


HEARING OFFICER'S REPORT

TO: The Honorable Shawn M. Garvin
Cabinet Secretary, Department of Natural Resources and Environmental Control

FROM: Lisa A. Vest 
Regulatory Specialist, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: Proposed Regulation Amendments to 7 DE Admin. Code 101, *Regulations Governing Delaware's Coastal Zone*

DATE: August 6, 2019

I. BACKGROUND AND PROCEDURAL HISTORY:

A public hearing was held on Monday, June 24, 2019, at 6:00 p.m. at the New Castle County office of the Department of Natural Resources and Environmental Control ("DNREC," "Department"), 391 Lukens Drive, New Castle, Delaware to receive comment on proposed regulatory amendments ("Amendments") to 7 DE Admin. Code 101, *Regulations Governing Delaware's Coastal Zone* ("Coastal Zone Regulations"). This public hearing was held jointly between DNREC and the Coastal Zone Industrial Control Board ("CZICB") to provide the public an opportunity to comment on these proposed Amendments.

This action is necessitated due to the signing of the *Coastal Zone Conversion Permit Act* ("CZCPA") by Governor John Carney on August 2, 2017. The CZCPA amended the *Delaware Coastal Zone Act* (codified at 7 *Del.C.* Chapter 70). The CZCPA authorizes DNREC to issue Conversion Permits for the construction and operation of new heavy industry uses within the 14 existing sites of heavy industry use within Delaware's Coastal Zone areas, as defined within the Act, 7 *Del.C.* §7002(i). It also authorizes DNREC to issue Conversion Permits for the bulk transfer of products under certain circumstances. Accordingly, the Department is now required to amend its existing Coastal Zone Regulations, to include additional regulatory language concerning the issuance of such Conversion Permits no later than October 1, 2019.

On June 28, 1971, the *Delaware Coastal Zone Act* (“Act”) was signed by then-Governor Russell Peterson, recognizing that the coastal areas of Delaware are the most critical areas for the future of the State in terms of quality of life. The Act is designed to protect Delaware’s coastal areas from the destructive impacts of heavy industrialization and offshore bulk product transfer facilities. Furthermore, the Act is intended to protect the natural environment of the State’s coastal areas, and safeguard their use primarily for recreation and tourism.

To accomplish these objectives, the Act has strictly prohibited the construction of new heavy industry use in Delaware’s Coastal Zone, as that industry was determined to be incompatible with the protection of the natural environment in those areas. The Act has also historically prohibited new offshore bulk product transfer facilities in the Coastal Zone, outside of the Port of Wilmington, or at established light manufacturing facilities that have, or may yet receive, a Coastal Zone Permit from the Department. The Act regulates existing heavy industrial activities, as well as new and existing manufacturing activities in Delaware’s Coastal Zone. Certain new activities, such as the bulk transfer of raw materials, and some heavy industry facilities (oil refineries, incinerators, paper mills, lightning gas terminals, and steel manufacturing plants) are not allowed in the Coastal Zone.

The Department is charged with the administration of the Act, pursuant to *7 Del.C. §7005(a)*. The Act provides the DNREC Secretary with the authority to promulgate regulations to carry out the requirements contained within the Act, provided that such regulations are approved by the CZICB. *7 Del. C. §7005(b)*. To that end, the Department promulgated the *Regulations Governing Delaware’s Coastal Zone* (7 DE Admin. Code 101, effective May 11, 1999). Over the past twenty years, the Coastal Zone Regulations have provided guidance to the business community, State officials, and the general public as to what is expected and required of them with regard to the implementation of this Act, including, but certainly not limited to, a description of what must be included in any Application for a Coastal Zone Status Decision, key definitions of the Department’s Coastal Zone Act Program, and the requirements to submit an Application for a Coastal Zone Act (“CZA”) Permit (including the offset requirement). An applicant must have the CZA Permit prior to beginning construction activities for any proposed project.

