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Keeping the Coast Clear: Lessons About Protecting the Natural Environment by Controlling Industrial Development Under Delaware's Coastal Zone Act

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In 1970, as the nation celebrated the first Earth Day, the State of Delaware stood at a proverbial fork in the road concerning its then largely undeveloped coastal area. Shell Oil was poised to begin construction of Delaware's second large oil refinery, this one to be located next to the Bombay Hook National Wildlife Refuge.¹ Zapata Norness, a bulk shipping company, was planning to build a 300 acre island in the Delaware Bay for staging shipments of bulk quantities of coal and iron ore.² The United States Department of Commerce was working with oil and shipping companies to make the Delaware Bay "the premier supertanker port and industrial center in the East."³ Thus, Delaware had a choice: to industrialize its coastal areas (much like its neighbors New Jersey and Pennsylvania had done farther up the Delaware River), or to restrict such industrialization and preserve the natural resources of the coast.

After a temporary moratorium on all new industrial development imposed via executive order by then-Governor Russell Peterson in January 1970,⁴ a Governor's Task Force recommended the

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1. See RUSSELL W. PETERSON, *REBEL WITH A CONSCIENCE* 125-26 (1999).

2. *Id.* at 127.

3. *Id.*

4. *Id.* at 128.

path of restricted industrial development.⁵ In June 1971, clearly driven by concern over the looming industrialization of its coast,⁶ the State of Delaware chose coastal resource preservation over unbridled industrialization when it enacted the Delaware Coastal Zone Act⁷ ("CZA" or "Act") over significant opposition from business and various political interests.⁸ The opening sentences of the

5. See GOVERNOR'S TASK FORCE ON MARINE & COASTAL AFFAIRS, COASTAL ZONE MANAGEMENT FOR DELAWARE (Feb. 18, 1971), http://unicorn.csc.noaa.gov/docs/czic/HT393.D3_C634_1971/89EDDC.pdf [hereinafter TASK FORCE REPORT]. Later state reports described the Task Force's conclusions as follows:

In February 1971, the Task Force completed a preliminary report recommending that industries compatible with high environmental standards be encouraged, but that no further incompatible industries be allowed in the coastal zone. Incompatibility would be determined on the basis of quantities and types of pollutants and the magnitude of adverse environmental effects resulting from the scale and nature of the industry. The Task Force also recommended prohibiting a deepwater port facility in Delaware Bay. The report emphasized the recreational values of the coastal zone for Delawareans and for visitors from other states.

See STATE COASTAL ZONE INDUS. CONTROL BD. & DEL. STATE PLANNING OFFICE, DELAWARE COASTAL ZONE PLANNING AND REGULATORY ADMINISTRATION: REPORT FOR THE PERIOD JUNE 28, 1971-JUNE 30, 1973 1 (Nov. 1973), http://unicorn.csc.noaa.gov/docs/czic/KFD265.A52_D3_1973/3139.pdf [hereinafter 1973 REPORT]; STATE COASTAL ZONE INDUS. CONTROL BD. & OFFICE OF MGMT., BUDGET & PLANNING, COASTAL ZONE ACT ADMINISTRATION: JUNE 28, 1971-JUNE 30, 1977 1 [hereinafter 1977 REPORT] (copy on file with author); STATE COASTAL ZONE INDUS. CONTROL BD. & DEL. DEPT OF NATURAL RESOURCES AND ENVTL. CONTROL, REPORT ON COASTAL ZONE ACT ADMINISTRATION: JULY 1977-DECEMBER 1983 1-1 (Sept. 1984), http://unicorn.csc.noaa.gov/docs/czic/HT393.D3_D469_1984/89EE60.pdf [hereinafter 1984 REPORT]. While the Task Force's recommendation to ban new heavy industry shows up in the Act, most of the other recommendations set forth in the Report do not. See *supra* TASK FORCE REPORT at 3-4.

6. See 1973 REPORT, *supra* note 5, at 1:

Enactment of the Coastal Zone Act was the result of the deep concern of many people and public officials in Delaware over the likelihood of industrial growth in the coastal zone resulting in a large new petroleum refinery and a deepwater terminal for supertankers and related heavy industries in areas not yet industrialized. Land ownership and some local zoning policies indicated that such industrialization was a real possibility. The lack of a State policy towards industrial growth in the coastal zone and regulatory authority over it left the State in a position of not having an effective voice in the use of this uniquely valuable and environmentally sensitive State resource – the coastal zone.

Nearly identical language can be found in the 1977 REPORT, *supra* note 5, at 1, and the 1984 REPORT, *supra* note 5, at 1-1.

7. DEL. CODE ANN. TIT. 7, § 7001 (2007).

8. See PETERSON, *supra* note 1, at 123-149. Opposition came from the Delaware Chamber of Commerce, which at that time had all of the major companies in Delaware on its Executive Committee. *Id.* at 131. As noted above, the United States Secretary of Commerce in the Nixon Administration had been working on a plan to make the Delaware Bay "the premier supertanker and industrial center in the East," *id.* at 127, and thus the Nixon Administration ultimately opposed the Act, *id.* at 144-146.

Act's first section capture the essence of the Act's intent and goal in stark terms:

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.⁹

On one level, statements by coastal states recognizing the importance of their coastal resources and the state's desire to protect them are not uncommon.¹⁰ In fact, such statements are encouraged by the federal Coastal Zone Management Act.¹¹ For

Governor Peterson's autobiographical account of the formulation and passage of the Act provides a fascinating insider look at the political and legislative strategies utilized to overcome this opposition and obtain passage of the Act.

9. DEL. CODE ANN. TIT. 7, § 7001 (2007). The original version of the Act can be found at 58 Del. Laws 490 (1971).

10. See, e.g., ALA. CODE § 9-7-11 (2006) ("The purpose of this chapter is to promote, improve and safeguard the lands and waters located in the coastal areas of this state through a comprehensive and cooperative program designed to preserve, enhance and develop such valuable resources for the present and future well-being and general welfare of the citizens of this state"); CAL. PUB. RES. CODE § 30001.5 (2006) (setting forth legislative findings that "the California coastal zone is a distinct and valuable natural resource of vital and enduring interest to all the people and exists as a delicately balanced ecosystem" and "that the permanent protection of the state's natural and scenic resources is a paramount concern to present and future residents of the state and nation"); CONN. GEN. STAT. § 22A-91 (2006) (legislative findings that the coastal area "represents an asset of great present and potential value to the economic well-being of the state, and there is a state interest in the effective management, beneficial use, protection and development of the coastal area" and "is rich in a variety of natural, economic, recreational, cultural and aesthetic resources, but the full realization of their value can be achieved only by encouraging further development in suitable areas and by protecting those areas unsuited to development"); GA. CODE ANN. § 12-5-321 (2006) (legislative findings that "the coastal area of Georgia comprises a vital natural resource system," "provides a natural recreation resource which has become vitally linked to the economy of Georgia's coast and to that of the entire state," and "that activities and structures in the coastal area must be regulated to ensure that the values and functions of coastal waters and natural habitats are not impaired and to fulfill the responsibilities of each generation as public trustees of the coastal waters and habitats for succeeding generations"); S.C. CODE ANN. § 48-39-20 (2006) (legislative finding that "The coastal zone is rich in a variety of natural, commercial, recreational and industrial resources of immediate and potential value to the present and future well-being of the State" and citing "the urgent need to protect and to give high priority to natural systems in the coastal zone").

11. See, e.g., 16 U.S.C. § 1451 (2006) (listing congressional findings in connection with the federal Coastal Zone Management Act ("FCZMA")). In promulgating the

most states, the value of protecting coastal resources must be balanced against interests in industrial development.¹² By contrast,

FCZMA in 1972, Congress specifically found that “[t]he key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone.” 16 U.S.C. § 1451(i) (2006). The Act has been described as encouraging “responsible economic, cultural, and recreational growth in coastal zones, consistent with the . . . notion that coastal management should foster ‘the widest possible variety of beneficial uses so as to maximize net social return.’” John R. Nolon, *Disaster Mitigation through Land Use Strategies*, 23 PACE ENVTL. L. REV. 959, 972-74 (Sept. 2007) (quoting STRATTON COMM’N, REPORT OF THE COMM’N ON MARINE SCI., ENG’G & RES., OUR NATION AND THE SEA: A PLAN FOR NATIONAL ACTION 57 (1969)), <http://www.lib.noaa.gov/noaainfo/heritage/stratton/title.html> (select “Contents” link and then the “Functions and Powers of State Coastal Zone Authorities” link). While the full extent of the FCZMA is beyond the scope of this article, Delaware’s Coastal Zone Management Program (which includes the CZA) has been approved under the FCZMA since 1979. See *Norfolk Southern Corp. v. Oberly*, 632 F. Supp. 1225, 1250 (D. Del. 1986), *aff’d*, 822 F.2d 388 (3d Cir. 1987) (discussing approvals under FCZMA).

12. See, e.g., ALA. CODE § 9-7-11 (2006) (identifying competing needs for coastal resources, including the needs of industry, and citing “the urgent need to balance development for the preservation of the natural systems in the coastal area”); ALASKA STAT. § 46.40.020 (2006) (identifying various objectives of coastal management program that include protection of resources and development of industrial or commercial enterprises and “the orderly, balanced utilization and protection of the resources of the coastal area”); CAL. PUB. RES. CODE § 30001.5 (2006) (identifying as basic goal of state to “assure orderly, balanced utilization and conservation of coastal zone resources taking into account the social and economic needs of the people of the state”); CONN. GEN. STAT. § 22a-92 (2006) (identifying as general goal “to insure that the development, preservation or use of the land and water resources of the coastal area proceeds in a manner consistent with the capability of the land and water resources to support development, preservation or use without significantly disrupting either the natural environment or sound economic growth”); HAW. REV. STAT. § 205A-4 (2006) (“In implementing the objectives of the coastal zone management program, the agencies shall give full consideration to ecological, cultural, historic, esthetic, recreational, scenic, and open space values, and coastal hazards, as well as to needs for economic development”); LA. REV. STAT. ANN. § 49:214.2 (2006) (“it is the policy of this state to achieve a proper balance between development and conservation and encourage the use of coastal resources”); LA. REV. STAT. ANN. § 49:214.22(3) (2006) (identifying public policy of state to be “[t]o support and encourage multiple use of coastal resources consistent with the maintenance and enhancement of renewable resource management and productivity, the need to provide for adequate economic growth and development and the minimization of adverse effects of one resource use upon another, and without imposing any undue restriction on any user”); N.H. REV. STAT. ANN. § 483-B:2 (2006) (list of interests that state’s minimum standard shall serve include protection and conserving resources and providing for economic development in proximity to water); S.C. CODE ANN. § 48-39-20 (2006) (legislative finding that statute needed “in light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone while balancing economic interests”); WASH. REV. CODE § 90.58.020 (2006) (stating that:

It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of

Delaware's Coastal Zone Act eschews balancing altogether when it comes to new "heavy industry uses"¹³ and "bulk product transfer facilities"¹⁴ in the coastal zone.¹⁵ They are flatly prohibited because of the environmental threats they pose:

rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.).

13. DEL. CODE ANN. TIT. 7, § 7003 (2007.)

14. *Id.*

15. The Act defines the coastal zone as follows:

[A]ll that area of the State, whether land, water or subaqueous land between the territorial limits of Delaware in the Delaware River, Delaware Bay and Atlantic Ocean, and a line formed by certain Delaware highways and roads as follows:

Beginning at the Delaware-Pennsylvania line at a place where said line intersects U.S. Route 13; thence southward along the said U.S. Route 13 until it intersects the right-of-way of U.S. Route I-495; thence along said I-495 right-of-way until the said I-495 right-of-way intersects Delaware Route 9 south of Wilmington; thence along said Delaware Route 9 to the point of its intersection with Delaware Route 273; thence along said Delaware Route 273 to U.S. 13; thence along U.S. 13 to Maintenance Road 409; thence along Maintenance Road 409 to Delaware Road 71; thence along Delaware Road 71 to its intersection with Delaware Road 54; thence along Delaware Road 54 to Delaware Road 896; thence along Delaware Road 896 to Maintenance Road 396; thence along Maintenance Road 396 to Maintenance Road 398; thence along Maintenance Road 398 to the Maryland state line; thence southward along the Maryland state line to Maintenance Road 433; thence along Maintenance Road 433 to Maintenance Road 63; thence along Maintenance Road 63 to Maintenance Road 412; thence along Maintenance Road 412 to U.S. 13; thence along U.S. 13 to Delaware 299 at Odessa; thence along Delaware Route 299 to its intersection with Delaware Route 9; thence along Delaware Route 9 to U.S. 113; thence along U.S. Route 113 to Maintenance Road 8A; thence along Maintenance Road 8A to Maintenance Road 7 to the point of its intersection with Delaware Route 14; thence along Delaware Route 14 to Delaware Route 24; thence along Delaware Route 24 to Maintenance Road 331; thence along Maintenance Road 331 to Maintenance Road 334; thence along Maintenance Road 334 to Delaware Route 26; thence along Delaware Route 26 to Maintenance Road 365; thence along Maintenance Road 365 to Maintenance Road 84; thence along Maintenance Road 84 to Maintenance Road 384; thence along Maintenance Road 384 to Maintenance Road 382A; thence along Maintenance Road 382A to Maintenance Road 389; thence along Maintenance Road 389 to Maintenance Road 58; thence along Maintenance Road 58 to Maintenance Road 395; thence along Maintenance Road 395 to the Maryland state line.

DEL. CODE ANN. TIT. 7, § 7002(a) (2007). A simpler way to describe it is all territorial water of the State of Delaware and all land from the Delaware coastline in for approximately two miles. See DEL. STATE PLANNING OFFICE, DELAWARE AND OUTER CONTINENTAL SHELF DEVELOPMENT: ROLES AND SYSTEMS AT VARIOUS LEVELS OF

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 product transfer facilities in the coastal zone is deemed imperative.¹⁶

The radical and unprecedented nature and extent of these absolute prohibitions have led to the Act being called “the first comprehensive coastal land use law in the world aimed at curbing industrial uses of a coastal area”¹⁷ and “one of the most original and innovative environmental and land use statutes in the world.”¹⁸ In addition, the controls and requirements imposed on permitted development or expansion for “non-conforming uses”¹⁹ and “manufacturing uses”²⁰—especially the regulatory requirement for the “offset” of the use’s negative environmental impacts²¹—are unique. The Act’s combination of the prohibitions and controls provide an interesting blueprint for any coastal state to use in protecting its own natural coastal resources.

The Coastal Zone Act has been in force for nearly 37 years, withstanding attempts to remove the prohibition on heavy industry in 1974,²² 1977,²³ and 1985,²⁴ as well as a challenge to its constitutionality in 1985.²⁵ The Act itself has been expressly amended only eight times,²⁶ and three of those amendments re-

GOVERNMENT 33 (June 1976) [hereinafter CONTINENTAL SHELF REPORT] (on file with Widener School of Law Legal Information Center, call number KFD 443 .D4 1976).

16. DEL. CODE ANN. TIT. 7, § 7001 (2007).

17. James May & Wendy Myers, *It Is Still Not A Shore Thing: Environmental Improvement And Industrial Uses Of Delaware’s Coastal Zone*, DEL. LAWYER, Spring 1999, at 20.

18. See 7-100-101 DEL. CODE REGS. pmbl. (Weil 2007).

19. See DEL. CODE ANN. TIT. 7, §§ 7002(b), 7004(a) (2007).

20. See DEL. CODE ANN. TIT. 7, §§ 7004(a) (2007).

21. See 7-100-101 DEL. CODE REGS. § 9.0 (Weil 2007).

22. See PETERSON, *supra* note 1, at 180–87.

23. *Id.* at 187–91.

24. *Id.* at 194–96.

25. See *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388 (3d Cir. 1987). This article discusses the constitutional challenge presented in this case, *infra* Section II(F).

26. In chronological order, those amendments are: 61 Del. Laws 164 (1977); 62 Del. Laws 277 (1979); 63 Del. Laws 425 (1981); 64 Del. Laws 571 at § 6 (1984); 66 Del.

lated solely to administration of the Act.²⁷ In addition, after a false start in 1994,²⁸ Delaware's Department of Natural Resources and Environmental Control ("DNREC"), pursuant to its statutory authority,²⁹ finally issued regulations under the Act in 1999 (the "1999 Regulations").³⁰ Yet despite the longevity, importance, and far-reaching impact of the Act, there has been no scholarly analysis of how the Act has been interpreted and applied beyond a detailed overview of the 1999 Regulations.³¹ This article is the first attempt to provide as complete a comprehensive scholarly analysis as possible.³²

Laws 491 (1988); 68 Del. Laws 290 (1991); 68 Del. Laws 1187 (1992); 71 Del. Laws 894 (1998).

27. See 61 Del. Laws 164 (1977) (changing references to official in charge of administering the Act from State Planner to Director of the Office of Management, Budget and Planning); 63 Del. Laws 425 (1981) (changing administration of Act to Secretary of Department of Natural Resources and Environmental Control); 68 Del. Laws 290 (1991) (requiring Secretary to set a schedule of fees under Act).

28. The Coastal Zone Industrial Control Board adopted an initial set of procedural regulations in December 1971 that were described by the Chancery Court as "consist[ing] of five pages of which only one five-line provision addressed substantive matters." *Chem. Indus. Council of Del. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *2 (Del. Ch. May 19, 1994). A version of the Board's early regulations (albeit seven pages in length) can be found in 1973 REPORT, *supra* note 5, at 88-94. In 1990, the state started a process of drafting a more substantive and comprehensive set of regulations, ultimately resulting in the Board's issuance of final regulations in 1993. *Chem. Indus. Council of Del.*, 1994 WL 274295 at *2-5. A group of plaintiffs challenged the 1993 Regulations under Delaware's Freedom of Information Act, 29 Del. C. § 10001 *et seq.*, for procedural irregularities in the public notices and the Board's use of executive sessions during its deliberations. *Chem. Indus. Council of Del.*, 1994 WL 274295, at *5. The Court agreed with both arguments and therefore voided the regulations. *Id.* at *14. The Court later denied the Board's motion for re-argument. *Chem. Indus. Council of Del. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274308 (Del. Ch. June 10, 1994).

29. See DEL. CODE ANN. TIT. 7, § 7005(b) (2007) (DNREC has the authority to "issue regulations including, but not limited to, regulations governing disposition of permit requests, and setting forth procedures for hearings before himself or herself and the Board. Provided, that all such regulations shall be subject to approval by the Board."). The Delaware Attorney General has opined that the Coastal Zone Industrial Control Board may not independently adopt or amend regulations regarding the substance of the Act. See Attorney General Opinion No. 94-1018, 1994 WL 284951 at *1 (May 4, 1994) ("[T]he Act is designed such that the Board is an appeals board, to which recourse from DNREC's permitting and other decisions may be had. Other than this authority to monitor DNREC decisions, whether regulatory or case related, there is no independent power vested in the Board by the Act.").

30. See 7-100-101 DEL. CODE REGS. (Weil 2004).

31. See May & Myers, *supra* note 17 (providing an overview of the Regulations in anticipation of their 1999 publication).

32. Working with the State of Delaware's Public Archives, the Coastal Zone Industrial Control Board, the Delaware Department of Natural Resources and Environmental Control, and the Delaware State Bar Association's Environmental Law Committee, the author has compiled all Board and Court decisions and all Attorney

This article consists of three parts. In the first, the article discusses the general principles of statutory interpretation that have been articulated under the Act. These principles provide important guideposts that can help interpretations stay true to the meaning of and purpose behind the Act. The second part discusses the provisions of the Act, complete with a comprehensive annotation to the interpretations of those terms made by the Delaware's Attorney General, Delaware's Coastal Zone Industrial Control Board (the agency charged with reviewing initial decisions under the Act³³), and Delaware courts. The third part discusses the lessons to learn from the interpretation and application of the Act for both Delaware and other coastal states grappling with the inevitable competition between industrial development and preservation of natural coastal resources. For Delaware, these lessons focus on emerging issues and challenges under the Act, including the need to emphasize and consciously apply the general principles of statutory construction in order to keep evolving interpretations moored to the Act, and the now controversial meanings of "use" and "nonconforming use" under the Act. In the broader national context, other coastal states can learn how to protect remaining coastal resources while respecting existing industrial development and find tools for linking future acceptable development to environmental improvement.

