

Final

Coastal Zone Conversion Permit Act

Process Recommendations Report

Prepared for the
Delaware Department of Natural Resources and Environmental
Control

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Executive Summary

Background

Delaware House Bill 190, the Coastal Zone Conversion Permit Act (CZCPA), amended the state's Coastal Zone Act (CZA) to allow heavy industrial redevelopment and limited bulk product transfer at 14 heavy industry sites¹ in the Coastal Zone. CZCPA requires that the Delaware Department of Natural Resources and Environmental Control (DNREC) develop regulations for Conversion Permits by October 1, 2019. Consistent with this requirement, DNREC will set up and serve as the lead agency for a Regulatory Advisory Committee (RAC) that will support its development of new regulations.

Process

DNREC took the first steps in this process by seeking public input about the RAC prior to identifying committee members. In October 2017, DNREC retained the Consensus Building Institute (CBI) to assist the agency with assessing stakeholder concerns and opinions about establishing the RAC and drafting regulations. CBI conducted stakeholder interviews in-person and by phone in October and November 2017 to gather some initial thoughts on how DNREC could establish a collaborative and effective process. DNREC hosted two public workshops, facilitated by CBI, to provide opportunities for more stakeholders to participate in this initial phase of the process, help ensure greater inclusion and transparency, and obtain further input on establishing the process for collaboratively developing regulations. DNREC released the draft Coastal Zone Conversion Permit Act Process Recommendations Report, authored by CBI, on December 22, 2017 and solicited public comments on the draft through January 19, 2018. CBI reviewed all comments heard during the initial assessment interviews, the two public workshops, and all written public comments in the drafting of the final Coastal Zone Conversion Permit Act Process Recommendations Report (Report) for DNREC.

¹ The Coastal Zone Act refers to such sites as “nonconforming use sites”. The Coastal Zone Conversion Permit Act refers to them as “heavy industry sites”. This Report will use the CZCPA terminology.

DNREC will identify a path forward after reviewing what its staff heard at the public workshops, reviewing the public comments, and reviewing the final Report.

General findings

In its assessment, CBI heard a wide range of opinions and concerns about the following topics:

1. The CZCPA legislative process
2. The main provisions of the CZCPA legislation
3. The DNREC process for establishing regulations to implement the CZCPA (including the CBI initial assessment interviews to generate input on the development of the RAC)
4. Main factors for DNREC and others to consider in developing the CZCPA regulations
5. Other issues and comments

Recommendations

CBI developed 13 draft recommendations for DNREC to consider as it convenes a RAC to help the agency develop regulations to implement the CZCPA. They are:

Scope

Recommendation #1: The RAC should focus solely on changes to existing regulations or the creation of additional regulations necessary to implement the CZCPA. The RAC should not be charged with amending or revising the regulations already in place for issuing permits under the Coastal Zone Act.

Stakeholder Groups

Recommendation #2: The Secretary should provide for representation by three broad stakeholder categories and one “other” category for those who may not fit clearly in one of those three categories: 1) environment, environmental justice, and public health; 2) community; 3) industry, business, and labor; and 4) other. The Secretary should

specifically seek to ensure participation from affected fenceline communities. The Secretary should not select state-level elected officials to serve on the RAC.

Committee Size and Balance

Recommendation #3: The Secretary should target a RAC of 15-21 members and allow for the following: 1) five to six members (5 to 6) from each of the three categories noted above, in equal balance of numbers for each of the three main stakeholder categories; 2) one to three (1 to 3) additional seats for those who do not fit within those three categories; 3) one (1) full member seat for DNREC; and 4) alternates nominated by each member.

Criteria for Membership

Recommendation #4: The Secretary should establish and publish clear criteria for membership and require that all nominees to the RAC complete a nomination and disclosure form that is made publicly available.

Membership Selection

Recommendation #5: The Secretary should establish a transparent nomination process. Interested parties would nominate individuals (self-nominations would be accepted as well) to the RAC during a period of time in early 2018. Nominations would identify the appropriate stakeholder category for the nominee. The Secretary would review the nominations and select members from the pool of nominees within a committee structure decided by the Secretary, as informed by the Report. After selection, each RAC member would identify an alternate if possible, which the Secretary would then accept or reject.

Workgroups and Technical Expertise

Recommendation #6: The Secretary should allow for the formation of RAC workgroups that can undertake detailed analysis and discussion of specific topics. These may include non-member technical experts. Workgroups would be for deliberation, exploration, and option generation but any and all decisions should rest solely with the full RAC. Workgroup meetings should adhere to Delaware's Open Meetings Law.

Community Outreach

Recommendation #7: The Secretary and the RAC should make a concerted effort to reach out to, communicate with, and build working relationships with marginalized and potentially-impacted communities, neighborhoods, and groups. This could be done by placing such individuals on the RAC itself, inviting community-based technical advisors to serve on the workgroup and/or the RAC, outreach, attending neighborhood meetings, and/or forming a workgroup.

Committee Transparency

Recommendation #8: The Secretary should ensure RAC transparency by considering the time, place, and form of its meetings and any associated public outreach and engagement to provide for public access, participation, and comment. At least some meetings and workgroups should be held in fence-line communities.

Committee Product

Recommendation #9: The Secretary should instruct the RAC to write prescriptive guidance (as defined in this Report) that DNREC will utilize to draft regulatory language. The RAC should also review regulatory language drafted by DNREC. This would allow for the RAC to draft detailed, prescriptive guidance to provide DNREC with the conceptual approach and many details for drafting actual regulations. The RAC should have the opportunity to review and comment on specific draft regulatory language to the greatest extent possible as it is developed by DNREC during the process.

Membership Expectations

Recommendation #10: The Secretary should establish draft expectations for RAC participation and include them among the nomination forms. At their first meeting, RAC members should review, revise as needed, and adopt such expectations as formal groundrules for participation.