Under the provisions of the Act, heavy industry or bulk product transfer facilities were allowed to continue to operate on fourteen (14) sites located within the Coastal Zone, as they were already in operation as of June 28, 1971, and were therefore “grandfathered” into the Department’s Coastal Zone Permitting Program. Those 14 sites are referred to as “nonconforming uses” under both the Act and the Department’s Coastal Zone Regulations. As the years passed since the Act’s inception, however, some of those sites became dormant, or underutilized, and the prior use of the same was abandoned. The Department’s Coastal Zone Regulations specifically prohibited conversion of any of those 14 grandfathered sites to a new heavy industry use, even if one of those sites were to become abandoned.

On August 2, 2017, the *Coastal Zone Conversion Permit Act* (“CZCPA”) formally amended the original Act by the establishment of a process to allow for the productive reuse of the 14 existing sites of heavy industry use within Delaware’s Coastal Zone. Specifically, the CZCPA authorizes DNREC to issue Conversion Permits, which allow for the construction and operation of an alternative or additional heavy industry use at any of the 14 existing heavy industry use sites within Delaware’s Coastal Zone. It also authorizes DNREC to issue Conversion Permits for bulk transfer of products produced within, or desired for, a facility within the Coastal Zone, and for the bulk transfer of agricultural products without regard to origin or destination.

The CZCPA necessitates the Department to promulgate amendments to its existing Coastal Zone Regulations, specifically, to add supplemental regulatory language therein concerning the permitting and issuance of Conversion Permits. The Department was further directed by the 149th General Assembly to finalize its promulgation of the Amendments on or before October 1, 2019. As previously noted, the Amendments must also be approved by the CZICB, prior to finalization, pursuant to 7 *Del.C.* §7005(b) and (c).

In order to be in compliance with all relevant statutory requirements, and, in recognition of the diversity of interests surrounding Delaware's Coastal Zone, the Department began its promulgation process in this matter with the convening of a Regulatory Advisory Committee ("RAC"). The RAC was charged by the Department with the development, by consensus, to the greatest degree possible, the conceptual framework and approach to these Amendments. To ensure an effective and efficient process, the Department appointed a RAC Chair, and retained the services of Patrick Field, Facilitator, from the Consensus Building Institute. The RAC Chair was Justice Randy J. Holland, who served on the Delaware Supreme Court for over 30 years, and retired in March 2017.

Given the strong public interest in the passage of the CZCPA (and the necessary development of the additional regulatory language to administer the same), the Department and the RAC engaged the public in the following ways:

- **Public Workshops:** DNREC held two public workshops in November 2017, involving some 80 attendees, to obtain feedback on the statutory changes to the CZA and the convening process for the RAC;
- **Fenceline Community Meetings:** DNREC staff engaged with various neighborhood groups and associations during the early work of the RAC. The goal of such engagement was to help fenceline communities, which are communities near or adjacent to a heavy industry use site, to understand the regulatory development process and inform them of ways to provide input;
- **Open Houses:** DNREC and the RAC held three Open Houses in late February 2019 to obtain feedback from the public on the RAC's preliminary recommendations. The Open Houses were held in Claymont, Delaware City, and Wilmington on different nights. The Open Houses included an overview presentation of the legislative changes and the RAC process in video form, as well as information stations, staffed by DNREC employees, on the RAC's preliminary recommendations. During and after the Open Houses, the public was offered the opportunity to provide focused, written feedback on the RAC's preliminary recommendations, with the purpose of informing future RAC discussions and final recommendations;

- **RAC Meetings:** All RAC meetings were publicly noticed, open to the public, and included a time for public comment;
- **Work Group Meetings:** All Work Group meetings were publicly noticed and open to the public;
- **Website:** The RAC's publicly available website served as a repository of information relating to the RAC and the CZA, including background information, meeting materials, public comment information, and information about the stakeholder engagement process in general; and
- **Public Comment Process:** Public comments were welcomed throughout the RAC process, including during the RAC meetings, at the three public Open Houses, and via a written form available online.

The RAC was the official body charged with providing recommendations to the Department as to the regulatory approach and content of the proposed Amendments that will govern the issuance of the aforementioned Conversion Permits. The RAC developed recommendations on several key topics, as follows: (1) Bulk Product Transfer Facilities; (2) Plans for Potential Impacts of Sea Level Rise and Coastal Storms; (3) Economic Effect; (4) Environmental Impact; (5) Offsets; (6) Financial Assurance; and (7) Cross-Cutting Issues. These recommendations were fully addressed in the *Final Report and Recommendations of the CZCPA Regulatory Advisory Committee (04/17/19)* ("RAC Report"), which was included as part of the Department's Exhibit package and incorporated into the hearing record ("Record") at the time of the joint public hearing held in this matter on June 24, 2019.

