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July 4, 2019

Lisa Vest
Hearing Officer
Delaware Department of Natural Resources & Environmental Control
89 Kings Highway
Dover, DE 19901

Coastal Zone Industrial Control Board
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

Dear Hearing Officer Vest and Members of the Coastal Zone Industrial Control Board:

Pursuant to public notice, I hereby submit these written comments on the proposed revisions to 7 Del. Admin. C. § 101, the Regulations Governing Delaware's Coastal Zone. I was an active commenter throughout the Regulatory Advisory Committee (RAC) process, providing six sets of comments at the beginning of the process, as well as a set of comments on the draft RAC recommendations to DNREC.

Comment #1: The Simultaneous, Dual Public Hearing is Procedurally Improper

Both DNREC and the Coastal Zone Industrial Control Board (Board) held a simultaneous, dual public hearing on June 24, 2019. DNREC's obligation concerning public hearings arises from the Administrative Procedures Act, 29 Del. C. § 10101 *et seq*. Pursuant to 29 Del. C. § 10115, DNREC was required to give public notice of the proposed changes to the Coastal Zone Act (CZA) Regulations. Having decided to hold a public hearing, DNREC is further obligated to hold the public comment period open after the hearing, § 10118(a), and then,

> At the conclusion of all hearings and after receipt within the time allowed of all written materials, upon all the testimonial and written evidence and information submitted, together with summaries of the evidence and information by subordinates, the agency shall determine whether a regulation should be adopted, amended or repealed and shall issue its conclusion in an order . . .

§ 10118(b). As part of its decision-making process, DNREC can make changes to the draft regulations, and then must determine whether any changes to the proposed regulations arising out of its post-hearing

review are "substantive;" if they are, DNREC must re-notice the revised regulations and provide further opportunity for comment. § 10118(c). In short, the proposed regulations before the Hearing Officer and the Coastal Zone Industrial Control Board ("Board") on June 24, 2019 were not final.

The Board's obligation to hold a public hearing arises from the fact that the CZA empowers DNREC to "issue regulations" under the Act, 7 Del. C. § 7005(b), but "all such regulations shall be subject to approval by the Board." *Id*. The Board is also subject to the Administrative Procedures Act, *see* 29 Del. C. § 10161(a), and thus must comply with the same requirements as set forth above for DNREC.

The fundamental problem here is that the proposed regulations before the Board on June 24, 2019 are not the final regulations issued by DNREC, but are subject to change as DNREC goes through the 29 Del. C. § 10118 process. DNREC cannot "issue regulations" until that process is finalized. As such, the Board is not satisfying its obligations under the Administrative Procedures Act via the June 24, 2019 hearing; rather, it is obligated by the APA to hold a hearing on the version finalized by DNREC. Thus, relying on the June 24, 2019 public hearing to satisfy all public hearing requirements is not supported by the law.

I appreciate the fact that the simultaneous, dual hearing was likely the result of DNREC and the Board trying to meet the October 1, 2019 deadline set forth in the Coastal Zone Conversion Permit Act (CZCPA). I note, however, that the RAC did not commence meeting until July 2018—a year after passage of the CZCPA. DNREC—perhaps for very laudable reasons—started the regulatory process with nearly half of the time already gone. Whatever the reasons for the timing crunch, the requirements of the APA are clear. Unless the Board holds a public hearing after DNREC finalizes the proposed regulations, a violation of the APA will occur.

Comment #2: Portions Of The Proposed Regulations Exceed DNREC's Authority And Purpose

29 Del. C. § 10115(a) in the Administrative Procedures Act governs proposals to issue regulations. It requires that that proposed regulations be submitted to the Register of Regulations and include "a brief synopsis of the subject, substance, issues, possible terms of the agency action, a reference to the legal authority of the agency to act and reference to any other regulations that may be impacted or affected by the proposal." Pursuant to this requirement, the Notice of the proposed regulatory changes provided in the Register of Regulations states:

> House Bill 190, the Coastal Zone Conversion Permit Act of 2017 (CZCPA), amended the Coastal Zone Act of 1971 and required DNREC to revise its Regulations Governing Delaware's Coastal Zone (7 **DE Admin. Code** 101). Prior to the passage of the CZCPA, all heavy industry and bulk product transfer activities not in operation on June 28, 1971 were prohibited in the coastal zone. The CZCPA allows for the permitting of these activities under certain conditions. The proposed regulations specify these conditions in accordance with the CZCPA.

Clearly, DNREC has characterized the Proposed Regulations as being drafted in response to, and pursuant to and limited by the authority granted in, the CZCPA.

In this context, it is important to identify what the CZCPA did and did not do. The CZCPA amended the CZA to allow 14 sites in the Coastal Zone that were nonconforming uses to have the opportunity to create new heavy industry uses or bulk product transfer facilities via a new conversion permit. As the Synopsis to H.B. 190 put it:

> This Act establishes a procedure to allow for the responsible, productive reuse of the 14 existing sites of heavy industry use within the coastal zone. Specifically, this Act provides that the Secretary of the Department of Natural Resources and Environmental Control ("Secretary") may issue a conversion permit entitling the owner, operator, or prospective purchaser of an existing heavy industry use site operate an alternative or additional heavy industry use at a heavy industry use site.

But that is all the CZCPA does. It did not alter or amend the CZA as it applies to anything else in the Coastal Zone other than the 14 sites. It does not alter or amend the permitting process for non-conversion permit sites. Indeed, as DNREC states in the proposed Appendix C to the Proposed Regulations, after the CZCPA, "there are two types of coastal zone permits: one is a standard coastal zone permit and the other is a conversion permit." Proposed Regulations, Appendix C, § 2.1. The CZCPA is focused solely on creating a conversion permit side in the CZA.

The CZCPA, in Section 9 of H.B. 190 (as amended by House Amendment No. 4), specifically required that DNREC "shall 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" (emphasis supplied). The Synopsis to House Amendment No. 4 described this provision as "This amendment requires that the regulatory process regarding *promulgation of new regulations stemming from this legislation* begins and is completed by specific dates" (emphasis added). This language clearly indicates that the General Assembly intended for the regulatory process to be limited to the regulatory changes necessary to carry out the new conversion permit process created by the CZCPA.

A review of the Proposed Regulations shows that DNREC has exceeded this limited authority and purpose by making numerous changes to the existing Regulations as they apply to non-conversion permits (what DNREC calls "a standard coastal zone permit"). At least some of these unauthorized changes appear to be the result of DNREC's decision to try to incorporate conversion permit concepts directly into the provisions that also govern "standard" CZA permits. DNREC did this despite my public comment suggestion at the beginning of the RAC process that the changes for conversion permits be set forth in a separate section of the regulations so as not to affect non-conversion permits and statements made by DNREC at the second public meeting of the RAC that it intended to follow that suggestion. These unauthorized changes include:

4.10	adds new prohibited use
5.1.10	extends the exception for the Port of Wilmington to "successors" of Diamond State Port Corp
5.1.20	extends exception for Public Sewage Treatment Plants
7.1	changes definition of who can ask for a status decision
8.1.11	adds a financial assurance statement requirement to all permit applications
8.2	imposes a new certification requirement for Environmental Impact Statements (EIS)
8.2.1	adds an annual basis and singular event requirements for all EIS
8.2.2	changes the requirement concerning environmental indicators for all EIS
8.2.7	changes requirement concerning glare, heat, noise, vibration, radiation, electromagnetic interference and obnoxious odors in all EIS
8.3.1	adds an Economic Effects Analysis requirement to all permit applications
Deletion of old 8.3.3	deletes requirement to consider impacts on environmental goals and indicators in all permit applications
8.5.1	creates a new "weighting" for consideration of non-conversion permit applications
8.6.1	creates permit duration limits applicable to non-conversion permits
8.6.2	creates a permit renewal process applicable to non-conversion permits
8.6.3	creates a permit modification process applicable to non-conversion permits
9.1.1	changes requirement that offsets for non-conversion permits be more beneficial to the environment of the Coastal Zone in favor a statewide benefit
9.1.3	eliminates regulatory preference for offset projects "that are within the Coastal Zone, that occur in the same environmental medium as the source of degradation of the environment, that occur at the same site as the proposed activity requiring a

permit and that occur simultaneously with the implementation of the proposed activity needing an offset."[1]

9.1.4 creates a third-party verification option for offsets

9.2.8 creates a monitoring schedule and third-party verification requirement for non-conversion permit offsets

9.2.9 imposes public outreach requirements on non-conversion permit offsets

Deletion of old 9.3 deletes the enforcement provisions applicable to offsets on non-conversion permits

12.1.1-12.1.4 imposes new recordkeeping and reporting requirements on non-conversion permittees

19.1-19.2 reduces the scope of severability and invalidation of the regulations

Appendix C eliminates significant portions of the Guidance in Appendix C that was applicable to non-conversion permits in favor of discussing conversion permits

In addition, DNREC has made numerous grammatical revisions throughout the Regulations, focusing on changing punctuation, removing passive voice, or otherwise restating the same concept in slightly different words. Because these changes are of text already existing in the Regulations (and not the newly added conversion permit language), they are of necessity changes to the non-conversion/standard permit process.

It is not clear why these changes were made to the non-conversion/standard permit process, but motive is irrelevant. The General Assembly only authorized DNREC to make changes to implement the CZCPA, and DNREC has noticed up these changes as being solely to carry out the mandate in the CZCPA (and not a wholesale revision and/or "cleanup" of the non-conversion/standard permit regulatory structure). Thus, changes to the regulations that are outside the scope of conversion permits are beyond DNREC's authority to change in this process. As such, any change in the Proposed Regulations that does not apply to conversion permits are legally improper and should be removed.

To be clear, some (though definitely not all) of these changes might in fact be improvements over the currently existing regulations. These changes could be the subject of a spirited public debate about the pros and cons of these revisions to the non-conversion/standard permit side of the CZA. That debate has not occurred. To change those portions of the regulations governing non-conversion/standard

[1] Although not clearly worded, it appears that the revised 9.1.3 creates a locational requirement when a "conversion project" (presumably, a conversion permit) is involved. So offset location matters when conversion permits are involved, but not for non-conversion/standard permits.

permits is inappropriate and should be saved for some other regulatory revision process DNREC initiates in the future in which that public debate could be fully aired.[2]

Comment #3: The Failure To Separate Conversion Permit Requirements From Non-Conversion/ Standard Permit Requirements Creates New Burdens And Weaknesses In the Non-Conversion/ Standard Permit Process.

In addition to being unauthorized, some of the proposed revisions on the non-conversion/ standard permit side of the CZA create new burdens for applicants and weaken the CZA's protections.

New Burdens

Some of the proposed revisions impose new burdens on CZA permit applicants that do not exist in the current regulations. These include:

8.1.11	adds a financial assurance statement requirement to all permit applications
8.2	imposes a new certification requirement for Environmental Impact Statements (EIS)
8.2.1	adds an annual basis and singular event requirements for all EIS
8.2.2	changes the requirement concerning environmental indicators for all EIS
8.2.7	changes requirement concerning glare, heat, noise, vibration, radiation, electromagnetic interference and obnoxious odors in all EIS
8.3.1	adds an Economic Effects Analysis requirement to all permit applications
8.5.1	creates a new "weighting" for consideration of non-conversion permit applications
8.6.1	creates permit duration limits applicable to non-conversion permits
8.6.2	creates a permit renewal process applicable to non-conversion permits

[2] Forcing that "debate" to occur solely within the public comment process on the draft regulations does not solve, but rather exacerbates, the problem. A true public debate allows public input *before* the regulations are drafted—as happened with the conversion permit additions to the CZA and occurred in 1999 when the current Regulations were formulated and adopted. Now, DNREC has already drafted regulatory language and, given the October 1, 2019 deadline imposed by the CZCPA, does not have the time for the give-and-take necessary to produce good regulatory language that all sides can accept. DNREC should not be allowed to use its two-year failure to engage in that broader discussion and an impending CZCPA deadline to simply ram through regulatory language it generated and wants without consideration of or regard for what the public thinks about it.

8.6.3	creates a permit modification process applicable to non-conversion permits
9.1.4	creates a third-party verification option for offsets
9.2.8	creates a monitoring schedule and third-party verification requirement for non-conversion permit offsets
9.2.9	imposes public outreach requirements on non-conversion permit offsets
12.1.1-12.1.4	imposes new recordkeeping and reporting requirements on non-conversion permittees

Separate and apart from whether DNREC has authority to make these revisions, there has been no public debate about the wisdom of imposing these requirements on non-conversion/standard permit applicants. As noted above, I might in fact support some of these changes in a review of this side of the CZA permitting process, while on others I might question its utility. The regulated community would likely have different opinions than mine. This a policy debate that needs a similar public workshopping effort to what has occurred on the conversion permit side of the CZA. It is not wise policy for DNREC to simply ram these changes through without public debate.

Weakened Protections

Several of the proposed revisions on the non-conversion/standard permit side of the regulations will have the effect of weakening the regulatory regime. These include:

1. Changes to Offsets.

In addition to the apparent double standard governing glare, heat, noise, vibration, radiation, electromagnetic interference and/or obnoxious odors outlined above, the proposed regulations make several other changes to the Offset requirements in the current regulations.

The first is the inclusion of language in current Regulation § 9.1.1 that all offset proposals must be a "project that benefits Delaware." While the specific inclusion of a Delaware location eliminates the possibility that an applicant might propose a project outside the state, the proposed deletion of language found in current Regulations § 9.1.3 that the Secretary "shall give preference to offset projects that are within the Coastal Zone" means that the environment and communities most affected by a CZA permit (i.e., those closest to the permitted facility) might not have the negative environmental benefits they suffer addressed by the offset project. While revised § 9.1.3 appears to contain a locational requirement, the language suggests this requirement only applies to conversion permits. *See* footnote 1 above. On balance, these changes have the potential to weaken Coastal Zone benefits from offset projects.

Perhaps more significantly, the proposed regulations delete current § 9.3, which created an enforcement mechanism specifically related to offsets. Section 9.3.2 created an automatic trigger requiring a new CZA permit application if the applicant failed to receive all required permits for the offset project. Thus, if an offset project requires one or more permits, a CZA permit can be obtained once the permit applications are deemed administratively complete (that is, before the permits for the project are actually issued), see proposed § 9.1.8 (which generally follows current § 9.1.6), under the proposed regulations there is no automatic penalty if the applicant drags its feet on actually getting the needed permits for the offset. That weakens the offset provisions of the regulations.

Finally, the proposed change to § 9.1.5 would now for the first time specifically allow the applicant to offset the release of a pollutant by "obtaining credits." The concept of using a "credit" (using the Emissions Banking and Trading Program established by 7 Del. Admin. C. 1137) does not (and by definition cannot) "more than offset" the future negative environmental impacts of a permitted project. "Credits" by their very nature result from some past reduction of pollution—that is, the reduction has already occurred so that its environmental benefit has already taken place. The negative environmental impact of the CZA project will occur in the future; it is therefore impossible to have an already-realized past benefit reduce pollution in the future. Quite simply, the use of "credits" is inconsistent with the offset requirements of the current and proposed CZA regulations. It should therefore be removed.

2. Grandfathering? The Potential for Permits With Different Status.

As noted earlier in this comment, the proposed regulations impose several new requirements on non-conversion/standard permits. While some of those requirements relate to the application for a permit, others create duties after the issuance of the permit. For example, the proposed permit duration and renewal provisions (8.6.1 and 8.6.2) and record keeping requirements (12.1.1-12.1.4) apply to permitted facilities. What the proposed regulations do not make clear is whether these new requirements will apply to already-existing permits or whether these facilities will be grandfathered such that these newly-created requirements only apply to permits issued after the effective date of the revised regulations.[3] Each of these options pose legal issues.

To the extent that the new requirements will apply to currently existing CZA permittees, it is unclear whether such changes can be unilaterally and retroactively applied. To the extent that the facilities will be grandfathered, the utility and effectiveness of the new regulatory requirements will be greatly reduced, and there will be two "tiers" of non-conversion/standard permits: those subject to the new requirements, and those not subject to the requirements. There is no evidence that this has been thought through.

[3] Of course, this grandfathering problem will not exist with conversion permits, as all will be new. This problem arises from the attempt to combine conversion permits and non-conversion/standard permits under a single permitting procedure.

3. Problems with Permit Renewals.

While the move towards duration limits of CZA permits in proposed 8.6.1 may in fact be a positive development because it allows updating as conditions change, the proposed mechanism for permit renewal in 8.6.2 seems problematic. First, proposed 8.6.2.1 suggests that an application for permit renewal "may address only those portions of the permit that the Department determines require revising, supplementing, deleting or incorporating the remaining permit terms by reference from the previous permit." Given that it is the *permittee* who submits the application "no fewer than one hundred eighty (180) days prior to the expiration of the permit," 8.6.2, it is unclear how the permittee is supposed to know which parts of the existing permit "the Department determines require revising, supplementing, deleting or incorporating the remaining permit terms by reference from the previous permit." Either the permittee will need to consult with the Department before submitting the renewal application (a process not explained in the proposed regulations), or it will need to be clairvoyant. What is likely to occur is that the permittee submits an entire application with all terms and then confers with the Department as to what parts really need to be in the application (necessitating a revised application). This does not seem very efficient. Further, to the extent the public disagrees with the Department's determination concerning which parts need to be addressed (versus simply incorporating from the prior permit), that may be the basis of appeals to the Board and potentially multiple rounds of permit issuance. This also does not seem very efficient.

The second concern is the form which the renewed permit will take. Proposed 8.6.2.1 states that "The Department may similarly, in issuing a renewal permit, specify only those portions that will be revised, supplemented or deleted, incorporating the remaining permit terms by reference." To the extent that DNREC chooses incorporation by reference, the permit will now consist of two documents, one of which is 20 years old. This does not seem very efficient.

With both of these concerns, if DNREC decides not to grandfather exiting CZA permits, the inefficiency and administrative burden might well be immense.

The better course is to simply have the renewal permit go through the same process as the original permit, and have the renewal permit be a separate, complete document. This is the approach used with NPDES permits, and DNREC would be better served by following that familiar example.

4. Elimination of Consideration of Environmental Goals and Indicators.

Section 8.3.3 of the current Regulations requires the Secretary, during the CZA permit application review process, to "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." The promise that DNREC would create environmental goals and indicators was an essential premise upon which the current Regulations were agreed to during the 1999 Regulatory Advisory Committee process. As the Preamble to the current Regulations states (and the proposed Regulations does not change):

> Finally, 25 years after passage of the Act, the negative implications of not having regulations came to outweigh the contentiousness of the debate. An advisory committee of dedicated Delawareans was then convened and, after eighteen months of oftentimes difficult debate, came to consensus agreement on how to embody the linked goals industry flexibility and environmental improvement. The committee's agreements were memorialized in a Memorandum of Understanding between all participants. That MOU was founded on consensus, respect and necessity and it was used as a basis for these regulations.

The MOU—signed by representatives of industry, environmental groups, labor, and the then-Secretary of DNREC, Christopher Tulou—included the following language:

> In particular, DNREC will need to develop several tools to better assess whether activities proposed for Coastal Zone permits will ensure environmental improvement. First, DNREC ***will*** develop a set of environmental goals specifically for the Delaware Coastal Zone. Second, DNREC ***will*** develop a set of prioritized environmental indicators to assess and track progress towards these goals.

Final MOU at p. 2 (emphasis supplied). A copy of the MOU is attached hereto as Exhibit 1. In Appendix C to the current Regulations, DNREC stated:

> DNREC will develop within 12 months of the ratification of the Coastal Zone MOU, a set of Coastal Zone environmental goals and appropriate environmental indicators which will highlight the most significant challenges to the Coastal Zone; and
>
> DNREC is responsible for defining, prioritizing, and making a matter of public record the set of goals and indicators for assessing the environmental quality in the Coastal Zone. Once goals for Coastal Zone have been established, DNREC will select a detailed set of indicators for use in assessing the quality of the environment as measured against those goals, and to monitor progress over time.

§§ 3.1, 3.2 of Appendix C to the CZA Regulations. Debbie Heaton—one of the signatories to the MOU on behalf of the Sierra Club—has specifically averred that the creation of environmental goals and indicators was essential to her agreeing to the MOU, and she would not have signed (and, therefore, there would not have been the "consensus" touted in the Regulation's Preamble) if she knew that DNREC was not going to create the promised goals and indicators. *See* Affidavit of Debbie Heaton (attached hereto as Exhibit 2). Further, the Coastal Zone Industrial Control Board, in approving the current Regulations in 1999, relied upon the promised existence of goals and indicators. After noting

that environmental goals and indicators were going to be developed,[4] the Board's Finding of Fact #7 states the following:

> Section I of the proposed regulations regarding Offset Proposal Requirements is not contrary to law as the Coastal Zone Act 7 Del. C § 7004(b) sets forth in detail the factors which must be considered in passing on permit requests. Among those listed are environmental impact, economic effect, aesthetic effect, and effect on neighboring land uses. The statute does not distinguish among "impacts" and "effects"; nor does the statute prohibit mitigation of such effects. Broad discretion was given to the Board under the Coastal Zone Act. **The Board believes the administrative actions of the Secretary in conjunction with the goals and indicators provided by EITAC will address any issues regarding the measuring of offsets.**

Order, 2 Del. Reg. at 2137 (emphasis supplied). A copy of the Board's Order approving the 1999 Regulations is attached hereto as Exhibit 3. In short, the Board *expressly cited to and relied upon* the environmental goals and indicators as a way to justify the adoption of the offset provisions of the Regulations.

