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ENVIRONMENTAL PROTECTION

LAND USE MANAGEMENT

Coastal Zone Management rules

Proposed Readoption of Specially Adopted Amendment: N.J.A.C. 7:7E-7.4

Authorized by: Bob Martin, Commissioner, Department of Environmental Protection

Authority: N.J.S.A. 12:3-1 et seq.; 12:5-3; 13:1D-1 et seq.; 13:9A-1 et seq., 13:19-1 et seq.;

Calendar Reference: See summary below for explanation of exception to calendar requirement

DEP Docket Number: 13-11-11

Proposal Number:

Submit written comments by March 3, 2012 to:

Gary J. Brower, Esq.

Attn.: DEP Docket No.

Office of Legal Affairs

Department of Environmental Protection

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The Department of Environmental Protection (Department) requests that commenters submit comments on CD or DVD as well as on paper. Submittal of a CD or DVD is not a requirement. Submittals on CD or DVD must not be access-restricted (locked or read-only) in order to facilitate the Department's use of the electronically submitted comments. The Department prefers Microsoft Word 6.0 or above. Macintosh™ formats should not be used. Each comment should be identified by the applicable N.J.A.C. citation, with the commenter's name and affiliation following the comment.

This rule proposal may be viewed or downloaded from the Department's web site at <http://www.nj.gov/dep/rules>.

The agency proposal follows:

Summary

As the Department is providing a 60-day comment period on this notice of proposal, this proposal is excepted from the rulemaking calendar requirements, pursuant to N.J.A.C. 1:30- 3.3(a)5.

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The Department is proposing to readopt without change the specially adopted amendment to the energy facility use rule, N.J.A.C. 7:7E-7.4, that implements P.L. 2011, ch. 20, which amended the Coastal Area Facility Review Act (CAFRA) at N.J.S.A. 13:19-10.1. In accordance with N.J.S.A. 13:19-10.1 as amended, the provision proposed for readoption allows for the construction of wind energy facilities on piers in certain circumstances, as explained further below. The specially adopted amendment to N.J.A.C. 7:7E-7.4 became effective immediately upon acceptance for filing with the Office of Administrative Law for a period not to exceed 12 months, and would have to be readopted within this 12 month period in accordance with the provisions of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., to avoid expiration. The specially adopted amendment was filed with the Office of Administrative Law on March 3, 2011 and published in the April 4, 2011 New Jersey Register (see 43 N.J.R. 886(a)). Because this proposed readoption was filed before March 3, 2012, the expiration date has been statutorily extended by 180 days, to August 30, 2012. See N.J.S.A. 52:14B-5.1c.

N.J.S.A. 13:19-10.1, as amended, provides that a wind dependent energy facility may be located on a pier within 500 feet of the mean high water line of tidal waters. The wind energy facility must be an accessory use to the other uses of, or purposes for, the pier. In addition, the permit application for the wind energy facility on a pier must meet all other criteria established in CAFRA and applicable rules.

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The Energy facility use rule, N.J.A.C. 7:7E-7.4, contains standards specific to various energy uses. Subsection (b) of the rule contains standards relevant to the siting of any new energy facilities, and specifically includes standards for the siting of wind energy facilities at N.J.A.C. 7:7E-7.4(b)3. At this time, the Department is proposing to readopt N.J.A.C. 7:7E-7.4(b)3iii without change. The rule, like the statute, provides that a wind dependent energy facility can be located on a pier provided the facility is an accessory use to the other uses of, or purposes for, the pier.

Social Impact

The specially adopted amendment to N.J.A.C. 7:7E-7.4 proposed for readoption without change will have a positive social impact as it supports renewable energy in the coastal zone, providing a source of electricity that does not result in greenhouse gas emissions. Where a wind energy facility is constructed on a pier, it will be visible in the coastal zone, both in the landscape and seascape. In most cases, is anticipated that the wind turbine(s) will be visually compatible with their surroundings since the statute and implementing rule require the turbine to be an accessory use to the other uses of, or purposes for, the pier. For example, the construction of a wind turbine on an amusement pier would be visually compatible with amusements such as a Ferris wheel or roller coaster due to its height above the pier.

