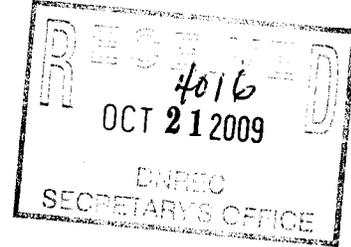




# Widener University

School of Law  
Environmental & Natural  
Resources Law Clinic

October 20, 2009



Collin O'Mara  
Dept. of Natural Resources and Environmental Control  
89 Kings Hwy  
Dover, DE 19901

Dear Secretary O'Mara:

Enclosed is two sets of Comments of Delaware Nature Society on the Request for Status Decision by Bouchard Associates under the Coastal Zone Act.

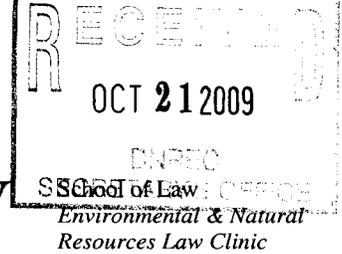
Sincerely,

Kenneth T. Kristl

cc: Brenna Goggin, DNS



# Widener University



## MEMORANDUM

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

FROM: Kenneth T. Kristl  
Associate Professor of Law, Widener University School of Law  
Director, Environmental and Natural Resources Law Clinic

DATE: October 20, 2009

RE: Comments of Delaware Nature Society on the Bouchard Associates Request for Status Decision under Coastal Zone Act

This memorandum concerns the vessel-to-vessel oil lightering operation proposed by Bouchard Associates ("Bouchard") that is the subject of an Application for Coastal Zone Act Status Decision submitted by Bouchard in July 2009 and publicly noticed by your office on Sunday, October 11, 2009. On behalf of the Delaware Nature Society, the Widener Environmental and Natural Resources Law Clinic has prepared this memorandum as interested persons providing input to the Secretary pursuant to § 7.6 of the Coastal Zone Act regulations, Code Del. Regs. 7 100 101.

We believe that Bouchard's proposed oil lightering operation is prohibited under the Coastal Zone Act, 7 Del. Code § 7001 *et seq.* A careful analysis of the text of the Act, the governing regulations, case law and other sources reveals both that (1) the Bouchard's proposed oil lightering operation is a bulk product transfer facility expressly prohibited under the Act, and (2) Bouchard has failed to substantiate its claim that it is a "nonconforming use" under the Act. As such, we recommend that you find Bouchard's proposed oil lightering operation is prohibited under the Act.

### **The Coastal Zone Act: Background and Purpose**

A proper legal analysis of Bouchard's Request for Status Decision must begin with the Coastal Zone Act itself. As the Delaware Supreme Court has made clear with respect to the Act, when applying the statute "the fundamental rule is to ascertain and give effect to the intent of the legislature." *Coastal Barge Corp. v. Coastal Zone Industrial Control Board*, 492 A.2d 1242, 1246 (Del. 1985). In the Coastal Zone Act, the legislature made its intent very clear in the very first section of the Act:

It is hereby determined that the coastal areas of Delaware are the most critical areas for the future of the State in terms of the quality of life in the State. It is, therefore, the declared public policy of the State to control the location, extent and type of industrial

development in Delaware's coastal areas. In so doing, the State can better protect the natural environment of its bay and coastal areas and safeguard their use primarily for recreation and tourism. Specifically, this chapter seeks to prohibit entirely the construction of new heavy industry in its coastal areas, which industry is determined to be incompatible with the protection of that natural environment in those areas . . . It is further determined that offshore bulk product transfer facilities represent a significant danger of pollution to the coastal zone and generate pressure for the construction of industrial plants in the coastal zone, which construction is declared to be against public policy. For these reasons, prohibition against bulk transfer facilities in the coastal zone is deemed imperative.

7 Del. Code § 7001. Thus, the express purpose of the Coastal Zone Act is to prevent two distinct and different types of activities at facilities in the coastal zone: heavy industry and bulk product transfer facilities not in operation as of June 28, 1971. The Act mandates that "no permits may be issued" for either of these prohibited activities. 7 Del. Code § 7003. The Regulations Governing Delaware's Coastal Zone prepared by the Delaware Department of Natural Resources and Environmental Control for the Coastal Zone Industrial Control Board on May 11, 1999 and set forth at Code Del. Regs. 7 100 101-1 through 101-13 ("the Regulations"), emphasize this point by identifying uses or activities prohibited in the Coastal Zone to include "offshore gas, liquid, or solid bulk product transfer facilities which were not in operation on June 28, 1971" (Regulations at § 4.3) and "the construction, establishment, or operation of offshore gas, liquid, or solid bulk product transfer facilities which were not in operation on June 28, 1971" (*id.* at § 4.7).

