

Charge of the Risk Evaluation and Financial Assurance Work Group

Background Information

The [Coastal Zone Conversion Permit Act](#) (CZCPA), passed by the Delaware General Assembly in 2017, amended the Delaware [Coastal Zone Act](#) (CZA) to provide for development on 14 existing “heavy industry use sites” in the state’s Coastal Zone. Such provisions allow for the “conversion” of these sites to alternative heavy industry use, additional heavy industry use, or a bulk product transfer facility.

All site conversions must be permitted by DNREC through a newly-created “conversion permit”. A Regulatory Advisory Committee (RAC) was convened in June 2018 to provide recommendations to DNREC on how to amend the existing CZA regulations to account for conversion permits.

Role and Scope of the CZCPA Work Groups

The CZCPA RAC is the official body charged with providing recommendations to DNREC on the regulatory approach and content of new CZA regulations that will govern conversion permits.

CZCPA Work Groups are tasked with providing the RAC with a range of *technically feasible options or alternatives* for the RAC to consider. Each option or alternative should have pros and cons clearly delineated. Work Groups are not to determine or recommend a specific option the RAC *should* pursue unless there is only one viable option.

CZCPA Work Group Focus Areas

As of August 2018, four Work Groups have been created, one each to explore the following topics:

- Economic Effect
- Environmental Impact
- Risk Evaluation and Financial Assurance
- (Environmental) Offsets

Note that some of these topics may overlap in scope.

CZCPA Work Group Topic: Risk Evaluation and Financial Assurance

The Risk Evaluation and Financial Assurance Work Group was assembled to provide technically feasible options for the RAC to consider for the regulatory approach to the “evidence of financial assurances” required under a conversion permit.

“Evidence of financial assurances” as outlined in the CZA (see [7 Del. C. §7014\(c\)\(8\)](#)), must be in “sufficient form” and meet the “amount necessary” for three types of financial assurance:

1. **Compliance** – Conversion permit applicants must demonstrate *sufficient resources* for all *costs of compliance* with the Delaware Hazardous Substance Cleanup Act¹ (HSCA) *and* any other relevant state and federal environmental statutes concerning contamination present on the site at the time of application.
2. **Corrective Action** – Conversion permit applicants must provide a *concept plan*² that outlines how, upon the event of an *incident resulting in environmental contamination*, all means will be taken to:
 - a. minimize environmental damage, and
 - b. stabilize and secure the heavy industry use site.
3. **Closure/Post-Closure** – Conversion permit applicants must provide a *concept plan*² that outlines how, upon *termination, abandonment, or liquidation of all heavy industry activities at the site*, all means will be taken to:
 - a. minimize environmental damage, and
 - b. stabilize and secure the heavy industry use site.

While the CZCPA does not statutorily require the regulations to consider specific variables for financial assurance, it *does* require the Secretary of DNREC to consider certain variables for financial assurance should a conversion permit application be submitted to DNREC before the new CZA regulations have been promulgated (see [7 Del. C. §7014\(c\)\(8\)b](#)). These variables include:

1. Size of the site of heavy industry use
2. Quantities of chemicals maintained on the site of heavy industry use
3. Quantities of chemicals generated as wastes on the site of heavy industry use
4. Financial assurances established through other programs operated by DNREC (applicants must be given due credit for such financial assurances)
5. The allowance of “evidence of financial assurance” to include insurance, guarantee, surety bond, letter of credit, proof of assets, qualification as a self-insurer, or other agreements deemed acceptable to the Secretary of DNREC

The Work Group may want to consider these variables in its options development for the RAC.

Charge of the Work Group on Risk Evaluation and Financial Assurance

The Risk Evaluation and Financial Assurance Work Group is charged with presenting to the RAC a range of technically feasible options for what should be considered “evidence of financial assurances in sufficient form and amount necessary”, as it relates to conversion permit applications. In the course of its work, the Work Group should feel free to ask questions of the RAC, should there be a need for specific guidance. The Work Group will be provided a technical consultant who will provide research capacity and methodological expertise to the Work Group. A DNREC staff member will also be assigned to the Work Group to serve as coordinator.

¹ See Delaware Code Title 7, Part IX, Chapter 91: Delaware Hazardous Substance Cleanup Act; incorrectly referred to in the CZA/CZCPA as the Delaware Hazardous Substances Control Act

² The concept plan will be approved by DNREC as part of the conversion permit; a final plan must be approved by DNREC before any activity authorized under the conversion permit can take place.

Essential questions the Work Group will need to address to provide technically feasible options include:

- What are the variables DNREC can consider when evaluating evidence of financial assurances?
- How can conversion permit applicants demonstrate that they have sufficient resources to cover all costs of compliance with HSCA and other relevant state and federal statutes?
- Are there incidents of such low probability in which financial assurance may not be required?
- How can risk (and, correspondingly, cost) be appropriately estimated and evaluated for corrective action incidents?
- How can risk (and, correspondingly, cost) be appropriately estimated and evaluated for closure/post-closure scenarios?
- What types of securities will be acceptable in providing evidence of financial assurances?
- Is there an upper limit/threshold for which applicants can be expected to acquire a security?
- If a conversion permit applicant established financial assurances through other programs (e.g., Resource Conservation and Recovery Act [RCRA], programs through DNREC), can they be given due credit in conversion permit applications? If so, how?

Other questions the Work Group may want to consider include:

- Financial responsibility under RCRA requires both a “per occurrence” and “annual aggregate” amount to be addressed. Can conversion permits consider both of these financial responsibility types?
- Does risk to public health and safety factor into the calculation of amount necessary for evidence of financial assurances?
- How does risk, as it relates to occurrences whose probabilities increase with time (e.g., flooding due to sea-level rise and coastal storms, flooding, other catastrophic weather or climate events), factor into the calculation of amount necessary for evidence of financial assurances?
- Can long-term assurances be required, such as a pay-in/per year “dues,” that could create something like an endowment to fund long-term monitoring and clean-up efforts?

Work Group Outputs

The technical consultant will prepare Work Group outputs on behalf of the Work Group.

Work Group outputs may be most helpful in the form of options for potential approaches and an examination of technical issues and complexities being addressed. This should include outlining the “pros” and “cons” of each of the various options put forth.

Work Group outputs should present options and issues in such a way that the RAC is able to:

- (1) reasonably understand and deliberate the options;
- (2) send questions, comments, and/or areas for further exploration to the Work Group that would further refine options; and
- (3) use the options, as presented, to make clear recommendations to DNREC on how to draft new CZA regulations.

Schedule and Deadlines

The Work Group will convene in August 2018 and conclude, at the latest, by the end of the calendar year. The Work Group is expected to meet at least once per month, with the option to meet more frequently at its discretion.

The CZCPA RAC meets once per month, and the last opportunity for the Work Group to present options is at the RAC's January 2019 meeting. As such, it is to the Work Group's advantage to present workable outputs and technically feasible options to the RAC as early and often as possible.

The scheduled RAC meetings for the remainder of 2018 are as follows:

- Tuesday, August 21
- Wednesday, September 12
- Tuesday, October 9
- Wednesday, November 7
- Tuesday, December 11

The DNREC staff member assigned to the Work Group will assist in scheduling and running Work Group meetings and ensuring that the Work Group stays on track.