



June 6, 2017

To: HB 190 Sponsors and Cosponsors: Rep. Ed Osienski, Senator Bryan Townsend, Senator Pettyjohn, Rep. Heffernan, Rep. Gray, Rep. Briggs King, Rep. Collins, Rep. Dukes, Rep. Hensley, Rep. Hudson, Rep. Kenton, Rep. Miro, Rep. Outten, Rep. Postles, Rep. Potter, Rep. B. Short, Rep. D. Short, Rep. Spiegelman, Rep. Wilson, and Rep. Yearick

House Natural Resources Committee: Chair Debra Heffernan, Vice-Chair Michael Mulrooney, Rep. Quinton Johnson, Rep. David Bentz, Rep. John A. Kowalko, Rep. Gerald L. Brady, Rep. Trey Charles Paradee, Rep. Ronald E. Gray, Rep. Richard G. Collins, Rep. Charles S Postles Jr., Rep. William J. Carson

Delaware General Assembly

Re: HB 190 AN ACT TO AMEND TITLE 7 OF THE DELAWARE CODE RELATING TO THE COASTAL ZONE ACT.

Delaware's Coastal Zone Act is a landmark piece of legislation that served as a national model for conserving natural resources, protecting public health, and providing business opportunities. The Coastal Zone Act allows for new

manufacturing (with a permit), yet restricts the most dangerous types of heavy industrial activity and bulk product transfer that have the most devastating impacts on communities, public health and ecosystems.

For the past 46 years the Coastal Zone Act has been highly successful and effective. Delaware has become a leading destination for tourism, contributing over \$3 billion annually to the state's economy and employing more than 40,000 people. In 2012 the State of Delaware launched the Bayshore Initiative in partnership with the U.S. Department of Interior and nonprofit organization partners. "Delaware is blessed with beautiful natural resources" said John Carney in the press release. "The Bayshore Initiative builds on Delaware's reputation as a unique and beautiful natural resource and boosts our economy. The initiative is encouraging more Delawareans and visitors to enjoy the state as a world-class birding and wildlife-watching destination," said then Governor Jack Markell. The State of Delaware press release continued to state "The Delaware Bayshore Initiative continues the conservation commitment made over the past half century by... government officials like Governor Russell W. Peterson in establishing Delaware's Coastal Zone Act." <sup>1</sup>

The air quality of Delaware has also improved. Delaware's 2014 Annual Air Quality Report shows that the state, for the very first time, met all National Ambient Air Quality Standards, and that pollutant levels had either declined or stabilized.<sup>2</sup> Healthy air is vital to Delaware's future, as air pollution is risk to health, especially among children. Reducing air pollution reduces "the burden of disease from stroke, heart disease, lung cancer, and both chronic and acute respiratory diseases, including asthma".<sup>3</sup>

HB 190 places the valuable resource of the Delaware Bayshore at risk to industrial accidents and chemical spills that could foul the estuary and harm our recreational economy for generations to come. HB 190 also promises to increase industrial pollution which places the health and welfare of Delawareans at risk. HB 190 does this by removing the heart of the Coastal Zone Act: the prohibition on new heavy industry and the prohibition on bulk product transfer.

**We, the undersigned organizations and individuals, oppose HB 190 for the following reasons:**

1. It irrevocably modifies the intent of the Coastal Zone Act through changes it makes to § 7001.
2. It allows new heavy industry in the Coastal Zone, which would be harmful to public.
3. It allows bulk product transfer in the Coastal Zone, which presents inherent dangers in transferring hazardous materials, and also attracts more heavy industry to the Coastal Zone, increasing public health and ecosystem risks.

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<sup>1</sup> <http://www.dnrec.delaware.gov/News/Pages/Delaware-Bayshore-Initiative-given-national-launch-to-spur-conservation,-recreation-and-eco-tourism-within-state.aspx>

<sup>2</sup> <http://www.dnrec.delaware.gov/Air/Documents/Ann%20Rpt%2014.pdf>

<sup>3</sup> <http://www.who.int/mediacentre/factsheets/fs313/en/>

**Instead, we ask that HB 190 be opposed and withdrawn pending research and a stakeholder process.** HB 190's authors and sponsors failed to engage in an open public dialogue from a variety of stakeholders before submitting the bill, and have done a weak job of outreach afterwards (sometimes presenting misleading arguments). The sponsors have falsely claimed to have had outreach with "both sides", incorrectly pitting jobs against the environment and completely ignoring the public health, recreation and quality of life implications of the bill.

Before changes are proposed for the Coastal Zone Act, DNREC should be asked to conduct a study of the environmental and economic benefits of the Coastal Zone Act, as well as how the Act as currently written could be implemented to better serve communities, the environment, and economic interests.

