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## **ENVIRONMENTAL PROTECTION**

### **WATERSHED AND LAND MANAGEMENT**

#### **Coastal Zone Management Rules**

#### **Coastal Wetlands Maps**

#### **Proposed Amendment: N.J.A.C. 7:7 Appendix D**

Authorized By: Shawn M. LaTourette, 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., and 13:19-1 et seq.

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

DEP Docket Number: 02-22-02.

Proposal Number: PRN 2022-035.

A **public hearing** concerning this notice of proposal will be held on Monday, April 11, 2022, at 10:00 A.M.

The hearing will be conducted virtually through the Department of Environmental Protection's (Department) video conferencing software, Microsoft Teams. A link to the virtual public hearing will be provided on the Department's website at [www.nj.gov/dep/wlm/](http://www.nj.gov/dep/wlm/). If you are interested in providing oral testimony or submitting written comments at the virtual public hearing, please email the Department at [peter.demeo@dep.nj.gov](mailto:peter.demeo@dep.nj.gov) no later than 5:00 P.M. on April 6, 2022, with your contact information (name, organization, telephone number, and email address). You must provide a valid email address so the Department can send you an email confirming receipt of your interest to testify orally at the hearing and provide you with a separate option for a telephone call-in line if you do not have access to a computer that can connect to Microsoft Teams. Please note that the Department will take oral testimony at the hearing in alphabetical order of the

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testifying person's last name. Further, this hearing will be recorded. It is requested (but not required) that anyone providing oral testimony at the public hearing provide a copy of any prepared remarks to the Department through email.

Submit comments by May 20, 2022, electronically at <http://www.nj.gov/dep/rules/comments>. The Department of Environmental Protection (Department) encourages electronic submittal of comments. In the alternative, comments may be submitted on paper to:

Gary J. Brower, Esq.

Attn.: DEP Docket No. 02-22-02

Office of Legal Affairs

NJ Department of Environmental Protection

401 East State Street, 7th Floor

Mail Code 401-04L

PO Box 402

Trenton, NJ 08625-0402

This notice of proposal may be viewed or downloaded from the Department's website 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 notice 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 amendments to the Coastal Zone Management rules, N.J.A.C. 7:7. Particularly, the Department is proposing to amend the boundaries reflected on coastal wetland maps applicable to Lower Alloways Creek Township, Salem County, at N.J.A.C. 7:7 Appendix D (incorporated by reference at N.J.A.C. 7:7-2.3(c)), as described below. The proposed amendments are consistent with the Department's determination in response to a petition for rulemaking, described below. Petitioner PSE&G Power, LLC (the Petitioner) filed a petition on November 6, 2020, seeking an amendment and remapping of Coastal Wetlands Maps 224-1752, 224-1758, 231-1752, 231-1758, and 238-1752, identified as Tax Block 26, Lots 2, 4, 4.01, and 5.01 on the tax map of Lower Alloways Creek Township to reflect current conditions on the ground. As further described below, the Department determined to grant the petition for Coastal Wetlands Maps 224-1758, 231-1752, and 231-1758, but not for the Coastal Wetlands Maps 224-1752 or 238-1752 because the area affected by the proposed changes is not within these maps. Therefore, through the proposed amendments, an area of approximately 150 acres currently mapped as coastal wetlands on the Petitioner's and the United States Army Corps of Engineers' (USACOE) property that the Petitioner is acquiring would no longer be classified as coastal wetlands. The revised mapping takes into account pre-existing development on the PSE&G Salem and Hope Nuclear Power plant property and the USACOE Artificial Island (Artificial Island) Confined Disposal Facility (CDF) and removes wetlands mapping for lands not subject to tidal influence due to historic filling, berms, and/or existing elevations.

#### Petition for Rulemaking

On November 6, 2020, the Department received a petition for rulemaking from Robert Rech, Vice-President AKRF, on behalf of the Petitioner. (Notice of receipt of the petition was published in the January 4, 2021 New Jersey Register at 53 N.J.R. 85(a)). The Petitioner requested

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that the Department amend Coastal Wetlands Maps 224-1752, 224-1758, 231-1752, 231-1758, and 238-1752 to exclude an approximate 197-acre portion of property designated as Tax Block 26, Lots 2, 4, 4.01, 5, and 5.01 of Lower Alloways Creek Township, Salem County. The Petitioner asserted that portions of the aforementioned map areas do not meet the definition of coastal wetlands set forth in the Wetlands Act of 1970 (Act), N.J.S.A. 13:9A-1 et seq., at N.J.S.A. 13:9A-2.