Committee Decision Rule

Recommendation #11: The RAC should utilize a “consensus” approach (as defined in this Report) that seeks to identify a final package of recommendations that all or almost all RAC members can “live with.” The RAC would issue a final report with consensus as

defined generally above to the greatest extent possible within the time and resources allocated to the RAC.

Role of DNREC on the RAC

Recommendation #12: A DNREC representative should serve as a full member of the RAC. Other DNREC staff should actively support and participate in the RAC deliberations, and the DNREC counsel from the DOJ should provide legal assistance, including drafting, and advice to the RAC. The full member from DNREC could serve as the Chair of the RAC or as the Chair with co-chairs from each of the three major stakeholder groups. If resources allow, a non-partisan facilitator could facilitate meetings and support the RAC and the Chair(s) throughout the process.

Issues to Cover in the Deliberations

Recommendation #13: DNREC should develop a draft work plan and timeline for the RAC's work and the RAC should review, revise as needed, and adopt the work plan and timeline at one of its first meetings.

Appendices

Appendix A lists the individuals CBI interviewed during the first phase of its assessment. Appendices B and C are a summary of the two public workshops and the list of workshop participants, respectively. Appendix D is a compilation of all written comments that were submitted to DNREC by December 7, 2017 in response to the workshops. Appendix E is a draft nomination form. Appendix F is a draft disclosure form. Appendix G is a list of possible resources for the RAC. Appendix H is a compilation of all written comments that were submitted to DNREC by January 19, 2018 in response to the draft Report.

Further information

Further information and all materials from the public workshops are available at de.gov/conversionpermits.

Background

Delaware House Bill 190, the Coastal Zone Conversion Permit Act (CZCPA), amended the state's Coastal Zone Act (CZA) to allow heavy industrial redevelopment and limited bulk product transfer at 14 heavy industry sites² in the Coastal Zone. CZCPA requires that the Delaware Department of Natural Resources and Environmental Control (DNREC) develop regulations for Conversion Permits by October 1, 2019. The Coastal Zone Act was a landmark piece of legislation when it was passed in 1971 and it has profoundly shaped Delaware's culture, communities, economy and environment. DNREC recognizes that there are many conflicting points of view about industrial development in the Coastal Zone and that effective regulations can be written only by using the opinions and expertise of a wide range of stakeholders.

To be responsive to the revised statute and the diversity of interests in the Coastal Zone, DNREC decided to convene a Regulatory Advisory Committee (RAC) to advise the agency in developing revised regulations. RACs are commonly utilized by state and federal agencies to gather input during the development of regulations. There is, however, no singular standard for who can serve on a RAC, how members are selected, or what role the RAC plays in the development of regulations.

DNREC has taken the first steps in this process by seeking public input about the RAC prior to identifying committee members and the scope of its work. To obtain this feedback:

1. DNREC retained the Consensus Building Institute (CBI), a nonprofit and non-partisan organization that provides mediation and facilitation services, to conduct a series of initial assessment interviews, facilitate two public workshops, and develop process recommendations.
2. CBI conducted 31 initial assessment interviews with individuals and groups who have a stake in the Coastal Zone or could be affected by the new regulations

² The Coastal Zone Act refers to such sites as "nonconforming use sites". The Coastal Zone Conversion Permit Act refers to them as "heavy industry sites". This Report will use the CZCPA terminology.

(see Appendix A for a list of interviewees).

3. DNREC held two public workshops, facilitated by CBI, to hear further public comment and receive input on the RAC process on November 29 and 30, 2017 (see Appendix B for a summary of the workshops and Appendix C for the list of participants).
4. CBI produced a draft Coastal Zone Conversion Permit Act Process Recommendations Report (draft Report).
5. DNREC and CBI accepted public comments on the draft Report from December 22, 2017 through January 19, 2018.
6. CBI produced this final Coastal Zone Conversion Permit Act Process Recommendations Report (Report) for DNREC to consider as it convenes the RAC.

General Findings

During the assessment process, CBI conducted 31 initial assessment interviews, facilitated two public workshops, reviewed 14 written public comments received at or after the public workshops, and reviewed 28 written public comments submitted in response to the draft Report. The final list of process participants included representatives and members of environmental organizations, communities, elected bodies, municipalities, businesses, consulting firms, trade associations, civic associations, as well as private citizens. Input heard during this process covered individual and organizations’ views on the changes to the Coastal Zone Act, suggestions for convening the RAC, and thoughts on the contents of the forthcoming regulations. The following table summarizes common themes and specific concerns expressed by participants:

Theme	Specific concerns
The CZCPA legislative process	<ul style="list-style-type: none"> • Anger over the lack of public participation and transparency during the development and passage of HB 190.
The main provisions of the CZCPA legislation	<ul style="list-style-type: none"> • Concern about increased risk of oil and chemical spills due to the bulk product transfer (BPT) provision. • Support for the legislative intent to bring jobs to Delaware. • Support for a law that “modernizes” the state’s current permitting approach while balancing economics with the environment. • Concern about the best way to balance economic development while maintaining appropriate environmental safeguards and remediating polluted sites.

