



TO: Collin O'Mara
Secretary, Department of Natural Resources and Environmental Control

FROM: Professor Kenneth T. Kristl, Director
Martin Reap, Legal Intern

DATE: June 2, 2011

RE: Comments of the Delaware Nature Society regarding the Coastal Zone Act
Request for Status Decision submitted by MWL Products, Inc.

The Delaware Nature Society, by and through its counsel, the Widener University School of Law's Environmental & Natural Resources Clinic, hereby submits these public comments on the Request for Status Decision by MWL Products, Inc. (MWL) under the Delaware Coastal Zone Act (CZA or Act).

We believe that the Act and precedent thereunder requires you to conclude that MWL's proposed boiler fuel production facility is "Heavy Industry" and therefore prohibited under the CZA.

BACKGROUND

The CZA was enacted in 1971 to protect the coastal zones of Delaware, which are the most "critical areas for the future of the State in terms of the quality of life in the State," 7 Del. C. §7001, by seeking to "control the location, extent and type of industrial development in Delaware's coastal areas." *Id.*

Since the passage of the Act, the Delaware Supreme Court has articulated four general principles for interpreting the Act. These principles are: recognizing that the purpose of the Act is important to understanding the Act; interpreting so as to harmonize all sections of the Act; liberally construing the Act to maximize its applicability; and favoring interpretations with reasonable consequences over those that produce unreasonable consequences or absurd results. These general principles should be followed every time a Request for Status Decision is made under the Act. Here, three of these principles—purpose of the Act, liberal construction, and favoring reasonable interpretations—are especially helpful in reviewing the MWL Request.

Purpose of the Act Is Important

The first principle is that the purpose of the Act—articulated in §7001—must play a preeminent role in any interpretation. As the Court stated in *Coastal Barge Corp. v. Coastal Zone Industrial Control Board*, 492 A.2d 1242 (Del. 1985), when applying the statute “the fundamental rule is to ascertain and give effect to the intent of the legislature.” *Id.* at 1246. While on one level this is nothing more than standard statutory construction, it is important because it emphasizes the critical role that § 7001 must play in any statutory interpretation. Section 7001 makes clear what the legislature intended—no heavy industry uses or bulk product transfer facilities and only permitted manufacturing uses—because of the threat posed to the natural environment of the Delaware Bay and coastal areas. It articulates a policy choice that protection of the environment wins over prohibited types of industrial development because that “better protect[s] the natural environment of its bay and coastal areas and safeguard[s] their use primarily for recreation and tourism,” 7 Del. C. § 7001, a use that is viewed as “critical . . . for the future of the State in terms of the quality of life in the State.” *Id.* It declares “construction of industrial plants in the coastal zone” to be “against public policy.” *Id.* These are strong words for the purpose behind the Act. Thus, when interpreting the Act, recognition of the importance of the Act’s purpose requires favoring environmental protection over certain types of development because that was the clear preference of the legislature itself.

Liberalily Construe the Act to Maximize Applicability

The principle of liberal construction comes from *City of Wilmington v. Parcel of Land*, 607 A.2d 1163 (Del. 1992), where the Delaware Supreme Court stated:

The Coastal Zone Act is an environmental protection measure designed to regulate closely the types of uses permitted and carried on in the area adjacent to the Delaware River, the Delaware Bay and the Atlantic Ocean. The legislative purpose of the Act is set forth in 7 Del. C. § 7001 . . . Given this broad statement of purpose and sweeping use of legislative authority, we conclude that the Act should be liberally construed in order to fully achieve the legislative goal of environmental protection.

Id. at 1166. The “liberality” espoused in *City of Wilmington* relates to an inclusiveness in the application and scope of the Act. On questions of whether the Act applies to a situation or not, a rule of liberal construction requires that that one err on the side of applying the restrictions and prohibitions of the Act (instead of finding that something is not covered by the Act) because that best meets the legislative purpose set forth in § 7001. *Id.* at 1166 (construe liberally “in order to fully achieve the legislative goal of environmental protection”). It is a bias towards inclusion within the scope of the Act so that the Act’s provisions and prohibitions are fully implemented. The corollary of this rule is that exceptions in the Act must be defined narrowly in order to assure that the Act and its prohibitions have the maximum opportunity to protect the environment as they are designed to do. The Secretary, courts and the Board must therefore liberally construe the Act to maximize applicability.

Favor Reasonable Interpretations Over Unreasonable Ones

The rule favoring interpretations with reasonable consequences over those with unreasonable consequences comes from the *Coastal Barge* Court's articulation of what it called "the golden rule of statutory interpretation:"

The golden rule of statutory interpretation to which we refer is that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result.