The Act defines "bulk product transfer facility" as

Any port or dock facility, whether an artificial island or attached to shore by any means, for the transfer of bulk quantities of any substance from vessel to onshore facility or vice versa. Not included in this definition is a docking facility or pier for a single industrial or manufacturing facility for which a permit is granted or which is a nonconforming use. Likewise, docking facilities for the Port of Wilmington are not included in this definition.

7 Del. Code § 7002(f).<sup>1</sup> The Regulations define "bulk product" as "loose masses of cargo such as oil, grain, gas and minerals, which are typically stored in the hold of a vessel." Regulations at § 3.0. Based on the description submitted with the Request for Status Decision, Bouchard clearly intends to engage in the transfer of bulk quantities of oil from the hold of tanker vessels to its own vessels, and thus squarely fits within § 7002(f)'s definition of a bulk product transfer facility. As a bulk product transfer facility, Bouchard's proposed oil lightering operation falls within the absolute prohibition of § 7003. The only issue in this matter is whether the fact that Bouchard may have engaged in oil lightering activity before the passage of the Act creates a

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<sup>1</sup> Although the Act speaks in terms of transfers from "vessel to onshore facility and vice versa," the Delaware Supreme Court has made clear that transfers from vessel to vessel in the waters of the coastal zone likewise fall within this definition and therefore the scope of the Act. *Coastal Barge*, 492 A.2d at 1247. *See also DNREC v. Vane Line Bunkering*, 2007 WL 4170810 at \*4 (Del. Sup. Nov. 17, 2007).

basis for Bouchard's new operation to avoid the prohibition on bulk product transfer facilities as a "non-conforming use." Answering this question requires an interpretation of the Act.

### **Coastal Zone Act: Rules of Interpretation**

The Delaware Supreme Court has articulated three rules that govern the interpretation of the Coastal Zone Act. The first is a rule requiring interpretations to harmonize the entire Act. As the court stated in *Coastal Barge*, "[a] statute is passed by the General Assembly as a whole and not in parts or sections. Consequently, each part or section should be read in light of every other part or section to produce a harmonious whole." 492 A.2d at 1245. Thus, interpretations of the Act which merely focus on a single word or phrase while ignoring the rest of the Act (including the clear purpose articulated in § 7001) are improper.

The Delaware Supreme Court's second rule of interpretation is a rule of liberal construction. In *City of Wilmington v. Parcel of Land*, 607 A.2d 1163 (Del. 1992), the 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.

607 A.2d at 1166. In *City of Wilmington*, the Court ruled that the valuation of an undeveloped parcel of land in a condemnation proceeding must take into consideration the fact that the Coastal Zone Act could apply because a hypothetical processing operation could be "manufacturing" under the Act. Thus, the rule of liberal construction under the Act requires that that one must err on the side of applying the restrictions and prohibitions of the Act because that best meets the legislative purpose set forth in § 7001. 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 assure that the environment is protected.

The third rule of interpretation applicable to the Coastal Zone Act is a rule favoring interpretations with reasonable consequences over those with unreasonable consequences. In *Coastal Barge*, the Delaware Supreme Court found that the vessel-to-vessel transfer of coal in the Delaware River fell within the Coastal Zone Act's prohibition against bulk product transfer facilities even though the literal language of § 7002(f) required the transfer of bulk products "from vessel to onshore facility or vice versa." The *Coastal Barge* court determined that its analysis needed to be guided by 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. The *Coastal Barge* court analyzed the purpose of the Act set forth in § 7001, with particular emphasis on the "prohibition against bulk product transfer facilities in the coastal zone is deemed imperative" language of that section. The Court held that, because the pollution potential from vessel to vessel transfers was the same as transfers from vessel to land, giving the "from vessel to onshore facility or vice versa" its literal meaning "would lead to the irrational and absurd result of prohibiting only those facilities for the transfer of substances from vessel to an onshore facility or vice versa, regardless of the potential threat of pollution and industrialization to the Delaware Coast." *Id.* The court therefore construed § 7002(f)'s "from vessel to onshore facility or vice versa" language to be merely "illustrative" of a bulk product transfer facility, and held that vessel to vessel transfers are also included within § 7002(f)'s definition. *Id.*

