

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Office of the General Counsel

625 Broadway, 14th Floor, Albany, New York 12233-1500

P: (518) 402-9185 | F: (518) 402-9018

www.dec.ny.gov

July 12, 2019

VIA EMAIL

Hon. Kathleen H. Burgess
Secretary to the Commission
New York State Public Service Commission
Empire State Plaza
Agency Building Three
Albany, NY 12223-1350
secretary@dps.ny.gov

Re: Application of Deepwater Wind South Fork, LLC for a Certificate of Environmental Compatibility and Public Need for the Construction of Approximately 3.5 Miles of Submarine Export Cable from the New York State Territorial Waters Boundary to the South Shore of the Town of East Hampton in Suffolk County and Approximately 4.1 Miles of Terrestrial Export Cable from the South Shore of the Town of East Hampton to an Interconnection Facility with an Interconnection Cable Connecting to the Existing East Hampton Substation in the Town of East Hampton, Suffolk County.
Case 18-T-0604

Dear Secretary Burgess:

The New York State Department of Environmental Conservation (NYSDEC) submits the following comments on the application of Deepwater Wind South Fork, LLC (Deepwater) to build and operate an electric transmission line that would connect the proposed South Fork Wind Farm, located in federal jurisdictional waters on the Outer Continental Shelf, to the existing mainland electric grid in the Town of Easthampton. On September 14, 2018, Deepwater filed an application (Application) with the Public Service Commission (PSC or Commission), requesting the Commission issue a Certificate of Environmental Compatibility and Public Need under Article VII of the Public Service Law (Article VII) authorizing construction and operation of the South Fork Export Cable Project (SFEC or Project).

The following is a summary of NYSDEC jurisdictional resources along the SFEC, including the Beach Lane landing site (preferred alternative) and the Hither Hills landing site (viable alternative). Additionally, this letter provides general comments based on NYSDEC's initial review of the Application. These and any other issues that may arise during NYSDEC's ongoing review of the Application will need to be addressed prior to the Commission issuing any Certificate for the Project under Article VII.



Department of
Environmental
Conservation

Jurisdictional Resources

The following provides a summary of NYSDEC jurisdictional resources along the SFEC including the Beach Lane and Hither Hills routes based on NYSDEC's review of the Application.

Environmental Conservation Law (ECL) Article 9 – Lands and Forests 6 NYCRR Part 575 – Prohibited and Regulated Invasive Species

Pursuant to 6 NYCRR Part 575, the possession, transport, importation, sale, purchase, and introduction of select invasive species is prohibited or regulated in New York State. The following is a summary of currently known existing invasive species along the Beach Lane and Hither Hills routes:

Beach Lane:

There were 29 invasive species occurrences identified onshore within or proximate to the Beach Lane route during Deepwater's field surveys. These occurrences include 18 invasive species. Twenty-eight of the occurrences were invasive plants, and one occurrence was for observed evidence of a Southern Pine Beetle (*Dendroctonus frontalis*) infestation within dead and dying Pitch Pine (*Pinus rigida*) trees located within and adjacent to the Long Island Railroad (LIRR) right-of-way (ROW).

Hither Hills:

There were 92 invasive species occurrences identified onshore within or proximate to the Hither Hills route during Deepwater's field surveys. These occurrences include 19 invasive species.

An Invasive Species Control Plan that is approvable by NYSDEC must be prepared for the Project. There shall be no new or increase in invasive species as a result of the Project.

ECL Article 11 – Fish and Wildlife 6 NYCRR Part 182 – Endangered and Threatened Species of Fish and Wildlife; Species of Special Concern; Incidental Take Permits

Pursuant to 6 NYCRR Part 182, a proposed activity that is likely to result in the take or taking of any species listed as endangered or threatened, is subject to regulation. This includes requirements to avoid, minimize, and mitigate potential impacts to listed species. The following is a summary of protected species that are known to occur within or in the vicinity of the Project, including the Offshore SFEC, Beach Lane and Hither Hills routes:

Offshore SFEC:

A letter from the New York Natural Heritage Program dated March 19, 2018, identified the following federally and state-listed endangered or threatened species or species of special concern along the Offshore SFEC route: four mammals (humpback whale, fin whale, North Atlantic right whale, and sperm whale); four reptiles (green sea turtle, loggerhead sea turtle, Kemp's ridley sea turtle, and leatherback sea turtle); and two finfish (Atlantic sturgeon and shortnose sturgeon).

Beach Lane:

A letter from the New York Natural Heritage Program, dated March 19, 2018, identified the following federally and state-listed endangered or threatened species or species of special concern along the Beach Lane alternative: two plants; one insect (coastal barrens buckmoth); five birds (piping plover, red knot, roseate tern, least tern, and common tern); and one mammal (northern long-eared bat (NLEB)).

