

## Final Recommendations to DNREC

Approved by the CZCPA RAC on March 12, 2019

### Final Recommendations regarding the Definition of “Project Site”

“Project Site” means the physical location at which a permitted facility operates or the location where a proposed project, that is the subject of a conversion permit application, will operate. A project site may comprise an entire tax parcel, or parcels, or part(s) of any tax parcel(s); however, its preliminary boundary shall be defined prior to the issuance of a permit in the application for a permit, and its final boundary, after a permit is granted by the Secretary, shall be defined in the permit. For nonconforming uses, if a project site’s boundary is not defined in a permit, the boundary is the footprint in Appendix B of the Regulations Governing Delaware’s Coastal Zone. [A conversion permit may not be granted for a heavy industry use or bulk product transfer facility outside a heavy industry use site depicted in Appendix B.](#)<sup>1</sup>

### Final Recommendations regarding the Definition of “Useful Life”

“Useful life” means the period of time that an applicant or permittee expects to operate a facility that requires a coastal zone conversion permit. The useful life equals thirty (30) years unless the Secretary allows an application for, or issue a permit for, a different time period. *This definition is potentially pertinent to sea level rise planning, financial assurances, permit duration, and offsets.*

### Final Recommendations regarding Permit Duration

Conversion permit duration (both for the initial permit and any renewed permit) should be 20 years.

### Final Recommendations regarding Permit Monitoring and Reporting Post-Approval

For Site Plans for Sea Level Rise and Coastal Storm Impacts: At least every 10 years, the permittee should update their Sea Level Rise and Coastal Storm Plan for the project site.

For Offsets: Applicant should provide a monitoring schedule that describes a process for 3rd party verification of offset project operation and completion.

For Financial Assurance: A conversion permittee should annually, within ten (10) days of the anniversary date of issuance of its permit, submit to DNREC evidence that the financial assurance required by the permit is in effect in the amount required by the permit and that the permittee has taken all necessary measures to ensure that the financial assurance will remain in effect throughout the duration of the permit.

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<sup>1</sup> [The CZCPA RAC Final Report will include information on how changing project site boundaries is a major permit modification. The Final Report will also address concerns about subdivision of heavy industry use sites.](#)

For Bulk Product Transfer: The permittee should submit an annual report (as previously recommended by RAC).

For Site Inspections: DNREC access should be allowed to the site at reasonable times and on a regular basis, with reasonable times generally meaning operating hours.

#### Final Recommendations regarding Permit Revocation

The Secretary may revoke a permit for significant or repeated violations, ~~such as~~ including but not limited to:

- a lapse in financial assurance;
- failure to complete or maintain an offset;
- denial of DNREC access to the permitted site or to records related to (or required to be kept by) a permittee; or
- ~~making any false statement, representation, or certification in an application, record, report, plan, or other document filed (or required to be maintained by) the permit;~~ ~~or~~
- ~~other~~

#### Final Recommendations regarding Permit Modification

Modifications to an existing permit would be allowed. If the Secretary grants a request for a modification, only the conditions subject to modification are reopened. The remainder of the permit remains as is.

Modifications would occur in two forms:

- *Minor modifications* would be for administrative changes and would not require a public notice. Administrative changes include, but are not limited to, corrections of spelling or grammatical errors, a change in only the name of the owner or operator of a permittee, or other administrative matters that do not affect the substantive requirements prescribed by the permit. DNREC should post minor modifications on its website and listservs.
- *Major modifications* would be changes that affect the substantive requirements of the permit and would require public notice and review. A modification of the ownership or operating entity in a permit shall be granted only in the event that the prospective permittee satisfies all the applicable requirements under these regulations.

#### Final Recommendations regarding Permit Renewal

Conversion permit renewal should be allowed. The application for permit renewal should be submitted no fewer than 180 days prior to expiration. So long as there is a timely renewal application, the permit should continue until the renewal application is acted upon by DNREC. The RAC notes that DNREC already has permitting review timelines required under the Coastal Zone Act.

