IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE/DEPARMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL ("DNREC"), and DELAWARE NATURE SOCIETY	)	
Appellants,	)	**C.A. No. 06A-12-001 ESB**
v.	)	**On Appeal from Decision of the Coastal Zone Industrial Control Board Docket No. 2006-01**
VANE LINE BUNKERING, INC.,	)	
Appellee,	)	**CONSOLIDATED**
and the	)	**C.A. No.: 06A-12-002 RFS**
COASTAL ZONE INDUSTRIAL CONTROL BOARD of the STATE of DELAWARE,	)	
Appellee.	)	

DELAWARE NATURE SOCIETY'S APPELLANT OPENING BRIEF

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NATURE OF PROCEEDINGS

This is an appeal pursuant to § 7008 of the Coastal Zone Act, 7 Del. C. § 7008, of a November 16, 2006 decision by the Coastal Zone Industrial Control Board ("Board"). The November 16, 2006 decision, explained in the Board's Decision and Final Order issued December 1, 2006 ("Order"), reversed a September 12, 2006 status decision issued by the Secretary of the Delaware Department of Natural Resources and Environmental Control ("DNREC") in which the Secretary held that Vane Line Bunkering, Inc.'s ("Vane Line") proposed oil lightering operation within the Coastal Zone was a bulk product transfer facility prohibited by 7 Del. Code § 7003 of the Coastal Zone Act.

STATEMENT OF THE CASE

This case revolves around the status under the Coastal Zone Act, 7 Del. C. § 7001 *et seq.* ("CZA" or "Act"), of Vane Line's proposed oil lightering operation at the Big Stone Anchorage in the Delaware Bay. The location known as the Big Stone Anchorage is within the coastal zone as defined by the CZA. Order at 18. Vane Line's proposed operation involves the lightering (i.e., transfer) of crude oil and No. 6 fuel oil from larger ocean going vessels (not owned by Vane Line) to Vane Line's own vessels for the subsequent transport and transfer of the oil to its customers' ports and refineries on the Delaware River. Order at 2. Oil lightering was conducted on or before the enactment of the CZA on June 28, 1971 by a corporate predecessor of Maritrans Operating Partners, LP ("Maritrans"). Order at 18. Neither Vane Line nor its corporate predecessors conducted oil lightering in Big Stone Anchorage on or before June 28, 1971. *Id.*

In 2005, Sunoco, Inc. approached Vane Line to conduct crude oil lightering operations in Delaware Bay on its behalf, and Sunoco and Vane Line ultimately entered into two oil lightering

contracts in November 2005. Order at 9. In connection with its discussions with Sunoco, Vane Line began discussions with DNREC for an air permit to conduct oil lightering. Order at 9.

On June 30, 2005, DNREC's Air Quality Management Section sent a letter to Vane Line and three other entities inquiring into their oil lightering activity to assess compliance with air permitting requirements. DNREC Ex. 1 - 3; Order at 9. Vane Line apparently "misplaced" the document and never responded to the inquiry. Order at 9.

During the course of air permit discussions, DNREC notified Vane Line that it must apply to the Secretary of DNREC for a determination of whether the proposed oil lightering operations were permissible under the CZA. Vane Line responded by submitting a Request for Status Decision to the Secretary. On September 12, 2006, The Secretary issued his decision pursuant to § 7005 of the Act, and determined that Vane Line's proposed activities constituted a new bulk product transfer facility prohibited by the CZA:

> I have concluded that your lighter proposal would constitute a new offshore bulk product transfer facility in the Coastal Zone and therefore is prohibited. This conclusion is based on our belief that the lightering operation you propose is a prohibited activity that was not in operation on or before June 28, 1971, the effective date of the Coastal Zone Act. That statute "absolutely" prohibits the establishment of offshore, liquid or solid bulk product transfer facilities in the coastal zone after June 28, 1971. 7 Del. Code § 7003.

Order at 2. An appeal of the Secretary's decision was filed on October 2, 2006, and the Board convened to review the status decision pursuant to § 7007.

