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July 9, 2019

Lisa A. Vest
DNREC Office of the Secretary
89 Kings Highway
Dover, DE 19901

Re: CZCPA Regulation Comments – Public Comments on the Proposed Changes to 7 Del. Admin C. 101 – Regulations Governing Delaware's Coastal Zone Register Notice SAN #2017-17/Docket #2019-R-CZ-0013

The Delaware Audubon Society, incorporated in 1977, is a 501(c)(3) nonprofit organization, and a statewide chapter of the National Audubon Society. The original Coastal Zone Act, championed by Governor Russell W. Peterson, was the first of its kind in the nation and set the standard for coastal conservation at a national level. Subsequent to his governorship, Russell Peterson became President of the National Audubon Society. Delaware Audubon is dedicated to fulfilling Russ's vision of enhancing and protecting the Coastal Zone of Delaware, and to developing a better appreciation of our natural environment, including species and habitat conservation. We advocate for environmental issues, principally in the Coastal Zone, and sponsor public programs and school education. Our focus is on the protection of the Delaware Bay and the Coastal Zone.

Delaware Audubon Society endorses the comments of our friends at the Delaware Ornithological Society, a research-based birding group in the State of Delaware. Their comments embody an intimate knowledge of the unique ecological characteristics of the Coastal Zone and take into consideration the impacts to avian species in Delaware.

Delaware Audubon Society opposed HB 190, the legislation that initiated these new regulatory changes, and we also refused to participate in the Regulatory Advisory Committee (RAC) process. We viewed this RAC as the same flawed process that was used to develop the 1998 Memorandum of Understanding (MOU), which DNREC failed to honor in its drafting of the 1999 regulations. The Coastal Zone Goals and Indicators, which emerged from the MOU process, were never developed. These regulations under consideration misrepresent the goals of HB 190, just as the 1999 regulations failed to incorporate the outcome of the MOU. We lack confidence in DNREC and its ability to maintain the public's trust in executing its duties in the implementation of the Coastal Zone Act.

When HB 190 was passed and signed by Governor Carney on August 2, 2017, DNREC was given until October 1, 2019 to develop regulations for the Conversion Permits. DNREC did not start the RAC meetings until 10 months after HB 190 was signed into law, and instead wasted valuable time that could have been used to ensure that the regulations were appropriately drafted. Because DNREC has chosen to push back the initiation of promulgating these regulations, the final stages of the drafting of the regulations are needlessly rushed. This could have been prevented if DNREC had acted more responsibly. Unfortunately, because of DNREC's poor decisions, the public is at a disadvantage with the compressed timeline for the completion of these regulations, including a poorly drafted document filled with inaccurate text and numerous grammatical errors and a joint DNREC and Coastal Zone Industrial Control Board (CZICB) hearing. We find this unacceptable.

We are additionally dissatisfied that the process was not transparent and open, as was promised by DNREC Secretary Shawn Garvin during the House and Senate Hearings for HB 190. Instead of having meetings on evenings and weekends to maximize public involvement, meetings were held during business hours on weekdays when the working public, including members of our board, were unable to attend. Audubon was asked to participate on the financial assurances component of this process, but we could not attend due to our professional schedules. Though DNREC did have a few public outreach workshops, these workshops lacked substance and were instead more of a public relations initiative than a community engagement process.

Had we been able to participate in a robust way, we are confident that many of the problems that are in this document could have been addressed during its formation. Because the process intentionally and willfully excluded the working public, including business professionals, the document is fraught with inaccuracies, includes numerous errors, is inarticulate, and poorly communicates the goals of HB 190.

We are particularly dissatisfied that DNREC exceeded the parameters of HB 190 and failed to adhere to the Start Action Notice #2017-17 for these regulations, which were to be exclusively for the Conversion Permits and not for changing non conversion Coastal Zone permits. For your convenience, we have appended the comments of Professor Ken Kristl, which we fully endorse in total, which describe this problem. That DNREC has chosen to open the regulations for the existing Coastal Zone Act Permits without including that in the Start Action Notice is a violation of the public trust and a violation of the Administrative Procedures Act. We oppose integrating Conversion Permits into the existing structure for Coastal Zone Act Permits and we oppose all proposed changes to the Regulations that are not specific to Conversion Permits.

The public was first asked to comment on these regulations, which were first published in the June 1, 2019 Delaware Register. We were given little more than one month to respond to this 39 page document that took DNREC and the Regulatory Advisory Committee approximately a year to draft. To assist in our comments, we submitted several FOIA requests to DNREC, and DNREC failed to provide documents to date,[1] placing us in a disadvantaged position in drafting our comments. In the absence of information from the

[1] FOIA requests require a response within 15 business days, and the Agency can ask for additional time to provide documents, which they have done in all cases.

Department, we have been forced to make inferences, particularly regarding the Port of Wilmington. When we requested a brief 30 days extension from the hearing officer Lisa Vest, that request was denied. We were told that "sufficient time for comment has been provided in this matter." That DNREC will delay in responding to FOIA requests, while not providing a corresponding extension to the public comment timeline, is an abuse of power.