The renewal process should be streamlined, as compared to the original application, and focused on environmental impacts and offsets, financial assurance, and sea level rise and coastal storm planning and

should take into account the applicant's compliance record. [Like other major environmental permits, the renewal process is expected to update relevant permit terms, as necessary, and be renewed contingent on the applicant's positive compliance record.]<sup>2</sup>~~The RAC recommends that, all things being equal, there is the presumption that the permit would be renewed.~~

### Final Recommendations regarding Bulk Product Transfer Facilities

Conversion permit regulations should require that:

- The following record keeping conditions apply to conversion permits:
  1. Records of specified bulk product transfer information (e.g., quantity of bulk product transfer, final destination of the product, date of product export) be kept on site at the bulk product transfer facility,
  2. Bulk product transfer of grain only be required to keep records on the quantities and dates of imports and exports, and
  3. A summary of the specified information be submitted to DNREC on an annual basis;
- Conversion permits be written to incorporate product categories, so as to minimize the need for permit modification or new permits for minor, related changes in bulk products imported or exported; and
- Addition of a new bulk product category, not included in the existing permit, may require a permit modification or new permit due to potential impacts on financial assurance or environmental offset.

### Final Recommendations regarding Plans for Potential Impacts of Sea Level Rise and Coastal Storms

Conversion permit regulations should require that:

- The Plan detail risk, likely impacts, and mitigation measures for the following geographic areas:
  1. The site's shoreline,
  2. Docks, piers, and offshore pipelines,
  3. All remediation areas on-site (including completed remediation areas and those in progress)
  4. All structures on-site, and
  5. Ingress/egress routes;
- The Plan include a discussion of any potential negative impacts to adjacent parcels resulting from development and flood mitigation activities; and
- The Plan address the following hazards over the anticipated useful facility life:
  1. Flooding, including the:
    - a. 1% chance flood (the current 100-year floodplain as defined by the effective FEMA maps),
    - b. 0.2% chance flood (the current 500-year floodplain as defined by the effective FEMA maps),
    - c. High sea level rise scenario (as defined by the effective Delaware Sea Level Rise Technical Committee recommendations), and

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<sup>2</sup> The CZCPA RAC did not come to consensus on the sentence in brackets. Differences of opinion and views among RAC Members, as it relates to this sentence, will be addressed in the CZCPA RAC Final Report.

- d. Combined effect of sea level rise and 1% chance flood;
- 2. Shoreline erosion; and
- 3. Wind speeds up to 95 mph, sustained ~~(Category 1 hurricane)~~.

- The Plan address measures necessary to evacuate, suspend operation(s), and secure the facility, when necessary, due to significant coastal storm events.
- Any update to a permittee’s Sea Level Rise and Coastal Storm Plan should be posted on the DNREC website for the public and be subject to written public comment for 30 days.

Final Recommendations regarding Economic Effect

- Conversion permit regulations should define “existing or previous use” to mean the same as “most recent heavy industry use.” or current use (if not a heavy industry use). Regulations should also hold that “economic effect” and “net economic improvement” use the same economic metrics.
- In order to ensure a commonly understood baseline for economic effect, the State of Delaware will prepare a “baseline report” that will detail the economic effect of the ~~existing or~~ most recent heavy industry use and current use (if not a heavy industry use) of the 14 sites. The applicant may use this baseline report, plus additional information they want to include, to prepare their conversion permit application.
- Conversion permit regulations should require that the applicant submit economic metrics for the following categories when reporting economic effect and net economic improvement:

| Category                          | Specific Project Information Requested   |
|-----------------------------------|--|
| Project Cost                      | Remediation, demolition, construction, operations, and capital costs; total investment costs   |
| Tax Revenue                       | Property tax, gross receipts tax, personal income tax, corporate income tax, and other taxes; conversion permit applicants could be asked to take into account tax incentives or credits received or anticipated, as well as income tax write-offs in the tax numbers provided                                   |
| Employment                        | Number of jobs <u>and the expected duration and type of each job or category (such as whether the job is permanent/temporary, full-time/part-time, contractor/permanent);</u> wages; and occupation distribution for all jobs expected to be created for site preparation, construction, and facility operations |
| State- and Community-Level Effect | Identification of local hiring preferences; local purchasing preferences; and investments in community benefit agreements, workforce development programs, or educational programs   |
| Other Costs to the State          | Tax incentives and credits; required infrastructure investment   |