	<ul style="list-style-type: none"> • Concern that the law is too vague.
<p>DNREC’s process for establishing regulations to implement the CZCPA (including the CBI initial assessment interviews to generate input on the development of the RAC)</p>	<ul style="list-style-type: none"> • Concern that this process has been flawed from the beginning and the work to-date was designed to limit the scope of discussion and steer the outcome as much as possible. • Interest in ensuring the RAC can work efficiently to meet the CZCPA’s October 1, 2019 deadline, if not an earlier deadline. • Concern about DNREC’s engagement with affected communities to-date and the agency’s past responses to community concerns. • The need for sufficient technical resources to support community representatives on the RAC. • The need for community representation on the RAC. • Concern about biased selection of RAC members by the Secretary. • The need to ensure process transparency and sufficient notification. • Ensuring RAC members are credible. • Concern about any power and education differential between stakeholder groups. • The need for criteria for RAC membership. • How to address conflicts of interest on the RAC. • The need to follow public meeting best practices and ensure accessibility by holding meetings at convenient times in convenient places.
<p>Main factors for DNREC and others to consider in developing the CZCPA</p>	<ul style="list-style-type: none"> • Cumulative health impacts and disparities in communities near the 14 sites. • Safety and noise along major transportation

<p>regulations</p>	<p>corridors (including areas outside the coastal zone).</p> <ul style="list-style-type: none"> • The need for comprehensive baseline (i.e. current) data. • Options for clarifying and/or streamlining the sequence of permits required. • Conversion Permit application requirements. • Clarity for prospective new investors and companies on the permitting timeline. • Belief that the legislation is prescriptive and descriptive of what the regulations should contain. • The need for offset language to be clarified. • The need to clearly define HB 190 terms and definitions. • The need to consider all aspects of potentially-impacted communities, including employment and health.
<p>Other issues and comments</p>	<ul style="list-style-type: none"> • Concern about DNREC underfunding and understaffing contributing to past oversight and enforcement failures. • Concern about DNREC's capacity to monitor and enforce new and existing activities on the 14 sites. • Concern about the failure to implement the Environmental Goals and Indicators program included in the previous 1990s negotiated agreement for Coastal Zone regulations. • Prioritizing cleanup in legacy communities and sites before redeveloping the 14 sites. • Concern about by some, but also support for by others, for DNREC approving a conversion permit

	<p>before the new regulations are finalized.</p> <ul style="list-style-type: none">• Support for a long-term, independent body composed of stakeholders that DNREC may consult with regarding implementation, permits, enforcement, public concerns, etc.• The appropriate role of the Coastal Zone Industrial Control Board in the RAC's formation and deliberations and DNREC's promulgation process.• Concern about the use of taxpayer money to offset economic incentives for new businesses in the Coastal Zone.
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Recommendations

CBI developed 13 draft recommendations for DNREC to consider as it convenes a RAC to help the agency develop regulations to implement the CZCPA. The following recommendations synthesize input heard during the initial assessment interviews, the two public workshops, and both rounds of public comment. CBI sought to reflect both what its staff heard during these discussions and what staff read as they reviewed comments. In this final Report, CBI staff acknowledged concerns and areas of disagreement, and revised their recommendations based on their best professional judgment and the comments they received.

Scope

The Secretary should develop a charter and scope for the RAC.

Most commenters expressed a strong preference for the RAC's deliberations to focus solely on developing regulations pertinent to the changes in the Coastal Zone Act made by the legislature in 2017 and did not wish to reopen or revisit other sections of the regulations. A few commenters suggested addressing a limited number of additional issues like *de minimis* permits for small businesses, permit application fees, and reconsidering the overall approach to offsets for all permits. Many commenters also emphasized that the RAC should focus on the regulatory changes needed and avoid revisiting the decisions reached by the General Assembly.

Given these comments, we recommend the general scope of the RAC be to deliberate upon and advise the Secretary of DNREC on the development of new regulations pertinent to the CZCPA. The RAC would focus solely on changes to existing regulations or the creation of additional regulations necessary to implement the 2017 changes. The RAC would not be charged with addressing the regulations already in place for Coastal Zone Act permits. This narrow scope of work would enable the RAC to complete its work in a timely fashion.

Recommendation #1: The RAC should focus solely on changes to existing regulations or the creation of additional regulations necessary to implement the CZCPA. The RAC should not be charged with amending or revising the regulations already in place for issuing permits under the Coastal Zone Act.

Stakeholder Groups

From the input received, we identified four broad categories of stakeholder groups.

These four possible groups are:

- Environment, Environmental Justice, and Public Health: This could include environmental, environmental justice, and public health groups and coalitions, as well as public health agencies and environmental science and law experts. This could include both long-established environmental groups in Delaware and newer organizations who may represent different or emerging views.
- Community. This could include fenceline neighborhoods, municipalities, counties, county planning and emergency management organizations, local elected officials, and others who represent communities with a stake in the Coastal Zone or communities that could be affected by the redevelopment of the 14 sites. This could include communities concerned about impacts directly related to but outside of the Coastal Zone, such as transportation of hazardous materials to or from the Coastal Zone.
- Industry, Business, and Labor. This could include statewide business groups or trade associations, individual companies with a stake in one of the 14 sites, labor groups, individual companies or industry representatives of new industries interested in siting in the Coastal Zone (e.g. “green” industries), consultants such as lawyers, engineers or others who do business with one or more of the 14 sites (see “Criteria for Membership” for further commentary on this topic), companies who do business in or near the Coastal Zone more generally, and economic

development agencies (e.g. Delaware Division of Small Business, Development and Tourism).

- Other. This could include those interests not clearly represented in the categories above such as the commercial fishing industry, tourism industry, recreational users, and churches or religious groups who represent a community.

Most commenters emphasized that the RAC should not include members of the General Assembly or state-level elected officials. CBI recommends that DNREC not accept nominations of individuals who meet these criteria. Several commenters felt that the categories were too broad and should be broken down further. One commenter expressed concern that local government and community representatives should be distinct and separate.

Recommendation #2: The Secretary should provide for representation by three broad stakeholder categories and one “other” category for those who may not fit clearly in one of those three categories: 1) environment, environmental justice, and public health; 2) community; 3) industry, business, and labor; and 4) other. The Secretary should specifically seek to ensure participation from affected fenceline communities. The Secretary should not select state-level elected officials to serve on the RAC.