Given these constraints, we are providing the best possible comments on these regulations. Thank you for the opportunity to submit these comments.

Revisionist History: Instead of honestly discharging the task of creating a Conversion Permit program, these regulations misrepresent the history of the 1998 MOU, particularly in regards to changes to the following text from Appendix C.:

> 3.4 ~~DNREC's process for developing and prioritizing the indicators will include opportunities for formal public review and comment. To ensure that the public has opportunities to provide input into the development and any subsequent revision of the environmental indicators, the Advisory Committee recommended that DNREC establish an Environmental Indicator Technical Advisory Committee (EITAC).~~ In 1999 the Department and its advisors intended to use environmental indicators, yet to be developed, to guide the identification and evaluation of environmental offsets. However, after the Environmental Indicator Technical Advisory Committee deliberated, the members concluded that the resources needed to launch and operate an indicators program would exceed those available to the Department. The General Assembly was silent on the issue of indicators in the CZCPA. The majority of references to indicators have therefore been removed from this guidance, although some provisions remain in the regulations and this guidance in case the resources become available and the Secretary chooses to resume developing the program in the future.

According to former DNREC employee who was environmental manager of Coastal Programs, former Coastal Zone Technical Advisory Committee member, former Delaware Audubon Society President, and current New Castle County Councilman Dr. David Carter: "The technical advisory committee NEVER concluded that the resources needed to launch and operate an indicator program would exceed those available to the Department. This is revisionist history."

It is important that any regulatory changes that are made reflect the conditions that occurred as accurately as possible. We ask that the changes to Appendix C 3.4 be stricken from the final regulations.

Potential for Another Metachem Situation

The potential for heavy industry in the ecologically delicate Coastal Zone highlights the need to learn from the lessons of Delaware's past, particularly Metachem. The 2003 report of the Task Force on Responsible Management of Facilities Handling Hazardous Products (the Metachem Process) found numerous areas where the Metachem incident could have been prevented. These include requiring random inspections instead of routine inspections that were scheduled in advance, and a limitation on the "revolving door", where employees for

DNREC take jobs with the company. These parameters are reasonable and should be included in the Regulations. Failure to do so could create conditions where another Metachem disaster could strain the taxpayers of our State. The costliest taxpayer-funded cleanup in Delaware history, Metachem has already exceeded $110 million dollars, as of 2012.

To prevent a second Metachem, we ask that all inspections of heavy industry use sites be random, and not scheduled in advance. The employees of DNREC should also be forbidden for taking employment at any of these facilities, their parent companies, or subsidiaries, for an extended period of time after leaving DNREC. The revolving door needs to be closed.

Goals Have Not Been Met: The goals of these regulations, as stated in the Preamble, are to "promote improvement of the environment within the Coastal Zone while also providing existing and new industries in Delaware's Coastal Zone with the flexibility necessary to stay competitive and to prosper".

Delaware Audubon Society submits that DNREC has failed to meet both of these goals with the draft regulations.

<u>Environmental Improvement:</u>

The regulations do not promote improvement of the environment within the Coastal Zone. For example, DNREC, in conjunction with the Governor's Office, the Department of Small Business and the Delaware Prosperity Partnership, intends on providing emission reduction credits (credits), which are based on historic facility closures and efficiency improvements. A new business that enters the Coastal Zone will emit new sources of pollution that are not met with real-time elimination of pollutants being emitted elsewhere in Delaware. Because credits do not reflect environmental improvements compared to when the project is built, the use of credits as offsets fails to encapsulate what improvement means to Delaware's environment. We therefore oppose the acceptance of credits as an offset for new sources of pollution and instead ask DNREC to require offsets from genuine projects, located on or near the facility, which are measured through a rigorous program of indicators.

The table below represents the most recent emissions bank data available. Numerous sources of credits originated from outside the Coastal Zone, including a large proportion of credits from the closure of the Chrysler Facility in Newark (University of Delaware / 1743 Holdings LLC).

Held By	VOC		NO_X	
	Ozone Season	Non-Ozone Season	Ozone Season	Non-Ozone Season
Diamond State Port Corporation	34	24	9	7
Delaware City Industries (DCI)	4	2	1	1
DuPont	0	0	0	0
Lafarge	3	2	0	0
VPI	6	4	1	1
1734 LLC	117	78	9	20
Calpine	0	0	27	19
NRG Energy Center	0	0	121	147
Division of Small Business	83	47	43	31
NRG Indian River	3	2	333	239
Total Currently in Bank (5/16/2018)	**250**	**159**	**544**	**465**

The table below represents the credits that are owned by the Department of Small Business, which receives 25% of all credits resulting from plant closures or efficiency improvements. The Department of Small Business uses these credits for economic development purposes (1134 Emission Banking and Trading Program §8.5.2). We would like to discontinue the practice of applying these to Coastal Zone Act Permits and Conversion Permits.