It is only when armed with true facts that a sincere discussion of the Coastal Zone Act can occur. Discussions of the public trust should not be held behind closed doors with special interests. An inclusive and public stakeholder evaluation should precede any proposed changes to the Coastal Zone Act.

**HB 190 allows activities that place Delaware's coastal communities at risk.**

The types of activities that would be allowable under the bill include: new coal-fired power plants with import of dirty coal via ship from China (used in the coastal zone); transfer of raw sewage and garbage for international export for combustion or disposal (produced in the coastal zone); shipment of petroleum coke or other hazardous waste products generated at the Delaware City Refinery (produced in the coastal zone), shipment of any waste products from any of the heavy industry facilities currently operating in the Coastal Zone, including the Delaware City Refinery, Croda, and Keuhne Chemical Company; import of heavy chemical raw materials, including flammable and explosive chemicals, for existing or new heavy industry. HB 190 requires bulk products to originate from or be used in the Coastal Zone, increasing the likelihood of more polluting heavy industry or more polluting manufacturing in the Coastal Zone. HB190 therefore has the potential to reverse the positive strides that Delaware has made to improve air quality, reduce air quality action days, and protect public health. It is also noted that HB 190 was introduced on a Code Orange Air Quality Action Day.

**BULK PRODUCT TRANSFER IS DANGEROUS**

**Bulk product transfer has inherent risks.** The Coastal Zone Act states that "bulk product transfer facilities represent a significant danger of pollution to the coastal zone" (§7001). Risks of bulk product transfer include spills of hazardous materials, which can pollute the Delaware River and estuary, as well as foul the shoreline. Delaware could also experience increased risks of rail accidents if rail connections are part of the bulk product transfer operation. It is important to note here that the News Journal has recently reported that Delaware is one of only a few states that fails to inspect our rail lines for safety.<sup>4</sup> Delaware lacks the needed infrastructure and management to prevent catastrophic disaster from bulk product transfer.

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<sup>4</sup> <http://www.delawareonline.com/story/news/2017/05/26/rail-safety-questioned-fuel-shipments-likely-go-up/96672684/>

HB 190's changes concerning bulk product transfer facilities are especially unfortunate. It removes § 7001's strong statement that prohibition of new bulk product transfer facilities is "deemed imperative" because their effects are against public policy, but fails to offer any justification for weakening the Act in this way. In addition, it opens up the possibility that new bulk product transfer facilities will be built on the nine Appendix B sites that are actually on the water—facilities that would seem to be creating competition for the publicly-funded and supported Port of Wilmington. It is simply unclear why either of those steps are necessary.

**Delaware's shipment needs are already met by the Port of Wilmington.**

Facilities in the Coastal Zone that have piers are already able to operate those piers for the use of the facility without needing bulk product transfer permissions, and bulk product transfer is already allowed at the Port of Wilmington. Only the Port has the infrastructure needed to address the safety needs of bulk product transfer. Dispersing bulk product transfer to other sites along the Delaware River spreads emergency response resources very thin and increases the probability of maritime and shore-based accidents.

**Liquefied Natural Gas limitations are misleading.** HB 190 restricts the bulk product transfer of liquefied natural gas, but this is already allowable at the Port of Wilmington. The bill therefore does not prohibit the transfer of LNG from the Coastal Zone, but only eliminates competition from LNG transfer, protecting the Port of Wilmington's interest.

**HB 190 is poorly written and dangerously ambiguous.** For example, while HB 190 exempts grain from the geographic limitations for bulk product transfer, it is ambiguous about whether hazardous substances that are derived exclusively from grain, including ethanol, are also permitted to be transferred unrestricted.

**Bulk products that should be absolutely prohibited from transfer in the Coastal Zone because of their risks of spills and public health dangers** include any sources of energy (including, but not limited to oil, coal, natural gas, ethanol, propane, and butane) as well as materials regulated under the Toxic Substance Control Act (TSCA).

**CONVERSION PERMIT (§7014)**

**Heavy industry is by definition a major source of air pollution and would create new public health risks.** HB 190 allows existing heavy industry to operate new heavy industrial uses on available land within their footprint and new heavy industry on abandoned sites of nonconforming use. Air pollution has been documented by the World Health Organization and the Environmental Protection Agency to be a source of public health risk, disease and death. Risk of death is especially high among children who live in fenceline communities.<sup>5</sup> HB 190

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<sup>5</sup> [http://www.who.int/gho/phe/outdoor\\_air\\_pollution/burden/en/](http://www.who.int/gho/phe/outdoor_air_pollution/burden/en/)  
<http://www.who.int/mediacentre/news/releases/2017/pollution-child-death/en/>  
<https://www.epa.gov/clean-air-act-overview/air-pollution-current-and-future-challenges>

perpetuates conditions of environmental injustice in Delaware. Delaware Health and Social Services cancer incidence data shows high rates of cancer in residential communities along the Coastal Zone industrial corridor from Claymont to Delaware City and census tracts downwind.<sup>6</sup> This area is where 13 of the 14 sites of nonconforming use are located. HB 190 increases the public health environmental burden in these low income communities and communities of color, including Claymont, Southbridge and Eastside Wilmington, Delaware City and Polktown.

