

From: [Ed B.](#)
To: [DNREC DCP Public Comment](#)
Subject: Comments on US Wind Federal Consistency Certifications
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Attachments: [US Wind - Consistency Certifications Comments \(65\).pdf](#)

Please see the attached comments on the US Wind Federal Consistency Certifications.

Ed Bintz

**Comments on Federal Consistency Certifications
For US Wind Maryland Offshore Project
June 5, 2024**

1. DNREC's Public Notice Was Insufficient and Invalid.

DNREC's public notice was insufficient and invalid under Section 3.2.3.1 of the Delaware Coastal Management Program Federal Consistency Policies and Procedures (the "DCMP Policies") for the following reasons:

a. The Notice that DNREC published in Cape Gazette's April 23, 2024 edition violated Section 3.2.3.1.2 of the DCMP Policies.¹ Section 3.2.3.1.2 requires that the notice describe the subject matter of the certification review, including a summary of the proposed activity and "an announcement of the availability of consistency certification and accompanying public information." The Cape Gazette notice failed to announce the availability of the consistency certification as expressly required by Section 3.2.3.1.2. In addition, although the notice summary of the proposed activity addresses offshore export cables, it fails to mention that (i) up to four onshore cables will be buried and then transition to overhead lines and (b) alternative corridors for the onshore cables are proposed. The onshore cables and alternative corridors are major issues for the public that should have been part of the summary of the proposed activity. It is not known where the second of DNREC's public notices was published, but it likely suffers from the same deficiencies as the Cape Gazette notice.

b. Section 3.2.3.1.5 of the DCMP Policies provides that "[p]ublic notice may be expanded in proportion to the degree of likely public interest involved, the substantial commitment of or impact on coastal resources, the complexity or controversy of the proposal, or for other good reasons. DNREC's failure to expand public notice pursuant to Section 3.2.3.1.5 was arbitrary and capricious. The degree of likely public interest involved and commitment of or impact on coastal resources is extremely high. In addition, the consistency certification, the Project, and surrounding issues are extremely complex and controversial. Yet, DNREC decided to provide minimal notice. And the notice that it did give not only violated Section 3.2.3.1.2 (as addressed above) but served to create confusion by failing to provide any help as to how it relates to the notice (and comment period) for DNREC's consideration of permit applications for the US Wind Project. Only a member of the public who is a trained lawyer, with a not insubstantial investment of time, would be able to sort through it without help. DNREC's failure to provide substantially expanded notice to the public, including its failure to hold even a single information session or hearing for the consistency certifications review, was arbitrary, capricious and in violation of law.

¹<https://www.capegazette.com/sites/capegazette/files/2024/05/field/attachments/Notice%20in%20the%204.23.24%20issue%20of%20the%20Gazette.pdf>

2. US Wind's Consistency Certification Fails to Address Major Effects of the Project in Analyzing Consistency Under DCMP Policies.

US Wind's Consistency Certification submission ("US Wind's Submission") fails to address major effects of the Project in analyzing consistency with the DCMP Policies. For example, the Submission fails to address the effect that up to 121 938-foot wind turbines would have on the viewshed in Delaware's coastal management area (CMA), including its major adverse effect on the public's aesthetic enjoyment of Delaware's CMA (including subaqueous lands). This is illustrated by US Wind's incorrect and incomplete analysis of compliance with Section 5.4.22 of the DCMP Policies, which provides that "DNREC shall consider the public interest in any proposed activity which might affect the use of subaqueous lands." Section 5.4.22 provides a nonexclusive list of factors to be considered, which include:

(a) "The potential effect on the public with respect to commerce, navigation, recreation, aesthetic enjoyment, natural resources and other uses of the subaqueous lands."

(b) "The value to the State or the public in retaining any interest in subaqueous lands which the applicant seeks to acquire, including the potential economic value of the interest. "

In addressing these factors with respect to the laying of export cables in subaqueous lands, US Wind's consistency analysis fails to consider, among other things, the effect of the 938-foot wind turbines on aesthetic enjoyment in the CMA and the turbines' effect on tourism and property values.

