

Widener University 
Delaware Law School

Environmental & Natural Resources Law Clinic
Kenneth T. Kristl, Professor of Law and Director

June 29, 2018

Regulatory Advisory Committee
On Conversion Permit Act Regulations
89 Kings Highway
Dover, DE 19901

Re: Public Comment #1 - Structure of Regulatory Changes

Dear Regulatory Advisory Committee:

I am a Professor of Law and Director of the Environmental and Natural Resources Law Clinic at the Widener University Delaware Law School. I am the author of *Keeping The Coast Clear: Lessons About Protecting The Natural Environment By Controlling Industrial Development Under Delaware's Coastal Zone Act*, 25 *Pace Env. L. Rev.* 37 (2008) (available at <http://ssrn.com/author=534168>) — the most complete scholarly analysis of the Coastal Zone Act. I have litigated a significant number of the recent cases under the Coastal Zone Act, and I testified before the House of Representatives on HB 190, which became the Coastal Zone Conversion Permit Act (CZCPA) that this Regulatory Advisory Committee (RAC) is now working to formulate regulations to implement. I therefore believe I have some expertise on the legal aspects of the matters before the RAC. I intend to submit a series of public comments on different major issues that the RAC will consider during its process.

At the June 14, 2018 RAC meeting, one of the items on the agenda for the next RAC meeting on July 12 was to create a “table of contents” for the regulatory changes that the RAC will consider. I believe that the best way for the RAC to approach the task ahead is to have a “big picture” view of the portions/areas of the regulations it must address in its work. This public comment document is designed to provide my proposal for such a big picture.

The Overall Regulatory Dynamic

The current regulations under the Coastal Zone Act are found at 7 Del. Admin. § 7001. They are the result of the efforts and recommendations by a prior RAC in 1998 that the Department of Natural Resources and Environmental Control (DNREC) turned into regulatory language ultimately approved by the Coastal Zone Industrial Control Board (CZICB). While I do not want to burden the current RAC with too much information, I would be happy to provide the RAC with a copy of the Memorandum of Understanding of March 19, 1998 setting forth the prior RAC's recommendations and the May 1999 Order of the CZICB adopting the Regulations if members of the current RAC wish to see these historical documents.

The CZCPA makes changes to the Coastal Zone Act that allows for new heavy industry uses and certain bulk product transfer facility operations on 14 nonconforming use sites in the Coastal Zone, and

contemplates the development of regulations (for which the current RAC plays a critical role) to implement the CZCPA's changes. What the CZCPA does not do, however, is change the Coastal Zone Act for any other sites in the Coastal Zone. In a sense, the CZCPA creates two regulatory tracks: (1) the old, 1999 regulatory track for application of the CZA to all sites (which should include the 14 nonconforming use sites to the extent the owner wants to do something other than the heavy industry or bulk product transfer activities now allowed by the CZCPA¹); and (2) the heavy industry or bulk product transfer activities under a Conversion Permit on the 14 nonconforming use sites contemplated by the CZCPA. Thus, what the current RAC must do is propose changes to the Coastal Zone Act Regulations that recognize these two tracks.

Perhaps the simplest way to create these two regulatory tracks is to leave the current track largely intact and to create a new, separate section of the Regulations to deal with the new, CZCPA-mandated track for the 14 sites. This separation would have the benefit of minimizing the disruption for applicants that do not own one of the 14 nonconforming use sites while putting in one place the unique requirements that will apply for owners of the 14 sites seeking a Conversion Permit. To the extent that the new conversion permit process might rely upon elements of the old permitting process, cross references and incorporations by reference can be utilized. In my opinion, this approach is the cleanest and least disruptive way to augment the Regulations to cover the new conversion permits.

Suggested Locations Within The Regulatory Framework The RAC Should Address

While the goal from the prior RAC meeting was to create a "table of contents" for the regulatory changes, I would propose that the RAC instead view its task through the lens of looking at specific places within the regulatory framework where changes should be made. Therefore, what follows are my suggestions of places where the RAC should consider providing guidance to DNREC for changes to the Regulations. To orient the RAC, I start at the beginning of the Regulations and proceed through the regulatory text:

Preamble – The Preamble to the Regulations is clearly focused on the 1999 issuance of the Regulations because that was the first time that regulations had actually been issued and approved pursuant to the statutory authority.² It makes some sense for the 2018-19 changes to be explained/described in some language in the Preamble. The best approach would be to caption the current Preamble as "Preamble to the 1999 Regulations" and the new Preamble Language as "Preamble to the 2019 Regulatory Amendments."

Section 4.0 Prohibited Uses – Section 4.0 of the Regulations sets forth certain activities/uses that "are prohibited in the Coastal Zone." The prohibitions are generally absolute in their language; however, because the CZCPA allows some previously prohibited heavy industry and bulk product

¹ For example, the owner of one of the 14 nonconforming use sites might want to build a manufacturing operation that is clearly allowed under the Coastal Zone Act in 7 Del. C. § 7004. Such owner would need to apply for and obtain a Coastal Zone Act permit for such manufacturing use, and the CZCPA does not affect or control that permit application.

² DNREC tried to issue regulations in the mid-1990s, but those regulations were struck down.

transfer activities, there must be some recognition of this fact in the regulations. In particular, the following sub-sections in Section 4.0 would seem to need this adjustment: Sections 4.1, 4.4, 4.5, and 4.6.

There are two ways to make this adjustment. One would be to include some general exception language at the beginning of the section and before the specific sub-sections are set forth. For example, the initial language of the Section could be modified as follows:

Except for activities allowed pursuant to a conversion permit under these regulations,³ the following uses or activities are prohibited in the Coastal Zone:

The other way would be to keep the introductory language at the beginning of the section the same and include this exception language in each of the affected sub-sections. Thus, for example, Section 4.1 would be modified as follows:

Except for activities allowed pursuant to a conversion permit under these regulations, heavy industry use of any kind not in operation on June 28, 1971.

Obviously, the first of these approaches would result in fewer changes to the regulations.

Section 8.0 Permitting Procedures – Section 8.0 spells out the procedures for non-conversion permits under the Act. Given that a different procedure will be implemented via the regulations on Conversion Permits that the RAC and DNREC will develop, there needs to be a recognition in Section 8.0 of the fact that its provisions will not apply to the conversion permit process. As with Section 4.0, there are two approaches: a general statement at the beginning of the section, or insertions in each of the sub-sections. Given the extensive nature of Section 8.0, the general statement at the beginning would seem to be the easier approach. The general language could be along the lines of the following:

This Section shall cover permitting under the Coastal Zone Act except for Conversion Permits, which are covered by Section [10] of these regulations.

Section 9.0 Offset Proposals – Like Section 8.0, Section 9.0 provides regulatory guidance for offset proposals in non-conversion permits under the Act. The CZCPA mandates that Conversion Permit offsets must “meet[] the requirements established by and includes the contents specified in regulations promulgated under this chapter,” which means that Section 9.0 applies to both non-conversion and Conversion Permits (but with Conversion Permits subject to an additional “annual basis” requirement). Thus, it may be best to call out this distinction via a general statement at the beginning of the Section would best create this carve-out:

³ The convention being used throughout this document is to show language being added via underlining, while language to be deleted shown via ~~strikeout~~.

This Section covers offset proposals for permitting under the Coastal Zone Act, with additional requirements for Conversion Permits covered by Section [10] of these regulations.

New Section 10.0 Conversion Permits – The primary thrust of the RAC’s work is to develop recommendations for the process of applying for and issuing Conversion Permits under the CZCPA. As noted above, the best approach is to put the regulations for the Conversion Permit process in a separate section of the regulations. Given that Sections 10.0 – 19.0 of the current Regulations are of general applicability (for example, Section 10.0 governs the Withdrawal and Revision of Permit Applications—which certainly could apply to both non-conversion permits and Conversion Permits), I suggest putting the new Conversion Permit section as Section 10.0 and then renumbering the old sections to reflect this insertion.