DNREC has either forgotten or wants to ignore this history selectively[5] and simply wipe environmental goals and indicators out of the CZA permitting decision process.[6] Further evidence of this selective amnesia can be found in the wholesale deletions in the current Appendix C document that remove most if not all of the description of the history behind the current CZA Regulations. The effect or removing goals and indicators is to weaken the CZA protections by avoiding the use of a metric deemed central to the creation of the current Regulations.

5. Change to the Standard Concerning Glare, Heat, Noise, Vibration, Radiation, Electromagnetic Interference and Obnoxious Odors.

The CZA—even after the CZCPA—contains the following language:

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[4] In its summary of Mr. Tulou's testimony, the Board stated: "Mr. Tulou believes there to be flexibility to the offset portion of the regulations and states that an Environmental Indicators Technical Advisory Committee "EITAC" is being developed to provide specific Coastal Zone goals and indicators." Order, 2 Del. Reg. at 2133.

[5] Ironically, the proposed regulations keep the May 11, 1999 date at the beginning of the Preamble and the first two paragraphs of the original Preamble. Thus, the amnesia is not complete.

[6] Oddly, however, the proposed regulations do not completely do away with environmental goals and indicators. Proposed § 8.2.2 retains current § 8.2.2's requirement that the Environmental Impact Statement submitted with a permit application contain an analysis of impacts on goals and indicators—although given that the proposed regulations remove the current § 8.3.3 requirement that the Secretary consider impacts to goals and indicators, it is unclear what role this component of the EIS would serve under the new regulatory regime. While proposed § 8.2.2 appears to excuse analysis of indicators until such indicators "are made publicly available," environmental goals were set by DNREC nearly 20 years ago, and so the obligation to analyze for something the Secretary will not consider is still there.

> In passing on permit requests, the Secretary of the Department of Natural Resources and Environmental Control and the State Coastal Zone Industrial Control Board shall consider the following factors:
>
> (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.

7 Del. C. § 7004(b). The current Regulations require applicants to include in their Environmental Impact Statement an "analysis" of "the likelihood of generation of glare, heat, noise, vibration, radiation, electromagnetic interference and/or obnoxious odors," 7 Del. Admin. C. § 101-8.2.8, and the general requirement that, in assessing a permit application, the Secretary "shall consider . . . direct and cumulative environmental impacts . . . ." 7 Del. Admin. C. § 101-8.3.2. The proposed regulations basically keep these two requirements, *see* proposed §§ 8.2.7 and 8.5.2. However, the proposed regulations add a wrinkle that may impact these specified environmental impacts. In § 3.0, Definitions, the proposed revisions add a new definition:

> "Pollution" means an environmental release, as defined in Title 7 §6002(19), or adverse impacts on human populations, air and water quality, land, wetlands, flora and fauna, or to produce dangerous or onerous levels of glare, heat, noise, vibration, radiation, electromagnetic interference and/or obnoxious odors.

Thus, "dangerous and onerous" levels of glare, heat, noise, vibration, radiation, electromagnetic interference and/or obnoxious odors are "pollution;" non-dangerous or onerous levels are not.[7]

Where this appears to matter is in the offset provisions in § 9.0 of the proposed regulations relating to offsets. In proposed § 9.1.5,

> If negative environmental impacts involve the release of a pollutant, the applicant shall attempt to offset the release by eliminating or obtaining credits for the release of the same pollutant, if practicable. If it is not practicable to eliminate or obtain a credit for the release of the same pollutant, the applicant may propose the elimination of a different

[7] This also raises the question of how—as implied by the definition—an obnoxious odor can sometimes be "onerous" and other times not be. Obnoxious already implies something beyond mere odor.

> pollutant that affects humans, wildlife or the environment in a way that is similar to the effects of the pollutant that will be released by the project.

Given that only "dangerous and onerous" levels of glare, heat, noise, vibration, radiation, electromagnetic interference and/or obnoxious odors are "pollution," the new requirement of offsetting the same pollutant does not apply to all glare, heat, noise, vibration, radiation, electromagnetic interference and/or obnoxious odors. Coupled with the removal of the stated preference in current Regulations § 9.1.3 for offsets in the "same environmental medium as the source of the degradation of the environment," it appears that the proposed regulations are creating two different sets of requirements for offsets when the negative environmental impact is glare, heat, noise, vibration, radiation, electromagnetic interference and/or obnoxious odors.

CONCLUSION

Thank you for the opportunity to present these public comments.

Sincerely,

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Attachments
1 – 1999 MOU
2 – Affidavit of Debbie Heaton
3 – Board's Decision Approving the Current CZA Regulations

KRISTL PUBLIC COMMENT
ATTACHMENT 1

MEMORANDUM OF UNDERSTANDING

FROM THE DELAWARE COASTAL ZONE REGULATORY ADVISORY COMMITTEE

TO THE DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

March 19, 1998

Introduction

This Memorandum of Understanding contains recommendations from the Delaware Coastal Zone Regulatory Advisory Committee to the Delaware Department of Natural Resources and Environmental Control (DNREC). The recommendations advise DNREC on the content of the regulations that DNREC will promulgate to implement the Coastal Zone Act.

The Advisory Committee held a Public Forum on January 13 whereupon members of the public were provided an explanation of the December 30, 1997 draft of this MOU and were encouraged to offer comments and suggestions for its improvement. For two weeks following the Forum, DNREC received additional written comments from interested citizens, worked with the Advisory committee on revisions to the document and subsequently prepared this March 12, 1998 final MOU for the Advisory Committee's formal ratification and transmittal to DNREC.

Once DNREC has received the final version, the agency will prepare draft regulations consistent with the MOU's recommendations. The Advisory Committee will then be provided an opportunity to review the regulations to be sure they are consistent with the recommendations contained in the MOU. DNREC will then transmit the draft regulations to the Coastal Zone Industrial Control Board for its review and adoption.

The Advisory Committee has been and continues to be facilitated by a team from the Consensus Building Institute (CBI) of Cambridge, Massachusetts. The facilitation team can be reached at 800-433-3043, ext. 17.

I. Environmental Improvement and Industry Flexibility

These recommendations are built around two linked goals. First, the regulations shall ensure environmental improvement in the Coastal Zone. Second, the regulations shall allow industry flexibility.

In order to meet these goals, the regulatory process should be designed so that each heavy industry facility can obtain permits to add new products, change existing products, increase production capacity, add new processes and modify existing processes so long as these activities are: 1) undertaken in a way that assures environmental improvement in the Coastal Zone; and 2) undertaken in such a way that they meet the six criteria outlined in the Coastal Zone Act.

In addition, the regulatory process should be designed so that each manufacturing, public sewage treatment facility, and public recycling facility can obtain a permit either to initiate operations in the Coastal Zone or to modify its existing operations so long as these activities are: 1) undertaken in a way that assures environmental improvement in the Coastal Zone; and 2) undertaken in such a way that they meet the six criteria outlined in the Coastal Zone Act.

Regulatory mechanisms developed by DNREC to meet the dual goals of environmental improvement and industry flexibility must be implemented simultaneously. In practice, this means that each grandfathered heavy industrial facility, manufacturing facility, public sewage treatment plant, and public recycling facility should be allowed increased flexibility in permitting and operations only after DNREC has developed a carefully defined procedure for assessing applications to ensure that proposed activities meet the environmental improvement standard, as well as the six criteria cited in the Act.

In particular, DNREC will need to develop several tools to better assess whether activities proposed for Coastal Zone permits will ensure environmental improvement. First, DNREC will develop a set of environmental goals specifically for the Delaware Coastal Zone. Second, DNREC will develop a set of prioritized environmental indicators to assess and track progress towards these environmental goals.

It is important to note that the development of these Coastal Zone environmental indicators is likely to take longer then the development of the regulations themselves. During the period after the regulations have been promulgated, but before the indicators are developed, DNREC will issue permits as otherwise prescribed in the new regulations. Applicants will still be required to describe the

likely impacts of their proposed activities on each of the six criteria cited in the Act. The Secretary will use this information to make a determination about whether a permit should be granted.

Provisions of the regulations relating to increased flexibility of industrial operations and environmental improvements in the health of the Coastal Zone need to be clearly identified. If subsequent to the issuance of regulations, any of the environmental improvement or industry flexibility provisions in the regulations are invalidated (for example, by court action) then the entire set of Coastal Zone Act regulations will be void, except for the footprint definitions and designated boundaries developed by the 1992 Ad Hoc Committee, and the provisions relating to public notice.

Furthermore, if any other provisions (other than the provisions relating to increased flexibility of industrial operations and environmental improvements in the health of the Coastal Zone) are invalidated, then only those particular provisions will be void. All other provisions will remain operational.

As DNREC proceeds with implementation of the regulations, no materials or any supporting reports, previous draft MOU's, prior drafts of regulations or any materials whatsoever that have been used throughout this consensus building effort, shall be used to interpret the regulations.

II. Tiered Permitting

The Advisory Committee recommends that DNREC establish a tiered system of Coastal Zone Act permitting. Such a system adds efficiency to the permitting process, by tailoring the extent of regulatory review to the expected impacts of the proposed project. Under the tiered approach, an industry will be required to obtain a Coastal Zone Act permit only in those instances when a proposed new manufacturing facility, or a change in the operations of a heavy industrial or manufacturing facility, may have a negative impact on one or more of the six criteria cited in the Act [7 Del. C. Section 7004. (b)]. In those instances when an industry is proposing an activity which will not cause a negative impact to any of these criteria, it can propose moving through a streamlined regulatory process.

The Advisory Committee recognizes that negative impacts do not include facility shut downs, personnel layoffs, negative impacts on state tax revenues and other business related issues which in and of themselves have no direct negative environmental impacts.

DNREC should establish three tiers of regulatory review:

Tier I Activities under Tier I will be exempt from the permitting process. A company which wishes to initiate a Tier I activity does not have to apply for a Coastal Zone permit or notify DNREC of its plans.

Following is a list of examples of Tier I activities. This list is intended by the Advisory Committee to be illustrative, rather than exhaustive.

- maintenance and repair of existing equipment and structures;
- replacement in-kind of existing equipment or installation of in-line spares for existing equipment;
- installation and modification of process equipment which does not include routine emissions, nor increase emissions from existing support equipment beyond existing permit limits;
- installation and operation of pollution control and safety devices mandated by federal or state law;
- research and development activities, as long as they do not involve the construction of a new facility;
- repair and maintenance of existing electrical generating facilities, so long as such operations do not require a new or revised air pollution, water pollution, hazardous waste permit, wetland or subaqueous lands permit;
- back-up emergency and stand-by sources of electrical power to adequately accommodate industry needs when outside supply fails or is not available;
- any project which is exempt from existing Delaware Air, Water, Hazardous Waste and Solid Waste regulations, or a de minimis situation where no regulations exist; and
- any project which is initially reviewed by DNREC under Tier II, and then determined by DNREC to be a Tier I activity.

Tier II Activities under Tier II will require a notification process. If an industry wants to propose a change in its products or processes that is not among those exempted from the permitting process by definition (Tier I), and the company believes that the activity will have no negative impact on the environmental health of the zone or on any of the six criteria named in the Act, then the company may choose to initiate a Tier II notification process.

At a minimum, any project which requires a new or re-negotiated air or water permit should be included in this tier. Proposed new manufacturing facilities which will operate in the Coastal Zone also fall under Tier II. In addition, new research and development facilities proposed for operation in the Coastal Zone will be included in this Tier. This applies both to new R & D facilities associated with an existing manufacturing or heavy industrial facility in the Coastal Zone, and new R & D facilities which are not associated with an existing use.

In effect, this notification process will be a revised version of the status determination process in use by the agency currently (and is essentially the same procedurally.) The notification process will involve an exchange of letters between the company and DNREC prior to the initiation of the proposed activity. The company's letter should detail the proposed activity and indicate its expected impacts on all of the criteria included in the Act (the exact required content of this letter will need to be defined by DNREC in the regulations.) Once correspondence from the applicant has been received, DNREC will review it and decide whether the proposed activity is Tier I or Tier III. This determination will be communicated to the company via written correspondence. DNREC should designate a time frame for the completion of its determination. The Advisory Committee recommends that this time frame be set at twenty-one business days.

If DNREC determines that the proposed activity will not produce any negative impacts on the six criteria, then the company will be given an approval to proceed without a permit. If DNREC determines that there will be negative impacts on any of the six criteria, then the company will be required to either refile under Tier III by submitting an application for a Coastal Zone permit, or drop the proposed project.

In those instances where DNREC determines that a project is a Tier 1 activity (after a tier II notification), DNREC shall publish said determination as a legal notice similar to that required for permit approvals. As such, this determination will be subject to appeal as any permit approval would.

If a facility applies for a Tier II notification and DNREC determines that a project is a Tier I activity, that facility will be allowed to implement the approved Tier I activities. If after a public notice, a member of the public appeals the Tier I determination, the approved Tier I activity will

not be delayed or terminated. If an appeal to the Tier I activity is upheld by the CZICB then the applicant will, if they choose to proceed with the project, apply for a Tier III permit.

DNREC will give public notice of all Tier II applications and provide for a ten day period for comments to assist the Secretary before a decision is reached

Tier III: Activities under Tier III will require a Coastal Zone permit. Included in this tier will be any activities proposed by either manufacturing facilities or heavy industrial facilities currently operating in the Coastal Zone, which have the potential to create negative impacts on any of the six criteria described in the Coastal Zone Act. In addition, any proposed activity which includes an "offset proposal" will automatically be included in this Tier.

The public shall be notified of any proposed activities which DNREC designates as Tier III after reviewing a company's written description of what is being proposed. In addition, all correspondence between DNREC and applicants for Coastal Zone permits will be part of the public record. DNREC will include in the draft regulations a clear description of how this public notification and participation process will take place. In developing this description, DNREC should review, and where appropriate borrow from, the Freedom of Information Act, the provisions on public notice and public participation in the 1992 Ad Hoc Committee's draft regulations, and other DNREC policies on public participation.

III. The Environmental Impact Statement

The applicant will place all information about the environmental impacts of the proposed project in the Environmental Impact Statement portion of the application. There will be a description of the required content of the Environmental Impact Statement (EIS) in the regulations themselves. It will be the responsibility of each applicant seeking a Coastal Zone permit to include in the Coastal Zone Permit application any and all information necessary for the Secretary to make an informed decision on the application .

At a minimum, the applicant shall be required to incorporate into the EIS a description of how the proposed activity will measurably increase air emissions, water discharges or otherwise cause negative environmental impacts on the

Coastal Zone environment. An applicant shall also include in the Environmental Impact Statement a description of how any negative impacts from the proposed project will be offset, either as part of the proposed activity itself or through an enforceable offset proposal. If the applicant proposes an enforceable offset, the description shall include all information needed to clearly establish:

A. how the offset proposal will be carried out;

B. what the likely environmental benefits will be and when they will be achieved;

C. what if any negative impacts will result, and when;

D. what scientific evidence there is about the efficacy of this strategy in producing its intended results; and

E. how the projected results -- both beneficial and negative -- can be tracked in the future.

The applicant may also provide evidence of past voluntary environmental improvements[1] and/or investments made prior to the time of application.

IV. Principles for Assessing an Application

In assessing an application, the Secretary will consider how the proposed project will affect the six criteria cited in the Act, including environmental impacts, economic effects, aesthetic effects, number and type of supporting facilities and their anticipated impacts on these criteria, effect on neighboring land uses, and compatibility with county and municipal comprehensive plans.

Any negative environmental impact associated with a proposed project will have to be more than offset, thus assuring continuing improvement in the coastal zone environment. The Secretary will only grant coastal zone permits in those cases where the overall environmental impacts of the total application, both positive and negative, assure improvement in the quality of the environment in the coastal zone.

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[1]Voluntary improvements" is defined here as improvements (related, for example, to emissions reductions, habitat creation, spill prevention--provided each is definite and measurable) which were made by a facility without any federal or state requirement to do so.

Therefore, activities proposed for a coastal zone permit which would measurably increase air emissions, water discharges, or would cause negative impacts on the Coastal Zone environment, shall include provisions for net environmental improvement of the coastal zone environment. These environmental improvements may be part of the permitted activity itself or realized through an enforceable offset proposal that will be implemented by a date agreed to by the company and DNREC.

DNREC will develop within 12 months of the promulgation of Coastal Zone Act regulations a set of coastal zone environmental goals and appropriate environmental indicators which will highlight the most significant environmental challenges to the coastal zone (see Section VI for more detail.) These indicators will be " prioritized" in accordance with their significance to achieving the coastal zone environmental goals. These prioritized indicators will provide coastal zone permit applicants a good idea of which types of future offset investments will yield the greatest environmental benefit and will allow a determination of which investments are most cost-effective. These indicators should also provide the rational basis for permit decisions that involve offset proposals.

Offset proposals will be evaluated by the Secretary using the following criteria:

- The Secretary will place a higher priority on offset projects within the Coastal Zone, in the same environmental medium as the source of degradation of the environment, that occur at the same site as the proposed activity requiring a permit and that occur simultaneously with the implementation of the proposed activity needing an offset.

- Although offsets in the same environmental medium are preferred, there will be circumstances when offsets in other media provide greater environmental benefit or otherwise make sense, and will be considered by the Secretary.

- In addition, the Secretary will give more weight to offset proposals that: 1) have established track records and are likely to succeed from a technical standpoint; and 2) will produce beneficial effects that are verifiable.

- If an applicant includes in its permit application evidence of past voluntary environmental improvements and/or investments made prior to the time of application, DNREC will consider this history of environmental performance in determining the magnitude of the required offsets for the proposed project

(with the understanding that the total project must assure improvement in the quality of the environment in the coastal zone.)

- The Secretary will also consider the applicant's ability to carry out such improvements as evidenced by its compliance history. Compliance with environmental standards and enforcement histories of facilities is not in itself a factor in determining the required magnitude of the potential offset project, but will be used by DNREC in gauging the applicant's ability to carry out the offset project with a minimum of supervision.

V. DNREC Permitting Responsibilities

DNREC will meet the following responsibilities during the permitting process:

A. The Secretary shall make permitting determinations and environmental impact assessments, in writing, based on all of the expected environmental impacts of the total project on the health of the Coastal Zone, including both positive and negative impacts. Impacts may be related to air and water emissions, or they may be related to other factors such as the viability of wildlife habitat, the protection of wetlands, or the creation or preservation of open space. The Secretary will develop and use a set of prioritized environmental indicators as a tool for assisting these determinations. (See VI, below).

B. The Secretary shall also include in the written determination an assessment of the degree to which the project is consistent with the other criteria in the Coastal Zone Act: economic effects, aesthetic effects, number and type of facilities required, effect on neighboring land uses, and compatibility with county and municipal comprehensive plans for development and/or conservation.

C. The Secretary shall consider likely cumulative impacts of proposed activities on the environment and the relevant environmental indicators.

D. DNREC will only approve an application which includes an offset proposal if the proposal describes well-defined and measurable commitments or accomplishments which are independently auditable by the Department, and available to the public via the Freedom of Information Act (FOIA). Each offset proposal must also include a projected timeline for the implementation of the proposal.

E. While it is the applicant's responsibility to fully describe an offset proposal in the Environmental Impact Statement, it is the Secretary's responsibility to carefully assess whether the applicant's offset proposal will offset negative impacts of the project , and thus ensure environmental improvement in the Coastal Zone.

F. All offset projects must be incorporated into the coastal zone permit as an enforceable condition of the permit. Since some of the benefits of "flexibility" are achieved immediately upon issuance of a permit (i.e. permission to proceed), and most benefits of "environmental improvement" are achieved over time, the permit itself must include well-defined and measurable commitments or accomplishments which are independently auditable by the Department, and available to the public via the Freedom of Information Act (FOIA). DNREC will also include inspection, reporting and/or notification obligations in the permit depending on the company's compliance record and the nature of the offset project.

G. The continuing validity of permits shall depend upon achieving all commitments, including those contained in the offset proposal. If the applicant fails to implement the proposal fully and in accordance with the agreed-upon schedule, then DNREC will have the authority to void the permit and to impose appropriate penalties on the applicant.

