

THIS IS A COURTESY COPY OF THIS NOTICE. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE OCTOBER 4, 2021, NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE NOTICE, THE OFFICIAL VERSION WILL GOVERN. **Note:** The Department filed this notice of action on petition for rulemaking on September 7, 2021, for publication on October 4, 2021. As indicated when the notice was published on January 3, 2022 (see 54 N.J.R. 101(c)), due to an inadvertent filing error at OAL, the notice was not logged in when it was originally received.

ENVIRONMENTAL PROTECTION

WATERSHED AND LAND MANAGEMENT

Notice of Action on Petition for Rulemaking

Coastal Zone Management Rules, N.J.A.C. 7:7-2.3

Request to revise Coastal Wetlands Maps 224-1752, 224-1758, 231-1752, 231-1758 and 238-1752 to remove property located in Lower Alloways Creek Township, Salem County

Petitioner: PSEG Power LLC

Take notice that the Department of Environmental Protection (Department) has determined to grant the petition for rulemaking described below which was filed by Robert Reich of AKRF Environmental on behalf of PSEG Power LLC (petitioner) on November 9, 2020.

The Petition

Petitioner indicates that it is the current owner of parcels designated on the tax map of Lower Alloways Creek Township, Salem County, as Block 26, Lots 4, 4.01, 5 and 5.01, and is in the process of taking ownership from the United States Army Corps of Engineers (“the Army Corps”

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or "USACE") of additional property located within Lower Alloways Creek Township designated as Block 26, Lot 2 (collectively, the site). The site includes an area within which the petitioner is participating in the development of the New Jersey Wind Port. The petitioner requests that Coastal Wetland Maps 224-1752, 224-1758, 231-1752, 231-1758, and 238-1752, that are listed at N.J.A.C. 7:7-2.3(a), be amended to exclude approximately 150 acres of the site that it asserts do not meet the definition of coastal wetlands contained in the Wetlands Act of 1970 at N.J.S.A. 13:9A-2 as described further below.

The petitioner asserts that the existing delineation of the coastal wetland boundary on maps 224-1752, 224-1758, 231-1752, 231-1758, and 238-1752 does not reflect current conditions on site in light of development at the PSEG Nuclear Salem and Hope Creek Generating Station (Block 26, Lot 4, 40.1, 5 and 5.01), as well as historic development and continuous operation of the ACOE Artificial Island Confined Disposal Facility (CDF) Cell No.3 (Block 26, Lot 2). The petitioner provided aerial photographs that it says document both the historic condition of the site and the previously authorized development in relation to the 1970 Coastal Wetland maps and 1977 revisions. The petitioner also provided a wetlands resource report, which concludes that the areas it seeks to have removed from the Coastal Wetlands maps do not meet the statutory definition of coastal wetlands for the following reasons:

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- The areas consist of existing development in the form of existing structures, laydown areas, roadways, maintained landscaped buffer or operating dredge disposal facilities and would not be considered a bank, marsh, swamp, meadow or flat;
- The identified areas are sufficiently separated from direct connection to or influence of tidal waters;
- Minimum elevation of the identified areas average from nine to 11 feet (NAVD 88) with maximum elevations as high as 23 feet (NAVD 88) which are significantly higher than the calculated local mean higher high tide elevation of 3.21 (NAVD 88); and
- Due to the disturbed nature of the area, lack of tidal exchange and higher elevation the capability of the areas to grow designated coastal wetland vegetation is limited.

The petitioner indicates that field investigations identified several small roadside swales and isolated topographic depressions that would be characterized as freshwater wetlands but noted the lack of connection to regional tidal waters and domination by invasive *Phragmites australis* as opposed to common native coastal wetland species. Further, soil borings collected in these areas are also asserted to be reflective of the highly disturbed nature of the site and included common fill type material.

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With reference to the existing USACE Artificial Island confined disposal facility Cell No.3, petitioner states that this area consists of an approximately 100-acre area isolated by containment berms ranging from 12 to 23 feet (NAVD 88). While areas outside the containment berms are tidally influenced and contain a mix of the invasive *Phragmites australis* as well as native *Spartina alterniflora* and other common coastal wetland vegetation species, the petitioner notes that historic construction of CDF Cell No.3 predates the development of the 1970 Department coastal wetland maps by several decades and speculates that the area within the berms was likely incorrectly identified as coastal wetlands due to the difficulties in using aerial photographs to distinguish the area from adjacent tidal marshes when overgrown with invasive *Phragmites australis* in aerial photography. The petitioner states that routine maintenance and continuous operation as a CDF has resulted in an area that is quite distinct ecologically and functionally separate from adjacent marsh areas.

The petitioner asserts that the requested modification would move the coastal wetland boundary east in several locations to consistently mirror the existing upper wetland boundary/upper wetland line (uwb/uwl) as provided by the Department's Office of Information Resource Management, Bureau of Geographic Information Systems and would exclude areas of existing development within the Salem and Hope Creek Generating Station and the operational ACOE Artificial Island CDF Cell No.3.

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The petition was received by the Department on November 9, 2020. Notice of receipt of the petition was published in the January 4, 2021 New Jersey Register (see 53 N.J.R. 85(a)).

The Department's Response to the Petition

The Department conducted a site investigation on December 28, 2020. Based on the site investigation, historical aerial photography and Letters of Interpretation issued for the site (File #1704-02-0001.4 FWW090001 and File #1704-02-0001.4 FWW140001), the Department has determined that changes to coastal wetlands maps 224-1758, 231-1752, 231-1758 are appropriate and that changes to coastal wetlands maps 224-1752 and 238-1752 are not necessary as these maps are outside the scope of the proposed changes. Specifically, the Department has determined that approximately 148.92 acres of the site's mapped coastal wetlands no longer meet the definition of coastal wetlands pursuant to the Wetlands Act of 1970 as they are either developed or are no longer at or below an elevation of one foot above local extreme high water. Therefore, the Department is proposing to revise coastal wetlands maps 224-1758, 231-1752, 231-1758 to reflect the area that the Department has determined no longer meets the definition of coastal wetlands. Because the coastal wetlands maps are promulgated by rule, the Department must undertake rulemaking to revise the maps. The rulemaking will

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describe the extent of the area determined to no longer meet the definition of a coastal wetland and will provide an opportunity for public comment on that determination.

Therefore, in accordance with N.J.S.A. 52:14B-4(f) and N.J.A.C. 1:30-4.2, after careful consideration of the petition, the Department has determined to grant the petition for rulemaking. A copy of this notice has been mailed to the petitioner as required by N.J.A.C. 1:30-4.2.