Renumbering of old Sections 10.0 – 19.0 – If in fact the Conversion Permit process is spelled out in New Section 10.0, then the remaining sections of the regulations should be renumbered to reflect the insertion. Thus, the sections would be:

OLD SECTION NUMBER AND NAME	NEW SECTION NUMBER AND NAME
Section 10.0 Withdrawal and Revision of Applications	Section 11.0 Withdrawal and Revision of Applications
Section 11.0 Permit Transfers	Section 12.0 Permit Transfers
Section 12.0 Abandoned Uses	Section 13.0 Abandoned Uses
Section 13.0 Public Information	Section 14.0 Public Information
Section 14.0 Public Notification	Section 15.0 Public Notification
Section 15.0 Public Hearings	Section 16.0 Public Hearings
Section 16.0 Appeals	Section 17.0 Appeals
Section 17.0 Fees	Section 18.0 Fees
Section 18.0 Enforcement	Section 19.0 Enforcement
Section 19.0 Severability	Section 20.0 Severability

The General Structure of New Section 10.0 Conversion Permits

The CZCPA spells out certain issues that play a role in the application for and issuance of a Conversion Permit. These statutory requirements in turn suggest a structure for the new regulatory section on Conversion Permits. I suggest the following structure:

Preliminary Language – Before getting into sub-sections, Section 10.0 should begin with preliminary language indicating that the provisions in this Section govern Conversion Permits under 7 Del. C. § 7014:

This Section sets forth the requirements for Conversion Permits under Section 7014 of the Coastal Zone Act.

What then follows are sub-sections that deal with various issues in the Conversion Permit process:

Section 10.1 Definitions – The RAC (and DNREC) may find it advisable to define terms unique to the Conversion Permit process. While many terms from the non-conversion permit sections of the Regulations (set forth in Section 3.0 of the current Regulations) will probably work as well in Section 10.0 (and thus not need re-defining), this would be a place to define terms for use in the remainder of Section 10.0.⁴

Perhaps the most important term that would benefit from the clarity of a definition is “heavy industry use site,” as that is the term used in 7 Del. C. § 7014(a) and (b) as the places for which a conversion permit can be sought. The CZCPA added the following definition to 7 Del. C. § 7002:

(e) "Heavy industry use site" means those 14 sites depicted in Appendix B of the Regulations Governing Delaware's Coastal Zone, § 101, Title 7 of the Delaware Administrative Code in effect on August 2, 2017, including those sites which have been abandoned in fact or have been the subject of an abandonment proceeding.

While Appendix B to the Regulations includes aerial views with the boundaries outlined (to show the “footprint” of the site⁵), these Appendix B sites are identified by the name of the owner/operation in 1999. Those nearly-30 year old names may (or may not) still describe the owner/operation.⁶ Appendix B does not contain other identifying information (address, size, etc.). It would be helpful for the 2019 Regulatory Amendments to provide sufficient site identify-information in order to avoid disputes in the future about where the 14 sites are that can have conversions permits issued.

Section 10.2 Application for Conversion Permit – The section should spell out what needs to be in the application:

- (1) Environmental and economic impacts of existing or previous use of the site (§ 7014(c)(1));

⁴ As an alternative, the definitions could be included in the Section 3.0 definitions.

⁵ The “footprints” have been important historically because, under 7 Del. C. § 7004(a) nonconforming uses which seek an “expansion or extension” must get a Coastal Zone Act permit, and the Regulations—in § 4.2—prohibit the “expansion of any non-conforming uses beyond their footprint(s) as depicted in Appendix B of these regulations.” Thus, the “footprints” still have a role to play. What I propose here is more identifying information so that future users of the Regulations will know exactly where each “heavy industry use site” is located.

⁶ DNREC, prior to the passage of HB 190, provided a document dated June 19, 2017 and titled “Background Information - Exiting, Non-Conforming Heavy Industry Sites in Delaware’s Coastal Zone” notes that “many sites have been known by different names before and after 1999” and contains a chart showing all known names; according to that chart, for example, the Uniqema site has had 4 other names.

- (2) Environmental and economic impacts of existing or proposed alternative or additional heavy industry use or bulk product transfer activity (§ 7014(c)(2));
- (3) Net environment or economic improvement in proposed use vs. most recent use (§ 7014(c)(3));
- (4) Evidence of compliance with Delaware Hazardous Substance Cleanup Act, 7 Del. C. § 9101 et seq. and any other relevant state or federal environmental statutes concerning contamination at the site, and agreement to pay all costs of such compliance (§ 7014(c)(4));
- (5) A Plan to prepare the site for potential impacts of sea level rise and coastal storms (§ 7014(c)(5));
- (6) An offset proposal that more than offsets the facility's negative environmental impacts on an annual basis (§ 7014(c)(6));
- (7) A timeframe for bringing the proposed use to operation (§ 7014(c)(7));
- (8) Evidence of financial assurance (§ 7014(c)(8)).

In this structure, the goal is to list the required elements without explanation, and to have the specifics for each topic described in subsequent sub-sections.

Section 10.3 Environmental Impact – Spell out minimum requirements of the environmental impact analysis necessary in a Conversion Permit application.⁷

Section 10.4 Economic Impact - Spell out minimum requirements of the economic impact analysis necessary in a Conversion Permit application.

Section 10.5 Sea Level Rise/Coastal Storms Plan - Spell out minimum requirements of the sea level rise/coastal storm plan necessary in a Conversion Permit application.

Section 10.6 Conversion Permit Offset Proposal - Spell out minimum requirements of the offset proposal necessary in a Conversion Permit application.

Section 10.7 Financial Assurance - Spell out minimum requirements of the financial assurance necessary in a Conversion Permit application.

⁷ Note that, according to 7 Del C. § 7014(d), the meaning of “environmental impact” and “economic impact” are to have “the same meaning as in [7 Del. C.] § 7004(b) of this title.” It may be helpful for the regulations to spell out what these terms mean (consistent, of course, with § 7004(b)), to make it easier for applicants to have all the information in one place.

Section 10.8 Department Consideration of Conversion Permit Applications – Spell out what the Department must do in considering a Conversion Permit application. In this regard, note that § 7014(e) – (i) impose certain requirements on the Department; they can be a starting place for drafting this subsection.

I intend to submit separate comments on the concepts involved in several of these sections. At this point, I am only proposing this structure to serve the “table of contents” notion that the RAC wants to bring into its July 12, 2018 Meeting.

Conclusion

I hope that the RAC finds these comments helpful in its deliberations and, ultimately, in its recommendations to DNREC concerning the necessary regulatory changes.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Kenneth T. Kristl". The signature is fluid and cursive, with a large initial "K" and a distinct "T" in the middle.

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July 6, 2018

Regulatory Advisory Committee
On Conversion Permit Act Regulations
89 Kings Highway
Dover, DE 19901

Re: Public Comment #2 – Environmental and Economic Impacts (7 Del. C. § 7014(c)(1) – (3))

Dear Regulatory Advisory Committee:

As promised in my Comment #1 letter, this Public Comment focuses on framing one of the issues that the RAC and DNREC need to consider in the formulation of the RAC's guidance and the ultimate language of the proposed Regulatory Amendments. The issue discussed in this public comment is compliance with the requirements of §§ 7014(c)(1) – (3), the consideration of Environmental Impacts and Economic Effects required in the Coastal Zone Conversion Permit Act (CZCPA).

The Role Of Environmental Impacts and Economic Effects in the CZCPA

The CZCPA creates a new 7 Del. C. § 7014 which sets out the statutory basis for the new Conversion Permits. Section 7014(c) sets forth the requirements for a Conversion Permit application. Included in these requirements are three related to environmental and economic impacts:

- (1) Environmental impact and economic effects of existing or previous use of the site (§ 7014(c)(1));
- (2) Environmental impacts and economic effects of the proposed alternative or additional heavy industry use or bulk product transfer activity (§ 7014(c)(2)); and
- (3) “The net environmental improvement or economic improvement, or both, inherent in the alternative or additional heavy industry use or bulk product transfer activity as compared to the most recent heavy industry use engaged in at that site” (§ 7014(c)(3)).

