

September 9, 2024

US Wind Wetlands Permit Application Opposition Comments

The public policy of Delaware is “to preserve and protect the productive public and private wetlands and to prevent their despoliation and destruction consistent with the historic right of private ownership of lands.” 7 *Del. C.* § 6602; 7 *Del. Admin. Code* § 7502 *2.0. The purpose of this policy is that:

“[M]uch of the wetlands of this State have been lost or despoiled by unregulated dredging, dumping, filling and like activities and that the remaining wetlands of this State are in jeopardy of being lost or despoiled by these and other activities; that such loss or despoliation will adversely affect, if not entirely eliminate, the value of such wetlands as sources of nutrients to finfish, crustacea and shellfish of significant economic value; that such loss or despoliation will destroy such wetlands as habitats for plants and animals of significant economic and ecological value and will eliminate or substantially reduce marine commerce, recreation and aesthetic enjoyment; that such loss or despoliation will, in most cases, disturb the natural ability of wetlands to reduce flood damage and adversely affect the public health and welfare; that such loss or despoliation will substantially reduce the capacity of such wetlands to absorb silt and will thus result in the increased silting of channels and harbor areas to the detriment of free navigation.” *Id.*

The US Wind Wetlands Permit Application, jointly submitted with its Subaqueous Lands and Beach Protection Applications (collectively “The US Wind Application”) fails to articulate adequate protections to preserve coastal wetlands; fails to meet the statutory and regulatory criteria required for a wetlands permit; and fails to provide necessary information to even make an informed decision on the permit requirements. These critical failures in the Application are outlined below

I. The US Wind proposed project negatively impacts the environment in the wetlands. 7 *Del. C.* § 6604(b)(1); 7 *Del. Admin. Code* § 7502 *12.2.

*A. Negative effects on the value of tidal ebb and flow. 7 *Del. Admin. Code* § 7502 *12.2.1.*

1) The proposed project would adversely impact 12.2.1.1 Production Value: carrying organic matter to adjacent estuaries and coastal waters which serve

as breeding areas for certain animal species (especially fish and shellfish). 7 *Del. Admin. Code* § 7502 *12.2.1.1.

The US Wind Application fails to support its assertions of minimal biotic impacts.¹ The effects to biota are not known until the disturbance occurs, therefore careful research and monitoring are necessary to determine whether impacts are minimal.² Additional scientific study is necessary to determine impacts of the project on the carrying of organic matter to adjacent waters.

2) The proposed project would adversely impact Value as a natural protective system of absorption of storm wave energy, flood waters, and heavy rainfall, thereby decreasing flood and erosion damage. 7 *Del. Admin. Code* § 7502 *12.2.1.2.

Damage due to the increased severity and frequency of recent weather events, such as hurricanes, rain and wind, have caused increased flooding and shore erosion, particularly in coastal areas, in recent years. The US Wind application fails to adequately consider wind in relation to tidal behavior.³ Additional protections are needed to ensure protection from the most threatening storms.

3) The US Wind Wetlands Permit Application does not adequately address the prevention of silting in certain harbors and inlets thereby reducing dredging. 7 *Del. Admin. Code* § 7502 *12.2.1.3.

No Wetlands Permit should be approved for this project because the analysis of dredging impacts is incomplete. The US Wind Application does not adequately address the impact of dredging to fringing wetlands on the estuary after the channel is dredged and additional modeling is required.⁴ The materials provided in appendix G of the US Wind Application do not sufficiently explain dredging activities to warrant the issuance of a Wetlands Permit.

4) The US Wind Wetlands Permit Application does not adequately address removal and recycling of inorganic nutrients. 7 *Del. Admin. Code* § 7502 *12.2.1.4.

¹ *Delaware Center of the Inland Bays* BOEM Comments, November 20, 2023 *7-8.

² *Id.*

³ *Id.* *4.

⁴ *Id.* *5-6.

Additional research and data concerning removal and recycling of inorganic nutrients to make informed findings based on substantial evidence.

