

**COASTAL ZONE CONVERSION PERMIT ACT REGULATORY ADVISORY COMMITTEE MEETING #5  
 OCTOBER 9, 2018  
 MEETING SUMMARY**

APPROVED BY THE CZCPA RAC ON NOVEMBER 7, 2018

Disclaimer: This meeting summary was prepared by the Consensus Building Institute (CBI), a non-profit entity contracted by DNREC to facilitate CZCPA RAC meetings and draft meeting summaries. This summary is not intended to be a meeting transcript. Rather, it focuses on the main points covered during the meeting without attribution.

**MEETING IN BRIEF**

At its October 9, 2018 meeting, the Coastal Zone Conversion Permit Act (CZCPA) Regulatory Advisory Committee (RAC) discussed key issues related to its charge to advise the Delaware Department of Natural Resources and Environmental Control (DNREC) on drafting regulations to implement the CZCPA. The RAC reviewed and approved the meeting summary from its September 12 meeting. The RAC heard presentations and provided feedback on draft recommendations prepared by DNREC staff after the last meeting related to preparing heavy industry use sites for sea level rise and coastal storm impacts and bulk product transfer. The RAC also heard an overview of the initial options generated by the Economic Effect Work Group and the Risk Evaluation and Financial Assurance Work Group. DNREC staff presented a brief update on community engagement efforts. After an opportunity for the public to comment on topics being discussed by the RAC, the meeting closed with a brief discussion of next steps. A list of meeting participants is attached to the end of this summary. Presentation slides are available at [de.gov/czcpa](http://de.gov/czcpa).

**ACTION ITEMS**

<b>Who</b>	<b>What</b>
RAC members	<ul style="list-style-type: none"> <li>• Review materials prior to next RAC Meeting.</li> <li>• Observe Work Groups, as desired.</li> </ul>
DNREC/DOJ	<ul style="list-style-type: none"> <li>• Post all presentation slides, background materials, and the approved September 12 meeting summary to the CZCPA RAC webpage at <a href="http://de.gov/czcpa">de.gov/czcpa</a>.</li> <li>• Develop recommendations on the key issue of sea level rise and coastal storm impacts for RAC decision-making at the RAC’s November meeting (November 7).</li> <li>• Environmental Impact and Offsets Work Groups develop overview presentation of issues for RAC to discuss.</li> <li>• Economic Effect and Risk Evaluation and Financial Assurance Work Groups refine the options presented for further RAC discussion and decision-making on November 7.</li> <li>• Confirm with the Attorney General’s office if DNREC does have the authority to track grain under the CZCPA statute.</li> <li>• Distribute draft October 9 meeting summary to RAC for review (will finalize at November 7 meeting).</li> <li>• With CBI, develop draft agenda for November 7 meeting.</li> </ul>
CBI	<ul style="list-style-type: none"> <li>• Prepare draft meeting summary.</li> <li>• Draft agenda for November 7 meeting.</li> </ul>

## UPCOMING MEETINGS AND EVENTS

Event	Date	Venue
RAC Meeting #6	Wednesday, Nov. 7, 2018	DNREC Lukens Drive Office, New Castle
RAC Meeting #7	Tuesday, Dec. 11, 2018	Bellevue Community Center, Wilmington

The most detailed and up-to-date information on upcoming CZCPA meetings and events, including Work Group meetings, is posted on the Delaware Public Meeting Calendar at [de.gov/czcpameetings](http://de.gov/czcpameetings).

## DISCUSSION

Below is a summary of key topics discussed during the meeting. All presentation slides are available at [de.gov/czcpa](http://de.gov/czcpa).

### RAC Business

The September 12 meeting summary was approved by the RAC with no changes. Larry Lambert, representing the Claymont Renaissance Development Corporation, was introduced as the person who would replace Dr. Eugene McCoy, who passed away in July, on the RAC.

### Developing Recommendations for Bulk Product Transfer

Andrea Kreiner (DNREC) presented draft recommendations on bulk product transfer (BPT) for the RAC's consideration, with a focus on the reporting and information needed to ensure adherence to the CZCPA. Following up on an action item from the last meeting, Ms. Kreiner told the RAC that DNREC consulted with the Delaware Secretary of Agriculture about tracking the bulk product shipment of grain. The Secretary was in favor of DNREC tracking shipments of grain because it would be helpful for his agency to know how much grain product is moving in and out of the state.

