

LAW OFFICES  
**PARKOWSKI, GUERKE & SWAYZE**

PROFESSIONAL ASSOCIATION  
800 KING STREET, SUITE 203  
WILMINGTON, DELAWARE 19801  
302-654-3300  
FAX: 302-654-3033

F. MICHAEL PARKOWSKI  
I. BARRY GUERKE  
DAVID S. SWAYZE  
CLAY T. JESTER  
JEREMY W. HOMER  
JOHN C. ANDRADE  
MARK F. DUNKLE  
WILLIAM A. DENMAN  
MICHAEL W. ARRINGTON  
CHRISTINE P. SCHILTZ  
MICHAEL W. TEICHMAN  
THOMAS H. KOVACH  
KASHIF I. CHOWDHRY  
MICHAEL W. MCDERMOTT  
ANNE HARTNETT REIGLE

WRITER'S DIRECT DIAL:  
(302) 594-3330

IN MEMORIAM  
GEORGE F. GARDNER, III  
(1938-2008)

---

DOVER OFFICE  
116 W. WATER STREET  
PO BOX 598  
DOVER, DE 19903-0598  
302-678-3262  
FAX: 302-678-9415

---

GEORGETOWN OFFICE  
16 S. FRONT STREET  
GEORGETOWN, DE 19947  
302-855-9090

October 27, 2009

Via E-Mail and Hand Delivery

Kevin Coyle  
Coastal Zone Act Administrator  
State of Delaware  
Department of Natural Resources and Environmental Control  
89 Kings Highway  
Dover, DE 19901

**RE: Coastal Zone Act Status Decision Request of Bouchard Affiliates**

Dear Kevin:

This firm represents Overseas Shipping Group, Inc. ("OSG"). Please allow this letter to constitute OSG's objection to the above referenced status decision application, in which Bouchard Affiliates announces its desire to commence lightering operations at Big Stone Beach anchorage in the Delaware Bay.

Lightering of oil tankers in the Delaware Bay has long been held to constitute an "offshore bulk product transfer facility" under the Delaware Coastal Zone Act (the "Act"). See *Delaware Department of Natural Resources and Environmental Control v. Vane Line Bunkering, Inc.*, 2007 WL 4170810 \*4 (Del. Super. Nov. 19, 2007)(citing *Coastal Barge v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1249 (Del. 1985)). As such, the activity is a prohibited use unless it was in operation on June 28, 1971, the date the Act was signed into law. See 7 Del. C. § 7003.

Appended to the application is the affidavit of Morton S. Bouchard, III (the "Bouchard Affidavit"), apparently included for the purpose of demonstrating that the applicant was engaged in oil lightering at Big Stone Beach anchorage prior to June 28, 1971. On its face, the Bouchard Affidavit is insufficient for the simple reason that, even if all of its assertions are accepted as

true, it fails to assert that Bouchard was engaged in lightering *on* June 28, 1971. Instead, it only asserts that it was occurring *prior to* June 28, 1971. The Act does not grandfather uses that were in operation at points in time before June 28, 1971, rather its grandfathering provisions are limited to uses that were in operation on that date. The Bouchard Affidavit fails to make this critical assertion.

Importantly, the Bouchard Affidavit provides no details with respect to the activity and no other evidence (*e.g.*, invoices for lightering services, etc.) is provided. This “bare-bones” affidavit is insufficient to demonstrate, as a factual matter, the existence of Bouchard lightering operations in the Coastal Zone at any time – before, during or after enactment of the Act. Neither the Act nor those provisions of Delaware’s Administrative Procedures Act applicable to DNREC provide guidance on the burden of proof necessary to demonstrate whether, as a matter of fact, an applicant was engaged in an activity, otherwise prohibited, on June 28, 1971. Ordinarily however, for case decisions under subchapter III of the Administrative Procedures Act, the applicant or proponent carries the burden of proof. 29 *Del. C.* § 10125(c).<sup>1</sup> In zoning cases dealing with proof that a non-conforming use existed before an ordinance passed, the applicant’s burden is typically proof by a preponderance of credible evidence. 83 *Am. Jur.* 2d Zoning and Planning § 556. Bouchard’s naked affidavit fails to meet this standard.