492 A.2d at 1247. Thus, *Coastal Barge* adds to the Act's statutory interpretation the clear rule that interpretations of the Act which allow a frustration or diminishment of the purpose of the Act are irrational and absurd and must be rejected. In effect, the Secretary, the Board, or a court must, when interpreting the Act, favor reasonable interpretations over unreasonable ones.

With these principles in mind, one can examine the general structure of the Act. Section 7003 prohibits "Heavy Industry" or "Bulk Product Transfer Facility" in the coastal zone, with the exception of "public sewage treatment and recycling plants":

Heavy industry uses of any kind not in operation on June 28, 1971, are prohibited in the coastal zone and no permits may be issued therefor. In addition, offshore gas, liquid or solid bulk product transfer facilities which are not in operation on June 28, 1971, are prohibited in the coastal zone, and no permit may be issued therefor. Provided, that this section shall not apply to public sewage treatment or recycling plants. A basic steel manufacturing plant in operation on June 28, 1971, may continue as a heavy industry use in the coastal zone notwithstanding any temporary discontinuance of operations after said date, provided that said discontinuance does not exceed 2 years. An incinerator is neither "public sewage treatment" nor a "recycling plant" for the purpose of this chapter.

7 Del C. §7003. In turn, §7004 allows for "Manufacturing Uses" and "Expansion" or "Extension" of nonconforming uses that obtain a permit, while allowing "Nonconforming Uses" to operate without permits:

Except for heavy industry uses, as defined in § 7002 of this title, manufacturing uses not in existence and in active use on June 28, 1971, are allowed in the coastal zone by permit only, as provided for under this section. Any nonconforming use in existence and in active use on June 28, 1971, shall not be prohibited by this chapter and all expansion or extension of nonconforming uses, as defined herein, and all expansion or extension of uses for which a permit is issued pursuant to this chapter, are likewise allowed only by permit. Provided, that no permit may be granted under this chapter unless the county or municipality having jurisdiction has first approved the use in question by zoning procedures provided by law.

7 Del. C. § 7004(a).

MWL plans to operate a burner fuel production facility at the Dupont Chambers Works Facility located in Pennsville, NJ but with a pier extending into the Delaware River (and hence into Delaware and DNREC's regulatory jurisdiction, *see New Jersey v. Delaware*, 552 U.S. 597 (U.S. 2008)). The application submitted by MWL does not fully explain what their production process entails in terms of raw materials and chemical additives. Although these details are missing, the general process MWL proposes to operate is one in which an oil product (what it calls "centrifuge oil") will be processed into a useable form of fuel for boilers. Thus, the dispositive question is whether MWL's proposed use is "manufacturing" or "heavy industry use" under the Act. Resolution of that question will guide the answer to the Request for Status Decision.

WHAT TYPE OF "USE" IS MWL PROPOSING?

The Act defines manufacturing as follows:

"Manufacturing" means the mechanical or chemical transformation of organic or inorganic substances into new products, characteristically using power-driven machines and materials handling equipment, and including establishments engaged in assembling component parts of manufactured products, provided the new product is not a structure or other fixed improvement.

7 Del. C. §7002(d). Heavy industry, which is prohibited by §7003 of the Act, is defined as follows:

"Heavy industry use" means a use characteristically involving more than 20 acres, and characteristically employing some but not necessarily all of such equipment such as, but not limited to, smokestacks, tanks, distillation or reaction columns, chemical processing equipment, scrubbing towers, pickling equipment and waste-treatment lagoons; which industry, although conceivably operable without polluting the environment, has the potential to pollute when equipment malfunctions or human error occurs. Examples of heavy industry are oil refineries, basic steel manufacturing plants, basic cellulosic pulp-paper mills, and chemical plants such as petrochemical complexes. An incinerator structure or facility which, including the incinerator, contains 5,000 square feet or more, whether public or private, is "heavy industry" for purpose of this chapter. Generic examples of uses not included in the definition of "heavy industry" are such uses as garment factories, automobile assembly plants and jewelry and leather goods manufacturing establishments, and on-shore facilities, less than 20 acres in size, consisting of warehouses, equipment repair and maintenance structures, open storage areas, office and communications buildings, helipads, parking space and other service or supply structures required for the transfer of materials and workers in support of off-shore research, exploration and development operations; provided, however, that on-shore facilities shall not include tank farms or storage tanks.