The Board held a public hearing on the appeal on November 16, 2006 at the Terry Campus of the Delaware Technical and Community College, Dover, Kent County, Delaware. DNREC did not call any factual witnesses during the proceedings, insisting that the issue was a matter of law. Order at 13. In support of the Secretary's decision, three correspondence letters were submitted to the Board. The letters were addressed to several entities conducting business

in the region. Essentially, DNREC was attempting to investigate as to whether any other entities besides Maritrans were conducting oil lightering in the Delaware Bay. Order at 13-14. DNREC's counsel also proffered several arguments before the Board: that the agency was unaware of any additional entities conducting oil lightering, that the agency is responsible for air quality monitoring while the Coast Guard is responsible for vessel and fleeting monitoring, that no records existed for tracking oil lightering, and that in light of the present matter the agency will investigate as to whether any other entities are conducting oil lightering in violation of the CZA. Order at 13-15.

Vane Line's counsel presented one fact witness, as well as several documents and arguments. Mr. Thomas Gaither, the Chief Operating Officer of Vane Line, testified that: several other entities conducted oil lightering at Big Stone Anchorage; Vane Line's only contact when allegedly lightering oil in the past was through the Coast Guard; that oil lightering as an activity was "not routine"; that Vane Line had not previously conducted oil lightering prior to June 28, 1971; and that Vane Line failed to respond to DNREC's inquiry into whether Vane Line was conducting oil lightering operations. Order at 9-13. Vane Line also offered two documents regarding past permit requests by Maritrans, as well as two articles dealing with the Coast Guard. Order at 12.

At the close of the November 16, 2006 public hearing, the Board voted 5-1 to overturn the Secretary's September 12, 2006 status decision.

The Board filed its opinion on the matter on December 1, 2006. In its Order, the Board drew several conclusions based on the parties' presentations. First, the Board found that oil lightering is "an important economic activity" that serves refineries along the East Coast. Also,

based on the evidence presented at the public hearing, the Board determined that "it is more likely than not that several entities have lightered oil in the Delaware Bay since June 28, 1971." Order at 19. The Board reasoned that DNREC's suspicion that such violators were conducting activities, that letters were sent to act on its suspicion, and that DNREC admitted the possibility that multiple entities were conducting oil lightering without its knowledge, leads inexorably to the conclusion that other entities have in fact done so subsequent to June 28, 1971.

The Board, focusing on the word "use" in the term "nonconforming use," found an ambiguity in whether nonconforming use applies to a "use" or a "user": "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')?" Order at 22. The Board concluded that the activity of oil lightering is a "nonconforming use" under § 7002(b) of the Act and thus oil lightering, as a "nonconforming use" is permissible under the CZA at levels exceeding those in place on or before June 28, 1971 by virtue of a permit under § 7004(a). Order at 23. Under this analysis, Vane Line's proposed oil lightering operation is not a "new" bulk product transfer facility but rather an expansion of the nonconforming use of the activity of oil lightering. *Id*.

Delaware Nature Society filed this appeal on December 6, 2006 to challenge the Board's decision.

STATEMENT OF QUESTION PRESENTED

Whether the Board abused its discretion by reversing the September 12, 2006 status decision and interpreting the statutory language of the Coastal Zone Act to allow the introduction of an entirely new bulk product transfer facility as proposed by Vane Line, where Vane Line had no such operation in place prior to June 28, 1971.

ARGUMENT

STANDARD OF REVIEW

On an appeal of a decision by the Board, the CZA directs this Court to determine "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." 7 Del. C. § 7008. This Court has long held that an administrative board abuses its discretion when its decision is not supported by substantial evidence on the record below or has erred as a matter of law. *In re Artesian Water Co.*, 189 A.2d 435, 437 (Del. Super. Ct. 1963). When the issue is one of construction of statutory law, "the court's review is plenary." *Stoltz Mgmt. Co., Inc. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992). *See Application of Beattie*, 180 A.2d 741, 744 (Del. Super. Ct. 1962) ("Delaware follows the general rule that factual determinations of an administrative agency are binding if supported by 'substantial evidence' in the record, but that the Appellate Court reviews questions of law"). For purposes of review of the factual findings, this court has defined "substantial evidence" to mean "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; it is more than a scintilla but less than a preponderance." *T.V. Spano Bldg. Corp. v. Wilson*, 584 A.2d 523, 526 (Del. Super. Ct. 1990) (citation omitted); *Bd. of Ed. of the Smyrna Sch. Dist. v. DiNunzio*, 602 A.2d 85, 93 (Del. Super. Ct. 1990) (citations omitted). Here, the Board has misinterpreted and misapplied the CZA to the facts of this case and therefore abused its discretion.