5) The US Wind Wetlands Permit Application fails to adequately address the effect that the proposed project would have on the estuarine waters. 7 *Del. Admin. Code § 7502 *12.2.1.5.*

The Indian River Bay is an Estuary of National Significance and the natural habitat of essential fish and aquatic organisms.⁵ The Bay waters must be afforded an extra level of protection; however, the US Wind application has provided inadequate data to conclude that the proposed project will cause no harm to the Bay.⁶

*B. The proposed project would adversely affect Habitat Value. 7 Del. Admin. Code § 7502 *12.2.2.*

1) The proposed project would negatively impact the habitat for resident species of wildlife including furbearers, invertebrates, finfish. 7 *Del. Admin. Code § 7502 *12.2.2.1.*

The environmental impact study fails to provide an adequate analysis of the project's impacts on finfish, invertebrates and other benthic resources concerning sediment contamination during cable installation; cable heat impacts; egg and larvae; and noise impact on these critical natural resources.⁷ No Wetlands Permit for this project should be issued without adequate information related to these species in their natural habitat.

The proposed project would have serious, permanent adverse impacts on commercial and recreational fishing.⁸ The installation of cables under the Inland Bay will negatively impact shellfish.⁹ There is inadequate scientific data concerning the effects of drilling, excavation and construction related to this project on horseshoe crabs. DNREC does not have enough information to make findings based on substantial evidence that the proposed project protects breeding and nesting areas.

⁵ *Id.* *2.

⁶ *Id.*

⁷ *Id.* *8.

⁸ BOEM Docket – 2024- 0033, Volume I, pp. 2-48.

⁹ *Delaware Center of the Inland Bays BOEM Comments, November 20, 2023 *7-8.*

2) The proposed project would negatively impact the habitat 12.2.2.2 for migratory wildlife species including waterfowl, wading birds, shorebirds, passerines, finfish, shrimp. *7 Del. Admin. Code § 7502 *12.2.2.2.*

The materials submitted by US Wind inadequately address the project's impact on birds because flyways are not clearly designated; all Mid-Atlantic species are not identified; and the effect of storms on migratory pathways; and damage cause by wind turbines.¹⁰

3) The US Wind Application fails to adequately address the rearing area, nesting area, breeding grounds for various species. *7 Del. Admin. Code § 7502 *12.2.2.3.*

Additional research and data concerning nesting areas and breeding grounds for species to make informed findings based on substantial evidence.

4) The US Wind Application fails to adequately address the habitat for rare or endangered plants. *7 Del. Admin. Code § 7502 *12.2.2.4.*

The Application fails to provide an adequate plan to protect the habitat for rare of endangered plants.

5) The proposed project would substantially reduce the presence of plants or animals known to be rare generally, or unique to the Inland Bays. *7 Del. Admin. Code § 7502 *12.2.2.5.*

While the US Wind Application lists plants, fish and animals that are rare, the Application fails to explain sufficient plans to protect rare species.

6) Additional scientific data is needed to determine whether the proposed project would substantially reduce the presence of plants or animals near the limits of their territorial range pursuant to *7 Del. Admin. Code § 7502 *12.2.2.6.*

7) The US Wind Application fails to adequately address the presence of unique geologic or wetland features pursuant to *7 Del. Admin. Code § 7502 *12.2.2.7.*

¹⁰ *Id.* *9.

*C. The US Wind Application does not adequately address the aesthetic effect of the proposed project pursuant to 7 Del. C. § 6604(b)(2) by failing to fully consider the presence of plants or animals of a high visual quality (7 Del. Admin. Code § 7502 *12.3.1); the presence of an associated water body (7 Del. Admin. Code § 7502 *12.3.2); and the Wetland type of topographic diversity (7 Del. Admin. Code § 7502 *12.3.3).*

The proposed electric cables connecting a substation with an offshore wind farm near the wetlands are not well suited to the visual presence of plants and animals in the region. The infrastructure related to this project is out of character with the Inland Bays. The adverse impact on the presence of animals and plants in the wetlands area outweighs any benefit of the proposed project to Delaware. The US Wind Wetlands Permit Application fails to adequately consider the impact of supporting facilities, including whether the construction of any public or private construction occurs in the wetlands, which would be required for the construction of operation of the proposed wetlands activity, such as roads, sewage disposal facilities, electric lines, water supply systems, and schools in accordance with 7 Del. C. § 6604(b)(3) and 7 Del. Admin. Code § 7502 *12.4.

II. The proposed project adversely effects neighboring land uses under 7 Del. C. § 6604(b)(4) and 7 Del. Admin. Code § 7502 *12.5.1 and inadequately addresses the environmental, aesthetic and economic effects of the proposed wetland activity on land uses neighboring the lands on which supporting facilities will be located under 7 Del. Admin. Code § 7502 *12.5.2.

