

September 1, 2024

Public Comment

US Wind Permit Application

DNREC Hearing Comments

Special Use under 7 Del.C Chapter47

The permit application by US Wind for conditional industrial use of Delaware State park, must be denied. The Secretary of DNREC must not exceed statutory authority in this instance, as procedural jurisprudence will consider the following facts as administered within the legislative body of Delaware. This permit application by US Wind appears to violate Delaware State code and DNREC's authority to solely arbitrate land use in Delaware State park.

There's a fundamental legal question of DNREC's regulatory bias in allowing the following inaccurate application to be considered by the public in a formal comment period. As an agreement would require a lease of formal payments and compensation to the State Treasurer, there's a probability of a 'knowing misrepresentation of the truth or a concealment of a material fact to induce another to act,' by US Wind in this instance.

As published in the US Wind application: *This law authorizes DNREC to grant easements for the purposes of transmission lines and other utilities and charge a fee. This Agreement or similar is anticipated for authorization to use and establish underground utility easements and install Project -associated underground utilities through the State Parkland shoreline and barrier beach areas.*

The permit in question. **Special Use Permit/Land Use Agreement 7 Del.C. Chapter 47 Public Lands, Parks and Memorials – State Parks**

The actual state code, Title 7, (chapter 47 State of Delaware Admin Code), provides specific guidance for state park management, which is only allowed as such:

Title 7 § 4701(a)(9) Grant, with the written approval of the Cabinet Committee on State Planning Issues, easements, for either private or public purpose over or under any public lands which it administers, for the purpose of transmission lines, such as: Telephone and telegraph lines, electric power lines, gas pipelines, and water and sewage pipelines and appurtenances. The term of any such easement together with the amount of any fee charged therefor shall be determined by the Department of Natural Resources and Environmental Control acting with approval of the Cabinet

Committee on State Planning Issues, and any funds received for the grant of such easements shall be deposited by the Department of Natural Resources and Environmental Control with the State Treasurer.

Title 7§ 4706. Zoning oversight to the General Assembly

Notwithstanding any provision of this chapter to the contrary, no state park, or any part thereof, or other area acquired primarily for recreational use, shall be rezoned, neither shall there be a change in the use of any such lands requiring a variance or subdivision approval, except upon 45 days prior notice to all elected members of the General Assembly in whose district such lands, or any part thereof, lie.

[72 Del. Laws, c. 156, § 1;](#)

The actual state code, which requires notification of the General Assembly, but isn't specific on how this land use change would be authorized by the elected body or how past financial appropriations for state parks operation under Title 29 (cited below) would be refunded to the general fund. Theoretically, if the DNREC Secretary was considering changing the scope of park use to industrial, then prior notification must be presented before any signatory due process.

Additionally, the laws and fee structure as decided by the state of Delaware, are clear on responsibility of the General assembly to oversee conservation measures in the public trust and funding of those areas. Use of state park and open space lands are not defined for any industrial purposes.

TITLE 29 State Government State Planning and Property Acquisition.

Specifically:

(e) Funds dedicated for the Stewardship program, and the earnings thereon, which are to be retained therein, shall be disbursed proportionately by the Secretary according to the following formula: 35% to the Division of Parks and Recreation, 35% to the Division of Fish and Wildlife, 10% to the Division of Historical and Cultural Affairs, and 20% to the Department of Agriculture Forest Service. The Stewardship program is intended to provide funds for current expenditure, although the state agencies may, in their discretion, accumulate funds for Stewardship programs for particular project purposes.

It is the intent of the General Assembly that funds in the Stewardship program shall be used by the state agencies for management, preservation and interpretation of biological, recreational and cultural resources in addition to any other funds which have been previously appropriated for this purpose or which may be so appropriated in the future.

(f) Funds in the Infrastructure Account, and the earnings thereon, which are to be retained therein, shall be disbursed by the Secretary to meet critical infrastructure needs of the Division of Parks and Recreation, the Division of Fish and Wildlife, and other department outdoor recreational facilities. The Infrastructure Account is intended to provide funds for reinvestment in key open space infrastructure such as campgrounds, trails, visitor centers, recreational amenities, hunting, fishing and wildlife viewing areas.

Under this specific language of Title 30, Chapter 54 Realty Transfer tax, Conservation trust fund, assignment of tax revenue in Delaware code, the applicable permits for US Wind to sequester industrial infrastructure within Delaware Seashore State park, must be additionally be denied for non-conformity to the intent of the General Assembly as cited above. In the letter dated January 13, 2024 Ray E. Bivens Director of Delaware state parks, responded to Gener G. Gotaingco of US Wind that DNREC (parks) was the landowner of 3R's beach, and authorized submission of activities for shoreline and waterway management. The legal tenants for ownership of state parks and open space is served best in interest of public trust, for the benefit the general public, not as an industrial facility. According to their website, *"The mission of the Department of Natural Resources and Environmental Control (DNREC) is to engage all stakeholders to ensure the wise management, conservation and enhancement of the State's natural resources; protect public health and the environment; provide quality outdoor recreation; improve the quality of life; lead energy policy and climate preparedness; and educate the public on historic, cultural and natural resource use, requirements and issues."*

Additionally, the state of Delaware Executive Department, Executive Order 41 on preparing Delaware for emerging climate impacts, placing infrastructure in vulnerable areas to prevent liability, further defines the risk of such investments.

- a. All state agencies shall incorporate measures for adapting to increased flood heights and sea level rise in the siting and design of projects for construction of new structures and reconstruction of substantially damaged structures and infrastructure. Such projects shall be sited to avoid and minimize flood risks that would unnecessarily increase state liability and decrease public safety. Construction projects shall also incorporate measures to improve resiliency to

flood heights, erosion, and sea level rise using natural systems or green infrastructure to improve resiliency wherever practical and effective.

