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**DEPARTMENT OF NATURAL RESOURCES AND
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SECRETARY

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Secretary's Order No.: 2024-W-0042

RE: Approval of the Issuance of the Section 401 Water Quality Certification required for the utilization of the United States Army Corps of Engineers' Individual Permit regarding the construction activities associated with the proposed offshore wind project of U.S. Wind, Inc., and its related infrastructure

Date of Issuance: October 18, 2024

Effective Date: October 18, 2024

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC"), pursuant to 7 *Del.C.* §§6003, 6004, 6006, and all other relevant statutory authority, the Department issues this Order, approving the Issuance of the Section 401 Water Quality Certification ("WQC") required for the utilization of the United States Army Corps of Engineers' Individual Permit regarding the construction activities associated with the proposed offshore wind project of U.S. Wind, Inc. ("US WIND" or "Applicant"), currently pending before the Department at this time. It should be noted that the WQC process necessitated by US WIND's proposed project does *not*, in and of itself, authorize any construction-related activities associated with any of the additional permits/authorizations currently pending before the Department in this matter, nor should it in any way be construed as an approval of the proposed project in its entirety. Rather, the WQC process is the mechanism by which DNREC, as the certifying agency in this matter, can review the water quality aspects of the project and provide comments and/or conditions to be included in the federal permitting processes.

Background, Procedural History and Findings of Fact

A joint virtual public hearing was held by DNREC on Tuesday, July 9, 2024, at 6:00 p.m. via the State of Delaware Zoom for Government Virtual Meeting Platform to receive comment on the following permit applications and authorizations of US WIND currently pending before the Department at this time:

- One (1) Subaqueous Lands Permit/Lease from the Division of Water (“DW”);
- One (1) Wetlands Permit from the DW;
- One (1) Water Quality Certification from the DW; and
- One (1) Beach Preservation Coastal Construction Permit from the Division of Watershed Stewardship (“DWS”).

The above permit applications and authorizations are necessitated by the Applicant’s proposal to develop a commercial-scale, offshore wind energy project within the Bureau of Ocean Energy Management (“BOEM”) Lease Area known as Lease OCS-A 0490 offshore of the State of Maryland (“proposed project”). The proposed project is comprised of up to 121 wind turbine generators, up to four (4) offshore substations, up to four (4) offshore/onshore export cables, and one (1) meteorological tower, in a gridded array pattern distributed across the Lease Area. Portions of the proposed export cables are located under state-regulated wetlands and subaqueous lands in the Atlantic Ocean within Delaware state waters and the Indian River Bay. The offshore/onshore export cables are proposed to land at 3R’s Beach near the parking lot and potential dune environments and to interconnect into a proposed substation to be constructed on Tax Parcel 233-2.00-2.01 adjacent to the Indian River Power Plant in Sussex County, Delaware.

The Applicant’s proposed project will require the above-referenced DNREC permits/authorizations for the proposed installation of cable ducts and offshore/onshore export cables using horizontal direction drilling, dredging and trenching, and for the proposed construction of a transition vault using horizontal directional drilling.

As of the date of this Order, the Department's technical review of the Subaqueous Lands permit/lease application and the Wetlands permit application submitted to the DW, the Beach Preservation Coastal Construction permit application submitted to the DWS, and the public comments received in direct association with those applications, remains ongoing. Given this, the Department cannot yet offer final recommendations with regard to whether the entirety of the Applicant's proposed project should be approved.

Despite the fact that the Department's technical review of the entire hearing record ("Record") has not yet been completed, DNREC (the certifying agency) and the United States Army Corps of Engineers ("USACE") have established that the appropriate timeframe to respond to the Applicant's WQC request is 180 days (6 months) from the date of receipt. Should DNREC not take action with regard to US WIND's WQC request prior to October 19, 2024, the Section 401 WQC will be deemed waived. Thus, this Order exclusively addresses the Department's review of the Record as it pertains to the Section 401 WQC required for the Applicant's construction activities associated with the proposed project, thereby enabling DNREC to provide input to the WQC process at the federal level. The remaining three (3) applications necessitated by US WIND's proposed project currently pending before the Department's DW and DWS, as listed above, will be fully addressed in a separate, subsequent Secretary's Order once the Department's technical review has been completed.

On April 15, 2024, the DW's Wetlands and Waterways Section ("DW-WWS") received a request for a WQC from US WIND, associated with the cable installation and dredging activities proposed as part of the Subaqueous Lands and Wetlands permit applications for their proposed project. Specifically, US WIND is proposing to utilize an USACE Individual Permit to install up to four (4) transmission cables utilizing various methods of installation that include jet plowing and hydraulically dredging up to 74,000 cubic yards of material from the Indian River Bay and Indian River.

