

100 Office of the Secretary

101 Regulations Governing Delaware's Coastal Zone

May 11, 1999

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.

1.0 Authority

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.** Ch. 70.

2.0 Applicability

- 2.1 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.** §7005(a).
- 2.2 These regulations apply to areas within the Coastal Zone as defined by 7 **Del.C.** Ch. 70. A map of the coastal zone appears in Appendix A of these regulations.
- 2.3 These regulations specify the permitting requirements for existing non-conforming uses already in the coastal zone and for new manufacturing uses proposing to locate within Delaware's coastal zone.

3.0 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:

“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.

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“Board” means the State Coastal Zone Industrial Control Board.

“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.

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

“Department” means the Delaware Department of Natural Resources and Environmental Control.

“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.

“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.

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

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

“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.

“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.

“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.

“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.

“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.

“Secretary” means the Secretary of the Department of Natural Resources and Environmental Control.

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

“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.

4.0 Prohibited Uses

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

- 4.1 Heavy industry use of any kind not in operation on June 28, 1971.
- 4.2 Expansion of any non-conforming uses beyond their footprint(s) as depicted in Appendix B of these regulations.
- 4.3 Offshore gas, liquid, or solid bulk product transfer facilities which were not in operation on June 28, 1971.
- 4.4 The conversion of an existing unregulated, exempted, or permitted facility to a heavy industry use.
- 4.5 Bulk product transfer facilities and pipelines which serve as bulk transfer facilities that were not in operation on June 28, 1971.
- 4.6 The conversion or use of existing unregulated, exempt, or permitted docking facilities for the transfer of bulk products.
- 4.7 The construction, establishment, or operation of offshore gas, liquid, or solid bulk product transfer facilities which were not in operation on June 28, 1971.
- 4.8 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.

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

5.0 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:

- 5.1 The raising of agricultural commodities or livestock.
- 5.2 Warehouses or other storage facilities, not including tank farms.
- 5.3 Tank farms of less than five acres.
- 5.4 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.
- 5.5 Facilities used in transmitting, distributing, transforming, switching, and otherwise transporting and converting electrical energy.
- 5.6 Facilities used to generate electric power directly from solar energy.
- 5.7 The repair and maintenance of existing electrical generating facilities providing such repair or maintenance does not result in any negative environmental impacts.
- 5.8 Back-up emergency and stand-by source of power generation to adequately accommodate emergency industry needs when outside supply fails.
- 5.9 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.
- 5.10 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.
- 5.11 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.
- 5.12 Docking facilities which are not used as bulk product transfer facilities.
- 5.13 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.
- 5.14 Maintenance and repair of existing equipment and structures.
- 5.15 Replacement in-kind of existing equipment or installation of in-line spares for existing equipment.
- 5.16 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.

- 5.17 Any facilities which have received, prior to the promulgation of these regulations, a status decision which provided an exemption for the activity in question.
- 5.18 Research and development activities within existing research and development facilities.
- 5.19 Any other activity which the Secretary determines, through the status decision process outlined in Section 7.0 of these regulations, is not an expansion or extension of a non-conforming use or heavy industry use.
- 5.20 Public Sewage Treatment Plants subject to regulation by the Federal Water Pollution Control Act, 33 U.S.C. § 1251, et. seq. and/or the Delaware Environmental Protection Act, 7 **Del.C.**, Chapter 60.

5 DE Reg. 930 (10/01/01)

6.0 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.

- 6.1 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.
- 6.2 Any recycling plant or sewage treatment plant not excluded by Section E(20) of the Regulations.
- 6.3 Any new activity, with the exception of those listed in Section 5.0 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.** §7004 (b):
 - 6.3.1 Environmental impact, including but not limited to, items 8.2.1 through 8.2.10 of these regulations.
 - 6.3.2 Economic effect, including the number of jobs created and the income which will be generated by the wages and salaries of these jobs in relation to the amount of land required, and the amount of tax revenues potentially accruing to state and local government.
 - 6.3.3 Aesthetic effect, such as impact on scenic beauty of the surrounding area.
 - 6.3.4 Number and type of supporting facilities required and the impact of such facilities on all factors listed in this subsection.
 - 6.3.5 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.
 - 6.3.6 County and municipal comprehensive plans for the development and/or conservation of their areas of jurisdiction.