Moreover, if a decision of DNREC in favor of Bouchard was to be affirmed by the Coastal Zone Industrial Control Board, and was thereafter appealed, the Superior Court would review this factual determination on the “substantial evidence” standard. This standard means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Tony Ashburn & Son, Inc. v. Kent County Regional Planning Comm’n.*, 926 A.2d 235, 239 (Del. 2008). Stated differently, “[s]ome evidence, or any evidence, may be insufficient to support the factual findings of the [agency]. The evidence must be substantial; and it is the duty of the reviewing court to weigh and evaluate the evidence for sufficiency to support the findings.” *General Motors Corp. v. Veasey*, 371 A.2d 1074, 1076 (Del. 1977)(*rev’d. on other grounds*, 514 A.2d 1132 (Del. 1989)). In our view the Bouchard Affidavit, which asserts an ultimate fact, but contains no background or contextual assertions that would support that asserted fact, or lend to it some measure of credibility, is hardly enough evidence to cause a reasonable mind to believe that Bouchard was engaged in lightering at Big Stone Beach on June 28, 1971. Perhaps the Bouchard Affidavit could be considered “evidence” but it is not “substantial.”

It is OSG’s position that no entity other than OSG’s predecessor in interest, Maritrans Inc., was engaged in lightering at Big Stone Beach anchorage on June 28, 1971. An affidavit (the “OSG Affidavit”) of Eric F. Smith, Chief Commercial Officer of OSG, is appended hereto that attests to this fact. To the extent that DNREC were to give weight or credence to the Bouchard Affidavit, it must give equal weight and credence to the OSG Affidavit. Given the existence of another affidavit that is directly contrary to Bouchard’s, DNREC cannot reasonably find that

---

<sup>1</sup> We recognize that subchapter III of the APA is not technically applicable to DNREC, however we see no reason why DNREC would not want to follow this common sense rule.

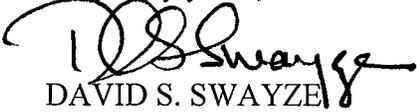
Kevin Coyle  
October 27, 2009  
Page 3 of 3

Bouchard was engaged in lightering at Big Stone Beach anchoring on June 28, 1971 based on the evidence in the record.

In any event, even if DNREC were somehow to determine that the applicant was engaged in lightering oil on June 28, 1971, there is no evidence in the record to indicate that the applicant has been engaged in lightering in the Delaware Bay *since* that date. Under Section 12.0 of the *Regulations Governing Delaware's Coastal Zone*, a non-conforming use that has been abandoned may not be reinstated. 7 Del. Admin Code § 101 – 12.1. One can make no clearer case for abandonment under the Act than for a use, such as that proposed by the applicant, which has been dormant the entire 38 years that the Act has been in existence.

Please contact me if you have questions or need additional information.

Very truly yours,



DAVID S. SWAYZE

DSS/MWT:bfd

Enclosure

cc: Robert Phillips, Esquire  
Eric F. Smith

Filename

**AFFIDAVIT OF ERIC F. SMITH**

County of New Castle        )  
  )  
State of Delaware            )        ss.

I, Eric F. Smith, being duly sworn according to law on this the 27<sup>th</sup> day of October, 2006, do hereby depose and attest to the following:

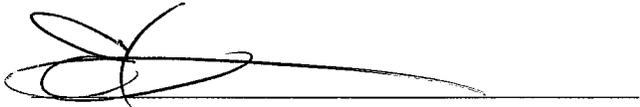
1. I am Vice President and Chief Commercial Officer for Overseas Shipping Group, Inc. I have held this position for four years.

2. In my position, I have become familiar with the business of lightering oil tankers at the Big Stone Beach anchorage in the Delaware Bay on June 28, 1971.

3. OSG's predecessor in interest, Maritrans Inc., was the only entity engaged in the lightering of oil takers at Big Stone Beach anchorage on June 28, 1971.

4. A search of OSG files and verbal interrogation of OSG employees confirms the absence of any corporate records or institutional memory indicating that any entity other than Maritrans Inc. was engaged in lightering oil at Big Stone Beach on June 28, 1971.

FURTHER AFFIANT SAYETH NOT



Sworn to and subscribed before me, a Notary Public for the County and State aforesaid on this the 27 day of OCTOBER, 2006.

  
Notary Public  
My Commission Expires: 4-27-11