The proposed project will negatively impact the environment related to neighboring land uses by negatively impacting fish, wildlife and animals. Moreover, the wind turbines and related structures contemplated by the proposed project will interfere with the visual aesthetic quality of neighboring lands. Undoubtedly, the proposed project will negatively impact property values and rental income of neighboring property, however more economic data is needed to quantify these adverse impacts.

III. The proposed project fails to comply with Federal, State, Regional, County and Municipal Comprehensive Plans according to the plans of the jurisdiction in which it is proposed to take place, and its impact on the plans or other affected jurisdictions. 7 Del. C. § 6604(b)(5).

The proposed project is inconsistent with the Sussex County Comprehensive Plan. The proposed offshore wind farm will negatively impact the aesthetic quality of the Delaware Coast. Yet, there is no economic study that evaluates the detriment of the project to tourism.

The proposed project is located within the Delaware Coastal Zone.¹¹ However, there is no evidence in the record that DNREC has determined that the requirements of the Coastal Zone Act do not apply to this project.

This permit process conflicts with State law and regulations. “No permit may be granted unless the county or municipality having jurisdiction has *first approved* the activity in question by zoning procedures provided by law.”¹² (*emphasis added*). The Sussex County Council has not issued the required zoning approvals related to this project. The power granted to DNREC to issue Wetlands “shall not authorize an activity in contravention of county or municipal zoning regulations.”¹³ DNREC has failed to follow its own Wetlands Regulations which require that zoning approvals related to the project be submitted with the Application.¹⁴ This permit process should be suspended, including US Wind’s request for a Subaqueous Lands Permit because that request was jointly submitted with the Wetlands Permit. No further action on the Permits should be taken by DNREC until such time as the County acts on the pending zoning approvals. If the County does approve the requisite zoning for this project, DNREC should initiate a new comment period.

Finally, the State entered a term sheet for the lease of public lands prior to DNREC’s consideration of this permit process with raises serious questions of impartiality under the State Ethics Code.¹⁵

IV. The economic impact of the proposed project is minimal compared to the potential disruption of wetlands. 7 Del. C. § 6604(b)(6).

*A. There is no evidence that the proposed project either significantly creates jobs or produces additional net income from any jobs created. 7 Del. Admin. Code § 7502 *12.7.1.*

¹¹ 7 Del. C. 7002(i).

¹² 7 Del. C. §6604(a).

¹³ 7 Del. C. 6618.

¹⁴ 7 Del. Admin. Code §7502 *8.3.3

¹⁵ 29 Del. C. §5801.

While arguably the proposed project may bring temporary jobs and income, there is no guarantee that any additional jobs or income will be permanent. The predominant economic benefits derived from the project will occur in Maryland. The project may cause Delaware to experience a net economic loss because of diminished tourism. Additional data on the cost/benefit of the project to Delaware is needed to make informed findings on these criteria.

*B. There is insufficient information in the US Wind Application to find that the proposed project increases revenues to State, County and Local governments (e.g., increased taxes from an increased tax base and increased expenditure for maintaining supporting facilities), however, the proposed project may cause additional expenditures to State and local governments. 7 Del. Admin. Code § 7502 *12.7.2.*

The proposed project does not appear to significantly increase revenue to Delaware, Sussex County, or local governments. The proposed project could cause additional expenditures related to increased government operations to support and protect the project during construction and operation. Additional data is necessary to evaluate the impact of the project on the revenue and expenditures of State, County and local governments in Delaware.

*C. Insufficient information exists in the US Wind Application to determine whether the proposed project increases or decreases in the value attributable to the wetlands as a source of nutrients to finfish, crustacea and shellfish and as habitat of such species or other flora or fauna of significant actual or potential economic value. 7 Del. Admin. Code § 7502 *12.7.3.*

The proposed project adversely impacts finfish, crustacea and shellfish. The Application acknowledges that the project will kill fish, plants and marine mammals, however, inadequate information is provided to gauge the extent of this destruction and the required protocols to minimize this damage. The project will interfere with commercial and recreational fishing and shellfish harvesting. No information concerning any adverse impacts on horseshoe crabs is provided. The project's impact on flora and fauna needs further study.

*D. The proposed project decreases the value of the land as a recreational area. 7 Del. Admin. Code § 7502 *12.7.4.*

The proposed project clearly decreases the value of the land as a recreational area because the wind turbines diminish visual aesthetic quality. The project would allow an ongoing commercial enterprise on public lands in direct

contravention to the purpose of Delaware wetlands policy “to preserve and protect the public and private wetlands and to prevent their despoliation and destruction.”¹⁶

*E. The proposed project will increase the cost of flood control or expected flood damage which might be caused by the effect of the activity on the natural capacity of the wetland to reduce flood damage. 7 Del. Admin. Code § 7502 *12.7.5.*

The proximity of the wind turbines to the Delaware Coast, the submerged transmission cables, and the substation will all increase the cost of flood damage in an amount that is unquantified in the current record.