The CZCPA makes clear that these requirements are not simply boxes to be checked off; instead, they are to play a role in the decision about whether or not a conversion permit should be issued. This is evident from that fact that (1) § 7014(c) expressly states that these are “to be considered in assessing a conversion permit application,” and (2) § 7014(e) requires that “[i]n making a decision on a conversion permit application under this section, the Secretary of the Department of Natural Resources and Environmental Control, in the first instance, and the State Coastal Zone Industrial Board, on appeal, shall consider . . . the items listed in paragraphs (c)(1) through (c)(8)” of § 7014. Thus, understanding

how environmental impacts and economic effects are determined, and then spelling out rules to govern those determinations in the new Regulations, are important parts of the RAC's and DNREC's jobs.

What Are Environmental and Economic Impacts?

While the concepts of environmental impacts and economic effects can seem very broad, the CZCPA provides guidance that helps to focus these concepts. According to 7 Del C. § 7014(d), the meaning of “environmental impact” and “economic effect” are to have “the same meaning as in [7 Del. C.] § 7004(b) of this title.” Here is how § 7004(b) describes these terms as part of the six factors that DNREC “shall consider” in “passing on permit requests:”

(1) Environmental impact, including but not limited to, probable air and water pollution likely to be generated by the proposed use under normal operating conditions as well as during mechanical malfunction and human error; likely destruction of wetlands and flora and fauna; impact of site preparation on drainage of the area in question, especially as it relates to flood control; impact of site preparation and facility operations on land erosion; effect of site preparation and facility operations on the quality and quantity of surface, ground and subsurface water resources, such as the use of water for processing, cooling, effluent removal, and other purposes; in addition, but not limited to, likelihood of generation of glare, heat, noise, vibration, radiation, electromagnetic interference and obnoxious odors.

(2) Economic effect, including the number of jobs created and the income which will be generated by the wages and salaries of these jobs in relation to the amount of land required, and the amount of tax revenues potentially accruing to state and local government.

Of the two terms, economic effect seems the easier to understand: it includes consideration of quantifiable concepts like number of jobs, wage/salary income, and potential tax revenue generated. Note, however, that the term is not limited to those three concepts; rather, the three concepts are “included” in economic effect—which suggests that other economic effects can be considered.

Environmental impact is broader in scope and harder to pin down. Section 7004(b) expressly makes clear that environmental impact includes consideration of several different ways that the environment can be affected by an activity being permitted, including by:

- “Probable air and water pollution likely to be generated by the proposed use.” Note that this particular concept requires consideration both of pollution “under normal operating conditions” and “during mechanical malfunction and human error.”

- Destruction of wetlands and of plant (flora) and animal life (fauna).
- Impacts on drainage, flood control, and land erosion from site preparation and facility operations.
- Impacts on the quality and quantity of water resources, such as surface, ground, and subsurface waters.
- Generation of such diverse effects as glare, heat, noise, vibration, radiation, electromagnetic interference and obnoxious odors.

Note that, like economic effect, this list of potential effects on the environment is not exhaustive; rather, the concept of “environmental impact” only “include[es] but [is not] limited to” this list. Thus, other effects on the environment can fall within the concept of “environmental impact.”¹

Given these definitions, it appears that the CZCPA requires that a Conversion Permit application must include (and the ultimate permit decision must consider) environmental impacts and economic effects in three different ways:

- “The environmental impact and economic effect of the existing or previous use” (§ 7014(c)(1));
- “The environmental impact and economic effect of the alternative or additional heavy industry use or bulk product transfer activity” (§ 7014(c)(2)); and
- “The net environmental improvement or economic improvement, or both, inherent in the alternative or additional heavy industry use or bulk product transfer activity as compared to the most recent heavy industry use engaged in at that site” (§ 7014(c)(3)).

To put it another way, the CZCPA appears to require the applicant to identify the environmental impacts and economic effects of the site’s usage before the conversion permit, what would be the environmental impacts and economic effects of the site’s usage after the conversion permit, and then do a comparison of the before and after to show the “net environmental improvement” and/or “net economic improvement” if the conversion permit is issued. Because this three-step process is spelled out in § 7014(c)(1) – (3), the Regulations implementing the CZCPA being generated via the RAC process must explain how this process will be implemented.

¹ For example, fenceline communities will likely be interested in impacts from truck and train traffic to and from the site. While technically falling within the listed concepts of “air pollution” and “noise,” traffic impacts are something that affects the environment in the community around a site but are not always examined under current permitting practices.

Current DNREC practice under the Coastal Zone Act does not carry out this three-step process. The current application form for what will now be a non-conversion permit under the Act only requires identification of environmental impacts and economic effects of the proposed permitted activity—at best, part of what the second step in § 7014(c)(1) – (3) requires. Thus, the RAC should consider and suggest ways for the Regulations to carry out all three steps.

In formulating its recommendations, the RAC should consider two critical issues inherent in the three-step process:

The Timing Conundrum of Step 1

Step 1 of the three-step process contemplates consideration of environmental impacts and economic effects of “the existing or previous use.” Given that the 14 heavy industry use sites eligible for a conversion permit all had nonconforming uses on them (that is, were operating on June 28, 1971), “previous use” can include a wide variety of activities that occurred at any time during the past 46+ years. “Existing use,” on the other hand, focuses very much on the present; according to DNREC’s analysis of the 14 sites prior to passage of the CZCPA, three of the sites (General Chemical, Kaneka, and Standard Chlorine) are formally abandoned heavy industry uses while two other sites (DuPont Edgemoor, OxyChem) have no currently active industrial activities. Thus, on five of the fourteen sites, the “existing use” is basically equivalent to a vacant lot—even though on all five there were “previous uses” that involved heavy industry use activity. As for the other nine sites, the “existing use” might be similar to, but at a different intensity level from, use during the previous 46+ years.

These differing levels of activity at a site create challenges for the three-step process, especially when one considers that the third step requires a showing that the conversion permitted process will be an “improvement” over prior uses. On the environmental impact side, in 1971 few of the major environmental laws were in place.² As a result, it is likely that the heavy industry operating on the 14 sites had many significant environmental impacts that are now controlled (and reduced) under current law. By contrast, the environmental impacts of a currently vacant site might be minimal compared to a full industrial operation. If the goal is to show “improvement” with a proposed new Conversion Permitted operation, there is great motivation for an applicant to choose a “dirtier” previous use that makes showing “net environmental improvement” easier. On the economic effect side, different time periods might make showing “net economic improvement” easier. A currently vacant site generates no jobs and little tax revenue; comparatively speaking, a new industrial operation will have greater economic benefits. However, prior operational periods might have provided more jobs and economic effects (think of the number of jobs at the DuPont Edgemoor facility or Delaware City Refinery (called “Star Enterprises” in Appendix B) at its peak) than a new, more efficient operation might do. Thus, the

² In 1971, only the federal Clear Air Act (passed in 1970) was in place. On the federal side, the modern Clean Water Act did not come until 1972; the amendments to the Solid Waste Act that became known as the Resource Conservation and Recovery Act (RCRA) came in 1976; the Comprehensive Environmental Remediation and Cleanup Liability Act (CERCLA) came in 1980. On the state side, Delaware’s Environmental Control Act (7 Del. C. § 6001 *et seq.*) was first passed in 1973, while the Hazardous Substances Control Act (HSCA) was passed in 1990.

goal of finding “net improvement” in Step 3 might motivate an applicant to want to use different “uses” from different time periods for the environmental impact and economic effect analyses. Can an applicant do that?

The language of § 7014(c)(1) setting forth Step 1 suggests a limitation. It requires the applicant to show “[t]he environmental impact and economic effect of the existing or previous use.” The “and” between “environmental impact” and “economic effect” would seem to require that the same use be used. In other words, an applicant can choose the “existing use” or a “previous use,” but then must calculate both the environmental impact and the economic effect of that selected use. In other words, an applicant cannot use one use for calculation of environmental impacts and a different use for the calculation of economic effects. This, however, relies upon a (fairly reasonable) interpretation of the statutory language; other interpretations might be offered reaching different conclusions. The way to make it clear is for the Regulations to resolve whatever ambiguity is present by spelling out how the environmental impact and economic effect analysis must be done and requiring an applicant to analyze the same use for environmental impacts and economic effects.

