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ENVIRONMENTAL PROTECTION
DIVISION OF LAND RESOURCE PROTECTION
Notice of Action on Petition for Rulemaking
Coastal Zone Management Rules, N.J.A.C. 7:7-4.16
Petitioner: BaySide Shellfish Co.

Take notice that the Department of Environmental Protection (Department) has determined to deny the petition for rulemaking received on October 19, 2020 from BaySide Shellfish Company, a shellfish aquaculture business consisting of a hatchery and nursery in Cape May Court House, New Jersey. (See 52 N.J.R. 2131(c); December 7, 2020)

Petitioner's Request

Petitioner raises various forms of shellfish, including clams and oysters. The petitioner requested that the Department amend the Coastal Zone Management (CZM) Rules, N.J.A.C. 7:7. Specifically, petitioner requested that N.J.A.C. 7:7-4.16, Permit-By-Rule (PBR) 16 for the placement of land-based upwellers and raceways for aquaculture activities, be amended to include both hatchery and nursery operations at an aquaculture business. The petitioner additionally requested the PBR be amended to allow covered structures, including a single-family dwelling. Petitioner stated that inclusion of both hatchery and nursery operations are necessary for such a facility to be economically viable. Petitioner stated that the requested amendments would facilitate aquaculture business growth and further contribute to the economy of the State. Petitioner included in its submission a list of organizations and businesses that it indicated support its petition for rulemaking.

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Petitioner stated that PBR 16 restricts any aquaculture business established subsequent to passage of the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 et seq., or aspiring shellfish businesses from being able to operate a financially viable business because the PBR only encompasses nursery operations. As a result, these shellfish operations, including BaySide, must go through what it says is the extensive and expensive process of applying for a CAFRA individual permit for the hatchery portion of the shellfish business. Petitioner indicates that this requirement hinders its businesses from growing and contributing further to the economy of the State of New Jersey.

Petitioner asserts that, although the hatchery portion of petitioner's operation (which consists of two large sheds, two small sheds and one 5000-gallon water tank) is required for a successful shellfish operation, it has been informed by the Department that it must apply for CAFRA individual permits for all of these structures. Petitioner asserted that it is not financially viable to require a shellfish aquaculture business to apply for a separate CAFRA individual permit for the hatchery portion of the operation.

Similarly, Petitioner says there is no reason that a single-family dwelling cannot be combined with a shellfish aquaculture business. Accordingly, BaySide requested that PBR 16 be amended to allow such an arrangement. Petitioner also stated that, if the Department requires shellfish aquaculture businesses to relocate their aquaculture hatchery operations to a site that does not include a single-family dwelling, then shellfish aquaculture businesses would be compelled to

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purchase an off-site location for the hatchery operations for the three months out of the calendar year during which the hatchery is in use.

Petitioner contends that the limitations imposed by the PBR severely hinder it and other shellfish businesses' ability to operate successfully. To address these concerns, the petitioner requested that N.J.A.C. 7:7-4.16 be amended as follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

7:7-4.16 Permit-by-rule 16- placement of land-based upwellers, [and] raceways **and structures necessary** for aquaculture activities **including hatchery and nursery related operations**.

(a) This permit-by-rule authorizes the placement of land-based upwellers, [and] raceways **and structures necessary** for aquaculture activities **including hatchery and nursery related operations combined with a single-family dwelling unit**. Activities that qualify for this permit-by-rule also qualify for a water quality certificate pursuant to Section 401 of the Federal Clean Water Act, 33 U.S.C. §§ 1251 et. seq. The aquaculture activities shall comply with the following:

- (1) The structures are located on the upland portion of the lot with a legally existing, functioning bulkhead;
- (2) No grading, excavation, filling or placement of a structure was undertaken on a beach, dune, or wetland; and
- (3) The discharge from the aquaculture activities is to a body of water and not directly into

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a wetland.