Committee Size and Balance

Any committee or group must balance inclusion and efficiency in its size. Smaller groups are typically more efficient and reaching agreement can be easier because there are fewer participants. Larger groups are typically more inclusive and allow for a broader range of interests and subsets of interests. Small groups, however, can lack inclusivity while large groups can lack efficiency. Commenters generally suggested that a group size of 15 to no more than 21 would probably best balance inclusion and efficiency. While there is no “right” answer to the size of a committee, given CBI’s past experience and the range of interests in this issue, we recommend a 15-21 member

RAC with five to six (5 to 6) members from each of the three categories noted above, in equal balance of numbers for each of the three main stakeholder categories. DNREC should reserve one to three (1 to 3) additional seats should individuals or organizations outside the three main stakeholder groups make a compelling case for membership. One (1) seat could be reserved for a representative of DNREC (see “Role of DNREC on the RAC” for further commentary on this topic).

After selection, each RAC member should identify an alternate in order to increase participation, provide for absences, and allow for redundancy given potential changes in jobs, positions, and life circumstances over time. The Secretary would then accept or reject the member-nominated alternate. Some RAC members may find it difficult to identify an alternate so a member should not be removed from the committee because they cannot identify an alternate. All alternates would be required to complete the nomination and disclosure forms and these would be made publically available. Alternates would have full access to meetings and all materials provided to members.

Whatever the exact size of the group, the Secretary should seek to balance the RAC carefully across interests and stakeholders. For instance, if DNREC decides to add an additional seat in one category, it should strive to do so to the greatest extent possible in the other categories. Depending on the committee decision rule (see “Committee Decision Rule”), an exact numeric balance may not be necessary, but commenters noted that actual and perceived balance for membership is extremely important.

DNREC should also consider RAC membership balance for gender, race, ethnicity, and geography. Some commenters also noted that potential members coming from under-resourced communities and organizations may need some form of support to participate fully.

Recommendation #3: The Secretary should target a RAC of 15-21 members and allow for the following: 1) five to six members (5 to 6) from each of the three categories noted above, in equal balance of numbers for each of the three main stakeholder categories; 2) one to three (1 to 3) additional seats for those who do not fit within those three categories; 3) one (1) full member seat for DNREC; and 4) alternates nominated by each member.

Criteria for Membership

From the input received, we have identified the following suggested criteria for membership, though this is not necessarily an exhaustive list. In general, members and alternate nominees should:

- Be an individual, not an entity. If an entity submits a nomination, it should identify the individual who would serve on the RAC.
- Have a stake in the Coastal Zone regarding potential redevelopment of the 14 sites, potential impacts of that development, and/or bring a particular expertise needed.
- Select the one stakeholder category where they best fit, recognizing that a nominee may have multiple affiliations or issues they work on.
- Not represent a subsidiary of a company or organization that has already submitted a nomination.
- Complete a disclosure form disclosing any financial interests, existing litigation, and affiliations related to the issues for full public disclosure.
- Credibly represent an entity with a constituency (e.g. civic association, business association) and commit to coordinate and communicate with that constituency about the RAC.
- Have a particular expertise (e.g. health, legal, community, economic, brownfields).

- Be willing and able to participate actively in an intensive process with substantial time commitments that may require evening or weekend work.
- Be willing and able to work constructively with others with whom they may disagree.
- Be willing and able to work within the scope of the effort.

Several commenters expressed a desire for an additional membership criterion: members and alternates should be residents of Delaware. To this point, we recommend that DNREC seek to appoint Delaware residents when possible, with the recognition that it is possible for desired technical expertise and relevant organizations or individuals to be located outside of Delaware (e.g. regional or national environmental or public health organizations).

Many commenters raised concerns about potential conflicts of interest among RAC members. Several argued that any person with a financial conflict of interest should be excluded from the RAC or at least recused from certain RAC deliberations and decisions. This is an important issue commenters raised.

CBI's understanding is that committees such as RACs are intentionally made up of stakeholders and are therefore intended to directly involve members with a direct or indirect interest in the issues. Stakeholders with a range of stakes can best articulate their own interests and concerns, raise issues of implementation and regulatory design, and often have extensive technical, local, or other knowledge. RACs as typically designed are not independent review bodies nor technical panels. Rather, by design, these committees include members who have clear, direct stakes in the issues. Such groups have been convened by local, state, and federal agencies for many decades. However, as addressed in a number of these recommendations, such stakeholder groups must be designed to ensure balance, inclusion, fairness, and transparency. It is vitally important that such interests be fully and publicly disclosed.

To address concerns about qualifications and conflicts of interest, CBI has developed a draft "nomination form" and a draft "disclosure form" for nominees to complete (see Appendices E and F), based on nomination and disclosure forms from similar committees in Delaware and elsewhere. The purpose of these forms is to foster

transparency of a public process and is not necessarily an effort to preclude someone from serving. All forms completed by nominees, including alternates, would be made publically available. Personal information such as email addresses and home addresses would be removed before posting.

Recommendation #4: The Secretary should establish and publish clear criteria for membership and require that all nominees to the RAC complete a nomination and disclosure form that is made publicly available.

Membership Selection

Membership selection should include a transparent, clear, and structured process that allows any and all interested parties to be considered for participation. From our commenters, we identified at least three primary approaches to selecting RAC members:

- Option 1: DNREC Selects Members – Under each stakeholder category, the Secretary identifies and appoints members and alternates to the RAC.
- Option 2: Nomination process and DNREC selection – The Secretary establishes a nomination process for each stakeholder category. Interested parties would nominate potential representatives (self-nominations would be accepted as well) to the RAC. The Secretary would review the nominations and select members and alternates from the pool of nominees within a committee structure decided by the Secretary as informed by the final Report.
- Option 3: Stakeholder group self-selection – The Secretary would decide upon an overall structure including the categories of stakeholder group, numbers of members, and criteria for membership based on the Report. Then each stakeholder group (environmental, environmental justice, and public health; community; industry, business, and labor) would organize among themselves to

select their members and alternates and put forward their “slate” within a set time frame. DNREC would appoint these nominees to the RAC.