The Applicant's proposed project is subject to various state and federal regulatory requirements, as well as provided for under 7 *Del.C.* Ch. 60. Pursuant to 40 CFR Part 121, a Section 401 WQC is required for any federal license or permit that authorizes an activity that may result in a discharge. According to 40 CFR §121.1, the term "discharge" refers to a discharge from a point source into a water of the United States. The construction activities associated with the Applicant's proposed project are considered to be a discharge. As such, the proposed discharge activity requires an individual WQC, in accordance with the USACE Individual Permit. Furthermore, the Department's DW-WWS, has reviewed the potential water quality impacts from the construction activities associated with the WQC portion of this proposed project, in accordance with Sections 301, 302, 303, 306 and 307 of the federal *Clean Water Act*, 7 DE Admin. Code 7201, *Regulations Governing the Control of Water Pollution*, 7 DE Admin. Code 7401, *Surface Water Quality Standards*, and as provided for under 7 *Del.C.* Ch. 60.

In addition to the above noted regulatory review at both the state and federal levels, the Department's DW-WWS coordinated with the following agencies during their technical review of the WQC portion of the Applicant's proposed project:

- DNREC Division of Fish and Wildlife
- DNREC Division of Watershed Stewardship, Watershed Assessment and Management Section
- DNREC Division of Climate, Coastal and Energy, Delaware Coastal Management Program
- United States Army Corps of Engineers
- United States Environmental Protection Agency

In accordance with 7 DE Admin. Code 7201, *Regulations Governing the Control of Water Pollution*, the public was invited to participate in the review of the Applicant's WQC request. Given the level of public interest in this matter, the Department made the decision to issue a Joint Public Notice on April 28, 2024, of (1) the aforementioned permit applications submitted by US WIND having been received by the Department; (2) an in-person Joint Public Information Session ("public information session") to be held by DNREC on June 5, 2024; and then (3) a Joint Virtual Public Hearing ("public hearing") to be held by DNREC on July 9, 2024.

The Department processed all the above permit applications received from US WIND regarding this proposed project together, and held the in-person public information session and the virtual public hearing, as publicly noticed, to assure both efficiency and transparency, and to make sure the public was afforded the ability to provide meaningful comment on the proposed project in its entirety, as noted above. Department staff, representatives of the Applicant, and members of the public attended both the public information session and the public hearing events held by the Department in this matter.

The Department's public information session, held in-person on June 5, 2024, at Beacon Middle School, 19483 John J. Williams Highway, Lewes, Delaware, lasted approximately three (3) hours in length. The event provided the public an opportunity to review the applications and other related documents, and offered a platform for the public to ask questions of both the Department and the Applicant about US WIND's proposed project. The event also included presentation boards from the Applicant, as well as from DNREC staff and various Federal partners. The Department's public hearing, held on July 9, 2024 (also lasting approximately three [3] hours in length), was held virtually on the Zoom platform, resulting in not only a greater level of participation by members of the public (when compared historically to in-person attendance at such events), but also enabling approximately 200 virtual attendees to use automated closed captioning in their choice of over 20 languages to further enhance their understanding of US WIND's proposed project. At the time of the public hearing, 34 attendees provided verbal comments to the Department regarding the Applicant's proposed project.

Subsequent to the public hearing, the Record remained open through September 9, 2024, giving members of the public a total of 134 days to provide comment to the Department regarding this matter, should they wish to do so. The Department received a total of 446 comments from the public regarding this matter: thirty-four (34) comments were received verbally at the time of the public hearing, and the remaining four hundred and twelve (412) comments were received in writing, submitted to the Department either before or after the public hearing, during the time period in which the Record remained open to receive public comment.

Of the public comments received, approximately fifty (50) commenters identified water quality as a concern, with those comments expressing general concerns regarding the possible environmental impacts of the Applicant's proposed project. All comments were posted on the DNREC public hearing web page dedicated to this matter upon their receipt. Proper notice of the hearing was provided as required by law.

Subsequent to the close of the public comment period on September 9, 2024, Hearing Officer Lisa A. Vest requested a Technical Response Memorandum ("TRM") from the Department's subject matter experts in the permitting Divisions identified above. On October 4, 2024, the Department's DW-WWS, provided their TRM dedicated exclusively to the WQC aspect of US WIND's proposed project, along with additional documentation in support of that TRM, and the same is discussed herein in greater detail below.

