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**VIA EMAIL**

Lisa Vest
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DNREC - Office of the Secretary
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Dover, DE 19901
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**Re: Comments to Proposed Amendments to Regulations Governing Delaware's Coastal Zone**

Dear Ms. Vest:

I write to provide comments on the Proposed Amendments to Regulations Governing Delaware's Coastal Zone ("Proposed Regulations"). Our comments are listed in order of the pertinent regulatory provision. For the most part, these comments are directed at issues that were not included in the recommendations of the Coastal Zone Act Conversion Permit Regulatory Advisory Committee ("RAC"), or are suggestions for drafting clarity.

3.0 Definitions

"Catastrophic Incident"

The term "Catastrophic Incident" is used in 8.4.4.1.5 in relation to an applicant's Environmental Remediation and Stabilization Plan, requiring the applicant to estimate the cost of implementing the plan for a catastrophic incident. By listing the Environmental Remediation and Stabilization Plan in 8.4.7, which describes how to calculate the Coastal Zone Financial Assurance Amount, the applicant's financial assurance must take into account a Catastrophic Incident. The Conversion Permit Act does not include a requirement for financial assurance for "catastrophic incidents" and instead refers to incidents "resulting in environmental contamination."

After due consideration, the RAC did not include financial assurance for a "catastrophic incident" in its recommendations, due largely to the difficulty in making the necessary financial assessment and the lack of a statutory basis for this requirement. The RAC recommendation also contemplated a two-pronged approach with respect to future incidents resulting in environmental contamination, allowing the amount of required financial assurance with respect to a future incident to be assessed upon the occurrence of an incident. That concept does not appear in the Proposed Regulations. Finally, the definition of Catastrophic Incident includes *any* release of a

hazardous substance or hydrocarbon and is not limited in quantity or any other way; thus, referring to all such incidents as "catastrophic" is potentially confusing. Accordingly, this provision should not be included in 8.4.4.1.5 and 8.4.7.

8.2.2 Environmental Impact Statement

The Proposed Regulations provide that an applicant shall submit an Environmental Impact Statement which shall contain an "assessment of the project's potential impact on the Coastal Zone environmental goals and indicators, when and if such indicators are made publicly available. Coastal Zone environmental goals and indicators may 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[.]"

The phrase "Coastal Zone environmental goals and indicators" is not defined, and since it is undefined, it should not be included in the regulations, to avoid uncertainty and vagueness in the permitting process. When and if such environmental goals and indicators are developed, they should be promulgated in accordance with law and only then imposed as regulatory requirements in the permitting process.

8.4.1 Application Contents Exclusive to Conversion Permits

The Proposed Regulations require the applicant to provide a "certification signed by the applicant or applicants that they agree to pay or ensure all costs of compliance with Delaware Hazardous Substances Cleanup Act and any other relevant State of Delaware or federal environmental statutes[.]"

The phrase "any other relevant State of Delaware or federal environmental statutes" is not defined and vague (e.g., does this mean any Delaware statute or only Delaware environmental statutes?). In order for an applicant to agree to pay or ensure all costs of compliance, it must know what statutes will be applicable. The Conversion Permit Act was focused on HSCA or related environmental remediation statutes, and the regulations should maintain that focus.

8.4.2 Application Contents Exclusive to Conversion Permits

The Proposed Regulations provide that a conversion permit applicant shall provide a Sea Level Rise and Coastal Storm Plan, which at a minimum shall provide under 8.4.2.3 a topographic map that clearly identifies, under 8.4.2.3.4, "[a]reas that will be flooded during the High Sea Level Rise Scenario, as defined by the Delaware Sea Level Rise Advisory Committee, as it may be amended from time to time."

The reference to the High Sea Level Rise Scenario does not provide an explicit reference, document, website, or other information that would allow an applicant to locate this scenario.

Additionally, the actions of the referenced advisory committee are not final administrative actions subject to review and comment. The regulation should be revised to include an explicit and unambiguous reference so that an applicant may properly prepare its application.

Additionally, a regulation referencing an external document that includes a mandatory requirement that must be met should include as part of the regulation the subject external document to ensure consistency with the Administrative Procedures Act. *See Baker v. Delaware Department of Natural Resources and Environmental Control*, 2015 WL 5971784 (October 7, 2015 Del. Super. Ct.), *affirmed by Delaware Dept. of Natural Resources and Environmental Control v. Baker*, 137 A.2d 122 (Del. Supr. 2016). Here, although it is not clear where the High Sea Level Rise Scenario can be found or whether it is a policy or guidance, the regulation as drafted refers to it as an external item that is required for an applicant's successful application.

8.4.3 Application Contents Exclusive to Conversion Permits

The Proposed Regulations require that a conversion permit applicant shall provide a timeframe for completing the conversion to an additional or alternative heavy industry use or bulk product transfer facility, "including milestones for financing."

"Milestones for financing" was not included in the RAC recommendations, and the need for this information in the permitting context is not clear. Financial information of this type is often confidential and does not bear on DNREC's decision to approve or deny a conversion permit. If a proposed project schedule is relevant to the permitting process, such a schedule can be submitted independently of financing milestones.

8.4.4 Application Contents Exclusive to Conversion Permits

The Proposed Regulations require that a conversion permit applicant shall provide a "Department approved Environmental Remediation and Stabilization Plan[.]"

