Wildlife Habitat Rule (Responding to Point I.d.)

The CWH rule protects those habitats "known to serve an essential role in maintaining wildlife, particularly in wintering, breeding, and migrating," such as rookeries for nesting birds, stopovers for migratory birds, natural corridors for wildlife movement, or ecotones.[12] N.J.A.C. 7:7-9.37(a). The CWH rule discourages development that would directly or indirectly adversely affect critical wildlife habitats unless (1) "[m]inimal feasible interference with the habitat can be demonstrated," (2) "[t]here is no prudent or feasible alternative location for the development," and (3) "[t]he proposal includes appropriate mitigation measures." N.J.A.C. 7:7-9.37(b). The CWH rule provides that DEP "will review proposals on a case-by-case basis." Id. at 7:7-9.37(c).

[12] "Ecotones" are "edges between two types of habitats" and are "a particularly valuable critical wildlife habitat. Many critical wildlife habitats, such as salt marsh water fowl wintering areas, and muskrat habitats, are singled out as water or water's edge areas." N.J.A.C. 7:7-9.37(a)(2).

DEP thoroughly explained its reasoning regarding the CWH rule. As discussed above, supra at 19–21, DEP found the Project area does not contain critical wildlife habitat as defined by the CWH rule such as rookeries, migratory bird stopovers, or ecotones. (Pa31). Notwithstanding that finding, DEP recognized that certain birds may pass through the Project area, and found that due to a number of mitigation measures, including limited lighting to minimize attraction of birds, perch deterrents, debris removal, and monitoring, the Project would not likely adversely affect ESA protected birds. (Pa28–29, Pa31). As discussed above, DEP also found that there is no prudent or feasible location for the development due to the Lease Area constraints. DEP therefore reasonably determined that Atlantic Shores demonstrated consistency with the CWH rule. (Pa31).

The Municipalities criticize DEP's decision, pointing to the federally protected birds that may pass through the Project area. (Pb34). But, as explained above, the record supports DEP's finding that the Project area does not contain critical wildlife habitat covered by the Rule. (Pa31). Stated differently, a bird flying over or through a given area without stopping does not make that area critical wildlife habitat for that bird.

And in any case, DEP did recognize that federally protected bird species may pass through the Project area, and concluded that the Lease Area locations had been

selected to minimize impacts, that passage was "extremely minimal," and that there were numerous mitigation measures in place. (Pa28–29, 31).[13] DEP should be accorded a strong presumption of reasonableness regarding such an application of its expertise. IFA Ins. Co., 195 N.J. Super. at 208. And, as discussed in Point I.c, supra, DEP also found that there is no prudent or feasible alternative location for the development. Therefore, having satisfied each of the CWH rule's exceptions, N.J.A.C. 7:7-9.37(b), it was reasonable for DEP to conclude that Atlantic Shores demonstrated consistency with the rule.

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

POINT II:

DEP IS REQUIRED BY STATE AND FEDERAL LAW TO CONDUCT THE FEDERAL CONSISTENCY REVIEW AND HAD NO BIAS REQUIRING RECUSAL (Responding to Point II, Pb35).

DEP is charged by both federal and State law to review the Project's consistency with State environmental statutes such as CAFRA, the Waterfront Development Act, and the Wetlands Act of 1970, and the associated Coastal Zone regulations. See supra at 5–6. Though the Municipalities argue DEP is

[13] As noted above, see supra n. 5, the Court may take judicial notice of BOEM's finding the Project is not likely to "adversely modify critical habitat." (Ra92).

precluded from this review, DEP complied with existing law and the Municipalities have failed to demonstrate any bias or law requiring the entire agency to recuse itself.

In New Jersey, the State Conflicts of Interest Law, N.J.S.A. 52:13D-23(e)(7), and its accompanying State Ethics Commission ("SEC") Rules, N.J.A.C. 19:61-7.1 to -7.5, govern impermissible bias claims. State officials must recuse themselves from matters in which they have a financial or personal interest, "direct or indirect, that is incompatible with the discharge of the State official's public duties." N.J.A.C. 19:61-7.4(d). The SEC rules incorporate a non-exhaustive list of potential incompatible interests, N.J.A.C. 19:61-7.4(e), none of which are alleged to apply here, and also establish a process for SEC to review recusal issues. N.J.A.C. 19:61-7.5.