I. THE BOARD ERRED IN ITS INTERPRETATION OF THE COASTAL ZONE ACT.

At its core, the Board's decision to reverse the Secretary's Order rests on the Board's interpretation that the *activity* of oil lightering is a "non-conforming use" under the CZA, and

thus Vane Line's proposal to start a new oil lightering operation 35 years after the passage of the CZA is not prohibited under the Act. The Board's decision therefore boils down to statutory construction of the Act. A close examination of the actual terms of the Act, and application of the recognized principles of statutory construction of the Act, shows the gross error in the Board's decision.

A. The Recognized Principles Of Statutory Construction Of The Act

As with the interpretation of any statute, "the fundamental rule is to ascertain and give effect to the intent of the legislature." *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985). In the Coastal Zone Act, the legislature made its intent very clear in the very first section of the Act when it stated that "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" and that "it is further determined that offshore bulk product transfer facilities represent a significant danger of pollution to the coastal zone and generate pressure for the construction of industrial plants in the coastal zone, which construction is declared to be against public policy. For these reasons, prohibition against bulk transfer facilities in the coastal zone is deemed imperative." 7 Del. C. § 7001. Thus, the express purpose of the Coastal Zone Act is to prevent two distinct and different types of activities in the coastal zone—heavy industry and bulk product transfer facilities—that were not in operation as of June 28, 1971. The Act mandates that "no permits may be issued" for either of these prohibited activities. 7 Del. C. § 7003. Since the passage of the Act in 1971, the Delaware Supreme Court has identified three principles of statutory construction to use in

connection with interpretation of the Act itself. These principles are necessary to understanding the error in the Board's decision.

The first of these principles is that interpretations must harmonize the entire Act. As the court stated in *Coastal Barge*, "[a] statute is passed by the General Assembly as a whole and not in parts or sections. Consequently, each part or section should be read in light of every other part or section to produce a harmonious whole." 492 A.2d at 1245. Thus, interpretations of the Act which merely focus on a single word or phrase while ignoring other parts of the Act (including the clear purpose articulated in § 7001) are improper. In effect, the Board is not free to disregard one section of the CZA when interpreting a term in a different section. Also, the Board may not create an ambiguity in the Act's terms by omitting substantial sections, especially the purpose section, when interpreting another section. The Board must read the CZA as one, whole document and give effect to the Act's intent only after such consideration.

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

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

607 A.2d at 1166. In *City of Wilmington*, the Court ruled that the valuation of an undeveloped parcel of land in a condemnation proceeding must take into consideration the fact that the Coastal Zone Act might apply because a hypothetical on-site flourspar processing operation

could be "manufacturing" under the Act (and therefore subject to § 7004's permitting requirements). In rejecting the property owner's position, the court stated that "[s]uch a pinched construction of the scope of the term 'manufacturing' would clearly defeat the legislative purpose of the Act 'to control the location, extent and type of development in Delaware's coastal areas.'" *Id*. at 1166-67. Thus, the rule of liberal construction under the Act requires that the Board must err on the side of applying the restrictions and prohibitions of the Act because that best meets the legislative purpose set forth in § 7001. The corollary of this rule is that exceptions in the Act must be defined narrowly in order to assure that the Act and its prohibitions have the maximum opportunity to assure that the environment is protected.