Held By	VOC		NO_X	
	Ozone Season	Non-Ozone Season	Ozone Season	Non-Ozone Season
ERCs Held by DEDO - Start of 2016	66	37	38	33
ERCs sold to MAGCO (2016)				-3
ERCs sold to NALCO (2016)				-1
ERCs acquired by shutdown of Chemours Edge Moor (2017)	17	12	5	3
ERCs sold to Essential Minerals (2018)		-2		-1
ERCs acquired by shutdown of Formosa (2019)	7	5	4	3
ERCs Held by Division of Small Business - As of 6/3/2019	**90**	**52**	**47**	**34**

The regulations fail to account for all sources of pollution from new facilities, particularly the emissions from logistics (rail, trucks, ships, and employee vehicles). We ask that all sources of pollution associated with any new facility be included in the calculation of offsets.

Sea Level Rise planning in the regulations is short-sighted, and only accounts for a useful life that looks 30 years into the future (8.4.2.2). Using the Delaware City Refinery as an example, which was built in 1958 and continues to operate, 30 years of sea level rise planning for the siting of a heavy industry facility fails to account for the potential for new facilities to be operating for a very long time. Delaware sea level rise projections up to the year 2100 predict an increase up to 1.5 meters.[2] Because DNREC has shortened the planning timeframe for sea level rise from the anticipated life of a facility to only 30 years, DNREC has neglected to protect the environment for future generations with these draft regulations.

[2] http://www.dnrec.delaware.gov/Admin/DelawareWetlands/Pages/Sea-Level-Rise.aspx

The regulations furthermore fail to promote the improvement of the environment because they do not include any way of quantifying a baseline of environmental quality or indicators for measuring environmental harms. For example, with our FOIA requests of DNREC of the pollution profile of the Port of Wilmington, we learned that the Department apparently does not track the current emissions from the Port. It does not benchmark emissions in any way. As the Port has been recently sold, with a promise to double in size, it is impossible for the public to know what incremental pollution the citizens in the environmental justice communities surrounding the Port will suffer as a result. Any effort to demonstrate environmental improvement as a result of these regulations must include a baseline study of current emissions.

Financial Assurances:

The second goal of the Regulations was to provide "existing and new industries in Delaware's Coastal Zone with the flexibility necessary to stay competitive and to prosper". In that regard, these regulations also fail.

Financial assurances are a negative incentive for new business to come into the Coastal Zone and will require taxpayer incentives like loans to grants and tax incentives, to cover the costs of the regulations. The regulatory burden forced upon these companies that are considering siting in Delaware's coastal zone is so great that the only way to overcome them is for Delaware to provide financial incentives to cover the upfront regulatory burdens. This amounts to a corporate giveaway.

An example of the corporate giveaway is the reopening of the Delaware City Refinery in 2011. A package of incentives, that included $42 million in a loan that was converted into a grant. The Bloom Energy Tariff has cost Delmarva ratepayers $225,659,503 to date[3] and Delaware Economic Development Office incentives in the amount of $11,250,000. Delaware's $21.5 million in grant and no-interest loan to Fisker Automotive is one of the more shameful moments in Delaware financial history. These are the types of behaviors that we expect from Conversion Permits moving forward given the additional regulatory burden of the financial assurances component.

We believe that the Financial Assurances component is an attempt to protect the State against its own Chancery Court. Delaware's number one business is incorporation of multiple types of businesses, including those with limited liability provisions. By requiring financial assurances for these conversion permits, Delaware is forcing whatever business opens on that site to provide guarantees not reliant on the individual corporation's operating performance. In short, regardless of the incorporation type chosen, the taxpayer can rely on some form of financial guaranty.

The calculation of the financial assurance necessary, as described in 8.4.7, appears intentionally vague. It incorporates two requirements, 1) Environmental Remediation and Stabilization Plan and 2) Sea Level and Coastal Storms Plan. The impact of other factors that could affect the costs that the state may have to bear should also be considered. The

[3] This is the latest total and it is through September 2019 based on Delmarva submissions to the Public Service Commission.

calculation of the amount of financial assurance tied to the above sub plans can lead to inaccurate and exaggerated numbers. Further, these numbers can dramatically change based on the large range of projections for sea level rise and environmental cleanup costs. The taxpayer would be better off with an established minimum level of base insurance coverage for incidents associated with these separate sub plans.

The Metachem disaster, as discussed above, should provide guidance as to the minimum requirements for financial assurance. To comfort the taxpayer, the financial assurance should rest on a dollar certain argument of around $100 million and should be adjusted annually based on the Consumer Price Index for each year following 2019. By tying the amount to the Consumer Price Index, the taxpayer can rest assured that the time value of money will be reflected in the financial assurances offered and that the State will not have to fill any gaps in funds, should that be necessary. Since 2012 the Delaware City Refinery has been maintaining a $75M insurance policy for unforeseen environmental incidents. We know that Metachem represents our largest single environmental failure and is in excess of $110M with more incurring costs ongoing for remediation. By requiring a minimum of $100M in incident insurance and tying it to chain CPI, the taxpayer can be assured that regardless of the type of company or the financial strengths of itself or its parent entities, that there is a minimum level of base coverage in the event of an environmental disaster.