*F. The proposed project will increase the costs of maintaining navigable harbors and waterways which would result from altering the capacity of the wetlands. 7 Del. Admin. Code § 7502 *12.7.6.*

The additional structures proposed by this Application will alter navigability which will in turn cause additional expenditures to maintain navigable waterways. More data concerning navigability and additional maintenance expenditures is necessary before making any determination on this issue.

*G. The US Wind Application fails to address the net economic effect, both public and private, of any contemplated supporting facilities. 7 Del. Admin. Code § 7502 *12.7.7.*

Additional data is needed to understand the net economic effect of any supporting facilities on public or private interests.

*H. The US Wind Application fails to establish any net positive economic effect, both public and private, of the proposed activity on neighboring land uses. 7 Del. Admin. Code § 7502 *12.7.8.*

The Application does not adequately address nor establish any net positive effect on public or private land uses.

¹⁶ 7 Del. C. §6602.

V. The proposed project design neither eliminates nor substantially lessens damage to the wetlands. 7 Del. Admin. Code § 7502 *12.8.

The project design neither eliminates nor substantially reduces damage to the wetlands. The project harms fish, marine mammals, plants and beaches without any discernable economic or environmental improvement to benefit Delaware. Moreover, the proposed long-term project forecloses the future use of Delaware wetlands for development projects, environmental preservation initiatives, or emergency responses that would benefit the citizens of Delaware.

VI. Conclusion

This permit process is void *ab initio* because the prerequisite zoning approvals were not submitted with the US Wind Application, as required by statute and regulation. The project proposed by US Wind will cause irreparable damage to Delaware’s critical natural resource wetlands area. The US Wind Wetlands Permit Application fails to satisfy the required statutory and regulatory criteria. The damage to the environment that would be caused by the proposed project far exceeds any minimal economic benefit. The Application fails to adequately provide necessary scientific and economic data. Accordingly, the Application must be denied, as a matter of law and public policy, to preserve and protect our most critical remaining Wetlands for future generations.

US Wind Subaqueous Lands Permit Application Opposition Comments

Delaware Subaqueous Lands comprise a critical resource of the State and require protection against uses or changes which may impair the public interest in the use of tidal or navigable waters. 7 Del. C. § 7201; 7 Del. Admin. Code § 7504. The proposed US Wind Subaqueous Lands Permit Application (“US Wind Application”) not only would impair the public interest in the use of tidal and navigable waters but fails to provide necessary scientific and economic data to make an informed decision on such an intrusive project in Delaware’s most precious natural resource areas as outlined in detail below.

I. The US Wind application fails to satisfy Subaqueous Lands Permit Criteria.

*A. The construction, excavation, and dredging activities associated with the US Wind Application would cause harm to the environment, both singly and in combination with other activities or existing conditions, which cannot be sufficiently mitigated. 7 Del. Admin. Code § 7504 *4.2.*

The US Wind Application involves excavation within the sensitive Delaware Subaqueous Lands area to place cables and construct an inland substation to support a comprehensive Maryland Offshore Wind Project. In November of 2023, the Delaware Center for the Inland Bays submitted comments to the Office of Renewable Energy (OREP) within the United States Department of the Interior, Bureau of Ocean Energy Management (BOEM) recommending overland cable transmission, as opposed to placing cable lines underneath Inland Bays.¹⁷ The Center noted that the proposed Maryland Project failed to provide adequate documentation of sediment transport and the impacts of dredging on water quality and wetlands.¹⁸ Additionally, the Maryland Project failed to document any adverse effects on wildlife such as “horseshoe crabs, Eastern Diamondback Terrapins, hard clam beds, and nesting terns.”¹⁹ Recent scientific studies have shown that excessive noise, as may occur during underwater construction activities, can cause an increase in whale deaths.²⁰

The construction, excavation, and dredging in Delaware proposed by the US Wind Application will disrupt public commerce, navigation, and the aesthetic quality of the Delaware coastal regions. The US Wind Application is based on conclusory statements rather than proven scientific data to ensure protection of Delaware’s vital natural resources. There is insufficient scientific data for the Delaware Department of Natural Resources and Environment (DNREC) to find, either on any single factor or in combination, that the proposed project would cause no harm to the environment based on substantial evidence.