The third rule of interpretation applicable to the Coastal Zone Act is a rule favoring interpretations with reasonable consequences over those with unreasonable consequences. In *Coastal Barge Corp.,* the Delaware Supreme Court found that the vessel-to-vessel transfer of coal in the Delaware River fell within the Coastal Zone Act's prohibition against bulk product transfer facilities even though the literal language of § 7002(f) required the transfer of bulk products "from vessel to onshore facility or vice versa." The *Coastal Barge* court used what it called "the golden rule of statutory interpretation" to reach this result:

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

492 A.2d at 1247. The *Coastal Barge* court analyzed the purpose of the Act set forth in § 7001, with particular emphasis on the "prohibition against bulk product transfer facilities in the coastal zone is deemed imperative" language of that section. The Court held that, because the pollution potential from vessel to vessel transfers was the same as transfers from vessel to land, giving the

"from vessel to onshore facility or vice versa" its literal meaning "would lead to the irrational and absurd result of prohibiting only those facilities for the transfer of substances from vessel to an onshore facility or vice versa, regardless of the potential threat of pollution and industrialization to the Delaware Coast." *Id*. The Court therefore construed § 7002(f)'s "from vessel to onshore facility or vice versa" language to be merely "illustrative" of a bulk product transfer facility, and held that vessel to vessel transfers are also included within § 7002(f)'s definition. *Id*. Thus, *Coastal Barge* clearly holds that interpretations of the Act that allow a frustration or diminishment of the purpose of the Act are irrational and absurd and must be rejected.

Application of these recognized principles of statutory construction in this case show that the Board's interpretation of the Act was wrong. It fails to harmonize all parts of the Act, applies a too narrow view of the Act in contravention of clear legislative intent, and produces absurd results which would frustrate and diminish the purposes of the Act.

B. The Board Erred In Its Finding Of The Purpose Of The Act.

The Board's legal error begins in the very first paragraph of its Conclusions of Law when it claims that the "stated purpose of the CZA" is to "control the location, extent, and type of industrial development in Delaware's coastal areas . . . to better protect the natural environment of the bay and coastal areas" so that "there is a need to strike a balance between those environmental protection goals and the State's need to encourage the introduction of new industry into the State." Order at 21. That statement completely misreads the first section of the Act, which states in full:

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

> can better protect the natural environment of its bay and coastal areas and safeguard their use primarily for recreation and tourism. Specifically, this chapter seeks to prohibit entirely the construction of new heavy industry in its coastal areas, which industry is determined to be incompatible with the protection of that natural environment in those areas. While it is the declared public policy of the State to encourage the introduction of new industry into Delaware, the protection of the environment, natural beauty and recreation potential of the State is also of great concern. In order to strike the correct balance between these 2 policies, careful planning based on a thorough understanding of Delaware's potential and her needs is required. Therefore, control of industrial development other than that of heavy industry in the coastal zone of Delaware through a permit system at the state level is called for. 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.

7 Del. C. § 7001. The intent of this language could not be clearer: "construction of new heavy industry" is "prohibit[ed] entirely," and the "prohibition" of bulk product transfer facilities is "imperative." This is also clear from § 7003, which states in pertinent part:

> Heavy industry uses of any kind not in operation on June 28, 1971, are prohibited in the coastal zone and no permits may be issued therefor. In addition, offshore gas, liquid or solid bulk product transfer facilities which are not in operation on June 28, 1971, are prohibited in the coastal zone, and no permit may be issued therefor.

Nothing in either of these sections says that, with respect to heavy industry and bulk product transfer facilities, any "balancing" of environmental protection goals and encouragement of new industry must take place—they are both expressly prohibited. The notion of a "balance" of interests comes into play only for control of non-heavy industrial development. Because this matter involves a bulk product transfer facility, the Board's claim that the stated purpose of the Act requires a balancing of interests misreads § 7001 and fails to harmonize that interpretation with § 7003.

C. The Board Erred In Its Application Of The Act To Vane Line's Proposed Oil Lightering Operation.

The crux of the Board's legal analysis is its conclusion that Vane Line's proposed oil lightering operation is not a new bulk product transfer facility and that the *activity* of oil lightering is a nonconforming use under the Act so that Vane Line's engaging in oil lightering is "grandfathered" as an existing use under the Act. Order at 22. Each of these conclusions is based on an incorrect reading of the Act and is wrong as a matter of law.