Notwithstanding a $100 million in financial assurance instruments, we agree that the planning for sea level rise and environmental remediation has value. As we recently learned from the explosion at the PES Refinery in Philadelphia, the costs of environmental cleanup from catastrophic events is complex. It is particularly problematic in a bankruptcy situation. The danger that heavy industries impose to fence line communities, the environment and even longer range-impacts, should not be underestimated through a financial assurance mechanism.

We ask that the Regulations be amended to require the disclosure of the beneficial owners of all applicants for Conversion Permits when an entity, such as a Limited Liability Company (LLC) or Limited Liability Partnership (LLP) is the applicant. Limited Liability Companies have been used as fronts to commit various crimes such as money laundering,[3] narcotics trafficking,[4] embezzlement,[5] bribery,[6] securities fraud,[7] prostitution[8] and child sex trafficking.[9] Money laundering and secret beneficial foreign (offshore) ownership of limited liability companies often are common denominators in combination with other crimes.[10] Furthermore, it is possible that entities that conceal beneficial owners could also be used to escape liability in Delaware's Chancery Court. It is vitally important that all entities disclose their beneficial owners in the Regulations.

Consider the example of PBF Energy, which has approximately 10 entities at the Delaware City Refinery alone. An organizational chart that specifies all the entities and sub-entities that will operate at any Conversion Permit site, including the beneficial owners of parent entities, should be appended to each permit application.

DNREC is incapable of permit management, including leveling fines, collecting fines and making sure that fine levels are appropriate. We have been evaluating the existing structure of DNREC penalties/fines and have concluded that the Department is incapable of

representing the taxpayer's interest in financial decisions. For example, the amount collected for violations under the Environmental Control Act[4] has not been updated since 1973, representing a 476.8% discount to present value according to the Consumer Price Index. Such delinquency of maintaining the financial programs harms Delaware's economy, undervalues the damage done to the environment, and lowers the cost of serious emissions events to polluters. For complete analysis, including other fines that DNREC may issue, see Appendix A (enclosed). DNREC's failure to collect on fines and penalties is also a serious problem. For example, The Delaware City Refinery currently has $529,230 in outstanding fines, as shown in Appendix B (enclosed) that were levied in 2013, representing a loss of $52,000 in value based on the Consumer Price Index from 2013-2019. Because DNREC has made no effort to modernize fines to include time value of money considerations, or to keep their permit portfolio up to date, we anticipate that the protective provisions of these regulations will also be neglected.

Furthermore, loopholes in the financial assurances portions of these draft Regulations render them inadequate to protect the public from the risks of abandonment or catastrophe. Bankruptcy situations where insurance premiums are unpaid leave the taxpayers vulnerable. DNREC is also granted authority to render a decision on financial assurance for an option that is not in these regulations, the parameters of which are undefined. We ask that limitations be placed on any additional forms of financial assurance, and that these can not include any form of common stock, preferred stock or convertible preferred stock. Financial assurance should not include equity. It should only include debt.

Sloppy Execution of Regulatory Changes: We fully endorse the analysis of Professor Kristl (see enclosed) on the improper comingling of Conversion Permits with Coastal Zone Act Permits in these Regulations. Doing so not only exceeds the scope of HB 190 and the Start Action Notice, but it creates nested sets of rules that are difficult to navigate.

Environmental Justice: We support the inclusion of environmental justice principles in these Regulations and ask that all offsets for Conversion Permits be required to be located within the fence line communities that will be most impacted by the project's pollution. We fear that if this requirement is not made, offsets will instead be made in affluent communities, such as Greenville, where the immediate health effects of emissions will not be felt. Any offsets that occur outside of the immediate area where the pollution is being emitted places the environmental justice communities that are adjacent to the 14 heavy industry use sites in greater harm.

Furthermore, all new and existing heavy industry and bulk product transfer facilities in the Coastal Zone should be required to have a Community Advisory Panel (CAP). The implementation of mandatory CAPs provides a structure for community engagement on an ongoing basis. The Delaware City Refinery has operated a self-selected CAP for many years that has served as a poor example of how ongoing community engagement can be implemented. The regulations should specify the composition, transparency, meeting schedule, and report minutes to DNREC annually.

[4] Title 7 Delaware Code Chapter 60 § 6005 (b)(1).

The Department should "require", not encourage, applicants to engage in meaningful dialogue with those communities in developing potential offset proposals. All offset proposals should be developed with a robust community engagement process that incorporates local knowledge and community needs about environmental and public health risk.

Permit Duration is Flawed

We submit that a 20 year permit duration is too long and the time frame appears to be arbitrary. The length of the authority of the State in the issuance of permits should not exceed the authority of federal permits (5 years for Title V and NPDES). As a result, we request that the length of a Conversion Permit be limited to five years.

A benefit of a 5 year permit cycle for Conversion Permits is the ability of the state to reassess whether permittees are acting as good neighbors. The leverage of the State over a shortened permit cycle will enable the State to better control facilities that become chronic violators, as well as to update responsible forecasting for the Financial Assurances. Planning in the corporate world is often tied to a 5 year planning cycle, so from a corporate standpoint, it also makes sense that permit duration should be 5 years.