The SEC's rules follow principles laid out in case law. Bias is "grounds for disqualification when the decisionmaker has a pecuniary interest in the outcome of the matter or has been the target of personal criticism from one seeking relief so as to form a basis for 'a personal vendetta' against the one seeking relief." In re Xanadu Project at Meadowlands Complex, 415 N.J. Super. 179, 192 (App. Div. 2010) (quoting In re Carberry, 114 N.J. 574, 586 (1989)). For example, a Board of Public Utilities commissioner should not have participated in proceedings involving a County utilities authority with whom the

commissioner had been offered an employment opportunity. In re Bergen Cnty. Utils. Auth., 230 N.J. Super. 411, 419–20 (App. Div. 1989).

In contrast, merely "being 'familiar with the facts of the case" by performing statutory or administrative duties "does not make the agency head biased or partial." Xanadu, 415 N.J. Super. at 192 (quotations omitted). "Nor is disqualification automatically required merely because a decisionmaker has announced an opinion on a disputed issue." Ibid. Government entities, including State agencies, "would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official." Grabowsky v. Twp. of Montclair, 221 N.J. 536, 554 (2015) (quoting Wyzykowski v. Rizas, 132 N.J. 509, 523 (1993)). Thus, courts analyze the "potential for conflict," ibid., but "the 'appearance' of impropriety must be something more than a fanciful possibility" and instead, "must have some reasonable basis." In re Bator, 395 N.J. Super. 120, 128 (App. Div. 2007) (quoting Higgins v. Advisory Comm. on Prof'l Ethics, 73 N.J. 123, 129 (1977)). "To presume that the agency head is biased merely because he or she is applying an agency rule or regulation" in a particular instance "would severely undermine the function of administrative agencies." Carberry, 114 N.J. at 585.

Here, DEP followed all applicable law and procedure when it considered this Project. Federal law requires New Jersey, and by extension DEP, to consider

the certification request. 16 U.S.C. § 1456(c)(3)(A); 30 C.F.R. § 585.627(b), .628(c) and (d). BOEM's environmental review includes coordinating and consulting with DEP regarding the Project's federal consistency with New Jersey's policies and providing opportunity for public comment. 30 C.F.R. § 585.627(b); 585.628(c) and (d). The CZM rules also encourage consultation before an applicant submits a proposed project to DEP. N.J.A.C. 7:7-22.1 to -22.2 (preapplication conferences). Further, federal law effectively requires a State to ensure the federal agency overseeing the proposed project agree to any project conditions or else the Consistency determination is considered a conditional consistency that can be converted into an objection. 15 C.F.R. § 930.4. DEP's application of statutory and regulatory requirements to this Project, including the requirement that DEP meet and consult with the applicant and agency before the final application submission, do not support the allegations of bias.

The Municipalities make a tenuous argument for pecuniary bias, arguing that the DEP Commissioner's job and jobs of DEP staff "almost certainly depended" on approving the Project due to Governor's Murphy's stated policy position in favor of offshore wind. (Pb37). They also claim that DEP's acquiescence regarding approval conditions is an indication of impermissible agency bias. (Pb37–38).

Those cynical claims are unsupported by any facts or violations of laws like the Conflicts of Interest Law, the SEC rules, or any New Jersey law or legal principle under which their claims of bias would be actionable. The New Jersey cases they do cite instead show the opposite. See Xanadu, 415 N.J. Super. at 192–93 (finding no bias when official had issued written opinion before rendering decision); In re Carberry, 114 N.J. at 584–87 (agency head who suspended police officer could conduct later agency hearing and was not biased because he lacked a direct pecuniary interest or indicia of a vendetta). The Municipalities' own actions tacitly concede that there is no objective support for their accusations. Indeed, they never requested review by DEP's ethics office, or sought recusal of any DEP employee under N.J.A.C. 19:61-7.5.

Because no New Jersey authority supports a bias finding based on such speculation, the Municipalities cite federal cases concerning the Younger abstention doctrine. The connections they seek to draw are attenuated at best. The Younger doctrine requires federal courts to abstain from deciding cases that would interfere with certain ongoing state proceedings. Smith & Wesson Brands, Inc. v. AG, 27 F.4th 886, 890 (3d Cir. 2022). The Supreme Court narrowed the Younger doctrine in 2014 to three "exceptional circumstances" that include "civil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions" which can include

bias allegations. Id. at 891 (citing Sprint Communs., Inc. v. Jacobs, 571 U.S. 69, 78 (2013). No party, including the Municipalities, seeks federal court review, rendering Younger inapplicable here. So, the cited federal courts' bias analyses—which often occurred with a more relaxed standard prior to Sprint—are not relevant to a conflicts analysis under New Jersey law.