Other legalities concerning this permit is Section 307 of the Coastal Zone Management Act 16 U.S.C. 1456 (15 CFR 930 Subpart D – Consistency for Activities Requiring a Federal License or Permit.

According to the application; ***This Coastal Zone Management Act (CZMA) authorizes states to manage the development and use of coastal waters and adjacent lands. The Act authorizes the state to conduct a consistency review of federal actions that may affect Delaware’s coastal uses and/or resources. The Delaware federal CZMP is delegated to DNREC for administration and given that US Wind will engage in a consistency review as set forth under 15 CFR 930.53. Subpart D review is to determine the consistency of the USACE application.***

However both DNREC and US Wind executed a stay of review on November 8, 2023, effective November 11, 2023. The FEIS (final environmental impact statement) issued by US Wind, has no reasonable legal basis for compliance under CZMA. National Environmental Protection Act (NEPA) requirements are for state regulatory input during this due process as directed under **61 FR 33805, § 923.3** general requirements.

(a) The management program must be developed and adopted in accordance with the requirements of the Act and this part, after notice, and the opportunity for full participation by relevant Federal and State agencies, local governments, regional organizations, port authorities, and other interested parties and persons, and be adequate to carry out the purposes of the Act and be consistent with the national policy set forth in section 303 of the Act.

(b) The management program must provide for the management of those land and water uses having a direct and significant impact on coastal waters and those geographic areas which are likely to be affected by or vulnerable to sea level rise. The program must include provisions to assure the appropriate protection of those significant resources and areas, such as wetlands, beaches and dunes, and barrier islands, that make the State's coastal zone a unique, vulnerable, or valuable area.

(c) The management program must contain a broad class of policies for each of the following areas: resource protection, management of coastal development, and simplification of governmental processes. These three broad classes must include specific policies that provide the framework for the exercise of various management techniques and authorities governing coastal resources, uses, and areas. The three classes must include policies that address uses of or impacts on wetlands and floodplains within the State's coastal zone, and that minimize the destruction, loss or degradation of wetlands and preserve and enhance their natural values in accordance with the purposes of Executive Order 11990, pertaining to wetlands. These policies also must reduce risks of flood loss, minimize the impact of floods on human safety,

health and welfare, and preserve the natural, beneficial values served by floodplains, in accordance with the purposes of Executive Order 11988, pertaining to floodplains.

§ 930.53 Listed federal license or permit activities.

(a) State agencies shall develop a list of federal license or permit activities which affect any coastal use or resource, including reasonably foreseeable effects, and which the State agency wishes to review for consistency with the management program. The list shall be included as part of the management program, and the federal license or permit activities shall be described in terms of the specific licenses or permits involved (e.g., Corps of Engineers 404 permits, Coast Guard bridge permits). In the event the State agency chooses to review federal license or permit activities, with reasonably foreseeable coastal effects, outside of the coastal zone, it must generally describe the geographic location of such activities.

(1) The geographic location description should encompass areas outside of the coastal zone where coastal effects from federal license or permit activities are reasonably foreseeable. The State agency should exclude geographic areas outside of the coastal zone where coastal effects are not reasonably foreseeable. Listed activities may have different geographic location descriptions, depending on the nature of the activity and its coastal effects. For example, the geographic location for activities affecting water resources or uses could be described by shared water bodies, river basins, boundaries defined under the State's coastal non point pollution control program, or other ecologically identifiable areas. Federal lands located within the boundaries of a State's coastal zone are automatically included within the geographic location description; State agencies do not have to describe these areas. State agencies do have to describe the geographic location of listed activities occurring on federal lands located beyond the boundaries of a State's coastal zone.

(2) For listed activities occurring outside of the coastal zone for which a State has not generally described the geographic location of review, States must follow the conditions for review of unlisted activities under § 930.54 of this subpart.

(b) ***General concurrences for minor activities.*** To avoid repeated review of minor federal license or permit activities which, while individually inconsequential, cumulatively affect any coastal use or resource, the State agency, after developing conditions allowing concurrence for such activities, may issue a general public notice (*see* § 930.61) and general concurrence allowing similar minor work in the same geographic area to proceed without prior State agency review. In such cases, the State agency must set forth in the management program license and permit list the minor federal license or permit activities and the relevant conditions which are covered by the general concurrence. Minor federal license or permit activities which satisfy the conditions of the general concurrence are not subject to the consistency certification requirement of this subpart. Except in cases where the State agency indicates otherwise, copies of federal license or permit applications for activities subject to a general concurrence must be sent by the applicant to the State agency to allow the State agency to monitor adherence to the

conditions required by such concurrence. Confidential and proprietary material within such applications may be deleted.

(c) The license and permit list may be amended by the State agency following consultation with the affected Federal agency and approval by the Director pursuant to the program change requirements found at 15 CFR part 923, subpart H.

(1) Consultation with the affected Federal agency means, at least 60 days prior to submitting a program change request to OCRM, a State agency shall notify in writing the relevant regional or field Federal agency staff and the head of the affected Federal agency, and request comments on the listing change. The notification shall describe the proposed change and identify the regional Federal agency staff the State has contacted for consultation.

(2) A State agency must include in its program change request to OCRM a description of any comments received from the affected Federal agency.

(d) No federal license or permit described on an approved list shall be issued by a Federal agency until the requirements of this subpart have been satisfied. Federal agencies shall inform applicants for listed licenses or permits of the requirements of this subpart.

Submitted for entry into the public record.

Gregg W. Rosner
W. Fenwick Island DE