The Petitioner contends in the petition it filed that Coastal Wetland Maps 224-1752, 224-1758, 231-1752, 231-1758, and 238-1752 do not reflect the current property conditions due to the presence, as described above, of sand, dredged material, gravel, asphalt, parking areas, berms, and elevated topography that precludes tidal inflow and, consequently, the area in question does not meet the definition of a coastal wetland under the Act.

Particularly, the Petitioner asserted the following:

Area 1 - Block 26, Lot 2 - Cell 3 is approximately 100 acres and consists primarily of the USACOE CDF along the western Delaware River shoreline and wetlands associated with Alloway Creek to the east. The CDF includes a perimeter containment berm ranging in elevation from 10 to 23 feet. Accordingly, the area is above the tidally influenced elevation. The facility contains large quantities of dredged sand material from the Delaware River deriving from recent navigation channel deepening activity. A discharge structure allows water to drain from the facility to dewater the CDF after suspended solids have settled. The USACOE CDF has been in continuous operation since well before the creation and adoption of the coastal wetlands maps authorized by the Act.

Area 2 - Block 26, Lot 4 contains the PSE&G Nuclear CDF, which is used for management of maintenance dredged material and desilting of water intake structures and the cooling tower

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basin. The area was initially used for construction staging and lay-down during construction of the Salem and Hope Creek Generating Station (the Station) and has been continuously used and managed to support the Station. This area also includes the PSE&G Nuclear Security Training Center and target range. The perimeter containment berm topography ranges from five to seven (NAVD88) feet and the internal elevations range from six to 10 feet, while the coastal wetlands along the river shoreline and east of the CDF associated with Alloway Creek have elevations that range from three to five feet. Thus, the perimeter elevations preclude tidal exchange with Area 2. Hydrologic characteristics are limited by the perimeter berms. Soils are highly disturbed and characterized by the historic placement of fill during the original construction of Artificial Island and the construction of the generating stations. Vegetation is dominated by invasive phragmites, due to the disturbed nature of the area.

Area 3 - Block 26, Lot 5 contains an existing PSE&G Nuclear laydown/emergency preparation area, existing employee parking areas, chill water plant, and a maintained 500kV transmission right-of-way and maintained buffer. The area consists of existing developed areas including soil/gravel laydown, asphalt parking asphalt roadways, and topography that ranges from eight (NAVD88) to 15 feet (NAVD88). The surrounding tidal marsh areas associated with Alloway Creek range from three to five feet. Hydrology is almost exclusively surface water runoff. Average elevations are too high for direct groundwater influence. Soils are highly disturbed.

Besides the above summary of Petitioner's narrative report, the Petitioner submitted exhibits in support of its assertions, including a Site Location Map, Artificial Island, October 2020, Figure 1; Freshwater Wetland Map Artificial Island, October 2020, Figure 2; National Resource Conservation Service -NCRS- Soils Map, Artificial Island, October 2020, Figure 3; Photo Location Map, Artificial Island, October 2020, Figure 5; and a series of 35 photographs depicting

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an existing access road, constructed overhead transmission lines, maintained roads with depictions of adjoining coastal wetlands, and the western berm of the USACOE CDF.

### Department's Response to the Petition

In response to the petition and consistent with application of the Act, the Department reviewed documentation submitted by the Petitioner and aerial site photography from 1930, 1951, 1963, 1970, 1977, 1979, and 2015 and conducted a thorough site inspection at extreme high tide. The Department also reviewed Letters of Interpretation issued for the site (File #1704-02-0001.4 FWW090001 and File #1704-02-0001.4 FWW140001) to determine the extent of tidal wetlands.

The Department has determined that the existence of historic longstanding fill, sand, dredged material gravel, elevated topography, and berms preclude tidal inflows. Thus, the Department is proposing to amend Coastal Wetlands Maps 224-1758, 231-1752, and 231-1758. As noted above, the Department is not proposing to amend Coastal Wetlands Maps 224-1752 or 238-1752 because the area affected by the proposed changes is not within these maps.