The Importance of Thoroughness

Also important to the three-step analysis of environmental impacts and economic effects is the need for thoroughness in each analysis. This is especially true for the determination of environmental impacts. Both Section 9.0 of the current Regulations (which may play a role in the Conversion Permit process) and 7 Del. C. § 7014(c)(6) require that permit applicants present offset proposals that will more than offset the facility’s negative environmental impacts. The only way to know what the “negative environmental impacts” from the proposed Conversion Permitted process is to identify all environmental impacts in Step 1 so that the appropriate offset can be proposed and approved. The Regulations can and should impose requirements to identify and consider all environmental impacts.³

³ This is especially important with the “mechanical malfunction/human error” component of the air and water pollution impact listed in the definition. It should not be sufficient for an applicant to simply say it won’t happen, or that procedures are in place to minimize impacts. The whole point of the mechanical malfunction/human error aspect of the definition is to consider what could be the results when bad things do happen and the procedures do not minimize the effects. This concept of determining the effects of bad things happening is part of the requirements of the federal Emergency Preparedness and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11001 *et seq.*, and so should not be foreign to a potential applicant.

Conclusion

I hope that the RAC finds these comments helpful in its deliberations and, ultimately, in its recommendations to DNREC concerning the necessary regulatory changes.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Kenneth T. Kristl". The signature is fluid and cursive, with a large initial "K" and a distinct "T" in the middle.

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July 6, 2018

Regulatory Advisory Committee
On Conversion Permit Act Regulations
89 Kings Highway
Dover, DE 19901

Re: Public Comment #3 – HSCA/Environmental Cleanup Compliance (7 Del. C. § 7014(c)(4))

Dear Regulatory Advisory Committee:

As promised in my Comment #1 letter, this Public Comment focuses on framing one of the issues that the RAC and DNREC need to consider in the formulation of the RAC's guidance and the ultimate language of the proposed Regulatory Amendments. The issue discussed in this public comment is compliance with the requirements of 7 Del. C. § 7014(c)(4), what can be called the Environmental Cleanup Compliance requirement in the Coastal Zone Conversion Permit Act (CZCPA).

The CZCPA creates a new 7 Del. C. § 7014 which sets out the statutory basis for the new Conversion Permits. Section 7014(c) sets forth the requirements for a Conversion Permit application. Included in these requirements is the following:

Evidence that the owner, prospective owner, or applicant for the conversion permit under this section has complied with, and will continue to comply with, the requirements of the Delaware Hazardous Substance Cleanup Act, Chapter 91 of this title, and any other relevant state or federal environmental statutes, and shall agree to pay all costs of such compliance.

7 Del. C. § 7014(c)(4). The authors of the CZCPA included this requirement to make sure that the applicant for a conversion permit would clean up historic environmental contamination at the site.

The CZCPA makes clear that this requirement (like the other seven § 7014(c) requirements) is not simply a box to be checked off; instead, it is to play a role in the decision about whether or not a conversion permit should be issued. This is evident from that fact that (1) § 7014(c) expressly states that the § 7014(c) requirements are “to be considered in assessing a conversion permit application,” and (2) § 7014(e) requires that “[i]n making a decision on a conversion permit application under this section, the Secretary of the Department of Natural Resources and Environmental Control, in the first instance, and the State Coastal Zone Industrial Board, on appeal, shall consider . . . the items listed in paragraphs (c)(1) through (c)(8)” of § 7014. It is therefore important for the RAC to consider how to put this requirement into the Regulations.

Section 7014(c)(4) imposes two requirements that should be included in the Regulations. The first is “evidence” of past and future compliance with “the Delaware Hazardous Substance Cleanup Act, Chapter 91 of this title, and any other relevant state or federal environmental statutes.” The Regulations implementing § 7014(c)(4) should specify what constitutes adequate “evidence” in this regard. One possible form of evidence may be a letter from the relevant government authority running the cleanup program, but there may be others that the RAC feels constitute sufficient proof that the site is in fact participating in a program that will result in cleanup of the site.

The second requirement is the applicant’s agreement “to pay all costs” of compliance with the relevant cleanup program. The Regulations should spell out what constitutes an adequate agreement. While requiring a clear agreement to pay such costs in the application is one way to do this, the RAC should consider whether such a statement, standing alone, is sufficient. One such mechanism could be to require that the payment of all such costs be a condition of the Conversion Permit. This has the advantage of making it clear that operation under the Permit depends upon the payment of such costs, and the failure to make such payments can lead to an enforcement action that could result in the revocation of the Permit.¹ The point here is that the RAC should think this through and recommend that language be included in the Regulations to address this issue.²

Conclusion

I hope that the RAC finds these comments helpful in its deliberations and, ultimately, in its recommendations to DNREC concerning the necessary regulatory changes.

Respectfully submitted,



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¹ Another mechanism could be a lien on the property (which is how DNREC secures repayment of its costs under the Hazardous Substances Cleanup Act) which could be foreclosed in the event of a failure to pay. Given that HSCA liens are expressly authorized by statute, this may be a more difficult mechanism to use.

² In this regard, it should be noted that 7 Del. C. § 7014(c)(8)(i) requires the applicant to provide financial assurance to ensure that there are sufficient resources to pay all these costs. The RAC should consider whether this requirement provides the necessary agreement; there are good arguments that it may not.

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89 Kings Highway
Dover, DE 19901

Re: Public Comment #4 – Sea Level Rise/Coastal Storm Plan (7 Del. C. § 7014(c)(5))

Dear Regulatory Advisory Committee:

As promised in my Comment #1 letter, this Public Comment focuses on framing one of the issues that the RAC and DNREC need to consider in the formulation of the RAC's guidance and the ultimate language of the proposed Regulatory Amendments. The issue discussed in this public comment is compliance with the requirements of 7 Del. C. § 7014(c)(5), concerning the Sea Level Rise/Coastal Storm Plan requirement in the Coastal Zone Conversion Permit Act (CZCPA).

The CZCPA creates a new 7 Del. C. § 7014 which sets out the statutory basis for the new Conversion Permits. Section 7014(c) sets forth the requirements for a Conversion Permit application. Included in these requirements is the following:

A plan to prepare the site for potential impacts of sea-level rise and coastal storms over the anticipated useful life of the facility and infrastructure in connection with the applied-for use.

7 Del. C. § 7014(c)(5).

The CZCPA makes clear that this requirement (like the other seven § 7014(c) requirements) is not simply a box to be checked off; instead, it is to play a role in the decision about whether or not a conversion permit should be issued. This is evident from that fact that (1) § 7014(c) expressly states that the § 7014(c) requirements are “to be considered in assessing a conversion permit application,” and (2) § 7014(e) requires that “[i]n making a decision on a conversion permit application under this section, the Secretary of the Department of Natural Resources and Environmental Control, in the first instance, and the State Coastal Zone Industrial Board, on appeal, shall consider . . . the items listed in paragraphs (c)(1) through (c)(8)” of § 7014. It is therefore important for the RAC to consider how to put this requirement into the Regulations.

What Is A Plan?

The requirement in § 7014(c)(5) is that the applicant submit a “plan” that addresses two things:

- Potential impacts of sea level rise over the anticipated useful life of the facility for the Conversion Permit is sought; and
- Potential impacts from coastal storms over the anticipated useful life of the facility for the Conversion Permit is sought.

Each of these aspects of the plan identify a subject matter on which the plan must focus as well as a timeframe over which that focus must apply.

As an initial matter, it should be presumed that the requirement of a “plan” means that the elements of the plan will in fact address the identified potential impacts. A proposal to place two pebbles on the property line to hold back the rising sea and protect against storm surge might be a “plan,” but one that has no meaningful chance of doing anything to mitigate or address the potential impacts of sea level rise or coastal storms. Thus, implicit in this statutory language is a requirement that the proposed plan be something that will actually protect the property and surrounding community from the identified potential impacts. The Regulations should therefore require that the plan meet a specified level of protection.