I. THE GENERAL PRINCIPLES OF STATUTORY INTERPRETATION FOR THE ACT

Before delving into the details of the Act, it is important to identify the general principles that have governed attempts to interpret the Act during its first 36 years. Such general principles of statutory construction can have an important effect on any interpretation by providing familiar guideposts that serve to focus the analysis in a clear, consistent way. Identification of these general principles of statutory construction is therefore an important first step to understanding the Act.

General opinions interpreting the Act, as well as status decisions rendered by the State Planner or the Secretary of DNREC during the periods June 28, 1971–April 2008 (with the exception of twenty-five status decisions identified by DNREC in response to a FOIA request that were not present in the files at the Public Archive). The analysis here is comprehensive as to the information available to the author.

33. See DEL. CODE ANN. TIT. 7, §§ 7005, 7008 (2007). Throughout this article, the Coastal Zone Industrial Control Board is referred to as "the Board."

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.

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*,³⁴ when applying the statute “the fundamental rule is to ascertain and give effect to the intent of the legislature.”³⁵ 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.³⁶ 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,”³⁷ a use that is viewed as “critical . . . for the future of the State in terms of the quality of life in the State.”³⁸ It declares “construction of industrial plants in the coastal zone” to be “against public policy.”³⁹ 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.

34. *Coastal Barge Corporation v. Coastal Zone Indus. Bd.*, 492 A.2d 1242 (Del. 1985).

35. *Id.* at 1246.

36. DEL. CODE ANN. TIT. § 7001.

37. *Id.*

38. *Id.*

39. *Id.*

Harmonize the Entire Act

The second general principle requires 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.”⁴⁰ 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. In *Coastal Barge Corp.*, the Delaware Supreme Court found that the vessel-to-vessel transfer of coal in the Delaware River fell within the Act’s prohibition against bulk product transfer facilities even though the literal language of § 7002(f) prohibited only the transfer of bulk products “from vessel to onshore facility or vice versa.”⁴¹ The *Coastal Barge* court found that the literal language of § 7002(f) was ambiguous because to interpret it as excluding vessel-to-vessel transfers would lead to unreasonable or absurd consequences (the fourth principle discussed *infra*) in light of the expressed statutory purpose in § 7001 of the Act.⁴² For purposes of the principle of harmonization, the *Coastal Barge* court looked at the language of § 7001, with emphasis on the language that “prohibition against bulk product transfer facilities in the coastal zone is deemed imperative,”⁴³ and noted the incongruity of applying the literal terms of § 7002(f):

In contrast to this strongly worded statutory purpose, §7002(f) would literally prohibit only port facilities “for the transfer of bulk quantities of any substance from vessel to onshore facility or vice versa”. But if a significant pollution potential existed, what difference would it make if the transfer was from vessel to vessel (barge from super collier) or from vessel to land to vessel

40. *Coastal Barge Corp.*, 492 A.2d at 1245.

41. DEL. CODE ANN. TIT. 7, § 7002(f). The Secretary had ruled that the coal lightering operation was not prohibited under the Act, but the Board reversed, and the Superior Court upheld the Board’s decision. *Coastal Barge Corp.*, A.2d at 1244. Interestingly, *Coastal Barge* was not the first coal lightering operation reviewed under the Act. In 1981, National Bulk Carriers, Inc. proposed such an operation, and the Secretary, on the basis of an Attorney General opinion finding that the lack of a transfer from ship to shore excluded the project from regulation under the Act, ruled as he did in *Coastal Barge*. See 1984 REPORT, *supra* note 5, at 3–13. For a summary of the June 24, 1981 Attorney General opinion involved in the National Bulk Carriers matter, see *id.* at 4–3.

42. *Coastal Barge Corp.*, 492 A.2d at 1246.

43. DEL. CODE ANN. TIT. 7, § 7001.

(barge to land to collier). The danger of pollution and industrialization to the Delaware Coast is the same. To distinguish between transfers made vessel to vessel and those made vessel to land would lead to such irrational and absurd results that it compels our determination that the Coastal Zone Act is ambiguous.⁴⁴

In other words, because the General Assembly found that offshore bulk product transfer facilities pose a “significant danger” of pollution to the coastal zone, excluding vessel-to-vessel transfers makes no sense. For the Delaware Supreme Court, harmonizing § 7002(f) with § 7001 required that § 7002(f) must be interpreted in a way that prevents the pollution the General Assembly wanted to prevent, and so vessel-to-vessel transfers must be prohibited as well.⁴⁵ Thus, courts or the Board must harmonize the entire Act, and are not free to disregard one section of the CZA when interpreting a term in a different section.

Liberaly Construe the Act to Maximize Applicability

The third general principle is a rule of liberal construction. In *City of Wilmington v. Parcel of Land*,⁴⁶ 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 [Del. Code Ann. tit. 7, § 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.⁴⁷

City of Wilmington arose out of the City’s condemnation of certain real property near the Port of Wilmington.⁴⁸ The issue in the case was the value of the highest and best use of the property, with the city arguing for a lower value based on the land’s use as an import-export facility.⁴⁹ The owner argued for a higher value based

44. *Coastal Barge Corp.*, 492 A.2d at 1246.

45. *Id.* at 1247.

46. *City of Wilmington v. Parcel of Land Known*, 607 A.2d 1163 (Del. 1992).

47. *Id.* at 1166.

48. *Id.* at 1164.

49. *Id.* at 1164-65.

in part on the presence of fluorspar tailings on the site, which would provide \$700,000 of additional value if further processed, plus \$209,000 for salvage value of the fluorspar processing equipment (even though there was no fluorspar processing present at the site).⁵⁰ The owner's appraiser assumed that the Coastal Zone Act would not be an impediment to conducting the hypothetical fluorspar processing on the site in order to realize the value.⁵¹ The Superior Court ultimately agreed with the property owner appraiser's assumption, and the issue on appeal was whether the court erred in instructing the commissioners that, for valuation purposes, a fluorspar operation on the property would not be subject to the Coastal Zone Act.⁵²

The Delaware Supreme Court reversed, articulating its liberal construction rule. The property owner argued that the hypothetical fluorspar processing operation was not "manufacturing" as defined in § 7002(d)⁵³ (and therefore was not subject to permitting under the Act) because it involved "the mere separation of fluorspar from other elements of the soil" that starts with fluorspar and ends with fluorspar.⁵⁴ The *City of Wilmington* Court rejected this argument as "a pinched construction of the scope of the term 'manufacturing' [that] would clearly defeat the legislative purpose of the Act 'to control the location, extent and type of development in Delaware's coastal areas'."⁵⁵ Instead, the Court applied its liberal construction rule:

If the term "manufacturing" is afforded a liberal meaning the proposed fluorspar proceeding plainly is subject to regulation. The processing operation would entail the use of chemical reagents, earth moving equipment, and mechanical equipment to separate the saleable grade fluorspar from the impurities with which it is mixed in an ore-like state. Furthermore, once the separation is complete, the resultant slurry must be disposed of

50. *Id.* at 1165. In other words, the property owner wanted the property value to include this hypothetical fluorspar processing operation, even though no such processing was taking place at the time of the condemnation.

51. *Id.*

52. *Id.* at 1165-66.

53. Section 7002(d) defines manufacturing as "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." DEL. CODE ANN. TIT. 7, § 7002(d) (2007).

54. *City of Wilmington*, 607 A.2d at 1166.

55. *Id.* at 1166-67 (quoting DEL. CODE ANN. TIT. 7, § 7001).

safely. As a Seibert official conceded at trial, “[n]obody wants to see this stuff [i.e. the slurry] to come [sic] into the river.” Far from being outside the scope of the Act, we believe such an operation is precisely the type of industrial use the General Assembly intended to regulate. It is a mechanical and chemical transformation of an inorganic substance (fluorspar tailings) into a new product (saleable grade fluorspar) through the use of “power-driven machines and materials handling equipment.” We, therefore, hold that the fluorspar processing operation envisioned here, if put into practice, would be a “manufacturing” activity as defined in the Coastal Zone Act and thus subject to the Act’s permit procedures.⁵⁶

The Court therefore found that the commissioners in the condemnation proceeding should be allowed to consider the impact of obtaining a Coastal Zone Act permit would have on the value of the property.⁵⁷

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 § 7001.⁵⁸ 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. Courts and the Board must therefore liberally construe the Act to maximize applicability.

Favor Reasonable Interpretations Over Unreasonable Ones

The fourth general principle is a rule favoring interpretations with reasonable consequences over those with unreasonable consequences. As noted before, 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

56. *Id.* at 1167.

57. *Id.*

58. *Id.* at 1166 (construe liberally “in order to fully achieve the legislative goal of environmental protection”).

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 applied 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.⁵⁹

The 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”⁶⁰ 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,⁶¹ 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.”⁶² 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,⁶³ and held that vessel to vessel transfers are also included within § 7002(f)’s definition.⁶⁴

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, a court or the Board must, when interpreting the Act, favor reasonable interpretations over unreasonable ones.

Why are these principles important? As *Coastal Barge* and *City of Wilmington* demonstrate, interpretations of the Act can and do arise in contexts that the Act’s language does not directly address. The four principles provide powerful insight and gui-

59. *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1247, 1247 (Del. 1985).

60. DEL. CODE ANN. TIT. 7, § 7001.

61. *Coastal Barge*, 492 A.2d at 1246.

62. *Id.* at 1247.

63. *Id.*

64. *Id.*

dance for the interpretation process that imbue the view of the Act's language with appreciation for and deference to the overarching purpose of the Act. The four principles thus serve an important purpose: they provide guideposts that can ground interpretation of the language of the Act in the Act's purpose and ultimate intent.

II. THE STRUCTURE AND INTERPRETRATION OF THE COASTAL ZONE ACT PROVISIONS

The first three sentences of the CZA make clear that it is focused on the environmental effect of industrial development in the coastal zone. They declare the "public policy" of the state to be the control of "the location, extent and type of industrial development in Delaware's coastal areas" so that "the State can better protect the natural environment of its bay and coastal areas and safeguard their use primarily for recreation and tourism."⁶⁵ In its effort to carry out this declared public policy, the CZA recognizes four different categories of industrial development:

- (1) heavy industry uses;⁶⁶
- (2) bulk product transfer facilities;⁶⁷
- (3) permitted industrial or manufacturing uses;⁶⁸ and
- (4) nonconforming uses.⁶⁹

Non-industrial uses are outside the scope of the Act's regulation,⁷⁰

65. DEL. CODE ANN. TIT. 7, §7001 (2004).

66. *See id.* §§ 7002(e), 7003.

67. *See id.* §§ 7001, 7002(f), 7003.

68. *See id.* § 7004(a).

69. *See* §§ 7002(b), 7004(a)

70. This is evident from the fact that the Act speaks only in terms of industrial development, with emphasis on heavy industry uses, bulk product transfer facilities, permitted industrial or manufacturing uses, and nonconforming uses. In addition, the 1999 Regulations issued under the Act contain language indicating that some non-industrial development is not within the regulatory purview of the Act. *See* 7-100-101 DEL. CODE REGS. §§ 5.1 to .19 (Weil 2007), which set forth types of facilities or activities that "shall be deemed not to constitute initiation, expansion or extension of heavy industry or manufacturing uses under these regulations." The facilities/activities on the list are:

§ 5.1: farming;

§ 5.2: warehouses or other storage facilities, but not including tank farms;

§ 5.3: Tank farms of less than 5 acres;

§ 5.4: Parking lots or structures, health care and day care facilities, maintenance facilities, commercial establishments not involved in manufacturing, office buildings, recreational facilities, and facilities related to the management of wildlife;

§ 5.5: Facilities used in transmitting, distributing, transforming, switching, and otherwise transporting and converting electrical energy;

§ 5.6: Facilities used to generate electric power directly from solar energy;

as are public sewage treatment and recycling facilities.⁷¹ The CZA's basic approach is to prohibit heavy industry uses and bulk product transfer facilities, regulate and control permitted industrial or manufacturing uses, and tolerate nonconforming uses.

During the nearly 37 years of the Act's existence, there have been 9 decisions by Delaware and federal courts, 18 interpretive decisions by the Board, at least 25 opinions by the Delaware Attorney General, and at least 266 status decisions by the State Planner or the Secretary of DNREC⁷² that provide some interpretive insight into the Act. Using the language of the Act and the 1999 Regulations, as well as these interpretations in actual cases

§ 5.7: Repair and maintenance of existing electrical generating facilities provided such repair or maintenance does not result in any negative environmental impacts;

§ 5.8: Back-up emergency and stand-by sources of power generation to adequately accommodate emergency industry needs when outside supply fails;

§ 5.9: Continued repair, maintenance and use of any non-conforming bulk product transfer facility where the facility transfers the same products and materials that it did on June 28, 1971;

§ 5.10: Bulk product transfer operations at dock facilities owned or acquired in the future by the Diamond State Port Corp. within the Port of Wilmington

§ 5.11: Docking facilities used as bulk product transfer facilities located on privately owned lands within the Port of Wilmington which had been granted a status decision extending the bulk product transfer exemption prior to the effective date of the regulations;

§ 5.12: Docking facilities not used as bulk product transfer facilities;

§ 5.13: Pipelines originating outside, traversing through, and terminating outside the Coastal Zone without connecting to a heavy industry or manufacturing use;

§ 5.14: Maintenance and repair of existing structures;

§ 5.15: Replacement in-kind of existing equipment or installation of in-line spares for existing equipment;

§ 5.16: Installation and modification of pollution control equipment for non-conforming uses within their designated footprint;

§ 5.17: Any facility that received an exemption for the activity in question;

§ 5.18: Research and development activities within existing research and development facilities; and

§ 5.19: Any other activity which the Secretary determines, through the status decision process, is not an expansion or extension of a non-conforming use or a heavy industry use.

71. See DEL. CODE ANN. TIT. 7, § 7003 (2007) ("Provided, that this section shall not apply to public sewage treatment or recycling plants"). The Board has ruled that the recycling portion of this exception applies only to "an entity which is government-sponsored or owned 'by the people.'" *In re Texaco's Proposed Re-Refining*, No. 260SD, at 16 (Coastal Zone Indus. Control Bd. July 9, 1992) (appeal of the Secretary's decision finding Texaco's re-refining to be a "New Prohibited Heavy Industry") (copy on file with author) (rejecting claim that oil re-refining operation at Texaco refinery could fall under recycling plant exception).

72. These numbers are as of April 1, 2008, and include the addition of the November 16, 2007 Superior Court decision in *DNREC v. Vane Line Bunkering, Inc.*, No. 06A-12-001-ESB (Del. Super. Ct. Nov. 16, 2007) (copy on file with author).

and matters, one can examine in detail the Act's prohibitions and provisions.

A. The Prohibition of Heavy Industry Uses

The CZA provides that "[h]eavy 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."⁷³ As § 7001 makes clear, such uses are prohibited because such "industry is determined to be incompatible with the protection of that natural environment in those areas."⁷⁴ Thus, heavy industry and the coastal zone's natural environment are in fundamental conflict, and because the CZA seeks to "better protect the natural environment of its bay and coastal areas and safeguard their use primarily for recreation and tourism,"⁷⁵ the environment wins.

Given that the CZA absolutely prohibits heavy industry uses, what constitutes such a use (and is therefore prohibited under the CZA) is of critical significance. The Act defines the term 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

73. DEL. CODE ANN. TIT. 7, § 7003. As the Board stated in *In re Appeal of Occidental Chem. Co.*, No. 259, at 10 (Del. Coastal Zone Indus. Control Bd. July 29, 1992), "In precise and clear language, the Act identifies construction of new heavy industry as incompatible with protection of the environment in the Coastal Zone. DEL. CODE ANN. TIT. 7, § 7001. Thus, the Legislature intended that heavy industry should be regarded as a category of development to be entirely prohibited in the coastal zone."

74. DEL. CODE ANN. TIT. 7, § 7001.

75. *Id.*

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.⁷⁶

Other than the specific examples of facilities that are or are not heavy industry uses, this definition merely provides basic criteria based on size, equipment, and potential to pollute, but little guidance on how to apply the criteria. For example:

Size. The definition suggests that heavy industry uses are “characteristically” greater than 20 acres in size, which of course suggests that uses less than 20 acres in size might still satisfy the definition. Indeed, in one of its early decisions, the Board rejected an applicant’s argument that no use can be a heavy industry use under the Act unless it was greater than twenty acres in size,⁷⁷ reasoning that “[t]he Legislature did not intend that the Act would permit the proliferation of fifteen acre oil refineries, basic steel manufacturing plants, basic cellulose pulp paper mill[s], or chemical plants.”⁷⁸

Equipment. The definition provides a list of the types of equipment that are indicative of a heavy industry use, but in a

76. DEL. CODE ANN. TIT. 7, § 7002(e). In the 1971 original version of the Act, this definition did not include the reference to an incinerator of 5,000 square feet or more being heavy industry, *see* 58 Del. Laws 490, 492 (1971); this language was added in 1998. *See* 71 Del. Laws 894 (1998). Likewise, the original definition did not include in the generic examples of non-heavy industry the language starting at “and on-shore facilities, less than 20 acres in size” to the end of the definition, *see* 58 Del. Laws 490, 492 (1971); this language was added in 1979. *See* 62 Del. Laws 277 (1979). Some of the facilities listed in the 1979 amendment were described as “onshore support facilities for Outer Continental shelf oil and gas activities.” 1984 REPORT, *supra* note 5, at 1-1.

77. *In re DeGussa Delaware, Inc.*, No. 270SD, at 4 (Del. Coastal Zone Indus. Control Bd. Nov. 12, 1973) (copy on file with author). *See also In re Texaco’s Proposed Re-Refining*, No. 260SD, at 17 (Del. Coastal Zone Indus. Control Bd. July 9, 1992) (appeal of the Secretary’s decision finding Texaco’s re-refining to be a “New Prohibited Heavy Industry”) (copy on file with author) (“the mere fact that the proposed project occupies fewer than 20 acres of land cannot salvage it from classification as a heavy industry”).

78. *In re DeGussa Delaware, Inc.*, No. 270SD, at 4 (Del. Coastal Zone Indus. Control Bd. Nov. 12, 1973). This does not mean that a size of less than twenty acres is irrelevant; indeed, the aerosol plant proposed by DeGussa Delaware was only six acres in size, and the fact that the facility’s size was “far less areas than the twenty acre standard of the Act” was one of the factors which convinced the Board that the facility in question was not a heavy industry use. *Id.* at 7.

way that leaves the parameters unclear. For example, the list itself is not exhaustive but merely equipment that is “characteristically” used, suggesting that other equipment not listed might also indicate a heavy industry use. The definition suggests that use of only “some” of the listed equipment can be enough to give rise to a heavy industry use. In short, the list merely gives guidance⁷⁹ and is not a checklist that specifies a certain quantity of equipment types necessary to satisfy the definition. For the individual items on the list, the definition fails to provide numerical guidelines about how many of a particular piece of equipment is necessary for a facility to be considered a heavy industry use. Indeed, the Board has stated that “the character and quantity of equipment to be utilized in the proposed facility is not determinative as to the ‘use’ classification of the facility,”⁸⁰ although it can be a factor in determining whether the facility is a heavy industry use.⁸¹

Pollution/Potential to Pollute. The definition suggests that a facility’s actual ability to pollute and its potential to pollute—whether from operation or from accident—is indicative of a heavy industry use. Evidence of no pollution may be enough to suggest that it is not a heavy industry use,⁸² while that fact that nearly all of the chemicals produced in or utilized by a process are hazardous tilts towards a heavy industry use.⁸³ However, the amount of actual or potential pollution necessary to trigger a finding of heavy industry use is undefined, raising at least the possibility that even small amounts could be enough to make a facility satisfy the definition.

The CZA itself suggests that the General Assembly recognized this imprecision of the definition. In the provisions establishing the administration of the Act, the initial version of the Act

79. See *In re Texaco’s Proposed Re-Refining*, No. 260SD, at 16 (“The equipment listed and the processes identified are intended only to exemplify the types of operations meant to be prohibited in total”).

80. *In re DeGussa Delaware*, No. 270SD, at 6.