Department Response

In 2013, the Department adopted emergency amendments to its coastal rules (formerly the Coastal Permit Program Rules, N.J.A.C. 7:7 and the CZM rules, N.J.A.C. 7:7E, now consolidated into the CZM Rules, N.J.A.C. 7:7) in view of the significant adverse social, economic and environmental impacts associated with Superstorm Sandy, which hit New Jersey's coastline on Monday October 29, 2012, and in support of the rebuilding and economic recovery of New Jersey's coastal areas in an expeditious and resilient manner (see 45 N.J.R. 1696(a) 45 N.J.R. July 15, 2013). The 2013 amendments focused on New Jersey's hard clam and oyster aquaculture industry which, according to the New Jersey Department of Agriculture, suffered nearly \$1,347,500 in damages to property, buildings, gear, structures and product as a result of Superstorm Sandy. To facilitate the restoration of this industry and to encourage shellfish aquaculture activities, the Department amended its coastal rules to streamline the permitting process through the addition of three new permits-by-rule and two new general permits-by-certification and other modifications to specifically address shellfish aquaculture.

A PBR is a permit to undertake a regulated activity for which the terms and conditions are established in the CZM Rules at N.J.A.C. 7:7-3 and 4. PBRs are effective without prior written approval from the Department, provided all requirements established for that activity in the applicable PBR are satisfied. In accordance with N.J.A.C. 7:7-3.2(b)1, the Department will

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promulgate a PBR only if the Department determines that the proposed activity will cause only minimal adverse environmental impacts when performed separately, as well as have only minimal cumulative environmental impacts.

To meet this standard, the scope of PBR 16 was limited to the placement of land based upwellers and raceways, including intakes and discharges, for aquaculture activities located on the upland portion of a lot with a legally existing, functioning bulkhead. For the purpose of the PBR, an upweller is a flow-through system that is used for growing shellfish seed contained in compartments where water, which is drawn from the adjacent water body, flows through the system to carry nutrients to the seed. A raceway is a long rectangular flow-through system in which shellfish seed can be grown to a sufficient size for planting. Water drawn from the adjacent waterway nourishes the juvenile shellfish, which, in turn, filter the water prior to its discharge, thereby improving the quality of the discharged water. Land-based upwellers and raceways, when appropriately placed, do not adversely affect the adjacent waters and water quality. Further, when located in appropriate upland areas, the structures and activity will not affect special areas as set forth at N.J.A.C. 7:7-9. The requirement that the activity be located on the upland portion of a bulkheaded lot ensures that wetlands, beaches and dunes are not present on the site. The grading, excavation, filling, or placement of structures on a beach, dune or wetland is prohibited. The PBR also requires that the discharge of the water from the system must be to a water body and not directly into a wetland in order to protect any wetlands on the site from impacts such as erosion.

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The Department limited the activities authorized under PBR 16 to small-scale operations to ensure that, consistent with N.J.A.C. 7:7-3.2(b)1, operations authorized under the PBR would have minimal individual and cumulative impacts on the environment. The proposed addition to the PBR would add covered structures and single-family homes which reduce the pervious area of a site, effectively sealing the ground and preventing water absorption. As a result, the amount of stormwater runoff, nonpoint source pollution and nutrients entering the adjacent waters could adversely affect overall water quality and the marine ecosystem. The limitations incorporated into PBR 16 reflect the Department's determination as to the extent of activity that can be allowed on a site without Department review while still ensuring that the individual and cumulative impact of such activities have a minimal impact on the environment. The crucial element in the PBRs is that they involve identical activities that can be undertaken by many entities with minimal impact on the environment. The addition of the other structures envisioned by the petition creates a high level of variability in both the individual and cumulative environmental impacts. While it is generally possible to accommodate other structures as part of a shellfish aquaculture business with appropriate planning, Department review of site-specific conditions and the particular plan for siting of the proposed structures is necessary to enable the Department to determine whether the activities can be conducted as proposed without an inappropriate impact on the environment. To help ensure that the application process and Department review of permit applications can proceed in as efficient and expeditious a manner as possible, applicants may request a pre-application meeting with

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Department staff. During a pre-application meeting, feedback on proposed projects, including whether activities are considered to be regulated activities, what authorizations are necessary, and what potential compliance issues may be present, is provided, and recommendations are given.

Accordingly, the Department cannot make the required findings under N.J.A.C. 7:7-3.2(b)1 to authorize the extent of activity requested in the petition under a PBR and is therefore denying the petition.

A copy of this notice has been mailed to the petitioner as required by N.J.A.C. 1:30-4.2.