DNREC Has Acted Inconsistently and Irresponsibly

In HB 190, and in the creation of Conversion Permits, the General Assembly went out of its way to exclude Liquified Natural Gas (LNG). In the Crown Landing case, the State of Delaware denied New Jersey a permit for a new Delaware River LNG terminal. However, earlier this summer Bryan Ashby represented Delaware before the Delaware River Basin Commission in support of an LNG terminal just outside our Coastal Zone waters in Gibbstown, New Jersey. This project will impact the Coastal Zone and Delaware's economically valuable Bayshore. The increase in shipping traffic in LNG export increases the probability of logistical accidents resulting in major catastrophe. DNREC has not acted in the best interest of Delaware's Coastal Zone in prior decisions, and this trend has continued with these regulations.

DNREC has also obfuscated on transparency, including our FOIA requests regarding these regulations and existing permits. In a letter from Chief Deputy Attorney General LaKresha Roberts on July 26, 2017 (see Appendix C), the Delaware Department of Justice found that "DNREC has failed to provide evidence of its compliance with 29 Del. C. $ 10003(h)(1) in connection with Mr. Martell's August 17, 2016 request" and that "DNREC has failed to provide evidence that DNREC provided a response within fifteen (15) days of the request "either by providing access to the requested records, denying access to the requested records or parts of them, or by advising that additional time is needed because the request is for voluminous records, requires legal advice, or a record is in storage or archived." This represents a pattern consistent with the misbehavior regarding our FOIA requests for these regulations. Such behavior is unlawful and unacceptable.

Potential for Abuse at Port of Wilmington

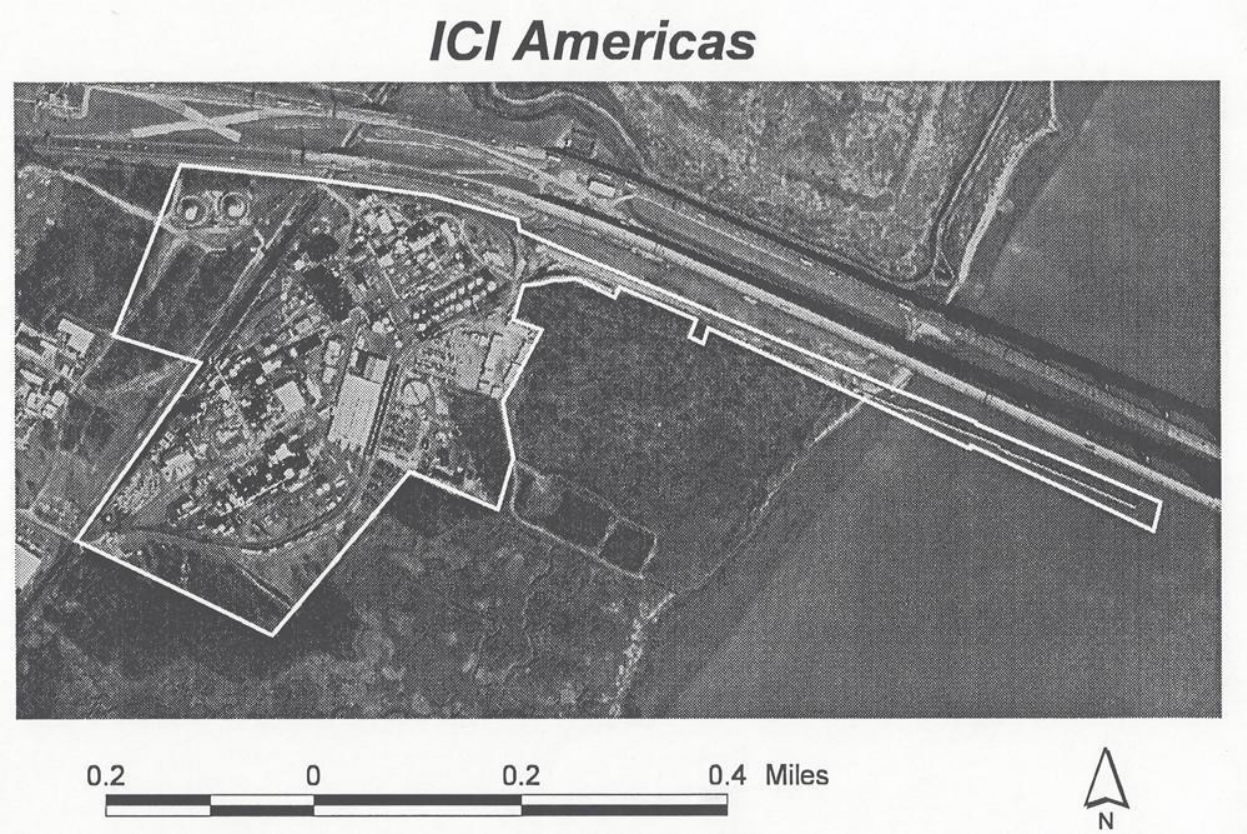
We object to the changes in section 5.1.10 that exempt the Port of Wilmington or its successor from the Coastal Zone Act. Gulftainer, a private United Arab Emirates Corporation, entered into a 50 year operating agreement through its GT USA subsidiary. Questions of ownership of environmental incidents and accidents should be known by the Delaware taxpayer, given the partnership agreement. As a foreign corporation the question becomes, what, if any, financial assurances exist at the Port now in the event of an environmental incident or accident? The exemptions in these regulations transfers the privileges of a public entity to a private company, which are inherently problematic.