5 DE Reg. 930 (10/01/01)

7.0 Requests for Status Decisions

- 7.1 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.
- 7.2 A person whose proposed activity is not exempted as specified in Section 5.0 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.
- 7.3 Status decision requests must be in writing on a form supplied by the Secretary and shall include, at a minimum, the following:
- 7.3.1 Name, address and contact person for the activity or facility under consideration.
 - 7.3.2 Site of proposed activity marked on a map or site plan.
 - 7.3.3 A detailed description of the proposed activity under consideration.
 - 7.3.4) An impact analysis of the proposed project on the six (6) criteria contained in Section 6.3 (1-6) above.
- 7.4 Any new manufacturing facility or research and development facility proposed to be sited in the Coastal Zone shall apply for a status decision.
- 7.5 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 18.0 of these regulations.
- 7.6 Upon receipt of an administratively complete request for a status decision, the Secretary shall publish a legal notice as prescribed in Section 14.0 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.
- 7.7 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 14.0 of these regulations.

8.0 Permitting Procedures**8.1 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:

- 8.1.1 A certification by the applicant that the information contained with the application is complete, accurate and truthful.
- 8.1.2 Evidence of local zoning approval as required by section 7004 (a) of the Act.
- 8.1.3 An Environmental Permit Application Background Statement as required under 7 **Del.C.** Ch. 79, if applicable.

- 8.1.4 An Environmental Impact Statement as described in Section 8.2 of these regulations.
- 8.1.5 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.
- 8.1.6 A description of the aesthetic effects of the proposed project, such as impact on scenic beauty of the surrounding area.
- 8.1.7 A description of the number and type of supporting facilities required and the impact of such facilities on all factors listed in this section.
- 8.1.8 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.
- 8.1.9 A statement concerning the project or activity's consistency with county and municipal comprehensive plans.
- 8.1.10 An offset proposal if required under Section 9.1.1 of these regulations.

8.2 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:

- 8.2.1 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.
- 8.2.2 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.
- 8.2.3 Likely destruction of wetlands and flora and fauna.
- 8.2.4 Impact of site preparation on drainage of the area in question, especially as it relates to flood control;
- 8.2.5 Impact of site preparation and facility operations on land erosion;
- 8.2.6 Effect of site preparation and facility operation on the quality and quantity of surface and ground water resources,
- 8.2.7 A description of the need for the use of water for processing, cooling, effluent removal, and other purposes;
- 8.2.8 The likelihood of generation of glare, heat, noise, vibration, radiation, electromagnetic interference and/or obnoxious odors,.

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8.2.9 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,

8.2.10 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.

8.3 Application Review Process

8.3.1 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.

8.3.2 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.

8.3.3 The Secretary shall also consider any impacts the proposed activity may have on the Department's environmental goals for the Coastal Zone and the environmental indicators used to assess long-term environmental quality within the zone.

8.3.4 Prior to public hearing, the Secretary shall provide a written assessment of the project's likely impact on the six criteria listed in Section 8.1 above and make available the preliminary determination of the sufficiency of the offset project as required in Section 9.0 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.

8.3.5 Upon receipt of an administratively complete application and completion of the Secretary's assessment as required in Section 8.3.4 above, the Secretary shall issue a public notice as prescribed in Section 14.0 of these regulations and hold a public hearing in accordance with hearing procedures described in Section O of these regulations.

8.3.6 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.

8.3.7 The permit decision shall be sent to the applicant by certified mail and shall be noticed as prescribed in Section 14.0 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.

9.0 Offset Proposals

9.1 Offset Proposal Requirements

9.1.1 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.

- 9.1.2 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.
- 9.1.3 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.
- 9.1.4 Offset proposals should be well-defined and contain measurable goals or accomplishments which can be audited by the Department.
- 9.1.5 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.
- 9.1.6 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.

9.2 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:

- 9.2.1 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 8.2.1 of these regulations.
- 9.2.2 How the offset project will be carried out and in what period of time.
- 9.2.3 What the environmental benefits will be and when they will be achieved.
- 9.2.4 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.
- 9.2.5 What, if any, negative impacts are associated with the offset project.
- 9.2.6 What scientific evidence there is concerning the efficacy of the offset project in producing its intended results.
- 9.2.7 How the success or failure of the offset project will be measured in the short and long term.

9.3 Enforcement Of Offset Proposals

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- 9.3.1 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.
- 9.3.2 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.

10.0 Withdrawal of and Revisions to Applications

- 10.1 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.
- 10.2 Once public notice announcing a public hearing is advertised according to Section 14.0 of these regulations, no revisions to any application will be permitted beyond those allowed in Section 10.3 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 8.0 of these regulations.
- 10.3 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.
- 10.4 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.

11.0 Permit Transfers

- 11.1 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.

12.0 Abandoned Uses

- 12.1 Any existing facility which is determined to be abandoned shall not be reinstated except as otherwise provided in the Act.
- 12.2 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.