81. See *id.* at 7-8 (factor supporting finding that aerosol plant was not heavy industry use was that “the facility will employ a only a limited quantity of the equipment listed by the act as characteristic of a ‘heavy industry use’); *In re Appeal of Occidental Chem. Co.*, No. 259, at 11 (Del. Coastal Zone Indus. Control Bd. July 29, 1992) (on file with author) (closed vessel reactor, scrubbers, wastewater treatment, tanks, and neutralizing equipment in proposed bleach chlorine manufacturing process are “forms and types of equipment suggestive of heavy industry”).

82. See *In re DeGussa Delaware, Inc.*, No. 270SD, at 8 (factor supporting finding that aerosol plant was not heavy industry use was that “the facility is identical to facilities which the appellant operates without detrimental effect upon the environment”).

83. See *In re Appeal of Occidental Chem. Co.*, No. 259, at 11.

required the State Planner to “develop and propose . . . regulations for the further elaboration of the definition of ‘heavy industry’ in a manner consistent with the purposes and provisions of this chapter,”⁸⁴ a responsibility that now resides in the Secretary of Delaware’s Department of Natural Resources and Environmental Control.⁸⁵ The State Planner attempted to meet this requirement,⁸⁶ but no regulatory definition was ever produced. After the shift of administrative responsibility in 1981, the Secretary has so far not issued regulations that define “heavy industry uses” except indirectly (by listing facilities and activities that do not constitute heavy industry uses or permitted industry uses).⁸⁷

B. The Prohibition of Bulk Product Transfer Facilities

Like it does with heavy industry uses, the CZA makes clear that “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.”⁸⁸ The reason for this prohibition is found in the first section of the Act:

[O]ffshore 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 product transfer facilities in the coastal zone is deemed imperative.⁸⁹

84. 58 Del. Laws at 495 (1971).

85. DEL. CODE ANN. TIT. 7, § 7005(c) (2007).

86. See 1977 REPORT, *supra* note 5, at 7. The State Planner proposed an “elaboration” of heavy industry, and hired Batelle, Columbus Laboratories to develop a rating system that would serve “two needs, i.e. allowing for determination of the least desirable industries which should be banned, and providing a method for reviewing an application to determine its potential impact and assess its acceptability.” 1973 REPORT, *supra* note 5, at 4-5. The Board rejected the State Planner’s proposed definition because it tried to identify heavy industry uses by categories instead of doing so on an individual basis. 1977 REPORT at 7-8. There is no evidence that any other definition from these efforts was ever adopted and used in the CZA process.

87. See 7-100-101 DEL. CODE REGS. § 4.1 (Weil 2007) (merely stating that “heavy industry use of any kind not in operation on June 28, 1971” are prohibited in the Coastal Zone, without any definition for the term); §§ 5-1 – 5-19 setting forth list of types of facilities or activities that “shall be deemed not to constitute initiation, expansion or extension of heavy industry or manufacturing uses under these regulations.” The list is set forth *supra*, note 65.

88. DEL. CODE ANN. TIT. 7, § 7003 (2007).

89. DEL. CODE ANN. TIT. 7, § 7001 (2007).

This antagonism against bulk product transfer facilities—even going so far as to declare them and their effects to be “against public policy”—carries through to the Regulations under the Act, which prohibit not only bulk product transfer facilities themselves,⁹⁰ but any attempt to create the equivalent of a bulk product transfer facility.⁹¹

What, then, is a bulk product transfer facility subject to the Act’s prohibition? The Act itself defines it this way:

“Bulk product transfer facility” means 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.⁹²

The *Coastal Barge* decision, as explained above, expanded this language to include transfers between vessels even though there may not be a transfer to or from the shore.⁹³ “Bulk product” has been interpreted to mean “cargoes shipped in large mingled masses and not to cargoes of individually packaged units or individual product items.”⁹⁴ The 1999 Regulations did not expand on this definition, except to formally define what “bulk product” and “docking facility” mean.⁹⁵ A very early opinion by the Delaware

90. See 7-100-101 DEL. CODE REGS. § 4.3 (Weil 2007) (identifying “offshore gas, liquid, or solid bulk product transfer facilities which were not in operation on June 28, 1971” as “uses or activities prohibited in the Coastal Zone”).

91. See 7-100-101 DEL. CODE REGS. § 4.5 (Weil 2007) (“bulk product transfer facilities and pipelines which serve as bulk transfer facilities that were not in operation on June 28, 1971” prohibited); *id.* § 4.6 (“the conversion or use of existing unregulated, exempt, or permitted docking facilities for the transfer of bulk products” prohibited); *id.* § 4.7 (“the construction, establishment, or operation of offshore gas, liquid, or solid bulk product transfer facilities which were not in operation on June 28, 1971” prohibited); and *id.* § 4.8 (“individual pipelines of sets of pipelines which are not associated with a use that obtains a permit but which meet the definition of bulk product transfer facilities” prohibited). The fact that some of these seem to overlap with each other and with § 4.3 suggests an attempt to create broad coverage for the prohibition.

92. DEL. CODE ANN. TIT. 7, § 7002(f).

93. See *Coastal Barge*, 492 A.2d at 1246.

94. Del. Op. Att’y Gen. No. 78-018 (Oct. 5, 1978).

95. The 1999 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. Cargoes such as automobiles, machinery, bags of salt and palletized items that are individually packaged or contained are not considered bulk products in the application of this definition” and “docking facility” as:

Attorney General interpreted the prohibition in § 7003 to mean that “the Legislature absolutely prohibited gas, liquid and solid bulk product transfer facilities in the Coastal Zone if all or any portion of the such facilities are found beyond the mean low water mark.”⁹⁶ A later opinion held that a pipeline could qualify as a bulk product transfer facility.⁹⁷

This definition does create a notable exception: a docking facility or pier that is used for a single industrial or manufacturing facility is not a bulk product transfer facility.⁹⁸ The industrial or manufacturing facility must be one “for which a permit is granted” or which is a “nonconforming use.”⁹⁹ The Board’s very first appeal decision involved a prohibited bulk product transfer facility that ultimately fit under this exception.¹⁰⁰

any structures and/or equipment used to temporarily secure a vessel to a shoreline or another vessel so that materials, cargo, and/or people may be transferred between the vessel and the shore, or between two vessels together with associated land, equipment, and structures so as to allow the receiving, accumulating, safekeeping, storage, and preparation of cargoes for further shipment, and administrative maintenance purposes directly related to such receiving, accumulating, safekeeping, storage, and preparation of cargoes for further shipment.

7-100-101 DEL. CODE DEL. REGS. § 3.0 (Weil 2007).

96. Del. Op. Att’y Gen. No. 71-110 (Sept. 21, 1971). Finding that § 7003 prohibits “off shore” bulk product transfer facilities, the Attorney General looked to definitions of “shore” under Delaware law, which is “the land between the high and low water marks,” quoting *State v. Pennsylvania Railroad Co.*, 228 A.2d 587, 600 (Del. Ch. 1967). He concluded that “off shore would be, therefore, not on the shore, and extending beyond the shore or extending beyond the mean low water mark.” 1971 Del. AG LEXIS 109 at *6. An Attorney General Opinion of the same date found that the mean low water mark to use is the mark as it existed on the day the Act was passed. See 1973 REPORT, *supra* note 5, at 113-114.

97. See 1984 REPORT, *supra* note 5, at 4-1 (summarizing July 6 and September 2, 1977 opinions).

98. DEL. CODE ANN. TIT. § 7002(f) (2007). The definition also excludes docking facilities for the Port of Wilmington. *Id.* This includes facilities within the Port of Wilmington on private land. See *In re Application of the Del. Terminal Co.*, No. CZ 2003-04 (Coastal Zone Indus. Control Bd. Feb. 10, 2004) (status decision) (copy on file with author) (reversing status decision that barred expansion of petroleum storage facility within the Port of Wilmington on privately owned land).

99. DEL. CODE ANN. TIT. 7, § 7002(f). The exception can only apply to one facility; other facilities cannot take advantage of the exception. See 1984 REPORT, *supra* note 5, at 4-4 (summarizing August 6, 1981 Attorney General Opinion). The effect of the exception is that, for permitted facilities, the exception retains CZA control over the project by virtue of the permitting of the industrial or manufacturing use that the docking facility or pier serves. For nonconforming uses, the exception combines the pier with the underlying nonconforming use to complete the Act’s limited control over nonconforming uses.

100. 1973 REPORT, *supra* note 5, at 9. In November 29, 1972, the Board affirmed a status decision that an extension of a pier at Sun Oil’s Marcus Hook, PA Refinery was a prohibited bulk product transfer facility. *Id.* The Board’s primary reason for its

The Board, in *Coastal Zone Status Decision on the Application of Crown Landing LLC*, specifically examined the issue of the single manufacturing use exception.¹⁰¹ Crown Landing planned to build a dock in the Delaware River connected to an on-shore facility in New Jersey for the purpose of unloading bulk quantities of Liquefied Natural Gas (LNG) from supertankers.¹⁰² Because

decision was that the pier “would largely be a conduit (for trans-shipment) of petroleum products rather than a facility necessary to operation” of the refinery, and that this increased trans-shipment capacity was therefore an “entirely new use.” *Id.* at 26. The Report goes on to note that, after the ruling, Sun Oil agreed to modify its use of the pier, and after the changes, Sun Oil, the Board, and the State Planner agreed the pier fit under the single industrial facility exception. *Id.* at 9.

101. *In re* Application of Crown Landing, LLC, No. CZ 2005-01, at 4 (Del. Coastal Zone Indus. Control Bd. Apr. 14, 2005) (status decision) (copy on file with author).

102. *Crown Landing* did not challenge the assumption that a dock located in the Delaware River (and therefore located in the State of Delaware by virtue of Delaware’s ownership of the River up to the low water mark on the New Jersey side of the river, *see* *New Jersey v. Delaware*, 291 U.S. 361 (1934)), but servicing a facility located in New Jersey, could fall within the jurisdiction of the Act. A 1978 Attorney General Opinion concluded that it does by noting:

If the development on the eastern rim of the state were to be uncontrolled by the regulatory mechanism of the Coastal Zone Act, pressure of development antithetical to the Act would exist The question then becomes the extent to which these same rules apply where the adjacent facility is located in another jurisdiction over which the Delaware legislature has no authority. There is no reason to believe that the legislature intended any different rule to apply to unattached lands from the lands attached to the Delaware shore within the Coastal Zone. Allowing the bulk product transfer facilities to generate pressure for industry anywhere in the water and air basins would be contrary to the purposes of the Act. This would apply no less to that part of Delaware which is located adjacent to New Jersey than to the fast lands of Delaware itself. Failure to apply the exemption to those facilities built adjacent to New Jersey would lead to an anomalous administration of the Act. The Act should not be read so as to produce an absurd result.

Del. Op. Att’y Gen. No. 78-018, 1978 WL 22485, at * 2. Though Crown Landing did not appeal under the Act, the battle has moved to a different venue—the United States Supreme Court. *See* Kenneth T. Kristl, *A Boundary Dispute’s Effect on Siting an LNG Terminal*, 21 NATURAL RES. & ENV’T 34 (2006). On April 12, 2007, Special Master Ralph Lancaster, Jr. issued his report and recommendation, finding that Delaware’s police power applied to projects on the New Jersey shore that extended into the Delaware River and into the State of Delaware. *See* Report of the Special Master at 84–85, *New Jersey v. Delaware*, No. 134 (U.S. Apr. 12, 2007), [http://www.pierceatwood.com/files/301_PLD%20Report%20of%20Special%20Master%20PDF%20\(W0725778\).pdf](http://www.pierceatwood.com/files/301_PLD%20Report%20of%20Special%20Master%20PDF%20(W0725778).pdf). New Jersey filed exceptions to the Report, the case was argued to the United States Supreme Court on November 27, 2007, and on March 31, 2008 the Supreme Court ruled 6-2 in Delaware’s favor. *See* *New Jersey v. Delaware*, No. 134, slip op. at 1, 552 U.S. ___ (Mar. 31, 2008). Justice Ginsberg, writing for the Court, accepted the Special Master’s recommendation “in principal part,” *id.* at 3, and found that “New Jersey and Delaware have overlapping authority to regulate riparian structures and operations of extraordinary character extending offshore of New Jersey’s domain into territory over which Delaware is sovereign.” *Id.* Given Dela-

LNG is kept at a temperature of about -260° F, the on-shore facility would heat up the LNG, add nitrogen (as necessary to adjust BTU content) and mercaptin (an odorant that gives natural gas its smell), and then pump the natural gas into existing pipelines to feed natural gas demand in the Northeast.¹⁰³ Crown Landing argued that the dock at which supertankers would unload fit under the single manufacturing facility exception in the § 7002(f) definition because the on-shore processes were a form of manufacturing in that the product entering the natural gas pipelines would be different from the LNG coming off the tanker.¹⁰⁴ The Board found as a matter of fact, however, that the on-shore component was not a manufacturing facility because the facility was “a single, integrated facility the onshore component of which exists solely to support the offshore component.”¹⁰⁵ Thus, as a matter of law, “the entire proposed facility [was] a docking facility which [did] not support a manufacturing or other facility.”¹⁰⁶ In other words, the Board viewed the single manufacturing facility exception as re-

ware’s finding that the LNG terminal was a heavy industry use and bulk product transfer facility under the CZA, the majority concluded that “[c]onsistent with the scope of its retained police power to regulate certain riparian uses, it was within Delaware’s authority to prohibit construction of the facility within its domain.” *Id.* at 23.

103. *Crown Landing*, CZ 2005-01, at 4.

104. *Id.* at 5. To prove this point, Crown Landing presented expert testimony to show that the on-shore component met the definition of manufacturing. *Id.* at 5–6. DNREC countered with expert testimony reaching the opposite conclusion. *See id.* at 6.

105. *Id.* at 7. This led the Board to conclude that “[t]he real sole purpose of the proposed facility is to serve as a bulk product transfer facility.” *Id.*

106. *Id.* at 10. The Board later noted that several parties had referred to a January 20, 1972 letter from the Delaware Attorney General concerning a status decision about an LNG terminal proposed by El Paso Eastern Company. A copy of that letter can be found in 1973 REPORT, *supra* note 2, at 103–04. In discussing the issue of whether the LNG terminal would qualify under the single industrial or manufacturing facility exception, the Attorney General stated:

It is my opinion that the El Paso Eastern terminal does not fit within the “single industrial or manufacturing facility” exception The facts contained in the letter from the El Paso Eastern Company indicate that the LNG terminal in question is merely a way station in the natural gas transportation system which El Paso Eastern is endeavoring to develop. It is quite clear that the legislative intent was to permit docking facilities where such facilities would benefit such industries as would be granted permits to operate in the Coastal Zone. Here the situation is reversed. The terminal will only exist as an adjunct to the docking facility. In other words, the important part of the project to El Paso Eastern is not the “industrial facility” but the docking facility.

Id. at 1. The Board quoted part of this excerpt and found that “a similar analysis applies to the proposed Crown Landing construction.” *Crown Landing*, CZ 2005-01, at 10.

quiring two completely separate facilities: a docking facility or pier, and a manufacturing facility. By finding that the onshore and offshore components of Crown Landing's proposal together constituted a docking facility, the second necessary component of facility was missing, and hence the exception could not apply.

C. Permitted Industrial or Manufacturing Uses

The third category of industrial development regulated under the CZA is industrial uses that the Act allows to operate in the industrial zone. While the Act initially describes this category as "industrial development other than that of heavy industry in the coastal zone of Delaware,"¹⁰⁷ the section of the Act establishing the permitting requirement describes it in two ways: as "manufacturing uses not in existence and in active use on June 28, 1971"¹⁰⁸ or the "expansion or extension" of a previously permitted use or a nonconforming use.¹⁰⁹ Thus, the Act requires a permit for "manufacturing uses" and any expansion or extension of a nonconforming use or of a previously permitted manufacturing use.

What falls within the term "manufacturing use"? Although the Act specifically defines eight terms,¹¹⁰ it does not define the term "use," despite the fact that it appears in numerous sections,¹¹¹ and so determining whether something is a "manufactur-

107. DEL. CODE ANN. TIT. 7, § 7001 (2007).

108. DEL. CODE ANN. TIT. 7, § 7004. Given the language of § 7001 describing this category as "industrial development other than that of heavy industry," it would seem obvious that manufacturing which amounts to a heavy industry use should not be able to qualify for a permit. The Board has rejected a claim that a chlorine bleach plant was a "simple manufacturing use" because it found that the chlorine plant would be heavy industry. See *In re Appeal of Occidental Chem. Co.*, No. 259, at 13 (Del. Coastal Zone Indus. Control Bd. July 29, 1992).

58 Del. Laws at 495 (1971).

109. *Id.* Originally, the Act only allowed "expansion" or "extension" of "non-conforming manufacturing uses." See 58 Del. Laws 490, 493 (1971). In other words, heavy industry uses and bulk product transfer facilities that were nonconforming uses could *not* expand. In 1992, the Act was amended to remove the "manufacturing" limitation so that expansion or extension of all nonconforming uses would be permissible. See 68 Del. Laws 1187 (1992). The notion of expansion of nonconforming uses is discussed more completely *infra* Section II(D).

110. DEL. CODE ANN. TIT. 7, § 7002 (a) (defining "coastal zone"); (b) (defining "non-conforming use"); (c) (defining "environmental impact statement"); (d) (defining "manufacturing"); (e) (defining "heavy industry use"); (f) (defining "bulk product transfer facility"); (g) (defining "Board"); and (h) (defining "person").

111. *Id.* § 7002(b) (Nonconforming use "means a use, whether of land or a structure, which does not comply with the applicable use provisions of this chapter, where such use was lawfully in existence and in active use . . ."); *id.* § 7002(c) (environmental impact statement defined as detailed description of "effect of the proposed use on the immediate and surrounding environment and natural resources"); *id.* § 7002(e)

ing use" subject to § 7004(a) involves figuring out whether the proposed industrial development involves "manufacturing." The Act defines it in this way:

"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.¹¹²

Mechanical or chemical transformation are the key components. Thus, for example, changing the sugar content and adding water, peel oil, and essences to orange juice concentrate,¹¹³ or pulverizing built-up roofing to make new asphalt roofing shingles¹¹⁴ involve manufacturing requiring a CZA permit, while the mere dilution of caustic soda solution with water,¹¹⁵ and the mere extraction and purification of landfill gas do not.¹¹⁶ The 1999 Regulations do not add to the Act's definition.¹¹⁷ Instead, they set forth certain "uses

(heavy industry use "means a *use*" characteristically involving specified size and equipment); *id.* § 7003 (prohibiting "heavy industry *uses*"); *id.* § 7004(a) (allowing "manufacturing *uses*" and expansion of "nonconforming *uses*" by permit and requiring that "county or municipality having jurisdiction has first approved the *use* in question by zoning procedures provided by law").

112. DEL. CODE ANN. TIT. 7, § 7002(d).

113. See Letter from John E. Wilson, III, Sec'y, DNREC, to Walter C. Tuthill, Esq., representing Citrus Coolstore, Inc. (Dec. 8, 1983) (copy on file with author).

114. See Letter from John E. Wilson, III, Sec'y, DNREC, to John Rocco, Dir., Res. Recovery Ass'n of Wilimington (July 1, 1986) (copy on file with author).

115. See Letter from John E. Wilson, III, Sec'y, DNREC, to Hugh McFadden, Plant Manager, Chloromone Corp. (April 7, 1986) (copy on file with author).

116. See Letter from John E. Wilson, III, Sec'y, DNREC, to Douglas Nielsen, Vice Pres., Wehran Energy Corp. (Feb. 5, 1985) (copy on file with author).

117. See 7-100-101 DEL. CODE REGS. §§ 6.0-6.3 (1999). However, the 1999 Regulations set forth certain "uses or activities [that] are permissible in the Coastal Zone by permit" and provides the following list:

§ 6.1: construction of pipeline or docking facilities serving as offshore bulk product transfer facilities if such facilities serve only one on-shore manufacturing or other facility. However, the materials transferred through the pipeline or docking facility must be used as a raw material in the manufacture of other products or be finished products being transported for delivery in order to be permissible under the regulations.

§ 6.2: public sewage treatment or recycling plants.