H. With the exception of information which is determined by the Secretary to be proprietary or trade secret within the bounds of the FOIA, it is essential that all parties, including the public, continue to have adequate opportunities to review and comment on all aspects of the permitting process. .

I. Where an offset project in itself requires a permit be issued by one or more regulatory programs within DNREC, the Secretary shall issue the Coastal Zone Permit only after all applicable permit applications for offsetting projects have been received and deemed administratively complete by DNREC. Such coastal zone permits shall be approved contingent upon the applicant carrying out the proposed offset in accordance with an agreed upon schedule for completion of the offset project. Said schedule will be included in the coastal zone permit as an enforceable condition of the permit.

J. Should a coastal zone permit applicant fail to receive, within 180 days of issuance of the Coastal Zone permit, any and all permits required to undertake an offset project, the applicant, except for good cause shown by the applicant

for additional time, will be required to submit an entirely new application for the Tier III activity, including impact assessments, permit fees and a new proposed offset project

VI. Relevance/Use of Environmental Indicators

In evaluating an application for a Coastal Zone permit, DNREC should consider a set of "environmental goals"[2] and prioritized "environmental indicators"[3] designed as a tool to measure and monitor the health of the Coastal Zone.

The environmental indicators should be: 1) developed and maintained by DNREC; 2) developed within twelve months of the completion of this MOU and open for public review and comment; 3) used as a basis for assessing environmental impacts associated with proposed changes in facility operations and proposed offsets; and 4) reissued periodically.

These indicators will serve several important purposes. First, they will assist DNREC in developing a more accurate picture of the health of the Coastal Zone, and measuring trends in this health over time. Second, they will assist DNREC and project applicants in the permitting process, by providing a means for evaluating the potential impacts of proposed changes in facility operations and proposed offsets on Coastal Zone health. Finally, the indicators will provide a basis for explaining decisions made during the permitting process to applicants and to the public.

Following are several more specific recommendations for how the set of environmental indicators for the Coastal Zone should be developed and maintained. These recommendations should not be included in the regulations themselves. Instead, they should be included in a separate guidance document prepared by DNREC (see Section XI below.)

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[2] "Environmental goals" are a collection of broad and strategic environmental priorities and objectives for a region. Environmental goals for the State of Delaware are presented in DNREC's Environmental Partnership Agreement-an agreement co-signed by the U.S. Environmental Protection Agency and the Department. .

[3] An "environmental indicator" is a numerical parameter which provides scientifically-based information on important environmental issues, conditions, trends, influencing factors and their significance regarding ecosystem health. Indicators inherently are measurable, quantifiable, meaningful and understandable. They are sensitive to meaningful differences and trends, collectible with reasonable cost and effort over longer time periods, and provide early warning of environmental change. They are selected and used to monitor progress towards Environmental Goals (see above.)

1) DNREC will be responsible for defining, prioritizing, and making a matter of public record the set of goals and indicators for Coastal Zone health. Once goals for Coastal Zone environmental health have been established, DNREC will select a detailed set of indicators to determine the status of Coastal Zone health as measured against those goals, and to monitor progress over time.

2) DNREC will periodically review and reissue the Coastal Zone environmental indicators (perhaps bi-annually). As conditions in the Coastal Zone change, and scientific methods for tracking and analyzing these changes evolve, it may be necessary to add or change some indicators, or drop others. It may also be necessary to reprioritize them as some parameters of environmental health improve and others decline. DNREC's periodic review of the indicators will allow for these kinds of adjustments to be made.

3) 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 recommends that DNREC establish an Environmental Indicator Technical Advisory Committee (EITAC). A substantial proportion of the members of the EITAC should be technical experts. The Committee should also include representatives of various stakeholder groups, for example, heavy industry and manufacturing in the Coastal Zone, industry outside the Coastal Zone, agricultural interests, environmental advocacy groups and labor. EITAC meetings should be public and any reports generated by the Committee should be made available to the public.

VII. Definitions of the Port of Wilmington, Research and Development, Docking Facility, Bulk Product Transfer, and Public Sewage Treatment Facilities and Recycling Facilities

In addition to the broad guidance described above, the Advisory Committee has reached agreement on recommendations for several specific provisions in the regulations under the Coastal Zone Act. These are described below:

Port Boundaries

DNREC will incorporate the following definition of the Port of Wilmington into the definitions section of the regulations (please see attached map for a visual illustration of the boundaries described below):

> The current boundary of the Port of Wilmington is the area beginning at the intersection of the right of way of US Route I-495 and the southern shore of the Christina River; thence southward along said I-495 right of way until the said I-495 right-of-way intersects the Reading Railroad Delaware River Extension; thence southeast along the said Reading Railroad Delaware River Extension to its point of intersection with the Conrail Railroad New Castle cutoff; thence southward along the Conrail Railroad New Castle cutoff until it intersects the right of way of U.S. Route I-295; thence eastward along said I-295 right of way until the said I-295 right of way intersects the western shore of the Delaware River; thence northward along the western shore of the Delaware River as it exists now to the confluence of the Christina and Delaware Rivers; thence westward along the southern shore of the Christina River to the beginning point of the intersection of the said I-495 right of way and the Southern shore of the Christina River.

This definition should delineate the docking facilities which will be entitled to an exemption under Section 7002(f) of the Coastal Zone Act, provided, however, that the docking facilities which are exempted include:

a. those located on lands owned by the Diamond State Port Corporation (DSPC) and which are located within the Port of Wilmington as defined herein as of the effective date of this MOU;

b. any docking facilities located on lands or facilities acquired by DSPC at any time in the future and which are located within the Port of Wilmington as defined herein;

c. docking facilities located on privately owned lands within the Port of Wilmington as defined herein which:

    i. have been granted a Status Decision extending the bulk products transfer exemption prior to the effective date of these regulations; or

    ii. receive a Status Decision (or Tier II determination) demonstrating that:

1) the docking facilities at the proposed use location bear a reasonable geographical relationship to the DSPC taking into account both the commercial and technological requirements; and

2) the docking facilities at the proposed use location demonstrate interdependence and integration of the proposed facilities and operations within the DSPC operations.

Docking Facility

DNREC will incorporate the following definition of docking facilities into the definitions section of the regulations:

> Docking facility means any structures and/or equipment used to temporarily secure a vessel to a shoreline or another vessel so that materials, cargo, and/or people may be transferred between the vessel and the shore, or between two vessels, together with associated land, equipment, and structures so as to allow the receiving, accumulating, safekeeping, storage, and preparation of cargoes for further shipment, and administrative maintenance purposes directly related to such receiving, accumulating, safekeeping, storage, and preparation of cargoes for further shipment.

Research and Development

DNREC will incorporate the following definition for Research and Development (R & D) into the definitions section of the regulations:

> R & D activities are those in which R & D substances are used in quantities that are not greater than reasonably necessary for the purposes of scientific experimentation or product and process development. The R & D substances must either be the focus of R & D itself, or be used in the R & D activity focusing on another chemical or product. R & D includes synthesis, analysis, experimentation or research on new or existing chemicals or products. R & D encompasses a wide range of activities which may occur in a laboratory, pilot plants or commercial plant, for testing the physical, chemical, production, or performance characteristics of a substance, conducted under the supervision of

a technically qualified individual. R & D is distinct from ongoing commercial activities which focus on building a market for a product rather than just testing its market potential. General distribution of chemical substances or products to consumers does not constitute R & D.

The regulations should treat proposed R & D activities (as described in the definition above) as distinct from proposed new R & D facilities. Whereas R & D activities will be included in Tier I of the tiered permitting process, new R & D facilities will be included in Tier II. This applies both to new R & D facilities associated with an existing manufacturing or heavy industrial facility in the Coastal Zone, and new R & D facilities which are not associated with an existing use.

Bulk Product Transfer

The definition of "bulk product" in the regulations will use the definition of "bulk" in Webster's Unabridged Dictionary: "in a mass; loose; not enclosed in separate packages or divided into separate parts." The definition should include examples of bulk products, such as grain, oil, gas, and minerals. It should also make clear that individually packaged items (such as autos, machinery, bags of salt, palletized items, etc.) are not considered bulk products.

Public Sewage Treatment Facilities and Public Recycling Plants

DNREC will incorporate a definition for public sewage treatment and public recycling plants into the regulations.

The definition for recycling plants could be taken from Federal Register, Vol. 56. No. 191. 10/2/91: "Recycling plants are industrial facilities whose primary products are recycled materials. The term recycle means the series of activities, including collection, separation, and processing, by which products or other materials are recovered from or otherwise diverted from the solid waste stream for use in the form of raw materials other than fuel for producing heat or power combustion."

DNREC will also clarify the exemption for public recycling facilities. The Advisory Committee recommends that DNREC define "public facilities" to mean facilities that are both publicly owned and also publicly operated.

VIII. Recommendations Based on the Ad Hoc Committee's Work

Sections of the recommendations developed by the Ad Hoc Committee to DNREC in July 1992 should be incorporated by DNREC into the new draft regulations. The specific language recommended for adoption is included in Attachment I. This is not a complete version of the 1992 draft submitted to DNREC; instead, it is a compilation of all those sections for which there is a consensus agreement among members of this Advisory Committee. In addition, there are a number of areas in this draft regulatory language where the Advisory Committee is recommending that DNREC add provisions or language on particular topics. These recommendations to DNREC are included as footnotes in the regulatory text in Attachment I. They are also listed below (please note that citations refer to sections of Attachment 1.)

It is important to note that a few of the provisions contained in Attachment #1 may not be consistent with the recommendations in this MOU. An example might be the provisions on status determination. While the MOU suggests that the "status determination" process should become a "Tier II notification process," the term status decision appears often in Attachment #1. DNREC will iron out these inconsistencies as draft regulations are developed. However, the Advisory Committee wishes to state clearly that the recommendations in the MOU should take precedence over the draft regulatory language when conflicts arise.

General Recommendations

- DNREC should ensure that the uses of the terms "non-conforming" and "manufacturing" are consistent throughout the regulations.

- DNREC should ensure that the different tiers comprising the tiered permitting system are clearly defined in the regulations. These definitions could be placed in Section II with the other definitions.

II. Definitions

- Under the definition for "Administratively Complete," DNREC should indicate the time-frame for determining that an application is administratively complete. The Advisory Committee recommends a time-frame of twenty-one business days.

- Between the definition "Bulk Product Transfer Facility" and "Department," DNREC should add a definition of "certify" (the process that applicants will use to legally attest to the truth of their submittal.) This standard for the Coastal Zone Act should be consistent with that used in other environmental regulatory programs.

- Between the definition of "Docking Facility" and "Heavy Industry Use," DNREC should add a definition of "Environmental Impact Statement" that includes a reference to the use of environmental indicators.

- Under the definition of "Potential to Pollute," DNREC should consider whether there is a need to add language indicating that the Secretary will consider risk management and offset controls in evaluating a proposed use's potential to pollute.

- Also between the definition of "Potential to Pollute" and "Research and "Development" DNREC should add a definition for "Public Sewage Treatment Plants and Public Recycling Plants." (see Section VII above.)

- In the definitions section, DNREC should add a definition for "trade secret" or "confidential information" (DNREC should choose which term to used based on the Attorney General's recommendation). This definition should be consistent with the definition included in other relevant laws and regulations. The definition should make clear that the Secretary makes the final decision on an applicant's claim of confidentiality -- and that the applicant must clearly identify the claimed confidential sections.

IV. Uses Regulated

- Between provisions a) 1) B) and a) 1) D), DNREC should add a provision on public sewage treatment plants and public recycling plants.

- DNREC should move provision a) 1) D) to the section of the regulations on abandonment.

- DNREC should ensure that the provision a) 1) F) appears in other appropriate locations in the regulations.

- Under provision b) 1) A), DNREC should add new text on the Port of Wilmington .

- Under the provision b) 2), either here or in the section of the regulations on "flexibility," DNREC may want to add other conditions under which the Secretary would permit the construction of pipelines on docking facilities serving as bulk product transfer facilities.

- Under the provision d) 1) D), DNREC should elaborate on this concept in the draft regulations.

- Also under d), DNREC should add a section on electric power delivery facilities that are not regulated and the treatment of certain auxiliary power generating facilities.

V. Administration of the Act

- At the end of the provision c) 2) A), DNREC should include a comprehensive list of the criteria cited in the Act.

- Under the provision c) 2) B), DNREC should add a time-frame for using this right.

- DNREC should modify the provision c) 4) B) to include a description of how environmental indicators will be used.

- DNREC should add a section d, on the public availability of information. The content of this section should be guided by DNREC's Guidance Document regarding the Freedom of Information Act. In addition, this section should be consistent with other state and federal laws.

- DNREC should ensure that this section is written in such a way that the administrative process protects trade secrets. A definition of trade secrets may be needed.

IX. Monitoring, Reporting and Penalties

In their applications for Coastal Zone permits, applicants should be required to include a clear description of any projects designed to produce environmental improvements, as well as a timetable for their completion. This will ensure that DNREC can include a description of the proposed activities in the permit itself, and can carry out straightforward and objective reviews of progress towards fulfilling permit conditions.

All applications for Coastal Zone permits should be "certified" (in the sense that the applicant legally attests to the truth of the submittal). Permit holders whose permit is conditioned on projects designed to produce an environmental improvement will be required to regularly report to DNREC (and to the public) on the progress made relative to their commitments. DNREC will carefully review and analyze these reports.

If commitments agreed to by the applicant as a condition of a permit are not being fulfilled, the permit holder will be in violation. The regulations shall reference the specific authorities DNREC has to impose penalties in the event that a permit holder does not comply with the conditions of the permit.

To ensure that the public is kept fully informed about the regulatory process under the Coastal Zone Act and about the health of the Coastal Zone generally, the Secretary will issue a report twelve months after the regulations are promulgated, and every twenty four months thereafter. The report will include:

1) A description of progress towards environmental goals developed by DNREC for the Coastal Zone;
2) Information on the general trends in the environmental indicators, in the form of narrative text as well as charts and graphs that will be easily understandable to a lay reader;
3) A list of permits issued, a brief description of the status of activities under those permits, and a review of selected existing permits and actual versus projected environmental benefits; and
4) A description of the cumulative impacts of permitted activities on the environmental indicators.

In addition to preparing this report, DNREC will maintain Coastal Zone regulation public records including:

1) permit applications and decisions including all permit conditions;
2) DNREC's annual report on the health of the coastal zone;
3) Tier II letters and decisions; and
4) status decision applications and decisions.

X. Public Notice Procedures

With the exception of information which is determined by the Secretary to be proprietary or trade secret within the bounds of the FOIA, it is essential that all

parties, including the public, continue to have adequate opportunities to review and comment on all aspects of the permitting process.

In addition to the standard channels for public comment which are already required (either by current laws or regulations, or under the federal or state FOIA's), the Secretary should provide an opportunity to citizens who are particularly interested in the Coastal Zone Act and the determinations and permits that might be granted under the Act, to subscribe to a direct notification process. Such a process would provide notification by mail and/or other means to interested persons of permit or other activities occurring under the Act or subsequent regulations.

The Coastal Zone Act regulations should summarize all requirements for public notice in one separate section on "Public Notice Procedures". This would be a gathering together of all the separate requirements under one heading. Placing all the requirements for public notice in one section of the regulations serves the interests of the public, DNREC and the applicants.

XI. Preparation of a Guidance Document

The Advisory Committee recommends that DNREC develop a guidance document to accompany the regulations, that should include:

1) A clear description of each step in the Coastal Zone permitting process, from an applicants initial contact with DNREC about a proposed Tier I, Tier II, or Tier III activity through the conclusion of the appeals process. This should be accompanied by a flow chart clearly illustrating how the different steps are sequenced.

2) A checklist of materials that DNREC must receive before an application will be designated "administratively complete."

3) A clarification about the relationship between the prior "status determination" process and the new Tier II notification process.

4) A description of DNREC's proposed process for developing, prioritizing, and revising the environmental indicators. When DNREC forms an Environmental Indicators Technical Advisory Committee (EITAC) or other such committees to assist in developing the indicators, then the guidance document should include a mission statement for the Committee.

The guidance document need not be developed simultaneously with the regulations, but ideally will be issued by the time the regulations are promulgated. If possible, the Advisory Committee would like to have an opportunity to comment on the guidance document before it is issued.

COASTAL ZONE
REGULATORY ADVISORY COMMITTEE

We, the undersigned members of the Coastal Zone Regulatory Advisory Committee, have reached consensus on the Memorandum of Understanding relating to the development of regulations governing administration of Delaware's Coastal Zone Act.

David Baker
Council of Farm Organizations

Jim Lynn
Dupont Corporation

David Healey
United Auto Workers

Adam McBride
Diamond State Port Corporation

Donald Crossan
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Tom Molin
United Steel Workers of America

John Deming
CIBA Specialty Chemicals

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Delaware Nature Society

Russell Peterson
Former Governor of Delaware

Deborah Heaton
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Grace Pierce-Beck
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Bill Wood
Chemical Industries Council

Governor Thomas R. Carper
WITNESS

March 19, 1998
Date

KRISTL PUBLIC COMMENT
ATTACHMENT 2

State of Delaware)
) SS.
New Castle County)

AFFIDAVIT OF DEBBIE HEATON

I, Debbie Heaton, having first been duly sworn, do hereby depose and say:

1. I have prepared this Affidavit because I will be out of town and unable to attend the February 27, 2017 hearing in *Delaware Audubon and League of Women Voters v. DNREC*, CZICB No. 2017-01. I have personal knowledge of the matters set forth herein.

2. In 1997, as a member of the Delaware Chapter of the Sierra Club working on Coastal Zone matters, I was appointed by Governor Tom Carper to serve on the Delaware Coastal Zone Regulatory Advisory Committee to the Delaware Department of Natural Resources and Environmental Control. The purpose of the Advisory Committee was to develop a Memorandum of Understanding (MOU) that would serve as recommendations on a set of regulations for implementing the Coastal Zone Act.

3. The membership of the Advisory Committee included representatives from different stakeholder groups, including industry and citizens, as well as representatives of various governmental offices, including the Governor's office and DNREC. The Advisory Committee operated on the principal of consensus agreement so that all members of the Committee would be heard and agree to the Committee's actions.

4. Governor Carper tasked the Advisory Committee with the job of generating an MOU leading to regulations that would meet two overriding goals. The first was that the regulations should ensure the continuing improvement of the environment of the Coastal Zone. The second was that industry would have flexibility in the administration of the Act necessary to accomplish the first goal.

5. The Advisory Committee met over the course of 18 months. In the course of discussing the goal of continuing improvement of the environment of the Coastal Zone, then DNREC Secretary Christophe Tulou proposed the use of environmental indicators as a way (along with a requirement for offsets) to measure progress and thereby assure achievement of the goal. As a representative of the Sierra Club, I believed that Secretary Tulou's proposal of environmental indicators and offsets were central to meeting the goal of continuing improvement of the environment of the Coastal Zone.

6. After approximately 18 months of work, the Advisory Committee reached consensus on a Memorandum of Understanding (MOU) that would guide the development of a set of proposed regulations by DNREC for submission to the Coastal Zone Industrial Control Board. All members of the Advisory Committee (including myself) signed the MOU, with Governor Carper as witness, on March 19, 1998.

7. The MOU included language which stated that DNREC would within 12 months develop a set of environmental goals and a set of environmental indicators to assess and track progress towards the environmental goals. It also provided that the DNREC Secretary would develop and use a set of environmental indicators in assessing CZA permit applications, and require offset proposals when necessary. The MOU also included language recommending that DNREC develop a Guidance document that would, among other things, spell out DNREC's process for developing the environmental indicators.

8. The language concerning environmental indicators and DNREC's promise to develop those indicators were an important factor in my agreeing on behalf of Sierra Club to sign the MOU because I viewed those provisions as the most appropriate way to achieve the Governor's goal of generating a set of regulations that would ensure the measurable improvement of the environment of the Coastal Zone.

9. Under the terms of the MOU, DNREC was to develop a proposed set of regulations consistent with the terms of the MOU. DNREC did create such a set of proposed regulations, and the Advisory Committee had an opportunity to review those proposed regulations before they were submitted to the Coastal Zone Industrial Control Board.

10. With the proposed set of regulations, DNREC also provided a Guidance document that included language on how environmental indicators would be developed, as well as DNREC's promise to develop a set of environmental indicators within 12 months. The Guidance document provided ultimately was identified as Appendix C to the proposed regulations.

11. Based on my review of the proposed set of regulations submitted to the Advisory Committee by DNREC, which included language indicating that environmental indicators would be used in assessing permit applications, as well as the language in the Guidance document concerning the development and timing of the environmental indicators, I believed that the proposed regulations and Guidance document accurately reflected what the MOU sought to be included in the proposed regulations. I therefore signed the MOU on behalf the Sierra Club.