*B. The value to the State and the public in retaining an interest in subaqueous lands far outweighs the potential economic value of the proposed project to the State and the public. 7 Del. Admin. Code § 7504 *4.6.1.*

The entire economic value of this project to Delaware is \$350,000 of revenue per year. The Delaware Term Sheet with US Wind overlooks the critical

¹⁷ *Delaware Center of the Inland Bays* BOEM Comments, November 20, 2023 *2.

¹⁸ *Id.* *2-6.

¹⁹ *Id.* *2.

²⁰ *Inside Energy, Ceasar Rodney Institute*, David T. Stevenson “Offshore Wind is Killing Whales” *1, July 16, 2024, citing the work of Apostolos Gerasoulis, NMFS, “BOEM and NOAA Fisheries North Atlantic Right Whale and Offshore Strategy” *8.

objective of Subaqueous Lands regulation, namely that Delaware Subaqueous Lands are to be preserved for the use of Delaware and not as an ancillary accommodation to a neighboring state whose municipalities seem unwilling to take on the inherent risks of underwater electric cable transmission. The potential future detriments of decaying materials in the Inland Bay at the end of the project's life cycle, or even worse, the immediate consequences of broken turbine blades washing up onto shore, as recently happened in Nantucket²¹, have not been fully considered. Notwithstanding the obvious potential negative effects on Subaqueous Lands, the US Wind Application does not provide comprehensive economic studies to support its proposal, including the detriment to Delaware's critical coastal tourism industry, which would far exceed \$350,000. Lacking the necessary economic data to evaluate the impact of the project on Delaware's economy, the record is inadequate for DNREC to make findings supported by substantial evidence to conclude that the potential economic benefit outweighs the harm to Subaqueous Lands.

*C. A conveyance of any interest in Subaqueous Lands deprives Delaware of future use in the public interest. 7 Del. Admin. Code § 7504 *4.6.2.*

The proposed project minimizes the potential use of Subaqueous Lands for projects that benefit Delaware citizens such as energy transmission, recreation, commerce or disaster recovery. The offshore export cables extend to a location at 3R's Beach and continue to an onshore substation in Dagsboro. The vast scope of the project would preempt future public use to benefit Delaware citizens. A study of potential future public Subaqueous Land use is needed before entering a long-term lease involving exclusive, extensive construction and operational maintenance in the Inland Bay.

*D. The proposed project significantly interferes with public commerce, navigation, recreation, aesthetic enjoyment, natural resources, and other uses of the subaqueous lands. 7 Del. Admin. Code § 7504 *4.6.3.*

The proposed project interferes with commercial fishing. The large number of wind turbines adversely impacts marine navigation. There is inadequate data to assess the effect on aviation navigation. These structures would increase the difficulty of emergency response. The number and locations of wind turbines diminishes views and interferes with the aesthetic enjoyment experienced by residents and tourists. The proposed construction of the turbines such as drilling will unduly stress wildlife and plants. Additional study to determine the adverse impact

²¹ *Coastal Point News*, M. Smith "Nantucket turbine failure spurs local reaction" July 6, 2024.

to natural resources, commerce and navigation is required to even consider the proposed project.

*E. The disruption of the public use of the subaqueous lands subject to the US Wind Application is permanent. 7 Del. Admin. Code § 7504 *4.6.4.*

The permanency of the public use of Subaqueous Lands is incapable of determination on the record before DNREC. The Inland Bays Commission Comments point out that the project provides incomplete information on such critical topics as dredging impacts, biotic impacts, bird geographical analysis and species listing, migration routes.²² The proposed project should not move forward without adequate data to assess its permanent effects on the public, wildlife and other natural resources.

*F. The public would experience minimal benefit from the activity proposed in the US Wind Application and suffer substantial detriment. 7 Del. Admin. Code § 7504 *4.6.8.*

In return for the minimal yearly rental fee Delaware will incur unforeseeable risks associated with the potential exposure of the export cables or broken wind turbines. The construction activities will disrupt birds, plants and fish living in their natural habitat. The water quality is exposed to damage caused by accidental chemical release. Additionally, the project interferes with commercial fishing, marine navigation, and emergency response. The detriment to the public far outweighs the minimal benefit.