1. The Board Erred In Finding That Vane Line's Proposed Oil Lightering Operation Is Not A New Bulk Product Transfer Facility Under The Act.

The Act defines the term "bulk product transfer facility" as follows:

> 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.

7 Del. Code § 7002(f). In *Coastal Barge*, the Delaware Supreme Court found that the vessel to vessel transfer of a bulk commodity (in that case, coal) fell within the Act's definition of bulk product transfer facility, and thus the proposed coal lightering operation there was prohibited under the Act. 492 A.2d at 1246. Here, Vane Line proposes to perform vessel to vessel transfers of a bulk commodity (in this case, oil). Vane Line's proposed activity clearly falls within the statutory definition as interpreted by *Coastal Barge*, and thus can only be interpreted as a bulk product transfer facility prohibited under the Act.

The Board's only analysis on this point is the curious claim that *Coastal Barge* is "not controlling in this matter" because the activity of coal lightering was not being performed at the time the CZA was passed while the activity of oil lightering was. Order at 26. The Board's

conclusion is erroneous for several reasons.

First, it does not address the language of § 7002(f), which makes clear that the definition focuses solely on whether or not there are "bulk quantities of any substance" being transferred from vessel to shore, from shore to vessel, or (as *Coastal Barge* concludes) from vessel to vessel. That is clearly what Vane Line will be doing in its proposed oil lightering operation. In effect, the Board is reading § 7002(f)'s definition as saying "the transfer of bulk quantities of any substance from vessel to onshore facility or vice versa, *provided that the activity of such transfer was not one that was taking place by anyone at the time the Act was passed*"—in effect creating a new statutory requirement (in italics) that is simply not found in the Act.

Second, *Coastal Barge* does not depend on the "newness" of the proposed transfer activity; it is focused solely on whether or not there are bulk quantities of substances being transferred as required by the definition—something which occurs in both coal and oil lightering. The court decided, based on the "strongly worded statutory purpose," that vessel-to-vessel transfers, although not literally defined under § 7002(f), must be included within its definition in order to set forth the most reasonable interpretation and uphold the purpose and public policy behind the Act. *Id.* The court reasoned that the danger of pollution and hazardous spills is equally as great whether the facility merely transferred material from offshore to an onshore facility or if the transfer was between two vessels. *Id.* Of course, the threat of pollution from such bulk product transfers is the same regardless of whether similar transfers were taking place before or after passage of the Act. In *Coastal Barge*, the court avoided an absurd and unreasonable interpretation of the statute that would have limited the Act's protection in order fulfill the Act's purpose of protecting the Coastal Zone from the most threatening polluters:

heavy industry and bulk product transfer facilities. That reasoning applies with full force here.

The Board apparently decided to disregard this important rule of statutory construction, and adopted a conclusion that is completely absurd and unreasonable. The Board's reasoning relinquishes the protective force of the Act by allowing the introduction of a new bulk product transfer facility at Big Stone Anchorage that was not in existence and active use prior to June 28, 1971. This type of interpretation is exactly what the court in *Coastal Barge* sought to avoid in order to uphold the Act's purpose. The Board, instead, defies the Act's goal of limited industrial intrusion into the Coastal Zone by "grandfathering" all oil lightering operations. In effect, the Board is putting a gloss on *Coastal Barge* that is simply unsupported by the case itself or the statute.

Third, the Board's new twist on the definition of bulk product transfer facility violates the Supreme Court's rule of liberal construction from *City of Wilmington*. Given the "imperative" need to prohibit bulk product transfer facilities set forth in § 7001, a liberal construction of the Act requires that the Board err on the side of applying the Act to find transfers of bulk quantities of commodities like oil fall within the definition because that best meets the legislative purpose to prohibit such facilities. An interpretation which adds a requirement that the activity of the bulk product transfer not be one that was performed at the time the Act was passed is to narrow the statute's reach in contravention of *City of Wilmington*.