The Act defines coastal wetlands as “any bank, marsh, swamp, meadow, flat or other low land subject to tidal action in the State of New Jersey along the Delaware Bay and Delaware River, Raritan Bay, Barnegat Bay, Sandy Hook Bay, Shrewsbury River including Navesink River, Shark River, and the coastal inland waterways extending southerly from Manasquan Inlet to Cape May Harbor, or at any inlet, estuary or tributary waterway or any thereof, including those areas now or formerly connected to tidal waters whose surface is at or below an elevation of one foot above local extreme high water, and upon which may grow, or is capable of growing, some, but not necessarily all, of the following: Salt meadow grass (*Spartina patens*), spike grass (*Distichlis spicata*), black grass (*Juncus gerardi*), saltmarsh grass (*Spartina alterniflora*), saltworts (*Salicornia Europaea*, and *Salicornia bigelovii*), Sea Lavender (*Limonium carelinianum*),

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saltmarsh bulrushes (*Scirpus robustus* and *Scirpus Paludosus var. atlanticus*), sand spurrey (*Spergularia marina*), switch grass (*Panicum virgatum*), tall cordgrass (*Spartina pectinate*), hightide bush (*Iva frutescens var. oraria*), cattails (*Typha angustifolia*, and *Typha latifolia*), spike rush (*Eleocharis rostellata*), chairmaker's rush (*Scirpus americana*), bent grass (*Agrostis palustris*), and sweet grass (*Hierochloe odorata*)." The Act, at N.J.S.A. 13:9A-1.b, required the Commissioner to make an inventory and maps including boundaries of all tidal wetlands within the State. As a result, in the early 1970s, the Department delineated tidal wetlands by interpreting aerial photography and conducting representative field inspections to verify the delineation.

The Act's definition of a coastal wetland specifically refers to areas whose surface is at or below an elevation of one foot above local extreme high water. The term "local extreme high water" is not defined by the Act. Thus, in applying the Act, the Department equates "local extreme high water" to "extreme high-water spring," which is the highest excursion of the spring tides or "mean higher high water," which is the average height of the highest tide. As a conservative measure, the Department utilized the higher of these two excursions in applying the Act.

To evaluate current site conditions, on December 28, 2020, Department staff conducted a site inspection. The Department scheduled the inspection date and time to coincide with a full moon high tide event to evaluate "local extreme high-water" conditions. Based on information provided by the Petitioner's surveyor, the spring high tide in this area is 3.04 feet NAVD88 and the mean higher high tide is 3.21 feet NAVD88. The Act defines coastal wetlands as areas within one foot of the "local extreme high water," therefore, the Department has determined that any area on the site below approximately 4.21 feet NAVD88 meets the definition of a coastal wetland, unless that area no longer has a hydrologic connection.

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Area A consists entirely of a USACOE CDF. Based on a review of aerial photography, Area A was historically filled with dredge material when Artificial Island was created. By 1977, CDF construction by the USACOE was complete. Area A has large berms surrounding the CDF that rise five to 18 feet above the existing marsh platform and have cut off all tidal flow from the surrounding wetlands and Delaware River. The CDF itself is about one to 15 feet above the marsh platform elevation with no tidal influence into this area. Thus, the Department supports removal of this 60.86-acre area from the coastal wetland mapping.

Area B consists of the PSE&G CDF, a stormwater management facility and a shooting range owned and operated by PSE&G. Most, or all, of Area B was filled when Artificial Island was created. The 1970 aerial shows it as fully vegetated, and the 1977 aerial shows it as completely developed. The fill/berm has not changed since the 1970s. The berm heights are approximately two feet above the highest elevation of the marsh platform and cut off tidal flow into the CDF. Land within the berm ranges from one to five feet above the marsh platform. Thus, the Department supports removal of Area B's 31.39 acres from the coastal wetland mapping.

Area C consists of facilities related to the PSE&G nuclear plant operation. Area C was under construction in 1977, as shown on the 1977 aerial. By 1979, it appears construction had ended, as the limits of disturbance in Area C have largely remained unchanged since that date. There are also wetlands on the site, as per Letters of Interpretation File #1704-02-0001.4 FWW090001 and FWW140001. The Department has determined, however, based upon its site inspection and the topographical information, that the wetlands are not subject to tidal influence, as the berms have prevented tidal flow throughout the interior. Additionally, the wetlands in Area C have elevations from approximately five to 15 feet and lie above the historic dredge material. Therefore, it is appropriate to regulate these wetlands pursuant to the Freshwater Wetlands



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Protection Act and the Department supports the removal of this 56.67-acre area from coastal mapping.