Placing the qualifier "Department approved" in front of Environmental Remediation and Stabilization Plan creates potential uncertainty as to the timing and mechanism for the "approval"—is the approval obtained through a DNREC process that is separate and distinct from the conversion permitting process, as part of the permitting process, or in some other fashion? The regulation should be clarified to indicate how the Department approval for this plan is to be obtained.

8.5.2 Application Review Process

The Proposed Regulations state that "[i]n assessing a conversion permit, the Secretary shall consider … the degree to which the project site boundary is compatible with the uses, remediation efforts and environmental goals for the heavy industry use site and Coastal Zone."

The relationship between a project site boundary and an unspecified set of "environmental goals" is a vague and imprecise standard to use in assessing a conversion permit application. As a result, this language creates ambiguity and may result in decision making based on unspecified criteria that are not subject to evaluation. The environmental goals for a site and the Coastal Zone should be explicitly defined, or this concept should be deleted from this regulation.

8.6.1 Permit Duration

Section 8.6.1 of the Proposed Regulations imposes a 20-year term on any permit issued under the Coastal Zone Act, regardless of whether it is a general permit or a conversion permit.

At the outset of the rulemaking process, and during the RAC process, DNREC stated that it was not re-opening the Coastal Zone Act regulations in their entirety, and that the new regulations would be limited in scope to conversion permits. Thus, the inclusion of a permit duration regulation applicable to all coastal zone permits, not just to conversion permits, is a departure from the spirit and intent of the rulemaking process.

The RAC did not make any recommendation concerning permit duration for non-conversion permits, and there was no consideration of that point. The RAC did, after extensive discussion, recommend a 20-year permit term for conversion permits.

There are several reasons why a permit term for any coastal zone permit is inappropriate, which include:

- A coastal zone permit is in the nature of a land use decision, which typically applies for an unlimited duration, and there is no rational basis for imposing a specific permit term.
- Imposing a permit duration on all permits will place newly issued CZA permits on an uneven footing with the many previously issued CZA permits that have no duration.
- Imposing a permit duration will create uncertainty in the permitting process and may inhibit a permit applicant's ability to obtain project financing.
- There is no need for a permit duration because any requirements for updating or resubmitting information during the permit term (e.g., financial assurance information or sea level rise plans) can be addressed in permit conditions. If the permit conditions are not met, appropriate enforcement action can be taken.

Additionally, the permit duration provision does not prescribe any standards for the exercise of discretion as to permit duration. The applicant is required to plan for a useful life of 30 years, but the permit term is set at 20 years (or whatever other term the Secretary selects based on unspecified factors). This regulation should be revised so that it only applies to conversion permits, and it should be further revised to eliminate the potential for the Secretary to impose a shorter permit term.

8.6.2 Permit Renewal

The meaning of "record of compliance" is not stated or defined in the regulations. This term is redundant in light of 8.6.2.2, which requires the Secretary to consider the applicant's performance and compliance under the existing permit.

8.6.3 Permit Modification

The Proposed Regulations allow a permittee to submit a request for a minor or major permit modification to the Secretary.

For consistency with other DNREC permitting programs, "minor modification" should be changed to "administrative modification." The suggested revision to 8.6.3 is consistent with the definition of "minor modification" in 8.6.3.1, which identifies various administrative changes. Accordingly, 8.6.3.1 should also be changed to "administrative modification" for clarity and consistency.

9.1.3 Offset Proposal Requirements

The Proposed Regulations require an applicant to propose an offset project that "countervails the negative environmental impacts of the conversion project[.]"

The term "countervails" is not commonly used in environmental regulation, and as a result its meaning in the environmental context is vague. "Countervails" should be replaced with "mitigates" because it is a better known, more commonly used term and concept in environmental regulation.

9.2.6 Offset Proposal

The Proposed Regulations state that in order for the Secretary to determine the adequacy of an applicant's offset proposal, the applicant must provide, at a minimum, "scientific evidence, including but not limited to peer reviewed studies, models, or state, local or federal government publications concerning the efficacy of the offset project in producing its intended results."

It appears that the regulation intends to list several types or examples of scientific evidence that may be submitted, but is not requiring that each and every type of information be provided. In that context, the phrase "including but not limited to" creates uncertainty as to whether each type of evidence must be submitted. In some cases, certain of the listed types of evidence may not exist. The language should be clarified to confirm the extent of the obligation that is being imposed. The phrase "but not limited to" should be revised to "which may consist of" to address this concern.

11.0 Permit Transfers

This provision (deleted in the Proposed Regulations) allowed the transfer of coastal zone permits in connection with facility transfers or business reorganizations. For unexplained reasons, the permit transfer provision was deleted in the Proposed Regulations, for all coastal zone permits.

A permit transfer provision is a common sense, necessary provision that encourages investment in the Coastal Zone by allowing transfer of a permit in the event of a sale, merger, acquisition, or other event of transfer. Deletion of the permit transfer provision was not contemplated in the conversion permit statute or by the RAC, and is outside the scope of DNREC's authority and the stated scope of the conversion permit rulemaking process. The provision should be reinstated, and it should be available for all types of coastal zone permits.

We appreciate your review and consideration of these comments.

Sincerely,

Robert W. Whetzel

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