12. Consistent with the MOU, the proposed regulations, and DNREC's promises in the Guidance document, I expected that DNREC would develop and adopt a set of environmental indicators for use in CZA permitting decisions. I would not have signed the MOU (and therefore there would not have had the necessary consensus for concluding the MOU) if I had known that DNREC would fail to keep its promise to develop environmental indicators and later claim that it need not use such indicators in the permitting process.

Debbie Heaton

Signed to and sworn before me
This 14th day of February, 2017.

Notary Public

MICHAEL K PINKSTON II
Notary Public
STATE OF DELAWARE
My Commission Expires August 22, 2020

KRISTL PUBLIC COMMENT
ATTACHMENT 3

Please check one box and return in the enclosed envelope.

☐ Yes, [although my worksheet indicates that long-term care insurance may not be a suitable purchase,] I wish to purchase this coverage. Please resume review of my application.

Drafting Note: Delete the phrase in brackets if the applicant did not answer the questions about income.

☐ No. I have decided not to buy a policy at this time.

APPLICANT'S SIGNATUREDATE

Please return to [issuer] at [address] by [date].

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

Statutory Authority: 7 Delaware Code, Chapter 70 (7 Del.C. Chp. 70)

ORDER

WHEREAS, pursuant to 7 *Del. C.* § 7005, the State Coastal Zone Industrial Control Board (the "Board") proposed to adopt Coastal Zone regulations as more specifically set forth in the Hearing Notices which are attached hereto as Exhibits "A" and "B" and incorporated herein; and,

WHEREAS, pursuant to 29 *Del. C.* § 10115, notice was given to the public that a hearing would be held on November 23, 1998, at 1:00 p.m. in Dover, Delaware and January 12, 1999, at 2:00 p.m. in Dover, Delaware to consider the proposed regulations and,

WHEREAS, the notice of the November 23, 1998 hearing invited the public to submit comments orally or in writing regarding the proposed amendments; and,

WHEREAS, two hearings were held on November 23, 1998, and January 12, 1999, and at each time a quorum of the Board was present; and,

SUMMARY OF EVIDENCE

WHEREAS, the Board heard oral comments at the hearing of November 23,1998, from those individuals listed in Exhibit "C" hereto. The oral comments and Board responses are summarized as follows: Former DNREC Secretary Christophe A.G. Tulou spoke in the capacity of a private citizen regarding his impressions and observations of the proposed regulations. According to Mr. Toulou, the Governor set forth to the Coastal Zone Regulatory Advisory Committee two overriding goals. Those goals were to develop a set of regulations that would ensure the continuing improvement of the environment in the Coastal Zone and to provide the flexibility for industry that is necessary to accomplish the first objective. Mr. Tulou believes the proposed regulations accomplish both those goals. The Coastal Zone Advisory Committee was comprised of 20 people appointed by the Governor who are involved in the Coastal Zone issues. In addition, any members of the public having an interest were invited to become involved in the process. The regulations as proposed are the product of a consensus of this Committee, not a majority vote, and therefore have the endorsement of all the groups and individuals represented through the Advisory Committee process. Mr. Tulou believes the proposed regulations are a very fragile agreement involving a tremendous amount of work and have dealt reasonably well with issues which have been extraordinarily hard to resolve. The product is a "bright-line test". Any activity that is going to have a negative impact on the Coastal Zone will require a permit. The application for such will detail, with certification, the impact on the Coastal Zone. Any negative impact on the Coastal Zone will have to be offset by some activity designed to ensure that the net result on the Coastal Zone environment will be better as a result. Some suggested offsets include eliminating harmful air emissions, or the restoration of wetlands. Mr. Tulou believes there to be flexibility to the offset portion of the regulations and states that an Environmental Indicators Technical Advisory Committee "EITAC" is being developed to provide specific Coastal Zone goals and indicators. The EITAC was formed pursuant to a Memorandum of Understanding put together by the Coastal Zone Advisory Committee. EITAC would provide yardsticks by which the future Secretary can determine if future proposals for offsets are appropriate. The information will also be available to the applicant so he or she may determine if their proposal is likely to be deemed appropriate.

Mary McKenzie, Acting Secretary of DNREC, recommended the Board accept the regulations as proposed and stressed that no changes should be made as the regulations are extremely complex and the agreement is fragile. She suggested that the Board adopt the regulations and allow them to demonstrate their effectiveness or problems over some time before amendments are considered.

Mark F. Dunkle spoke on behalf of the Delaware Solid Waste Authority(DSWA). His comments reflect those that he made at the August 26, 1998, workshop. Mr. Dunkle reiterated the DSWA's objection to the proposed Regulation Section C : Definition (11) regarding "Public Recycling Plants". The definition includes "any recycling plant or industrial facility whose primary product is recycled

materials and which is owned and operated by any city, town, county, district or other political subdivision". Mr. Dunkle believes this definition conflicts with the Authority's more recent and generic enabling act therefore inhibiting the ability of DSWA to contract out. Mr. Dunkle further asserted that the DSWA is a public body or instrumentality; however this was not mentioned in the definition of public recycling plant, despite a previous draft of such including such mention.

Mr. Dunkle questioned the definition of public sewage treatment plant in Section C: Definitions (12) as it is treated differently from that of public recycling plant in (11) and suggested the use of the language "under the jurisdiction", found in (12), also be applied to the definition of public recycling plant. In response to a question by the Board, Mr. Dunkle stated that he believes the DSWA constitutes an "existing use" at the time the Coastal Zone Act was adopted by way of the Act's inclusion of public recycling facilities. The DSWA undertook responsibilities for public recycling facilities and accordingly he believes it constitutes an existing use.

The Board disagrees, based on the evidence presented. The Board does not believe the DSWA was in existence and in active use on June 28, 1971 and therefore is required to have a permit. The Board does not agree that the definition of public recycling plant needs to be as expansive as that of public sewage treatment plant in order to conform with the Act. The Act does not define either public sewage treatment plant or public recycling plant and the Board is free to define these terms through the Regulations pursuant to the Coastal Zone Act at 7 *Del.C* § 7005(c).

Tom Mullin , a representative of the United Steel Workers of America and an employee at ICI Americas, advised the Board that ICI will be using its original footprint, not the one re-submitted in the summer. He also stressed that the regulations must strike a balance. Mr. Mullin urged to Board accept the proposed regulations without amendment and commented that there was opportunity for public comment at every meeting of the Advisory Committee.

Wendy Meyers, on behalf of the Eastern Environmental Law Center, offered comment questioning whether the regulations should address electrical utilities. She believes the regulation of such should be reviewed and that the regulations should address the construction of parking lots. She stated parking lots are presently exempt under Section E (4) and she believes they should be subject to the permitting requirements. Lastly, she suggested that the offsets be carefully planned and have a direct correlation to the health of the coastal zone with industry being required to prove such correlation with reasonable scientific certainty. Ms. Meyers agreed these issues could wait to be addressed by the Board at a later date through amendment.

The Board did not agree with Ms. Meyers that the construction of a parking lot in itself should constitute expansion or extension of heavy industry or manufacturing uses under the regulations. The Board does not agree that the construction of parking lots presently requires inclusion in the regulations to protect the coastal zone from industrial development. The Board, likewise, did not agree that sufficient evidence was presented to the Board to require the inclusion of electrical utilities within the present proposed regulations. The Board agrees that proposed offsets should be carefully planned and correlate to the health of the coastal zone. Allan Muller, a representative of Green Delaware, commented regarding the composition of the Advisory Committee, suggesting there should have been representatives of watermen, fishermen, and recreational tourism industries. It is his belief that the chemical industry dominated the committee and residents of the coastal zone were not specifically contacted. He also stated that no member of the Committee or the Board is a minority.

Mr. Muller questioned the amount of discretion left with DNREC under the proposed regulations and the offsetting process. Mr. Muller believes the regulations are fundamentally unsound in their reliance on the offset process, indicator process, and the exclusion of electrical facilities from heavy industry.

The Board disagrees with Mr. Muller that the composition of the Advisory Committee or the Board is discriminatory. The Board further disagrees with Mr. Muller that the regulations give DNREC more discretion than it is capable of properly exercising. The Board's opinion regarding Mr. Muller's remaining comments have previously been addressed herein.

Jim Lisa, a representative of the Delaware Economic Development Office, advised that the Office of Tourism is housed within the Delaware Economic Development Office and the Director of Tourism was informed of all meetings, invited to attend and was provided all information regarding the regulations by the Advisory Committee. The Delaware Economic Development Office is in full support of the regulations as proposed and recommends their adoption without modification.

The remainder of the public comments are summarized as follows: the consensus process
was lengthy and thorough enough that no hidden agendas or surprise areas appear to remain. The
regulations meet the major objectives of all parties. They are a delicately balanced compromise agreement and are extremely fragile. The regulations should be adopted as proposed.

WHEREAS, the Board received several written comments, documents and other submissions regarding the hearing of November 23, 1998. These are described in more detail below and were made part of the record identified as Exhibits "D-H"and incorporated herein; Exhibit "D": November 19, 1998, letter from Mark F. Dunkle, Esq.

supporting his oral comments made on November 23, 1998, at the public hearing. Mr. Dunkle's comments have been addressed by the Board previously and will not be restated.

Exhibit "E": November 23, 1998, Statement from the League of Women Voters of Delaware by Jackie Harris, President. Ms. Harris urges that the Board promptly adopt the regulations as transmitted by DNREC based on the lengthy consensus process, which was monitored by League members.

Exhibit "F": November 23, 1998, letter from Robert W. Whetzel, Esq. from Richards, Layton & Finger, P.A., a law firm. Mr. Whetzel asserts the offset provisions of the proposed regulations are beyond the statutory authority granted by the Coastal Zone Act (CZA). Mr. Whetzel argues the CZA identifies factors for the Secretary to consider in reviewing a permit application under 7 *Del.C.* § 7004(b), however it does not require a permit applicant to more than offset the environmental impacts of a proposed project. Mr. Whetzel further objects to the failure of the proposed regulations to define the terms "negative environmental impact" or "offset proposal". Additionally, he felt that there is no basis to measure the impact. Lastly, Mr. Whetzel objects to Section G (1) regarding status decisions. He believes the proposed regulations are unclear in regards to the request for a status decision whether or not an activity or facility is a "heavy industry". He suggests the Board replace the language with "requires a Coastal Zone permit".

The Board disagrees with Mr. Whetzel. The Board believes Section I of the proposed regulations regarding Offset Proposal Requirements is not contrary to law as the Coastal Zone Act 7 *Del.C.* § 7004 (b) sets forth in detail the factors which shall be considered in passing on permit requests. Among those listed are environmental impact, economic effect, aesthetic effect, and effect on neighboring land uses. The statute does not distinguish among such "impacts" or "effects"; nor does the statute prohibit mitigation of such effects. Moreover, the Act mandates the development of comprehensive regulations and gives the Board broad discretion in regard to those regulations.

The Board does not believe that further definition regarding this Section is presently necessary. The determination of negative environmental impacts and the measuring of offsets can be resolved through the administrative actions of the Secretary in conjunction with the goals and indicators provided by EITAC. If problems arise, an appeal may still be made to the Board. The Board also disagrees that Section G (1) regarding status decisions is unclear. The request for a status decision as to whether or not an activity or facility is a "heavy industry" will adequately advise the inquirer as to how its intended activity or facility will be handled under the Coastal Zone Act and its regulations.

Exhibit "G": November 23, 1998, Comment from Wolfgang von Baumgart. Mr. Baumgart suggested the inclusion of radioactive agents, high-level radioisotopes, Plutonium, and Actinides, Lanthanides to Section D regarding prohibited uses. He further suggested the Secretary and Board have the power to prohibit or limit some proposed activities regarding those items previously mentioned.

The Board does not agree that Section D need be expanded at this point to include those agents suggested by Mr. Baumgart. The Board has been presented with insufficient evidence to suggest these agents are presently a threat to the Coastal Zone or are being contemplated as agents to be used within the Coastal Zone at this time.

Mr. Baumgart suggested amendments to Section E regarding Uses Not Regulated. The Board sees no present need to change the proposed language regarding this Section to conform to his suggestions and has been presented with no other evidence in support of such.

Mr. Baumgart suggested amendments to Section H.2 Environmental Impact Statement under Permitting Procedures. The Board does not agree that the proposed amendments are presently necessary to adequately fulfill the Permitting Procedures. The Board believes the environmental impact statement requirements are presently sufficient and has been presented no other evidence to support the inclusion of these amendments to the statement. The Board referred Mr. Baumgart's comments to the Secretary of DNREC for his or her administrative guidance.

Exhibit "H": November 23, 1998, Statement from Richard A. Fleming, Private Citizen. Mr. Fleming requested the Board adopt the proposed regulations without amendment.

WHEREAS, the Board received oral comments at the hearing of January 12, 1999, from those individuals listed in Exhibit "I" as attached. The oral comments are summarized as follows:

Ms. Betty Piovoso, a technologist in the Environmental Department at the Delaware City Refinery owned and operated by Motiva Enterprises, offered three comments. First Appendix B showing the Footprints of Nonconforming Uses should be changed to read "Motiva Enterprise" instead of "Star Enterprise" in light of their recent change in ownership. Second, she suggested the workload surrounding the new permitting process may be too burdensome for DNREC. Third, Motiva does not believe the Coastal Zone Act requires a net environmental improvement but simply a mitigation of impact through the offsetting process. Notwithstanding that observation, Motiva believes the Secretary should develop specific guidance for the regulated community to use in determining the magnitude and adequacy of offset proposals. Ms. Piovoso agreed any immediate harm could be eliminated through the Secretary's administrative decisions.

The Board does not agree that the footprints presently in the regulations must be changed for their adoption. The footprints are presently sufficient for adoption of the

regulations. The footprints will change periodically for various reasons, such as changes in ownership, and these changes can be resolved through future amendment.

The Board does not agree that the DNREC will be overburdened by the adoption of the regulations as proposed and has confidence that a new Secretary will adequately address any administrative needs and changes to accommodate the implementation of these regulations; if not, an appeal may be made to the Board. The Board likewise disagrees that any net environmental improvement resulting from the offsetting process would be contrary to the Coastal Zone Act. The Board expects the Secretary to issue guidance on offsets in the future. Mr. Bruce Patrick, a Kent County engineer, commented regarding public sewer treatment plants (POTWs). Mr. Patrick is concerned the that POTWs are already very heavily regulated. Mr. Patrick questioned the definition in Section C (12) of Public Sewer Treatment Plants and suggested deleting the word "conveyance" from the definition. By including the word "conveyance", he is concerned that it will be more difficult to conduct septic elimination projects in the Coastal Zone. The logistics will slow the process for many of the townships fixing failing septic systems. Mr. Patrick's second comment questioned the effect the definition will have on the existing POTWs. Mr. Patrick suggests the regulations may slow the ability of POTWs to make modifications to address failing septic systems. Mr. Patrick suggested either eliminating POTWs from the Coastal Zone regulations and instead focusing on industrial wastewater treatment facilities, or eliminating the term "conveyance".

Mr. Michael Izzo, the County Engineer for Sussex County, echoed Mr. Patrick's concerns. He specifically addressed the cost associated with the application process as troubling and informed the Board that the Sussex County Council opposes the inclusion of any reference to wastewater facilities of any kind in the proposed regulations.

The Board does not agree at this time with Mr. Patrick's suggested change to Section C (12) defining Public Sewer Treatment Plants. The concerns addressed to the Board by both gentlemen regarding POTWs are speculative. While the Board is concerned that sewer systems have problems, especially in Kent and Sussex Counties, the Board hopes the Secretary of DNREC will make every effort to implement administrative policies to protect against excessive delay or unreasonable cost. If not, an appeal may be made to the Board. The comments regarding the regulation of POTWs have not been supported by sufficient evidence at present to convince the Board that the proposed regulations will result in an adverse impact to the Coastal Zone. The Pfisteria problem is being concurrently studied. The inconvenience or additional cost of regulation is not a justifiable reason to exempt an activity or facility from the Coastal Zone Act and its permitting requirements, especially if administrative remedies are yet available.

The remaining public comments are summarized as follows: there have been several ownership changes of the involved industries and the footprints should be left as is. Any changes in footprints can be addressed through later amendment to the regulations. The Advisory Committee meetings were open to the public, however, representatives from the counties did not attend.

WHEREAS, prior to the close of the written comment period the Board received written comments from Oceanport Industries, Inc. and Motiva Enterprises, LLC. These comments were made part of the record, are attached as Exhibits "J" and "K"and incorporated herein. These comments are summarized as follows:

Exhibit "J": November 17, 1998 Letter from Robert H. MacPherson of Oceanport Industries, Inc. Mr. MacPherson questions the clarity of Section C (6) defining Docking Facility and offers some revised language. The Board disagrees that the language is ambiguous and does not adopt his suggested revision. Mr. MacPherson suggests modification to Section D E.9 to include "or as subsequently approved by Delaware Coastal zone permit". The Board disagrees that this language is necessary as the activity is already permitted and its inclusion is unnecessary. Mr. MacPherson further suggests an addition to E.12 to include mooring buoys, dolphins and other mooring devices serving only to safely secure vessels to an existing nonconforming bulk product transfer facility. The Board disagrees and believes the definition of "docking facility" adequately addresses this concern.

Mr. MacPherson expressed concern that Section D. numbers 3, 5, and 7 are sufficiently similar and should be condensed into one use or activity. The Board has determined the prohibited uses or activities as stated in numbers 3, 5, and 7 describe different uses or activities distinctly enough that their separation into different sections is appropriate and unambiguous. These were referred to the Secretary for his or her guidance.

Mr. MacPherson further suggests modification to Section F.1 and F.3 in accordance with his reading of the regulation. The Board disagrees that the suggested changes by Mr. MacPherson to Section F of Uses Requiring a Permit are necessary at this time. Mr. MacPherson has presented insufficient evidence in support of any of his suggested amendments or changes to the proposed regulations and the Board is not convinced by his written comments that these changes are presently necessary for the regulations to conform to the Coastal Zone Act.

Lastly, Mr. MacPherson suggests changing the footprint of Oceanport. Mr. MacPherson has provided little evidence that the footprint as proposed is inaccurate. The Board accepts the footprint as presented and to the extent change is later shown necessary, it can be accomplished through amendment.

Exhibit "K" November 23, 1998, letter from P.M. Laabs

of Motiva Enterprises, LLC. Mr. Laabs' comment addresses the facility's footprint and suggests it be changed in light of the change in ownership. Also, Mr. Laabs addresses the same concerns as Ms. Piovoso regarding the increased workload at DNREC in issuing permits and the concerns surrounding the offsetting process. The Board has previously responded to these concerns in addressing Ms Piovoso's comments and they will not be restated here.

FINDINGS OF FACT

WHEREAS, the Board makes the following factual findings:

1) The regulations as proposed are a fragile consensus of agreement between industry, and members of the public who have expressed an interest in the Coastal Zone and the Department of Natural Resources and Environmental Control. The regulations represent a delicate balance of each party's concerns and opinions on how to govern the disposition of permit requests and procedures for hearings before the Secretary of the Department of Natural Resources and Environmental Control ("DNREC") and the Board. The regulations as proposed serve as a comprehensive plan and guideline for the Board regarding acceptable types of manufacturing uses in the coastal zone and further elaborate the definition of "heavy industry" in a manner consistent with the purposes and provision of Chapter 7. The Act mandates that the Secretary of DNREC shall prepare such comprehensive regulations.

2) Many of the concerns addressed to the Board were previously addressed to the Advisory Committee and sub-committees. Having had the opportunity to engage in lengthy discussion and research, the Advisory Committee believes that the regulations as proposed appropriately address these concerns. Members of the Advisory Committee provided oral comments regarding some of these concerns. The Board is satisfied that the concerns were adequately addressed through the Advisory Committee process and were adequately taken into account in drafting the proposed regulations. The Board has not been presented with sufficient evidence to cause it to modify the suggested language of the regulations as proposed.

3) The Board is satisfied that the composition of the Advisory Committee and the Board is a fair representation of the citizens of the State of Delaware and the industries affected.

4) The concerns addressed to the Board through oral and written comment regarding POTWs and de minimis impact projects are adequately addressed by the regulations. The Board is confident that the Secretary of DNREC will attempt to exercise the appropriate discretion and implement appropriate administrative policies to further resolve any issues. If not, an appeal may be made to the Board. Although the possibility of additional costs and possible delays are of concern, they are only possible consequences of the regulations as proposed and have not at this point been proven as having an adverse impact on the Coastal Zone. The comments also support that these issues can be further addressed through the administrative actions of the Secretary. None of the issues presented were supported by sufficient evidence to require amendment to the regulations as proposed at present. The Board believes the proposed regulations are sufficiently written to provide adequate notice and are enforceable.