§ 6.3: any new activity other than those listed in §§ 5.1-5.19 of the regulations [see list *supra* note 70] that may result in any negative environmental impact on the factors found in DEL. CODE ANN. TIT. 7, § 7004(b), including: environmental impact as defined in § 8.2.1-8.2.10 of the regulations; economic effect of the project; aesthetic effect, such as impact on

or activities [that] are permissible in the Coastal Zone by permit," without any indication that the list is comprehensive.¹¹⁸

In determining whether manufacturing is involved, the Board has held that the decision maker "must be able to look at the complete use being made of the industrial development. That is to say the [decision maker] must consider the facility as a whole in determining whether or not that portion of the facility to be constructed within the Coastal Zone is, in fact, part of the manufacturing use."¹¹⁹ Thus, a water pumping system in the coastal zone for a proposed nuclear power plant could not be judged separately from the facility's operation,¹²⁰ while a buried natural gas pipeline was viewed separately because it was not "inextricably connected" to a proposed turbine project that was the subject of a separate CZA proceeding.¹²¹

The Act requires that the decision to issue a permit involve consideration of several impacts or effects of the proposed use. These impacts include:

Environmental Impacts. The list of issues to assess in considering environmental impacts is extensive. Obvious impacts, such as air and water pollution, require consideration of probable pollution under both normal operating conditions as well as during mechanical malfunction and human error.¹²² Likely de-

the scenic beauty of the surrounding area; the number and type of supporting facilities required; effect on neighboring land uses, including effect on public access to tidal waters, effects on recreational areas, and effect upon adjacent residential and agricultural areas; and county/municipal comprehensive plans for development or conservation.

The 1999 Regulations do not indicate if this list is comprehensive. *See id.*

118. *See* 7-100-101 Del. Code Regs. §§ 6.0-6.3.

119. *In re Delmarva Power & Light Co.*, No. 421SD, at 3 (Del. Coastal Zone Indus. Control Bd. July 3, 1974) (copy on file with author). The Board supported its conclusion with the following observation:

The purpose and intent of the Coastal Zone Act would be rendered meaningless if it were to be decided that only those elements of a facility which were located within the coastal zone geographical area could be considered in determining whether or not a permit should issue. This is true only where, as here, the industrial construction to be located within the Coastal Zone is an essential and integral part of the facility as a whole.

Id. at 4.

120. *Id.* at 3-4. However, the Board also made clear that, in examining the environmental impacts of the project, the focus should be limited to those aspects of the facility which directly affect the coastal zone. *Id.* at 4.

121. *In re Delmarva Power & Light Co. Claymont-Wilmington Natural Gas Pipeline*, No. 217SD, at 6 (Del. Coastal Zone Indus. Control Bd. July 22, 1988) (appeal of the status decision by the Delaware Audubon Soc'y) (copy on file with author).

122. DEL. CODE ANN. TIT. § 7004(b).

struction of wetlands must be considered as well as destruction of flora and fauna.¹²³ Less obvious impacts must also be considered, including impacts on drainage, flood control, land erosion, and effects on surface, ground, and subsurface water resources from operations,¹²⁴ as well as the "likelihood of generation of glare, heat, noise, vibration, radiation, electromagnetic interference and obnoxious odors."¹²⁵ The addition of pollutants over current levels can be enough to justify denial of a permit,¹²⁶ while a reduction in environmental impacts¹²⁷ or the presence of safety measures¹²⁸ can favor granting a permit. However, "the Coastal Zone Act does not require that a project meet particular Clean Air Act standards to qualify for a State Coastal

123. *Id.*

124. *Id.*

125. *Id.* See also *in re* Jacob Kreshtool, No. 221P, at 8, 10 (Del. Coastal Zone Indus. Control Bd. July 22, 1988) (appeal from the Delmarva Power & Light Co. Gas Combustion Turbine Permit Decision) (copy on file with author) (finding noise from new gas turbines at power plant are a negative environmental impact, but requiring modification of permit condition to set a specific decibel level reading).

126. See *in re* Appeal of J-M Manufacturing Co., No. 165, at 5-6 (Del. Coastal Zone Indus. Control Bd. Nov. 29, 1985) (copy on file with author) (affirming decision to deny permit for PVC pipe plant because of likely increase in vinyl chloride monomers emissions in a non-attainment area).

127. See *Kearney v. Coastal Zone Indus. Control Bd.*, 2005 WL 3844219, at * 6-7 (Del. Super. March 18, 1985) (net positive effects from 219 tons per year (t/y) reduction in SO₂ emissions, elimination of 2,700 t/y of sodium sulfate wastes, and 30,000 gallons per day reduction in potable water consumption, as against increased emissions of 12 t/y of NOX, 26.4 t/y of CO, and 11 t/y of acid mist, "show that offsets [i.e. positives] exist which are clearly and demonstrably more beneficial than any harm from the project"); *In re* Coastal Zone Permit 406P Issued to E.I. DuPont DeNemours & Co., No. CZ 2003-02 & 03, at 4 (Del. Coastal Zone Indus. Control Bd. Oct. 24, 2003) (copy on file with author) (citing fact that proposed new sulfuric acid recovery facility would have less overall air emissions than reconstructed old facility or what refinery would have been able to legally produce under permit for old facility shows an overall positive environmental effect); *In re* The Appeal of the Delaware Audubon Soc'y, No. 95-1, at 10 (Del. Coastal Zone Indus. Control Bd. July 28, 1995) (copy on file with author) (noting proposed expansion of bulk product transfer facility to handle other products while reducing amount of oil off-loaded makes project "less hazardous than its existing authority" in affirming permit issued for facility).

128. See *E.I. DuPont DeNemours & Co.*, No. CZ 2003-02 & 03, at 4 (agreeing with finding by Secretary that "the requirement of a detailed Process Safety Management Program . . . subject to DNREC's review prior to operation, represents a reasonable consideration of the environmental impact of the proposed use during mechanical malfunction and human error").

Zone Act permit,”¹²⁹ and the Board will not impose such standards in connection with reviewing a permit under the Act.¹³⁰

Economic Effects. This analysis focuses on what economic good the proposed use will generate, including jobs and income (i.e., wages and salaries) created by the project as well as the likely tax revenues that would accrue to state and local government.¹³¹ Interestingly, the Act requires that the jobs and income component of this effect be measured “in relation to the amount of land required,”¹³² without any guidance as to what relationships are better or worse for the permitting decision.

Aesthetic Effects. This analysis is relatively undefined—the only example the Act gives is “impact on scenic beauty of the surrounding area.”¹³³ Nevertheless, any impact that can be described as “aesthetic” appears to be fair game.

Effects on Neighboring Land Uses. This analysis requires consideration of how the project might affect such things as public access to tidal waters, effects on recreational areas, and the effects on adjacent residential and cultural areas.¹³⁴

Effects on Local Land Use Plans. This analysis requires consideration of the project’s affect on any county or municipal comprehensive plans.¹³⁵

Size Effects. This analysis requires consideration of the “Number and type of supporting facilities required and the impact of such facilities on all factors listed in this subsec-

129. *In re Coastal Zone Permit 403P Issued to Sunoco, Inc.*, No. CZ 2003-01, at 8 (Del. Coastal Zone Indus. Control Bd. Oct. 17, 2003) (copy on file with author) (rejecting argument that evaluation of proposed hydrogen sulfide processing unit at refinery under § 7004(b) requires project to achieve “lowest achievable emission rate” or best available control technology” standards under Clean Air Act).

130. *Id.*

131. DEL. CODE ANN. TIT. 7, § 7004(b)(2).

132. *Id.*

133. DEL. CODE ANN. TIT. 7, § 7004(b)(3).

134. *Id.* § 7004(b)(5).

135. DEL. CODE ANN. TIT. 7, § 7004(b)(6). Note that § 7004(a) specifically states 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.” The Superior Court has ruled that this does not require that the applicant have final zoning approval before it applies for a CZA permit, provided that there is some evidence of likely approval by the zoning authority and the CZA permit includes an express condition tying its validity to obtaining a zoning permit. See *Kearney v. Coastal Zone Indus. Control Bd.*, 2005 WL 3844219 at * 6 (Del. Super. March 18, 1985) (advisory letter from County on zoning and fact that County had previously approved sulfuric acid regeneration units at site, plus permit condition tying permit’s own validity to applicant obtaining full zoning permits once it finalizes a design plan, held sufficient to satisfy § 7004(a)).

tion"¹³⁶—something that would likely occur in conducting the analyses under the other factors anyway.

In terms of these statutory factors, no one requirement necessarily controls. As the Board put it:

A permitted use which is environmentally benign—that is which meets applicable air, water and other environmental regulations—may be rejected because it would affect negatively tourism or recreation, or impede access to wetlands or be aesthetically unacceptable. An economic development project which raises serious concerns about the applicant's responsibility in meeting environmental regulations might be rejected.¹³⁷

The 1999 Regulations largely track the statutory language, requiring a permit applicant to submit an Environmental Impact Statement¹³⁸ that conducts the statutorily-required analyses of the specified effects.¹³⁹ However, the 1999 Regulations add some specificity to the required analyses. For example, in addition to requiring the analysis of probable air, land, and water pollution, the 1999 Regulations require the applicant to "provide a statement concerning whether, in the applicant's opinion, the project or activity will in any way result in any negative environmental impact on the Coastal Zone."¹⁴⁰ The 1999 Regulations also add three requirements to the Environmental Impact Statement that are not specifically listed in the Act:

- "[A]n assessment of the project's likely impact on the Coastal Zone environmental goals and indicators."¹⁴¹ These "goals and indicators" are not defined in the Regulations—indeed, the Regulations indicate that they "shall be developed by the Department after promulgation of these regulations and used for assessing applications and determining the long-term environmental quality of the Coastal Zone."¹⁴² A Delaware Coastal Zone Environmental In-

136. DEL. CODE ANN. TIT. 7, § 7004(b)(4).

137. *In re Kreshtool*, No. 176, at 9 (Coastal Zone Indus. Control Bd. Apr. 11, 1986) (appeal of status decision dated Jan. 24, 1986 granting Crown Zellerbach Corp. a coastal zone permit) (copy on file with author) (affirming decision to allow Crown Zellerbach to add and operation four flexographic printing presses to its existing operation).

138. 7-100-101 DEL. CODE DEL. REGS. § 8.1.3 (Weil 2007).

139. *Id.* § 8.2.

140. *Id.* § 8.2.1.

141. *Id.* § 8.2.2.

142. *Id.*

dicators Technical Advisory Committee (EITAC) was formed in 1999 and made recommendations to DNREC on what the goals and indicators should be;¹⁴³ while DNREC adopted the goals, there is no evidence that DNREC adopted or developed any indicators.¹⁴⁴

- Consider the effect of the proposed project on threatened and endangered species.¹⁴⁵
- Information on “the raw materials, intermediate products, byproducts and final products and their characteristics from material safety data sheets (MSDS’s) if available, including carcinogenicity, mutagenicity and/or the potential to contribute to the formation of fog.”¹⁴⁶

Perhaps the 1999 Regulation’s most significant addition to the permitted industrial use category is the requirement that a permittee reduce negative environmental impacts through an “offset proposal.”¹⁴⁷ The requirement applies to any “activity or facility that will result in any negative environmental impact.”¹⁴⁸ The offset proposal must satisfy two important requirements: it “must

143. See DEL. COASTAL ZONE ENVTL. INDICATORS TECHNICAL ADVISORY COMM., ENVIRONMENTAL GOALS AND INDICATORS FOR DELAWARE’S COASTAL ZONE (March 1999), [http://www.dnrec.delaware.gov/Admin/CZA/Documents/eitacfinal doc.pdf](http://www.dnrec.delaware.gov/Admin/CZA/Documents/eitacfinal%20doc.pdf). The recommended goals relate to improved air quality, improved water quality, protecting habitat, land cover, aesthetics, and preserving and maintaining healthy living resources. *Id.* at ii. Each goal has a set of indicators that is designed “to track progress towards these goals.” *Id.* For example, for the air quality goal, EITAC proposed “Air Quality Indicators” consisting of an Ambient Air Indicator (a database of all information on ambient air quality, air emissions from pollution sources, and trends in pollutant loading), *see id.* at 21; Affected Populations Indicator (designed to identify at-risk populations by looking at human health and plant impacts from pollutants), *see id.* at 21–22; Accidental Releases Indicator (compiling data from actual releases and estimates of impacts from potential releases to develop vulnerability zones), *see id.* at 22; and an Atmospheric Deposition Indicator (focused on compiling data via sampling stations on concentrations of NO₃, NH₄, SO₄, and pH), *see id.*

144. On January 31, 2000, then-Secretary Nicholas DiPasquale signed a memo approving the four goals recommended by EITAC. See Memorandum from Sarah W. Cooksey, Administrator, to Nicholas A. DiPasquale, Secretary of DNREC 2 (January 31, 2000) (copy on file with author). However, while DNREC’s website page concerning the Coastal Zone Act provides a link to the EITAC recommendation report, there is nothing to indicate what (if anything) DNREC ultimately adopted. DNREC, Coastal Zone Act Program, <http://www.dnrec.delaware.gov/Admin/CZA/Pages/CZAHome.aspx> (select “Final Recommendations of the Environmental Indicators Technical Advisory Committee”) (last visited Apr. 8, 2008). Richard Fleming, the co-chair of EITAC, has confirmed that DNREC never adopted or promulgated any indicators. Telephone interview of Richard Fleming (April 23, 2007).

145. 7-100-101 DEL. CODE REGS. § 8.2.9 (Weil 2007).

146. *Id.* § 8.2.10.

147. *Id.* § 9.0.

148. *Id.* § 9.1.1.

more than offset the negative environmental impacts associated with the proposed project or activity;"¹⁴⁹ and should be "well-defined and contain measurable goals or accomplishments which can be audited by the Department"¹⁵⁰ properly presented in the application.¹⁵¹ Of these, the requirement that the negative environmental impacts must be "more than offset" is by far the most intriguing. The effect of "more than" offsetting negative environmental impacts is that there be a net *positive* environmental impact from the project. Properly applied, this requirement is a revolutionary way to improve the coastal environment. However, questions about its effectiveness have been raised.¹⁵² The Secre-

149. *Id.* §§ 9.1.1, 9.1.2.

150. *Id.* § 9.1.4.

151. The Regulations specify that the offset proposal must provide sufficient information to allow the Secretary to determine the adequacy of the proposal, including such things as a qualitative and quantitative description of how the offset proposal will more than offset the negative environmental impacts of the permitted facility, *id.* § 9.2.1; the details of how and when the proposal will be carried out, *id.* § 9.2.2; what the environmental benefits from the offset proposal are, *id.* § 9.2.3; how the proposal will impact attainment of the Department's environmental goals for the Coastal Zone, *id.* § 9.2.4; any negative impacts associated with the offset project, *id.* § 9.2.5; scientific evidence to support the claim that the proposal will produce its intended results, *id.* § 9.2.6; and how success or failure of the proposal will be measured, *id.* § 9.2.7. To assist applicants in identifying possible offset proposals, DNREC makes available a report providing initial descriptions of 67 "potential Environmental Enhancement projects that may be considered by applicants" for permits under the Act. See DNREC, ENVIRONMENTAL ENHANCEMENT PROJECTS FOR DELAWARE'S COASTAL ZONE at 1 (August 2000), <http://www.dnrec.delaware.gov/Admin/CZA/Documents/CZAEenhancements.pdf> (Some examples of the projects listed are incentive programs for clean burning fuels, community plant-a-tree projects, converting brownfields to open space, emission trading outside the coastal zone, wildlife habitat restoration with species reintroduction, farmland BMP work, conservation easements, noxious weed control, and septic maintenance and replacement projects.

152. The concerns relate primarily to the location and quantity of the benefits. As to location, while the 1999 Regulations make clear that there is a preference for projects that are within the Coastal Zone, occur in the same environmental medium as the negative environmental impact it offsets, occurs at the same site as the facility being permitted, and occur simultaneously with the implementation of the activity giving rise to the need for an offset, 7-100-101 DEL. CODE REGS. § 9.1.3 (Weil 2007), offsets outside the coastal zone are possible. That leads to a concern about whether the process will deliver the benefits envisioned. See May & Myers, *supra* note 17, at 22 ("the Regulation's allowance that environmental degradation that occurs in the coastal zone may be "offset" by improvements outside of the zone—and theoretically even outside of the State—may mean that permitted uses may not be as carefully scrutinized as would otherwise be the case. Although it is a fair statement that environmental improvements that occur outside of the coastal zone may lead to environmental improvement within the zone, it is also fair to be skeptical about the degree to which such association can be made, monitored, and enforced"). The quantity concern arises from regulatory language suggesting that applicants who have undertaken "past voluntary improvements" may be required to provided less of an offset. See 7-

tary will review the offset proposal and make a preliminary determination about whether the proposal is sufficient.¹⁵³ All CZA permits issued shall be contingent upon the applicant carrying out the proposed offset, and the schedule for completion of the offset shall be included as an enforceable condition of the permit.¹⁵⁴

D. Nonconforming Uses

The final category of industrial development recognized in the CZA is nonconforming uses. The Act defines it 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, 1971.¹⁵⁵

This definition therefore requires a use have two characteristics in order to be considered a “nonconforming use.” First, it must “not comply” with the use provisions in the Act. This can only mean one thing: that the use in question is a heavy industry use or a bulk product transfer facility (in which case it does “not comply” because it would be prohibited under § 7003 of the Act¹⁵⁶) or else it is a manufacturing use that requires a permit which does not have permit (in which case it does “not comply” because such uses must have a permit under § 7004 of the Act).¹⁵⁷ In short, nonconforming uses are uses that would otherwise be prohibited under the Act.¹⁵⁸ Second, to be a nonconforming use under the Act, the

100-101 DEL. CODE REGS. § 9.1.2 (“Applicants who have undertaken past voluntary improvements may be required to provide less of an offset than applicants without a similar record of past achievements”). This discretion has been criticized. See May & Myers, *supra* note 17, at 22 (DNREC’s nearly unfettered discretion to allow an applicant who has made past “voluntary improvement” to provide less of an offset is problematic for two reasons. First, it works in only one direction: While the Regulations allow DNREC to reduce the amount of offset required because of past good deeds, it does not allow the agency to increase offsets when an applicant has refused to make such improvements, or has otherwise been a bad actor. Second, the Regulations are silent on what constitutes “voluntary improvements.” Conceivably, any environmental improvements that an applicant has made due to any Federal, State or Local requirement, for example, could be considered for the reduced offset.).

153. 7-100-101 DEL. CODE REGS. § 9.1.5.

154. *Id.* § 9.3.1.

155. DEL. CODE ANN. TIT. 7, § 7002(b).

156. *Id.* § 7003.

157. *Id.* § 7004.

158. See *In re Delaware Audubon Soc’y*, No. 95-1, at 10 (Del. Coastal Zone Indus. Control Bd. July 28, 1995) (appeal) (copy on file with author) (“The Board finds that Oceanport’s facility was in active use in 1971 by its predecessor, Texaco, and was

otherwise prohibited use must have been "lawfully in existence and in active use" prior to June 28, 1971 (the date Delaware enacted the CZA). Combining these two characteristics, the Act views nonconforming uses as uses which would otherwise be prohibited under the Act but for the fact that they were in existence and active use at the time the Act was passed.

Nonconforming uses are especially important because, in their original form, they are allowed to operate as they had at the time of the Act's passage without any requirement for a permit: "Any nonconforming use in existence and in active use on June 28, 1971, shall not be prohibited by this chapter"¹⁵⁹ Thus, the Act takes a hands off approach to nonconforming uses as they existed on June 28, 1971. This means that some heavy industry, bulk product transfer facilities, and unpermitted manufacturing facilities are allowed to operate in the Coastal Zone despite the Act's prohibitions or limitations on such uses.

This apparent contradiction was explained, at least early on, by reference to the corresponding notion of nonconforming uses under zoning law. The Act originally did not allow for heavy industry nonconforming uses to expand,¹⁶⁰ and thus early interpretations cited Delaware case law under zoning¹⁶¹ and voiced the expectation that nonconforming uses are expected to wither and eventually die.¹⁶² This zoning view of nonconforming uses under the Act was, however, undermined by two developments. First,

nonconforming in that its handling of oil would otherwise have been prohibited in the Coastal Zone"); 1984 REPORT, *supra* note 5, at 4-2, -3 (summarizing the March 6, 1979 Attorney General opinion as stating that, "[a] nonconforming use is a heavy industry use or bulk product transfer facility which would otherwise be prohibited but which was in lawful operation prior to and at the time of enactment" of the Act).