II. The project described in the US Wind Application would cause significant, adverse effects to the environment.

*A. The project would impair water quality temporarily and permanently. 7 Del. Admin. Code § 7504 *4.7.1.1.*

More study is needed to assess the project's temporary and permanent impact on water quality. In the Inadvertent Release Contingency Plan attached to its jointly submitted Subaqueous Lands and Wetlands Application, US Winds acknowledges the risk of inadvertent fluid release during drilling. However, the Application does not address the probability and consequences of such release. The Application discusses water quality in Appendix S Supplemental Information and proposed steps for risk avoidance but fails to address the extent of the potential risks.

²² Delaware Center of the Inland Bays BOEM Comments, November 20, 2023 *6-9.

Additional information is necessary to adequately determine the scope of risks to water quality.

*B. The US Wind Application proposal would adversely affect shellfishing and shellfish beds, finfishing, other recreational activities, and existing or designated water uses. 7 Del. Admin. Code § 7504 *4.7.1.2.*

The proposed project would cause major long-term impacts to commercial and recreational fishing.²³ The Indian River Bay is an Estuary of National Significance that contains Essential Fish Habitat for Black Bass, Scup and Summer Flounder which must be afforded exceptional protection.²⁴ US Wind at page 59 of its Application acknowledges that dredging would cause mortality impacts to shellfish and finfish. It states that this mortality will be temporary and spatially limited but fails to quantify the loss of these vital resources.

*C. The proposed project would cause harm to aquatic or tidal vegetation, benthic organisms or other flora and fauna and their habitats. 7 Del. Admin. Code § 7504 *4.7.1.3.*

The structures associated with the project as well hydrodynamic impacts could disrupt plankton that feed marine mammals. The Benthic Reports attached as Appendices H 10, 11 and 12 to the US Wind Application assess the current levels of organisms and marine mammals in the project area, however these reports do not adequately address the project impact on marine life.

*D. The proposed project would cause a loss of natural aquatic habitat. 7 Del. Admin. Code § 7504 *4.7.1.4.*

Additional data is necessary to assess the impact of the project on the loss of natural habitat. The Inland Bays are filled with diverse plant and animal life that are vulnerable to chemicals and commercial development.²⁵ Thus, Subaqueous Lands are “uniquely sensitive to novel perturbations and stressors”²⁶ such as the disruption that would be caused by the proposed project. The US Wind Application fails to address the impact of the project on horseshoe crabs, which are vitally important to the environment and scientific research.

²³ BOEM Docket – 2024- 0033, Volume I, pp. 2-48.

²⁴ *Delaware Center of the Inland Bays* BOEM Comments, November 20, 2023 *2.

²⁵ *Delaware Center of the Inland Bays* BOEM Comments, November 20, 2023 *1.

²⁶ *Id.*

*E. Air quality would be impaired by the proposed project, including noise, odors, and hazardous chemicals. 7 Del. Admin. Code § 7504 *4.7.1.5.*

The US Wind application anticipates the inadvertent release of chemicals during the project.²⁷ The exposure to excessive noise can cause harm to marine mammals and the noise associated with the operation of turbines contemplated by this proposed project has not been adequately studied. Turbine emissions also need further investigation.

*F. 4.7.1.6 Natural surface and groundwater hydrology and sediment transport functions would be adversely impacted by the proposed project. 7 Del. Admin. Code § 7504 *4.7.1.6.*

As described in Section I. A. above, the adverse effects of sediment transport related to the proposed project are not adequately documented at this point.

III. The US Wind Application fails to adequately consider additional criteria related to public lands, engineering standards and uses of subaqueous lands.

*A. The project interferes with public lands, waterways or surrounding private interests. 7 Del. Admin. Code § 7504 *4.7.5.1.*

Delaware officials must carefully consider any alternative future use of public subaqueous lands that are subject to the proposed lease to accommodate the substation and transmission cables which support the Maryland wind power project. There is no record of any such consideration. Nor is there adequate consideration of the potential impact on waterways or surrounding private interests.

*B. The US Wind Application does not adequately address sound engineering principles and appropriate construction materials. 7 Del. Admin. Code § 7504 *4.7.5.2.*

Appendices C-1, C-2, and C-3 to the US Wind Application fail to completely establish sound engineering principles and appropriate construction materials for a project of this magnitude. To the extent that US Wind does describe engineering principles, a complete and comprehensive review of wind turbine technology is necessary in the wake of recent failures in Nantucket and Block Island. The US Wind Application even fails to specify whether concrete mattresses will be

²⁷ US Wind Application Inadvertent Release Contingency Plan

placed in the ocean or the bays. This is a critical structural detail that is best determined in the design phase of the project to enable DNREC to make informed findings concerning the proposed engineering concept.