Both DNREC and the CZICB are subject to the provisions of the Administrative Procedures Act ("APA), which governs the adoption of regulations, pursuant to 29 Del.C. §10161(a)(10) and (b). The regulatory adoption process is set forth in Subchapter II of Chapter 101 of Title 29. The public hearing of June 24, 2019, held jointly by DNREC and the CZICB (and formally noticed as such), provided the public yet another opportunity to participate in this regulatory development process by offering comment for inclusion into the Record.

Both the Department and the CZICB have the statutory basis and legal authority to act with regard to this proposed regulatory promulgation, pursuant to 7 *Del.C.* §7005(b) and (c). Following the receipt of the recommendations contained within the RAC Report as described above, the Department published the initial proposed Amendments in the June 1, 2019 *Delaware Register of Regulations*. Thereafter, the joint public hearing in this matter was held on June 24, 2019, at which time the aforementioned proposed Amendments were presented and thoroughly vetted to members of the public. Pursuant to 29 *Del.C.* §10118(a), the Record remained open for fifteen (15) additional days subsequent to the date of the hearing for the purpose of allowing additional public comment to be received regarding this proposed promulgation. The Record closed for comment in this matter on July 9, 2019, with public comment having been received by the Department during all phases of this formal promulgation.

After the comment period formally closed on July 9, 2019, the Department's Coastal Zone Program staff, located within the Division of Climate, Coastal and Energy ("DCCE"), performed a thorough review of the Record, including all of the comments received on the proposed Amendments. The full range of comments contained in the Record includes not only those from members of the public, but from other contributors as well, such as the Delaware Audubon Society, the Delaware Ornithological Society, the Delaware City Refining Company, Sunoco Partners Marketing & Terminals, L.P., and the Environmental & Natural Resources Law Clinic of Widener University. All proper notification and noticing requirements concerning this matter were met by both DNREC and CZICB. Proper notice of the hearing was provided as required by law.

II. SUMMARY OF THE PUBLIC HEARING RECORD:

The Record consists of the following documents: (1) a verbatim transcript; (2) eleven documents compiled by responsible Department staff during the course and scope of this formal promulgation, marked by this Hearing Officer as Department Exhibits 1-11; (3) Technical Response Memorandum from Judy Jordan, Coastal Zone Program Administrator, DCCE, offering the DNREC Coastal Zone Program's formal responses to the comments received concerning the proposed Amendments; and (4) Legal Issues Memorandum from Ralph K. Durstein, III, Esq., Deputy Attorney General (07/29/19), addressing comments received concerning the Department's regulatory adoptive process (as well as the CZICB's approval process) with regard to this particular promulgation. The Department's person primarily responsible for the drafting and overall promulgation of these proposed Amendments, Ms. Jordan (as referenced above), developed the Record with the relevant documents in the Department's files.

As stated previously, members of the public attended the joint public hearing held on June 24, 2019. A significant amount of comment was received by the Department concerning this proposed regulatory action, not only at the time of the hearing itself, but also during both the pre-hearing and post-hearing phases of this promulgation. The comment period closed on July 9, 2019.

As a result of the review performed subsequent to the close of the comment period on July 9, 2019, and, in consideration of all the public comments received on the proposed Amendments, the DCCE staff determined that some changes to the Department's initial proposed Amendments were necessary. These changes, which were non-substantive in nature, were made for the purposes of (1) clarification of the proposed regulatory language; (2) removal of some language deemed redundant in nature; (3) improved reflection of historical data (as contained in the appendix section); and (4) correction of various clerical and grammatical error contained therein.

In those instances where revisions were made to the Amendments for clarification purposes, no changes were made to any substantive content contained therein, or to any previously vetted requirements of the Department's Coastal Zone Program. Rather, changes were made only to further define and clarify the Department's proposed Conversion Permit approval process.