- The RAC recommends that the Secretary consider any potential negative economic effect from the activity or facility set forth in the conversion permit.
- The RAC agreed that DNREC should verify the economic information submitted by the applicant. DNREC may use any number of options for verifying the applicant's submitted economic effect data and conclusions. These options could include, but are not limited to, applicant-provided data and case studies, state agency review by the appropriate agencies and staff, retention of an expert academic or consulting economist or economics firm, or the establishment of a more formal panel of experts from across the state (state employees and/or others).
- The RAC emphasizes that local, robust hiring is an intent and goal of the CZCPA. Thus, the RAC recommends that the Secretary, to the degree his or her role and authorities allow, seek to encourage and ensure such local hiring preferences and actions.

#### Final Recommendations regarding Environmental Impact

- DNREC should produce a baseline report of current use and existing environmental conditions, impacts, and risks on the 14 heavy industry use sites (including but not limited to those items described in Section 7015). In his or her conversion permit application, the applicant may describe any proposed changes from that baseline, further elaborating on the DNREC baseline report as they wish (including providing additional information on the environmental history of the site, if necessary, to explain how the existing environmental conditions came about).
- For CZCPA purposes, environmental impacts should be characterized in the same manner used to characterize environmental impacts under the current CZA permit program, consistent with the existing CZA statutory definition of "environmental impact" (Section 7004(b)(1)).
- Direct and cumulative impacts should continue to be considered for conversion permits, per the existing Regulations Governing Delaware's Coastal Zone, Section 8.3.2.

#### Final Recommendations regarding Offsets to Environmental Impacts

1. Note that under 7 Del. C. § 7014 all offsets proposals shall favor offsets that directly benefit Delaware.
2. The offset proposal must more than offset all environmental impacts (including but not limited to one-time impacts and annual environmental impacts over the duration of the permit (life of the facility?)).
3. An offset project should be located as close as possible to the site and, to the greatest extent possible be consistent with the negative impact in medium, duration, timing and pollutant.
  - a. For example, if adverse impact is the emission of 10 lb of NO<sub>x</sub> annually over the useful life of the plant, the most suitable offset is to reduce another source of NO<sub>x</sub> on the site by more than the new emission over the useful life of the plant.
  - b. Or if a new process will emit 90 decibels of noise 12 hours a day over some specified time period, the offset could focus on reducing other sources of noise in the community (e.g., building structures to reduce noise for a nearby highway or facilitating a change in truck routes to reduce truck-related

noise in the local community).

4. If the applicant is unable to identify an offset for the same pollutant in the same medium on or close to the site, then they should offset a similar pollutant or environmental impact. “Similar” means a pollutant that has the same type of effect on the environment when it is released (e.g., offset a benzene (VOC) emission that would affect ozone with a different VOC (xylene)).
5. If it is not possible to offset a particular environmental impact on or near the site, then the applicant should identify an offset project for the pollutant in the same medium somewhere else in the Coastal Zone, but as close as possible to the site.
6. If it is not possible to offset the same pollutant or impact somewhere else in the Coastal Zone, then the applicant should search for another location in Delaware, with preference given to potential projects closer to the Coastal Zone.
7. If the applicant is not able to identify an appropriate offset project through the previous steps, they should consider:
  - a. the environmental effect and attempt to identify an offset as close to the site as possible that will counter that negative effect (~~e.g., if the project could negatively affect waterfowl habitat that can't be restored or protected, make a donation to a bird rescue and rehabilitation organization~~); or
  - b. an offset for the same pollutant in a different medium as close to the site as possible (~~e.g., if the environmental impact is a NO<sub>x</sub> emission to the air, then a potential offset project may be to reduce nutrients from stormwater in the watershed that is home to the project~~).
8. If the applicant is not able to identify an appropriate offset project through the previous steps, applicant may propose an alternative environment improvement project of commensurate value to Delaware’s coastal resources, as close to the site as possible. Such projects might include recreational access opportunities, waterfront community engagement, or other community benefits, with a nexus to net ecological improvement.
9. Related considerations and recommendations:
  - a. To the extent feasible the offset process should encourage concurrent permitting or consultation to provide administrative efficiencies and facilitate coordination among the applicant and regulators.
  - b. With respect to the location of offset projects, local impacts should be offset locally.
  - c. Minimizing environmental impacts is a priority in the CZCPA process. The offset process is intended to address environmental impacts that cannot be avoided or further minimized.
  - d. The existence of an offset process does not in any way limit DNREC’s authority to reject conversion permit applications with environmental impacts determined to be too severe or for which potential offset projects have insufficient nexus.
  - e. The Secretary should provide greater clarity on the process and procedures for demonstrating offset consistency with these rules and priorities.