*C. The proposed project does not fit with surrounding structures, facilities, and uses of the subaqueous lands. 7 Del. Admin. Code § 7504 *4.7.5.3.*

The proposed project consists of placing electric transmission cables under public subaqueous lands. This use is not consistent with the surrounding coastal environment and public park. Nor does the use contemplated by this proposed project preserve sensitive public natural resources for recreation, scientific research, and other potential public uses that benefit Delaware.

*D. There is inadequate information to determine whether the proposed activity complies with Delaware's Surface Water Quality Standards during construction and subsequent operation or maintenance. 7 Del. Admin. Code § 7504 *4.7.5.4.*

The discussion on page 61 of the US Wind Application does not provide sufficient detail to evaluate Surface Water Quality Standards both during construction and operation.

IV. The US Wind Application contains insufficient data to determine whether structures related to the project will be constructed in a manner that allows for continued growth and nourishment of aquatic and wetland vegetation under or near the structure wherever possible and allows for adequate water circulation and water quality to support plants and animals. 7 Del. Admin. Code § 7504 *4.8.1.

*A. The US Wind Application does not adequately address how structures shall be constructed, installed, and used in a manner that minimizes pollution or the causing of harm to aquatic and tidal plants, fish and wildlife. 7 Del. Admin. Code § 7504 *4.8.2.*

The disruption caused by construction and long-term operation of the project will impact plants, fish and marine mammals. The US Wind Application fails to establish that excessive noise during construction will cause no adverse impact to marine mammals or other marine life. Additional data and further evaluation are needed to make an informed finding concerning construction methods.

*B. The proposed project fails to establish that structures will be constructed with the best available materials and technologies in a manner that will prevent or minimize leaching or runoff of harmful chemicals or other substances which may cause water pollution or harm to aquatic plants and wildlife. 7 Del. Admin. Code § 7504 *4.8.3.*

The recent failures in other wind power projects dictate that best available materials and technologies must be thoroughly reviewed prior to approving this project to avoid the release of chemicals and other pollutants that adversely impact plants and wildlife. As previously stated, US Wind acknowledges the potential for inadequate release of chemicals but does not address the probability or the quantity of such potential harmful release.

*C. The 4.8.4 structures related to the proposed project interfere with navigation, public, or other rights. 7 Del. Admin. Code § 7504 *4.8.4.*

The structures related to the proposed project will interfere with marine navigation. These structures may also interfere with ariel navigation and emergency response. Additional data concerning the impact on the public is required to make findings supported by substantial evidence on these criteria.

V. The US Wind Application provides inadequate information concerning shoreline erosion control methods that best provide for the conservation of aquatic nearshore habitat, maintain water quality, and avoid other adverse environmental effects. 7 Del. Admin. Code § 7504 *4.10.1.2.

*A. The Application fails to adequately consider the protection of aquatic biota, wetlands, and nearshore shallow water habitat. 7 Del. Admin. Code § 7504 *4.10.6.1.*

There is no adequately documented sediment transport model for the project model and insufficient data to evaluate the coupling of dispersion or hydrodynamics.²⁸

²⁸ Delaware Center of the Inland Bays BOEM Comments, November 20, 2023 *3.

*B. The Application inadequately addresses the protection of water quality, flushing, and naturally occurring littoral drift and flow. 7 Del. Admin. Code § 7504 *4.10.6.2.*

The US Wind Application lacks detail information concerning tidal behavior and wind.²⁹ The sediment impacts from jet plowing and the extent of suspended sediment plume are based on inadequate data.³⁰

*C. The Application fails to adequately consider protection against "toe scour" for vertical walls by adequately designed toe depth and, in high energy environments, rip-rap at the toe of the structure for existing tidal and wave conditions. 7 Del. Admin. Code § 7504 *4.10.6.3.*

*D. The Application insufficiently addresses adequate flow and circulation necessary to support the functional value of adjacent wetlands or aquatic habitat. 7 Del. Admin. Code § 7504 *4.10.6.4.*

The interaction of tides and freshwater flow does not completely consider groundwater flows.³¹

*E. The Application does not establish that materials and methods of construction shall be sufficient to withstand the stresses to which they will be subjected, from wind, waves, tides, currents, ice, and debris. 7 Del. Admin. Code § 7504 *4.10.6.5.*

The frequency and intensity of wind, rain and severe hurricanes have increased dramatically. The project construction methods should establish the ability to withstand even the most threatening weather events. There is no evidence that the project will be backed by adequate bonding and/or insurance to insure against possible construction defects

*F. The Application fails to provide sufficient information concerning minimization of increased erosion of adjacent or downdrift shorelines. 7 Del. Admin. Code § 7504 *4.10.6.7.*

²⁹ *Id.* *4.