Hither Hills:

A letter from the New York Natural Heritage Program, dated March 19, 2018, identified the following federally and state-listed endangered or threatened species or species of special concern along Hither Hills alternative: 14 plants; 5 birds (piping plover, least tern, northern harrier, red knot, and roseate tern); and 1 mammal (NLEB).

To avoid direct impacts to fish and wildlife species, Deepwater should consult with NYSDEC on appropriate Best Management Practices (BMPs), including but not limited to seasonal construction windows and appropriate construction methodologies.

ECL Article 15 – Protection of Waters

6 NYCRR Part 601 – Water Withdrawal Permitting, Reporting, and Registration

6 NYCRR Part 602 Long Island Wells

The Long Island Water Well Permit and Water Withdrawal programs are potentially implicated by the Project. It is not clear if any dewatering activities for construction will be regulated under either program. Additional information is needed from Deepwater to ensure statutory and regulatory requirements are met and to determine if any restrictions or conditions are required.

ECL Article 15 – Water Resources

6 NYCRR Part 608 – Use and Protection of Waters

The following provides a summary of the water resources regulated under ECL Article 15 that are located along the Offshore SFEC, Beach Lane and Hither Hills routes and the implicated regulations:

Offshore SFEC: The Offshore SFEC traverses the North Atlantic Ocean which is a Class SA saline surface waterbody. Classification SA (marine waters) are waters with a best usage for shellfishing for market purposes, swimming and other recreation, and fishing. Excavation/placement of fill in navigable waters associated with the installation of the offshore SFEC are regulated under 6 NYCRR Part 608.5 *Excavation or placement of fill in navigable waters*. In addition, a federal Clean Water Act (CWA) Section 401 Water Quality Certification will be also be required for work along the Offshore SFEC pursuant to 608.9 *Water quality certifications*, since the Atlantic Ocean is also a federally regulated water.

Beach Lane:

- 608.2 *Disturbance of protected streams* - there are no protected streams along the Beach Lane route.

- *608.9 Water quality certifications* – according to Deepwater, there are no federally regulated wetlands along the onshore SFEC route associated with the Beach Lane landing site (Route A corridor).

Hither Hills:

- *608.2 Disturbance of protected streams* - there are no protected streams along the Hither Hills route.
- *608.9 Water quality certifications* – according to Deepwater, there are approximately 2 acres of federally regulated wetlands along the onshore SFEC route associated with the Hither Hills landing site (Route B corridor). A Section 401 Water Quality Certification is required for the onshore wetland impacts.

NYSDEC is evaluating the application to ensure that all proposed impacts to water resources are avoided and minimized to the maximum extent practicable. BMPs for construction activities in Article 15 water resources will be reviewed for consistency with NYSDEC regulatory requirements. Deepwater will need to develop plans to mitigate for any unavoidable impacts to water resources, in consultation with NYSDEC.

ECL Article 17 – Water Pollution Control

6 NYCRR Part 750 – State Pollutant Discharge Elimination System Permits (SPDES)

Pursuant to Section 402 of the CWA, stormwater discharges from certain construction activities are unlawful unless they are authorized by a National Pollutant Discharge Elimination System (NPDES) permit or by a state permit program. New York's State Pollutant Discharge Elimination System (SPDES) is a NPDES-approved program with permits issued in accordance with the ECL. Coverage under GP-0-15-002 is required for construction activities involving soil disturbances of one (1) or more acres. Accordingly, Deepwater will be required to obtain coverage under GP-0-15-002 for construction of the Project.

ECL Article 24 – Freshwater Wetlands

6 NYCRR Parts 663 and 664 – Freshwater Wetlands Permits/Maps

The following provides a summary of the Freshwater Wetlands resources regulated under ECL Article 24 that are located along the Beach Lane and Hither Hills routes:

Beach Lane:

According to the Application, NYSDEC Freshwater Wetland EH-25 is located approximately 400 feet (122 m) to the east of the Beach Lane route, beyond the adjoining residential properties and woodlands that adjoin Wainscott Stone Road. The wetland is associated with Georgica Pond and is designated as a Class I wetland. No other mapped NYSDEC freshwater wetlands occur at or within 500 feet (152 m) of the Beach Lane route.

Hither Hills:

According to the Application, several NYSDEC Freshwater Wetlands were delineated along the Hither Hills Route, including Class I wetlands GE-4, GE-5, and NA-3; and Class III wetlands NA-6 and NA-8. Additionally, 13.21 acres of freshwater wetland adjacent areas were delineated along the Hither Hills route.

NYSDEC will need to verify the delineated Article 24 Freshwater Wetland boundaries in the field. Such verification of delineations is necessary to fully assess the nature and extent of the Project's impact on freshwater wetlands regulated under ECL Article 24. Nor has Deepwater conducted an impact analysis on the wetlands that were delineated along the Hither Hills route. An impact analysis must be conducted for NYSDEC to fully assess compliance with ECL Article 24 and associated regulations in 6 NYCRR Parts 663 and 664.