### **Conclusion**

Accordingly, based upon the aforementioned review of historic aerial photography, the Letters of Interpretation, the site inspection that confirms high berms that preclude tidal flow, and the documentation submitted by the Petitioner, the Department has determined that changes to coastal wetlands maps 224-1758, 231-1752, and 231-1758 are merited and that and changes to coastal wetlands maps 224-1752 and 238-1752 are not needed.

In accordance with the requirements of the Administrative Procedure Act, at N.J.S.A. 52:14B-4, and the implementing Rules for Agency Rulemaking, N.J.A.C. 1:30, on September 7, 2021, the Department filed a notice of action with the Office of Administrative Law for publication in the New Jersey Register and sent a copy of the notice of action to the Petitioner. The Department additionally posted the notice of action on its website. Due to an oversight, the notice was not initially published in the New Jersey Register. Upon discovery of the oversight, the notice of action was published in the New Jersey Register on January 3, 2022 (see 54 N.J.R. 101(c)).

### **Public Notice**

In accordance with the Act, at N.J.S.A. 13:9A-3, the Department has provided individual notice of the proposed wetland boundary revision to each owner having a recorded interest in such wetlands by mail. In addition, as set forth above, in accordance with N.J.S.A. 13:9A-3, a public hearing is scheduled for April 11, 2022, and notice of the hearing has been published in a newspaper of general circulation in the municipality in which the property is located.

### **Social Impact**

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The Department anticipates that there will be a positive impact associated with the mapping reclassification from coastal wetlands to uplands. First, the remapping will reflect the current site conditions in this area and correct or update the existing coastal wetlands map to be currently accurate. Second, the area is the site of a planned wind power port and construction of the wind power port will be possible in these areas because the mapping will now be accurate. This will create construction and permanent operating jobs. In addition, the anticipated wind power port will reduce reliance on fossil fuels and increase use of sustainable wind energy, thus reducing greenhouse gas emissions. While these impacts were not part of the Department's analysis of the requested amendment of coastal wetland boundaries, the anticipated benefits of the wind power port will assist in the State's efforts to address climate change and support the clean energy goals outlined in Governor Murphy's Energy Master Plan, the Global Warming Response Act (GWRA), N.J.S.A. 26:2C-37 et seq., the Global Warming Response Act 80x50 Report (80x50 Report), prepared in accordance with the GWRA, and the interim emissions target set forth in Governor Murphy's Executive Order No. 274 (2021) (EO 274). As indicated in EO 274, the environmental impacts caused by climate change include rising sea levels, increased flooding, more frequent and severe extreme weather events, and numerous other adverse environmental impacts. The Sixth Assessment Report from the Intergovernmental Panel on Climate Change (IPCC) contains the strongest call to action to enact sustainable solutions such as Offshore Wind to reduce our greenhouse gas emissions. The transition to a low carbon economy will be achieved through reducing carbon pollution, expanding clean energy infrastructure, and building resilient communities. Offshore Wind projects will deliver the clean, renewable energy generation needed to meet the State's goals of reaching 50 percent renewable energy by 2030 and a 100 percent clean energy economy by 2050.

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### **Economic Impact**

The proposed remapping of the coastal wetlands, which reflects both current and longstanding physical conditions on the ground, will facilitate a positive economic impact. As the mapping will now be accurate, construction of the wind power port will be possible in these areas, yielding construction and permanent operating jobs. Construction of these facilities in New Jersey could also lead to technological innovation and the start of new businesses in the area. Finally, increased sustainable and non-fossil fuel wind power for New Jersey will reduce the need for emissions and contribute to better air quality and a healthier population.

### **Environmental Impact**

The Department considers coastal wetlands as one of the most environmentally valuable land areas within the coastal zone. Coastal wetlands provide various functions, including being part of the primary food web for estuarine and marine ecosystems; providing breeding, nesting, feeding, and foraging habitat for turtles, waterfowl, small mammals, finfish, and shellfish; storm surge protection; flood water and sediment storage; pollution filtration; and a buffer from human activities. Recognition of the environmental value of coastal wetlands led to the passage of the Act. The Department continues to foster the goals of the Act by regulating activities within correctly mapped coastal wetlands.

In this instance, however, the coastal wetland maps are being amended to reflect the longstanding and actual physical conditions on the ground with fill and berms that are more than one foot above tidal flow. Area A consists entirely of an USACOE CDF, which, based upon historic aerial photography, was historically filled with dredge material when Artificial Island was established. Area B, as with Area A, was subject to filling when Artificial Island was created. As depicted on the 1977 aerial photography, Area B was completely developed, and the fill/berm that

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cuts off tidal flow has not changed since the 1970s. Area C consists of facilities related to the PSE&G nuclear plant operation. As depicted in the 1977 aerial photography, construction was underway and since 1979, the limits of disturbance in Area C have remained the same. Because the areas to be remapped as uplands do not meet the definition of a coastal wetland under the Act, the map amendments will have no environmental impact.