³⁰ *Id.* *3.

³¹ *Id.* *5

VI. The activities related to the proposed project involving dredging, drilling, excavating or extracting materials do not support the issuance of a subaqueous lands permit.

*A. The proposed project does not maintain the navigability of channels. 7 Del. Admin. Code § 7504 *4.11.1.2.*

The materials presented in Appendix G of the US Wind application do not adequately describe dredging activities to support the issuance of a subaqueous lands permit. The Inland Bays Comments state that the analysis of dredging impacts is incomplete.³² No subaqueous lands permit should be issued until the effects of dredging are completely and thoroughly addressed.

*B. The proposed project will neither maintain nor improve the environmental quality of the State's water resources, subaqueous lands and wetlands. 7 Del. Admin. Code § 7504 *4.11.1.3.*

Additional study is needed to determine the long-term impacts of the proposed project on Delaware's water resources, subaqueous lands and wetlands. The incomplete status of the US Wind Application requires DNREC to reject the requested permits in their current form.

*C. Any economic and noneconomic benefits of the project compared to the costs of the project are indirect and completely minimal. 7 Del. Admin. Code § 7504 *4.11.2.3.*

The economic and noneconomic benefits of the proposed project to Delaware are minimal in comparison in comparison to the large benefits that would be experienced by Maryland. The detriment to Delaware's vital tourism industry has not been thoroughly studied. Such an analysis is critical to weigh the economic factors related to the proposed project. A complete economic analysis will most likely establish that any economic benefit of this project to Delaware does not outweigh the serious detriment to the preservation of Delaware's precious natural resources.

*D. The proposed project conflicts with regional growth and local land use plans. 7 Del. Admin. Code § 7504 *4.11.2.4.*

³² *Id.* *5-6.

The proposed project adds little to the regional growth of Delaware and may even diminish growth. Although the project is in the Coastal Zone, DNREC has failed to determine whether the Coastal Zone Act and Regulations apply to the US Wind Application.

This permit process is fatally flawed because Subsection 3.1.2.5 of the Delaware Subaqueous Lands Regulations requires the submission of zoning approvals for the project in the Application. No such zoning approvals were submitted with the US Wind Application nor has Sussex County approved the necessary zoning required for the project. For this reason alone, this permit process should cease immediately.

Additionally, this permit process conflicts with State law and regulations concerning Wetlands regulations. “No permit may be granted unless the county or municipality having jurisdiction has first approved the activity in question by zoning procedures provided by law.”³³ The Sussex County Council has not issued the required zoning approvals related to this project. The power granted to DNREC to issue Wetlands Permits “shall not authorize an activity in contravention of county or municipal zoning regulations.”³⁴ Further, DNREC has failed to follow its own Wetlands Regulations which require that zoning approvals related to the project be submitted with the Application.³⁵ Because US Wind jointly submitted requests for Subaqueous Lands and Wetlands the statutory and regulatory deficiencies that relate to the Wetlands Permit invalidate this entire permit process.

Finally, the State entered a term sheet with US Wind prior to the permit process. This sequence of events casts a cloud of impartiality over these proceedings and runs afoul of the State’s Ethics Code:

Each state employee, state officer and honorary state official shall endeavor to pursue a course of conduct which will not raise suspicion among the public that such state employee, state officer or honorary state official is engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the State and its government.³⁶

³³ 7 Del. C. § 6604(a).

³⁴ 7 Del. C. § 6618.

³⁵ 7 Del. Admin. Code § 7502 *8.3.3.

³⁶ 29 Del. C. § 5801.

VII. Conclusion:

The US Wind Application for a Subaqueous Lands Permit should be denied because the application is incomplete. DNREC has failed to follow its own regulations by not requiring the submission of zoning approvals in the Application. Based on the record before DNREC, US Wind has failed to meet the required criteria, and additional data is necessary to make informed findings based on substantial evidence. US Wind has not adequately explained how the information it submitted meets the criteria required for the issuance of the Subaqueous Lands permit. The detriment to the environment, plants, and wildlife that would be caused by the project far exceeds the minuscule economic benefit to the State, accordingly the permit must be denied.

-David T. Stevenson
On behalf of the Caesar Rodney Institute