ECL Article 25 – Tidal Wetlands

6 NYCRR Part 661 – Tidal Wetlands – Land Use Regulations

The following provides a summary of the Tidal Wetlands resources regulated under ECL Article 25 that are located along the Beach Lane and Hither Hills routes (*note: the Littoral Zone (LZ) tidal wetland category is defined by NYSDEC as "[t]he tidal wetland zone that includes all lands under tidal waters which are not included in any other category. There shall be no LZ under waters deeper than six feet at mean low water"*):

Beach Lane:

According to the Application, a LZ tidal wetland is crossed by the sea-to-shore transition corridor. The LZ tidal wetland is proposed to be crossed using horizontal directional drilling (HDD). No other mapped NYSDEC tidal wetlands occur at or within 300 feet (91 m) of the Project.

Hither Hills:

According to the Application, a LZ tidal wetland is crossed by the sea-to-shore transition corridor. The LZ tidal wetland is proposed to be crossed using HDD. According to the Application, there are 4.73 acres of tidal wetland adjacent areas delineated along the onshore Hither Hills route.

NYSDEC will need to verify the delineated ECL Article 25 tidal wetland boundaries in the field. Such verification of delineations is necessary to fully assess the nature and extent of the Project's impact on tidal wetlands regulated under ECL Article 25. Nor has Deepwater conducted an impact analysis on the wetlands that were delineated along the Hither Hills route. An impact analysis must be conducted for NYSDEC to fully assess compliance with ECL Article 25 and associated regulations in 6 NYCRR Part 661.

ECL Article 34 – Coastal Erosion Hazard Areas

6 NYCRR Part 505 – Coastal Erosion Management

A Coastal Erosion Hazard Area (CEHA) is mapped along the shoreline at both the Beach Lane and Hither Hills landing sites. The following provides a summary of the CEHA resources regulated under ECL Article 34 that are located along the Beach Lane and Hither Hills routes:

Beach Lane:

The proposed vault and construction activities surrounding the vault are well landward of CEHA by approximately 325 feet.

Hither Hills:

In Montauk, at Hither Hills the proposed vault is in the upper parking lot, which is approximately 300 feet landward of CEHA.

Provided the SFEC can be installed via HDD and the vaults can be placed outside of the CEHA jurisdictional area, there are not CEHA concerns. Specifically, NYSDEC recommends the exit pit be located a minimum of 1,000 feet seaward of Mean Low Water, and at a Mean Low Water depth of no less than 15 feet. The final location of the drilling and exit pits shall be reviewed and accepted by NYSDEC, including to ensure compliance with ECL Article 34 and associated regulations in 6 NYCRR Part 505.

General Comments:

NYSDEC notes that the Application lacks certain information for NYSDEC to fully assess the nature and extent of the potential environmental impacts from the Project, as well as compliance with all applicable environmental statutes and regulations. Accordingly, at a minimum, Deepwater must provide such information, and NYSDEC must assess such information, prior to the Commission issuing any Certificate for the Project under Article VII. NYSDEC is providing this list of informational deficiencies in the Application in these comments to facilitate the ongoing review of the Application.

Cable Installation and Burial Depth

- 1) The Application should discuss measures to avoid interactions with fishing gear and to prevent potential exposure of the cable, including burial of the offshore SFEC at least six feet.
- 2) The Application should provide the locations and areal extent of proposed concrete mattresses or alternative cable protection measures.
- 3) The Application lacks an evaluation of alternative cable protection measures. Concrete mattresses may conflict with fishing gear and need to be buried sufficiently below grade. If sufficient burial is not feasible, alternative measures need to be proposed and discussed.
- 4) The Application lacks an evaluation of alternatives to sidecasting excavated sediments, including the proposed impacts to fish and other aquatic life from the sidecasting of dredged material.
- 5) The Application states that seabed disturbance would occur during seabed preparation while clearing and leveling the seabed. The Application does not discuss the procedures for leveling the seabed, the extent of leveling and whether this activity would occur in New York State waters.
- 6) The Application states that an HDD Contingency Plan will be developed in the Project's Environmental Management and Construction Plan (EM&CP), however, to fully evaluate the impacts of the project and consider provisions to protect fish and other aquatic life from harm, the HDD Contingency Plan needs to be provided at an earlier stage in the

proceeding. Additional information regarding the management and containment of HDD drilling returns needs to be provided.

- 7) The Application lacks information on the temporary cofferdam including how it will be installed, dewatered, and the area restored after construction.