Subsequent to the receipt of the Department's TRM referenced above, Hearing Officer Vest prepared her Hearing Officer's Report ("Report"), dated October 10, 2024. Ms. Vest's Report was dedicated exclusively to the WQC portion of the Applicant's proposed project, and set forth the procedural history, summarized and established the record of information ("Record") relied on in the Report, and provided findings of fact, reasons, and conclusions that recommend the approval of the Department's issuance of the *finalized* Section 401 WQC, with conditions, required for the Applicant's construction activities associated with the proposed project that would be conducted within the Indian River Bay in Sussex County, Delaware.

The Report, along with its Appendices, is incorporated herein by reference. The Report also addressed the water quality concerns voiced in the public comments received in this matter and concluded that the same did not warrant the Department's denial of the pending Section 401 WQC, nor the delay of the decision regarding the same to receive any additional information.

Reasons and Conclusions

Currently pending before the Department is the Draft Section 401 WQC for U.S. WIND's proposed project. I find that the Applicant is required to obtain the aforementioned requisite WQC, pursuant to 40 CFR Part 121, for the reasons noted above, and that the proposed project is subject to various state and federal regulatory requirements, as previously set forth herein.

As noted in the TRM, the Department's experts in the DW-WWS, have reviewed the potential water quality impacts from U.S. WIND's proposed activities, relative to Delaware's *Surface Water Quality Standards*, based on the information provided by the Applicant, the public comments received, and DNREC's knowledge of the area of potential impacts. Upon approval of the Draft WQC, the *finalized* WQC to be issued by the Department will be reflective of the applications submitted in this matter by US WIND and will be appropriately conditioned to ensure continued protection of public health and the environment.

The Draft WQC (attached to Ms. Vest's Report as Appendix "B") sets forth in detail the Department's review of the WQC aspects of US WIND's proposed project. As noted previously, the construction activities associated with the proposed project, as referenced above, are considered a "discharge," and thus the Applicant requires a Section 401 WQC, pursuant to 40 CFR Part 121.

The proposed discharge of dredged material is defined as a pollutant, and the project site has been identified as being located in Delaware Exceptional Recreational or Ecological Significant Waters (“ERES”). Under 7 DE Admin. Code 7401, designated ERES waters must be accorded a level of protection and monitored in excess of that provided in most other Waters of the State. The project monitoring plan known as the *Indian River Bay Turbidity Minimization and Monitoring Plan* (attached to Ms. Vest’s Report as Appendix “C”) was developed for the Applicant by TRC Environmental, Inc., to describe US WIND’s proposed concept plan to minimize turbidity in the Indian River Bay and Indian River through best management practices and engineering controls in order to prevent exceedance of Delaware’s *Surface Water Quality Standards* (see 7 DE Admin. Code 7401, Sections 5.6.1.2 and 5.6.3.4.1). The plan also describes general monitoring activities that the Applicant has proposed to employ in order to comply with expected permit conditions.

The Department’s experts in the DW-WWS also reviewed the *Indian River and Indian River Bay Surface Water and Sediment Assessment* technical report (attached to Ms. Vest’s Report as Appendix “D”), prepared by Environmental Risk Solutions and Hill Consulting, Inc., to ensure that the proposed discharge meets Delaware’s *Surface Water Quality Standards*. That review, which included a submitted analysis of chemical constituents in the sediments, found that the final documentation provided in US WIND’s application adequately characterized the potential water quality concerns that might result from the proposed activities. Furthermore, the report presented an evaluation of surface water and sediment samples collected from the Indian River and the Indian River Bay. The evaluation was conducted to characterize current constituent levels in the surface water and sediments from areas proposed for potential dredging/plowing, and to evaluate increased potential for impact on ecological and/or human health as a result of the proposed activities. Analytical surface water data were compared to DNREC Water Quality Standards and Hazardous Substance Cleanup Act (“HSCA”) Screening Levels for Marine Surface Water.

Analytical sediment data from three composite samples were compared to appropriate human health and ecological screening levels and were used to calculate porewater concentrations for comparison to applicable water quality standards. All of the calculations and comparisons were done to evaluate water quality impacts as a result of dredging/plowing for transmission cable placement and from dredge material dewatering and upland disposal locations.