5) The Board does not find any of the definitions to be vague or overly broad. In particular, the Board is satisfied that the definition of Public Recycling Plant at Paragraph 11 is reasonable and enforceable. The definition conforms to the mandates of the Coastal Zone Act and the objectives of Title 7 *Del.C.* Chapter 64.

6) The footprints presently in the regulations are sufficient for adoption of the regulations and any changes in ownership or otherwise can be resolved through future amendment without the necessity of present modification to the regulations as proposed.

7) Section I of the proposed regulations regarding Offset Proposal Requirements is not contrary to law as the Coastal Zone Act 7 *Del.C.* § 7004 (b) sets forth in detail the factors which shall be considered in passing on permit requests. Among those listed are environmental impact, economic effect, aesthetic effect, and effect on neighboring land uses. The statute does not distinguish among such "impacts" or "effects"; nor does the statute prohibit mitigation of such effects. Broad discretion was given to the Board under the Coastal Zone Act. The Board believes the administrative actions of the Secretary in conjunction with the goals and indicators provided by EITAC will address any issues regarding the measuring of offsets.

8) Any additional concerns presented to the Board not specifically addressed herein are deemed either not relevant to the Coastal Zone Regulations or the Board believes they can be fully addressed administratively and incorporated through amendment to the regulations following a more thorough review. The Board does not believe these concerns will result in any immediate adverse impact on the Coastal Zone nor are they contrary to law.

WHEREAS, the Board is satisfied that the regulations, as proposed, adequately set forth a comprehensive plan and guidelines for the Board concerning manufacturing uses acceptable in the coastal zone, and that they further elaborate the definition of "heavy industry" in a manner consistent with the purposes and provision of the Coastal Zone Act and that its rules and regulations are in compliance with the provision of 7 *Del.C.* Chapter 70 and 24 *Del. C.* Ch. 29;

NOW, THEREFORE, based on the Board's authority to adopt rules and regulations pursuant to 7 *Del. C.* § 7005, it is the decision of the Board to adopt the proposed regulations as presented to the Board. The regulations as proposed, a copy of which are attached hereto as Exhibit "L" and

incorporated herein, shall be effective 10 days from the date of this Order as published in the Register of Regulations pursuant to 29 *Del.C.* § 10118(e). The Board will forward a copy of the record to the Secretary of DNREC for consideration in implementing the regulations with specific and immediate reference to Section C 12 concerning Public Sewage Treatment Plants or POTWs and any resulting impact on county sewer systems.

IT IS SO ORDERED this day of , 1999.

STATE COASTAL ZONE INDUSTRIAL CONTROL BOARD

Christine M. Waisanen, Chairwoman
George Collins
R. Jefferson Reed
David Ryan
J. Paul Bell
Victor Singer
Darrell Minott
Donald J. Verrico
John Allen, Sr.

Regulations Governing Delaware's Coastal Zone
Prepared by
The Delaware Department of Natural Resources and Environmental Control
for
The Coastal Zone Industrial Control Board
May 11, 1999

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***PLEASE NOTE THAT DUE TO SPACE CONSTRAINTS THE TABLE OF CONTENTS IS NOT BEING REPRINTED HERE. THE TABLE OF CONTENTS IS AVAILABLE FROM THE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL OR THE REGISTRAR.**

Preamble

These regulations have been developed to accomplish two key goals. They have been designed 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 – all while adhering to the edicts and nuances of one of the most original and innovative environmental and land use statutes in the world.

Delaware's Coastal Zone Act was passed in 1971 and provides to the Secretary of the Department of Natural Resources and Environmental Control and the Coastal Zone Industrial Control Board the authority to promulgate regulations to carry out the requirements contained within the Act. For numerous reasons, regulations were never adopted and implementation of Coastal Zone Act was left to an undefined and informal process that frustrated industry and environmentalist alike. That frustration further polarized the debate over the original intention of the Act and what the focus of any regulations should be.

Finally, 25 years after passage of the Act, the negative implications of not having regulations came to outweigh the contentiousness of the debate. An advisory committee of dedicated Delawareans was then convened and, after eighteen months of oftentimes difficult debate, came to consensus agreement on how to embody the linked goals of industry flexibility and environmental improvement. The committee's agreements were memorialized in a Memorandum of Understanding between all participants. That MOU was founded on consensus, respect and necessity and it was used as a basis for these regulations.

A. Authority

1. These regulations are promulgated pursuant to authority granted to the Secretary and the State Coastal Zone Industrial Control Board by Section 7005(b) and (c) of the Coastal Zone Act, 7 Del. C., Chapter 70.

B. Applicability

1. The Coastal Zone Act program and these regulations are administered by the Delaware Department of Natural Resources and Environmental Control pursuant to 7 Del. C. Section 7005(a).

2. These regulations apply to areas within the Coastal Zone as defined by 7 Del. C. Chapter 70. A map of the coastal zone appears in Appendix A of these regulations.

3. These regulations specify the permitting requirements for existing non-confoming uses already in the coastal zone and for new manufacturing uses proposing to locate within Delaware's coastal zone.

C. Definitions

Many terms which appear in these regulations are defined in the Coastal Zone Act as shown in Appendix E. Terms not defined in the Act shall have the following meanings:

1. "Administratively Complete" means a coastal zone permit application or status decision request that is signed, dated, and contains, in the opinion of the Secretary, substantive responses to each question, a sufficient offset proposal, if applicable, and includes the appropriate application fee and all enclosures the applicant has referenced in the application.

2. "Board" means the State Coastal Zone Industrial Control Board.

3. "Bulk Product" means loose masses of cargo such as oil, grain, gas and minerals, which are typically stored in the hold of a vessel. Cargoes such as automobiles, machinery, bags of salt and palletized items that are

individually packaged or contained are not considered bulk products in the application of this definition.

4. "Certify" means the applicant is attesting, by affirmation, that all the data and other information in the application is true and accurate.

5. "Department" means the Delaware Department of Natural Resources and Environmental Control.

6. "Docking Facility" means any structures and/or equipment used to temporarily secure a vessel to a shoreline or another vessel so that materials, cargo, and/or people may be transferred between the vessel and the shore, or between two vessels together with associated land, equipment, and structures so as to allow the receiving, accumulating, safekeeping, storage, and preparation of cargoes for further shipment, and administrative maintenance purposes directly related to such receiving, accumulating, safekeeping, storage, and preparation of cargoes for further shipment.

7. "Environmental indicator" means a numerical parameter which provides scientifically-based information on important environmental issues, conditions, trends, influencing factors and their significance regarding ecosystem health. Indicators inherently are measurable, quantifiable, meaningful and understandable. They are sensitive to meaningful differences and trends, collectible with reasonable cost and effort over long time periods, and provide early warning of environmental change. They are selected and used to monitor progress towards environmental goals.

8. "Footprint" means the geographical extent of non-conforming uses as they existed on June 28, 1971 as depicted in Appendix B.

9. "Port of Wilmington" means those lands contained with the footprint shown in Appendix B of these regulations.

10. "Potential To Pollute" means the proposed use has the potential to cause short and long term adverse impacts on human populations, air and water quality, wetlands, flora and fauna, or to produce dangerous or onerous levels of glare, heat, noise, vibration, radiation, electromagnetic interference and obnoxious odors as determined in the applicant's Environmental Impact Statement accompanying the permit application. The Department will consider mitigating controls and risk management analysis reports from the applicant in evaluating a proposed use's potential to pollute. The Department shall consider probability of equipment failure or human error, and the existence of backup controls if such failure or error does occur, in evaluating an applicant's potential to pollute.

11. "Public Recycling Plant" means any recycling plant or industrial facility whose primary product is recycled materials and which is owned and operated by any city, town, county, district or other political subdivision.

12. "Public Sewage Treatment Plant" means any device and/or system used in conveyance, storage, treatment, disposal, recycling and reclamation of municipal sewage or industrial wastes of a liquid nature, which systems are under the jurisdiction of a city, town, county, district or other political subdivision.

13. "Recycle" means the series of activities, including collection, separation, and processing, by which products or other materials are recovered from or otherwise diverted from the solid waste stream for use in the form of raw materials other than fuel for producing heat or power combustion.

14. "Research And Development Activity" means those activities in which research and development substances are used in quantities that are not greater than reasonably necessary for the purposes of scientific experimentation or product or process development. The research and development substances must either be the focus of research and development itself, or be used in the research and development activity focusing on another chemical or product. research and development includes synthesis, analysis, experimentation or research on new or existing chemicals or products. Research and development encompasses a wide range of activities which may occur in a laboratory, pilot plants or commercial plant, for testing the physical, chemical, production, or performance characteristics of a substance, conducted under the supervision of a technically qualified individual. Research and development is distinct from ongoing commercial activities which focus on building a market for a product rather than just testing its market potential. General distribution of chemical substances or products to consumers does not constitute research and development.

15. "Secretary" means the Secretary of the Department of Natural Resources and Environmental Control.

16. "Vessel" means any ship, boat or other means of conveyance that can transport goods or materials on, over, or through water.

17. "Voluntary Improvements" means improvements, for example, in emissions reductions, habitat creation and spill prevention -- provided that each is definite and measurable and which were made by a facility without any federal or state requirement to do so.

D. Prohibited Uses

The following uses or activities are prohibited in the Coastal Zone:

1. Heavy industry use of any kind not in operation on June 28, 1971.

2. Expansion of any non-conforming uses beyond their footprint(s) as depicted in Appendix B of these regulations.

3. Offshore gas, liquid, or solid bulk product transfer facilities which were not in operation on June 28,

1971.

4. The conversion of an existing unregulated, exempted, or permitted facility to a heavy industry use.

5. Bulk product transfer facilities and pipelines which serve as bulk transfer facilities that were not in operation on June 28, 1971.

6. The conversion or use of existing unregulated, exempt, or permitted docking facilities for the transfer of bulk products.

7. The construction, establishment, or operation of offshore gas, liquid, or solid bulk product transfer facilities which were not in operation on June 28, 1971.

8. Individual pipelines or sets of pipelines which are not associated with a use that obtains a permit but which meet the definition of bulk product transfer facilities.

9. Any new tank farm greater than 5 acres in size not associated with a manufacturing use is prohibited as a new heavy industry use.

E. Uses Not Regulated

The construction and/or operation of the following types of facilities and/or activities shall be deemed not to constitute initiation, expansion or extension of heavy industry or manufacturing uses under these regulations:

1. The raising of agricultural commodities or livestock.

2. Warehouses or other storage facilities, not including tank farms.

3. Tank farms of less than five acres.

4. Parking lots or structures, health care and day care facilities, maintenance facilities, commercial establishments not involved in manufacturing, office buildings, recreational facilities and facilities related to the management of wildlife.

5. Facilities used in transmitting, distributing, transforming, switching, and otherwise transporting and converting electrical energy.

6. Facilities used to generate electric power directly from solar energy.

7. The repair and maintenance of existing electrical generating facilities providing such repair or maintenance does not result in any negative environmental impacts.

8. Back-up emergency and stand-by source of power generation to adequately accommodate emergency industry needs when outside supply fails.

9. The continued repair, maintenance and use of any non-conforming bulk product transfer facility where that facility transfers the same products and materials, regardless of the amount of such products or materials, as those transferred on June 28, 1971.

10. Bulk product transfer operations at dock facilities owned by the Diamond State Port Corp. (DSPC), or acquired by the DSPC at any time in the future, and which are located within the Port of Wilmington as shown in Appendix B.

11. Docking facilities used as bulk product transfer facilities located on privately owned lands within the Port of Wilmington which have been granted a status decision extending the bulk product transfer exemption prior to the effective date of these regulations.

12. Docking facilities which are not used as bulk product transfer facilities.

13. Any pipeline that originates outside the Coastal Zone, traverses the Coastal Zone without connecting to a manufacturing or heavy industry use and terminates outside the Coastal Zone.

14. Maintenance and repair of existing equipment and structures.

15. Replacement in-kind of existing equipment or installation of in-line spares for existing equipment.

16. Installation and modification of pollution control and safety equipment for nonconforming uses within their designated footprint providing such installation and modification does not result in any negative environmental impact over and above impacts associated with the present use.

17. Any facilities which have received, prior to the promulgation of these regulations, a status decision which provided an exemption for the activity in question.

18. Research and development activities within existing research and development facilities.

19. Any other activity which the Secretary determines, through the status decision process outlined in Section G of these regulations, is not an expansion or extension of a non-conforming use or heavy industry use.

F. Uses Requiring a Permit

The following uses or activities are permissible in the Coastal Zone by permit. Permits must be obtained prior to any land disturbing or construction activity.

1. The construction of pipelines or docking facilities serving as offshore bulk product transfer facilities if such facilities serve only one on-shore manufacturing or other facility. To be permissible under these regulations, the materials transferred through the pipeline or docking facilities must be used as a raw material in the manufacture of other products, or must be finished products being transported for delivery.

2. Any public sewage treatment plant or public recycling plant.

3. Any new activity, with the exception of those listed in Section E of these regulations proposed to be initiated after promulgation of these regulations by an existing heavy industry or a new or existing manufacturing facility that may result in any negative impact on the following factors as found in 7 Del. C., Section 7004 (b):

a) Environmental impact, including but not limited to, items H.2.a through H.2.j of these regulations.

b) 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.

c) Aesthetic effect, such as impact on scenic beauty of the surrounding area.

d) Number and type of supporting facilities required and the impact of such facilities on all factors listed in this subsection.

e) Effect on neighboring land uses including, but not limited to, effect on public access to tidal waters, effect on recreational areas and effect on adjacent residential and agricultural areas.

f) County and municipal comprehensive plans for the development and/or conservation of their areas of jurisdiction.

G. Requests For Status Decisions

1. Any person wishing to initiate a new activity or facility may request a status decision to determine whether or not the activity or facility is a heavy industry.

2. A person whose proposed activity is not exempted as specified in Section E above may request of the Secretary a status decision to determine whether or not the proposed activity requires a Coastal Zone permit under the Act or these regulations.

3. Status decision requests must be in writing on a form supplied by the Secretary and shall include, at a minimum, the following:

a) Name, address and contact person for the activity or facility under consideration.

b) Site of proposed activity marked on a map or site plan.

c) A detailed description of the proposed activity under consideration.

d) An impact analysis of the proposed project on the six (6) criteria contained in Section F.3 (a-f) above.

4. Any new manufacturing facility or research and development facility proposed to be sited in the Coastal Zone shall apply for a status decision.

5. The Secretary may, if he has cause to suspect an activity within the confines of the Coastal Zone is prohibited or should receive a permit under these regulations, request of the person undertaking that activity to apply for a status decision as described in this section. Failure of the person to respond to the Secretary's request shall subject said person to enforcement procedures as contained in the Act and/or Section R of these regulations.

6. Upon receipt of an administratively complete request for a status decision, the Secretary shall publish a legal notice as prescribed in Section N of these regulations advising the public of the receipt of the request and allowing 10 business days for interested persons to review the request and provide the Secretary with input on whether a permit should be required of the applicant.

7. The Secretary shall then, within an additional 15 business days, determine whether or not a permit will be required and notify the applicant in writing of his determination. The Secretary shall publish that determination as a legal notice as prescribed in Section N of these regulations.

H. Permitting Procedures

Application Contents

The applicant shall complete and submit to the Secretary three (3) identical copies of the Coastal Zone permit application. The application will be on a form supplied by the Secretary and will contain, at a minimum:

a) A certification by the applicant that the information contained with the application is complete, accurate and truthful.

b) Evidence of local zoning approval as required by section 7004 (a) of the Act.

c) An Environmental Permit Application Background Statement as required under 7 Del. C. Chapter 79, if applicable.

d) An Environmental Impact Statement as described in Section H.2 of these regulations.

e) A description of the economic effects of the proposed project, including the number of jobs created and the income which will be generated by the wages and salaries of these jobs and the amount of tax revenues potentially accruing to State and local government.

f) A description of the aesthetic effects of the proposed project, such as impact on scenic beauty of the surrounding area.

g) A description of the number and type of supporting facilities required and the impact of such facilities on all factors listed in this section.

h) A description of the effect on neighboring land uses including, but not limited to, effect on public access to tidal waters, effect on recreational areas and effect on adjacent residential and agricultural areas.

i) A statement concerning the project or activity's consistency with county and municipal comprehensive plans.

j) An offset proposal if required under Section I.1.a of these regulations.

H.2 Environmental Impact Statement

An environmental impact statement must be submitted with the Coastal Zone permit application and must contain, at a minimum, an analysis of the following:

a) Probable air, land and water pollution likely to be generated by the proposed use under normal operating conditions as well as during mechanical malfunction and human error. In addition, the applicant shall provide a statement concerning whether, in the applicant's opinion, the project or activity will in any way result in any negative environmental impact on the Coastal Zone.

b) An assessment of the project's likely impact on

the Coastal Zone environmental goals and indicators, when available. Coastal Zone environmental goals and indicators shall be developed by the Department after promulgation of these regulations and used for assessing applications and determining the long-term environmental quality of the Coastal Zone. In the absence of goals and indicators, applicants must meet all other requirements of this section.

c) Likely destruction of wetlands and flora and fauna.

d) Impact of site preparation on drainage of the area in question, especially as it relates to flood control;

e) Impact of site preparation and facility operations on land erosion;

f) Effect of site preparation and facility operation on the quality and quantity of surface and ground water resources,

g) A description of the need for the use of water for processing, cooling, effluent removal, and other purposes;

h) The likelihood of generation of glare, heat, noise, vibration, radiation, electromagnetic interference and/ or obnoxious odors,.

i) The effect of the proposed project on threatened or endangered species as defined by the regulations promulgated by the State or pursuant to the Federal Endangered Species Act, and,

j) The raw materials, intermediate products, byproducts and final products and their characteristics from material safety data sheets (MSDS's) if available, including carcinogenicity, mutagenicity and/or the potential to contribute to the formation of smog.

H.3 Application Review Process

a) The Department reserves the right to request further relevant information after receipt of an application and prior to the application being deemed administratively complete. The Secretary shall notify the applicant by certified mail when the application is deemed administratively complete.

b) In assessing an application, the Secretary shall consider how the proposed project will affect the six criteria cited in the Act, including direct and cumulative environmental impacts, economic effects, aesthetic effects, number and type of supporting facilities and their anticipated impacts on these criteria, effect on neighboring land uses, and compatibility with county and municipal comprehensive plans.

c) 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.

d) Prior to public hearing, the Secretary shall provide a written assessment of the project's likely impact on the six criteria listed in Section H.1 above and make available the preliminary determination of the sufficiency of the offset project as required in Section I of these regulations. The Secretary's report will be provided to the applicant and interested citizens prior to the public hearing and made a part of the record.

e) Upon receipt of an administratively complete application and completion of the Secretary's assessment as required in Section H.3.d above, the Secretary shall issue a public notice as prescribed in Section N of these regulations and hold a public hearing in accordance with hearing procedures described in Section O of these regulations.

f) Within 90 days of receipt of an administratively complete application, not counting the day the application became administratively complete, the Secretary shall reply to the request for a Coastal Zone act permit either granting the permit, denying the permit or granting the permit but with special conditions. The Secretary shall state the reasons for his decision.

g) The permit decision shall be sent to the applicant by certified mail and shall be noticed as prescribed in Section N of these regulations. If no appeal is received within the 14-day appeal period following the date of publication of the legal notice, the decision becomes final and no appeal will be accepted.

I. Offset proposals

Offset Proposal Requirements

a) Any application for a Coastal Zone permit for an activity or facility that will result in any negative environmental impact shall contain an offset proposal. Offset proposals must more than offset the negative environmental impacts associated with the proposed project or activity requiring a permit. It is the responsibility of 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 permitting activities themselves.

b) All applicants, are required to more than offset the negative impacts of the project or activity that is the subject of the application for a Coastal Zone permit. Applicants who have undertaken past voluntary improvements may be required to provide less of an offset than applicants without a similar record of past achievements.

c) The Secretary shall give preference to offset projects that are within the Coastal Zone, that occur in the same environmental medium as the source of degradation of the environment, that occur at the same site as the proposed activity requiring a permit and that occur simultaneously with the implementation of the proposed activity needing an offset.

d) Offset proposals should be well-defined and contain measurable goals or accomplishments which can be audited by the Department.

e) Within 30 days of receipt of an application, the Secretary shall make a preliminary determination as to whether the proposed offset commitment is sufficient. If the offset commitment is deemed not to be sufficient, the applicant will be informed that his application is not administratively complete and the Secretary shall request another offset proposal.

f) Where an offset project in itself requires one or more permits from a program or programs within DNREC, the Secretary shall issue the Coastal Zone Permit only after all applicable permit applications for offsetting projects have been received and deemed administratively complete by DNREC.