Additional approaches suggested by commenters included:

- A. Each legislator from the Coastal Zone and the City of Newark could nominate RAC members.
- B. Ask the General Assembly to pass a new law outlining how RAC members should be appointed (e.g. by the Governor, county leaders or mayors)
- C. The public could consider a broad field of candidates and select members by voting online or endorsements.
- D. Use an approach modeled after the Underground Storage Tank regulatory process: a large formal group (around 50 people) is convened and the public is allowed to comment and participate to the extent of their interest.
- E. Interested parties are nominated within stakeholder groups and a lottery determines the final candidate.
- F. Each stakeholder category offers a set number of nominees to DNREC and the Secretary chooses a certain percentage of them to appoint to the RAC.

Option #1 does not provide a chance for any interested group to note their candidacy. This option would likely lead to a group that is not as inclusive nor diverse as would be possible under recommended Option #2. Option #3, while giving substantial autonomy and decision-making to stakeholder groups, would pose problems for at least some stakeholder groups since they are diverse and diffuse categories, would likely take substantial time and resources to implement, and might create unnecessary conflict and divisiveness within stakeholder groups. Additional Approach B is probably not feasible; the General Assembly chose not to express its preference for membership selection in the CZCPA. Additional Approach D could produce a RAC with uneven stakeholder interests and one that could be too large to build agreement effectively and efficiently given legislative deadlines.

Given comments received on these options and other approaches, we recommend Option #2. DNREC should provide a general framework for the committee structure,

define stakeholder groups, identify key criteria for membership selection, and establish a nomination process. Since the development of regulations is DNREC's obligation and responsibility, and as DNREC is the implementer of the CZA regulations, the Secretary would have the responsibility for selecting final membership. Any and all interested parties ought to have an opportunity to nominate themselves or others so that the Secretary has a full sense of who is interested in participating and can provide a process for new, emerging or different interests to potentially participate in addition to those with express, long-standing interest in the issues. The nomination process should be transparent: the process should be clearly explained, criteria put forth (including how potential conflicts of interest will be evaluated), nominees posted on the DNREC website, and the final RAC members and alternates names and affiliations made publicly available (without personal contact information). Some commenters requested that the proposed list of members and alternates be available for public comment before being finalized. Other commenters requested the Secretary assemble a selection committee of well-respected Delawareans who would help select the slate of nominees from which the Secretary would make their final selection.

Recommendation #5: The Secretary should establish a transparent nomination process. Interested parties would nominate individuals (self-nominations would be accepted as well) to the RAC during a period of time in early 2018. Nominations would identify the appropriate stakeholder category for the nominee. The Secretary would review the nominations and select members from the pool of nominees within a committee structure decided by the Secretary, as informed by the Report. After selection, each RAC member would identify an alternate if possible, which the Secretary would then accept or reject.

Workgroups and Technical Expertise

The RAC will likely need to establish a few workgroups and avail itself of technical expertise from members and outside resources.

In order to carry out their responsibilities, all RAC members and alternates should have access to technical expertise and resources to support their understanding of the topics under discussion.

Typically, workgroups can be established to support the work of the full committee under the following rules:

- Workgroups are for deliberation, exploration, and option generation but they are not and should not be decision-making bodies – decisions should rest solely with the full committee deliberating together.
- Workgroups can include participants outside of committee membership. Such participants may be required to also complete a disclosure form.
- The scope and charge of the workgroup should be set by the full committee.
- Workgroup meetings would adhere to Delaware’s Open Meetings Law.
- Workgroup meeting notices, agendas, and meeting summaries should be posted promptly on the RAC website.

Any number of topics could require or benefit from a workgroup, but given the changes to the statutes, likely areas for this include the following:

- Economic impact analysis, particularly since this topic is not an expertise of DNREC, potentially with expertise in sustainable development, “triple bottom line” analysis.
- Financial assurances, given the complexity of that issue and importance in both the statute and to stakeholders.
- Offset programs, since the scale of potential redevelopment and the associated increased complexity of offsets will need particular exploration.
- Environmental risk analysis, especially regarding coastal areas and heavy industry.
- Inclusion and community outreach (see “Inclusion and Community Outreach”).
- Bulk product transfer and freight traffic, given the concerns raised about this change to the Act.

Commenters mentioned that the following areas of expertise may be needed to complete the RAC’s work. This expertise might be found in universities, research

institutions, agencies, communities, community groups, consulting firms, businesses, and non-governmental organizations. RAC members or alternates themselves may provide some, but likely not all, of this kind of expertise.

- Remediation and brownfields
- Environmental impact assessment
- Economic impact assessment
- Financial assurances
- Permitting processes and policy
- Community engagement
- Environmental law
- Environmental justice
- Climate adaptation and sea level rise
- Coastal wetlands and wildlife
- Emergency response
- Air quality
- Water quality
- Public health
- Economic development and industrial development

Recommendation #6: The Secretary should allow for the formation of RAC workgroups that can undertake detailed analysis and discussion of specific topics. These may include non-member technical experts. Workgroups would be for deliberation, exploration, and option generation but any and all decisions should rest solely with the full RAC. Workgroup meetings should adhere to Delaware's Open Meetings Law.

Inclusion and Community Outreach

Many commenters voiced frustration with a lack of public consultation and outreach during the legislative process for HB 190. Commenters felt that the general public was given little opportunity to comment on the bill before it passed and their comments were made in vain because the decision to revise the CZA had already been made.