Even indulging the Municipalities' reliance on nonbinding, inapplicable federal caselaw, both cases where bias was found involved direct pecuniary advantages enjoyed either by individuals involved or the agency itself that led to bias. See Esso Std. Oil Co., 389 F.3d 212, 218-19 (1st Cir. 2004) ("the adjudicative body stands to benefit financially from the proceeding because any fine imposed will flow directly to [its] budget."); Yamaha Motor Corp., 21 F.3d 793 at 798 (Commissioner was biased because he was a Harley Davidson dealer so "had a pecuniary interest in eradicating Yamaha from the State" and was a "conduit" for the challenger's "legal funds"). And though the Municipalities cite a Mississippi district court case for the principal that "structural infirmities" obviate the need for the presence of actual financial interest be present for a finding of bias, All American Check Cashing, Inc. v. Corley, 191 F.Supp.3d 646, 664 (S.D. Miss. 2016), that court found no bias present. The Municipalities have never alleged circumstances similar to either Yamaha or Esso here, nor could they, as this is instead a typical permitting matter.

As DEP simply followed all relevant federal and state laws and regulations in rendering the Concurrence, it did not act in a biased manner and did not need to recuse itself from the decision.

POINT III:
THE MUNICIPALITIES DO NOT HAVE A STATUTORY OR CONSTITUTIONAL RIGHT TO A THIRD-PARTY HEARING (Responding to Point III, Pb38).

DEP correctly denied the Municipalities' request for a third-party hearing in accordance with the APA and well-settled caselaw. The Municipalities did not have a right to an OAL hearing because they are not the applicant, there is no statutory right to a hearing, and their speculation that the Project will reduce their projected tax revenues does not constitute a constitutionally protected property right warranting an OAL hearing.

It is well-established that third-party objectors, like the Municipalities, have no automatic right to an adjudicatory hearing before an administrative law judge. To avoid "chaotic unpredictability and instability," the APA prohibits agencies from promulgating "any rule or regulation that would allow a third party to appeal a permit decision" unless specifically authorized to do so by federal law or State statute. N.J.S.A. 52:14B-3.1 and 3.3. The term "third-party" includes any party other than the applicant, State agency, or other party with a "particularized property interest sufficient to require a hearing on

constitutional or statutory grounds." N.J.S.A. 52:14B-3.2. To have standing, parties other than the applicant or the agency must demonstrate: (1) a right to a hearing under the applicable statute, or (2) a "particularized property interest" of constitutional significance. Id.; see also In re Freshwater Wetlands Statewide Gen. Permits, 185 N.J. 452, 463–64 (2006). The Municipalities cannot meet that high standard.

None of the statutes underlying the CZM rules—namely, CAFRA, the Wetlands Act of 1970, and the Waterfront Development Law - grant a statutory right to an adjudicatory hearing for third party objectors. See Spalt v. Dep't of Env't Prot., 237 N.J. Super. 206, 210-11 (App. Div. 1989), certif. denied, 122 N.J. 140 (1990); In re Freshwater Wetlands, 185 N.J. at 463–64; In re Riverview Dev., LLC, 411 N.J. Super. 409 (App Div. 2010); see also N.J.A.C. 7:7-28.1(e) (expressly limiting its procedure for granting an adjudicatory hearing request to the APA terms). Absent a statutory provision that expressly confers a right to a hearing, an administrative agency cannot create such a right by mere regulation. As no statutes entitle the Municipalities to a hearing, they instead must demonstrate they have a "particularized property interest" of constitutional significance. N.J.S.A. 52:14B-2, -3.1(b) to (d), -3.2; Riverview, 411 N.J. Super. at 423.

Courts have consistently held that proximity or any type of generalized property right shared with other property owners, such as recreational interests, traffic, views, quality of life, and property values, is insufficient to demonstrate a particularized property right required to establish third-party standing for a hearing. See Spalt, 237 N.J. Super. at 212 (App. Div. 1989) (close residency, fear of resultant injury to property, damage to recreational interest or shared generalized property rights are not particular property rights); Riverview, 411 N.J. Super. at 437–38 (general claims of adverse aesthetic and traffic impacts did not create sufficient property interest to entitle neighboring homeowners to hearing). As the court stated in Riverview, the "anticipated impact from [the] proposed development is similar to the impacts commonly experienced by owners of property in the vicinity of any proposed new development." Riverview, 411 N.J. Super. at 428 (citing In re Amico/Tunnel Carwash, 371 N.J. Super 199, 211 (App. Div. 2004)); see also Musconetcong Watershed Ass'n v. N.J. Dep't of Env't Prot., 476 N.J. Super. 465, 484 (App. Div. 2023) (proximity to the permitted site and a general fear of future development are insufficient to trigger a right to an adjudicatory hearing).