I.2 Offset Proposal Contents

The applicant may provide whatever materials or evidence deemed appropriate in order to furnish the Secretary with the information necessary for him to determine the adequacy of the offset proposal. The applicant must provide, at a minimum, the following information:

a) A qualitative and quantitative description of how the offset project will more than offset the negative impacts from the proposed project as provided by the applicant pursuant to Section H.2.a of these regulations.

b) How the offset project will be carried out and in what period of time.

c) What the environmental benefits will be and when they will be achieved.

d) How the offset will impact the attainment of the Department's environmental goals for the Coastal Zone and the environmental indicators used to assess long-term environmental quality within the zone.

e) What, if any, negative impacts are associated with the offset project.

f) What scientific evidence there is concerning the efficacy of the offset project in producing its intended results.

g) How the success or failure of the offset project will be measured in the short and long term.

I.3 Enforcement Of Offset Proposals

a) Coastal Zone permits shall be approved contingent upon the applicant carrying out the proposed offset in accordance with an agreed upon schedule for completion of the offset project. Said schedule will be included in the Coastal Zone permit as an enforceable condition of the permit.

b) Should a Coastal Zone permit applicant fail to receive, within 180 days of issuance of the Coastal Zone permit, any and all permits required to undertake an offset project, the applicant, except for good cause shown by the applicant for additional time, will be required to submit an entirely new application for the activity, including all submissions listed in Section H above, additional permit fees and a new proposed offset project.

J. Withdrawal Of and Revisions To Applications

1. An applicant may withdraw his request for a status decision or Coastal Zone permit at any time by submitting a written request, signed by the original applicant, to the Secretary. The Secretary shall provide public notice of the applicant's withdrawal request and the Secretary's action on the request for withdrawal. In the case of such withdrawal there shall be no refund of the application fee paid. Once publicly noticed, the decision is final and cannot be reversed by the applicant or the Secretary.

2. Once public notice announcing a public hearing is advertised according to Section N of these regulations, no revisions to any application will be permitted beyond those allowed in Section J.3 below. In the event an applicant finds cause to make substantive revisions to an application after publication of the notice, the applicant will be required to submit a new application, including an additional application fee, an offset project and any other required application submissions as specified under Section H of these regulations.

3. A new application is not required for changes which can be incorporated into the original application where such changes will not significantly affect the nature of the project first proposed and which will not significantly increase the Department's review and evaluation of the application originally submitted. Such changes must be submitted in writing prior to publication of the legal notice announcing the public hearing.

4. If the Secretary receives information which he believes may significantly alter the scope of the project, he may require the applicant to submit a new application to reflect the altered nature of the project.

K. Permit Transfers

1. Coastal Zone permits may be transferred in cases of real estate transfer, corporate mergers and acquisitions or other actions whereby ownership of the activity or facility changes. Permit transfers shall require a written request of the Secretary and shall be processed within 60 days of receipt of a request for transfer.

L. Abandoned Uses

1. Any existing facility which is determined to be abandoned shall not be reinstated except as otherwise provided in the Act.

2. Involuntary shutdown of a facility shall not be deemed abandonment or a loss of the facility's non-conforming use status if the Secretary can determine that the owner had no intention to abandon the use.

3. In determining whether or not the cessation of the use is temporary or an abandonment, factors such as, but not limited to, status of environmental permits and/or business licenses, maintenance of machinery and structures, owner presence and involvement to some degree in reinstating the use, and the duration of cessation shall be considered.

4. When, after investigation, the Secretary makes a preliminary determination that an existing use may be abandoned, he shall notify the owner/operator in writing, by registered mail, that he intends to declare the use abandoned. The owner/operator shall have sixty days from the receipt of said notice to demonstrate that there is or was no intention to abandon the use and when operation of the use will resume.

5. Within 120 days from the date of receipt by the owner/operator of the notice of abandonment, the Secretary shall render a decision of abandonment of the facility taking into consideration the response, if any, received from the owner/operator and shall give reasons therefore.

6. The Secretary shall issue a public notice of the decision, which decision may be appealed in accordance with the provisions of Section P of these regulations and 7 Del C. Section 7007.

M. Public Information

1. All correspondence, permit applications, offset proposals and any other supporting materials submitted by applicants or materials prepared by DNREC are subject to Delaware's Freedom of Information Act (29 Del C., Chapter 100) and the Department's FOIA policy.

N. Public Notification

1. At a minimum, the Secretary shall notify the public by legal notice when the following events occur:

a) The receipt of a request for status decision.

b) The decision by the Secretary of a status decision request.

c) The decision by the Secretary to consider a facility/use as abandoned.

d) The receipt of an application for a Coastal Zone Permit.

e) The scheduling of all public hearings.

f) The decision on all permit applications.

g) The withdrawal of an application by the applicant.

h) The receipt of a request for a permit transfer as specified in Section K.1.

2. All legal notices shall appear in one newspaper of statewide circulation and a second newspaper of local circulation in the county in which the proposed project is located. The Secretary will make every effort to publish legal notices on either Wednesdays or Sundays but may publish on other days when schedules require more expeditious handling of legal notices.

3. The Secretary shall also maintain a direct mail program whereby interested citizens may subscribe, free of charge, to a service where copies of all legal notices will be mailed directly to citizens. The Secretary shall advertise this service on an annual basis and renew subscriptions from interested citizens as requested. Failure of the Secretary to mail notices in a timely and accurate fashion shall not be cause for appeal of any action or decision of the Secretary.

O. Public Hearings

1. All public hearings shall be held in the county in which the proposed project is to be located and within a reasonable proximity to the proposed project site.

2. The date, location, time and a brief description of the project shall be published at least twenty (20) days prior to the date of the hearing. A copy of the hearing notice shall be mailed to the applicant.

3. A written transcript of the hearing shall be made for the Department.

4. All hearings shall be conducted in accordance with the Delaware Administrative Procedures Act (29 Del. C. Chapter 101).

P. Appeals

P.1 Appeals of Decisions of the Secretary

a) Any person aggrieved by any permit or other decision of the Secretary under the Act may appeal same under Section 7007 of the Act and this section of the regulations.

b) Receipt of an appeal does not serve to stay the activity or approval in question.

c) Applicants must file notice of appeal with the Board within 14 days following announcement by the Secretary of his decision. The day after the date of the announcement shall be considered the beginning date of the 14-day appeal period.

d) The date at which a notice of appeal is considered to have been filed shall be the date the Board receives the notice of appeal at the Dover Office of the Secretary of DNREC, 89 Kings Highway, Dover, Delaware, 19901. Should the end date of the 14-day filing period fall on a Saturday, Sunday, or legal holiday, the ending date of the appeal period shall be 4:30 p.m. of the next working day.

e) It is the responsibility of the applicant to insure that the appeal is received at the Secretary's office within the appeal period.

f) If no appeal is received within 14 days following the date of the publication of the legal notice, the decision becomes final and no appeal will be accepted.

P.2 Procedures for Appeals Before the Coastal Zone Industrial Control Board

a) A majority of the total membership of the Board less those disqualifying themselves shall constitute a quorum. A majority of the total membership of the Board shall be necessary to make a final decision on an appeal of a status decision or permit request.

b) The Board shall publish a notice of the hearing as prescribed in 29 Del C. Chapter 101, Section 10122 at least 20 days prior to the hearing.

c) The Board must process and rule on the appeal in accordance with 29 Del C., Chapter 101, Subchapter III.

P.3 Appeals of Decisions of the Coastal Zone Industrial Control Board

a) Any person aggrieved by a final order of the

Board as provided for in 29 Del C., Subsection 10128, may appeal the Board's decision to Superior Court in accordance with 29 Del C Subsection 10142. The Secretary may also appeal any decision of the Board as any other appellant.

b) The appeal shall be filed within 30 days of the day the notice of decision is mailed.

c) Appeals to Superior Court shall be carried out as specified in 29 Del. C., Chapter 101.

Q. Fees

1. The Secretary shall charge an application fee for Coastal Zone status decisions and permits as found in the Department's fee schedule as approved by the General Assembly.

2. Interested parties shall be entitled, at no charge, to copies of Coastal Zone Act status decisions and permit applications, provided such applications are not unreasonably bulky.

3. The applicant shall bear the costs of all public hearing notices, and the preparation of public hearing transcripts for the Department in addition to the application fee charged by the Department. Anyone desiring a typed transcript of the hearing must acquire their copy directly from the court reporter.

R. Enforcement

1. In cases of non-compliance with these regulations or the provisions of 7 Del. C. Chapter 70, the Secretary may revoke any permit issued pursuant to these regulations or exercise other enforcement authorities provided for in the Act.

2. If an applicant fails to carry out any offset project in accordance with the schedule outlined in their permit, the Secretary may take any enforcement action he deems appropriate, including revocation of the Coastal Zone permit.

S. Severability

1. If, at any time, provisions within these regulations relating to Sections E and I are invalidated by a court of law, the entire regulation shall become null and void with the exception of the footprints for non-conforming uses shown in Appendix B and the public notice provisions of Section N of these regulations.

2. If, at any time, provisions other than those relating to requirements in Sections E and I are invalidated by a court of law, then only those particular provisions will become null and void and all other provisions will remain operational.

Appendix A

Map of the Coastal Zone

***PLEASE CONTACT THE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL FOR A COPY OF THIS DOCUMENT.**

Appendix B

Footprints of Nonconforming Uses

***PLEASE CONTACT THE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL FOR A COPY OF THIS DOCUMENT.**

APPENDIX C

DNREC Guidance For Implementation and Interpretation of the Regulations Governing Delaware's Coastal Zone

A. Introduction

1. These regulations are built around two linked goals as developed by Governor Carper's Coastal Zone Regulatory Advisory Committee. This committee met in late 1996, through 1997 and culminated their work in early 1998 with signing of the Memorandum of Understanding that formed the basis for these regulations . These regulations are designed to ensure environmental improvement in the Coastal Zone while at the same time providing industry with the needed flexibility to remain competitive in a global marketplace.

2. In order to meet these two goals, a regulatory process comprised of regulatory exemptions, permitting requirements and offset provisions has been developed. This regulatory process has been designed so that each nonconforming use and new manufacturing uses can add new products, change existing products, increase production capacity, add new processes and modify existing processes or do any other activity so long as these activities are: 1) undertaken in a way that assures environmental improvement in the Coastal Zone; and 2) undertaken in such a way that they meet the six criteria outlined in the Coastal Zone Act.

3. For a more thorough explanation of the deliberations of the Advisory Committee and the foundation upon which these regulations are built, the reader is referred to the final Memorandum of Understanding dated March 19, 1998, and which is available in the offices of the Department at 89 Kings Highway, Dover, Delaware.

4. The following guidance is made available to interested citizens and applicants to better understand how these regulations will be interpreted and implemented by the Department. This guidance is, however, not a regulation and does not have the force of law. In the event of a conflict between this guidance and the regulations, the regulations will prevail.

B. Guidance in determining whether a permit is required

1. When a business wants to conduct an activity that may be one of the activities exempted from the permitting process as outlined in Section E, but the business is unsure of its determination, then the company may choose

to seek a status decision from the Secretary rather than proceeding with filing a Coastal Zone permit application.

2. The Advisory Committee recommended that DNREC establish a tiered system of Coastal Zone Act permitting and emphasized that such a system would promote efficiency to the permitting process by tailoring the extent of regulatory review to the expected impacts of the proposed project. Under the tiered approach outlined in the MOU, an industry would have been required to obtain a Coastal Zone Act permit only in those instances when a proposed new manufacturing facility, or a change in the operations of a heavy industrial or manufacturing facility, may have a negative impact on one or more of the six criteria cited in the Act .

3. These regulations have maintained that provision, however, they have removed the concept of a tiered system and in its place created essentially two levels of review. The first are activities that are clearly exempted from regulation because they have no environmental consequence, they are exempted in the Act or they were seen by the advisory committee to be activities that simply shouldn't require a permit. The second level is the full Coastal Zone act permit where any negative impact on the six criteria will trigger the permit requirement. In cases where the applicant is unsure of the impact or how their activity will be viewed by the Department, they may apply for what has historically been – and will continue to be -- called the "status decision".

C. Environmental Goals and Indicators

1. DNREC will develop within 12 months of the ratification of the Coastal Zone Act MOU, a set of Coastal Zone environmental goals and appropriate environmental indicators which will highlight the most significant environmental challenges to the Coastal Zone. The indicators will serve several important purposes. First, they will assist DNREC in developing a more accurate picture of the environmental quality of the Coastal Zone, and measuring trends in this quality over time. Second, they will assist DNREC and project applicants by providing a means for evaluating the potential impacts of proposed changes in facility operations and proposed offsets on the Coastal Zone environment.

2. DNREC is responsible for defining, prioritizing, and making a matter of public record the set of goals and indicators for assessing the environmental quality in the Coastal Zone. Once goals for Coastal Zone have been established, DNREC will select a detailed set of indicators for use in assessing the quality of the environment as measured against those goals, and to monitor progress over time.

3. DNREC will periodically review and reissue the Coastal Zone environmental indicators (perhaps bi-annually). As conditions in the Coastal Zone change, and scientific methods for tracking and analyzing these changes evolve, it may be necessary to add or change some indicators, or drop others. It may also be necessary to reprioritize them as some parameters of environmental health improve and others decline. DNREC's periodic review of the indicators will allow for these kinds of adjustments to be made.

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).

5. A substantial proportion of the members of the EITAC should be technical experts. The Committee should also include representatives of various stakeholder groups, for example, heavy industry and manufacturing in the Coastal Zone, industry outside the Coastal Zone, agricultural interests, environmental advocacy groups and labor. EITAC meetings should be public and any reports generated by the Committee should be made available to the public.

D. Principles for Assessing an Application

1. Any negative environmental impact associated with a proposed project will have to be more than offset, thus assuring continuing improvement in the Coastal Zone environment. The Secretary will only grant Coastal Zone permits in those cases where the overall environmental impacts of the total application, both positive and negative, assure improvement in the quality of the environment in the Coastal Zone.

2. Therefore, activities proposed for a Coastal Zone permit which would measurably increase air emissions, water discharges, or would cause negative impacts on the Coastal Zone environment, shall include provisions for net environmental improvement of the Coastal Zone environment. These environmental improvements may be part of the permitted activity itself or realized through an enforceable offset proposal that will be implemented by a date agreed to by the company and DNREC.

3. DNREC will develop within 12 months of the ratification of the Coastal Zone Act MOU, a set of Coastal Zone environmental goals and appropriate environmental indicators which will highlight the most significant environmental challenges to the Coastal Zone. These indicators will be " prioritized" in accordance with their significance to achieving the Coastal Zone environmental goals. These prioritized indicators will provide Coastal Zone permit applicants a good idea of which types of future offset investments will yield the greatest environmental benefit and will allow a determination of which investments are most cost-effective. These indicators should also provide the rational basis for permit decisions that involve

offset proposals.

E. Evaluation of Offset Proposals

1. Although offsets within the Coastal Zone, in the same environmental medium and at the same site are preferred, there will be circumstances when offsets outside the Coastal Zone, in other media, or at another site within the zone provide greater environmental benefit or otherwise make sense, and will be considered by the Secretary.

2. While it is the applicant's responsibility to fully describe an offset proposal in the Environmental Impact Statement, it is the Secretary's responsibility to carefully assess whether the applicant's offset proposal will more than offset negative impacts of the project, and thus ensure environmental improvement in the Coastal Zone.

3. The Secretary shall make decisions on applicants' status decision requests and environmental impact assessments, in writing, based on all of the expected environmental impacts of the total project on the health of the Coastal Zone, including both positive and negative impacts. Impacts may be related to air and water emissions, or they may be related to other factors such as the viability of wildlife habitat, the protection of wetlands, or the creation or preservation of open space. The Secretary will develop and use a set of prioritized environmental indicators as a tool for assisting these determinations as discussed elsewhere in this guidance.

4. The Secretary shall consider likely cumulative impacts of proposed activities on the environment and the relevant environmental indicators. The Secretary shall also give consideration to the potential for negative cumulative impacts in situations where cross-media offsets are proposed.

5. In addition, the Secretary will give more weight to offset proposals that: 1) have established track records and are likely to succeed from a technical standpoint; and 2) will produce beneficial effects that are verifiable.

6. If an applicant includes in its permit application evidence of past voluntary environmental improvements and/or investments made prior to the time of application, DNREC will consider this history of environmental performance in determining the magnitude of the required offsets for the proposed project (with the understanding that the total project must assure improvement in the quality of the environment in the Coastal Zone).

7. The Secretary will also consider the applicant's ability to carry out such improvements as evidenced by its compliance history. Compliance with environmental standards and enforcement histories of facilities is not in itself a factor in determining the required magnitude of the potential offset project, but will be used by DNREC in gauging the applicant's ability to carry out the offset project with a minimum of supervision.

8. All offset projects must be incorporated into the Coastal Zone permit as an enforceable condition of the permit. Since some of the benefits of "flexibility" are achieved immediately upon issuance of a permit (i.e. permission to proceed), and most benefits of "environmental improvement" are achieved over time, the permit itself must include well-defined and measurable commitments or accomplishments which are independently auditable by the Department, and available to the public via the Freedom of Information Act (FOIA). DNREC will also include inspection, reporting and/or notification obligations in the permit depending on the company's compliance record and the nature of the offset project.

9. In cases where an applicant fails to receive all required offset permits within 180 days and must therefore show good cause why a new permit application should not be required, good cause shall mean, but not be limited to, delays on the part of DNREC or other permitting authorities that could otherwise not have been expected and are considered by the Secretary to be extraordinary.

F. Guidance regarding activities within the Port Of Wilmington

1. All proposed manufacturing uses within the footprint of the Port of Wilmington are not in any way exempted from permitting requirements and must apply for and be issued a Coastal Zone Act permit if otherwise applicable.

2. Proposed uses within the Port of Wilmington which constitute heavy industry uses are prohibited.

3. The regulations do not prohibit or restrict activities involving containerized, palletized, or otherwise confined materials at any location within the Diamond State Port Corp. Bulk products, once off-loaded within the designated area, may be stored, transported, or otherwise used throughout the Port, subject to all other appropriate local, state and federal statutory and regulatory provisions.

4. The MOU negotiated by the Advisory Committee goes to some length to define the area that is the Port of Wilmington, some of which area is actually owned by the Diamond State Port Corporation. Regardless of the definition of the Port, it is nonetheless the equivalent of a "footprint" as that term is used to define other areas of industrial activity within the Zone. Therefore the definition of the Port as negotiated in the MOU is not repeated within the definitions section of these regulations but is rather transformed into a map or footprint similar to the other non-conforming industrial uses found in Appendix B of the regulation.

5. The current boundary of the Port of Wilmington is the area beginning at the intersection of the right of way of US Route I-495 and the southern shore of the Christina River; thence southward along said I-495 right of way until the said I-495 right-of-way intersects the Reading Railroad Delaware River Extension; thence southeast along the said Reading Railroad Delaware River Extension to its

point of intersection with the Conrail Railroad New Castle cutoff; thence southward along the Conrail Railroad New Castle cutoff until it intersects the right of way of U.S. Route I-295; thence eastward along said I-295 right of way until the said I-295 right of way intersects the western shore of the Delaware River; thence northward along the western shore of the Delaware River as it exists now to the confluence of the Christina and Delaware Rivers; thence westward along the southern shore of the Christina River to the beginning point of the intersection of the said I-495 right of way and the Southern shore of the Christina River.

G. Coastal Zone Report

1. To ensure that the public is kept fully informed about the regulatory process under the Coastal Zone Act and about the quality of the Coastal Zone generally, the Secretary will issue a report twelve months after the regulations are promulgated, and every twenty-four months thereafter. The report will include:

a) A description of progress towards environmental goals developed by DNREC for the Coastal Zone;

b) Information on the general trends in the environmental indicators, in the form of narrative text as well as charts and graphs that will be easily understandable to a lay reader;

c) A list of permits issued, a brief description of the status of activities under those permits, and a review of selected existing permits and actual versus projected environmental benefits; and

d) A description of the cumulative impacts of permitted activities on the environmental indicators.

Appendix D

Permitting Flow chart

***PLEASE CONTACT THE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL FOR A COPY OF THIS DOCUMENT.**

Appendix E
Delaware's Coastal Zone Act

***PLEASE CONTACT THE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL FOR A COPY OF THIS DOCUMENT.**

DIVISION OF AIR AND WASTE MANAGEMENT
AIR QUALITY MANAGEMENT SECTION

Statutory Authority: 7 Delaware Code, Chapter 60 (7 **Del.C.** Ch. 60)

Secretary's Order No. 99-A-0022

Re: Proposed Amendments to Regulation No. 25, Requirements for Preconstruction Review of the Regulations Governing the Control of Air Pollution

Date of Issuance: April 15, 1999

Effective Date of the Regulatory Amendments: May 11, 1999

I. Background

On Tuesday, March 23, 1999, at approximately 6:00 p.m., a public hearing was held in the DNREC Auditorium at 89 Kings Highway, Dover, Delaware. The purpose of the hearing was to receive comment on proposed amendments to Regulation No. 25, entitled *Requirements for Preconstruction Review of* the *Regulations Governing the Control of Air Pollution.* Thereafter, the Hearing Officer prepared his report and recommendation in the form of a memorandum to the Secretary dated April 14, 1999, and that memorandum is expressly incorporated herein by reference.