What Potential Impacts Should The Plan Address?

Sea level rise is an especially important issue in the State of Delaware, given that sea levels are rising while Delaware—already the lowest elevation state—is sinking. DNREC has prepared several reports and analyses on sea level rise that conservatively (perhaps too conservatively) estimate potential impacts from sea level rise. The RAC (or any working group of the RAC on this issue) should review both DNREC and other literature to have a sense of the magnitude and urgency of the problem. While § 7014(c)(5) is not designed to deal with all aspects of sea level rise in Delaware, such review will provide important background with which to view its requirements. Within this literature, the RAC may also find information on coastal storms that are related to climate change.

While § 7014(c)(5) speaks in terms of “sea level rise” and “coastal storms,” it is important to recognize that these general terms encompass a broad range of conditions that could alter the planning to address them. We think of sea level rise primarily in terms of slowly increasing water levels, often measured as increases in the mean low tide level at a particular site. That increase, however, does not necessarily consider what happens at high tide, when additional water is piled on top of the rising mean low tide.¹ An adequate consideration of “potential impacts of sea level rise,” and a plan that successfully deals with those impacts, looks at the full range of what happens with sea level rise. Thus, an effective plan to deal with the potential impacts of sea level rise should consider how sea level rise could impact the site operations in some detail and propose ways to mitigate environmental risks from such impacts. The Regulations should require that the § 7014(c)(5) plan does that.

¹ Thus, you can get “sunny day” flooding (i.e., flooding which occurs on a sunny day without any rain because a higher mean low tide plus a high tide overwhelms currently existing structures) as now occurs in places like Miami, FL.

Coastal storms pose a wider range of potential effects because water comes not just from the sea but also from rain, and high winds can cause damage at industrial sites. The effects of Hurricane Harvey on the industrial corridor along the Houston Ship Channel is instructive in this regard.² Thus, an effective plan to deal with the potential impacts of coastal storms rise should consider how such storms could impact the site operations in some detail and propose ways to mitigate environmental risks from such impacts. The Regulations should require that the § 7014(c)(5) plan does that.

Note too that the statute requires consideration of potential impacts over the anticipated useful life of the facility—which could be fifty or more years (based on the fact that operations that were active on June 28, 1971 on some of the 14 sites are still active 46+ years later). Thus, the Regulations should require the plan to consider impacts over a long timeframe.

How Should The Plan Address The Impacts?

The CZCPA does not spell out how the § 7014(c)(5) plan should address potential impacts, but for the plan to be meaningful and fulfill the purpose behind § 7014(c)(5), the Regulations should spell out what constitutes an adequate plan. In the context of addressing impacts, the plan should set forth concrete steps that will be taken to minimize and mitigate the impacts to the facility and surrounding community as described above.

The Need To Update The Plan

While § 7014(c)(5) expresses a requirement that the plan be in the application, there is nothing in the statute which says what happens to the plan after issuance of the Conversion Permit. Experience shows that sea level rise estimates have changed over time (generally becoming higher), and there is some science suggesting that storms in general and coastal storms in particular may be getting more intense because of climate change. Given the long timeframe for which the plan must address potential impacts, a plan formulated at the time of Permit issuance may be inadequate at some point later in the useful life of the facility. The Regulations should require periodic review and update if necessary so that the plan will be adequate to address potential impacts as they change over time. In this context, prudence dictates that the Regulations should set forth requirements (which could be included as a Permit condition) that the § 7014(c)(5) plan be updated every five or ten years.

² Indeed, although Hurricane Harvey was unique in some ways (for example, the amount of rain it dumped on the Houston area), it is also instructive as to what can happen in a storm (and by extension, from the flooding of sea level rise). Direct impacts to facility operations, as well as impacts to the community from contamination from the facility spread by flood waters, are two obvious examples of detailed impacts that should be identified and dealt with in the plan.

Conclusion

I hope that the RAC finds these comments helpful in its deliberations and, ultimately, in its recommendations to DNREC concerning the necessary regulatory changes.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Kenneth T. Kristl". The signature is fluid and cursive, with a large initial "K" and a distinct "T" in the middle.

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July 6, 2018

Regulatory Advisory Committee
On Conversion Permit Act Regulations
89 Kings Highway
Dover, DE 19901

Re: Public Comment #5 – Offsets (7 Del. C. § 7014(c)(6))

Dear Regulatory Advisory Committee:

As promised in my Comment #1 letter, this Public Comment focuses on framing one of the issues that the RAC and DNREC need to consider in the formulation of the RAC’s guidance and the ultimate language of the proposed Regulatory Amendments. The issue discussed in this public comment compliance with the requirement in 7 Del. C. § 7014(c)(6), concerning the requirement for offset proposals in the Coastal Zone Conversion Permit Act (CZCPA).

The CZCPA creates a new 7 Del. C. § 7014 which sets out the statutory basis for the new Conversion Permits. Section 7014(c) sets forth the requirements for a Conversion Permit application. Included in these requirements is the following:

An offset proposal that meets the requirements established by and includes the contents specified in regulations promulgated under this chapter and more than offsets the facility's negative environmental impacts on an annual basis. Such proposal shall favor offsets that directly benefit Delaware.

7 Del. C. § 7014(c)(6).

The CZCPA makes clear that this requirement (like the other seven § 7014(c) requirements) is not simply a box to be checked off; instead, it is to play a role in the decision about whether or not a conversion permit should be issued. This is evident from that fact that (1) § 7014(c) expressly states that the § 7014(c) requirements are “to be considered in assessing a conversion permit application,” and (2) § 7014(e) requires that “[i]n making a decision on a conversion permit application under this section, the Secretary of the Department of Natural Resources and Environmental Control, in the first instance, and the State Coastal Zone Industrial Board, on appeal, shall consider . . . the items listed in paragraphs (c)(1) through (c)(8)” of § 7014. It is therefore important for the RAC to consider how to put this requirement into the Regulations.

The offset proposal requirement contains three basic elements that the Regulations should address:

- The offset proposal's contents;
- What the offset proposal must do; and
- The Delaware-focused nature of the offset.

This Comment explores each of these requirements.

Offset Proposal Contents

Section 7014(c)(6) requires that the offset proposal “meet the requirements established by and include the contents specified in regulations promulgated under this chapter.” Section 9.0 of the current Coastal Zone Act Regulations, 7 Del. Admin. § 101, specify requirements and contents for offset proposals in connection with non-Conversion Permit applications under the Act. One way to read the language in § 7014(c)(6) is to interpret it as requiring the application of current Section 9.0. However, a different way to read it is that the requirements and contents can be specified in new, Conversion Permit-specific regulations that the RAC will recommend and DNREC will draft as part of the RAC process now underway. Given the unique nature of the Conversion Permit created by the CZCPA, this latter reading is the better one. The RAC and DNREC may look to Section 9.0 of the current Regulations for ideas and guidance, but should recommend and promulgate a complete set of regulations concerning offsets for Conversion Permits.

Among the ideas worth borrowing from Section 9.0:

- § 9.1.1's requirement that applications for activities/facilities that result in any negative environmental impact must contain an offset proposal;
- § 9.1.1's imposition of responsibility on the applicant to choose an offset project that is “clearly and demonstrably more beneficial to the environment in the Coastal Zone than the harm done by the negative environmental impacts associated with” the to-be-permitted activity;
- § 9.1.4's requirement that offset proposals be “well-defined and contain measureable goals or accomplishments which can be audited” by DNREC (and imposing a requirement on DNREC to in fact audit the offsets once implemented);
- § 9.1.5's requirement that the DNREC Secretary make a preliminary determination as to whether the proposed offset is sufficient;
- § 9.1.6's requirement that permits for offset activities be received or administratively complete before issuance of the Conversion Permit; and
- § 9.2's (including §§ 9.2.1 - 9.2.7's) requirements for offset proposal contents.

Although technically not content requirements, the concepts of making the offset enforceable via a condition in the permit (found in § 9.3.1) and the 180 day requirement to file a new application (found in § 9.3.2) are both worthwhile and should be included in the offset proposal regulations for Conversion Permits.