The Municipalities insist that their property interests rise to the constitutional threshold warranting a third-party hearing. (Pb39). But the property interests the Municipalities claim are speculative and generalized, and

indistinguishable from those shared by other neighboring municipalities and property owners, so do not provide constitutional standing to challenge DEP's determination in OAL. Spalt, 237 N.J. Super. at 212 (App. Div. 1989). The Municipalities point to the estimated loss of various tax revenues the constructed Project may cause. (Pb40–41). However, there is no constitutionally protected interest in either maintaining a particular level of tax revenue, or avoiding an increased tax burden on their residents to maintain a particular level of revenue.

The Due Process Clause of the Fourteenth Amendment "is no protection against inequality of tax burdens." B & L Motor Freight, Inc. v. Heymann, 120 N.J. Super. 270, 282 (Ch. Div. 1972) (citing Gomillion v. Lightfoot, 364 U.S. 339, 343 (1960)), overruled on other grounds, Private Truck Council v. State, 221 N.J. Super. 89 (App. Div. 1989). This makes sense, as tax revenue—particularly revenue based on property values—can be influenced by any number of factors, including macroeconomic trends beyond any one party's control. And while the Municipalities point to a study they commissioned showing possible tax revenue impacts, much of that study related to offshore wind's impacts on tourism—and, as noted above, that is an area in which there is no clear consensus. (Pa199–209).

The Municipalities cite In re Application of John Madin/Lordland Dev. Int'l for Pinelands Dev. Approval, 201 N.J. Super. 105, 123 (App. Div. 1985) as

an example where the court found that "uncertified" municipalities were entitled to a hearing regarding a Pinelands Commission development approval. (Pb42). However, in that matter, the proposed development was located within the municipalities' borders and the Pinelands Protection Act conferred a hearing right to the municipalities. Id. at 130. Such is not the case here, where the activity is far outside the Municipalities' borders, and where the APA and CZM rules prohibit third party administrative hearings.

In addition, the fear of economic losses that might result from visual impacts of development are not a particularized property interest sufficient to create a constitutional right to an adjudicatory hearing, especially where there is not a common law protected right to a view. Bubis v. Kassin, 323 N.J. Super. 601, 616 (App. Div. 1999). The Municipalities' claims of economic harm fall squarely under the Riverview analysis:

> [T]he collateral economic impacts upon surrounding properties caused by the siting of an otherwise-lawful building are part and parcel of the social compact. They result from the unavoidable interrelatedness of living in a world surrounded by other persons and by other things.
>
> If we were to hold that such collateral economic impacts automatically entitled neighboring property owners to a formal hearing in the [Office of Administrative Law] each time a State permit is issued for, say, a sewerage treatment plant, a group home, a new prison, or some other building that could depress

> surrounding property values, the construction of those and other important structures might be thwarted or unduly delayed, at great cost to the public. That surely would be contrary to the interests of the citizens as a whole. The Legislature recognized this problem by adopting strict limitations on third-party hearing rights in the APA.
>
> [411 N.J. Super. at 435–36.]

The Riverview court held that the challengers' expert report estimating a twenty percent average reduction in their home values resulting from visual impacts of a proposed development that would obstruct their view of the Hudson River and New York City skyline did not create a particularized property interest sufficient to warrant an adjudicatory hearing. Id. at 429. Likewise, the Municipalities' speculative claims that they will lose tax revenue are not sufficient. The Appellate Division in Riverview determined that such "collateral economic impacts" are not a particularized property interest to merit a hearing. Id. at 436. Here as well, where the claimed impacts concern views of development located far offshore, the Municipalities lack a particularized property interest.

CONCLUSION

For the foregoing reasons, DEP's consistency determination and adjudicatory administrative hearing request denial should be affirmed.

Respectfully submitted,

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IN THE MATTER OF THE FEDERAL CONSISTENCY CERTIFICATION FOR ATLANTIC SHORES OFFSHORE WIND SOUTH PROJECT	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-2743-23 **ON APPEAL FROM**: New Jersey Department of Environmental Protection File No. 0000-21-00221, CDT210001 **Civil Action**

APPELLANTS' REPLY BRIEF
SUBMITTED MARCH 10, 2025

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Preliminary Statement

Respondent New Jersey Department of Environmental Protection's (DEP) opposition brief contains a stunning admission – that DEP never seriously considered finding the Atlantic Shores project inconsistent with its enforceable coastal policies and lodging an objection to it, because of the possibility that the federal government could have overridden such a determination. DEP's framing of its review turns the Coastal Zone Management Act (CZMA) on its head. DEP's obligation under the statute, and its obligation to the citizens of New Jersey, was to review the Atlantic Shores project for consistency with New Jersey's coastal policies. That the Secretary of the federal Department of the Interior may, if certain statutory criteria were satisfied and with such findings subject to judicial review, have been permitted to allow the project to move forward notwithstanding New Jersey's objections, does not change that obligation.