Quite simply, the Board got it wrong when it ruled that Vane Line's proposed oil lightering operation was not a new bulk product transfer facility under the Act. That error of law carries over into the Board's remaining analysis.

2. The Board Erred In Finding That The Activity Of Oil Lightering Is A Nonconforming Use Under The Act.

The Board compounded its legal error when it analyzed "nonconforming uses" under the Act. The error here is two-fold: first, the Board erred when it treated Vane Line's proposed oil lightering operation as a nonconforming use; and second, when it tried to bootstrap Vane Line's proposed oil lightering into a nonconforming use by ruling that the *activity* of oil lightering is a nonconforming use under the Act, such that Vane Line's proposed oil lightering operation was permissible under the Act as an "expansion" of a nonconforming use. These interpretations conflict with the language of the Act and violate the Supreme Court's principles of statutory construction.

The Act defines a nonconforming use as follows:

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

7 Del. C. § 7002(b). Application of this definition to Vane Line's proposed oil lightering operation shows that the operation cannot satisfy the definition because it was not "lawfully in existence and in active use prior to June 28, 1971." The plain language of the statute precludes a finding that Vane Line's proposal is a nonconforming use.

The Board's attempt to bootstrap Vane Line by claiming that the *activity* of oil lightering is a nonconforming use likewise ignores the plain language of the Act. While the Board focused on the word "use," it ignored an even more fundamental aspect of the statutory definition in § 7002(b): what ever a "use" may be, it must be one that "does not comply with the applicable use provisions in this chapter" but was "lawfully in existence and in active use" prior to the Act's passage date. In other words, the only way something can be a nonconforming use is if it is

something unlawful under the Act but was in operation prior to June 28, 1971. The Act makes three things unlawful: heavy industry uses, bulk product transfer facilities, and non-heavy industrial uses that operate without a permit. *See* 7 Del. C. §§ 7003-7004. If a use is not one of these three things, then by the statutory definition, it *cannot* be a nonconforming use entitled to the protection afforded nonconforming uses in §§ 7003 and 7004. This is the only way to harmonize these three sections, as required by *Coastal Barge*, for if a use is not a heavy industry use, bulk product transfer facility, or non-heavy industrial use without a permit, the protection as a nonconforming use is completely unnecessary given that the Act does not regulate things falling outside those categories. The Board's failure to identify the prohibited "use" involved in the *activity* of oil lightering means that this activity cannot be a "nonconforming use."[1]

Despite this obvious error based on the plain language of the Act, the Board attempts to support its erroneous conclusion that the *activity* of oil lightering is the nonconforming use with three basic arguments:

1. The fact that the definition employs the undefined term "use" instead of "user" means that the activity of oil lightering can be a nonconforming use, Order at 23-24;

2. The Third Circuit, in *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388 (3rd Cir. 1987), stated that oil lightering is a use that was being performed on June 28, 1971 and is therefore grandfathered under the Act, Order at 24; and

3. DNREC's failure to regulate oil lightering means that DNREC concluded that the activity of oil lightering was a "grandfathered use." Order at 24.

Each of these arguments is legally wrong, ignores the plain language of the Act, and violates the

[1] Given that a nonconforming use must be a use otherwise prohibited under the Act, the internal inconsistency of the Board's logic becomes readily apparent. Having found that Vane Line's proposed oil lightering operation is not a bulk product transfer facility, the Board was foreclosed from finding that Vane Line's operation was a nonconforming use (or an expansion of a nonconforming use). Quite simply, the Board's findings do violence to the text of the Act and therefore fail to harmonize all sections of the Act as required by *Coastal Barge*.

recognized principles of statutory construction. As such, the Board abused its discretion in reaching its legal conclusions.

a. "Use" Has A Facility-Specific Meaning In The Act.