The following draft recommendations on non-grain BPT were developed based on feedback provided by the RAC at its last meeting:

BPT Recommendation 1: Recordkeeping and reporting. The Coastal Zone Conversion Permit Regulations should require that:

- (1.1) Records of specified information (e.g., quantity, final destination, date of export) be kept on site at the Bulk Product Transfer Facility
- (1.2) BPTs of grain should only be required to keep records on the quantities and dates of imports and exports, and
- (1.3) A summary of the specified information be submitted to DNREC on an annual basis.

BPT Recommendation 2: Bulk product categories.

- (2.1) Coastal Zone Conversion Permits should be written to include product categories, so as to minimize the need for permit modification or new permits with minor, related, changes in Bulk Products imported or exported.
- (2.2) 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.<sup>1</sup>

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<sup>1</sup> Under the current Coastal Zone Permit process, a company cannot apply for a permit modification. A change in the bulk products they are importing or exporting requires a new application to the Secretary.

The RAC discussed the recommendations and provided feedback to DNREC. The comments below are from RAC members unless otherwise specified:

- **Questions and comments on BPT Recommendation 1: Recordkeeping and reporting.**
  - As DNREC drafts regulations for bulk products, the agency should keep in mind that the amount of bulk product transferred in and out of sites in the Coastal Zone will rarely be equal due to “shrinkage”.
  - Does DNREC has the authority to track bulk product transfer of grain under the CZCPA statute? If so, reporting requirements may impose a burden on companies.
  - Much of the information needed to track bulk products is already included on the Bill of Lading and other paperwork that shipping companies already submit to the state, so tracking grain may not impose a burden on companies.
  - **DNREC Response:** DNREC staff will confirm with the Attorney General’s office if DNREC does have the authority to track grain under the CZCPA statute.
- **Questions and comments on BPT Recommendation 2: Bulk product categories.**
  - Given the lack of flexibility to change bulk products imported or exported under the current Coastal Zone Permit application process, we should add a recommendation 2.3 in the conversion permit process for emergency provisions, which could provide flexibility for sites to transfer bulk product under certain conditions. These conditions would need to be defined in the regulations.
  - How would bulk product categories be delineated? Would these be included in the regulations?

The RAC approved both preliminary recommendations in their entirety. DNREC staff will prepare the preliminary recommendations for transmittal to the Secretary from the Chair.

### **Developing Recommendations for Preparing Sites for Sea Level Rise and Coastal Storm Impacts**

Susan Love (DNREC) presented draft recommendations regarding sea level rise and coastal storm impacts (SLRCS) planning for the RAC’s consideration. The following draft recommendations on this topic were developed based on additional research and feedback provided by the RAC at its last meeting:

SLRCS Recommendation 1: Facility life. The required plan for sea level rise and coastal storms over the “anticipated useful life of the facility and infrastructure” should have a planning horizon of no less than 60 years. The plan can include a longer planning horizon depending on the particular facility.

SLRCS Recommendation 2: Geographic scope. The plan should detail risk, likely impacts, and mitigation measures for the following geographic areas:

- The site’s shoreline and near-shore areas
- Docks, piers, and offshore pipelines
- All remediation areas on-site (includes completed remediation areas and those in progress)
- All structures on-site
- Ingress/egress routes

The plan should also include a discussion of any potential negative impacts to adjacent parcels resulting from development and flood mitigation activities.

SLRCS Recommendation 3: Risks to be considered in a plan. The plan should address the following hazards over the anticipated useful facility life:

- Flooding (1% chance flood (100-year floodplain as defined by FEMA); 0.2% chance flood (500-year floodplain as defined by FEMA); high sea level rise scenario (as defined by the DE SLR Technical Committee); combined effect of sea level rise and 1% chance flood)
- Shoreline erosion
- Wind speeds up to 95 mph, sustained (Category 1 hurricane)

Additional questions that DNREC staff are still exploring include:

- How does air quality permitting incorporate storm events and how are facilities monitored during storm events?
- How do facility emergency management plans incorporate storm preparation and what is the role of the Local Emergency Planning Committees?
- How should the new regulations incorporate changes to 3rd party guidance and criteria (new SLR scenarios, FEMA construction guidance, etc.)?