**Environmental Impact analysis required for a conversion permit (§7014(c)(1)) is meaningless and offers zero protection.** Delaware has no regulatory standard for what an environmental impact statement or analysis should look like and what it should contain. Delaware does not require such analysis to be peer-reviewed. Delaware does not require any scientific rigor whatsoever. DNREC staff has already identified through the recent Rehoboth Ocean Outfall's Environmental Impact Statement that it lacks standards and procedures for adequately evaluating environmental impact analysis. Because environmental impact analysis in Delaware is arbitrary and capricious, DNREC lacks the ability to conduct an environmental review for conversion permits in the Coastal Zone.

**Indicators for assessing environmental projects have never been developed.** Despite nearly two decades, Delaware has not yet adopted indicators for evaluating environmental harm or how offsets should be measured that were outlined in the "Environmental Goals and Indicators for Delaware's Coastal Zone" report conducted by DNREC and the Environmental Indicators Technical Advisory Committee in 1999. These indicators are essential for determining the environmental impact of permitted projects in the Coastal Zone so that offsets can be adequately allocated. Because DNREC has failed to promulgate indicators, all decisions made on the environmental impacts of projects in the Coastal Zone are arbitrary and capricious.

**DNREC is currently unable to manage existing permits and may be equally unable to take on the new responsibilities of HB 190.** DNREC has a poor track record on permit implementation, particularly for the NPDES permit program. EPA described the extent of the problem:

As of the end of Fiscal Year 2013 (through September 30, 2012), 12 of DNREC's major permits were expired representing a 57% backlog of the major permits universe, and 23 minor permits were expired representing a 49% backlog of the minor permit universe.<sup>7</sup>

An example of the depth of this problem is the Delaware City Refinery's NPDES Permit, which was issued in 1997 and has been on administrative extension since 2002, despite a public hearing on a permit renewal in March 2015. With the substantial backlog in NPDES permits, we have little confidence that DNREC has the capacity to accept the new permitting responsibilities required by HB 190.

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<sup>6</sup> <http://dhss.delaware.gov/dph/dpc/cancer.html>

<sup>7</sup> EPA, 2015. Region III NPDES Permit Quality Review, Delaware, August 6-8, 2013. U.S. EPA Region III. 1650 Arch Street, Philadelphia, PA 19103.

Furthermore, DNREC has also demonstrated an inability to collect on existing fines, and has a substantial backlog in FOIA, demonstrating that the Department lacks the capacity to enforce existing environmental regulations, let alone new ones.

**Financial assurances are inadequate.** Financial assurances required in §7014 (c) (8) of the bill are inadequate to cover the costs of long-term environmental degradation in the event of a spill, explosion, or other catastrophe. The current bill leaves the determination of cost and insurance provisions to DNREC and not to market conditions. This vagueness underscores the risks of incidents like Metachem, where the disaster is one of generational impact. Despite spending ~\$115M, the estimated costs of future remediation to prevent the spills from reaching the deeper aquifer involved are currently unknown.

### **JUSTIFICATIONS FOR THE BILL ARE FLAWED**

**Environmental Remediation:** HB 190's sponsors have inaccurately argued that the 14 sites of nonconforming use are in need of environmental remediation, and that the cleanup funds must come from redevelopment. This is a red herring, all of the sites are either in existing federally-mandated environmental remediation programs or are currently operating and therefore not subject to cleanup requirements and/or unable to utilize the justification that cleanup demands new heavy industrial development. The 14 sites of nonconforming use and their environmental programs are as follows:

1. Chloramone/Keuhne Chemical Company: operating, also has a 2011 EPA Consent Agreement
2. Citisteel/Evraz Steel: HSCA
3. Delaware Storage Pipeline: operating
4. Edgemoor: RCRA
5. Formosa: NPL (Superfund), and still operating
6. General Chemical: RCRA
7. Kaneka: HSCA
8. Oceanport: operating
9. Oxy Chemicals: RCRA
10. Port of Wilmington: operating
11. Standard Chlorine / Metachem: NPL (Superfund)
12. Refinery: RCRA and also still operating
13. SunOil: RCRA and HSCA
14. Uniqema / Croda: HSCA and also still operating

State and federal cleanup programs are currently managing environmental hazards at all the non-operating existing sites of nonconforming use. DNREC has not presented any evidence to the public that the environmental remediation at any of these sites is substandard or deficient.