We have concerns about the projected incremental pollution as a result of the port expansion, combined with the anticipated doubling of ship traffic at the Port of Wilmington, without any of the protections afforded by the Coastal Zone Act. GT USA has already announced the intention to increase the volume of petroleum coke[5] handled at the Port of Wilmington, which is a risk factor for public health and the environment. We ask that the operators of the Port not be granted an exemption to Conversion Permits in these regulations.

Discrepancies Between Footprint Maps

We are confused about the discrepancy between the following two maps for ICI Americas / Uniquema. The first map, from the 1998 EITAC, shows a much different footprint than that provided in the regulations. To the extent that this represents a change to the geographic footprint, it would be improper. We ask that the Hearing Officer's report reconcile the discrepancy between these two maps, and assess potential differences in the other thirteen sites, so that the public can be assured that changes have not been made without adequate public notice. We further ask that the 1998 map of the footprint for ICI Americas / Uniquema be maintained in any changes to these regulations.

[5] https://www.joc.com/port-news/us-ports/port-wilmington-del/gulftainer-plan-quintuple-wilmington-delaware-capacity-stirs-competition_20181010.html



1998 EITAC Map provided by EITAC member Debbie Heaton

Proposed 101 Regulations Governing Delaware's Coastal Zone

Section by Section Review of Regulations

We offer the following suggestions, section by section of the regulations. To reiterate our point above, we ask DNREC to remove all changes to the Regulations that exceed beyond Conversion Permits, as these extend beyond HB 190 and the Start Action Notice for these regulations, as this is improper. However, to the extent it would be helpful, we are making suggestions to the entirety of the proposed changes, including those for standard Coastal Zone Act permits.

3.0 Definitions

The following definitions warrant clarification:

"Environmental Damage" includes "harm to human health". This harm should be clarified as clearly as the harm to "environment", which is described as follows: "including wildlife and wildlife habitat, which can result from such occurrences as pollution, releases of substances to air, land, and water, soil disturbance and erosion, alterations to drainage, filling of wetlands, habitat disturbance from light and noise, radiation, and others."

"Permittee" is defined to include an "entity". The meaning of entity should be further described to include Corporations, Limited Liability Companies and Limited Liability Partnerships.

"Pollution" is defined to include "adverse impacts". Adverse is a subjective term and the definition should be clarified. We ask that "light" be added to the definition.

"Project Site" is defined to include the location in which the facility operates, not the footprint. Because Project Site can be just part of a parcel, redevelopment can occur on the less contaminated portions of the footprint, thereby ignoring the environmental cleanup goals of HB 190.

The proposed regulations are lacking definitions that should be included:

"Heavy Industry" and "Heavy Industry Use" should be defined sufficiently to include the numerous different ways that the term appears throughout the document. In some cases, the definition is used to describe the footprint of the site as defined in the Coastal Zone Act, including:

- 2.2 Heavy industry use site[s], as defined in 7 Del.C. Ch. 70, §7002(g)
- 2.3 Heavy industry use sites subject to conversion to an alternative or additional heavy industry use or bulk product transfer facility
- 8.2.10 Footprint of the heavy industry use site
- 8.5.2 Environmental goals for the heavy industry use site and Coastal Zone
- Appendix C 2.1 Fourteen heavy industry use sites

In other cases, the term "heavy industry use" or "heavy industry" is used to define a type of activity at the site, which is not defined in the Coastal Zone Act, including:

- 4.1 Heavy industry use of any kind not in operation on June 28, 1971
- 8.3.2.4 Comparison with the most recent heavy industry use
- 8.4.3 Conversion to an additional or alternative heavy industry use or bulk product transfer facility
- Appendix C 2.1 Alternative or additional heavy industry use
- Appendix C 3.1 Precluded from future heavy industry uses
- Appendix C 3.1 New heavy industry uses are allowed to be added
- Appendix C 4.4 Most recent heavy industry of the site
- Appendix C 5.0 Counter the environmental impacts of a heavy industry use

There appears to be no way for the public to know if a proposed activity is, in fact, a heavy industry use or not. Therefore, it is difficult to know when a conversion permit may be needed on one of the 14 sites of heavy industry use, or when a standard Coastal Zone Act permit may be sufficient. This could lead to Coastal Zone Act permits being issued when a Conversion Permit is required.

A clear definition of "heavy industry" and "heavy industry use" in regulations to describe those cases of the terms being used that do not refer to the footprint of the site, as described in the Coastal Zone Act, could alleviate this confusion.