II. Findings and Conclusions

All of the findings and conclusions contained in the Hearing Officer's Memorandum dated April 14, 1999, are expressly incorporated herein and explicitly adopted as the findings and conclusions of the Secretary.

III. Order

In view of the above, I hereby order that the proposed amendments to Regulations No. 25, *Requirements for Preconstruction Review,* of the *Regulations Governing the Control of Air Pollution* as proposed in the Hearing Draft of the Regulation (with the additional change suggested in AQM's March 30, 1999, memorandum) be promulgated in the manner and form provided for by law.

IV. Reasons

Adopting the proposed amendments to the *Regulations Governing the Control of Air Pollution* will further the policies and purposes of 7 Del. C. Chapter 60, because it will allow for the construction of new major sources and the modification of existing major sources that emit volatile organic compounds and nitrogen oxides in Delaware in a manner intended to protect the environment. This rulemaking was not opposed in any way by the public or the regulated community. In addition, this amendment is

intended to address deficiencies that the United States Environmental Protection Agency found in Delaware's regulation of these pollutants.

Nicholas A. Di Pasquale
Secretary

REGULATION NO. 25
REQUIREMENTS FOR PRECONSTRUCTION REVIEW

~~01/11/93~~ **~~[xx/xx/99]~~[5/11/99]**

Section 1 - General Provisions

1.1 Requirements of this regulation are in addition to any other requirements of the State of Delaware Regulations Governing the Control of Air Pollution.

1.2 Any stationary source which will impact an attainment area or an unclassifiable area as designated by the U.S. Environmental Protection Agency (EPA) pursuant to Section 107 of the Clean Air Act Amendments of 1990 (CAA), is subject to the regulations of Section 3, Prevention of Significant Deterioration (PSD).

1.3 Any stationary source which will impact a non-attainment area as designated by the EPA pursuant to Section 107 of the CAA is subject to the regulations of Section 2, Emission Offset Provisions (EOP).

1.4 A source may be subject to PSD for one pollutant and to EOP for another pollutant, or may affect both attainment or unclassifiable areas and a non-attainment area for the same pollutant.

1.5 Any emission limitation represented by Lowest Achievable Emission Rate (LAER) may be imposed by the Department pursuant to regulations adopted under Section 2 herein notwithstanding any emission limit specified elsewhere in the State of Delaware Regulations Governing the Control of Air Pollution.

1.6 Any emission limitation represented by Best Available Control Technology (BACT) may be imposed by the Department pursuant to regulations adopted under Section 3 herein notwithstanding any emission limit specified elsewhere in the State of Delaware Regulations Governing the Control of Air Pollution.

1.7 No stationary source shall be constructed unless the applicant can substantiate to the Department that the source will comply with any applicable emission limit or New Source Performance Standard or Emission Standard for a Hazardous Air Pollutant as set forth in the State of Delaware Regulations Governing the Control of Air Pollution.

1.8 Any stationary source that implements, for the purpose of gaining relief from Regulation 25, Section 3, by any physical or operational limitation on the capacity of the source to emit a pollutant, including (but not limited to) air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design and the limitation or the effect it would have on emissions is enforceable, not withstanding any emission limit specified elsewhere in the State of Delaware Regulations Governing the Control of Air Pollution. If a source petitions the Department for relief from any resulting limitation described above, the source is subject to review under Regulation 25, Sections 2 and 3 as though construction had not yet commenced on the source or modification.

1.9 Definitions - For the purposes of this regulation

A. "Major Stationary Source" - See Sections 2.2 and 3.0

B. "Major Modification"

1. Major modification means any physical change or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the CAA.

2. Any net emissions increase that is significant for either volatile organic compounds or nitrogen oxides shall be considered significant for ozone.

3. A physical change or change in the method of operation shall not include:

i. Routine maintenance, repair and replacement;

ii. Use of an alternative fuel or raw material by reason of an order under sections 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plan pursuant to the Federal Power Act;

iii. Use of an alternative fuel by reason of an order or rule under Section 125 of the CAA;

iv. Use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

v. Use of an alternative fuel or raw material by a stationary source which:

a. The source was capable of accommodating before January 6, 1975, unless such change would be prohibited under any previously issued permit condition which was established after January 6, 1975.

b. The source is approved to use under any previously issued PSD permit or under Regulation 25, Section 3.

vi. An increase in the hours of operation or in the production rate, unless such change would be prohibited under any previously issued permit condition which was established after January 6, 1975;

vii. Any change in ownership at a stationary source.

C. "Net Emissions Increase"

1. Net emissions increase means the amount by which the sum of the following exceeds zero:

i. Any increase in actual emissions from a particular physical change or change in method of operation at a stationary source; and

ii. Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

2. An increase or decrease in actual emissions is contemporaneous with the increase from the particular change only if it occurs between:

i. The date five years before construction on the particular change commences; and

ii. The date that the increase from the particular change occurs.

3. An increase or decrease in actual emissions is creditable only if the Department has not relied on it in issuing a permit for the source under this section, which permit is in effect when the increase in actual emissions from the particular change occurs.

4. An increase or decrease in actual emissions of sulfur dioxide or particulate matter which occurs before the applicable baseline date is creditable only if it is required to be considered in calculating the amount of maximum allowable increases remaining available.

5. An increase in actual emissions is creditable only to the extent that the new level of actual emissions exceeds the old level.

6. A decrease in actual emissions is creditable only to the extent that:

i. The old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions;

ii. It is enforceable at and after the time that actual construction on the particular change begins; and

iii. It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change.

iv. It has not been adopted by the Department as a required reduction to be made part of the SIP or it is not required by the Department pursuant to an existing requirement of the SIP.

7. An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

D. "Potential to Emit" means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

E. "Stationary Source" means any building, structure, facility or installation which emits or may emit any air pollutant subject to regulation under the CAA.

F. "Building, Structure, Facility, or Installation" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same first two digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively). For purposes of Section 2, this definition shall apply only to the "Building, Structure or Facility".

G. "Emissions Unit" means any part of a stationary source which emits or would have the potential to emit any pollutant subject to regulation under the CAA.

H. "Construction" means any physical change or change in the method of operation (including fabrication, erection, installation, demolition or modification of an emissions unit) which would result in a change in actual emissions.

I. "Commence" as applied to construction of a major stationary source or major modification means that the owner or operator has all necessary preconstruction approvals or permits and either has:

1. Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

2. Entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

J. "Necessary Preconstruction Approvals or Permits" means those permits or approvals required under Delaware air quality control laws and regulations.

K. "Begin Actual Construction" means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction or permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.

L. "Best Available Control Technology" means an emissions limitation (including a visible emission standard) based on the maximum degree of reduction for each

pollutant subject to regulation under CAA which would be emitted from any proposed major stationary source or major modification which the Department, on a case-by-case basis, takes into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant. In no event shall application of best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under Regulation 20 and 21. If the Department determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, a design, equipment, work practice, operational standard, or combination thereof, may be prescribed instead to satisfy the requirement for the application of best available control technology. Such standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of such design, equipment, work practice or operation, and shall provide for compliance by means which achieve equivalent results.

M. "Baseline Concentration"

1. Baseline concentration means that ambient concentration level which exists in the baseline area at the time of the applicable baseline date. A baseline concentration is determined for each pollutant for which a baseline date is established and shall include:

i. The actual emissions representative of sources in existence on the applicable baseline date, except as provided in paragraph 1.9M(2);

ii. The allowable emissions of major stationary sources which commenced construction before January 6, 1975, but were not in operation by the applicable baseline date.

2. The following will not be included in the baseline concentration and will affect the applicable maximum allowable increase(s):

i. Actual emissions from any major stationary source on which construction commenced after January 6, 1975; and

ii. Actual emissions increases and decreases at any stationary source occurring after the baseline date.

N. "Baseline Date"

1. Baseline date means the earliest date after August 7, 1977, on which the first complete application is submitted by a major stationary source or major modification subject to the requirements of Regulation 25, Section 3.

2. Baseline date means the earliest date after August 7, 1977, but before the effective date of this regulation, on which the first complete application by a major stationary source or major modification which would have been subject to the requirements of Regulation 25, Section 3 if application were submitted after the effective date of this regulation.

3. The baseline date is established for each pollutant for which increments or other equivalent measures have been established if:

i. The area in which the proposed source or modification would construct is designated as attainment or unclassifiable for the pollutant on the date of its complete application under this section; and

ii. In the case of a major stationary source, the pollutant would be emitted in significant amounts, or, in the case of a major modification, there would be a significant net emissions increase of the pollutant. O."Baseline Area"

1. Baseline area means any intrastate area (and every part thereof) designated as attainment or unclassifiable in which the major source or major modification establishing the baseline date would construct or would have an air quality impact equal to or greater than 1 $\mu g/m^3$ (annual average) of the pollutant for which the baseline date is established.

2. Area redesignations cannot intersect or be smaller than the area of impact of any major stationary source or major modification which:

i. Establishes a baseline date, or

ii. Is subject to this section.

P. "Allowable Emissions" means the emissions rate of a stationary source calculated using the maximum rated capacity of the source (unless the source is subject to enforceable limits which restrict the operating rate, or hours of operation, or both) and the most stringent of the following:

1. The applicable standards as set forth in Regulations 20 and 21;

2. Other applicable Delaware State Implementation Plan emissions limitations, including those with a future compliance date; or

3. The emissions rate specified as an enforceable permit condition, including those with a future compliance date.

Q. "Secondary Emissions" means emissions which would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself. For the purpose of this section, secondary emissions must be specific, well defined, quantifiable, and impact the same general area as the stationary source or modification which causes the secondary emissions. Secondary emissions may include, but are not limited to:

1. Emissions from ships, trains, or other vehicles coming to or from the new or modified stationary source; and

2. Emissions from any offsite support facility(s) which would not otherwise be constructed or increase its emissions as a result of the construction or operation of the major stationary source or major modification.

R. "Innovative Control Technology" means any system of air pollution control that has not been adequately demonstrated in practice, but would have a substantial likelihood of achieving greater continuous emissions reduction than any control system in current practice or of achieving at least comparable reductions at lower cost in terms of energy economics, or non-air quality environmental impacts.

S. "Fugitive Emissions" means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

T. "Actual Emissions:

1. Actual emissions means the actual rate of emissions of a pollutant from an emission unit, as determined in accordance with subparagraphs (2) through (4) below.

2. In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The Department shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

3. The Department may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

4. For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

U. "Complete" means, in reference to an application for a permit, that the application contains all of the information necessary for processing the application.

V. "Significant"

1. Significant means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (TPY)
Sulfur dioxide: 40 TPY
Particulate matter: 25 TPY
Ozone:New Castle and Kent Counties - 25 TPY of either volatile organic compounds or nitrogen oxides *
Sussex County - 40 TPY of either volatile organic compounds or nitrogen oxides *
Lead: 0.6 TPY
Asbestos: 0.007 TPY
Beryllium: 0.0004 TPY
Mercury: 0.1 TPY
Vinyl chloride: 1 TPY
Fluorides: 3 TPY
Sulfuric acid mist: 7 TPY
Hydrogen sulfide (H_2S): 10 TPY
Total reduced sulfur (including H_2S): 10 TPY
Reduced sulfur compounds (including H_2S): 10 TPY
PM_{10} particulate: 15 TPY

* Note: Increases in net emissions shall not exceed 25 tons per year in New Castle and Kent Counties, or 40 tons per year in Sussex, when aggregated with all other net increases in emissions from the source over any period of five consecutive calendar years which includes the calendar year in which such increases occur. No part of the five consecutive years shall extend before January 1, 1991.

2. "Significant" means, in reference to a net emissions increase or the potential of a source to emit a pollutant subject to regulation under the CAA that paragraph 1.9 V.(1) does not list, any emissions rate.

3. Notwithstanding paragraph 1.9 V.(1), "significant" means any emissions rate or any net emissions increase associated with a major stationary source or major modification, which would construct within ten kilometers of a Class I area, and have an impact on such area equal to or greater than 1 $\mu g/m^3$, (24-hour average).

W. "Fixed capital cost" means the capital needed to provide all the depreciable components.

X. "Lowest Achievable Emission Rate (LAER) means the same as defined in Regulation No. 1, "Definitions and Administrative Principles".

Y. "Reconstruction" will be presumed to have taken place where the fixed capital cost of the new components exceed 50 percent of the fixed capital cost of a comparable entirely new stationary source. Any final decision as to whether reconstruction has occurred shall be made in accordance with the provisions of 40 CFR 60.15(f)(1)-(3). A reconstructed stationary source will be treated as a new stationary source for purposes of this regulation. In determining lowest achievable emission rate (LAER) for a reconstructed stationary source, the provisions of 40 CFR 60.15(f)(4) shall be taken into account in assessing whether a new source performance standard is applicable to such stationary source.

Z. "Ozone Transport Region" means the region designated by section 184 of the federal *Clean Air Act* and comprised of the states of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and the Consolidated Metropolitan Statistical Area that includes the District of Columbia and northern Virginia.

AA. "Permanent" (Reductions) means that the actual emission reductions submitted to the Department for certification have been incorporated in a permit or a permit condition or, in the case of a shutdown, the permit to operate for the emission unit(s) has been voided.

BB. "Quantifiable" (Reductions) means that the amount, rate and characteristics of emission reductions can be determined by methods that are considered reliable by the Department and the Administrator of the EPA.

CC. "Real" (Reductions) means reductions in actual emissions released into the atmosphere.

DD. "Surplus" (Reductions) means actual emission reductions below the baseline (see Section 2.5(B)) not required by regulations or proposed regulations, and not used by the source to meet any state or federal regulatory requirements.

EE. "Enforceable" means any standard, requirement, limitation or condition established by an applicable federal or state regulation or specified in a permit issued or order entered thereunder, or contained in a SIP approved by the Administrator of the U.S. Environmental Protection Agency (EPA), and which can be enforced by the Department and the Administrator of the EPA.

~~01/11/93~~ **~~[xx/xx/99]~~[5/11/99]**

Section 2 - Emission Offset Provisions (EOP)

2.1 Applicability - The provisions of this Section shall apply to any person responsible for any proposed new major stationary source or any proposed major modification.

2.2 For purposes of Section 2, "major stationary source" means

A. Any stationary source of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Clean Air Act, except for either volatile organic compound or nitrogen oxides, or

B. Any stationary source of air pollutants which emits, or has the potential to emit either volatile organic compounds or nitrogen oxides in the following amounts:

1. ~~New Castle & Kent Counties - 25 tons per year of either volatile organic compounds or oxides of nitrogen~~

~~2.~~ ~~Sussex County~~ For areas in ozone attainment, ozone marginal, or ozone moderate nonattainment areas and located in the ozone transport region - 50 tons per year volatile organic compounds or 100 tons per year of oxides of nitrogen, or

2. For serious ozone nonattainment areas - 50 tons per year of either volatile organic compounds or oxides of nitrogen, or

3. For severe ozone nonattainment areas - 25 tons per year of either volatile organic compounds or oxides of nitrogen, or

4. For extreme ozone nonattainment areas - 10 tons per year of either volatile organic compounds or oxides of nitrogen.

C. Any physical change that would occur at a stationary source not qualifying under paragraph (A) or (B) as a major stationary source, if the change would constitute a major stationary source by itself**~~[.]~~**, or

D. A major stationary source that is major for either volatile organic compounds or nitrogen oxides shall be considered major for ozone, and "installation" means an identifiable piece of process, combustion or incineration equipment.

2.3 For the purposes of Sections 2.4 and 2.5 of this regulation, emission units located in areas designated as attainment or marginal nonattainment areas that are located within the ozone transport region shall be considered located in a moderate ozone nonattainment area.

2.4 Conditions for Approval - No person subject to the provisions of subsection 2.1 shall install a major stationary source of volatile organic compounds or of nitrogen oxides, or make a major modification to a source which will cause or contribute to any violation of the national ambient air quality standards for ozone within an area of non-attainment for that pollutant unless the following conditions are met:

A. The new major source or the major modification is controlled by the application of lowest achievable emission rate (LAER) control technology.

B. All existing sources in the State owned or controlled by the owner of the proposed new or modified source are in compliance with the applicable local, State and federal regulations or are in compliance with a consent order specifying a schedule and timetable for compliance.

C. ~~To the extent that allowable emissions of VOC from the new major stationary source or major modification will exceed the growth allowance in the State Implementation Plan, an emission reduction from existing sources shall be provided prior to start-up of the applicable source such that total allowable emissions from the existing sources and new major stationary sources will be less than that allowed from the existing source under the existing state implementation plan requirements. Where no emission limit exists under the state implementation plan, the level of emissions in existence at the time the permit application is filed shall be used in determining the baseline for the emission reduction.~~

For the purposes of satisfying offset requirements, the ratio of total actual emissions reductions of volatile organic compounds or nitrogen oxides to total allowable increased emissions of volatile organic compounds or nitrogen oxides shall be:

1. For New Castle & Kent Counties, 1.3 to 1, or

~~2. For Sussex County, 1.15 to 1~~The new or

modified source must satisfy the following offset requirements:

1. The ratio of total actual emissions reductions of volatile organic compounds or nitrogen oxides to total allowable increased emissions of volatile organic compounds or nitrogen oxides shall be:

a. For moderate ozone nonattainment areas, 1.15 to 1, or

b. For serious ozone nonattainment areas, 1.2 to 1, or

c. For severe ozone nonattainment areas, 1.3 to 1, or

d. For extreme ozone nonattainment areas, 1.5 to 1.

2. All offsets shall be federally enforceable at the time of application to construct and shall be in effect by the time the new or modified source commences **[~~construction~~][operation]**.

D. ~~The emission reduction required by Section 2.3 C is implemented such that there is a net air quality benefit in the affected area.~~

~~E.~~1. The application for construction permit pursuant to Regulation No. ~~II~~ 2 shall include an analysis of alternative sites, sizes, production processes and environmental control techniques for such proposed source which demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification.

2. Public participation for the construction permit shall be pursuant to Regulation No. 2, Section 12.3 or 12.4 and 12.5.

2.5 Criteria for Emission Reductions Used as Offsets

A. All emission reductions claimed as offset credits shall be real, surplus, **[permanent,]** quantifiable, and federally enforceable;

B. The baseline for determining credit for emissions reductions shall be the lower of actual or allowable emissions. The offset credit shall only be allowed for emission reductions made below the baseline;

C. Emission reductions claimed as offsets shall **[~~be included in the most recent rate of progress (ROP) emissions inventory and shall~~]** have occurred on or after January 1, 1991;

D. Credit for an emission reduction may be claimed for use as an offset to the extent that the Department has not relied on it in issuing any permit under this regulation and has not relied on it for demonstration of attainment or reasonable further progress;

E. Emission reductions shall not be used as offsets in an area with a higher nonattainment classification than the one in which they were generated.

F. Emission reductions claimed as offsets by a source must be generated from within the same nonattainment area or from any other area that contributes to a violation of the ozone National Ambient Air Quality Standard in the nonattainment area which the source is located.

2.6 Emission reductions generated in a state other than Delaware and which are placed in the emissions bank established pursuant to Regulation No. 34 of the State of Delaware**[~~'s~~]** "Regulations Governing the Control of Air Pollution" may be used as offsets provided they are federally enforceable and meet, at a minimum, all the provisions of Regulation No. 34 and Sections 2.5(E), and (F) of this regulation.

03/29/88

Section 3 - Prevention of Significant Deterioration of Air Quality

3.0 Definitions - For purposes of this Section 3

A. "Major Stationary Source"

(1) Major stationary source means:

(i) Any of the following stationary sources of air pollutants which emits or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the CAA: Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants, fossil fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(ii) Notwithstanding the stationary source size specified in paragraph 3.0 A.(1)(i) of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of any air pollutant subject to regulation under the CAA; or

(iii) Any physical change that would occur at a stationary source not otherwise qualifying under paragraph 3.0 as a major stationary source, if the change would constitute a major stationary source by itself.

(2) A major stationary source that is major for volatile organic compounds shall be considered major for ozone.

