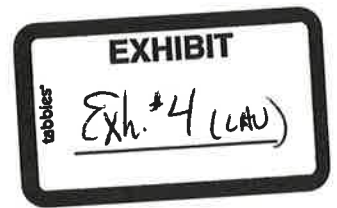


APPENDIX "D"



Legal Issues Memorandum

To: Lisa Vest, Regulatory Specialist (Hearing Officer)
From: Ralph K. Durstein III, Deputy Attorney General
Date: July 29, 2019
Regarding: Coastal Zone Act Conversion Regulations



On June 1, 2019, the Secretary proposed amendments to the Coastal Zone Regulations, 7 Del. Adm. Code 101, to incorporate changes necessitated by the Coastal Zone Conversion Permit Act ("CZCPA"), 82 Del. Laws Ch. 120 (Aug. 2, 2017). A public hearing on the regulations was held on June 24, 2019, and the public comment period extended through July 9, 2019. Several of the comments questioned the process for adoption of the regulations and approval by the Coastal Zone Industrial Control Board ("CZICB"), pursuant to 7 Del. C. §7005(b). This memorandum addresses those concerns.

1. Can DNREC and the CZICB hold a joint public hearing?

Yes. Both DNREC and the CZICB are subject to the provisions of the Administrative Procedures Act ("APA") governing the adoption of regulations. See 29 Del. C. §10161(a)(10) and (b). The regulatory adoption process is set forth in Subchapter II of Chapter 101 of Title 29. With respect to the CZCPA, the General Assembly recognized that amendments to the Coastal Zone Regulations would be needed, and the Secretary was directed to develop and propose regulations "for the further elaboration of conversion permits under §7014 of [Title 7] in a manner consistent with the purposes and provisions of [Chapter 70 of Title 7]". 7 Del. C. §7005(c) (as amended).

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Insofar as timing, H.B. 190 mandated that DNREC “start the public workshop process to promulgate revised regulations consistent with this bill no later than October 1, 2017 and shall promulgate the revised regulations by October 1, 2019”. 81 Del.Laws Ch. 120 §9 (Aug. 2, 2017). All Coastal Zone Act (“CZA”) regulations are subject to approval by the CZICB. 7 Del.C. §7005(b). The CZICB may alter conversion permit regulations at any time after a public hearing. 7 Del.C. §7005(c).

The APA does not require a public hearing on proposed regulations; but allows for public hearing in the discretion of the agency. 29 Del.C. §10117. With respect to the CZCPA, the Secretary and the Board Chair determined that a joint public hearing should be held on the Regulations. When a public hearing on proposed regulations is held, the APA requires notice of the regulations and of the hearing, the transcription of verbal comments, and the opportunity to submit written comments for a minimum of fifteen days after the public hearing. §10117(2); §10118(a).

Nothing in the APA or Chapter 70 of Title 7 would prevent a joint hearing on the same regulations by two (or more) State agencies or entities. Such joint hearings have been conducted in the past without issue or challenge. In this instance, as in previous cases,¹ the hearing process yielded written materials, including the transcribed testimony and submitted comments and summaries, of the evidence, per §10118(b), that are independently reviewed by the Secretary and the CZICB after the hearing.

¹ DNREC and the Delaware Department of Agriculture held joint hearings on proposed regulatory amendments governing firearms in State Parks and State Forest Areas, as per the *Register of Regulations*. The resulting Regulations were challenged, *DSSA v. DNREC*, 196 A.3d 1254 (Del.Super. 2018); but the joint hearing process was not questioned.

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2. Must CZICB members be present at the public hearing?