The Department's Draft WQC goes into great detail with its discussion of the above calculations and comparisons made during its technical review of the WQC aspect of the Applicant's proposed project, and the public may gain further insight with an in-depth review of that document. The evaluations set forth in the Draft WQC were conducted to characterize potential water quality impacts from the Applicant's proposed dredging/plowing and related activities. The potential water quality impacts from the proposed activities have been reviewed by the Department's experts in the DW-WWS relative to Delaware's *Surface Water Quality Standards* based on the information provided by the Applicant, the public comments received related to the WQC portion of the proposed project, and DNREC's knowledge of the area of potential impacts. As a result of that review, the Department has concluded that there should be negligible impacts to surface water quality should the Applicant's proposed project ultimately be approved, provided that both engineering and operational controls are in place to minimize the extent and duration of turbidity generated during construction. These controls are detailed in the permit conditions included in the Draft WQC, and are set forth specifically below, in the event the Secretary determines that conditional certification is appropriate for this project.

Given the above conclusions set forth in the Draft WQC, the Department's experts in the DW-WWS have conditionally certified that the proposed discharge into Waters of the United States will comply with Delaware's *Surface Water Quality Standards*, provided the scope of US WIND's proposed project remains unchanged, and the materials are sourced from the specified locations and arranged in accordance with the aforementioned *Indian River Bay Turbidity Minimization and Monitoring Plan*.

The Draft WQC sets forth six (6) specific permit conditions that the Department believes are necessary to ensure the discharges associated with the proposed project comply with water quality standards in the State of Delaware, as follows:

1. The Permittee shall prepare a detailed turbidity monitoring plan for approval by DNREC that specifies the concepts outlined in the *Indian River Bay Turbidity Minimization and Monitoring Plan* (e.g., sample locations, sample schedule, sampling methods, plan view drawings depicting engineering controls, standard operation procedures, etc.). The detailed monitoring plan shall be submitted to, and approved by, DNREC prior to any authorized sediment disturbing activity.
2. The monitoring plan shall include details regarding the measurement of Total Suspended Solids (TSS)/turbidity utilizing real time and laboratory techniques (ADCP, water quality sonde, and laboratory samples) during pre-installation trials and/or during cable installation in order to generate appropriate correlations for use during real-time daily monitoring. Results generated during Campaign 1 (i.e., the initial Construction Phase of the proposed project) shall be used to inform monitoring requirements for Campaign 2 (i.e., the subsequent Construction Phase of the proposed project).
3. During construction activities, the Permittee shall measure TSS, turbidity, and general water quality parameters (temperature, salinity, specific conductance, etc.) at pre-approved locations each day (during daylight hours only) at the following tidal stages: max flood, high slack, max ebb, and low slack during project activities. Any observed activities or measured water quality parameters that may cause, or have caused, exceedances of the applicable *Surface Water Quality Standards* (7 DE Admin. Code 7401) must cease immediately.

4. In order to establish ambient (background) turbidity/TSS during dredging and cable installation operations, ambient TSS shall be measured daily at established compliance monitoring stations up current and down current of the work area prior to the start of daily operations. The average of the daily up current and down current ambient turbidity/TSS levels would establish the baseline for compliance for operations each working day. Turbidity/TSS concentrations at a distance of 500 feet from project activities shall not exceed 200 mg/L (or 600 NTU) above the average ambient turbidity/TSS (7 DE Admin. Code 7401, Section 6.4.1.3). If measurements exceed these thresholds, then work must stop immediately until turbidity diminishes enough to continue within permit limits. Additionally, the Permittee shall measure baseline turbidity at 3 locations along and up-river from the export cable route approximately over 7 days prior to construction activities commencing and 7 days after cable installation to confirm conditions are within 5 mg/L of background conditions, discounting any storm or unusual upset conditions.
5. The Permittee shall install turbidity curtains prior to commencing any jet plowing or dredging and shall be positioned around the discharge locations to protect key critical boundary features such as tidal creeks, channels, and shoreline areas to prevent the encroachment of sediment into natural drainage areas (*see* 7 DE Admin. Code 7401, Section 4.1.1.2).
6. Any current proposed or future activities and controls within the Indian River Bay must attain/maintain average levels for nitrogen, phosphorus and TSS during the SAV growth season (March 1 to October 31), per 7 DE Admin. Code 7401, Section 4.5.8.4, as these criteria were developed in order to support the re-introduction of SAV in the area.

Again, it should be noted that the Draft WQC, with the above conditions, pertains only to the authority of 7 DE Admin. Code 7201 and 7 DE Admin. Code 7401, and does not extend to any permitting requirements of other sections within DNREC. Moreover, receipt of the finalized WQC from the Department does not relieve US WIND of its obligation to comply with other applicable agencies.