Even under the deferential standard of review afforded its determinations, DEP's finding that the Atlantic Shores project was consistent with its coastal regulations was arbitrary, capricious and unreasonable. Apparently aware of the vulnerability of its decision to endorse construction of 200 1000-foot turbines just off the coast, DEP now injects uncertainty as to whether its Scenic Resources and Design rule applies to offshore wind projects. DEP's decision

documents contain no such trepidation in applying the rule, albeit with unsupported findings of compliance.

Properly analyzed, the Scenic Resources and Design rule mandated finding this specific project inconsistent with DEP's Coastal Zone Management (CZM) rules. DEP acknowledged that the array of turbines would have major visual impacts, which renders the project "discouraged" under the rule. DEP's rules mandate that such "discouraged" development is approvable only if there will be mitigation sufficient to result in a net benefit to the coastal resource at issue. DEP and Atlantic Shores concede there is no net benefit to scenic resources from mitigation Atlantic Shores proposed and instead seek to evade the application of that requirement. But if DEP wishes to alter that requirement or give itself the ability to waive it, the proper recourse is to engage in rulemaking, not simply ignore its current rules.

DEP's application of numerous other rules, including its rules protecting fisheries, surf clams, and critical wildlife, was similarly arbitrary and capricious. This Court should thus reverse the consistency certification, and remand to DEP with directions for DEP to object to the project or to impose conditions on its approval allow the project to satisfy the Coastal Zone Management rules.

The Court should likewise reverse DEP's denial of the Shore Municipalities' adjudicatory hearing request. DEP's admission that it viewed

itself as constrained to issue an affirmative consistency certification underscores that Atlantic Shores' application needs to be subject to adversarial proceedings and searching review by a neutral adjudicator.

Argument

I. The CZMA permitted DEP to object to the project.

DEP indicates that it reviewed the project under a less stringent standard because of the possibility that the federal government could override an objection. See DEPb28-29.[1] But that framing misinterprets and unduly limits New Jersey's rights under the CZMA, and abdicates DEP's responsibility to fully review a proposed development and object to it if warranted.

Under the CZMA, an impacted state is entitled to review a development with potential impacts on its coastal zone, and permitted to find the project to be consistent, conditionally consistent, or inconsistent with its coastal polices. See 16 U.S.C. 1456(c)(3). It is true that the Secretary of the Interior can override a state's objection. 16 U.S.C. 1456(c)(3)(A); 16 U.S.C. 1456(c)(3)(B)(iii). But that is permissible only in limited circumstances where, for example, the Secretary of the Interior determines the development to be "in the interest of national security." Ibid. Otherwise a state's objection prevents the federal

[1] "DEPb" refers to DEP's brief. "Asb" refers to Atlantic Shores' brief. "Pa" refers to the Shore Municipalities' appendix submitted with their opening brief.

government from approving the development. 16 U.S.C. 1456(c)(3)(A) ("No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification . . ."); 16 U.S.C. § 1456(B) (requiring applicant to submit a plan amendment or a new plan if a state objects to certification).

Thus, the fact that the federal government could override an objection does not justify DEP lowering its own standards and greasing the path towards federal approval. DEP's apparent relaxation of its Scenic Resources and other rules to find the Atlantic Shores project consistent with New Jersey's CZM rules was arbitrary, capricious, and unreasonable, and warrants reversal of the consistency certification.

II. The project does not satisfy the Scenic Resources and Design rule.

Apparently taking its lead from Atlantic Shores, DEP now questions whether the Scenic Resources and Design rule, N.J.A.C. 7:7-16.10, applies to offshore wind projects, adding the qualifier "to the extent it applies" to its analysis of the rule throughout its brief. However, DEP added no such qualifiers in analyzing the rule in its decision documents, see Pa47-Pa50, and the Court should disregard this post hoc attempt to avoid judicial review.

Courts "interpret a regulation in the same manner that [a court] would interpret a statute." US Bank, N.A. v. Hough, 210 N.J. 187, 199 (2012). A "court

principle that guides [a court's] review . . . is the notion that codified provisions, whether they be enacted within a statute, an administrative regulation, or an ordinance, must be interpreted sensibly in a manner that avoids reaching absurd results." In re N.J.A.C. 12:17-2.1, 450 N.J. Super. 152, 166-167 (App. Div. 2017).