159. DEL. CODE ANN. TIT. 7, § 7004(a).

160. The Act originally only allowed for the expansion of nonconforming manufacturing uses. See 58 Del. Laws 490, 493 (1971).

161. *New Castle County v. Harvey*, 315 A.2d 616 (Del. Ch. 1974).

162. See *In re Fischer Enters., Inc.*, No. 192, at 7 (Del. Coastal Zone Indus. Control Bd. Oct. 28, 1986) (appeal of the status decision) (copy on file with author) ("it is clear that the intent of 7 Del. C. sec. 7004(a) is not to allow any extension or expansion of a nonconforming use without a permit. This embodies the traditional law about nonconforming uses that they are allowed to exist with the idea that they will not grow and will become smaller and eventually extinct by attrition"); *In re Application of Dunn Dev. Co.*, No. 127, at 7 (Del. Coastal Zone Indus. Control Bd. 1981) (status determination) (copy on file with author) (stating that intent of the Act "is to prohibit new bulk product transfer facilities, see 7 Del. C. § 7001 [sic], and gradually eliminate existing bulk product transfer facilities (and other nonconforming uses) through attrition, as with existing Delaware case law on nonconforming sage,"). See also 1984 REPORT, *supra* note 2, at 4-3 (summary of the August 6, 1981 Attorney General Opinion: "in general, the ultimate extinguishment of nonconforming uses is an objective of

soon after the passage of the Act, both the State Planner and the Board recognized that some changes at heavy industry nonconforming uses needed to be allowed (especially when existing heavy industry uses wanted to modify their facilities either for business reasons or because of requirements for pollution control equipment).¹⁶³ To address the problem, the Board adopted a definition of expansion or extension that focused on changes which significantly increase production capacity, land use, or environmental impact.¹⁶⁴ The effect of this definition was two-fold. The first was that, during the 1971–1992 period before the Act was amended, at least 75 changes to nonconforming uses out of a total of 212 proposals reviewed by the permitting authority (or roughly 35% of all status decisions) were found not to be expansions and therefore found *not subject to regulation under the Act*.¹⁶⁵ The other effect

zoning ordinances. A rebuilding of [a] completely destroyed nonconforming structure or facility would be contrary to this philosophy”).

163. See CONTINENTAL SHELF REPORT, *supra* note 15, at 36; 1973 REPORT, *supra* note 5, at 12–13.

164. See 1973 REPORT, *supra* note 5, at 99.

165. For examples of the 75 projects found not regulated, see 1973 REPORT, *supra* note 5, at 18 (construction of carbon monoxide boiler and mercox treatment plant to remove organic sulfides at Getty Oil refinery); see also *id.* at 21 (construction of Stretford Sulfur Recovery Unit to remove hydrogen sulfide at Sun Olin Chemical Company plant in Claymont); *id.* at 27 (replacement of batch-type Sulfate Process with Chlorine Process at E.I. DuPont de Nemours and Company titanium dioxide facility); *id.* at 30 (liquid carbon dioxide manufacturing facility at Sun Olin plant in Claymont); *id.* at 30–31 (sulfur dioxide recovery plant at Getty Oil refinery in Delaware City); *id.* at 33 (activated sludge wastewater treatment plant at Getty refinery); *id.* at 36–37 (construction of atactic recovery unit at Amoco Chemicals Corporation facility in New Castle); *id.* at 45 (modification to sulfuric acid alkylation plant at Getty Oil's refinery); *id.* at 45–46 (wastewater treatment plant for ICI Americas Wilmington plant); 1977 REPORT, *supra* note 5, at 33 (modification of catalytic cracker reactor at Getty Oil's refinery); *id.* at 34 (replacement of steam boilers at Stuafter Chemical PVC plant near Delaware City); *id.* at 35 (debottlenecking project to increase polypropylene production at Amoco New Caste Polymer plant); *id.* at 38 (plant improvements to increase sodium bisulfate production at Allied's Claymont plant); *id.* at 41 (installation of hydrodesulfurization unit and a hydrogen plant at Sul Oil's refinery); *id.* at 42 (installation of equipment to increase PVC resin production at Diamond Shamrock facility); *id.* at 43 (installation of 10,000 kW turbogenerator to increase electric generating capacity at Getty Oil refinery); *id.* at 44 (installation of two flexographic printing presses at Crown Zellerbach plant); *id.* at 49 (gas recovery system at Amoco plant); *id.* at 50 (expansion of PVC paste production facility at Diamond Shamrock's Delaware City facility); *id.* at 52 (expansion of wastewater treatment facility at Standard Chlorine of Delaware's facility); 1984 REPORT, *supra* note 5, at 3–2 (10,000 gallon liquid sulfur dioxide storage and handling system at Allied Chemical Claymont plant); *id.* (Aromatics-150 recovery system and stack-scrubbing unit at Getty Oil's refinery); *id.* (modification of sorbitol processing facility at ICI America's New Castle plant); *id.* at 3–3 (modification of fractionation tower at Getty Oil's refinery); *id.* (production facility modification at ICI Americas facility in New Castle even

was that, when the Board actually considered the application of its definition, it tended to view the concept of "expansion" in terms of the types of activities conducted or that could have been conducted at the nonconforming facility. Thus, *In re Coastal Zone Status Determination Regarding Application of Dunn Development Co.* allowed expansion of a nonconforming bulk product transfer facility to include handling bulk coal transfers¹⁶⁶ because it would not "substantially change the character of the facility as it existed at the time the Act was adopted."¹⁶⁷ The transfer activity was the same—only the product being transferred was different.¹⁶⁸ But in a different case, the Board upheld a status decision prohibiting the owner of an on-shore facility from engaging in vessel-to-vessel transfers of liquid fertilizer in Delaware Bay because this activity was not part of the use of the property granted non-

though 65% increase in production; "by itself a production capacity increase with no significant environmental or land area increases does not necessarily justify a determination that a project is an expansion or extension"; *id.* at 3-4 (petroleum storage tanks at Getty Delaware City refinery); *id.* at 3-10 (molten sulfur unit at Allied Chemical plant); *id.* at 3-10 – 3-11 (new plant to produce methanol at Getty refinery); *id.* at 3-11 (magnesium oxide regeneration facility at Allied Chemical plant); *id.* at 3-13 (Continuous Catalyst Regeneration Platforming Unit at Getty refinery); *id.* at 3-14 (reboiler units at Delmarva Edgemoor power plant); *id.* at 3-18 (production equipment for new type of alumina gel at Barcroft Co. facility in Lewes).

166. *In re Application of Dunn Dev. Co.*, No. 127.

167. *Id.* at 7. In justifying its decision, the Board cited the prohibition against bulk product transfer facilities in § 7003 and the permission for nonconforming uses in § 7004 and stated:

The Board does not read this language to require a bulk product transfer facility to remain static with the product being transferred always remaining the same; however, the Board does conclude that the word "use" refers to the nature of the facility in existence on June 28, 1971 and thereby limits future use of the facility to those operations which, both in kind and quantity, could, in fact, have been performed in 1971. The Board reads the Acting Director's reference to "change in character" in his decision to mean that modification of the facility which would permit uses or operations that could not be accomplished on June 28, 1971 are prohibited . . . The Board believes this analysis to be consistent with both the intent of the act, which is to prohibit new bulk product transfer facilities, see [DEL. CODE ANN. tit. 7.] § 7001 (2007), and gradually eliminate existing bulk product transfer facilities (and other nonconforming uses) through attrition, and with existing Delaware case law on nonconforming usage, which provides that a new use differing in quality or character is prohibited unless otherwise provided by statute. *New Castle County v. Harvey*, 315 A.2d 616 ([Del. Ch.] 1974).

Id.

168. *Id.* at 4.

conforming use status.¹⁶⁹ The Board in other cases looked at the impacts from the facility.¹⁷⁰ The net effect of the Board's definition, however, was to undermine the notion that nonconforming use was similar to nonconforming use under zoning law because the definition was allowing facilities to continue to operate and change with business conditions (instead of withering and dying).

The second blow to the applicability of the zoning notion of nonconforming use was the 1992 amendment allowing *all* nonconforming uses to expand or extend upon obtaining a permit,¹⁷¹ for the amendment clearly unlinked nonconforming uses under the Act from at least the "wither and die" concept under zoning law. In *Kearney v. Coastal Zone Indus. Control Bd.*,¹⁷² a citizen challenged a CZA permit allowing DuPont to construct a new spent acid regeneration (SAR) unit at the Delaware City, DE refinery to replace a SAR unit that had suffered a catastrophic accident.¹⁷³ The refinery, having operated since the 1950s, was a nonconforming use, and the new SAR unit would be within the footprint of the refinery.¹⁷⁴ The citizen argued that the CZA should be inter-

169. *In re Fischer Enters., Inc.*, No. 192, at 5 (Del. Coastal Zone Indus. Control Bd. Oct. 28, 1986) (appeal of status decision) (copy on file with author). The Board rejected an argument under *Dunn Development*, stating:

The Board concludes that the use proposed was not in existence and in active use on June 28, 1971. Specifically, the Board concludes that there was no such use at Big Stone Anchorage [a specific area in Delaware Bay] prior to 1971 by [applicant], or anyone else Unlike *Dunn Development Company, Inc.* in 1981 where a new product was going to be substituted for part of the capacity of the facility without changing the size or character of the facility, here a new activity, namely vessel to vessel bulk transfers at Big Stone Anchorage is planned, which operation was not in existence and in active use in 1971 would be commenced. Accordingly, the Board's decision in *Dunn Development* is inapposite.

Id. at 6-7.

170. The Board's decision, *In re Coastal Zone Permit Determination of Getty Refining & Marketing Co.*, No. 123 (Del. Coastal Zone Indus. Control Bd. January 27, 1981) (copy on file with author), concerned a proposal by Getty Oil to build a methanol plant at its then-existing facility in Delaware City. Because the existing facility was a nonconforming use, the issue was whether the methanol plant was an expansion or extension of the nonconforming use requiring a permit. A 5-2 majority of the Board found that no permit was necessary because "there will be no significant increase in feedstock use of the plant; there will be no significant increase in the land use area of the proposed methanol plant; and that there will be no significant adverse environmental impact from the operation of the methanol plant." *Id.* at 6.

171. See 68 Del. Laws 347 (1992).

172. 2005 WL 3844219 (Del. Super. Ct. March 18, 2005), *aff'd*, 897 A.2d 767 (Del. 2006).

173. *Id.* at *1.

174. *Id.* As explained *infra*, text accompanying notes 179-80, the 1999 Regulations view "expansion or extension" in terms of the footprint of the nonconforming use. The

preted under zoning principles, forcing undesirable land-uses out of existence by forbidding them from being expanded, upgraded, or transferred so that they “wither and die” away.¹⁷⁵ The Delaware Superior Court rejected this argument because of the “extension or expansion” language of § 7004(a):

Even if Mr. Kearney’s characterization of zoning is correct in a general sense, it ignores the plain language of the Act. Section 7004(a) of the Act provides that “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.” Subsection (b) provides that, when the Secretary makes a permitting decision, he must consider, “Economic effect, including the number of jobs created and the income which will be generated by the wages and salaries of these jobs in relation to the amount of land required, and the amount of tax revenue potentially accruing to state and local government.” . . . This language makes it clear that the General Assembly did not intend to doom every existing, non-conforming use in the coastal zone to extinction by attrition. Instead, the legislature clearly expects the Secretary to make a judgment call on any proposed expansions, balancing environmental and economic factors to reach the best result for Delaware and its citizens.¹⁷⁶

While the Act now allows “expansion or extension” of a nonconforming use with a permit, the Act itself does not define what an “expansion or extension” is.¹⁷⁷ The 1999 Regulations view it in spatial terms (i.e., an increase of the “footprint” of the nonconforming use).¹⁷⁸

SAR unit would not increase the refinery’s footprint, and thus it was not an “expansion or extension.”

175. *Kearney*, 2005 WL 3844219, at *5.

176. *Id.* at *5–6. While “wither and die” is no longer appropriate, other zoning concepts might still apply. For example, nonconforming uses under zoning law are preexisting uses that give rise to a property right. *See, e.g.*, *Outdoor Graphics, Inc. v. City of Burlington, Iowa*, 103 F.3d 690 (8th Cir. 1996); *Toys R Us v. Silva*, 676 N.E.2d 862 (N.Y. 1996); *Morgan v. Callaway*, 2003 WL 1387127, at *5 (Del. Super. Ct. 2003) (“Once a non-conforming use is vested and continues, it runs with the land.”) (citation omitted); *Johnson County Mem’l Gardens, Inc. v. City of Overland Park*, 718 P.2d 1302 (Kan. 1986); *Hager v. West Rockhill Tp. Zoning Hearing Bd.*, 795 A.2d 1104 (Pa. Cmmw. Ct. 2002); *In re Lashins*, 807 A.2d 420 (Vt. 2002); *Western Theological Seminary v. City of Evanston*, 156 N.E. 778 (Ill. 1927). Given the treatment of nonconforming uses under § 7004(a) of the Act, a similar conclusion results.

177. *See* 58 Del. Laws at 495 (1971).

178. The 1999 Regulation’s approach is somewhat confusing. In 7-100-101 DEL. CODE REGS. § 4.2 (Weil 2007), the Regulations indicate that “expansion of any non-

Because of the special status of nonconforming uses under the Act, this category of industrial activity under the Act has generated significant litigation. One important issue (and the subject of a recent Board decision) is what a “use” is for purposes of determining whether that “use” is a “nonconforming use” under the Act. *Vane Line Bunkering, Inc. v. Sec’y of the Dep’t of Natural Res. & Envtl. Control*¹⁷⁹ involved a request for status decision by Vane Line Bunkering, Inc. to operate an oil lightering operation at the Big Stone Anchorage in Delaware Bay in which crude oil and No. 6 fuel oil would be lightered (that is, transferred) from larger ocean-going tankers to Vane Line’s own vessels for delivery to ports and refineries on the Delaware River.¹⁸⁰ The Secretary’s status decision held that the proposed oil lightering operation would be a new bulk product transfer facility prohibited under the Act.¹⁸¹ The Board reversed.¹⁸² It found that oil lightering as an activity was being conducted by another entity at the time the Act was passed.¹⁸³ It framed the issue this way:

[T]he CZA is ambiguous to the extent its provisions are not entirely clear whether an activity, such as oil lightering is a “nonconforming use” or whether oil lightering constitutes a “bulk product transfer facility.” In other words, is the activity of oil lightering defined by the CZA in terms of a “use” or in terms of an entity engaged in the activity (i.e., the “user”)? The CZA and its regulations do not specifically define “use.”¹⁸⁴

conforming uses beyond their footprint(s)” are a prohibited use or activity in the Coastal Zone, where “footprint” is defined as “the geographical extent of nonconforming uses as they existed on June 28, 1971” and depicted in aerial photographs that are included as Appendix B to the Regulations. *See id.* § 3.0. The flat prohibition in § 4.2 would seem to be at odds with the language of DEL. CODE ANN. TIT. 7, § 7004(a) (2007), allowing “expansion or extension” of nonconforming uses with a permit. However, in a later section describing uses requiring a permit, the 1999 Regulations list “any new activity . . . by an existing heavy industry or a new or existing manufacturing facility that may result in any negative impact” as “uses or activities [that] are permissible in the Coastal Zone by permit.” *See* 7-100-101 DEL. CODE REGS. § 6.3.

179. *Vane Line Bunkering, Inc. v. DNREC*, No. CZ 2006-01, (Del. Coastal Zone Indus. Control Bd. Dec. 1, 2006), *rev’d*, No. 06A-12-001-ESB (Del. Super. Ct. Nov. 16, 2007) (copy on file with author).

180. *Id.* at 2.

181. *Id.*

182. *Id.* at 23.

183. *Id.* at 18.

184. *Id.* at 22.

The Board went on to find that the *activity* of oil lightering is a nonconforming use so that Vane Line's proposed oil lightering operation would simply be an extension or expansion of that nonconforming use allowable under § 7004(a).¹⁸⁵ The Board based its conclusion on the fact that § 7002(b)'s definition of nonconforming use speaks of "uses" rather than users,¹⁸⁶ that the Third Circuit's *Norfolk Southern* decision contained language suggesting that oil lightering was a use that was grandfathered under the Act,¹⁸⁷ and that DNREC's failure to regulate oil lightering under the Act "create[d] an inference which the Board finds persuasive and accepts, that DNREC deemed oil lightering a grandfathered 'use,' rather than a use permissible only when performed by a grandfathered 'user.'"¹⁸⁸

That decision was appealed to the Superior Court by both DNREC and the Delaware Nature Society,¹⁸⁹ and in November 2007 the Superior Court reversed the Board's decision.¹⁹⁰ The Court expressly rejected the Board's analysis:

There is nothing ambiguous about the three sections of the Coastal Zone Act [§§ 7002(b), 7003, and 7004] that are applicable to this case. The Board simply did not understand them. Similarly, the Board's conclusions about Vane's proposed oil lightering facility are wrong because they are contrary to the plain language of the Coastal Zone Act, its regulations, and the Supreme Court's holding in *Coastal Barge*.¹⁹¹

185. *Id.* at 23.

186. *Id.* at 24.

187. *Id.* In the factual background section of its opinion, the Third Circuit contrasted the proposed coal lightering operation (which had never been done before in Delaware Bay) with oil lightering (which had been done before). *Norfolk S. Corp. v. Oberly*, 822 F.2d 388, 391 (3d Cir. 1987). In a footnote, the Third Circuit stated: "Oil lightering is not subject to the CZA ban because it was an existing use at the time of the CZA's enactment and is thus covered by the grandfather provision." *Id.* at 391 n.3. Given that *Norfolk Southern* was a challenge to the Act under the dormant commerce clause of the United States Constitution, and therefore not required to interpret the meaning of terms under the Act itself, it is at best unclear whether the Third Circuit's words have any interpretive effect under the Act.

188. *Vane Line*, No. CZ 2006-01, at 24.

189. The author is part of a team of attorneys representing the Delaware Nature Society in that appeal.

190. DNREC v. Vane Line Bunkering, Inc., No. 06A-12-001-ESB (Del. Super. Ct. November 16, 2007) (copy on file with author).

191. *Id.* at 6.

The Court ruled that “nonconforming use” can only refer to a facility, and not a general practice or activity;¹⁹² thus, because Vane Line did not have a oil lightering facility in operation on June 28, 1971, it could not be a nonconforming use.¹⁹³

E. Procedures Under the CZA

The CZA and the Regulations issued thereunder contemplate three distinct decision points for determining whether a particular industrial development proposal can proceed under the Act. Those three steps are: (1) Status Decisions before the full permit process starts; (2) the Permit Process itself; and (3) Appeals from the permit process. Each step has its own statutory and/or regulatory basis, and is independent of any other permitting requirements.¹⁹⁴

1. Status Decisions Under the CZA

The CZA’s provisions concerning application of the Act focus primarily on permitting, setting forth general requirements for permit applications¹⁹⁵ and empowering the Secretary to determine whether the proposed use is prohibited, regulated, or not subject to the Act.¹⁹⁶ This makes logical sense; if heavy industry

192. *Id.* at 6–7.

193. *Id.* at 7–8.

194. *See* *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 907 (Del. 1994) (“There is no statutory requirement that a permit applicant obtain a favorable CZA status decision before applying for Chapter 60 [Environmental Protection Act] permits. Similarly, when determining an applicant’s status under the CZA, there is no requirement that the applicant have any status with regard to Chapter 60 permits”).

195. DEL. CODE ANN. TIT. 7, § 7005 (2007) states:

All requests for permits for manufacturing land uses and for the expansion or extension of nonconforming uses as herein defined in the coastal zone shall be directed to the Secretary of the Department of Natural Resources and Environmental Control. Such requests must be in writing and must include (1) evidence of approval by the appropriate county or municipal zoning authorities, (2) a detailed description of the proposed construction and operation of the use and (3) an environmental impact statement.

Under the Act as originally passed, applications were to be submitted to the State Planner. *See* *Kreshtool v. Delmarva Power & Light Co.*, 310 A.2d 649, 651 (Del. Super. Ct. 1973). The Act was amended in 1981 to vest this power in the Secretary of DNREC. *See* 63 Del. Laws 425 (1981).