3.1 Ambient Air Increments. In areas designated as Class I, II or III, increases in pollutant concentration over the baseline concentration shall be limited to the following:

Maximum allowable increase (Micrograms per cubic meter)	
Class I	
Pollutant	
Total suspended particulates:	
Annual geometric mean	5
24-hour maximum	10
Sulfur dioxide:	
Annual arithmetic mean	2
24-hour maximum	5
3-hour maximum	25
Class II	
Pollutant	
Total suspended particulates:	
Annual geometric mean	19
24-hour maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
24-hour maximum	91
3-hour maximum	512
Class III	
Total suspended particulates:	
Annual geometric mean	37
24-hour maximum	75
Sulfur dioxide:	
Annual arithmetic mean	40
24-hour maximum	182
3-hour maximum	700

For any period other than an annual period, the applicable maximum allowable increase may be exceeded during one such period per year at any one location.

3.2 Ambient Air Ceilings. No concentration of a pollutant shall exceed:

A. The concentration permitted under the national secondary ambient air quality standard, or

B. The concentration permitted under the national primary ambient air quality standard, whichever concentration is lowest for the pollutant for a period of exposure.

3.3 Restrictions on Area Classification.

A. All Areas in the State of Delaware are designated Class II, but may be redesignated as provided in 40 CFR 52.51(g).

B. The following areas may be redesignated only as Class I:

(1) Bombay Hook National Wildlife Refuge; and

(2) A national park or national wilderness area established after August 7, 1977 which exceeds 10,000 acres in size.

3.4 Exclusions from Increment Consumption

A. Upon written request of the governor, made after notice and opportunity for at least one public hearing to be held in accordance with procedures established by the State of Delaware, the Department shall exclude the following concentrations in determining compliance with a maximum allowable increase:

(1) Concentrations attributable to the increase in emissions from stationary sources which have converted from the use of petroleum products, natural gas, or both by reason of an order in effect under sections 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) over the emissions from such sources before the effective date of such an order;

(2) Concentrations attributable to the increase in emissions from sources which have converted from using natural gas by reason of a natural gas curtailment plan in effect pursuant to the Federal Power Act over the emissions from such sources before the effective date of such plan;

(3) Concentrations of particulate matter attributable to the increase in emissions from construction or other temporary emission-related activities of new or modified sources;

B. No exclusion of such concentrations shall apply more than five years after the effective date of the order to which paragraph 3.4A(1) refers or the plan to which paragraph 3.4A(2) refers, whichever is applicable. If both such order and plan are applicable, no such exclusion shall apply more than five years after the later of such effective dates.

3.5 Stack Heights

The provisions of Regulation 27 - STACK HEIGHTS, are applicable to this section.

3.6 Review of Major Stationary Sources and Major Modifications - Source Applicability and Exemptions.

A. No stationary source or modification to which the requirements of paragraphs 3.7 through 3.14 of this section apply shall begin actual construction without a permit which states that the stationary source or modification would meet those requirements. The Department has authority to issue

any such permit.

B. The requirements of paragraphs 3.7 through 3.14 of this section shall apply to any major stationary source and any major modification with respect to each pollutant subject to regulation under the CAA that it would emit, except as this section otherwise provides.

C. The requirements of paragraphs 3.7 through 3.14 of this section apply only to any major stationary source or major modification that would be constructed in an area designated as attainment or unclassifiable.

D. The requirements of paragraphs 3.7 through 3.14 of this section shall not apply to a particular major stationary source or major modification, if:

(1) The source or modification would be a nonprofit health or nonprofit educational institution, or a major modification would occur at such an institution, and the governor requests that it be exempt from those requirements; or

(2) The source or modification would be a major stationary source or major modification only if fugitive emissions, to the extent quantifiable, are considered in calculating the potential to emit of the stationary source or modification and the source does not belong to any of the following categories:

(i) Coal cleaning plants (with thermal dryers);

(ii) Kraft pulp mills;

(iii) Portland cement plants;

(iv) Primary zinc smelters;

(v) Iron and steel mills;

(vi) Primary aluminum ore reduction plants;

(vii) Primary copper smelters;

(viii) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(ix) Hydrofluoric, sulfuric, or nitric acid plants;

(x) Petroleum refineries;

(xi) Lime plants;

(xii) Phosphate rock processing plants;

(xiii) Coke oven batteries;

(xiv) Sulfur recovery plants;

(xv) Carbon black plants (furnace process);

(xvi) Primary lead smelters;

(xvii) Fuel conversion plants;

(xviii) Sintering plants;

(xix) Secondary metal production plants;

(xx) Chemical process plants;

(xxi) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input:

(xxii) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(xxiii) Taconite ore processing plants;

(xxiv) Glass fiber processing plants;

(xxv) Charcoal production plants;

(xxvi) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input;

(xxvii) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the CAA; or

(3) The source is a portable stationary source which has previously received a permit under this section, and

(i) The owner or operator proposal to relocate the source and emissions of the source at the new location would be temporary; and

(ii) The emissions from the source would not exceed its allowable emissions; and

(iii) The emissions from the source would impact no Class I area and no area where an applicable increment is known to be violated; and

(iv) Reasonable notice is given to the Department prior to the relocation identifying the proposed new location and the probable duration of operation at the new location. Such notice shall be given to the Department not less than ten days in advance of the proposed relocation unless a different time duration is previously approved by the Department.

E. The requirements of paragraphs 3.7 through 3.14 of this section shall not apply to a major stationary source or major modification with respect to a particular pollutant if the owner or operator demonstrates that, as to that pollutant, the source or modification is located in an area designated as non-attainment.

F. The requirements of paragraphs 3.8, 3.10, and 3.12 of this section shall not apply to a major stationary source or major modification with respect to a particular pollutant, if the allowable emissions of that pollutant from the source, or the net emissions increase of that pollutant from the modification:

(1) Would impact no Class I area and no area where an applicable increment is known to be violated, and

(2) Would be temporary.

G. The Department may exempt a stationary source or modification from the requirements of paragraph 3.10 with respect to monitoring for a particular pollutant if:

(1) The emissions increase of the pollutant from the new source or the net emissions increase of the pollutant from the modification would cause, in any area, air quality impacts less than the following amounts:

Carbon monoxide: 575 ug/m^3, 8-hour average;

Nitrogen dioxide: 14 ug/m^3, annual average;

Total suspended particulate: 10 ug/m^3, 24-hour average;

Sulfur dioxide: 13 ug/m^3, 24-hour average;

Ozone (Note 1)

Lead: 0.1 ug/m^3, 24-hour average;

Mercury: 0.25 ug/m^3, 24-hour average;

Beryllium: 0.0005 ug/m^3, 24-hour average;

Fluorides: 0.25 ug/m^3, 24-hour average;

Vinyl chloride: 15 ug/m^3, 24-hour average;

Total reduced sulfur: 10 ug/m^3, 1-hour average;

Hydrogen sulfide: 0.04 ug/m^3, 1-hour average;

Reduced sulfur compounds: 10 ug/m^3, 1-hour average;

PM_{10} particulate: 10 ug/m^3, 24-hour average

(2) The concentrations of the pollutant in the area that the source or modification would affect are less than the concentrations listed in paragraph 3.6G(1), or the pollutant is not listed in paragraph 3.6G(1).

3.7 Control Technology Review

A. A major stationary source or major modification shall meet each applicable emissions limitation of the State of Delaware's Air Pollution Control Regulations.

B. A new major stationary source shall apply best available control technology for each pollutant subject to regulation under the CAA that it would have the potential to emit in significant amounts.

C. A major modification shall apply best available control technology for each pollutant subject to regulation under the CAA for which it would result in a significant net emissions increase at the source. This requirement applies to each proposed emissions unit at which a net emissions increase in the pollutant would occur as a result of a physical change or change in the method of operation in the unit.

D. For phase construction projects, the determination of best available control technology shall be reviewed and modified as appropriate at the latest reasonable time which occurs no later than 18 months prior to commencement of construction of each independent phase of the project. At such time, the owner or operator of the applicable stationary source may be required to demonstrate the adequacy of any previous determination of best available control technology for the source.

Note 1: No de minimus air quality level is provided for ozone. However, any net increase of 100 tons per year or more of volatile organic compounds subject to PSD would be required to perform an ambient impact analysis including the gathering of ambient air quality data.

3.8 Source Impact Analysis. The owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reductions (including secondary emissions), would not cause or contribute to air pollution in violation of:

A. Any national ambient air quality standard in any air quality control region; or

B. Any applicable maximum allowable increase over the baseline concentration in any area.

3.9 Air Quality Models.

A. All estimates of ambient concentrations required under this section shall be based on the applicable air quality models, data bases, and other requirements specified in the "Guideline on Air Quality Models" (OA-QPS 1.2-080, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, N.C. 27711, April, 1978 or its subsequent revisions). This document is incorporated by reference.

B. When an air quality impact model specified in the "Guideline on Air Quality Models" is inappropriate, the model may be modified or another model substituted. Such a change must be subject to the notice and opportunity for public comment under paragraph 3.14 of this section. Written approval of the Department must be obtained for any modification or substitution. Methods like those outlined in the "Workbook for the Comparison of Air Quality Models" (U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, N.C. 17711, May, 1978 or its subsequent revisions) should be used to determine the comparability of air quality models.

3.10 Air Quality Analysis

A. Preapplication Analysis.

(1) Any application for a permit under this section shall contain an analysis of ambient air quality in the area that the major stationary source or major modification would affect for each of the following pollutants:

(i) For the source, each pollutant that it would have the potential to emit in a significant amount;

(ii) For the modification, each pollutant for which it would result in a significant net emissions increase.

(2) With respect to any such pollutant for which no National Ambient Air Quality Standard exists, the analysis shall contain such air quality monitoring data as the Department determines is necessary to assess ambient air quality for that pollutant in any area that the emissions of that pollutant would affect.

(3) With respect to any such pollutant (other than non-methane hydrocarbons) for which such a standard does exist, the analysis shall contain continuous air quality monitoring data gathered for purposes of determining whether emissions of that pollutant would cause or contribute to a violation of the standard or any maximum allowable increase.

(4) In general, the continuous air quality monitoring data that is required shall have been gathered over a period of at least one year and shall represent at least the year preceeding receipt of the application, except that, if

the Department determines that a complete and adequate analysis can be accomplished with monitoring data gathered over a period shorter than one year (but not to be less than four months), the data that is required shall have been gathered over at least that shorter period.

(5) The owner or operator of a proposed stationary source or modification of volatile organic compounds who satisfies all of the following conditions may provide post-approval monitoring data for ozone in lieu of providing preconstruction data as required under paragraph 3.10A.

Condition 1: The new source is required to meet an emission limitation which specifies the lowest achievable emission rate for such source.

Condition 2: The applicant must certify that all existing major sources owned or operated by the applicant (or any entity controlling, controlled by, or under common control with the applicant) in Delaware are in compliance with all applicable emission limitations and standards under the CAA (or are in compliance with an expeditious schedule approved by the Department).

Condition 3: Emission reductions ("offsets") from existing sources in the area of the proposed source (whether or not under the same ownership) are required such that there will be reasonable progress toward attainment of the applicable NAAQS. Only intrapollutant emission offsets will be acceptable (e.g., hydrocarbon increases may not be offset against SO(reductions)).

Condition 4: The emission offsets will provide a positive net air quality benefit in the affected area (see 40 CFR Part 51 App. S). Atmospheric simulation modeling is not necessary for volatile organic compounds and NO_x. Fulfillment of Condition 3 will be considered adequate to meet this condition for volatile organic compounds and NO_x.

B. Post-construction monitoring. The owner or operator of a major stationary source or major modification shall, after construction of the stationary source or modification conduct such ambient monitoring as the Department determines is necessary to determine the effect emissions from the stationary source or modification may have, or are having, on air quality in any area.

C. Operations of monitoring stations. The owner or operator of a major stationary source or major modification shall meet the Quality Assurance Requirements for PSD Air Monitoring as preapproved by the Department during the operation of monitoring stations for purposes of satisfying paragraph 3.10 of this section.

3.11 Source Information. The owner or operator of proposed source or modification shall submit all information necessary to perform any analysis or make any determination required under this section.

A. With respect to a source or modification to which paragraphs 3.8, 3.10, and 3.12 of this section apply, such information shall include but not be limited to:

(1) A description of the nature, location, design capacity and typical operating schedule of the source or modification, including specifications and drawings showing its design and plant layout;

(2) A detailed schedule for construction of the source or modification;

(3) A detailed description as to what system of continuous emission reduction is planned for the source or modification, emission estimates, and any other information necessary to determine that best available control technology would be applied

B. Upon request of the Department, the owner or operator shall also provide information on:

(1) The air quality impact of the source or modification, including meteorological and topographical data necessary to estimate such impact; and

(2) The air quality impacts, and the nature and extent of any or all general commercial, residential, industrial, and other growth which has occurred since August 7, 1977 or the applicable baseline date(s), in the area the source or modification would affect.

3.12 Additional Impact Analyses.

A. The owner or operator shall provide an analysis of the impairment to visibility, soils and vegetation that would occur as a result of the source or modification and general commercial, residential, industrial and other growth associated with the source or modification. The owner or operator need not provide an analysis of the impact on vegetation having no significant commercial or recreational value.

B. The owner or operator shall provide an analysis of the air quality impact projected for the area as a result of general commercial, residential, industrial and other growth associated with the source or modification.

3.13 Public Participation

A. Within 30 days after receipt of an application to construct, or any addition to such application, the Department shall advise the applicant of any deficiency in the application or in the information submitted. In the event of such a deficiency, the date of receipt of the application shall be, for the purpose of this section, the date on which the Department received all required information.

B. Within one year after receipt of a complete application, the Department shall make a final determination on the application. This involves performing the following actions in a timely manner:

(1) Make a preliminary determination whether construction should be approved, approved with conditions, or disapproved.

(2) Make available a copy of all materials the applicant submitted, a copy of the preliminary

determination, and a copy or summary of other materials, if any, considered in making the preliminary determination.

(3) Notify the public, by advertisement in a newspaper of general circulation in each region in which the proposed source or modification would be constructed, of the application, the preliminary determination, the degree of increment consumption that is expected from the source or modification, and the opportunity for comment at public hearing as well as written public comment.

(4) Send a copy of the notice of public comment to the applicant and to officials and agencies having cognizance over the location where the proposed construction would occur as follows: the chief executives of the city and county where the source or modification would be located and any comprehensive regional land use planning agency whose lands may be affected by emissions from the source or modification. Additionally, if the proposed source would have significant interstate impact, the Governor of that impacted state would be notified.

(5) Provide opportunity for a public hearing for interested persons to appear and submit written or oral comments on the air quality impact of the source or modification, alternatives to the source or modification, the control technology required, and other appropriate considerations.

(6) Consider all written comments submitted within a time specified in the notice of public comment and all comments received at any public hearing(s) in making a final decision on the approvability of the application. No later than ten days after the close of the public comment period, the applicant may submit a written response to any comments submitted by the public. The Department shall consider the applicant's response in making a final decision. The Department shall make all comments available for public inspection in the same locations where the Department made available preconstruction information relating to the proposed source or modification.

(7) Make a final determination whether construction should be approved, approved with conditions, or disapproved pursuant to this section.

(8) Notify the applicant in writing of the final determination and make such notification available for public inspection at the same location where the Department made available preconstruction information and public comments relating to the source or modification.

3.14 Source Obligation.

A. Any owner or operator who constructs or operates a source or modification not in accordance with the application submitted pursuant to this section or with the terms of any approval to construct, or any owner or operator of a source or modification subject to this section who commences construction after the effective date of these regulations without applying for and receiving approval hereunder, shall be subject to appropriate enforcement action.

B. Approval to construct shall become invalid if construction is not commenced within 18 months after receipt of such approval, if construction is discontinued for a period of 18 months or more, or if construction is not completed within a reasonable time. The Department may extend the 18-month period upon a satisfactory showing that an extension is justified. This provision does not apply to the time period between construction of the approved phases of a phased construction project; each phase must commence construction within 18 months of the projected and approved commencement date.

C. Approval to construct shall not relieve any owner or operator of the responsibility to comply fully with applicable provisions of any other requirements under local or Federal law.

D. At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980 on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then the requirements or paragraphs 3.7 through 3.14 of this section shall apply to the source or modification as though construction had not yet commenced on the source or modification.

3.15 Innovative Control Technology.

A. An owner or operator of a proposed major stationary source or major modification may request the Department in writing no later than 30 days after the close of the public comment hearing to approve a system of innovative control technology.

B. The Department shall, with the consent of the Governor of Delaware, determine that the source or modification may employ a system of innovative control technology, if:

(1) The proposed control system would not cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation or function;

(2) The owner or operator agrees to achieve a level of continuous emissions reduction equivalent to that which would have been required under paragraph 3.7B by a date specified by the Department. Such date shall not be later than four years from the time of startup or seven years from permit issuance;

(3) The source or modification would meet the requirements of paragraphs 3.7 and 3.8 based on the emissions rate that the stationary source employing the system of innovative control technology would be required to meet on the date specified by the Department;

(4) The source or modification would not be before the date specified by the Department:

(i) Cause or contribute to a violation of an applicable national ambient air quality standard; or

(ii) Impact any Class I area; or

(iii) Impact any area where an applicable increment is known to be violated; and

(5) All other applicable requirements including those for public participation have been met.

C. The Department shall withdraw any approval to employ a system of innovative control technology made under this section, if:

(1) The proposed system fails before the specified date to achieve the required continuous emissions reduction rate; or

(2) The proposed system fails before the specified date so as to contribute to an unreasonable risk to public health, welfare, or safety; or

(3) The Department decides at any time that the proposed system is unlikely to achieve the required level of control or to protect the public health, welfare, or safety.

D. If a source or modification fails to meet the required level of continuous emission reduction within the specified time period or the approval is withdrawn in accordance with paragraph 3.15C, the Department may allow the source or modification up to an additional three years to meet the requirement for the application of best available control technology through use of a demonstrated system of control.

April 1, 1999

DEPARTMENT OF PUBLIC SAFETY

ALCOHOLIC BEVERAGE CONTROL COMMISSION

Statutory Authority: 4 Delaware Code, Section 304(a)(1) (4 **Del. C.** 304(a)(1))

ORDER

Following notice published in the Register of Regulations, the News Journal and the Delaware State News and a public hearing held on April 1, 1999 on the proposed revisions to Rule 29, Delaware Alcoholic Beverage Control Commission ("the Commission") the Commission makes the following findings and conclusions:

SUMMARY OF EVIDENCE AND INFORMATION SUBMITTED

1. On June 18, 1998, the Commission held a public hearing to receive comment from the public as to whether to undertake a revision of Commission Rule 29 dealing with the publication of prices and post-offs by wholesalers. The Commission received both written submissions and oral comments in connection with the public hearing. The comments received focused primarily on the ability of wholesalers to quickly move beer that is going out of code and other aging and/or discontinued products pursuant to the provisions of Rule 29. One licensed wholesaler expressed its belief that Rule 29 requires the posting and holding of prices in violation of the Sherman Anti-Trust Act. Another licensed wholesaler, while disagreeing that the rule violates the Sherman Anti-Trust Act, suggested the implementation of a hotline phone system to move out of code and discontinued products quickly. One retailer suggested that the rule be abolished in its entirety and favored having the Commission set and control prices. Another retailer submitted that retailers rely on the existing monthly publication notifying retailers of the wholesaler's prices but believed most retailers would not oppose a modification of the rule that gave every retailer access to the changed prices at the same time, and which provided for registration of the price changes with the Commission. Finally, the Enforcement Section of the Division of Alcoholic Beverage Control ("Enforcement") expressed concern with assuring that all retailers receive a fair opportunity to take advantage of price changes. No comments were received from the general public.

The Commission took no action with regard to Rule 29 but indicated that it had established a subcommittee to look at all of its rules and would receive further public comment in connection with a proposal to modify Rule 29.

2. On January 26, 1999, the Commission conducted a public hearing on a proposed amended Rule 29. At that hearing, licensees made suggestions for improving the Rule 29 proposal as published in the Register of Regulations on January 1, 1999 (2:9 Del.R. 1216). Representatives of the retail and wholesale segments of the alcohol industry indicated that the proposed daily price changes to a toll-free telephone number would pose a hardship to small retailers by causing them to continuously check to see whether price changes had been made. At least one licensee suggested that the Rule should allow only weekly changes in prices.

The written comment period remained open through January 31, 1999, as required by the Administrative Procedures Act. Written comments from one wholesaler included a proposal that the 3 day hold in Rule 29.3(a) on the availability of a new product should be deleted from the Rule as inconsistent with eliminating any type of "hold" in Rule 29. The Commission received no comments from the general public.

The Commission reconvened on February 18, 1999, following the close of the written comment period to consider and vote on the verbal and written comments concerning proposed Rule 29. The Commission determined that at least some of the proposed changes to the Rule were substantive changes requiring re-notice of the Rule. The Commission filed with the Register of Regulations ("the Register") an Order providing that it would re-notice a