Failure to apply the Scenic Resources rule to offshore development would cause absurd and irrational results. The rule broadly defines scenic resources to "include the views of the natural and/or built landscape." N.J.A.C 7:7-16.10(a). It would make no sense to include the beach as part of the natural landscape to be protected, but not the ocean vistas that brings people to the beach. But adopting Atlantic Shores' interpretation of the rule would mean development that would be disallowed or discouraged at the water's edge because of its adverse impact to ocean views would suddenly become permitted if moved into the water itself despite the same impact on the scenic resources of the Coastal Zone. The Court should thus reject such a constrained interpretation of the Scenic Resources rule, and find that it applies to the project.

When applied, the rule is not satisfied. DEP does not contest that the project is considered "discouraged" development under the rule – and it must be, given the acknowledged "major visual impacts"– meaning that it "is likely to be rejected or denied" unless it is in the public interest and with sufficient

mitigation "so that there can be a net gain in quality and quantity of the coastal resource of concern." See Pa48; N.J.A.C. 7:7-1.5 (defining "discouraged").[2] DEP and Atlantic Shores acknowledge that the mitigation proposed does not result in a "net benefit" to scenic resources. They instead argue the rule's plain language does not apply to offshore wind projects.

The CZM rules contain no such exception. If DEP wishes to exempt offshore wind projects from the scenic resources rule, it must amend its rules to do so. As the Supreme Court has explained, "[w]hen [an] agency is concerned with 'broad policy issues' that affect the public at-large or an entire field of endeavor or important areas of social concern, or the contemplated action is intended to have wide application and prospective effect, rulemaking becomes the suitable mode of proceeding." Crema v. N.J. Dep't of Env't Prot, 94 N.J. 286, 299 (1983) (quoting Bally Mfg. Corp. v. N.J. Casino Control Comm'n, 85 N.J. 325, 340-341 (1981)); see also Metromedia v. Director, Div. of Taxation, 97 N.J. 313, 331-332 (1984).

This Court previously required DEP to engage in rulemaking before it could relax certain rules to avoid a regulatory taking of a tract on which strict application of its regulations would prevent development of a housing project.

[2] This definition is to be applied throughout N.J.A.C. 7:7 "unless context clearly indicates otherwise." N.J.A.C. 7:7-1.5.

See East Cape May Associates v. State, Dep't of Env't Prot., 343 N.J. Super. 110, 130-131 (App. Div. 2001) ("our courts have not hesitated to declare that waiver of environmental regulations requires rule-making"). The same result is called for here. Development of offshore wind projects just off New Jersey's coast is a matter of broad public concern. DEP should not be permitted to relax its rules and waive mitigation requirements to push such projects forward, without engaging in the public process of adopting rules governing its review of such projects. Accordingly, if DEP believes that offshore wind projects with adverse impacts on scenic resources should be approved without satisfying its current rules concerning such "discouraged" developments, it must amend its rules to so provide.

The claims of impossibility of mitigation do not save Atlantic Shores and DEP. First, impossibility has not been shown. Atlantic Shores could have proposed mitigation measures that would improve or preserve scenic resources elsewhere by, for example, acquiring oceanfront property and improving the viewshed. It did not do so. Even if such actions would not be sufficient to result in a "net benefit," that does not mean the solution is to simply ignore the requirement. The solution is for DEP to amend its rules if it wishes to nonetheless permit such viewshed-destroying development.

The reliance on OWEDA to evade the requirements of DEP's rules fares no better. OWEDA concerns offshore wind renewable energy credits to be awarded by the Board of Public Utilities. N.J.S.A. 48:3-87.1. The statute does not waive environmental requirements or provide any direction or guidance to DEP in its review of applications. Rather, it expressly requires an application to indicate any environmental approvals required and directs the BPU to only issue awards to projects that have a net environmental benefit to New Jersey.[3] N.J.S.A. 48:3-87.1(a)(9) and -(a)(10)(c); N.J.S.A. 48:3-87.1(b)(1)(b).