*Coastal Barge* highlights two important principles that are critical to the analysis of Bouchard's Request for Status Decision. First, fulfilling the purpose of the Act is important, and in applying the liberal construction principle it is appropriate to include within § 7002(f)'s ambit those things which are similar to and have the effect of a bulk product transfer facility even if the literal terms of the statute appears to exclude them. Second, interpretations of the Act that allow a frustration or diminishment of the purpose of the Act are irrational and absurd and must be rejected. Both of these principles lead inexorably to the conclusion that Bouchard's proposed oil lightering operation is a bulk product transfer facility prohibited under the Act and not saved by the fact that Bouchard allegedly did some oil lightering before passage of the Act.

#### **Application of the Coastal Zone Act: Bouchard's Claim of Nonconforming Use Status Is Factually Unsupported and Contrary to the Text, Meaning, and Purpose of the Act**

Bouchard does not and cannot seriously dispute the fact that its proposed oil lightering operation is a bulk product transfer facility under the Act. Indeed, the Superior Court's decision in *DNREC v. Vane Line Bunkering*, 2007 WL 4170810 (Del. Sup. Nov. 17, 2007), expressly found that a proposed oil lightering operation virtually identical to Bouchard's proposal was a bulk product transfer facility under the Act. *Id.* at \*4. Section 7001 of the Act makes it clear that "prohibition against bulk product transfer facilities in the coastal zone is deemed imperative" because such facilities "represent a significant danger of pollution to the coastal zone and generate pressure for the construction of industrial plants in the coastal zone, which construction is declared to be against public policy." The prohibition is then embodied in § 7003.

Bouchard attempts to avoid the prohibition by claiming that its proposed oil lightering operation is a nonconforming use under the Act. Its claim is entirely based on the following cryptic language in the Affidavit of Morton Bouchard, III attached to the Application:

"Prior to June 28, 1971, Bouchard Associates lightered oil at the Big Stone Anchorage in Delaware for customers including Gulf and BP."

Bouchard Affidavit ¶ 5. We respectfully submit that this does not satisfy the requirements of the Act.

**1. Bouchard Does Not Satisfy The Statutory Requirements For Non-Conforming Use**

The relevant provisions of the Act concerning non-conforming uses are found in §§ 7002(b), 7003 and 7004. Section 7002(b) defines the term “nonconforming use” as follows:

"Nonconforming use" means a use, whether of land or of a structure, which does not comply with the applicable use provisions in this chapter where such use was lawfully in existence and in active use prior to June 28, 1971.

Section 7003 states:

. . . 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.

Section 7004 then provides:

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.

Reading these sections together through the lens of the Delaware Supreme Court’s three principles of interpretation for the Act, it is clear that a bulk product transfer facility claiming to be a nonconforming use must have been “in existence and in active use on June 28, 1971” (§ 7004), for if it was not “in operation on June 28, 1971” (§ 7003) then it is prohibited. Thus, the statute clearly requires the bulk product transfer facility’s existence, operation, and active use **on June 28, 1971** to claim the benefit of § 7004. The court in the *Vane Line* decision reached this same conclusion:

§7003 prohibits bulk product transfer facilities in the coastal zone unless they were in operation on June 28, 1971 . . . the logical corollary to § 7003’s prohibition against bulk transfer facilities that were not in operation on June 28, 1971, is that a bulk product transfer facility that was in operation on that date is a nonconforming use that may continue to operate . . . § 7002(b) defines a nonconforming use as a “use, whether of land or a structure, which does not comply with the applicable use provision in this chapter where such use was lawfully in existence and in active use prior to June 28, 1971.” This definition makes explicit, and is consistent with, what 7003 implies . . . § 7004 states that any nonconforming use in existence and in active use on June 28, 1971 shall not be prohibited by this chapter and all extensions or expansions of nonconforming uses shall only be allowed by permit. This definition also makes explicit, and is also consistent with, what § 7003 implies . . . When you read these three sections together, the only conclusion you can reach is that a nonconforming use is a bulk product transfer facility that was in operation on June 28, 1971.

Given these statutory requirements, Bouchard's Request for Status Decision clearly fails. All the Bouchard Affidavit shows is that, sometime **prior** to June 28, 1971, Bouchard supposedly engaged in oil lightering—not that its lightering operation was in existence, in operation, and in active use **on** that date (or even that Bouchard engaged in that activity at any time in the 38 years since the passage of the Act). Quite simply, the Request fails to offer actual evidence of satisfying the fundamental statutory requirements set forth in §§ 7003 and 7004. That alone is grounds to find the proposed operation is prohibited under the Act.