What The Offset Must Do

Section 7014(c)(6) expressly states that the offset must “more than offset[] the facility's negative environmental impacts on an annual basis.” This imposes three requirements on the offset proposal: (1) it must consider the facility’s “negative environmental impacts;” (2) for each such impact, it must “more than offset” its negative environmental impact; and (3) it must “more than offset” each impact “on an annual basis.” These requirements warrant further examination.

The Requirement To Identify And Address Each Negative Environmental Impact

Section 7014(c)(6)’s express language that the offset must deal with “the facility’s negative environmental impacts” makes two things clear. First, use of the plural in “impacts” means that the offset analysis cannot be limited to a single negative environmental impact. Second, the unqualified reference to “negative environmental impacts” means that the offset cannot merely with *some* impacts (perhaps the biggest or most easily quantifiable). Together, these two insights strongly suggest that the offset proposal must deal with *all* negative environmental impacts that the proposed activity will create.¹ This is why, as I noted in my Public Comment #2, it is important to identify every environmental impact of the proposed activity in connection with the requirements of § 7014(c)(2): each environmental impact that is negative will need to be addressed in the offset proposal, and so it is important that the § 7014(c)(2) analysis be thorough and complete. The Regulations should therefore require that every negative environmental impact be identified and the offset proposal address all such negative impacts.

The Requirement To More Than Offset Each Negative Impact

Section 7014(c)(6) requires that the proposal “more than offset” each negative environmental impact. In other words, the offset cannot merely address the negative effect—it must go beyond that so that, in the words of § 9.1.1 of the current Regulations, it is “clearly and demonstrably more beneficial to the environment in the Coastal Zone than the harm done by the negative environmental impacts associated with” the to-be-permitted activity. In short, the offset must improve the environment of the Coastal Zone. The Regulations should expressly require such improvement as part of meeting the “more than offset” requirement of § 7014(c)(6).

The RAC should consider articulating one or more ways to show that a particular offset activity “more than offsets” a negative environmental impact. During the June 14, 2018 RAC meeting, a

¹ In this context, it is important to note that there is nothing in the language of § 7014(c)(6) or the current Section 9.0 Regulations that require a single action offset everything; it is certainly possible for a series of actions—each addressing one particular environmental impact—to serve collectively as the “offset proposal” accompanying the permit application.

DNREC official indicated that DNREC uses a 1.3-to-1 ratio for offsets. For measurable negative environmental impacts such as air pollution, such a ratio can be easily applied (for example, if the facility will emit 1 ton of an air pollutant, require a reduction—often achieved historically via air pollution credits obtained from the Delaware Economic Development Office—of 1.3 tons of the pollutant). Such a ratio is clear and easily enforceable. However, some of the things falling within the definition of environmental impacts might not be so easily quantifiable (drainage, erosion, or glare, to name a few). The regulatory criteria for what constitutes “more than offsets” should be able to cover as many environmental impacts as possible.

The Requirement to Offset On An Annual Basis

Section 7014(c)(6)’s express language that the proposal must more than offset “on an annual basis” has no comparative basis under Section 9.0 of the current Regulations. The language can only be read as requiring that the “more than offsetting” must occur each year—in other words, “one and done” offsets may not be enough. For example, in the air pollution example above, a facility that emits 1 ton of an air pollutant each year does not “more than offset . . . on an annual basis” the pollution by a one-time grant of 1.3 tons of pollution credits²; instead, it must show a 1.3 ton reduction each and every year.³ What the annual basis language requires is an assessment of continuing impacts from year to year and a “more than offsetting” of those impacts each year—an annual accounting of the offset’s performance.. The Regulations should make clear that the offset proposal must include ways to demonstrate or account for annual compliance. The Regulations may also spell out ways to accomplish such a demonstration, as well as ways to account for such annual performance.

The Substitution Issue

There is one situation which can arise with offsets: a “substitution” proposal. By this I mean that an applicant might want to do an offset that is environmentally beneficial but may not directly offset a facility’s negative environmental effect. For example, consider a proposal that will not destroy any wetlands but will increase air pollution and produce other negative environmental impacts. The applicant proposes to do a wetlands restoration project as its offset. The Regulations should provide some direction for how DNREC should consider such substitutes when determining if the negative environmental impacts are being “more than offset.”

It is possible to articulate some principles that should apply in the substitution situation. Initially, every effort should be made to deal with actual negative impacts from the proposed facility. After all, the statute requires that the offset proposal “more than offset *the facility’s negative environmental impacts*” (emphasis supplied)—not general negative environmental impacts. Thus, it

² This has sometimes been done historically under current Section 9.0 offsets.

³ There may be scenarios where a single action can have an effect each year. For example, one of the things expressly referenced in the definition of environmental impacts is destruction of wetlands. An offset which created 1.3 acres of new wetlands for each acre destroyed would continue to offset the destruction in year 2 and beyond as long as the created wetlands continued to exist and were maintained.

seems fair to require an applicant proposing a substitution offset to show that it has taken all steps to minimize the facility's negative environmental impacts before it can be allowed to use a substitution offset.

There may be circumstances, however, where it is not possible to "more than offset" a negative environmental impact, and so substitution should be allowed.⁴ In such circumstances, the Regulations could require that the applicant minimize facility impacts and then be able to show, in the words of § 9.1.1 of the current Regulations, that the offset project is "clearly and demonstrably more beneficial to the environment in the Coastal Zone than the harm done by the negative environmental impacts associated with" the to-be-permitted activity. Both the applicant and DNREC should be required to articulate why the substitute is "more beneficial to the environment in the Coastal Zone" so that the public can confirm it and have confidence that due consideration was given to the need for, and the adequacy of, the proposed substitution.

The Delaware Focus Of The Offset

The last sentence of § 7014(c)(6) states that the offset proposal "shall favor offsets that directly benefit Delaware." Frankly, if the Regulations for Conversion Permit offsets includes the § 9.1.1 requirement that the offset be "clearly and demonstrably more beneficial to the environment in the Coastal Zone than the harm done by the negative environmental impacts associated with" the to-be-permitted activity (as they should), then the statutory preference for Delaware-based benefits will be satisfied because the "environment in the Coastal Zone" will benefit. However, because the language "shall favor" suggests that it is possible for an offset to be proposed that benefits somewhere outside Delaware.⁵ The question is how the Regulations should deal with such non-Delaware offsets.

One solution is to include language in the Conversion Permit offset regulations barring such non-Delaware offsets (which arguably is what § 9.1.1 does). A different approach would be to allow the non-Delaware offset, but to require a higher environmental benefit (say, a 2-to-1 ratio). Such a higher burden on non-Delaware offsets incentivizes applicants to seek Delaware-based benefits (presumably because a Delaware-based offset at a 1.3-to-1 ratio is cheaper than a non-Delaware offset at a 2-to-1 ratio) and thereby "favors" offsets that benefit Delaware. The RAC and DNREC should both confront and resolve this non-Delaware issue in the regulatory drafting process.

⁴ An example might be a facility being built on a vacant site. It might not be possible to "more than offset" the sound or light/glare from the facility compared to the silent, dark vacate site (although a creative applicant might be able to find other sources of sound or light in the community to reduce so that the net effect is more than offsetting the negative impact from the facility itself). The point here is that once can conceive of a situation where such creative offsetting might not be available.

⁵ An example of this would be a proposal to offset air pollution created in the Coastal Zone from the facility via steps (say, reducing the sulfur in gasoline or diesel fuel that will be used in Pennsylvania or New York. (I believe this was proposed in connection with a previous Coastal Zone Act permit application; DNREC should be able to confirm or correct). The environmental negative impact (more air pollution) occurs in Delaware, but the benefit (cleaner air) occurs in Pennsylvania or New York. Using the 1.3-to-1 ratio, the environment in general arguably benefits, but the environment in Delaware most certainly does not.