The RAC discussed the recommendations and provided feedback to DNREC. The comments below are from RAC members unless otherwise specified:

- **Benchmarking**
  - How do these recommendations compare to similar ones in other jurisdictions?
  - **DNREC Response:** Delaware could be among the first states to develop regulations that include SLRCS planning for infrastructure that is not owned, funded, or managed by the state. New York is currently developing draft regulations on preparing public projects for sea level rise and coastal storm impacts; such regulations would cover wastewater treatment facilities. The recommendations put before the RAC are consistent with the Delaware Executive Order 41 (Gov. Jack Markell) planning guidance developed for state-owned facilities.
- **Effect on developer interest**
  - It is concerning that the combined effect of these planning recommendations could discourage potential developers.
  - This planning should be considered due diligence and therefore is not onerous.
  - The information an applicant would need to submit to DNREC may not be onerous but the mitigation measures that may be required to protect the proposed development may be.

DNREC staff will further discuss draft recommendations for sea level rise and coastal storm impact planning for the RAC to discuss and reach agreement on at its November 7 meeting.

### **Overview and Initial Options Considered by the Economic Effect Work Group**

Leslie Genova (IEc) presented an overview of the goals, underlying issues, and the five initial scope issues the Economic Effect Work Group has addressed. The Work Group sought to identify recommendations that would satisfy Section 7014(c)(1)-(3), which deals with issues of baseline, the effect of a proposed action, and the net economic improvement due to the proposed action. The groups' goal was to provide the RAC with options for regulations that meet statutory requirements, gather data that can be meaningfully assessed, and do not overly burden permit applicants. The group wrestled with two questions: (1) how will economic effect data be used by the Secretary and (2) will permit approvals be made based on economics? Throughout its work, Work Group members raised concerns about

excessive requirements that could discourage applicants from considering Delaware as a place to locate a heavy industry facility. They also felt that providing information about past uses of a site would not be useful to the Secretary.

The Work Group developed options for the RAC to discuss for five initial scope issues:

1. Determining “existing or previous use”: Whether existing or previous use should be reported for active and inactive sites.
2. Assumptions and data for estimating “existing or previous use”: Based on geographic limit (e.g., permit area, tax parcel) and use type (e.g., heavy industry use, all industry), and additional assumptions that would be needed to evaluate the economic effect of previous use.
3. Assumptions and data for estimating effects of the proposed action: Assumptions related to economic effect metrics for the “alternative or additional heavy industry use or BPT activity” and whether those need to match those used for “existing or previous use.”
4. How to estimate “economic effect”: Whether the statutory minimum-required metrics are sufficient or whether other metrics should also be provided (e.g., metrics that help to explain indirect or induced economic effect).
5. How to estimate “net economic improvement”: Whether “net economic improvement” should be defined as the difference between the economic effect of the most recent heavy industry use and the economic effect of the planned action or as something else.

Details about the options developed for each initial scope issue are available in the presentation slides available at [de.gov/czcpa/rac](http://de.gov/czcpa/rac).

The RAC discussion of and feedback on these options is summarized below:

- **How should potential economic costs to the state be factored into a permit evaluation?**
  - Although the statute does not name this issue, the RAC should recommend that permit applications include information about the potential economic burden on the state from a proposed action. For instance, such information could include information on the economic costs of infrastructure investment and what the economic effect would be of a hypothetical, catastrophic event that prevents future use of the site (e.g., lost tax dollars).
  - Calculating lost opportunity costs are difficult because it involves making many assumptions.
  - This issue could be addressed by the Economic Effect Work Group or the Risk Evaluation and Financial Assurance Work Group.
- **How should different pieces of an application be considered and weighed?**
  - Should some areas of a permit application be weighted more than others? The RAC may want to provide recommendations to the Secretary on this subject.
  - The community-level economic effect of a proposed action should be considered when determining the net economic improvement. They should have the same weight as other economic effects. Where economic development will occur is also important to consider – it is not enough to know that there will be economic development.
  - Should there be an economic effect threshold for a project that must be met (e.g., a minimum of 200 jobs created)?
- **What are the appropriate burdens for applicants and DNREC staff?**
  - DNREC could generate information about the previous use for each site so applicants can include that information in their conversion permit applications.