## Final Recommendations regarding Financial Assurance

Below is a table of recommendations per financial assurances. This table provides information on: (1) event categories of expected financial risk, (2) the process used in establishing financial assurances for each risk event, (3) the way to determine the amount of financial assurances necessary to meet the requirements of the Act, (4) the types of financial assurance instruments available, and (5) each instrument's ability to both adapt to the time horizon of a risk event and to ensure funds are available in the time and amount necessary.

In addition to this table, the RAC offered the following recommendations:

- Financial assurances, in general, must be commensurate with the use (and its associated risks) proposed by the conversion permit applicant.
- The form and amount of financial assurances should be reviewed at appropriate periodic intervals, since financial conditions can change once a conversion permit is in place. Such review should occur for the life of that permit.
- The Secretary should define more clearly “environmental damage,” as outlined in the statute. Does such damage include natural resources damages, public health damages, or economic loss associated with natural resource-related activities such as fishing, swimming, boating, and beach going?
- The RAC supports providing a range of financial assurance instruments, from trust funds to captive insurance, as described in the table below. However, self-insurance instruments are not preferred for actions to minimize environmental damage and stabilize and secure the site upon termination, abandonment, or liquidation of site activities, since that time frame is likely many decades out and/or bankruptcy could cause such closure. Thus, the RAC recommends the following:
  - The Secretary should consider either offering expedited or less complex review for applicants who use third-party instruments or a clearly described, stepped process where the applicant has to explain why, how, and what protections are in place should they utilize self-insurance options.
  - Like all instruments, self-insurance instruments will need to be reviewed at appropriate periodic intervals.
  - DNREC review of self-insurance options will likely require expertise beyond DNREC's current staffing and expertise. Thus, the Secretary should ensure that, for any applicant utilizing self-insurance, DNREC is able to cover the additional administrative costs of reviewing and considering such financial instruments and that such costs be taken into account when determining the application fee.
  - The RAC encourages the Secretary to ensure that he or she has the authority, in the periodic review of self-insurance instruments, to require those who self-insure to carry a blended approach of third-party and self-insurance instruments and/or to move to only third-party instruments, as circumstances merit.

**CZCPA Financial Assurance (FA) Risk Categories, Process, Amount, and Types of Instruments  
CZCPA RAC Final Recommendations**