At the request of this Hearing Officer, a Technical Response Memorandum ("TRM") was prepared by the Department's DCCE staff, located within the Division of Climate, Coastal and Energy, to serve as a comprehensive summary of the comment received in this matter. The TRM, dated August 5, 2019, not only provides a thorough discussion of the comment received in this matter, but also provides the DCCE's responses and recommendations concerning the same.

The Department's TRM reflects each instance where the Department determined that certain changes to the initial proposed Amendments were necessary, and provides the reasoning for such revisions. Furthermore, the TRM notes that none of the comments received in this matter warranted a substantive change to the proposed Amendments, and that the changes which have been made are non-substantive in nature, as described above. As such, no further re-noticing or re-publication of the Department's proposed *revised* Amendments is necessary in this matter. Accordingly, the Department's proposed *revised* Amendments, RAC Report, and TRM are hereby expressly incorporated into the hearing record generated in this matter, and are attached hereto for the Secretary's review as Appendices "A," "B," and "C," respectively.

It should be noted that comments offered for the Record in this matter voiced specific legal concerns regarding the Department's regulatory adoption process in this matter, as well as the CZICB's approval process concerning the same. To serve as an accompanying document to the TRM noted above, a Legal Issues Memorandum ("LIM"), dated July 29, 2019, was prepared by Ralph K. Durstein, III, Esquire, Deputy Attorney General. The LIM addresses those concerns which pertain to the regulatory adoption processes noted above, and thoroughly responds to the same. It should be noted that, in the spirit of promoting a greater understanding and full transparency with regard to this promulgation, Mr. Durstein's LIM is hereby expressly incorporated into the Record generated in this matter, and is attached hereto as Appendix "D."

III. RECOMMENDED FINDINGS AND CONCLUSIONS:

Based on the Record developed in this matter, I find and conclude that the Department has provided appropriate reasoning regarding the need for the aforementioned proposed *revised* regulatory Amendments. Accordingly, I recommend promulgation of the same, in the customary manner provided by law.

Further, I recommend the adoption of the following findings and conclusions:

1. The Department and the CZICB have the statutory basis and legal authority to act with regard to the proposed *revised* amendments to 7 DE Admin. Code 101: *Regulations Governing Delaware's Coastal Zone*, pursuant to 7 *Del.C.* §7005(b) and (c);
2. The Department has jurisdiction under its statutory authority, pursuant to 7 *Del.C.* Ch. 60, to issue an Order adopting the proposed *revised* Amendments as final, pending approval of the CZICB, pursuant to 7 *Del.C.* §7005(b) and (c);
3. The Department and the CZICB provided adequate public notice of the initial proposed Amendments, and all proceedings associated with the same, in a manner required by the law and regulations. The Department and the CZICB also provided the public with an adequate opportunity to comment on the Amendments, including at the time of the public hearing held on June 24, 2019. The Department held the Record open through close of business on July 9, 2019, consistent with 29 *Del.C.* §10118(a), in order to consider public comment on the same before making any final decision;
4. Promulgation of the proposed *revised* Amendments will enable both DNREC and CZICB to comply with the recent changes to *Delaware's Coastal Zone Act*, specifically, the CZCPA, and enable the Department's *Regulations Governing Delaware's Coastal Zone* to be amended to remain consistent with the same;

5. The Department has reviewed these proposed *revised* Amendments in the light of the Regulatory Flexibility Act, consistent with 29 *Del.C.* Ch. 104, and believes the same to be lawful, feasible, and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;

6. The proposed regulatory Amendments, as published in the June 1, 2019 *Delaware Register of Regulations*, and then as *revised*, as set forth in Appendix “A” hereto, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, they should be approved as final regulatory Amendments, pending CZICB approval, as noted above, which shall go into effect ten days after their publication in the next available issue of the *Delaware Register of Regulations*; and

7. The Department shall submit its proposed *revised* Amendments, pending approval by the CZICB, as final regulatory Amendments to the *Delaware Register of Regulations* for publication in its next available issue, and provide such other notice as the law and regulations require, and the Department determines is appropriate.



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Attachments/Appendix:

Appendix A: Proposed *Revised* Reg. Amendments

Appendix B: *Final Report and Recommendations of the CZCPA Regulatory Advisory Committee* (04/17/19)

Appendix C: TRM (08/05/19)

Appendix D: LIM (07/29/19)