- Minimizing the research effort needed to provide previous use information would be good.
- Much of the previous use information may not be available for certain sites, so requiring this information in an application may not be feasible.
- Should applicants be asked to provide information on direct and indirect economic effects of the proposed action?
- **What information is necessary for the Secretary to evaluate a conversion permit application?**
  - The information an applicant submits should be relevant to the Secretary's decision. The Secretary may not need to know about past economic effects of a site for a site that currently has no activity on it.
  - Submitted information should convey the economic trends of the site over time. This provides important economic context.
  - Applicants can always submit more than the minimum-required information if they think it will be relevant or helpful for their application.
  - The regulations should preserve flexibility for the Secretary if, in the future, certain information is deemed important to evaluate.
  - An applicant should provide information about the existing or previous use at the project-scale, not the full heavy industry use site-scale.
- **Additional comments**
  - Telling the remediation and redevelopment stories of these sites to the general public will be important as the Secretary begins reviewing and making decisions on conversion permits. People need to appreciate that artificial intelligence and technological advancement are changing how things are manufactured today, and therefore, these sites may not support the large number of employees they once did.

The Work Group will refine these options for further RAC discussion and decision-making at its next meeting.

### **Overview and Initial Options Considered by the Risk Evaluation and Financial Assurance (REFA) Work Group**

Mike Donlan and Chiara Trabucchi (IEc) presented an overview of the design of an effective financial assurance program that balances the interests of the state, the public, and the regulated party. A good program should encourage sound operational behavior, ensure that regulators have timely access to funds to undertake actions, account for existing financial assurance, and facilitate site redevelopment. While developing options for the RAC, the REFA Work Group drew on a case study: a financial assurance program that was set up by the State of Louisiana in 2017.<sup>2</sup>

The REFA Work Group developed draft options for three specific issues relevant to REFA regulatory program design and anticipates developing several more issue papers before the November RAC meeting. The three draft options papers, with associated pros/cons, were developed by the REFA Work Group and presented to the RAC at the October meeting:

1. Options for standard financial assurance instruments. There is a range of different types of financial instruments commonly considered for use in a financial assurance context. The table included in the options paper provides a brief description of each instrument, identifies pros and

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<sup>2</sup> An overview of this financial assurance program is available in the presentation slides at [de.gov/czcpa/rac](https://de.gov/czcpa/rac).

cons, and identifies the federal programs that make use of them and the extent to which they are used to address compensatory damages and/or third-party liability.

2. Options for identifying existing financial assurances at a site. The Work Group believes that conversion permit financial assurance should avoid duplicating existing financial assurances applicable to the site and address only those elements where existing coverage is absent or insufficient for Delaware's needs. The Work Group recommends that the RAC consider including a requirement in the conversion permit regulations for applicants to identify existing financial assurance relevant to a site.
3. Options for ensuring DNREC has access to financial assurance expertise and/or third-party verification. Conversion permit decision-makers may not have the internal resources necessary to critically evaluate financial assurance information provided in support of CZCPA permit applications. The Work Group identified three approaches to address this challenge: third-party verification, DNREC hiring a consulting expert, and leveraging expertise from within Delaware's state programs.

These draft options papers are available in full at [de.gov/czcpa](http://de.gov/czcpa).

The RAC discussion of and feedback on these options is summarized below. The comments below are from RAC members unless otherwise specified:

- **Comments on Issue Paper #1: Financial assurance instruments**
  - Why is third-party insurance not listed as an allowable financial assurance instrument in the Louisiana program?
  - IEc Response: Louisiana named the three instruments they thought would be used most frequently but provided an additional option for a regulated party to use third-party insurance under the "other forms of financial assurance" provision. The RAC will need to decide whether to recommend to the Secretary a set list of priority financial assurance instruments or give the Secretary the flexibility to choose the best-suited instrument when an application is evaluated.
  - The Work Group should add a column to the table titled "Alignment with Delaware regulations."
- **Louisiana financial assurance case study**
  - A Louisiana case study might have been a poor choice due to the state's historically poor environmental and enforcement record.
  - IEc Response: We chose to present the Louisiana model because it is a concise, generalized financial assurance program that DNREC can draw on, as needed, as it develops its own program. There are other examples of financial assurance programs in Delaware and nationwide but the Louisiana program could be a comparable program.
- **Other comments**
  - These options papers outline a good regulatory design that accounts for risk and provides flexibility for DNREC over time.
  - There needs to be clarification on how financial assurance will be handled in the case where a developer wants to develop only a portion of one of the 14 heavy industry use sites.
  - Department of Justice (DOJ) Response: The term "site" is used in different contexts in the statute; DOJ will need to look further into this issue.
  - The RAC should not take a vote on these options papers until the next meeting. The RAC needs time to digest this information and formulate questions.

