

### 2019 Environmental and Energy Law Forecast

#### DELAWARE FORECAST

##### **DNREC to Promulgate Revised Coastal Zone Act Regulations in 2019**

***Stephen D. Daly, Esq.***

In 2017, the Coastal Zone Conversion Permit Act (Conversion Permit Act) was signed into law, amending Delaware's landmark Coastal Zone Act. The amendments established a new "Conversion permit," distinct from the Act's Coastal Zone permit, that allows for the "conversion" of a heavy industry use within the Coastal Zone into an alternative heavy industry use, an additional heavy industry use, or a bulk product transfer facility, subject to certain permitting requirements.

The Conversion Permit Act sets October 1, 2019 as the deadline for when Delaware's Department of Natural Resources and Environmental Control (DNREC) must promulgate revised regulations consistent with the new amendments. DNREC is currently in the process of revising its existing regulations governing Delaware's Coastal Zone to incorporate conversion permits, although DNREC has represented that only those sections of the regulations pertinent to conversion permits will be amended. As part of this process, DNREC Secretary Shawn Garvin established a Regulatory Advisory Committee to provide them guidance and feedback on the development of new Coastal Zone regulations. It is estimated that the Regulatory Advisory Committee will issue its final recommendations to DNREC this spring. DNREC will then promulgate initial proposed regulations, which will be subject to a written public comment period. The proposed regulations will also have to be approved by the Coastal Zone Industrial Control Board after a hearing.

The revised regulations will be an issue for any stakeholder in Delaware's Coastal Zone to monitor in 2019.

##### **Climate Change and Brownfield Redevelopment Remain Focuses of Carney Administration**

***Stephen D. Daly, Esq.***

As Governor Carney enters the third year of his administration, his agenda will likely continue to touch upon issues relating to energy and the environment in Delaware. Climate change and brownfield redevelopment remain two important areas of focus for his administration:

###### Climate Change

- Governor Carney has identified climate change as a threat to Delaware's future because of the state's status as the country's lowest-lying state. While the federal government has assumed a more limited role in curtailing climate change, Delaware continues to engage in initiatives to reduce carbon

emissions and mitigate the effects of climate change. In 2017, Delaware joined the U.S. Climate Alliance, a coalition of states committed to upholding the Paris Agreement, in order to uphold the goals of the Paris Agreement to combat climate change.

- To uphold the goals of the Paris Agreement, the state continues to participate in the Regional Greenhouse Gas Initiative, a nine-state program to reduce greenhouse gas emissions from power plants, and also invests in and evaluates renewable energy sources. In June 2018, the Offshore Wind Power Working Group, a task force established by Governor Carney, submitted its final report to Governor Carney with an evaluation of Delaware's potential options for investing in an off-shore wind project. It remains to be seen whether the Governor will act on the Working Group's analysis and recommendations.
- Delaware also continues to invest in coastal resilience measures to mitigate the effects of climate change. DNREC's Shoreline and Waterway Management Section has been active in beach replenishment work along the state's coast line.

### Brownfield Redevelopment

- The 2017 amendments to the Coastal Zone Act were largely directed at promoting redevelopment of brownfield sites located within Delaware's Coastal Zone. With the regulations addressing the [Coastal Zone Act amendments due this year](#), the Carney administration is hoping the state's new Coastal Zone Act conversion permits will provide a viable avenue for redevelopment of the 14 heavy industry sites located within the Coastal Zone.
- Brownfield sites that the Carney administration has previously identified as candidates for redevelopment include the former Chemours site at Edgemoor, the former steel plant in Claymont, the General Motors auto plant in Newport, and the Seaford nylon plant. It is likely that the Carney Administration will continue to encourage redevelopment of these and other sites in the state in 2019.

## **New Stormwater Regulations Set to Take Effect in Delaware**

### ***Stephen D. Daly, Esq.***

In October 2018, DNREC provided public notice of proposed revisions to its stormwater regulations that are intended to cure the defects identified by the Superior Court in *Baker v. DNREC*, C.A. No. S13C-08-026 (*Del. Super. Ct. 2015*). DNREC's 2013 stormwater regulations were intended to improve Delaware's stormwater and sediment plan review process and update the regulations to reflect current best management practices and referenced technical documents to support and explain the regulations. The *Baker* court struck down the 2013 regulations as invalid because the technical documents, which DNREC claimed were not subject to the state's Administrative Procedures Act (APA), improperly imposed mandatory obligations and standards on the regulated community. The court held that DNREC could not rely on technical and advisory documents that had not been formally adopted as regulations under the APA when reviewing sediment and stormwater plans and issuing permits.

With the October 2018 regulations, DNREC drafted the proposed revisions so that any mandatory requirements are included in the regulations, not the technical documents. DNREC further specified that the technical documents cannot be used for purposes of enforcement or to deny approval of a sediment and stormwater plan, although DNREC expects that the technical documents will still be used in the preparation of plans and for purposes of facilitating compliance with the regulations.

Once finalized, the revised regulations will likely take effect this year.

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