"Liquified Natural Gas" is not defined in the regulations, yet is referred to in 4.1.5 and 4.10 and is used to describe the liquid form of natural gas that is easier and safer to transport. However, there is another, similar, liquid that is also a concern, "Natural Gas Liquids", which are "hydrocarbons—in the same family of molecules as natural gas and crude oil, composed exclusively of carbon and hydrogen. Ethane, propane, butane, isobutane, and pentane".[6] Natural Gas Liquids present a similar risk factor to communities and the environment as Liquified Natural Gas, and therefore this distinction should be clarified in the definitions. The definition of Liquified Natural Gas should be broadly enough to include Natural Gas Liquids.

4.0 Prohibited Uses

4.1.1 The phrase "that is not one of the non-conforming uses that was operating on June 28, 1971" is unnecessary per the line above in 4.1.

4.3 Offshore gas, liquid, or solid bulk product transfer facilities are permissible with a conversion permit, however, HB 190 restricts the destination of such transfers to within the Coastal Zone, not offshore. It is incorrect to keep the term "offshore" in this section.

8.0 Permitting

8.2 Requires an Environmental Impact Statement Statement to be certified by a Delaware registered professional engineer or professional geologist. However, in the Definitions section,"Environmental Damage" is defined to mean "harm to human health and the environment, including wildlife and wildlife habitat, which can result from such occurrences as pollution, releases of substances to air, land, and water, soil disturbance and erosion, alterations to drainage, filling of wetlands, habitat disturbance from light and noise, radiation, and others." A certified professional engineer or professional geologist is unable to use their licensure to make assessments on the full range of environmental damage, including human health and biological factors. The requirements for the Environmental Impact Statement should include sections that are individually certified by a professional engineer, professional geologist, licensed physician, and a wildlife biologist or ecologist, where appropriate. All Environmental Impact Statements should be subject to third party peer-review.

[6] https://www.eia.gov/todayinenergy/detail.php?id=5930

8.2.2 Changes the development of indicators by DNREC from “shall” to “may”. This inappropriately rejects prior commitments by DNREC and the MOU from 1998, and should not be changed. DNREC should act now to promulgate the indicators that were agreed upon 21 years ago. Its failure to do so violates the public trust. DNREC should not issue one CZA or Conversion Permit until the indicators are established.

8.2.3 Destruction of wetlands is vague and subjective. The type or degree of destruction should be defined.

8.2.4 …”displacement by structures of floodwaters” should read displacement of floodwaters by structures”.

8.2.6 The Description should be defined so as to include impacts on impingement and entrainment, the pollutants and their quantities, thermal pollution and its impact on aquatic life.

8.2.7 “Obnoxious” is a subjective and vague term. The regulations should use objective terminology that is easy to define and understand.

8.2.10 For conversion permit applications only, the effect of the project site’s proposed boundary on environmental remediation within the footprint provides the opportunity for redevelopment of heavy use sites without the environmental cleanup that served as the justification for HB 190 and should not be allowed. Any development on the site should be required to remediate within the entire footprint.

8.3.1.1 Should specify construction and post-construction operating.

8.3.1.2 Should be changed to include school taxes.

8.3.2.1 Must document and demonstrate the site's design for manufacture and where the state can compare with other locations doing similar work (benchmarks). The applicant shall provide references and data to support any financial analyses, citing published, peer reviewed articles, models and modeling results, and data sources, and official government regulations, reports and studies, where available and relevant. The application shall be on a form supplied by the Department. Information provided should break down construction from operations. As Bloom, Fisker, and TDC have taught us, we can't rely on financial projections from new industry startups.

8.4.2.4 Grammatical error: ...ensure that ~~the~~ any facilities...

8.4.2.7 How is the description of the potential adverse impacts to upstream and adjacent properties to be documented? It should include the types of analysis that are required and who is authorized to certify that analysis.

8.4.3 Grammatical error: there should be a hyphen between “land” and “disturbing”, so as to read …”major construction or land-disturbing and start up events“...

8.4.4.1.1 Applicant must identify all past and ongoing sources, locations, and concentrations of contamination or environmental damage that require remediation under federal or state law… How is this different from what has already been done? If a Phase I and/or Phase II Site Assessment is required, that should be specified in the regulations.

8.4.4.1.4 Applicant must include an estimate, provided by a third-party with experience in environmental remediation. However, the third-party company stipulation is too vague and should be more specific to describe the credentials required for the estimate.

8.5.2 Grammatical error: the "and" between "neighboring land uses" and "compatibility with county…" should not be deleted.

8.5.2 What are the "environmental goals for the heavy industry use site and Coastal Zone"? This needs to be clarified, including who makes this decision, how the decision is to be made, and how often it is to be updated.

8.3.3 "The Secretary shall also consider any impacts the proposed activity may have on the Department's environmental goals for the Coastal Zone and the environmental indicators used to assess long-term environmental quality within the zone." should not be deleted. This violates the terms of the 1998 MOU and is a violation of the public trust.