196. Section 7005 goes on to state:

The Secretary of the Department of Natural Resources and Environmental Control shall first determine whether the proposed use is, according to this chapter and regulations issued pursuant thereto, (1) a heavy industry use under § 7003 of this title; (2) a use allowable only by permit under

and bulk product transfers are prohibited under the Act, then the only area where there should be activity is in connection with uses that can be permitted under § 7004. Yet waiting until the permit process to determine that a use in fact qualifies for a permit places an applicant in a difficult position. Given the general statutory requirements for a permit application, an applicant must make a significant investment without knowing whether the Secretary will agree that the proposed use is permissible under the Act—an investment that will be lost if the Secretary decides that the use is in fact prohibited.

To address this problem, one of the first things the Board did was to create a “status decision” process wherein the State Planner would “decide on the applicant’s status under terms of the [Act] prior to the full application . . . requiring detailed project plans and an environmental impact statement.”¹⁹⁷ This status decision process has continued through the 1999 Regulations. Applicants may request a status decision “to determine whether or not the activity or facility is a heavy industry”¹⁹⁸ or “to determine whether or not the proposed activity requires a Coastal Zone permit.”¹⁹⁹ While these provisions of the Regulations make the Request appear voluntary, the Regulations require a Request for Status Decision for “any new manufacturing facility or research and development facility proposed to be sited in the Coastal Zone.”²⁰⁰ The applicant submits a Request for Status Decision in writing that requires applicant and site identifying information, a

§ 7004 of this title; or (3) a use requiring no action under this chapter. The Secretary of the Department of Natural Resources and Environmental Control shall then, if he or she determines that § 7004 of this title applies, reply to the request for a permit within 90 days of receipt of the said request for permit, either granting the request, denying same, or granting the request but requiring modifications; the Secretary shall state the reasons for his or her decision.

DEL. CODE ANN. TIT. 7, § 7005. As noted, *see supra* note 195, this power originally resided in the State Planner.

197. 1973 REPORT, *supra* note 5, at 7-8 (describing Board’s decision at September 13, 1971 meeting).

198. 7-100-101 DEL. CODE REGS. at § 7.1 (Weil 2007).

199. *Id.* § 7.2.

200. *Id.* § 7.4 (requiring any new manufacturing facility or R & D facility proposed for the Coastal Zone “shall apply for a status decision”). In addition, the Secretary can ask that a person submit a Request for Status Decision if the Secretary “has cause to suspect an activity within the confines of the Coastal Zone is prohibited or should receive a permit.” *Id.* § 7.5. Failure to respond to the Secretary’s request subjects the person to the enforcement provisions under the Act and Regulations. *Id.* These include cease and desist orders, DEL. CODE ANN. TIT. 7, § 7009, injunctions by the Court of Chancery, *id.* § 7011, and civil penalties up to \$50,000 for each offense. *Id.* § 7010.

detailed description of the proposed activity,²⁰¹ and an “impact analysis” that examines the impact of the project under six different factors.²⁰² Once the Request is deemed administratively complete, the Secretary must publish legal notice advising the public of the Request and allow ten business days for public comment.²⁰³ The Secretary has fifteen business days thereafter to make a decision about the status of the project under the Act.²⁰⁴

2. The CZA Permit Process

The Act itself says little about the process for getting a permit (beyond § 7004(b)’s articulation of the six factors that the Secretary must consider), and thus it is the Regulations that spell out the permitting process. Applicants must complete and submit an application form provided by DNREC.²⁰⁵ The Regulations spell out minimum contents for the application, including a certification about the completeness and accuracy of the application,²⁰⁶ evidence of local zoning approval,²⁰⁷ an Environmental Permit Application Background Statement (if required),²⁰⁸ an Environ-

201. 7-100-101 DEL. CODE REGS. §§ 7.3.1–7.3.3.

202. *Id.* §§ 6.3.1–6.3.6. These factors are: environmental impacts, economic effect, aesthetic effect, number and type of supporting facilities and the separate impacts of those facilities, effect on neighboring land uses, and interaction with the county or municipal comprehensive plans. These factors mirror the factors that the Secretary must consider when reviewing a permit application. *See* DEL. CODE ANN. TIT. 7, § 7004(b). Although these factors suggest a detailed analysis akin to a permit application, the form for Status Decision Requests issued by DNREC suggests that the analysis is more summary in nature, requiring only a “detailed statement” of the impacts. *See* DNREC, Coastal Zone Act Program, <http://www.dnrec.delaware.gov/Admin/CZA/Pages/CZAHome.aspx> (click on “Coastal Zone Status Decision Application”) (last visited Apr. 8, 2008).

203. 7-100-101 DEL. CODE REGS. § 7.6.

204. *Id.* § 7.7.

205. *Id.* § 8.1. The application is available at DNREC, Coastal Zone Act Program, <http://www.dnrec.delaware.gov/Admin/CZA/Pages/CZAHome.aspx> (select “Coastal Zone Permit Application”) (last visited Apr. 8, 2008).

206. *See* § 8.1.1.

207. *See id.* § 8.1.2. This satisfies the requirement in the Act 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.” DEL. CODE ANN. TIT. 7, § 7004(a).

208. *See* 7-100-101 DEL. CODE REGS. § 8.1.3. Environmental Permit Application Background statements are required annually under § 7902. They must contain information on the officers, directors, and major shareholders of the company, information on notices of violation, criminal and civil proceedings for violation of environmental permits, laws or regulations, and whether the company, having been designated a chronic violator under § 7904, has implemented policies, programs, and procedures designed to detect, deter, and correct violations of the law. The purpose behind requiring the statement is “to ensure that the State has adequate information

mental Impact Statement,²⁰⁹ descriptions of the project's effects under the § 7004(b) factors other than environmental impact,²¹⁰ and an offset proposal if required under the regulations.²¹¹

Once submitted, the Regulations dictate how DNREC and the Secretary review and process the application. First, DNREC must determine that the application is administratively complete.²¹² If it is not complete, DNREC has the ability to request additional information; if it is complete, DNREC must so notify the applicant.²¹³ Next, the Secretary must consider how the project affects the six § 7004(b) factors,²¹⁴ the environmental goals and indicators for the Coastal Zone,²¹⁵ and the sufficiency of the offset proposal,²¹⁶ and generate a written assessment of these issues that is provided to the applicant and made available to the public.²¹⁷ A public hearing on the application must be held,²¹⁸ with the public able to comment but not necessarily as parties,²¹⁹ and the

about the background of applicants or regulated parties for the purposes of processing permits and conducting other regulatory activities" DEL. CODE ANN. TIT. 7, § 7901.

209. 7-100-101 DEL. CODE REGS. § 8.1.4. The requirements of the Environmental Impact Statement are discussed *supra* Section II.C.

210. 7-100-101 DEL. CODE REGS. §§ 8.1.5–8.1.9.

211. *See id.* § 8.1.10. The requirements of the offset proposal are discussed *supra* Section II.C.

212. *See id.* § 8.3.1.

213. *Id.*

214. *Id.* § 8.3.2.

215. *Id.* § 8.3.3.

216. *Id.* § 8.3.4.

217. *Id.* § 8.3.4.

218. *Id.* § 8.3.5.

219. *See In re Coastal Zone Permit 406P Issued to E.I. DuPont DeNemours & Co.*, No. CZ 2003-02 & 03, at 6–7 (Del. Coastal Zone Indus. Control Bd. Oct. 24, 2003) (copy on file with author) (applying the Administrative Procedures Act, DEL. CODE ANN. TIT. 29, § 10101 (2007), definition of party, "it seems that only the applicant is a party entitled to all the protections of due process during the review of the permit application unless another person or agency (1) properly seeks to be admitted as a party and (2) shows a right to be so admitted. Clearly, showing up and speaking at the public hearing is insufficient to confer party status"). In *Kearney*, which affirmed the Board's conclusions in *E.I. DuPont DeNemours*, the Superior Court explained that this conclusion makes sense because:

The reason for this restriction is obvious; during the initial stages of a permit application, it is essential for DNREC to keep an open dialogue with the applicant so that agency's concerns can be quickly addressed. This back-and-forth often occurs through phone calls with agency staff, comments at site visits, or an exchange of emails. If everyone who attends a public hearing were to become a party during the permitting process, this simple, efficient exchange would be compromised. Instead, every proposed design change or Agency suggestion would have to be made in writing or memorialized, reviewed by counsel, and served upon a multitude of

Secretary must decide to grant or deny the permit.²²⁰

3. The CZA Appeals Process

The CZA contemplates two levels of appeals for decisions under the Act.

Appeals to the Coastal Zone Industrial Control Board

In the first instance, any person who is “aggrieved” by a final decision of the Secretary under the Act may appeal to the Coastal Zone Industrial Control Board within 14 days of the announcement of the decision.²²¹ The Board consists of nine voting members—five appointed by the Governor and confirmed by the state Senate subject to certain statutory constraints, and four from specified state or local agencies.²²² The Act gives the Board broad powers in its review of a decision under the Act:

The Board may affirm or reverse the decision of the Secretary of the Department of Natural Resources and Environmental Control with respect to applicability of any provisions of this chapter to a proposed use; it may modify any permit granted by the Secretary of the Department of Natural Resources and Environ-

semi-interested parties, who then could seek discovery, all of which would bog down the permit process.

Kearney v. Coastal Zone Indus. Control Bd., No. C. A. 03A-11-008JRJ, 2005 WL 3844219, at *7 (Del. Super. Ct. March 18, 2005). The Court also found that the restriction:

is especially logical because members of the public with a negative view of a project will have a complaint only if the Secretary decides to grant a permit. Affording them party status before then would slow the process for permits that will ultimately be denied, a tremendous waste of Agency resources. It will also hamper consideration of environmentally friendly, clearly meritorious applications in order to placate the ever-present “NIMBY” bloc, who could be easily disposed during appeal on standing grounds.

Id. at *8.

220. 7-100-101 DEL. CODE REGS. § 8.3.6.

221. DEL. CODE ANN. TIT. 7, § 7007(b). The Regulations underscore this point: “If no appeal is received within the 14-day appeal period following the date of the publication of the legal notice, the decision becomes final and no appeal will be accepted.” § 8.3.7.

222. See § 7006(a) (specifying that, for the 5 appointed and confirmed members “[n]o more than 2 of the regular members shall be affiliated with the same political party” and “[a]t least 1 regular member shall be a resident of New Castle County, 1 a resident of Kent County and 1 a resident of Sussex County, provided that no more than 2 residents of any county shall serve on the Board at the same time,” while the additional 4 members are mandated to be the Director of the Delaware Economic Development Office, and the chairpersons of the planning commissions of each county”).

mental Control, grant a permit denied by the Secretary, deny a permit or confirm the Secretary's grant of a permit. Provided, however, that the Board may grant no permit for uses prohibited in § 7003 herein.²²³

In short, the Board can affirm or reverse status decisions, and can affirm, reverse, or modify a permit decision. The Act requires the Board to hold a public hearing and render its final decision in the form of a final order within sixty days of receipt of an appeal.²²⁴

The ability of the Board to act depends upon a "majority" of the "total membership:"

Any member of the Board with a conflict of interest in a matter in question shall disqualify himself or herself from consideration of that matter. A majority of the total membership of the Board less those disqualifying themselves shall constitute a quorum. A majority of the total membership of the Board shall be necessary to make a final decision on a permit request.²²⁵

In *Shields v. Keystone Cogeneration Systems, Inc.*,²²⁶ the Superior Court had to untangle the meaning of these terms. *Shields* involved a CZA permit issued to Keystone allowing the construction of a pier and water intake facility on the Delaware River that would service an electrical generation facility located in New Jersey.²²⁷ Opponents of the project appealed to the Board, which had only five members present, four of whom voted to sustain the permit issuance and one voting for remand.²²⁸ The Board therefore believed that it was unable to render a "final decision" under

223. *Id.* § 7007(a).

224. *Id.* § 7007(b).

225. *Id.* § 7006.

226. 611 A.2d 502 (Del. Super. Ct. 1991).

227. *Id.* at 503-04.

228. *Id.*

the Act,²²⁹ thereby leaving the status of the permit and the appeal up in the air.²³⁰

The Superior Court made several rulings that clarify the nature of the Board process. First, the court ruled that the four absent Board members should not be considered “disqualified” merely by their absence (so that the “total membership” by which one determines a “quorum” would have been five).²³¹ Second, the court held that “total membership” in both sentences of § 7006 had the same meaning: the total number of members who were not disqualified.²³² Given that the mere absences of the four members were not viewed as disqualifications, that meant that the agreement of five Board members (a majority of the nine total members) was needed to render a final decision.²³³ Because only four had voted to sustain (or affirm) the permit issuance, there was no valid “final decision” of the Board.²³⁴ That, of course, created a problem: the Board had not ruled within the sixty-day window provided in § 7007, and so the *Shields* court needed to articulate a way to reach a decision when, as it put it, “the statutory procedure has failed.”²³⁵ Finding that it still had jurisdiction,²³⁶ the *Shields* court ruled that it would decide the appeal

229. *Id.* at 504. The *Shields* court cites the following language from the minutes of the Board’s meeting:

[T]he Coastal Zone Act at [title 7, section] 7006 [of the Delaware Code] requires that a “final decision” may be reached only by [sic] a majority of the Board members. The quorum for the Hearing was a simple majority of five members. The Board being unable to reach a unanimous decision, no “final decision” was reached.

Id. The actual order issued by the Board stated, “Following its deliberations, the Board was unable to reach a final decision by a vote of a majority of the Members of the Board, as required by [DEL. CODE ANN. TIT. 7, § 7006].” *In re* Keystone Cogeneration Sys., Inc. (Del. Coastal Zone Indus. Control Bd., Nov. 22, 1991) (copy on file with author).

230. See *Shields*, 611 A.2d at 504.

231. *Id.*, 611 A.2d at 504. The court commented: “The record contains no indication that any of the four absent members were absent because of disqualification for conflict of interest. Experience with public agencies does not support an inference that a member’s absence on a particular occasion is caused by disqualification.” *Id.*

232. *Id.* at 505.

233. *Id.*

234. *Id.*

235. *Id.* at 507.

236. The Appellants had argued—perhaps with some justification—that the lack of a final decision by the Board meant that the Superior Court did not have jurisdiction (as only persons aggrieved “by a final order” of the Board can appeal under title 7, section 7008 of the Delaware Code). The *Shields* court rejected this “technical” argument and justified its jurisdiction as follows:

based on the record created before the Secretary and the Board.²³⁷ However, the decision on the merits was apparently left for another day, as the opinion does not decide the merits.²³⁸

Appeals to the Superior Court

After review by the Board, the Act allows persons “aggrieved” by the Board’s decision to appeal that decision to the Superior Court.²³⁹ In addition, the Secretary can appeal “any modification” of his or her ruling.²⁴⁰ Appeals to the Superior Court must be filed within twenty days “following announcement of the Board’s decision.”²⁴¹ The Superior Court’s consideration of the appeal is limited to the record before the Board and to the issue of “whether the Board abused its discretion in applying standards set forth by this chapter and regulations issued pursuant thereto to the facts of the particular case.”²⁴² Given this language, courts tend to apply a deferential standard of review.²⁴³

This technical argument overlooks the fact that the Board is not confined to affirming or reversing the Secretary’s decision but is empowered to modify any permit or grant a permit denied by the Secretary. In the exercise of its powers, each member of the Board is entitled to assert his or her own position concerning the granting or denial of a permit or the restrictions to be incorporated in the permit. In view of the variety of alternatives, a majority may not support one particular form of relief even if all members participate. In that case, the Court is called upon to resolve the appeal based on accepted principles.

Id. at 505.

237. *Id.* In support, the *Shields* court relied upon *Hopson v. McGinnes*, 381 A.2d 187, 189 (Del. 1978), in which the Delaware Supreme Court found that an appeal from a matter in which the State Personnel Commission had failed to obtain a majority vote involving discharge of an employee of the Division of Adult Corrections could be handled by the Superior Court making its own determinations based on the record. *Shields*, 611 A.2d at 505. Because there is no final decision to give deference to, the Superior Court need not apply the deferential standard of review but rather can make its own findings. *Id.* .

238. It is the author’s understanding that the parties reached a settlement, thereby obviating the need for a decision on the merits. The Keystone facility was in fact built.

239. DEL. CODE ANN. TIT. 7, § 7008 (2007).

240. *Id.*

241. *Id.* This raises a potential problem for appellants. If the Board votes at the public hearing and reaches a result, the language suggests that the 20 day clock starts running. However, the Board’s “final order” explaining its decision may or may not come out during that 20 day period (depending on how much of the sixty days the Board has left at the time of the public hearing).

242. *Id.*

243. See *Kreshtool v. Delmarva Power & Light Co.*, 310 A.2d 649, 652 (Del. Super. Ct. 1973) (“Although the reviewing court’s inquiry into the record is to be searching and careful, the ultimate standard that it must apply is a normal appellate one. Re-

F. General Issues Under the Act

Although not related to particular provisions of the Act, three general issues concerning the Act must be discussed. The first relates to the constitutionality of the Act; the second, to issues of standing under the Act; and the third, to whether “uses” can be abandoned.

1. Is the Act Constitutional?

Despite the Act’s far-reaching effects, there has been only one court challenge to the Act’s constitutionality. After losing their case under the Act in *Coastal Barge*, the proponents of the coal lightering operation challenged the Act as violating the dormant Commerce Clause. The challenged failed in both the District Court²⁴⁴ and Third Circuit,²⁴⁵ albeit for different reasons. The District Court, finding issues of material fact under the *Pike* balancing test,²⁴⁶ held that the process of review and approval of the Act by the Secretary of Commerce under the federal Coastal Zone Management Act²⁴⁷ evidenced express congressional consent to the Act under the Commerce Clause, thereby insulating the Act from a constitutional challenge based on the Clause.²⁴⁸ The Third

versal is warranted if the administrative agency exercised its power arbitrarily, or committed an error of law, or made findings of fact unsupportable by substantial evidence. It is immaterial whether the reviewing court would have reached a contrary conclusion from the same evidence.” (citations omitted).

244. *Norfolk S. Corp. v. Oberly (Norfolk I)*, 632 F. Supp. 1225 (D. Del. 1986), *aff’d* 822 F.2d 388 (3d Cir. 1987).

245. *Norfolk S. Corp. v. Oberly (Norfolk II)*, 822 F.2d 388, 390 (3d Cir. 1987).

246. The *Pike* balancing test refers to the test articulated by the United States Supreme Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. (citation omitted). The District Court rejected arguments to apply stricter and more deferential review, see *Norfolk I*, 632 F. Supp. 1234–42, finding them “unconvincing,” *id.* at 1242, and instead found *Pike* “properly applies.” *Id.* at 1234. The District Court found, however, that there were disputes as to the burdens on commerce and the putative local benefits and therefore summary judgment was inappropriate under *Pike*. *Id.* at 1243.

247. 16 U.S.C. §§ 1451–65 (2001).

248. *Norfolk I*, 632 F. Supp. at 1250. The District Court cited to *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 104 (1984), and *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 654 (1981), to support the proposition that

Circuit rejected the District Court's consent theory,²⁴⁹ but affirmed because it found that, under the *Pike* test,²⁵⁰ the Act put no discriminatory burden on interstate commerce (i.e., a burden not shared by in-state entities).²⁵¹ Thus, the Act is constitutional under the dormant Commerce Clause.²⁵²

2. Standing Under the Act

One judicial decision impacts the issue of standing to challenge decisions under the Act: *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*²⁵³

Oceanport involved a petroleum tank farm located in the coastal zone that had operated since 1905.²⁵⁴ Oceanport Industries acquired the site and, in addition to continuing to handle bulk quantities of petroleum, sought state permission to use the site for off-loading bulk quantities of such things as road salt, crushed stone, and cement, while reducing the quantity of oil products stored at the facility.²⁵⁵ Oceanport requested a status decision, arguing that the proposed operation either fell within the single industrial facility exception of the definition of bulk product transfer facility in § 7002(f) or that the historic operation of handling bulk quantities of products at the site gave rise to a nonconforming use exempt from regulation under the Act.²⁵⁶ The Secretary determined that the site was a nonconforming use and that the proposed operations were not a significant expansion or

"[t]he congressional power to consent to otherwise impermissible state regulation of interstate commerce must be exercised expressly," *Norfolk I*, 632 F. Supp. at 1244.