As previously stated, the WQC process necessitated by US WIND's proposed project does *not*, in and of itself, authorize any construction-related activities associated with any of the permits/authorizations currently pending before the Department in this matter, nor should it in any way be construed as an approval of that project. Rather, the WQC process is the mechanism by which the certifying agency (in this case, DNREC) can review the water quality aspects of the project and provide comments and/or conditions to be included in the federal permitting processes.

I find that the Department's TRM and the Draft WQC, identified and attached to Ms. Vest's Report as Appendices "A" and "B," respectively, offer a thorough and balanced review of the WQC aspects of the Applicant's proposed project. I further find that the Department's experts in the DW-WWS have reviewed and considered the public comments that concern the WQC aspects of US WIND's proposed project, and have subsequently prepared the Draft WQC, with conditions, accurately reflecting the information contained in the Record.

The mission of DNREC is to engage 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 quality of life; lead energy policy and climate preparedness; and educate the public on historic, cultural, and natural resource use, requirements, and issues. Furthermore, it is the policy of DNREC that no person shall, on the grounds of race, color, national origin, sex, age, or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance, as provided by Title VI of the *Civil Rights Act of 1964*, the *Rehabilitation Act of 1973*, the *Civil Rights Restoration Act of 1987*, and all other related nondiscrimination laws and requirements.

The Record developed in this matter reflects that the Department's experts in the DW-WWS have, based upon their technical review of the WQC aspects of the proposed project, conditionally certified that the proposed discharge into Waters of the United States will comply with Delaware's *Surface Water Quality Standards*, provided that (1) the scope of the project remains unchanged, and (2) the materials are sourced from the specified locations and arranged in accordance with the attached *Indian River Bay Turbidity Minimization and Monitoring Plan*. Furthermore, the Department has conditioned the Draft WQC, in consideration of the water quality concerns voiced in the public comments received by DNREC in this matter, to be protective of human health and the environment. The Department's experts have weighed public benefits of the issuance of the finalized WQC against potential detriments and have recommended approval of the same, as detailed in the Record established in this matter.

I find and conclude that the Record supports finalization and approval of the Draft WQC, prepared by the Department's experts in the DW-WWS, as set forth above. The *finalized* WQC to be issued by the Department will be reflective of the applications submitted by US WIND, and consistent with the Department's technical review of the WQC portions of the Applicant's proposed project, to ensure continued protection of public health and the environment, and consistent with the Record developed in this matter. Accordingly, this Order hereby approves the issuance of the *finalized* WQC, with conditions, as necessitated for US WIND's proposed project, pursuant to 40 CFR Part 121 and in accordance with the USACE Individual Permit, as set forth above.

Further, the Department concludes and specifically directs the following:

1. The Department has jurisdiction, as provided for under 7 *Del.C.* Ch. 60, and all other relevant statutory authority, to make a final determination on the aforementioned pending WQC requested by the Applicant, after holding a public hearing, considering the public comments, and all information contained in the Record as it relates to the WQC aspect of U.S. WIND's proposed project;

2. The Department considered all timely and relevant public comments in the Record as it relates to the WQC aspect of the Applicant's proposed project, as established in the Department's TRM (with enclosures), dated October 4, 2024, and the *finalized* WQC (with enclosures), all of which have now been expressly incorporated into the Record generated in this matter;
3. The Department has carefully considered the factors required to be weighed in issuing the *finalized* WQC necessitated by the Applicant's proposed project, and finds that the Record supports approval of the same;
4. Furthermore, the Department has reviewed the Record generated in this matter in the light of potential Environmental Justice issues existing in the area surrounding the Applicant's proposed project, and has determined that the issuance of the *finalized* WQC is consistent with the Department's Environmental Justice policy;
5. The Department shall issue to the Applicant the *finalized* WQC, as set forth above, consistent with the technical review of the WQC aspects of the Applicant's proposed project, as conducted by the technical experts in the Department's DW-WWS, and consistent with the Record developed in this matter;
6. Moreover, the *finalized* WQC shall include all conditions as set forth in the Department's TRM and Draft WQC, to ensure that Delaware's environment and public health will be protected from harm;
7. The Department adopts the Report and all Appendices as further support for this decision;
8. The Department has an adequate Record for its decision, and no further public hearing is appropriate or necessary; and

9. The Department shall serve and publish its Order on its internet site.



Shawn M. Garvin
Secretary