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Economic Impact

No significant economic cost or benefit is anticipated from readopting without change the specially adopted rule at N.J.A.C. 7:7E-7.4(b)3iii allowing wind energy facilities on piers. Prior to the special adoption, the construction of wind turbines on piers was prohibited with limited exceptions. The exceptions were piers in Atlantic City, where wind turbines could be allowed under N.J.A.C. 7:7E-3.49(c)5, and piers in areas in the developed northern waterfront and developed Delaware River area of the coastal zone within areas known as the northern waterfront, urban and Delaware River regions (as defined at N.J.A.C. 7:7E-5A.2), which were not subject to the limitations in N.J.A.C. 7:7E-7.4(b)2ii. The rule proposed for re-adoption provides pier operators with the opportunity to construct wind energy facilities on piers anywhere in the coastal zone which could reduce the operator's energy costs in the long term.

A pier operator wishing to construct a wind energy facility on a pier will be required to apply for and obtain an individual coastal permit for the facility. The facility must meet the requirements of applicable Coastal Zone Management rules. Accordingly, pre-construction and/or post-construction monitoring may be required. A pier operator would incur the costs associated with the individual coastal permit application process and any required monitoring. These costs may include those associated with retention of professionals in preparation of application materials including an Environmental Impact Statement, site plans, and any monitoring plans/reports. However, it is anticipated that

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such costs would only be incurred by those who have determined that construction of a wind energy facility on a pier as allowed by the provision proposed for readoption would result in an overall positive economic impact to them.

Environmental Impact

The ability for pier operators to locate wind turbines on piers will have a positive environmental impact as renewable energy in the coastal zone provides a source of electricity that does not result in greenhouse gas emissions.

The facilities must meet all applicable criteria in the Coastal Zone Management rules. Thus, such projects may not be acceptable if they do not meet the requirements of, for example, the Endangered and threatened wildlife and plant species rule and Critical wildlife habitat rule, N.J.A.C. 7:7E-3.38 and 3.39, respectively, due to the potential impacts on migratory and resident birds and bats. The applicability of all Coastal Zone Management rules to the construction of a wind energy facility on a pier will have a positive environmental impact as the proposed wind energy facilities will only be approvable if they will not have inappropriate impacts on resources protected by the Coastal Zone Management rules, including special area and resource rules. Special areas are areas that are so naturally valuable, important for human use, hazardous, sensitive to impact or particular in their planning requirements, as to merit focused attention and special management rules. The resource rules are used to analyze the proposed

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development in terms of its effects on various resources of the built and natural environment of the coastal zone, both at the proposed site as well as the surrounding region. Compliance with the standards of these rules will ensure that the impacts of wind turbines on resources such as threatened and endangered wildlife, critical wildlife, wild and scenic river corridors, marine mammals and fisheries are addressed.

Federal Standards Analysis

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. require that State agencies which adopt, readopt or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a Federal Standards Analysis. The Federal Coastal Zone Management Act (16 U.S.C. 1450) was signed into law on October 27, 1972. The Act does not set specific regulatory standards for development in the coastal zone; rather, it provides broad guidelines for states developing coastal management programs. The Federal Coastal Zone Management Program guidelines are found at 15 C.F.R. 923. They include the basic components that must be included in a state's coastal zone management plan, including a requirement that the program provide for an orderly process for siting major facilities related to energy development. However, the Federal guidelines do not set forth procedures by which individual activities within a state's coastal zone are to be regulated. Accordingly,

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Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. do not require a Federal Standards Analysis.