249. *Norfolk II*, 822 F.2d at 392-98. The Third Circuit found that the Coastal Zone Management Act did not, on its face, "expand state authority to legislate in ways that would otherwise be invalid under the Commerce Clause," *id.* at 394-95, and had legislative history which "does not convey an 'unmistakably clear' Congressional intent to confer added authority on the states," *id.* at 396, leading the court to find no Congressional consent to the Act under the Commerce Clause. *Id.* at 398.

250. The Third Circuit provided an extensive analysis on why a strict scrutiny review was inappropriate, *Norfolk II*, 822 F.2d at 400-05, and a perfunctory analysis on why a deferential review was inappropriate as well. *Id.* at 405. By process of elimination, that left the *Pike* balancing test as "appropriate in this case." *Id.*

251. *Norfolk II*, 822 F.2d at 405-07.

252. For a more detailed discussion of the two *Norfolk Southern* decisions and the dormant Commerce Clause issues raised by them, see Carolyn Cunningham, Note & Comment, *Norfolk Southern v. Oberly: Coastal Protection Wins in Delaware*, 4 PACE ENVTL. L. REV. 439 (1987).

253. 636 A.2d 892 (1994).

254. *Id.* at 896.

255. *Id.* at 897.

256. *Id.*

extension (that would otherwise require a permit).²⁵⁷ No one appealed the Secretary's status decision,²⁵⁸ and thus the application of the Act was not directly at issue in *Oceanport*.

The case itself arose from three permits Oceanport sought for the project: a permit to undertake pier improvements in subaqueous lands, required by Del. Code Ann. tit. 7, § 7205; an air discharge permit for fugitive emissions under Del. Code Ann. tit. 7, § 6003; and a storm water discharge permit under Del. Code Ann. tit. 7, § 6003.²⁵⁹ After the Secretary issued the permits, Wilmington Stevedores appealed these permits to the Delaware Environmental Appeals Board (EAB).²⁶⁰ The EAB dismissed the appeal on the basis that Wilmington Stevedores lacked standing to challenge the permit.²⁶¹ On appeal, the Superior Court reversed the EAB, finding Wilmington Stevedores had standing, and remanding the case back to the EAB with instructions to remand the matter back to the Secretary to review the status of the project under the CZA.²⁶² An interlocutory appeal to the Delaware Supreme Court followed.

The *Oceanport* court considered the issue of standing, both from the perspective of injury to Wilmington Stevedores itself as well as injury to Wilmington Stevedores' members (i.e., organizational standing). To determine if Wilmington Stevedores suffered its own injury sufficient to create standing, the court applied a test it had previously derived from the United States Supreme Court's decision in *Assoc. of Data Processing Serv. Org. v. Camp*:²⁶³ "[t]he test of standing is whether: 1) there is a claim of injury-in-fact; and 2) the interest sought to be protected or regulated by the statute or constitutional guarantee in question."²⁶⁴ To determine injury-in-fact, the *Oceanport* court looked to the then-recent decision in *Lujan v. Defenders of Wildlife*²⁶⁵ to find that the injury must be "concrete and particularized" and "actual

257. *Id.*

258. *Id.*

259. *Id.* at 898.

260. *Id.* The Environmental Appeals Board hears appeals of air and stormwater discharge permit decisions by the Secretary pursuant to title 7, section 6008 of the Delaware Code and subaqueous lands permit decisions pursuant to section 7210. DEL. CODE ANN. TIT. 7, §§ 6008, 7210 (2007).

261. *Oceanport*, 636 A.2d at 898–99.

262. *Id.*

263. 397 U.S. 150, 153–54 (1970).

264. *Oceanport*, 636 A.2d at 900 (quoting *Gannett Co., Inc. v. State*, 565 A.2d 895, 897 (1989)).

265. 504 U.S. 555 (1992).

and immediate.”²⁶⁶ For Wilmington Stevedores, this formulation proved fatal. The claimed environmental injuries—arising out of an interest in water quality and protection from fugitive air emissions²⁶⁷—failed because it lacked proof to show that the injuries would “affect the plaintiff in a personal and individual manner.”²⁶⁸ The claimed economic injuries, arising from potential shipping accidents that would close the River,²⁶⁹ while satisfying the injury-in-fact prong,²⁷⁰ failed the zone of interest prong because “the goal of the relevant statutes is the protection of the environment”²⁷¹ and not Wilmington Stevedores’ economic interests.²⁷² As for organizational standing, the Court cited the three-part test of *Hunt v. Wash. State Apple Advertising Comm’n*,²⁷³ and found that Wilmington Stevedores did not show that its members would themselves have standing.²⁷⁴

At first glance, *Oceanport* does not appear to apply directly to the CZA. The permits at issue were under Delaware’s Environmental Protection Act²⁷⁵ and Subaqueous Lands Act.²⁷⁶ In addition, the Court’s standing analysis focused on the fact that both statutes allow appeals by persons “substantially affected” by the Secretary’s or EAB’s decision,²⁷⁷ while the Act allows appeals by

266. *Oceanport*, 636 A.2d at 904 (citing *Lujan*, 504 U.S. at 560).

267. *Id.*

268. *Id.* at 905.

269. *Id.*

270. *Id.* at 905-06.

271. *Id.* at 906.

272. *Id.* The Court went on to state:

Reading the statutes as a whole, it would contravene the basic legislative intent to confer standing to challenge decisions made under those statutes based upon the sole claim of economic injury. Had WSI sufficiently asserted its environmental injury, or satisfied the elements of organizational standing, then the result might well be different. But WSI has not done so.

Id.

273. 432 U.S. 333 (1977). *Hunt* allows an organization to sue on behalf of its members if 1) the interests to be protected by the suit are germane to the organization’s purpose; and 2) neither the claim asserted nor the relief requested requires the participation of individual members; and 3) the organization’s members would otherwise have standing. *Id.* at 342-43.

274. *Oceanport*, 636 A.2d at 902-03 n.13. The Court found two problems: WSI had failed to raise the issue in the court below, and that even if it had, there was no proof (via affidavits or otherwise) that members actually use the River and would be affected by the Secretary’s decision.

275. DEL. CODE ANN. TIT. 7, §§ 6001-99 (2007).

276. *Id.* §§ 7201-17.

277. *See id.* §§ 6008, 7210.

persons “aggrieved” by a final decision of the Secretary.²⁷⁸ However, the *Data Processing*-based two-part test and the *Lujan*-based three-part test for injury-in-fact, first articulated in *Oceanport* continue to be the tests for standing in Delaware in a wide variety of contexts.²⁷⁹ Likewise, *Oceanport*’s test for organizational standing governs that issue.²⁸⁰ Further, *Oceanport* contains references to the Act that can help in applying the *Data Processing* test to claims under the Act.²⁸¹ It is therefore likely that *Oceanport* provides important guidance on the issue of standing under the Act.²⁸²

278. See *id.* § 7007 (appeals to Board) and § 7008 (appeals to Superior Court). At least one court has found that standing granted to persons “aggrieved” means that *Oceanport* does not dictate the requirements of standing. See *Swann Keys Civic Ass’n v. Bd. of Adjustment of Sussex County*, 2001 WL 167869, at *2–3 (Del. Super. Ct. January 23, 2001) (standing of homeowners’ association to challenge variance for setback requirement governed by four-part test in *Vassallo v. Penn Rose Civic Assoc.*, 429 A.2d 168, 170 (Del. 1981)). But see *Harvey v. Zoning Bd. of Adjustment of Odessa*, 2000 WL 33111028, at *6–7 (Del. Super. Ct. November 27, 2000) (using principles from *Oceanport* to find that petitioner was “aggrieved” by zoning board decision so as to have standing).

279. See, e.g., *Dover Historical Soc’y v. City of Dover Planning Comm’n*, 838 A.2d 1103, 1111 (Del. 2003); *General Motors Corp. v. New Castle County*, 701 A.2d 819, 823–24 (Del. 1998); *B.F. Rich Co., Inc. v. Gray*, 2006 WL 3337163, at *8 n.80 (Del. Ch. Nov. 9, 2006); *O’Neill v. Town of Middletown*, 2006 WL 205071, at *28 (Del. Ch. Jan. 18, 2006); *Eastern Shore Envtl., Inc. v. Delaware Solid Waste Auth.*, 2004 WL 440414, at *3 (Del. Super. Ct. Feb. 26, 2004); *Cave v. New Castle County Council*, 2003 WL 21733076, at *2 n.23 (Del. Super. Ct. July 21, 2003); *Motiva Enters. LLC v. Sec’y of DNREC*, 745 A.2d 234, 246–48 (Del. Super. Ct. 1999); *Citizen’s Coal., Inc. v. County Council of Sussex*, 1999 WL 669307, at *3–4 (Del. Ch. July 22, 1999); *Breslin v. Richard*, 1994 WL 1892113, at *5–6 (Del. Super. Ct. July 22, 1994).

280. See, e.g., *Comm. of Merchants & Citizens Against Proposed Annexation, Inc. v. Longo*, 669 A.2d 42, 44 (Del. 1995); *Citizen’s Coal., Inc. v. County Council of Sussex*, 1999 WL 669307, at *3–4 (Del. Ch. July 22, 1999).

281. For example, the *Oceanport* court noted that:

In the context of the Coastal Zone Act, [DEL. CODE ANN. TIT. 7,] §§ 7001–7013 [(2007)], and the Subaqueous Lands Act, [tit. 7, §§] 7201–7216, under review here, the future occurrence of environmental degradation is clearly within the zone of interest sought to be protected by the acts. The Coastal Zone Act, [tit. 7,] § 7001, states as its purpose the protection of the coastal zone. Likewise, the Subaqueous Lands Act, [tit. 7,] § 7201, states as its purpose the protection of subaqueous lands against use or change not in the public interest. It would be inconsistent to exclude the future occurrence of events from the scope of these acts, because one cannot prevent environmental degradation after it has already occurred. Thus, WSI’s claims relating to present or future injuries under the relevant laws are within the zone of interest as enunciated in the *Data Processing* test.

Oceanport Indus., Inc. v. Wilmington Stevedores, Inc., 636 A.2d 892, 903 (1994).

282. See *In re Coastal Zone Permit 403P Issued to Sunoco, Inc.*, No. CZ 2003-01, at 6 (Del. Coastal Zone Indus. Control Bd. Oct. 17, 2003) (copy on file with author) (“Mr. Kearney testified that he lives, works and engages in recreational activities in loca-

3. Can a Use Be Abandoned?

A use allowed under the Act (because it is a nonconforming use under § 7003 or a permitted use under § 7004) obtains a status that should protect the use throughout its existence. What happens, though, if the facility stops operating? Can its protective status be lost via abandonment?

The Act itself is silent on this direct point, though it gives a hint that abandonment is possible. 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."²⁸³ In 1988, the one year period was extended to two years.²⁸⁴ Clearly, the General Assembly was concerned that a temporary discontinuance of operations could 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." Thus, a fair reading of the 1984 amendment is that abandonment is possible whenever operation discontinues at a site.²⁸⁵ Further, given the narrow scope of the 1984 amendment, no other abandoned use would get the benefit of the two-year grace period.

While the Act does not directly address the issue, the 1999 Regulations clearly do. Facilities that are "abandoned" cannot be reinstated "except as otherwise provided under the Act"²⁸⁶—which, given the lack of any provisions in the Act, means once abandoned, a use's status is lost. Abandonment requires an investigation by the Secretary²⁸⁷ to determine if the cessation of activ-

tions affected by the permitted facility. The Board finds this evidence sufficient to establish that he is a 'person aggrieved' with standing to appeal the Secretary's decision," though not citing *Oceanport*).

283. 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.

284. *See* 66 Del. Laws 491 (1988).

285. Other interpretations support this conclusion. *See* 1984 REPORT, *supra* note 5, at 4-2 (summarizing April 30, 1979 Attorney General Opinion as saying that a discontinued nonconforming manufacturing use can get a new permit, but a renewed use would be prohibited if it is a heavy industry use).

286. 7-100-101 DEL. CODE REGS. § 12.1 (Weil 2004).

287. *Id.* § 12.4.

ity is temporary or an abandonment.²⁸⁸ The Secretary may consider factors such as the status of permits and licenses, maintenance of machinery and structures, duration of the cessation, and owner presence and attempts to reinstate the use.²⁸⁹ The Secretary must determine that the owner intends to abandon; involuntary shutdown without such an intent “shall not be deemed an abandonment.”²⁹⁰ If the Secretary believes abandonment has occurred, he must give notice to the owner, who has sixty days to demonstrate no intent to abandon.²⁹¹ The Secretary must announce a final decision and give public notice.²⁹²

III. LESSONS TO LEARN FROM THE ACT

After nearly thirty-seven years, experience under the Act suggests that certain lessons can be learned from the interpretation and application of the Act. Some of these lessons are local in nature, suggesting how Delaware should move forward in utilizing the Act. Others offer suggestions to coastal states that may now be looking for ways to protect remaining coastal resources before they are lost forever. Each set of lessons are important legacies of the Act that deserve serious consideration.

A. Lessons For Delaware

From the local perspective of the State of Delaware, perhaps the biggest question after nearly thirty-seven years is whether the Act has been successful. On a macro level, the evidence suggests that Delaware’s Coastal Zone Act has proved to be an effective control on industrial development in Delaware’s coastal zone. The oil refinery, bulk shipping artificial island, and supertanker port that drove its original enactment have not been built. The purpose of the Act to prohibit new heavy industry uses²⁹³ has largely been fulfilled in that numerous attempts to build heavy industry—either through amending the Act or through proposals presented under the Act—have been thwarted. The declared public policy to “encourage introduction of new industry” through a

288. *Id.* § 12.3.

289. *Id.* These factors were first identified in a August 6, 1981 Opinion of the Attorney General. See 1984 REPORT, *supra* note 5, at 4-3.

290. *Id.* § 12.4.

291. *Id.*

292. §§ 12.5–12.6.

293. DEL. CODE ANN. TIT. 7, § 7001 (2007).

controlled permitting process²⁹⁴ appears to have been met in that, while new heavy industry has not sprung up, lower impact manufacturing uses have been allowed. Tourism and recreation—the primary use of coastal resources that the Act seeks to “safeguard”²⁹⁵—provide significant economic benefits to the state.²⁹⁶ Thus, at this macro, results-oriented perspective, one can conclude that the Act has been a success.

At a micro, function-oriented perspective (that is, how the Courts, Board, and permitting authority have performed), the results are more mixed:

Delaware Courts. The courts have done an excellent job in protecting and strengthening the Act in their interpretations of its provisions. *Coastal Barge* and *City of Wilmington* are examples where the court articulated and applied the four principles of interpretation to find ways for the Act to apply because such interpretation was most consistent with the purpose of the Act. *Coastal Barge* is the most obvious example of this; even though the Act literally applied only to transfers between vessel and shore, the Court found that vessel to vessel transfers must also fall within the Act’s regulatory purview because the pollution risks the Act seeks to prevent are the same, and excluding vessel-to-vessel transfers would be unreasonable and absurd in light of the Act’s purpose to prevent such pollution. Thus far, the Delaware Supreme Court has been creative and staunch in its support of the Act. The Delaware lower courts’ record is largely positive, having been affirmed in *Coastal Barge* and *Kearney*, reversed in *City of Wilmington*, and no review of *Kreshtool*, *Shields* and *Vane Line*. By and large, the Delaware courts have been an effective bulwark against challenges to the Act’s reach and regulation.

The Board. Given the nature and extent of the Board’s jurisdiction, it is perhaps not surprising that the Board’s performance in furthering the purpose and objectives of the Act is more mixed. The Board’s interpretive decisions were upheld in *Kreshtool*, *Coastal Barge*, and *Kearney*, but reversed in *Shields* and *Vane Line*. Arguably, the Board’s early definition of “expansion or extension” put a significant amount of industrial activity outside the reach of the Act, and that seems inconsistent with

294. *Id.*

295. *Id.*

296. See, e.g., Adam Sacks, Managing Dir., Travel & Tourism, Global Insight, How Important is Tourism to Delaware? (June 9, 2005), <http://dedo.delaware.gov/information/tourism/DETS2005.ppt> (power point presentation reporting \$1.2 billion total economic impact to state).

the Act's purpose to "control the location, extent and type of industrial development in Delaware's coastal areas"²⁹⁷ (though the effect was largely neutralized by the 1992 amendment requiring all expansions or extensions of nonconforming uses be permitted). The Board's latest ruling in *Vane Line*, as discussed *infra*, raises some concern that the Board is not interpreting the Act correctly, at least with respect to nonconforming uses.

The Permitting Authority. The State Planner originally, and now the Secretary of DNREC, have the greatest amount and widest range of responsibility under the Act. After 266 status decisions and numerous other permitting decision, the record for those decisions is mixed but mostly positive. Of the known status decisions, eight were affirmed by the Board, while three were overturned (a 62.5% affirmance rate), with 254 decisions (95.8% of all status decisions) ultimately reviewed by the Board, while all six of the appealed permitting decisions were affirmed by the Board. Of the permitting authority decisions reviewed by courts, three (in *Kreshtool*, *Coastal Barge*, and *Kearney*) were upheld by the court. In terms of administering the Act, the Permitting Authority actively applied the Board's "expansion or extension" definition that put significant industrial activity outside the scope of the Act in at least seventy-five instances. The Secretary of DNREC has actively applied the 1999 Regulation's offset proposal requirements, and appears to be demanding and obtaining promises that will create net reductions in pollution.

While these signs appear to be generally positive, there are emerging threats to the Act's continued effectiveness that arise primarily out of how the Act is now being interpreted. The "canary in the coal mine" for these problems is in the application of the four general principles of statutory construction under the Act. Since the *City of Wilmington* decision in 1991, the only two court cases to analyze the Act did not cite to any of the four principles or to the two cases that articulated them.²⁹⁸ Of the fourteen Board decisions since *Coastal Barge*, only five mention *Coastal*

297. DEL. CODE ANN. TIT. 7, § 7001.

298. See *DNREC v. Vane Line Bunkering, Inc.*, No. 06A-12-001-ESB (Del. Super. Ct. Nov. 16, 2007); *Kearney v. Coastal Zone Indus. Control Bd.*, 2005 WL 3844219 (Del. Super. Ct. Mar. 18, 2005), *aff'd*, 897 A.2d. 767 (Del. 2006). The *Vane Line* decision does discuss *Coastal Barge*, but only in the context of applying its holding that vessel-to-vessel transfers constitute bulk product transfer facilities. It did not discuss *Coastal Barge* in the context of providing any principles or guidance for statutory interpretation.

Barge or *City of Wilmington*,²⁹⁹ and of those five, only two actually discuss or apply one or more of the four principles to the matter at hand.³⁰⁰ It is as if the principles have been relegated to historical footnotes or forgotten in a bout of amnesia. The risk is that, without proper attention to the four principles, interpretations of the Act may lose their mooring to the Act's intent and core values without the parties even knowing that it has happened.

Why is this important? The general principles of statutory construction that the Delaware Supreme Court has articulated for interpreting the Act—that the purpose of the Act is important, that one must harmonize the entire Act, that the Act must be liberally construed to maximize its applicability, and that one must favor reasonable interpretations over unreasonable ones—are critical to effective application of the Act. *Coastal Barge* and *City of Wilmington*—the cases that collectively articulated these four principles—could not have been decided without them. The wisdom inherent in these principles is two-fold. First, the four principles provide a means to ensure that a proffered interpretation is ultimately moored to the core of the Act. Interpretations that comply with the four principles tend to be ones that further the purposes of the Act. *Coastal Barge*, for example, dramatically shows that an interpretation which includes vessel-to-vessel transfers of bulk product within the definition of bulk product transfer facilities better fits with the purpose, terms, and reasonable scope of the Act. At a fundamental level, it “makes sense” given the Act's language and intent. Likewise, the four principles can help to expose what the *City of Wilmington* court called “pinched” constructions of the Act—interpretations that must be rejected because of some fundamental flaw. Thus, the four principles serve as guideposts that assure interpretations do not drift from the Act's core values.