The Work Group will refine these options for further RAC discussion and decision-making at its next meeting.

### **Community Engagement Update**

Ian Yue (DNREC) provided a brief update on DNREC's community engagement activities for the conversion permit regulatory development process. During September and early October, DNREC staff met with three fenceline communities/community groups about the regulation-drafting process. Further meetings with fenceline communities are scheduled. DNREC staff will start planning Public Workshops to be held in early 2019 and will present initial ideas for these Workshops at the November 7 RAC meeting.

### **Next Steps**

Patrick Field (CBI) reviewed the next steps in the RAC process and action items (listed on page 1). The next RAC meeting will be held on November 7, 2018. At that meeting, DNREC will present draft recommendations on the topics of sea level rise and coastal storms impact planning, and the RAC will engage in agreement-seeking on those recommendations. The RAC will also hear presentations from all four Work Groups and will discuss the products they have produced to date. This RAC meeting, and all upcoming RAC and Work Group meetings, was and will be open to the public. Before the next meeting, RAC members, DNREC, DOJ, and CBI should plan to complete the action items detailed on page one of this summary.

### **Public Comment**

Below is a summary of questions and remarks offered during the public comment session.

Bill Dunn (Civic League for New Castle County): Sea level rise and coastal storms impact planning should take into consideration the increasing number of "100 year" storms Delaware has experienced in recent years. DNREC should track imports and exports of bulk products, as well as any intermediate products that are imported to be used as part of a bulk product transformation process. The RAC should consider environmental and economic effects together when making recommendations because the statute names them together; they should not be considered separately. Regarding the REFA Work Group's presentation, Louisiana is a poor model for what should be put in place in Delaware. That state is a poor model for environmental protection practices. New Underground Storage Tanks should not be allowed on any of these sites because they are low-lying and may be impractical. The RAC should discuss a topic it wants to make a recommendation on at one meeting and wait to do agreement-seeking until the following meeting.

### **Adjournment**

The RAC Chair, Justice Randy J. Holland, adjourned the RAC at approximately 12:30pm.



**APPENDIX A: PARTICIPANT LIST**

RAC members (and designated alternates sitting in for RAC members)

<b>Name</b>	<b>Affiliation</b>
Neeraj Batta	Batta Environmental
Brenna Goggin	Delaware Nature Society
Michael Hackendorn	Delaware Building and Construction Trades Council
Hon. Randy J. Holland	Chair, CZCPA RAC
Tim Konkus	Delaware City Marina and Main Street Delaware City, Inc.
Larry Lambert	Claymont Renaissance Development Corp.
Tim Lucas (Designated Alternate for Herb Inden)	City of Wilmington
James Maravelias	AFL-CIO
Jerry Medd	Pilots' Association for the Bay and River Delaware
Jeffrey Richardson	Imani Energy
Robert Whetzel	Richards, Layton & Finger
Delores Whildin	Resident of Claymont
Dora Williams (Designated Alternate for Ronald Handy, Sr.)	New Castle Prevention Coalition
Marian Young	BrightFields, Inc.

DNREC staff and other state employees

<b>Name</b>	<b>Affiliation</b>
James Brunswick	Delaware DNREC
Judy Jordan	Delaware DNREC
Andrea Kreiner	Delaware DNREC
Susan Love	Delaware DNREC
Bob Scarborough	Delaware DNREC
Jameson Tweedie	Delaware DOJ
Ian Yue	Delaware DNREC

Facilitation team

<b>Name</b>	<b>Affiliation</b>
Patrick Field	Consensus Building Institute
Rebecca Gilbert	Consensus Building Institute

Members of the public (including designated alternates not sitting in for RAC members)

<b>Name</b>	<b>Affiliation</b>
Matt Brill	Self
James DeChene (Designated Alternate for Robert Whetzel)	Delaware State Chamber of Commerce
Michael Donlan	Industrial Economics
Bill Dunn	Civic League for New Castle County
Bill Freeborn	KBF Advisors, LLC
Leslie Genova	Industrial Economics
Paul Morrill	The Committee of 100
Mary Peck (Designated Alternate for Brenna Goggin)	Delaware Nature Society
Bryon Short	Self
David Swayze	Parkowski, Guerke & Swayze
Chiara Trabucchi (by phone)	Industrial Economics