Many commenters expressed deep concern that in its process to-date, DNREC has not adequately consulted and involved affected communities. Some commenters cited the locations and short notice for the two public workshops as examples of areas where DNREC needs to strengthen its public outreach. Fenceline communities as well as communities along major transportation routes may be directly affected by any redevelopment and operation of the 14 sites. Many of these communities have legacy pollution, cumulative health impacts, and other disparities. Commenters stated that DNREC should prioritize cleanup activities on the 14 sites and in legacy communities. Commenters want to see a transparent and inclusive process going forward but are concerned that DNREC will not run such a process based on past experiences with the agency.

Some commenters emphasized the need for DNREC to make meaningful connections in affected communities. One commenter recommended that any workgroup formed to address this topic should be facilitated and/or chaired by someone who is respected and identified by communities near the 14 sites and along major transportation routes. Other commenters, however, felt that this outreach is outside of the RAC's scope and should be the sole responsibility of DNREC.

Recommendation #7: The Secretary and the RAC should make a concerted effort to reach out to, communicate with, and build working relationships with marginalized and potentially-impacted communities, neighborhoods, and groups. This could be done by placing such individuals on the RAC itself, inviting community-based technical advisors to serve on the workgroup and/or the RAC, outreach, attending neighborhood meetings, and/or forming a workgroup.

Committee Transparency

Given the interest in the coastal zone, the iconic nature of this statute in Delaware, and the potential range of economic and environmental impacts that might occur, commenters felt strongly that the regulation drafting process must be inclusive and transparent. The following recommended actions are to be considered in total, not as a menu, and other actions may also be necessary and desirable:

- All meetings of the full RAC should be regularly scheduled and publicly posted with sufficient notice.
- Meetings should be open to the public and provide opportunity for public comment.
- Meeting arrangements should follow Delaware’s Freedom of Information Act, the Administrative Procedures Act, and the Americans with Disabilities Act.
- The process should have a dedicated website to post agendas, meeting summaries, and meeting materials.
- The public should be able to provide written comments during the process that in turn should be distributed to RAC members for consideration.
- The RAC should consider holding its meetings at different and accessible locations and times in or near the Coastal Zone (partially restrained by venue options) in order to allow members and the public with different work schedules and other responsibilities to participate. This would enable those individuals and entities potentially most affected by the CZCPA changes (e.g. living near the 14 sites, living near or working on waterways) to participate in this process. Special effort may be needed to elicit these preferences from fence-line community members. At least some meetings and workgroups should be held in fence-line communities.
- The RAC should host public meetings or workshops at appropriate times during the deliberations. This might include early “listening sessions” for the RAC to hear any issues, concerns, and ideas from the public. This might also include

public meetings or workshops once options and specific ideas for regulations have been developed to allow the public to weigh in and comment before the RAC completes its deliberations.

Several commenters strongly encouraged the RAC to hold its meetings only in the Coastal Zone or only in fenceline communities. Many stressed the importance of holding meetings in locations that are readily accessible by public transportation.

Recommendation #8: The Secretary should ensure RAC transparency by considering the time, place, and form of its meetings and any associated public outreach and engagement to provide for public access, participation, and comment. At least some meetings and workgroups should be held in fenceline communities.

Committee Product

Given the general charge to the RAC, the group could produce at least one of four kinds of product or outcome for DNREC to discharge its regulatory responsibilities. These four options for a final product are:

- Option 1: Regulations – The RAC could seek to draft the regulations themselves. This would require deliberating on and arriving at agreement on the general concepts and details of what a regulation should include, as well as drafting the regulatory language. The advantage to this approach is that the group maintains full influence over the actual wording and details of regulation. The disadvantages include that drafting precise regulatory language by a large group is time consuming and often exhausting. It would likely be difficult to meet the deadlines in the Act under this approach.
- Option 2: Prescriptive Guidance – The RAC could seek to draft detailed, prescriptive guidance to provide DNREC with the conceptual approach and many details to guide the drafting of actual regulations. Prescriptive guidance could

include overall principles for guiding regulations, a framework and overall structure for how to organize the regulations, specific approaches to regulations on the core topics outlined in the statute, and other guidance the group felt necessary for DNREC to draft clear, effective, and meaningful regulations. Prescriptive guidance usually provides detailed direction or advice for how to draft regulations and though short of the regulatory language itself, provides clear and specific direction. The advantages to this approach are that the RAC would focus on the regulatory approach and intent, leaving detailed drafting to DNREC and the Attorney General (AG); that reaching agreement on concepts and direction is likely easier than reaching agreement on exact regulatory language; and that prescriptive guidance, if agreed to by the RAC, provides DNREC clear and specific direction. The disadvantages include that this kind of deliberation will also take extensive time and that there is always the possibility that the RAC will not be satisfied that the later written regulations fully meet the intent and purpose of the RAC's guidance.

- Option 3: Broad Principles and Options – The RAC could seek to draft broad principles to guide DNREC in its regulatory development, as well as explore a range of options for addressing particular issues in future regulations (say, financial assurances, offsets, definitions, and other topics). The advantage of this approach is that the RAC could complete these tasks more easily, with less negotiation, and likely less time. The disadvantages include that it does not provide more specific guidance to DNREC, allows DNREC to pick and choose among the options, and may not result in regulations that are broadly supported by, or at least accepted by, many or most.
- Option 4: Review of Regulatory Language drafted by DNREC – Any of the above options might also include an opportunity for the RAC to review specific draft regulatory language as it is developed by DNREC after being informed by committee deliberations and advice.