7 Del. C. §7002(e). While the Coastal Zone Industrial Control Board has cautioned against using the language of “heavy industry use” as a kind of checklist, holding that “the equipment listed and the processes identified are intended only to exemplify the types of operations meant to be prohibited in total,” *In re Texaco’s Proposed Re-Refining*, No. 260SD at 17 (Coastal Zone Industrial Control Bd. July 9, 1992), MWL’s Request indicates that two liquid storage tanks, Request ¶ 4.6(b), are present. In addition, MWL proposes chemical additives used in conjunction with filtration equipment for processing their final product. We believe this does fit the element of chemical processing equipment, Request ¶ 4.6(d).

Furthermore, the proposed facility will be handling oil and producing oil products—which is exactly what an oil refinery or oil recycling facility does. Section 7002(e) expressly includes oil refineries in the definition of “heavy industry.” MWL proposes refining 500,000 gallons of oil four times per year, Request ¶ 4.1, meaning that a significant threat of pollution of the Delaware River due to equipment malfunction or human error exists—which is the core concept behind the definition of heavy industry in § 7002(e). An interpretation which treats such a large source of potential pollution from processing and essentially recycling oil in the coastal zone as a “manufacturing use” would create a large loophole in the Act that would be at odds with the purpose of the Act and would otherwise lead to unreasonable results. Consistent with the principles of statutory interpretation of the Act, including the principles of upholding the purpose of the Act and liberally construing the Act to favor more protection, the more reasonable interpretation is that the proposed MWL facility best fits under heavy industry and is therefore prohibited under § 7003 of the Act.

However close the question may be as a result of this direct analysis of the Act’s language and purpose as applied to MWL, the question is clearly settled by precedent. The *In re Texaco Proposed Re-Refining* decision of the Coastal Zone Industrial Control Board offers strong support for finding MWL’s proposed facility is heavy industry use and not manufacturing. In that case, Texaco sought a status decision on a proposed oil recycling facility in the Port of Wilmington that was going to be less than 1 acre in size. The Board very clearly found that:

- “The mere fact that the proposed project occupies fewer than 20 acres of land cannot salvage it from classification as a heavy industry.” *Id.* at p. 17;
- The fact that Texaco characterized its process as “recycling” did not “remove it from the category of ‘oil refinery’” because “[t]hese are not mutually exclusive concepts . . . Distillation is refining, and refining of oil is prohibited in the Coastal Zone. The recycling of used oil necessarily requires that it be refined.” *Id.* at p. 17 – 18.

The Board found Texaco’s proposed oil recycling facility was “heavy industry” and therefore prohibited under the Act, and subsequently upheld the Secretary’s Status Decision. *Id.* The *Texaco* decision clearly states that oil processing is refining of oil. In addition, your status decision in the FCC Environmental matter reached the same result, finding that oil recycling fell under the heavy industry prohibition in 7 Del. C. § 7003. Given that MWL proposes to process oil to create a new oil-based fuel product, it appears to be engaged in oil recycling and therefore oil refining. *Texaco* and *FCC Environmental* therefore require a finding that the MWL proposal is likewise heavy industry and subsequently prohibited under the Act.

MWL also cannot claim to be a nonconforming use entitled to protection under §7003. The definition of nonconforming use in §7002(b) requires that the use be “lawfully in existence and in active use prior to June 28, 1971.” MWL admits that its proposed burner fuel production facility cannot meet this requirement. *See* Request ¶ 4.11. The fact that the site itself may be of an industrial or manufacturing nature does not and legally cannot elevate MWL’s proposed facility to nonconforming use status. *See DNREC v. Vane Line Bunkering, Inc.*, 2007 WL 4170810 at *4 (Del. Supr. November 19, 2007) (for a nonconforming use, you ask whether facility *proposed in the Request for Status Decision* was in operation on June 28, 1971).

CONCLUSION

We appreciate MWL’s desire to provide its customers with low cost, alternative burner fuels. The issue before you, however, is one of applying the CZA to this proposed facility in the coastal zone. The language of the statute, viewed through the principles of statutory interpretation articulated by the Delaware Supreme Court as well as existing precedent from the Coastal Zone Industrial Control Board, leads to the conclusion that the proposed facility is prohibited heavy industry under the Act. We urge you to reach the same conclusion in your review of MWL’s Request.

Respectfully submitted,

/s/ Kenneth T. Kristl

Kenneth T. Kristl, Esq. (DE Bar #5200)
Widener Environmental and Natural Resources Law Clinic
4601 Concord Pike
Wilmington, DE 19803
(302) 477-2053
(302) 477-2032 (fax)
ktkristl@widener.edu

Counsel for Delaware Nature Society