The requirement that US Wind's consistency analysis for export cables in subaqueous lands take into account the effect of the wind turbines is reflected by Section 3.4.3 of the DCMP Policies. Section 3.4.3 provides that for OCS (Outer Continental Shelf) projects (covered by Subpart E), the information supplied with the certification "must include an assessment of the probable coastal zone effects, and a set of findings indicating that the proposed activities, their associated facilities, and their combined effects, are all consistent with the provisions of the management program."

NOAA's publication "CZMA Federal Consistency Overview" states that "[a]t the heart of federal consistency is the 'effects test.'"² The effects test is embodied in 15 CFR § 930.11(g), which provides that "effect on any coastal use or resource" means:

[A]ny reasonably foreseeable effect on any coastal use or resource³ resulting from a Federal agency activity or federal license or permit activity (including all types of activities subject to the federal consistency requirement

² <https://coast.noaa.gov/data/czm/consistency/media/federal-consistency-overview.pdf>

³ The phrase "any coastal use or resource" is defined as any land or water use or natural resource of the coastal zone and includes, public access, recreation, fishing, historic or cultural preservation, and scenic and aesthetic enjoyment. See 15 CFR § 930.11(b).

under subparts C, D, E, F and I of this part.) Effects are not just environmental effects, but include effects on coastal uses. Effects include both direct effects which result from the activity and occur at the same time and place as the activity, and indirect (cumulative and secondary) effects which result from the activity and are later in time or farther removed in distance, but are still reasonably foreseeable. . . . See 15 CFR § 930.11(g).

It is more than reasonably foreseeable that if offshore export cables are laid, the 938-foot wind turbines will be built within the same general time frame same and will have a major effect on Delaware's CMA. The export cables would not be laid if the wind turbines are not installed, and vice versa. It's a single Project.

3. US Wind's Consistency Certification Statements Fail to comply with the DCMP Policies and the CZMA Regulations; They are Invalid

a. Subpart E Certification (OCS).

Section 3.4.3 of the DCMP Policies directs that the Subpart E certification state as follows: "The proposed activities described in detail in this plan comply with Delaware's approved coastal management program and will be conducted in a manner consistent with such program." 15 CFR 930.76(c) specifies the same language (but with a placeholder for the name of the state).

US Wind's certification instead states as follows: "US Wind has determined that the Project complies with Delaware's approved coastal management program and will be conducted in a manner consistent with such program."

b. Subpart D Certification (Federal licenses and permits),

Section 3.2.2 of the DCMP Policies directs that the Subpart D certification state as follows: "The proposed activity complies with Delaware's approved coastal management program and will be conducted in a manner consistent with such program." 15 CFR §930.57(b) specifies the same language (but with a placeholder for the name of the state).

US Wind's certification instead states as follows: "US Wind has determined that the Proposed Project complies with Delaware's approved coastal management program and will be conducted in a manner consistent with such program."

US Wind's additions of the qualification that "US Wind has determined" is material. With the added qualification, even if the Project clearly violates Delaware's coastal management program, US Wind could nonetheless say that its certifications were correct on the grounds that it was simply incorrect when it made its determinations. The certifications differ from those specified in both the DCMP Policies and the CZMA Regulations. They are invalid.

4. US Wind’s Submission Fails to Address Section 5.6.1.5 of the DCMP Policies; DNREC Is Required to Comply With 7 Del.C. § 7307(8) in Deciding Whether the Project is Consistent with DCMP Policies.

Section 5.6.1.5 of the DCMP Policies states that “[a]id shall be provided in the establishment, restoration, and preservation of natural areas within the State and elsewhere than in the nature preserve system.” 7 Del.C. § 7307(8) provides that “[i]n furtherance of the purposes of this chapter and in implementation of the powers and duties elsewhere provided in this chapter [Natural Areas Preservation System], [DNREC] shall have the [power and duty] [t]o promote and assist in the establishment, restoration and protection of, and advise in the management of, natural areas. . . and aid in the establishment, restoration and preservation of natural conditions within the State elsewhere than in the [nature preserves] system.

US Wind’s Submission failed to address Section 5.6.1.5 of the DCMP Policies, including by failing to identify what areas affected by the Project are “natural areas.” Section 3.6.5.1.1 of Volume I of BOEM’s draft environmental impact statement states that 3R’s Beach is an “Inland Natural Sandy Area.” DNREC is required to comply with 7 Del.C. § 7307(8) with respect to natural areas, including in its review of US Wind’s Submission.

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