Prior information provided by DNREC suggests that in some cases remediation may be more dangerous. For example, DNREC has long contended that removal of the dioxin pile at the Edgemoor site would increase public health risk. It is unclear that doing more at contaminated sites would be more harmful.

**Bulk Product Transfer needed by Chemours.** Arguments that Chemours has demanded Bulk Product Transfer or they would move operations out of Delaware has no merit. Chemours has already sold off all of its assets in the Coastal Zone. Edgemoor has been sold to the Port of Wilmington for \$10 million, and the DuPont Sulfuric Acid Regeneration Plant was also sold in 2016. Chemours has no interest in the Coastal Zone.

Furthermore, Chemours has recently committed to building a new refrigerant plant in Corpus Christi TX, likely because of the close proximity and lower cost of natural gas in Texas. The costs of raw materials and energy, rather than the Coastal Zone Act, appear to be influencing where Chemours prefers to develop its new heavy industrial facilities.

### **ECONOMIC ANALYSIS PROVES A DIFFERENT DIRECTION FOR FUTURE GROWTH**

HB 190 does not “modernize” the Coastal Zone Act. Instead, it significantly weakens core protections in the Act in the unsubstantiated hope that backwards-looking options like heavy industry will somehow provide an economic boost to Delaware.

If the goal is to allow development of these selected sites, it is unclear why the proposed changes to the Coastal Zone Act are needed. The current version of the Act allows for the construction and operation of manufacturing uses on these sites. Things like auto assembly plants, Amazon warehousing operations, and other large operations that could generate thousands of good, high-paying jobs can be built on these sites right now without the need for any changes to the Act. That those types of operations are not being built now suggests that the Act is not what is holding these sites back.

HB 190’s proposed changes to the Act are primarily focused on allowing heavy industry to be built on these sites. There are at least two reasons to think that this narrow focus will not be the economic panacea that it is presumed to be. First, building new heavy industry is inconsistent with the findings of the recent review of the Delaware Economic Development Office, which specifically found that Delaware’s economic future does not lie with the heavy industry of the past. In short, it does not fit into the state’s own conception of how to move the economy forward. Second, the sites to which these proposed changes would apply were nonconforming uses under the Act, which means that their heavy industry uses were not prohibited but rather allowed to continue without regulation under the Act (save only for the need for a permit if they expanded). In other words, they had favored status under the Act. The fact that many of these sites could not make it as heavy industry despite their favored status means that something other than the Act was the impediment to their continued operation. Changing the Act will not remove those underlying problems.

The belief that merely changing the Act will suddenly lead to redevelopment of these sites is likely to be overly optimistic. The proposed changes to the Act do nothing to change any of the other legal conditions that apply to these sites. To the extent that there is environmental contamination at these sites, Delaware's Hazardous Substances Control Act (which HB 190 specifically requires compliance with) and the federal CERCLA and RCRA statutes create liabilities that will add to the costs of redevelopment. Further, the economic realities that have caused other heavy industry to close down or leave the Coastal Zone will be unchanged by this legislation.

Given the lack of development despite the current opportunities available under the Act, and the low probability that the heavy industry focus of the proposed changes will alter that dynamic, changing Delaware's unique Coastal Zone Act and Russ Peterson's legacy seems both unnecessary and unwise.

### **DELAWARE HAS A TRACK RECORD OF CONVERTING PRIOR INDUSTRIAL SITES TO NON-INDUSTRIAL BENEFICIAL USE**

The examples of the former Chrysler facility's conversion to the University of Delaware's Science Technology and Advanced Research (STAR) Campus, the redevelopment of the Christina riverfront in Wilmington to commercial, residential and recreational space, the NVF redevelopment in Yorklyn, and the AMOCO Polymers Plant demonstrate that Delaware successfully converts contaminated industrial sites to beneficial and profitable uses that do not pollute the community.

***The future of the Coastal Zone Act's 14 sites of nonconforming use cannot be addressed with broad-brush approaches that diminish the integrity of Delaware's landmark environmental protection law, as offered by HB 190.***

***We need to tailor our approaches to the best possible outcome in a manner that is inclusive, equitable, and based on facts. We ask that you therefore oppose HB 190 and work with us to find the solutions that Delaware needs for the prosperity that we all deserve.***

Respectfully submitted,

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