Next, attempting to minimize the adverse impacts of the project, DEP arbitrarily walks away from its recent reliance on studies concerning adverse impact on tourism from near-shore offshore wind turbines, and suggests the science is without consensus. Specifically, in its 2023 analysis of the proposed Ocean Wind offshore wind farm, DEP relied on a study by the University of Delaware, which found that turbines further than 15 miles offshore would lower "impacts on businesses dependent on recreation and tourism activities" and a study by North Carolina State University, which reflected that turbines closer to shore would impact vacation rental prices. (Pa641). DEP cites no new studies to

[3] The Shore Municipalities note that the BPU recently terminated its Fourth Solicitation, determining not to issue an award to Atlantic Shores. See [redacted]nj.gov/bpu/newsroom/2024/approved/20250203.html (last accessed March 10, 2025).

warrant changing its prior analysis or reliance on those studies, other than the inconvenient fact that they would require concluding that the closer-than-15 mile Atlantic Shores project would have adverse impacts on a vacation tourism economy like those of the Shore Municipalities. It is the definition of arbitrary and capricious for DEP to flip-flop on its earlier findings to justify its conclusion that this project complies with its rules.

Thus, for these reasons and those in the Shore Municipalities' opening brief, the Court should reverse the consistency determination based on DEP's arbitrary, capricious, and unreasonable application of the Scenic Resources rule.

III. The project does not satisfy the Marine Fish and Fisheries rule.

As with the Scenic Resources Rule, the acknowledged adverse impacts the project will have on marine fish and fisheries renders it "discouraged" under the Marine Fish and Fisheries rule, N.J.A.C. 7:7-16.2, requiring "mitigating or compensating measures can be taken so that there is a net gain in quality and quantity of the coastal resource of concern" if it is to nonetheless be permitted. N.J.A.C. 7:7-1.5. [4] And as the Shore Municipalities pointed out in their opening brief, DEP's conclusions concerning the Marine Fish and Fisheries rule were

[4] Unlike with the Scenic Resources rule, DEP and Atlantic Shores do not appear to contest that both the "public interest" and "net benefit" prongs must be satisfied to approve development that is considered "discouraged" under the Marine Fish and Fisheries rule. No explanation for that discrepancy in positions is offered.

inadequate on their face, because DEP found only that there would be no net loss in the quantity and quality of fisheries, and did not find there would be a net gain as required by the rule. DEP glosses over that deficiency, and Atlantic Shores asks this Court to in essence rewrite DEP's findings to satisfy the rule. The Court should decline that invitation.

Even if the Court were to construe the "no net loss" finding to be the equivalent of a finding of "net gain," such a finding is arbitrary and capricious based on the remainder of DEP's analysis. DEP and Atlantic Shores rely heavily on monitoring to satisfy the mitigation requirement. But monitoring the impacts of this project is insufficient to support a finding that it will result in a net benefit to the quantity and quality of marine fish and fisheries, particularly with no commitment to remove turbines or take other actions if the impacts are indeed severe. Rather, it simply transforms the waters just off the New Jersey coast into a laboratory. If no further projects are developed, the monitoring will result only in a quantification of negative impacts and no net benefit.

As explained in the Shore Municipalities' opening brief, the other mitigation proposed by DEP is likewise insufficient to result in a net benefit to the quantity and quality of marine fish and fisheries. Atlantic Shores has proposed no measures to improve habitat, agreeing only to take certain steps to reduce the harm it will cause. The monetary compensation proposed will at most

compensate for losses, but will not leave fisheries in an improved standing. DEP's finding of consistency with N.J.A.C. 7:7-16.2 was thus arbitrary and capricious, and should be reversed.

IV. DEP's finding of compliance with the Surf Clam Area rule was arbitrary and capricious.

For similar reasons, DEP's finding that the Surf Clams Area rule, N.J.A.C. 7:7-9.3, was satisfied was arbitrary and capricious. DEP and Atlantic Shores do not dispute that the only mitigation of the project's permanent impacts to surf clam areas consists of monitoring studies, and instead seek to hide beyond the principle of deference to gloss over that such studies will do nothing to mitigate the adverse effects of *this* project. It is unreasonable to interpret the CZM rules to allow mitigation that will provide an impact only in the event of speculative future projects, while not eliminating or mitigating the acknowledged harm that the project under review will cause. Thus, DEP's finding of compliance with N.J.A.C. 7:7-9.3 based solely on monitoring studies should be reversed.

V. DEP's finding of compliance with the Critical Wildlife Habitat rule was arbitrary and capricious.

DEP's opposition brief fails to address the essential point raised by the Shore Municipalities in their argument under the Critical Wildlife Habitat rule, N.J.A.C. 7:7-9.37(a)(3): that DEP had construed the definition of habitat too

narrowly, and ignored express language in its rule including "natural corridors for wildlife movement" within the rule's scope. See N.J.A.C. 7:7-9.37(a)(1).