Commenter input on this issue was highly varied with no clear preference on the best approach. Many commenters suggested a phased or blended approach of these

options. Most commenters suggested that while Option #1 might be ideal in that all parties will have a say in and be able to see the exact and full regulatory language to be formally reviewed and promulgated, the time, labor, and “pain” to develop actual regulations by committee seemed daunting. Most commenters felt that Option #3 would not provide enough detailed guidance, would not encourage the in-depth analysis, robust deliberations, and serious negotiations needed among stakeholders, and would provide DNREC too much “leeway” to pick and choose advice. Almost all commenters thought that some form of Option #4 should be folded into the process. Lastly, some commenters expressed concern that implementation of any agreement could be problematic based on the fact that some parts of the late 1990’s CZA regulatory negotiated agreement were not fully implemented (e.g. the environmental indicators program).

The actual drafting of the Committee’s written product should be done in a fair, transparent, and as non-partisan fashion as possible. The RAC will determine the detailed approach in their deliberations, but options include utilizing co-chairs, a drafting committee, a trusted “super-editor” selected from the group, and/or the facilitator of the group, should there be one.

The RAC will need to further refine the outlines of this final committee product in its early deliberations. Regardless of the approach it selects, the RAC should seek to balance efficiency and thoroughness in preparing its work products.

It should be noted that once the RAC’s work is complete, the regulations will be promulgated following the Administrative Procedures Act and will be reviewed and ultimately approved by the Coastal Zone Industrial Control Board.

Recommendation #9: The Secretary should instruct the RAC to write prescriptive guidance (as defined in this Report) that DNREC will utilize to draft regulatory language. The RAC should also review regulatory language drafted by DNREC. This would allow for the RAC to draft detailed, prescriptive guidance to provide DNREC with the conceptual approach and many details for drafting actual regulations. The RAC should have the opportunity to review and comment on specific draft regulatory language to the greatest extent possible as it is developed by DNREC during the process.

Membership Expectations

Effective committees have a clear scope, charge, and set expectations for members and the public. A number of the above topics, as decided upon, would be described in the RAC charter or scope. In addition, DNREC should establish expectations for participation. The following are possible expectations, norms or groundrules, drawn from other committee efforts as well as the particulars of the subject matter at hand. For example, participants might be expected to:

- Attend all meetings or have their alternate be present.
- Prepare for meetings ahead of time by reviewing materials, issues, and items to be discussed.
- Participate in associated public meetings and outreach.
- Work in a constructive manner.
- Be respectful of other participants, even those with whom they disagree.
- Listen as well as speak.
- Avoid personal attacks, name-calling, and attributing motivations to others.
- Speak for themselves and their organization or constituents but not for the RAC as a whole.
- Communicate with and seek feedback from their constituency about the RAC's activities.

- Hold the right to disagree and the responsibility to clearly articulate why they disagree and offer alternatives that might meet their and others' interests.
- Negotiate in good faith.

In the first meeting or meetings of the RAC, RAC members should review, revise as needed, and adopt such expectations as formal groundrules for participation. DNREC and the RAC should determine at the beginning of the process what the protocol would be if any RAC member who is a property or business owner eligible for a Conversion Permit applies for one prior to completion of the RAC's work.

Recommendation #10: The Secretary should establish draft expectations for RAC participation and include them among the nomination forms. At their first meeting, RAC members should review, revise as needed, and adopt such expectations as formal groundrules for participation.

Committee Decision Rule

In addition to such expectations, the RAC will need a decision rule for how it goes about reaching agreement or specific recommendations. The decision rule is often correlated to the makeup and balance of the committee. For example, if the decision rule is majority vote, then stakeholders and the public may be concerned about the exact number and make up of the committee. If the decision rule is more consensus-based, the exact number of various members on the RAC becomes less important since agreement will require most committee members' consent.

We recommend a form of consensus-based approach to ensure active participation, broad support, inclusion, voice, and influence for a range of interests. Generally, while the RAC must make interim decisions on process and substance to keep deliberations moving, final consensus is sought only on the final package of recommendations since members may make careful tradeoffs between issues and topics, and while remaining dissatisfied with individual recommendations, be able to consent to an overall package

because their most important interests are met in other parts of the package recommendations.

Options for a consensus approach include:

- *Full Consensus*. Every member of the RAC must consent, that is, to acknowledge they can “live with” the final recommendations. The advantage is that every member has equal power and the ability to hold up the decision-making until their interests are sufficiently met. The significant disadvantage is that any one member can hold up the progress and work of the RAC.
- *Consensus*. Consensus by the RAC can also be defined as the consent of most, or almost all, committee members in its final recommendations. No one member can stop the final deliberations and recommendations of the RAC, but in turn, almost all members of the RAC must consent for the recommendations to be considered consensus-based. While some committees set a specific number, usually well above even a supermajority (2/3rds), others prefer to leave this somewhat vague and determine final “maximum” consensus at the end when they “see it.”

We recommend a “consensus” approach that seeks to identify a final package of recommendations all or almost all RAC members can “live with”. The RAC would issue a final report with consensus as defined generally above to the greatest extent possible within the time and resources allocated to the RAC. Should the RAC not be able to reach consensus on some but not all issues, for those remaining areas of disagreement, the RAC would: 1) clearly delineate and explain the remaining differences of opinion; 2) narrow the options for that issue to the fewest degree and number possible; 3) delineate the pros and cons of each remaining options; 4) explain, as needed, how decisions on this or these outstanding items may or might affect areas of agreement elsewhere in the final report; (5) make public any dissenting votes and reasoning.

Some commenters were concerned the above recommendation is too vague. Some suggested utilizing a clear voting threshold (e.g. 75% or higher in favor) while others

suggested a full consensus. Ultimately, the RAC itself will need to deliberate on and decide the committee decision rule when it develops its process protocols.

Recommendation #11: The RAC should utilize a “consensus” approach (as defined in this Report) that seeks to identify a final package of recommendations that all or almost all RAC members can “live with.” The RAC would issue a final report with consensus as defined generally above to the greatest extent possible within the time and resources allocated to the RAC.