No, there is no requirement that members attend a public hearing, and, indeed, there is no formal role for them at the hearing. §10118. The same is true of the DNREC Secretary and program staff. *Id.* A public hearing must be distinguished from the later vote on the regulations, which can only take place after the deadline for public submissions (fifteen or more days after the hearing) has passed. §10118(a). It would be premature (and would violate the APA) for either the Secretary or the CZICB to take any action on the regulations at the hearing. Under the APA, a hearing on regulations is not a question and answer process, but rather an opportunity for the public to be heard, without any response or input from the agency or board. It can be counterproductive to have senior staff or board members actively participating at a hearing, because one board member or less than a quorum cannot properly speak for a public body, and no action by DNREC or the CZICB can be taken prior to a review of the full record. §10118(b). In the case of DNREC, the Secretary may ask for a "technical response memo" ("TRM") from program staff, analyzing public comments. This document, and the report of the hearing officer, in addition to the transcribed testimony and the written comments submitted, would be subject to review by the Secretary and the CZICB. The Secretary and the board members have the responsibility under the APA to review "all the testimonial and written evidence and information submitted, together with summaries of the evidence and information by subordinates" in determining whether regulations should be adopted. 29 *Del.C.* §10118(b).

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3. Can a public hearing on regulations be conducted by a hearing officer as designee of the Secretary and the CZICB?

Yes. The APA specifically provides for this at 29 *Del.C.* §10117(1), which authorizes the use of a “subordinate designated by the agency” who can issue subpoenas, administer oaths, and control the proceedings. Specifically, the hearing officer is empowered to exclude irrelevant, immaterial, insubstantial, cumulative, unduly repetitive, or privileged matter. §10117(1)(c). The hearing officer may also be tasked to prepare a summary of the evidence and information presented, both at the hearing and through written materials. §10118(b). This is increasingly how agencies handle public hearings. It is an efficient use of time, and ensures that everyone who so desires has the chance to make public comments, and/or to submit prepared comments for the record. With the use of a court reporter, this approach yields a verbatim record for review by the agency or board, in conjunction with comments submitted before, during, and after the hearing, and information provided by subordinates. §10118(b). The APA requires that the record remain open at least fifteen days following the hearing. 29 *Del.C.* §10118(a). The public hearing, if held, is thus just one step in the process of gathering feedback and comments from the public for later review and decision. The APA contemplates that the Secretary, and in this case the Board, will review the record only at the conclusion of the hearing and after receipt of all written materials within the time allowed following the hearing (fifteen days, in this case). Only at that point can the agency determine whether the regulations should be adopted, and issue the required order, pursuant to §10118(b).

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4. What version of the regulations should be approved by the CZICB?

The CZICB will vote on the final version of the regulations approved by the Secretary pursuant to 29 *Del.C.* §10118(b). This is consistent with the CZA mandate that regulations adopted by DNREC be “subject to approval by the Board”. 7 *Del.C.* §7005(b). The APA contemplates a regulatory adoption process that begins with the notice of new proposed regulations through publication in the *Register of Regulations*. 29 *Del.C.* §10115. After public comment, the agency must then publish the final version of the regulations, incorporating any changes. §10118(b). It is this version that will be submitted to the CZICB, along with the record of comments, the “technical response memo” from DNREC staff, and the Hearing Officer’s report, for review and a vote at a meeting of a quorum of the Board members.

5. Does the Secretary have authority to propose changes in CZA regulations beyond those necessitated by the CZCPA amendments?

Yes. The DNREC Secretary has broad authority to propose regulations, and amendments to regulations, under the CZA. 7 *Del.C.* §7005(b). With respect to the CZCPA, the Secretary has a specific mandate from the General Assembly to promulgate regulations “for the elaboration of conversion permits” by October 1, 2019. 82 *Del.Laws* Ch. 120 §9; 7 *Del.C.* §7005(c). The only pertinent statutory limitation is that the amended regulations be consistent with §7003, §7004, and §7014 of Title 7. §7005(c). There is nothing to prevent the Secretary from incorporating changes to the Regulations beyond those dictated by the CZCPA, so long as they are consistent with the CZA. The Secretary is not limited to only changes necessitated by the adoption of the CZCPA.

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Any changes to the existing Regulations are subject to the notice, publication, comment, and final promulgation provisions of the APA, *infra*. This procedural process ensures that the public is afforded notice of all the changes that are proposed, whatever their source or motivation.