- 12.3 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.
- 12.4 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.
- 12.5 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.
- 12.6 The Secretary shall issue a public notice of the decision, which decision may be appealed in accordance with the provisions of Section 16.0 of these regulations and 7 Del. C. §7007.

13.0 Public Information

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. Ch. 100) and the Department's FOIA policy.

14.0 Public Notification

- 14.1 At a minimum, the Secretary shall notify the public by legal notice when the following events occur:
- 14.1.1 The receipt of a request for status decision.
 - 14.1.2 The decision by the Secretary of a status decision request.
 - 14.1.3 The decision by the Secretary to consider a facility/use as abandoned.
 - 14.1.4 The receipt of an application for a Coastal Zone Permit.
 - 14.1.5 The scheduling of all public hearings.
 - 14.1.6 The decision on all permit applications.
 - 14.1.7 The withdrawal of an application by the applicant.
 - 14.1.8 The receipt of a request for a permit transfer as specified in Section 11.1.
- 14.2 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.
- 14.3 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.

15.0 Public Hearings

- 15.1 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.
- 15.2 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.
- 15.3 A written transcript of the hearing shall be made for the Department.
- 15.4 All hearings shall be conducted in accordance with the Delaware Administrative Procedures Act (29 **Del.C.** Ch. 101).

16.0 Appeals

- 16.1 Appeals of Decisions of the Secretary
 - 16.1.1 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.
 - 16.1.2 Receipt of an appeal does not serve to stay the activity or approval in question.
 - 16.1.3 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.
 - 16.1.4 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.
 - 16.1.5 It is the responsibility of the applicant to insure that the appeal is received at the Secretary's office within the appeal period.
 - 16.1.6 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.
- 16.2 Procedures for Appeals Before the Coastal Zone Industrial Control Board
 - 16.2.1 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.
 - 16.2.2 The Board shall publish a notice of the hearing as prescribed in 29 **Del.C.** Ch. 101, Section 10122 at least 20 days prior to the hearing.
 - 16.2.3 The Board must process and rule on the appeal in accordance with 29 **Del.C.** Ch. 101, Subchapter III.

16.3 Appeals of Decisions of the Coastal Zone Industrial Control Board

16.3.1 Any person aggrieved by a final order of the Board as provided for in 29 **Del.C.** §10128, may appeal the Board's decision to Superior Court in accordance with 29 **Del.C.** §10142. The Secretary may also appeal any decision of the Board as any other appellant.

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

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

17.0 Fees

17.1 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.

17.2 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.

17.3 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.

18.0 Enforcement

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

18.2 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.

19.0 Severability

19.1 If, at any time, provisions within these regulations relating to Sections 5.0 and 9.0 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 14.0 of these regulations.

19.2 If, at any time, provisions other than those relating to requirements in Sections 5.0 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****1.0 Introduction**

- 1.1 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.
- 1.2 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.
- 1.3 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.
- 1.4 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.

2.0 Guidance in determining whether a permit is required

- 2.1 When a business wants to conduct an activity that may be one of the activities exempted from the permitting process as outlined in Section 5.0, 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.
- 2.2 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.

- 2.3 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".

3.0 Environmental Goals and Indicators

- 3.1 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.
- 3.2 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.
- 3.3 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.
- 3.4 DNREC's process for developing and prioritizing the indicators will include opportunities for formal public review and comment. To ensure that the public has opportunities to provide input into the development and any subsequent revision of the environmental indicators, the Advisory Committee recommended that DNREC establish an Environmental Indicator Technical Advisory Committee (EITAC).
- 3.5 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.

4.0 Principles for Assessing an Application

- 4.1 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.
- 4.2 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.
- 4.3 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.

5.0 Evaluation of Offset Proposals

- 5.1 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.
- 5.2 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.
- 5.3 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.
- 5.4 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.
- 5.5 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.
- 5.6 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).

- 5.7 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.
- 5.8 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.
- 5.9 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.

6.0 Guidance Regarding Activities Within The Port Of Wilmington

- 6.1 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.
- 6.2 Proposed uses within the Port of Wilmington which constitute heavy industry uses are prohibited.
- 6.3 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.
- 6.4 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.
- 6.5 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.

7.0 Coastal Zone Report

- 7.1 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:
- 7.1.1 A description of progress towards environmental goals developed by DNREC for the Coastal Zone;
 - 7.1.2 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;
 - 7.1.3 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
 - 7.1.4 A description of the cumulative impacts of permitted activities on the environmental indicators.

Appendix D**Permitting Flow Chart**

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Appendix E**Delaware's Coastal Zone Act**

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