Role of DNREC on the RAC

Commenters noted that it is important to delineate the role of DNREC in this decision-making process. CBI recommends that a DNREC representative serve as a full member of the RAC. In addition, DNREC staff should actively support and participate in the RAC deliberations, and DNREC counsel from the DOJ would provide legal assistance, including drafting, and advice to the RAC. The DNREC Secretary, who is ultimately responsible for promulgating Conversion Permit regulations, should participate in the work of the RAC, as should those members of their staff with responsibility for reviewing permit applications.

Some commenters felt that DNREC should not serve as a full member of the RAC because it could be perceived as a procedural conflict of interest. CBI acknowledges this concern though believes that it would be important for DNREC staff and the Secretary to clearly express any disagreement, explain why, be open to influence and negotiations, and to provide, like any other member, an alternative approach to meet the interests and concerns expressed. DNREC retains decision-making authority within Delaware’s administrative procedures – subject to approval by the Coastal Zone Industrial Control Board – and will have to submit draft regulations for formal public comment. DNREC should, to the extent possible, advance the recommendations of the RAC.

We also recommend that the full member from DNREC either serve as the Chair of the RAC or serve as the Chair with co-chairs from each of the three major stakeholder groups. Co-chairs would help develop agendas, resolve disputes, speak on behalf of the RAC as a whole, and serve other functions.

If resources allow, a non-partisan facilitator should facilitate meetings and support the RAC and the Chair(s) throughout the process. Many commenters stressed the importance of having a neutral party facilitate this process.

Recommendation #12: A DNREC representative should serve as a full member of the RAC. Other DNREC staff should actively support and participate in the RAC deliberations, and the DNREC counsel from the DOJ should provide legal assistance, including drafting, and advice to the RAC. The full member from DNREC could serve as the Chair of the RAC or as the Chair with co-chairs from each of the three major stakeholder groups. If resources allow, a non-partisan facilitator could facilitate meetings and support the RAC and the Chair(s) throughout the process.

Issues to Cover in the Deliberations

Commenters identified a number of issues that the RAC would need to take up based on their reading of the changes to the Coastal Zone Act and their understanding of the issues. This is not necessarily a complete list of all the issues that the RAC might need to cover, but a starting point for DNREC and the RAC to build a work plan. CBI recommends that DNREC develop and publish a draft work plan based on the issues identified in the assessment that the RAC – at its first meeting – would then review, receive public comment on, revise as needed, and adopt. The issues identified included:

- Definitions and clarification of the prohibited uses as outlined in the CZCPA (such as liquefied natural gas terminal)

- Strategies to ensure the protection of public health; ecosystem health; and water, soil, and air quality in the new regulations.
- The provision that bulk product transfer will be allowed (with permit) for products to be used within the Coastal Zone, or produced in the Coastal Zone
 - What are the definitions and limitations to this bulk transfer provision?
 - What are the appropriate spill prevention exercises and plans that the regulations should require?
- Detailing the net environmental improvement or economic improvement of the proposal
 - To what extent, detail, and scope must environmental and economic impact be reviewed?
 - Does environmental include public health and major public safety risks?
 - Amidst numerous issues, media, contaminants, and benefits on dollars, jobs, and environment, how would “net” actually be determined?
 - How will fence-line and directly affected communities’ impacts fit into this calculus?
- Establishing criteria to calculate and review offset proposals
 - Can clearer direction and criteria for offsets under the changes be established for these 14 sites and Conversion Permits?
 - What is the role of Emission Reduction Credits (ERCs) going forward?
 - How to ensure localized benefit to the extent possible for those in and near the Coastal Zone?
 - What is the baseline to which offsets will be determined, especially for sites with no current operational activity?
- Establishing criteria for ensuring financial assurance for environmental cleanup
 - What tools are available and achievable, not only for completing remediation during cleanup, but more importantly, in the long term for when a facility decades from now closes, for emergency response and spills, and for catastrophic events?
- Determining adequate preparation of the site for sea level rise and coastal storms

- Establishing criteria for formulating formal evacuation procedures in the event of an accident at one of the 14 sites or on the Delaware River.
- Establishing decision criteria for DNREC and the general process of decision-making
 - How can the process be as efficient and predictable as possible and lead to a timely decision without extensive delay?
 - How can the process be thorough and deliberate within the timelines set in statute given that there will likely be few of these permits, but they will involve substantial changes and impacts to the Coastal Zone?
- Monitoring and Enforcement
 - Given DNREC's constrained resources, how will it both review and consider permits adequately as well as meaningfully enforce provisions of any Conversion Permit once granted?
 - Who will monitor and enforce upon DNREC itself as to the commitments the agency makes in the RAC process and final agreement, should one be reached?
 - What legal steps may parties take to provide redress in cases where regulations are not enforced?
- What is the appropriate role of the RAC's deliberations related to any requests for a permit that come before the Secretary prior to promulgation of final regulations?
- Strategies to reach out to, communicate with, and build working relationships with marginalized and affected communities, neighborhoods, and groups during the RAC's work.

Recommendation #13: DNREC should develop a draft work plan and timeline for the RAC's work and the RAC should review, revise as needed, and adopt the work plan and timeline at one of its first meetings.

An additional 156 pages of appendices make up this “Final Coastal Zone Conversion Permit Act Process Recommendations Report”. These appendices can be found and accessed at:

<http://www.dnrec.delaware.gov/Admin/Documents/final-delaware-czcpa-process-recommendations-report.pdf>

If you have any issues or questions about gaining access to these appendices, please contact either Ian Yue (ian.yue@state.de.us) or Susan Love (susan.love@state.de.us) by email or phone at (302) 735-3480.