The Need For Enforcement

The final point to raise here is that the Regulations must provide strong enforcement tools to DNREC in connection with offsets. Requirements for clarity of what the offset involves and measurability of the offset's performance are critical. Equally important is that DNREC be able to enforce offsets and have means to deal with situations where the offset does not achieve what the applicant claims it will. The provisions of Section 9.3 of the current Regulations are a good start, but DNREC should also have the power, based on the accounting of annual performance, to re-open permits and demand new offsets if the permitted offsets are not "more than offsetting" negative environmental impacts "on an annual basis."

Conclusion

I hope that the RAC finds these comments helpful in its deliberations and, ultimately, in its recommendations to DNREC concerning the necessary regulatory changes.

Respectfully submitted,



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July 6, 2018

Regulatory Advisory Committee
On Conversion Permit Act Regulations
89 Kings Highway
Dover, DE 19901

Re: Public Comment #6 – Financial Assurance (7 Del. C. § 7014(c)(8))

Dear Regulatory Advisory Committee:

As promised in my Comment #1 letter, this Public Comment focuses on framing one of the issues that the RAC and DNREC need to consider in the formulation of the RAC's guidance and the ultimate language of the proposed Regulatory Amendments. The issue discussed in this public comment compliance with the requirement in 7 Del. C. § 7014(c)(8) concerning financial assurance in the Coastal Zone Conversion Permit Act (CZCPA).

The CZCPA creates a new 7 Del. C. § 7014 which sets out the statutory basis for the new Conversion Permits. Section 7014(c) sets forth the requirements for a Conversion Permit application. Included in these requirements is the following:

Evidence of financial assurances in sufficient form and amount necessary to ensure that: (i) there are sufficient resources for all costs of compliance with the Delaware Hazardous Substances Control Act and other relevant state and federal environmental statutes concerning contamination on the site at the time of application; and (ii) upon the event of an incident resulting in environmental contamination, or upon termination, abandonment, or liquidation of all activities at the site of any heavy industry use, all means will be taken to minimize environmental damage and stabilize and secure the heavy industry use site in accordance with a concept plan that will be approved by the Department of Natural Resources and Environmental Control as part of the conversion permit. A final plan approved by the Department of Natural Resources and Environmental Control is required prior to the initiation of operation of the activity being authorized under the conversion permit.

7 Del. C. § 7014(c)(8).¹

¹ This is not the entire text of § 7014(c)(8); the section goes on, in § 7014(c)(8)(a), to spell out that the financial assurance must comply with regulations issued under 7 Del. C. Chapter 92 and the regulations the RAC and DNREC will develop, and in § 7014(c)(8)(b), to spell out how DNREC should handle the financial assurance requirement prior to the issuance of regulations. The RAC should inquire of DNREC concerning regulations under Chapter 92 to the extent they exist (as DNREC's website and online resources do not obviously point to, and I could not find, any such regulations), but otherwise these remaining portions of § 7014(c)(8) do not affect the work of the RAC and so are not included here.

The CZCPA makes clear that this requirement (like the other seven § 7014(c) requirements) is not simply a box to be checked off; instead, it is to play a role in the decision about whether or not a conversion permit should be issued. This is evident from that fact that (1) § 7014(c) expressly states that the § 7014(c) requirements are “to be considered in assessing a conversion permit application,” and (2) § 7014(e) requires that “[i]n making a decision on a conversion permit application under this section, the Secretary of the Department of Natural Resources and Environmental Control, in the first instance, and the State Coastal Zone Industrial Board, on appeal, shall consider . . . the items listed in paragraphs (c)(1) through (c)(8)” of § 7014. It is therefore important for the RAC to consider how to put this requirement into the Regulations.

The financial assurance requirement contains three basic elements that the Regulations should address:

- The forms of financial assurance that will be “sufficient;”
- The three categories of events for which financial assurance must be provided and the methods for calculating the costs in each category;
- The concept plan and final plan contemplated by § 7014(c)(8).

This Comment explores each of these requirements.

Financial assurance generally is a concept with a long history in many aspects of federal and state environmental law. It applies, for example, in the context of making sure that the future closure and the cost of monitoring and maintenance after closure (which can stretch out 30 years) for landfills under the federal Solid Waste Disposal Act/RCRA. As a result, there is a fulsome body of literature on the topic. The RAC (or a RAC working group dealing with this topic) might want to available itself of this literature as part of the RAC’s Work. Thus, a bibliography of some of that literature is attached to this Comment.

Forms of Financial Assurance

Because of the federal and state experience with financial assurance, there is a generally accepted set of tools for providing financial assurance. These standards tools include:

- Insurance
- Guaranty by a corporate parent or direct higher-level corporate entity
- Letter of Credit
- Surety Bond
- Trust Fund

- Satisfaction of a Financial Test showing adequate corporate resources²

See 7 Del. Admin. 1302 §§ 264.143, 145-47 for an example of how DNREC regulations use these tools in the context of closure, post-closure, and liability issues related to hazardous waste disposal facilities.³ The Conversion Permit Regulations should include provisions describing the tools which will be acceptable for satisfying the financial assurance requirement of § 7014(c)(8).

Categories and Methods

While the tools of financial assurance are relatively straightforward, the more difficult question is determining the amount of money for which financial assurance must be provided. Section 7014(c)(8) identifies three categories of events for which financial assurance must be provided. The Regulations should identify and describe each category and provide necessary procedures for calculating the amount of financial assurance the category demands.

As an overarching principle, it is important to remember that § 7014(c)(8) requires that the financial assurance be in a “sufficient . . . amount necessary to ensure that” the costs in the three categories will be covered. The notion that the amount must “ensure” that the costs will be covered implies that the calculation of the cost, and the amount assured via one (or more) of the accepted tools, must be robust enough so that there are no costs that are not covered (and presumably would end up being costs that the state must cover). This notion of “ensuring” the amount of financial assurance required is “sufficient” should govern the consideration of the categories and methods in drafting (and ultimately applying) the Regulations.

Category 1: HSCA/Cleanup Costs

The first category of costs expressly mentioned in § 7014(c)(8) relates to the requirement in § 7014(c)(4) that the applicant must participate in a cleanup of the site under HSCA or another federal or state statute. Section 7014(c)(8)(i) describes the category this way:

Evidence of financial assurances in sufficient form and amount necessary to ensure that:
(i) there are sufficient resources for all costs of compliance with the Delaware Hazardous Substances Control Act and other relevant state and federal environmental statutes concerning contamination on the site at the time of application

² Although beyond the scope of this issue-framing comment, the issue of whether a Limited Liability Company (LLC)—a common form of entity used in these situations—can or should be allowed to use this mechanism is something the RAC or RAC Working Group should examine closely.

³ Note also that the Delaware regulations allow for a combination of tools to be used. See 7 Del. Admin 1302 § 264.143(g). The RAC and DNREC should consider whether such flexibility is appropriate for § 7014(c)(8) compliance.

Thus, to satisfy this first category of costs for which financial assurance must be provided, the applicant must be able to show (1) “all costs of compliance” with the relevant statute, and (2) that the financial assurance is in an amount sufficient to cover all those estimated costs.

In terms of a “method” for calculating these costs that could be included in the Regulations, the logical steps of such a calculation are:

- (1) Determine the “contamination on the site at the time of application”
- (2) Calculate the cost to “comply” with the relevant statute (which will often involve some remediation of the contamination and monitoring of the site)

It should be recognized that these cost numbers could change after the time of application. It is logical to assume that a potential owner applying for a permit might not want to commit to engage in the remediation unless the permit is issued, and so will not have done all of the investigation to fully delineate the contamination. After permit issuance, more contamination (or more complex conditions around the contamination) might be found, thereby requiring additional remediation (and cost). Given that the statutorily-stated goal is to “ensure” cost coverage, the Regulations should account for the possibility that cost estimates may change after permit issuance.⁴

Category 2: Costs of Environmental Contamination Incident

The second category of costs requiring financial assurance are described this way in § 7014(c)(8)(ii):

Evidence of financial assurances in sufficient form and amount necessary to ensure that . . . (ii) upon the event of an incident resulting in environmental contamination . . . all means will be taken to minimize environmental damage and stabilize and secure the heavy industry use site in accordance with a concept plan that will be approved by the Department of Natural Resources and Environmental Control as part of the conversion permit.