Jobs Impact

The readoption without change of the specially adopted amendment is not expected to have a significant impact on jobs. There may be some increase in jobs in the consulting field associated with the preparation and submission of an individual coastal permit application for the construction of a wind turbine on a pier as well as some increase in jobs associated with the construction and maintenance of any turbines built on piers.

Agriculture Industry Impact

The proposed readoption without change of the specially adopted amendment applies to the construction of wind energy facilities on piers and therefore does not affect the agricultural industry. Therefore, there will be no impact on agriculture.

Regulatory Flexibility Analysis

In accordance with the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the Department has determined that the specially adopted amendment proposed for

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readoption may affect “small businesses” as defined in the Act. The specially adopted amendment proposed for readoption without change will allow wind energy facilities to be located on piers in the coastal area provided the facility complies with all applicable rules. As stated previously, the rule does not modify the standards under which a proposed wind energy facility will be reviewed nor does it modify the types of permits that will be required. Further, the provision proposed for readoption is consistent with and implements the statutory directive allowing for the construction of wind turbines on piers provided the wind turbine complies with all applicable Coastal Zone Management rules. The Coastal Zone Management rules establish the minimum standards determined to be appropriate for protection of resources in the coastal area. As stated in the Environmental Impact statement above, compliance with the standards of all applicable rules will ensure that the impacts of wind turbines on resources such as threatened and endangered wildlife, critical wildlife, wild and scenic river corridors, marine mammals and fisheries are addressed. Accordingly, the Department is not proposing any differing standards for small businesses.

Housing Affordability Impact Statement

In accordance with N.J.S.A. 52:14B-4, as amended effective July 17, 2008, by P.L. 2008, c. 46, the Department has evaluated the proposed readoption to determine the impact, if any, on the affordability of housing. The specially adopted amendment

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proposed for re adoption allows wind energy facilities to be located on piers in the coastal area. The rule does not impose requirements on homeowners. Therefore, the rule proposed for re adoption without change will evoke no change in the overall average cost associated with housing in the State.

Smart Growth Development Impact Analysis

In accordance with N.J.S.A. 52:14B-4, as amended effective July 17, 2008, by P.L. 2008, c. 46, the Department has evaluated the specially adopted amendment proposed to be re adopted to determine its impact, if any, on housing production in Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan (State Plan). The rule allows wind energy facilities to be located on piers in the coastal area. As such, the rule proposed for re adoption without change will not evoke a change in housing production in Planning Areas 1 or 2, or within designated centers.

Full text of the specially adopted amendment proposed for re adoption without amendment at this time follows (additions specially adopted March 3, 2011 (see 43 N.J.R. 886(a)) indicated in boldface **thus**; deletions indicated in brackets [thus]).

7:7E-7.4 Energy facility use rule

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(a) (No change.)

(b) Standards relevant to siting of new energy facilities, including all associated development activities, are as follows:

1. – 2. (No change.)

3. Notwithstanding (b)2 above, wind and solar energy facilities, including blades, towers and site disturbance, shall be sited at least 50 feet inland of the mean high water line of tidal waters, excluding manmade lagoons and manmade ditches, in the areas identified at (b)2i and ii above, except for the following:

i. A wind energy facility that meets N.J.A.C. 7:7E-3.49(c)5; [or]

ii. A wind energy facility that meets (1) and (2) below. The Department shall limit approvals under this subparagraph to ensure that the cumulative number of wind turbines approved does not exceed five, each with a power rating as determined by the manufacturer of five megawatts or less, or six, each with a power rating as determined by the manufacturer of four megawatts or less. The wind energy facility shall be:

(1) Located in the Atlantic Ocean within State waters between latitude 39° 55' 56" N (offshore of Seaside Park) and latitude 39° 01' 58" N (offshore of Stone Harbor); and

(2) No closer than 2.5 nautical miles to the mean high water line; **or**

iii. A wind energy facility located on a pier provided the facility is an accessory use to the other uses of, or purposes for, the pier;

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4. – 5. (No change.)

(c) – (s) (No change.)