While the proposed map amendments will not have any environmental impact to the resources protected under the Wetlands Act of 1970, as discussed in the Social Impact statement, it is anticipated that the more accurate wetland boundaries proposed will have an indirect positive environmental impact because the amendments make it possible to achieve the reduction of greenhouse gases and corresponding positive impacts on climate change through the potential construction of the wind power port in these areas. The wind power port would be subject to compliance with all applicable Department permitting standards.

#### **Federal Standards Statement**

N.J.S.A. 52:14B-1 et seq., requires State agencies that 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. §§ 1451 et seq. (Federal CZMA) does not set specific regulatory standards or requirements for development in the coastal zone; rather, it provides broad guidelines for states developing coastal management programs. The general requirements for what a state coastal management program must include are found at 15 CFR Part 923. The requirements do not specifically address the mapping of coastal wetlands and the standards that apply to the protection or development of this coastal resource. The guidelines simply provide a planning and management process, without establishing development standards for development in the coastal area. Therefore, the proposed

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revisions to Coastal Wetlands Maps 224-1758, 231-1752, and 231-1758 do not exceed any Federal standards or requirements of the Federal CZMA.

### **Jobs Impact**

The Department anticipates that the proposed revisions to Coastal Wetlands Maps 224-1758, 231-1752, and 231-1758 will have a positive impact on the number of jobs in the State. It is estimated that the wind port will support up to 1,000 jobs in the long term. Accurate mapping will allow for construction of the wind power port, which will create construction and continued operating jobs.

### **Agriculture Industry Impact**

In general, all development or disturbance within coastal wetlands is restricted under the Coastal Zone Management Rules, N.J.A.C. 7:7, except for the continued production of commercial salt hay or other agricultural crops on lands utilized for these purposes on or before April 13, 1973. The proposed revisions to Coastal Wetlands Maps 224-1758, 231-1752, and 231-1758 will have no effect on the agricultural industry, as the mapped coastal wetlands subject to the remapping have not been used for continuous commercial salt hay or any other agricultural production since April 13, 1973.

### **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 proposed amendment of Coastal Wetlands Maps 224-1758, 231-1752, and 231-1758 will not have an impact on small businesses, as the amendment simply updates the wetland mapping to reflect current conditions and does not impose reporting, recordkeeping, or other compliance requirements on small businesses.

### **Housing Affordability Impact Analysis**

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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 revision to Coastal Wetlands Maps 224-1758, 231-1752, and 231-1758 to determine the impact, if any, on the affordability of housing. The proposed revisions to the Coastal Wetlands Maps will result in the reclassification of an approximately 150-acre area of coastal wetlands to uplands and is not anticipated to have any effect on housing affordability. The Department believes that it is extremely unlikely that the reclassification of this land area at the Lower Alloways Creek Township nuclear plant would evoke a change in the average costs associated with housing.

### **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 proposed revisions to Coastal Wetlands Maps 224-1758, 231-1752, and 231-1758 to determine the 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 site on which the reclassification of coastal wetlands as uplands would occur, located in Lower Alloways Creek Township, Salem County, is within Planning Areas 5 and 8 (environmentally sensitive planning areas and Federal park), under the State Plan. Accordingly, the reclassification of approximately 150 acres of coastal wetlands to uplands within these Planning Areas will not evoke a change in housing production in Planning Areas 1 or 2, or within designated centers.

### **Racial and Ethnic Community Criminal Justice and Public Safety Impact**

In accordance with N.J.S.A. 52:14B-4(a)(2) and 2C:48B-2, the Department has evaluated this rulemaking and determined that it will not have an impact on pretrial detention, sentencing,

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probation, or parole policies concerning adults and juveniles in the State. Accordingly, no further analysis is required.

**Full text** of the proposal follows:

## APPENDIX D

### COASTAL WETLANDS MAPS

(incorporated by reference at N.J.A.C. 7:7-2.3(c))

1-7. (No change.)

8. Salem County

**(Agency Note:** The following maps are proposed to be altered:)

...

224-1758

...

231-1752

231-1758

9. – 11. (No change.)