| Risk Event Category   | FA Process   | FA Amount   | Types of FA Instruments |                  |                  |             |   |   |   |                                |
|---|--|---|-------------------------|------------------|------------------|-------------|---|---|---|--------------------------------|
|   |  |   | Third-Party Instruments |                  |                  |             | Self-Insurance  |   |   |                                |
|   |  |   | Trust Fund              | Letter of Credit | Insurance Policy | Surety Bond | Corporate Financial Test                                      | Corporate Guarantee   | Captive Insurance   |                                |
| <p>Actions to address existing site contamination.</p> <p>Time Horizon: Short to Medium Term</p>  | <p>CZCPA applications should identify actions, and associated FA, to address current site contamination. DNREC conducts application-specific evaluations of the sufficiency of existing FA, coordinating with other state and federal personnel familiar with the site.</p>  | <p>The need for and amount of conversion permit FA should be determined on an application-specific basis. Such determination should be based on the degree to which existing FA at the site is sufficient to meeting existing site needs. Amount of FA should be incremental to all existing site FA.</p>   | ●                       | ●                | ●                | ●           | ●   | ●   | ●   | ●<br><i>Funds Availability</i> |
| <p>Actions to minimize environmental damage, stabilize and secure the site 'upon termination, abandonment or liquidation of site activities'</p> <p>Time Horizon: Medium to Long Term</p> | <p>A "concept plan" of action(s) must be submitted with the conversion permit, along with a proposal for associated FA. Upon DNREC approval of a "final plan", the permit applicant should be required to procure the approved FA and evince such FA to DNREC prior to site operation.</p>   | <p>Face value should be equal to the estimated cost of completing the activities in the DNREC-approved plan, including DNREC oversight/administration costs. The face value should be downward adjusted to the degree existing FA covers activities identified in the DNREC-approved plan.</p>  | ●                       | ●                | ●                | ●           | ●<br><i>Not Adaptive to Long Time Horizons</i>                | ●<br><i>Funds Availability</i>                                | ●<br><i>Not Adaptive to Long Time Horizons</i>                |                                |
| <p>Actions to address future incidents resulting in environmental contamination</p> <p>Time Horizon: Short, Medium, or Long Term</p>  | <p>Any approved permit should include language stating that FA will be required to address site-specific actions to address environmental contamination incidents if/when they occur. DNREC should be mindful that other existing state/federal requirements may affirmatively require FA for such actions pursuant to other regulatory authorities.</p> | <p>The Secretary should consider a two pronged approach for future possible but unknown incidents. First, the Secretary should evaluate the potential use and availability of insurance or similar mechanisms to ensure availability of some funding in advance of the occurrence of a future triggering event. Second, following an incident, DNREC should ensure that sufficient FA is put in place such that the face value should be equal to the estimated cost of specified actions to minimize environmental damage, including DNREC oversight/administration costs. The face value should be downward adjusted to the degree existing FA covers such actions.</p> | ●                       | ●                | ●                | ●           | ●<br><i>Short Term</i><br><br>●<br><i>Medium to Long Term</i> | ●<br><i>Short Term</i><br><br>●<br><i>Medium to Long Term</i> | ●<br><i>Short Term</i><br><br>●<br><i>Medium to Long Term</i> |                                |



|   |  |   |   |   |   |   |  |  |  |
|---|--|---|---|---|---|---|--|--|--|
| <p>Maintenance or repair of site or infrastructure improvements to address sea level rise or coastal storms</p> <p>Time Horizon: Short to Long Term</p> | <p>CZCPA applications should identify any site or infrastructure improvements that will be undertaken to address sea level rise or coastal storms. DNREC conducts application-specific evaluation of the extent to which FA is needed to ensure sufficient funds to address associated maintenance and/or potential future repair.</p> | <p>Face value should be equal to the estimated cost to maintain and/or repair relevant infrastructure and site improvements, including DNREC oversight/ administration costs. The face value should be downward adjusted to the degree existing FA covers such actions.</p> | ● | ● | ● | ● | <p>●</p> <p><i>Short Term</i></p> <p>●</p> <p><i>Medium to Long Term</i></p> | <p>●</p> <p><i>Short Term</i></p> <p>●</p> <p><i>Medium to Long Term</i></p> | <p>●</p> <p><i>Short Term</i></p> <p>●</p> <p><i>Medium to Long Term</i></p> |
|---|--|---|---|---|---|---|--|--|--|

**KEY:**

- FA instrument is adaptive to the time horizon of the risk event **and** provides reasonable assurance of funds availability in the timing and amounts necessary assuming the instrument is structured correctly.
- FA instrument is not easily adapted to the time horizon of the risk event **or** may not provide reasonable assurance of funds availability in the timing and amounts suggested by the risk event category.
- FA instrument is not easily adapted to the time horizon of the risk event **and** does not provide the regulator with reasonable assurance of funds availability.