Thus, to satisfy this second category of costs for which financial assurance must be provided, the applicant must be able to identify (1) all potential “incidents” that could result in “environmental contamination,” (2) the means necessary to minimize environmental damage from each potential incident (and the costs of such means), (3) the means necessary to “stabilize and secure” the site (and the costs of such means), and (4) that the financial assurance is in an amount sufficient to cover all those estimated costs.

⁴ This might be accomplished via permit conditions requiring the applicant and DNREC to revisit the financial assurance calculations on a regular (perhaps annual) basis and allowing for the adjustment of the amount of financial assurance necessary.

Because there are many types of “incidents” that can result in varying amounts of “environmental contamination,” this will likely be the most difficult category of costs to pin down. Incidents can range from a few drops of chemicals falling on the ground to catastrophic releases of thousands of gallons of chemicals from a tank or pipeline rupture. The means to “minimize environmental damage” will likely be proportionate to the incident, thereby varying in cost. And potential operators might be hesitant to identify “worst case scenarios” because of the community reaction to such low probability, high impact possibilities.

Nevertheless, the statutory language is clear: there must be financial assurance in a “sufficient amount” to “ensure” that “all means will be taken” to minimize environmental damage and protect the site. The only way to meet this requirement is to identify all possible incidents that could cause environmental contamination, the means to means to minimize environmental damage and stabilize the site in response to that incident, and the costs associated with those means. To comply with the statutory mandate, the Regulations must reflect this basic methodology.

Category 3: Costs of Shutdown

The third category of costs requiring financial assurance are described this way in § 7014(c)(8)(ii):

Evidence of financial assurances in sufficient form and amount necessary to ensure that . . . (ii) . . . upon termination, abandonment, or liquidation of all activities at the site of any heavy industry use, all means will be taken to minimize environmental damage and stabilize and secure the heavy industry use site in accordance with a concept plan that will be approved by the Department of Natural Resources and Environmental Control as part of the conversion permit.

Thus, to satisfy this first category of costs for which financial assurance must be provided, the applicant must be able to show (1) the means to minimize environmental damage from the termination, abandonment, or liquidation of all activities at the site (and the costs of those means), (2) the means to stabilize and secure the site after the termination, abandonment, or liquidation of all activities at the site (and the costs of those means), and (3) that the financial assurance is in an amount sufficient to cover all those estimated costs.

It would seem that this category is more predictable than Category 2. The means to prevent or minimize environmental damage and stabilize and secure a site as it is being closed down are generally well-known (for example, draining tanks and removing chemicals and other pollutants), and so the costs are more easily ascertainable. The Regulations should require that these activities be identified and their costs calculated as part of determining the amount of financial assurance necessary.

It should be noted that, in some instances (especially when there may be contamination present at the site but “controlled” under a HSCA-type remedy) where the closing of the site raises issues of

environmental damage⁵ or site stabilization and security⁶ that can occur *after* the site is closed (and presumably when the owner is no longer around). These situations may require some post-closure care (similar to what happens with landfills as explained above). The Regulations should require that the issue of post-termination/abandonment/liquidation costs be addressed in the financial assurance requirements for Category 3.⁷

Conceptual and Final Plan

Section 7014(c)(8) describes Category 2 and Category 3 costs in terms of the means for minimizing environmental damage and stabilizing and securing the site

in accordance with a concept plan that will be approved by the Department of Natural Resources and Environmental Control as part of the conversion permit. A final plan approved by the Department of Natural Resources and Environmental Control is required prior to the initiation of operation of the activity being authorized under the conversion permit.

Based on the language of § 7014(c)(8)(ii), it appears that the concept and final plan are to set forth the means for addressing Category 2 and Category 3 costs. A reasonable reading of this language is that the conceptual plan is what the applicant proposes as the actions which give rise to Category 2 and Category 3 actions—i.e., here is what the applicant will do for all things falling in each category, and the costs associated with those actions. Section § 7014(c)(8)(ii) expressly gives DNREC the power to review and approve the conceptual and final plans. The amount of financial assurance necessary for Category 2 and Category 3 then flows from what is in the approved plan.

As a result, the Regulations should spell out what needs to be in the conceptual plan to be submitted. Logically, the plan should include the elements described above. DNREC can then review the plan and determine whether it is adequate to meet the requirements of § 7014(c)(8)(ii). The plan should also include a final amount for which financial assurance must be provided.

Given that the conceptual plan needs to spell out the actions giving rise to the costs for Categories 2 and 3, the RAC should consider whether it makes sense to include in the plan the costs in Category 1. While the language of § 7014(c)(8) does not require Category 1 costs be in the plan, it may make sense for all financial assurance calculations to be in a single document.

⁵ For example, in lieu of digging up and removing contaminated soils, some HSCA-approved remedies involve placing a “cap” of clay or asphalt on top of the soils to prevent human exposure to the contamination below the cap. If a company leaves a site because it is no longer operating there, the continued maintenance of the cap must occur in order to continue to prevent exposure.

⁶ A simple example related to security is a fence placed around a site. If the owner is no longer present on site, who will maintain the fence?

⁷ Depending on the response to a Category 2 Contamination Incident, a similar issue of post-remedy care may arise. The Regulations should require that such costs be considered in the analysis and, if necessary, be part of what must be covered by the Category 2 financial assurance.

The Need For On-Going Review

While § 7014(c)(8) focuses on the time of application (as it is a requirement governing the contents of the application), the Regulations should also recognize that conditions can change (and with it the amount of financial assurance necessary). A facility might change a chemical used in the process, and thus the costs associated with a release of the chemical would no longer need coverage (though there might well be new costs associated with the new chemical). A facility might stop operating one part of the plant but not “all activities at the site” (the language in Category 3). A facility might also expand, and thereby have larger quantities of chemicals that could trigger higher Category 2 or 3 costs. Because conditions might change, the Regulations should include provisions requiring review of costs on a periodic basis (one, five, ten year intervals) to assure that the financial assurance still meets the statutory requirement of “ensuring” that costs will be covered.

Conclusion

I hope that the RAC finds these comments helpful in its deliberations and, ultimately, in its recommendations to DNREC concerning the necessary regulatory changes.

Respectfully submitted,



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Financial Assurance Instruments and Fact Sheet

Code of Federal Regulations Title 40 Protection of the Environment -
<https://www.gpo.gov/fdsys/browse/collectionCfr.action?selectedYearFrom=2017&go=Go>

EPA Action Items for Improving and Maintaining Financial Assurance Data for CERCLA, August 1, 2016 - <https://semspub.epa.gov/work/HQ/100000155.pdf>

EPA Financial Assurance in Superfund Settlements and Orders -
<https://www.epa.gov/enforcement/financial-assurance-superfund-settlements-and-orders>

EPA Financial Assurance Requirements for Hazardous Waste Treatment, Storage, and Disposal Facilities -
<https://www.epa.gov/hwpermitting/financial-assurance-requirements-hazardous-waste-treatment-storage-and-disposal>

RCRA Financial Assurance Instrument - Insurance -
<https://www.epa.gov/sites/production/files/2015-08/documents/insur-fs.pdf>

RCRA Financial Assurance Instrument - Trust Fund -
https://www.epa.gov/sites/production/files/2015-08/documents/tfund-fs_0.pdf

RCRA Financial Assurance Instrument - Letter of Credit -
https://www.epa.gov/sites/production/files/2015-08/documents/loc-fs_0.pdf

RCRA Financial Assurance Instrument - Surety Bonds -
https://www.epa.gov/sites/production/files/2015-08/documents/sbond-fs_0.pdf

RCRA Financial Assurance Instrument - Corporate Financial Test -
https://www.epa.gov/sites/production/files/2015-08/documents/ftest-fs_0.pdf

Surety Bonds - Department of the Treasury Listing of Certified Companies -
https://www.fiscal.treasury.gov/fsreports/ref/suretyBnd/c570_a-z.htm

EPA Superfund Trust Fund - Superfund Special Accounts -
<http://www.epa.gov/enforcement/superfund-special-accounts>