The Atlantic Shores project is indisputably within the Atlantic Flyway used for migration by numerous bird species. DEP's failure to consider the project area subject to the rule's requirements, and finding of compliance on the basis that "no activities are proposed within defined critical wildlife habitat," was arbitrary and capricious and should be reversed on appeal.

VI. DEP's Bias Required Procedural Safeguards in Reviewing the Application.

DEP and Atlantic Shores additionally dispute that procedural safeguards, such as review by a neutral tribunal, were required to fairly review Atlantic Shores' application. DEP relies heavily on precedents and regulations concerning the recusal or disqualification of agency members due to personal or financial conflicts is misguided in this context, as this case is not about individual biases but an institutional predisposition -- a scenario absent from the cases the DEP cites. Even under the law relied upon by the DEP, a member of an administrative agency may be disqualified even absent actual bias; "it is the potential for conflict that disqualifies. There need be no showing that the official succumbed to temptation or was even aware of it." See In re Bergen Cnty. Utils. Auth., 230 N.J. Super. 411, 419–20 (App. Div. 1989). "The matter of conflict is fact-sensitive" and requires assessing "whether the circumstances could

reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty." Id.

DEP's opposition brief, including its concession that the agency appears to have considered its obligation to be to find Atlantic Shores' application consistent with its CZM rules, underscores that protections were required to ensure New Jersey's interests under the CZMA were protected. Accordingly, the consistency certification should be vacated, and remanded for further review with procedural protections such as an investigatory hearing in the Office of the Administrative Law. See, e.g. N.J.A.C. 1:1-21.1(a).

VII. The consistency certification should be remanded for an adjudicatory hearing.

Finally, DEP's denial of the Shore Municipalities' hearing request should be reversed, and the consistency certification remanded for a hearing in the Office of Administrative Law.

DEP and Atlantic Shores' challenge the Shore Municipalities' constitutional right to a hearing. But their arguments in opposition are unavailing. As the Shore Municipalities explained in their opening brief, a "property interest" under the Due Process clause "may take many forms over and above the ownership of tangible property"; the focus is on a "legitimate claim of entitlement." Nicoletta v. N.J. Dist. Water Supply Comm'n, 77 N.J. 145, 154 (1978). DEP and Atlantic Shores argue that the Shore Municipalities

have no constitutionally protected right against "inequality of tax burdens" [Db33] or avoid "speculative potential reductions in tax revenue" [Ib33] But the cases on which they rely for those propositions, including Gomillion v. Lightfoot, 364 U.S. 339 (1960), and Camden v. Byrne, 82 N.J. 133, 158 (1980), are distinguishable.

In Gomillion, the U.S. Supreme Court invalidated Alabama's redistricting that disenfranchised Black voters; its mention of inequalities in tax burdens was limited to incidental effects of legitimate state action. Byrne dealt with legislative tax caps and appropriations laws, which the Supreme Court held were within the exclusive authority of the legislative branch and could not be judicially altered. Those situations are simply incomparable. This case involves direct, project-specific administrative action by the DEP that threatens the Shore Municipalities' ability to collect tax revenues; the Shore Municipalities are not challenging legislative policy decisions on fiscal management like in Byrne.

Nor does In re Riverview Dev., LLC, 411 N.J. Super. 409, 426 (App. Div. 2010) squarely address the issue as the DEP and Atlantic Shores suggest. That case involved individual homeowners asserting what this Court deemed an unprotected interest in scenic views that was insufficient to warrant a hearing. Here, the stakes are far greater. The Shore Municipalities represent entire municipalities facing catastrophic losses of hundreds of millions in tax revenue

and the irreversible transformation of New Jersey's coastline. Unlike Riverview, this is not a case of localized, collateral impacts but a statewide issue of profound public importance.

DEP falls back on its claim that there is a lack of scientific consensus concerning the severe adverse economic impacts the Shore Municipalities assert they will suffer to disregard the study the Shore Municipalities present in support. DEP ignores that the studies it cited indeed found adverse impacts on tourism from turbines closer than 15 miles. (Pa48). And to the extent there remains questions on the adverse impacts that DEP was unable to resolve on the record before it, that only further justifies a factfinding hearing to draw a firmer conclusion concerning the visual impacts of the turbines before endorsing a project of such unprecedented scale.

Accordingly, this Court should reverse DEP's denial of the Shore Municipalities' hearing request, and remand the consistency certification for an adjudicatory hearing.

Conclusion

For all the foregoing reasons and those in the Shore Municipalities' opening brief, the Shore Municipalities respectfully submit that the consistency certification should be reversed and remanded for an adjudicatory hearing.

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