It would violate the Act and the principles governing it to find that proof of activity solely prior to June 28, 1971 is sufficient to satisfy the existence, operation, and active use on June 28, 1971 requirement of §§ 7003 and 7004. This is true for at least three reasons. First, it ignores the actual language of the Act itself.<sup>2</sup> Second, it violates the principle of liberal construction of the Act by allowing a bulk product transfer facility that is otherwise against public policy and whose prohibition is deemed imperative in § 7001 of the Act. A liberal construction of the Act requires strict proof of operation and active use on June 28, 1971. Third, an interpretation that use prior to June 28, 1971 alone is enough to avoid the prohibition of § 7003 leads to the illogical and absurd result that, because a company once performed a now-prohibited operation at sometime prior to passage of the Act, and has apparently not performed that operation in the 38 years since the passage of the Act, it can now start up a new version of the activity despite the Act's clear prohibitions.

Further, we are gravely concerned that the casual, conclusory nature of the claimed factual support for nonconforming use status will, if allowed, create a new loophole for companies seeking to avoid the Act's strictures. If a simple, unverifiable affidavit is all that a company needs to claim—38 years after the fact—nonconforming use status, then the potential for mischief will very strong. In other words, Bouchard should not be allowed to prove its status by simply submitting an amended, conclusory affidavit. In light of the principle of liberal interpretation—which seeks to minimize exceptions to the Act's coverage—a company attempting to claim nonconforming use status should bear the burden of proof and be required to offer extensive, independent factual proof of existence, operation, and active use on June 28, 1971 before DNREC will recognize that use as nonconforming. No such proof exists in the record before you.

**2. *Bouchard Appears To Have Abandoned Any Nonconforming Use It May Have Had***

Even if Bouchard could somehow be said to satisfy the requirements of §§ 7003 and 7004, it appears that Bouchard abandoned any nonconforming use it may have had. The Bouchard affidavit suggests that oil lightering occurred before June 28, 1971, and there is no

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<sup>2</sup> While the definition in § 7002(b) refers to existence and active use “prior to” June 28, 1971, this section cannot be read in isolation. Sections 7003 and 7004 both require the additional element of operation **on** June 28, 1971. To satisfy the *Coastal Barge* mandate that the sections be read together in a way that gives meaning to all three sections, you should find that the Act requires both existence and active use **before** and **on** June 28, 1971.

evidence that Bouchard did any lightering since that date. In other words, the Request seeks to claim nonconforming use status for a use that has not been in operation *for over 38 years*.

The language of the Act itself strongly supports the conclusion that discontinuation of operations results in the inability to claim nonconforming status (i.e., that a use can be abandoned, and thus no longer entitled to treatment as a nonconforming use). In 1984, as part of a rescue package to keep the Phoenix Steel Corporation's steel manufacturing plant open, the General Assembly amended § 7004 to include the following language: "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 one year."<sup>3</sup> In 1988, the one year period was extended to two years.<sup>4</sup> Clearly, the General Assembly was concerned that a temporary discontinuance of operations would alter Phoenix Steel's status as a nonconforming use, and so wanted to legislate that possibility out of existence by giving Phoenix Steel a "grace period." Applying relevant principles of statutory construction, and liberally construing § 7004 to effectuate the Act's purposes (including the intent to prohibit bulk product transfer facilities), the 1984 amendment must mean that (a) abandonment of status as a nonconforming use generally occurs whenever operations discontinue at a site, and (b) Phoenix Steel (and only Phoenix Steel) would get the benefit of the two year grace period. Bouchard's more than 38 year absence from oil lightering means that Bouchard abandoned the alleged nonconforming use long ago. As such, the proposed oil lightering operation is a new operation that, under *Vane Line*, 2007 WL 4170810 at \*4, is clearly prohibited by the Act.

### CONCLUSION

We strongly urge you to find that the vessel-to-vessel oil lightering operation proposed by Bouchard Associates is a bulk product transfer facility prohibited by the Act.

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<sup>3</sup> 64 Del. Laws 571, 572 (1984). The Act making this amendment states that its purpose is to "prevent the severe impact on the economy of the State of Delaware which would result from the financial collapse of Phoenix Steel Corporation," and included loans and other assistance. *Id.* at 571.

<sup>4</sup> See 66 Del. Laws 491 (1988).