8.6.1 Permit duration should not be 20 years. Even federal permits issued under the Clean Air Act and the Clean Water Act only have a life of 5 years. Conversion Permits should only be issued for 5 years, and should be subject to renewal after 5 years.

8.6.2.3 Who is able to request a public hearing? This should be clarified so that it is clear that any member of the public may request a public hearing, and that the DNREC Secretary must hold a public hearing if one is requested.

8.6.3.1 There should be no minor permit modifications without public notice. Because "minor" is not defined, this is too vague and could be subject to abuse.

8.4.6 does not require frequency or number of shipments. This is related to transportation method used to get bulk product to final destination. How many trucks or train loads will be scheduled per week, month, year? what is pollution in relation to these transportation options?

In the following sections, the role of the Secretary should instead be replaced with the Delaware State Treasurer. The Secretary does not have the financial experience or capability to render such a decision or assume such responsibilities.

- 8.6.4.1
- 8.6.4.1.1.3
- 8.6.4.1.1.5
- 8.6.4.1.1.7
- 8.6.4.1.2.4
- 8.6.4.1.2.8

- 8.6.4.1.3.5
- 8.6.4.1.3.8
- 8.6.4.1.3.9

8.6.4.1.3.8.4 If the permittee does not pay the premium and 120 days passes before going bankrupt, the State will hold the debt. This places the State in a financially precarious position and is unacceptable.

8.6.4.1.3.8.5 In the event of abandonment by the permittee, the insurance policy covering the facility should be required to remain in effect if the Treasurer makes premium payments.

8.6.5.3 This places the State in a precarious position regarding bankruptcy and is unacceptable, as in section 8.6.4.1.3.8.4 noted above.

9.0 Offsets

9.1.1 Offsets should be required to be located within the Coastal Zone and within 3 miles of the site, so that the communities who are impacted will also be the ones who experience the benefits that any offsets provide. Applicants should be required to "more than offset" by 150%, which would include normal operating capacity and upsets. Regulations should specify how "negative environmental impacts" are to be quantified (i.e. indicators).

9.1.2 "Negative impacts" is too vague and should be clarified.

9.1.5 That the applicant "shall attempt to offset the release…" is not acceptable. What constitutes an attempt? What if the attempt is deemed too expensive? The benefits should be in the area of impact of the project. Emissions reduction credits should not be permitted to be used as any offsets. Offsets should only include reductions in current emissions compared to the baseline before the project is constructed, not past emissions reductions that were made, perhaps decades ago, by other facilities.

9.1.8 Permits should only be issued after all other permits are issued, not at the time of submission. There can be errors in an application for air or water that cannot be known to DNREC until the permitting process and the public comment period occurs.

9.2 This section should include indicators and a baseline assessment of those indicators for benchmarking the project.

9.2.4 The "Department's environmental goals for the Coastal Zone" should be clarified to explain what this actually means, who makes the decision, the process for making this decision, and how often the decision is to be updated. "The" should not be replaced with "any", as this is too vague and erodes the commitment of the 1998 MOU.

9.2.8 The monitoring schedule should be required to be done by a third party.

9.2.9 Public outreach should be required for all offset proposals.

12.0 Permit Recordkeeping and Reporting

12.1.2 Inspection should be unscheduled and "random". Inspections should not be able to be scheduled in advance. This provides an opportunity for a facility to conceal problems.

12.1.6 Sea Level Rise and Coastal Storm Plan should be updated every 5 years, not every 10 years, to reflect our requested 5 year permit cycle.

17.0 Fees

17.4 "Financial insurance" should instead read "financial assurance".

18.0 Enforcement

18.2 The conditions in which the Secretary shall be required to file for an injunction should be specified in the regulations. This protects the public by providing an understanding of those situations where the State must take action, and also provides clear direction to potential applicants about the conditions under which they may be shut down.

Appendix C

1.0 Introduction. The history should not be removed.

2.1 Grammatical error: "in the statute **an** as described" should instead read "in the statue **and** as described".

3.0 Environmental Goals and Indicators should not be removed.

This is false and should be stricken.

4.5 The role of the Secretary should instead be replaced with the Delaware State Treasurer. The Secretary does not have the financial experience or capability to render such a decision or assume such responsibilities.

5.1 Grammatical error: "we well as projects that are" should read "as well as projects that are".

5.1 The Department should "require", not encourage, applicants to engage in meaningful dialogue with those communities in developing potential offset proposals, including engaging the public and holding public meetings in partnership with DNREC.

5.2 The word "discrete" should not be used to describe a type of impact, as it can have numerous meanings. Another word should be chosen for clarity.

6.4 The definition of footprint should not be removed from the port. This could be interpreted to mean that anything owned by the port could fall into the port's special status, not just things within the footprint, which expands the heavy industry use sites to new areas.

In the last paragraph of Appendix C, “the” should be added between “...information about” and “effects of the Coastal Zone Program.”

Thank you for accepting our comments, we look forward to reading your response.

Sincerely,

Board of Directors
Delaware Audubon Society