Marine Resources

- 8) The Application does not identify all the marine species that may be present in the Project area. Further consultation with NYSDEC regarding the presence, location and abundance of marine species should be conducted. The following provides an overview of missing species:
 - a. The following species were caught in the SoMAS/DEC 2018 Ocean Trawl Survey in medium to large numbers and should be included in the Application's impact assessment: butterfish; black sea bass; scup; summer, winter and windowpane flounders; American shad; longfin squid; striped bass; Atlantic mackerel; smooth and spiny dogfish; northern and striped searobin; silver and spotted hake; skates and rays; and forage fish (including menhaden, Atlantic herring and river herring). In addition, the following species were found in low numbers: Atlantic sturgeon; monkfish; tautog; Atlantic cod; northern puffer; sand tiger shark; horseshoe crab; American lobster; and Jonah crab. Weakfish and bluefish were also caught in low numbers, but probably due to their fast swimming speed.
 - b. Additional species that may be in the area include juvenile white shark (nursery area), dusky shark, thresher shark, sand bar shark, dolphins, and seals.
- 9) The Application should provide a full disclosure of the marine species data available for the Project area. For example, when citing New York State Energy Research and Development Authority (NYSERDA) high resolution digital aerial survey data, the Application notes the certain number of green sea turtles that were detected in summer 2016, however, it fails to note the 145 sea turtles of unknown species that were detected.
- 10) The Application fails to provide the most updated marine species data available. Riverhead Foundation for Marine Research and Preservation should be contacted for updated sea turtle stranding information. The ocean is changing too quickly to use information from the 1980s to plan for future development.
- 11) The Application does not evaluate avoidance and minimization measures for finfish species, including species windows. Narrative regarding the avoidance of work during Atlantic sturgeon migration periods is also missing from the Application.
- 12) The Application discusses three unique benthic habitats but does not evaluate the impacts on these different habitats.
- 13) The Application does not include an egg density analysis for cold water zooplankton/ichthyoplankton species found in the later fall and early winter.

- 14) The Application does not discuss the presence or absence of corals.

Rare, Threatened and Endangered Plant Species

- 15) The Application does not identify the specific locations of rare, threatened, and endangered plant species.

Northern Long-Eared Bats (NLEB)

- 16) The Application does not evaluate the potential year-round impacts on the NLEB. Winter acoustic monitoring from eastern Long Island has documented NLEBs active on the landscape in December, January, February, and March. Additionally, appropriate tree clearing windows (November 1st through March 31st) should be considered to avoid impacts to NLEBs. Further consultation with NYSDEC regarding NLEBs should be conducted.
- 17) The Application does not evaluate impacts to NLEB occupied habitat at the Hither Hills landing site. The Hither Hills landing site is within occupied habitat for the species, confirmed through both acoustic and capture results. Most of the cable corridor from this landing site also lies within occupied habitat. Since this route is considered a viable alternative, there should be a full evaluation of impacts along this route.

Shorebirds and Sea Ducks

- 18) The Application identifies five threatened or endangered shorebirds in the vicinity of the Project, however, it does not discuss measures to avoid impacts to shorebirds, such as a shorebird exclusion window from April 1st through August 31st for work on or near the beach, including directional drilling.
- 19) The Application does not evaluate potential impacts to sea ducks. The Atlantic Coast Sea Duck Surveys from 2008 to 2011 should be utilized to conduct an impact analysis.

Hither Hills Route

- 20) The Application lacks an avoidance, minimization, and mitigation plan for wetlands and waterbodies along the Hither Hills Route alternative. Since this route is considered a viable alternative, there should be a full evaluation of impacts along this route.
- 21) A full evaluation of the impacts to Hither Hills State Park and Beach Lane is not included in the Application, including but not limited to the avoidance of work at Hither Hills State Park and the Beach Lane public access area during summer peak recreation season. The Application is also lacking a thorough evaluation of the impacts from temporary beach closures from construction, operation and maintenance activities.

Remediation Sites and Soil Management

- 22) The Application includes a Phase I Environmental Site Assessment (ESA) conducted on the National Grid Generating Station property near Horseshoe Drive and Cove Hollow Road. Past NYSDEC spill records exist for the property and the property is listed on the Resource Conservation and Recovery Act (RCRA) large hazardous waste generator database. It is not clear what the impacts to this property will be, therefore a full impact analysis should be conducted for this property in consultation with NYSDEC.
- 23) For work along the LIRR, NYSDEC recommends testing and proper disposal of soils.

Please feel free to contact me at (518) 402-0894 or lisa.covert@dec.ny.gov; or Karen Gaidasz of the Division of Environmental Permits at (518) 402-9153 or karen.gaidasz@dec.ny.gov; with any questions about these comments.

Sincerely,



Lisa A. Covert, Esq.
Senior Attorney

ecc: Andy Davis, DPS
Andrea Cerbin, Esq., DPS
Laura McLean, DOS
Greg Lampman, NYSERDA
USACE NY District
Party List Case 18-T-0604