299. See *In re Fischer Enterprises, Inc.*, No. 192, at 6 (Del. Coastal Zone Indus. Control Bd. Oct. 28, 1986) (appeal of status decision) (copy on file with author); *In re Occidental Chem. Co.*, No. 259, at 13 (Del. Coastal Zone Indus. Control Bd. July 29, 1992) (copy on file with author); *In re Texaco's Proposed Re-Refining*, No. 260SD, at 13–14, 16 (Del. Coastal Zone Indus. Control Bd. July 9, 1992) (appeal of the Secretary's decision finding Texaco's re-refining to be a “New Prohibited Heavy Industry”) (copy on file with author); *In re Delaware Audubon Soc'y*, No. 95-1, at 10 (Del. Coastal Zone Indus. Control Bd. July 28, 1995) (copy on file with author); *Vane Line*, No. CZ 2006-01, at 4, 22 (Del. Coastal Zone Indus. Control Bd. Dec. 1, 2006).

300. See *In re Texaco's Proposed Re-Refining*, No. 260SD, at 14, 16 (citing *Coastal Barge*, applying harmony rule and rejecting interpretation as an absurd result); *Vane Line*, No. 06A-12-001-ESB, slip op. at 22 (citing *Coastal Barge*, referencing the golden rule of statutory interpretation to avoid unreasonable results).

The second aspect of the wisdom inherent in the four principles flows from the first. For if the four principles serve as guideposts that help keep interpretations moored to the Act's purpose and core values, then they can also provide a convenient yardstick against which to measure a potential interpretation of the Act. In other words, the four principles provide a methodology by which an advocate, the Board, or a court can interpret the Act. Consciously analyzing whether a proposed interpretation is consistent with and fulfills the purpose and intent of the Act, harmonizes with all other provisions in the Act, maximizes the applicability of the Act, and produces reasonable consequences will likely produce a final interpretation that is consistent with and true to the Act's core values.

When the four principles are forgotten, the ability of an advocate or decisionmaker to assure that its interpretation is ultimately moored in the Act can be crippled without the decisionmaker even knowing it. *Vane Line* is a good example of this problem because the method by which the Board reached its decision is troubling in light of the four principles. As noted above, the Board in *Vane Line* viewed "use" as ambiguous in the sense that it is unclear whether it refers to the *activity* being performed (which the Board referred to as the "use") or the *person* performing the activity (which the Board referred to as the "user").³⁰¹ The Board found that the *activity* of oil lightering qualified as a nonconforming use, and even though Vane Line's proposed operation was not in existence on June 28, 1971, because a different operator's oil lightering operation was engaged in the activity Vane Line's proposed new operation would be merely an expansion of that nonconforming use.³⁰² In reaching its decision, the Board only referenced the fourth principles (favoring reasonable interpretations over unreasonable ones),³⁰³ and did not discuss the application of that principle in any detail. How, then, does the analysis compare against the four principles?

Purpose of the Act. *Coastal Barge* teaches that transfers of bulk quantities of product between vessels (which is the essence of oil lightering) falls within the Act's definition of bulk product transfer facilities, and that the concern over the potential pollution effect of such vessel-to-vessel transfers set forth in § 7001 is behind the prohibition against bulk product transfer facilities in

301. *Vane Line*, No. CZ 2006-01, at 22, 24.

302. *Id.* at 23.

303. *Id.* at 22.

§ 7003. The Board's failure to consider the Act's purpose behind the § 7003 prohibition, and whether its ruling furthers the purpose of the Act reflected in § 7001, means that the Board missed an opportunity to assure its conclusion was in fact consistent with the purpose of the Act.

Harmonize the Entire Act. The issue as framed by the Board was the meaning of the term "use" in the definition of "nonconforming use."³⁰⁴ While "use" is not defined in the Act, it does appear in numerous places in the Act.³⁰⁵ The principle of harmonizing the entire Act requires that the interpretation applied in one part of the Act must work in all parts of the Act, given the generally accepted rule for construction of any statute that the same words should not be given two different meanings in the same statute.³⁰⁶ The Board's only textual analysis of the Act was to note that the definition refers to "use" as opposed to "user";³⁰⁷ the Board failed to look at how the term "use" is used in other parts of the Act. Arguably, the term "use" has a location- or facility-specific meaning elsewhere in the Act,³⁰⁸ which seems to cut

304. *Id.*

305. See DEL. CODE ANN. TIT. 7, § 7002(b) (2007) ("Nonconforming use" means a use, whether of land or a structure, which does not comply with the applicable use provisions of this chapter where such use was lawfully in existence and in active use. . . .") (emphasis added); *id.* § 7002(c) (environmental impact statement defined as detailed description of "effect of the proposed use on the immediate and surrounding environment and natural resources") (emphasis added); *id.* § 7002(e) (heavy industry use "means a use" characteristically involving specified size and equipment) (emphasis added); *id.* § 7003 (prohibiting "heavy industry uses") (emphasis added); *id.* § 7004(a) (allowing "manufacturing uses" and expansion of "nonconforming uses" by permit and requiring that "county or municipality having jurisdiction has first approved the use in question by zoning procedures provided by law") (emphasis added).

306. See e.g., *State v. Reynolds*, 836 A.2d 224, 286 (Conn. 2003), *cert denied*, 541 U.S. 908 (2004) (identical term used in statutory provisions pertaining to same subject matter should not be read to have different meanings unless there is some indication from the legislature that it intended such a result) (citing *Nancy G. v. Dep't of Children & Families*, 733 A.2d 136, 145 (Conn. 1999)). See also *Commonwealth v. Saul*, 499 A.2d 358, 360 (Pa. Super. Ct. 1985).

307. *Vane Line*, No. CZ 2006-01, at 24. The Superior Court found that the distinction between use and user "while true, is meaningless." *DNREC v. Vane Line Bunkering, Inc.*, No. 06A-12-001-ESB, slip op. at 11 (Del. Super. Ct. Nov. 16, 2007).

308. See DEL. CODE ANN. TIT. 7, § 7002(b) (definition of a nonconforming use; speaking of a "use of land or a structure"); § 7002(e) (definition of a heavy industry use; speaking of characteristics based on facility size, specific equipment used at facility, and specific effects of facility-specific potential to pollute); and § 7004(a), (b) (allowing manufacturing use to obtain a permit and articulating factors to consider in granting permit, including facility-specific environmental, aesthetic, economic, neighboring property, and land use planning impacts). In finding that "nonconforming use" only refers to a facility, the *Vane Line* court relied upon the language of § 7002(b). *Vane Line*, No. 06A-12-001-ESB, slip op. at 6-7.

against the idea that a nonconforming use can be an *activity* (that can be conducted in many locations and at many facilities). Applying that meaning to “use” as it appears in the definition of “nonconforming use” would suggest that nonconforming uses are specific facilities instead of *activities* that could be done at many facilities—exactly what the Superior Court found.³⁰⁹ From a perspective of the principles of statutory construction, if the term “use” has a facility- or location-specific meaning elsewhere in the Act, then applying a meaning of use that is not facility- or location-specific in construing § 7002(b) does not appear to harmonize the section with the rest of the Act. The 1999 Regulations also support a distinction between “use” and “activity,” specifically identifying four different variations on bulk transfers as “uses or activities [that] are prohibited in the Coastal Zone.”³¹⁰ This language reveals that “uses” and “activities” must be different things (because it uses both terms, and if they meant the same thing then one of the terms is superfluous, which would violate the general rule of statutory construction to avoid interpretations which render terms meaningless or mere surplusage³¹¹). Thus, the Board’s equation of “use” for purposes of nonconforming uses with an “activity” like oil lightering appears to be inconsistent and not in harmony with the use of the term “use” elsewhere in the Act. Having failed to conduct a harmonization analysis, the Board missed an opportunity to assure its conclusion was in fact consistent with the terms of the Act.

Liberal Construction of the Act. *City of Wilmington* teaches that liberal construction of the Act means interpreting it to maximize the Act’s coverage and minimizing the Act’s exceptions and limitations. In *Vane Line*, the prohibition at issue is § 7003’s bar on bulk product transfer facilities, while the exception of limitation at issue is the limited regulation of nonconforming uses. Thus, a “liberal” construction of the Act would want to make sure that the prohibition on new bulk product transfer facilities is ex-

309. *Vane Line*, No. 06A-12-001-ESB, slip op. at 6–7.

310. 7-100-101 DEL. CODE REGS. § 4.3 (Weil 2007) (“offshore gas, liquid, or solid bulk product transfer facilities which were not in operation on June 28, 1971”); § 4.5 (“bulk product transfer facilities and pipelines which serve as bulk transfer facilities that were not in operation on June 28, 1971”); § 4.6 (“the conversion or use of existing unregulated, exempt, or permitted docking facilities for the transfer of bulk products”); and § 4.7 (“the construction, establishment, or operation of offshore gas, liquid, or solid bulk product transfer facilities which were not in operation on June 28, 1971”).

311. See *Grimes v. Alteon*, 804 A.2d 256, 264 (Del. 2002).

tended as far as possible while the inclusion of things within the nonconforming use category is restricted as much as possible in order to, as *City of Wilmington* says, “fully achieve the legislative goal of environmental protection.”³¹² Arguably, the Board’s conclusion making any *activity* taking place in June 1971 a “nonconforming use” that allows brand new facilities to be built because they are merely “expansions” appears to restrict the prohibition against bulk product transfer facilities and expand the nonconforming use exception—the opposite of what is required by the liberal construction rule of *City of Wilmington*. Having failed to conduct a liberal construction analysis, the Board missed an opportunity to assure its interpretation was in fact a “liberal” application of the Act’s terms.

Favoring Reasonable Interpretations Over Unreasonable Ones. This final principle from *Coastal Barge* requires examining the logical consequences of an interpretation. Allowing an *activity* taking place in June 1971 to be a “nonconforming use” that allows brand new facilities to be built because they are merely “expansions” leads to the unreasonable and absurd result of expressly prohibited facilities (such as oil refineries) being allowed because they were merely “expansions” of the *activity* of oil refining. The Board’s response to this argument—that new oil refineries could not be built because they fall within the express definition of § 7002(e) and are therefore prohibited heavy industry under § 7003³¹³—ignores the fact that being a nonconforming use trumps the prohibition of § 7003,³¹⁴ and thus a new refinery merely “expanding” the nonconforming use of the *activity* of oil refining should not (under the Board’s logic) be barred.³¹⁵ In effect,

312. *City of Wilmington v. Parcel of Land*, 607 A.2d 1163, 1166 (Del. 1992).

313. *Vane Line Bunkering, Inc. v. DNREC*, No. CZ 2006-01, at 27 (Del. Coastal Zone Indus. Control Bd. Dec. 1, 2006).

314. Nonconforming uses are “not prohibited” by the Act. DEL. CODE ANN. tit. 7, § 7004(a). As noted *supra* Section II.D, the very definition of nonconforming use requires that the “use” in question be something otherwise prohibited under the Act (i.e., a heavy industry use, bulk product transfer facility, or manufacturing use without a permit) that was in use in 1971. So, for example, the Delaware City refinery is allowed to continue operating as a nonconforming use because, even though it clearly fits the definition of heavy industry, it was in active use on June 28, 1971. Thus, under the terms of the Act, being a nonconforming use trumps § 7003’s prohibition against heavy industry uses.

315. Though not citing it in the context of applying the fourth principle of statutory construction, the Superior Court’s response to the Board’s argument was quite blunt:

If the Board can understand that new refineries and chemical plants, which are ‘heavy industry uses,’ are prohibited by § 7003 because they were not in operation on June 28, 1971, then I am at a total loss as to why

the Board's reasoning requires that one assume that the General Assembly passed the Act to prevent the Shell refinery from being built, and included language specifically identifying refineries as prohibited "heavy industry uses" under the Act,³¹⁶ while knowing that the new refineries could be built because the *activity* of oil refining (in lawful existence and active use on June 28, 1971 by virtue of the Delaware City refinery) was a nonconforming use not prohibited under the Act. That incongruity should be strong evidence of the unreasonableness of viewing an *activity* as a nonconforming use.

In short, the Board adopted an interpretation under the Act that appears to violate all four principles of statutory construction under the Act. As the Superior Court described in reversing the decision, "the Board tried to understand the meaning of 'nonconforming use' in a vacuum, resulting in the logistical quagmire that is the Board's decision."³¹⁷ The use and application of the principles might have avoided such a result. As long as the principles are not recognized and given due importance in the process of interpreting the Act, the ability to moor the interpretation in the core principles and terms of the Act will continue to be at risk because the natural checks and constraints on erroneous interpretations provided by the wisdom of the four principles will be absent.

What, then, can be done to revitalize the role of the four principles in efforts to interpret the Act? The first step is to recognize the four principles and their importance to the Act itself. The second step is to consciously require a thorough consideration of the four principles in each effort of statutory construction. This is not some kind of "checklist" approach, in which the four principles become platitudes to which an advocate, the Secretary, the Board, or a court can pay mere lip service without really applying their deeper meaning. Instead, advocates should hold each other's posi-

the Board cannot understand why Vane's new vessel-to-vessel oil lightering facility is also prohibited by § 7003 because it was not in operation on June 28, 1971.

DNREC v. Vane Line Bunkering, Inc., No. 06A-12-001-ESB, slip op. at 15 (Del. Super. Ct. Nov. 16, 2007)

316. See DEL. CODE ANN. TIT. 7, § 7002(e) (defining "heavy industry use" that is later prohibited in § 7003 and including the language "[e]xamples of heavy industry are oil refineries.").

317. *Vane Line*, No. 06A-12-001-ESB, slip op. at 8. In an amended decision issued days later, the Superior Court changed the word "logistical" to "logical." See *Vane Line Bunkering, Inc. v. DNREC*, No. 06A-12-001-ESB, slip op. at 8 (amended opinion issued November 19, 2007) (copy on file with author).

tions up to the light of the principles: does the opposing side's interpretation promote or diminish the purpose of the Act? Does that interpretation harmonize with other provisions in the Act? Does the interpretation maximize the Act's applicability and minimize the exceptions to the Act in an appropriate manner? Are the results of the interpretation reasonable or are they absurd? The Board and the courts should demand that the advocates before them explore these issues, and then apply the same four principles to their own analyses and interpretations under the Act. By adopting this "common language" based on the four principles, the entire process of interpreting the Act will continue to invoke the wisdom that underlies the four principles and better assure that interpretations stay closely tied to the Act's purpose, intent, and text. Honest consideration of the four principles still leaves plenty of room for responsible yet vigorous advocacy—especially when it comes to cases of first impression—but the results of such advocacy will always have at their core the advancement of the Act itself. Awareness of, sensitivity for, and fealty to the four principles is the best defense for keeping the Act vital and protective of Delaware's natural resources in the coastal areas. Thus, an important lesson for Delaware to learn from the Act's history is the need to remember and apply in a meaningful way the four principles of statutory construction of the Act.

B. Lessons For Other Coastal States

While Delaware's lessons focus on the details of the Act's application, the lessons available for other coastal states look at larger issues arising from the Act's structure and application.

Because the federal Coastal Zone Management Act squarely puts the onus for coastal preservation on the states,³¹⁸ each coastal state theoretically has the ability to adopt policies and laws similar in scope to the Coastal Zone Act. No such coastal state has done so. Indeed, given the emphasis in other states on balancing economic development with coastal preservation,³¹⁹ and the differences between the relatively undeveloped coast of Delaware in 1971 and the varied levels of development in other states' coastal zones, the likelihood of other coastal states following Delaware's lead in absolutely banning new heavy industry and bulk product transfer facilities appears remote.

318. See *supra* note 11.

319. See *supra* note 10.

While other states may not be interested in the broad prohibitions of the Act, there are at least two narrower aspects of the Act that can be instructive: § 7004(b)'s six factor analysis for coastal zone permits and the concept of environmental offsets.

Lessons From § 7004(b)'s Six Factor Analysis

The six factors of § 7004(b) can be a useful guide for coastal states because they provide a comprehensive review of what a proposed project will do to the coastal environment. The six factors—environmental impact, economic impact, aesthetic impact, impact on neighboring land uses, impacts on local land use plans, and size impacts³²⁰—require the permitting authority to go beyond a perhaps narrower view that focuses only on environmental and economic impacts. They do so in two ways. *First*, the environmental impact factor is broader than one might otherwise expect. It requires consideration of probable pollution under both normal operating conditions as well as during mechanical malfunction and human error.³²¹ Thus, consideration of “worst case scenarios” is built into the analysis. In addition, the environmental impact factor goes beyond obvious environmental impacts (like air and water pollution) to explicitly require analysis of things like impacts on drainage, flood control, land erosion, and effects on surface, ground, and subsurface water resources from operations,³²² as well as the “likelihood of generation of glare, heat, noise, vibration, radiation, electromagnetic interference and obnoxious odors.”³²³ In short, the environmental impact factor encompasses a wide range of impacts, the consideration of which will likely provide greater protection for the coastal environment simply by making more projects have negative environmental impacts. *Second*, consideration of aesthetic and land use impacts broadens the focus of the permitting process to a larger picture of how a project impacts the coastal zone as a whole. This broader focus on non-environmental impacts beyond the project site itself likely provides greater protection for the coastal environment simply by

320. DEL CODE. ANN. TIT. 7, § 7004(b). See *supra* Section II.C for a full discussion of the six factors.

321. *Id.* § 7004(b)(1).

322. *Id.*

323. *Id.* See also *In re Jacob Kreshtool*, No. 221P, at 8, 10 (Del. Coastal Zone Indus. Control Bd. July 22, 1988) (appeal from the Delmarva Power & Light Co. Gas Combustion Turbine Permit Decision) (finding noise from new gas turbines at power plant are a negative environmental impact, but requiring modification of permit condition to set a specific decibel level reading) (copy on file with author).

making projects be more compatible with the area in which they will operate.

Section 7004(b)'s broader focus on the project's impacts provides other coastal states with a model for approaching development within their respective coastal zones. Adoption of the six factors would still allow those states to engage in their own balance of environmental and economic interests, but would assure that such balancing is more informed by injecting the full impacts of the project into the balancing analysis. More informed decision-making about how valuable coastal resources will be used is the best defense against uncontrolled development and exploitation of those resources. Coastal states would do well to learn from Delaware's example and seek to apply the § 7004(b) six factor analysis to their decisions on whether to allow coastal development projects to go forward.

Lessons From Environmental Offsets

An underappreciated aspect of the Act as applied in Delaware is the 1999 Regulation's requirement that a permittee engaging in any "activity or facility that will result in any negative environmental impact"³²⁴ must reduce those negative environmental impacts through an "offset proposal"³²⁵ that "must more than offset the negative environmental impacts associated with the proposed project or activity."³²⁶ Properly submitted offsets have the effect of *reducing* net negative environmental effects in the Coastal Zone. In effect, the permittee makes a trade: to get the privilege to create some negative environmental impacts, the permittee must reduce other impacts such that there is a net improvement in the coastal environment. Properly applied, offsets can have a measurably positive impact on coastal resources.

Delaware's environmental offset regulations provide a model for coastal states to protect the coastal resources they generally recognize as "valuable."³²⁷ Imposing a requirement of an environmental offset on activities in coastal areas can garner coastal states the best of both worlds: allowing development that the state believes satisfies the balance of economic and environmental interests while at the same time providing positive environmental benefits to the state's coastal resources. Coastal states would do

324. 7-100-101 DEL. CODE REGS. § 9.1 (Weil 2007).

325. *Id.* § 9.0.

326. *Id.* §§ 9.1.1, .2.

327. *See supra* note 10.

well to learn from Delaware's example and seek to apply environmental offset requirements to coastal development projects.

IV. CONCLUSION

As the Act begins to draw close to the end of its fourth decade of operation, there are many signs that it has achieved much of what its authors intended. The oil refineries and large industrial port complex so feared in the lead up to the passage of the Act³²⁸ never materialized, but non-heavy industry uses have been built under CZA permits. Recreation and tourism—the interests cited in § 7001 as the primary uses that the Act seeks to safeguard—have continued to thrive and provide positive economic and aesthetic benefits to the State of Delaware. In short, the Act has been a success, and provides a model for other coastal states to follow in keeping their own coasts clear of the development that threatens valuable coastal resources.

In Delaware, the Act's future success, however, depends upon a continued commitment by the citizenry, the regulated community, the Board, and the judiciary to remain true to the purposes that animated the Act at its passage. Going forward, the Act's greatest enemies may be amnesia about the origins and original purposes of the Act and complacency about thoughtful application of the principles that have guided interpretation of the Act. Effective advocacy and thoughtful consideration of issues raised in future cases will be the best chance for the Act to continue in its role as one of "the most original and innovative environmental and land use statutes in the world."³²⁹

328. *See supra* note 2.

329. 7-100-101 DEL. CODE REGS. pmbl.