While the Act does not define the word "use," there is overwhelming evidence that the Act views "use" in facility-specific terms. The definition of nonconforming use in § 7002(b) describes it by reference to use of "land or of a structure." It is impossible for two different users to use the same land or structure to conduct a prohibited heavy industry use, bulk product transfer facility, or non-heavy industrial use without a permit—each such use will occur in its own facility.[2] Thus, under § 7002(b), it is the prohibited facility itself that must be "lawfully in existence and in active use prior to June 28, 1971" in order to qualify for treatment as a nonconforming use.

This facility-specific focus shows up in other occurrences of the term "use" in the Act. In § 7002(e), the Act defines "heavy industry use" as follows:

> Heavy industry use means a use characteristically involving more than 20 acres, and characteristically employing some but not necessarily all of such equipment such as, but not limited to, smokestacks, tanks, distillation or reaction columns, chemical processing equipment, scrubbing towers, pickling equipment and waste treatment lagoons; which industry, although conceivably operable without polluting the environment, has the potential to pollute when equipment malfunctions or human error occurs. Examples of heavy industry are oil refineries, basic steel manufacturing plants, basic cellulosic pulp-paper mills, and chemical plants such as petrochemical complexes. An incinerator structure or facility which, including the incinerator, contains 5,000 square feet or more, whether public or private, is "heavy industry" for purpose of this chapter. Generic examples of uses not included in the definition of "heavy industry" are such uses as garment factories, automobile assembly plants and jewelry and leather goods manufacturing establishments, and on-shore facilities, less than 20

[2] The Board's own findings support this notion. The Board found that "a ship used to lighter oil is a 'structure,' as that term is commonly defined." Order at 20. The boats that Maritrans (as corporate successor to the oil lightering operation in lawful existence and active use before June 28, 1971) uses to lighter will not and cannot be used by Vane Line to lighter—Vane Line will have to use different boats and hence different "structures."

> 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.

The Act clearly defines this prohibited activity in terms of the unique size of the facility, the unique equipment used at the facility, and the unique potential of the facility to pollute. It gives examples that are plant-specific—refineries, steel and chemical plants, and mills. Its description and examples of what is not a heavy industry use are likewise plant-specific—incinerators of a certain size, factories, plants, establishments, and facilities of a certain size with certain types of buildings or structures.[3]

The only other time the term "use" is substantively employed in the Act[4] is in § 7004, which provides that "manufacturing uses not in existence and in active use on June 28, 1971, are allowed in the coastal zone by permit only, as provided for under this section." In granting the power to issue permits for such non-heavy industry uses, § 7004 requires Secretary of DNREC and the Board to consider specified factors of environmental impact, economic impact, aesthetic effect, number and types of supporting facilities, effects on neighboring land uses, and compliance with municipal and county comprehensive plans. 7 Del. C. § 7004(b). Each of these factors is, of necessity, specific to a particular facility. For example, the environmental impact factor requires consideration of

[3] Although it does not contain the term "use," the Act's definition of bulk product transfer facility likewise contains this facility-specific focus, referring to a "port or docking facility." 7 Del. C. § 7002(f).

[4] The only other places that the Act uses the term "use" is in § 7003, which simply uses the "heavy industry use" and nonconforming use" terms defined in § 7002, and § 7005, which refers to "manufacturing land uses" described in § 7004, "heavy industry uses" and "nonconforming uses," a "use allowable only by permit under § 7004 of this title"; and "a use requiring no action under this chapter" (presumably because it is not a "heavy industry use," "bulk product transfer facility," or non-heavy industry or manufacturing use requiring a permit).

> probable air and water pollution likely to be generated by the proposed use under normal operating conditions as well as during mechanical malfunction and human error; likely destruction of wetlands and flora and fauna; impact of site preparation on drainage of the area in question, especially as it relates to flood control; impact of site preparation and facility operations on land erosion; effect of site preparation and facility operations on the quality and quantity of surface, ground and subsurface water resources, such as the use of water for processing, cooling, effluent removal, and other purposes; in addition, but not limited to, likelihood of generation of glare, heat, noise, vibration, radiation, electromagnetic interference and obnoxious odors.

Id. at 7004(b)(1). The only way to calculate probable air or water pollution, impacts on drainage and flood control, or any of these other factors is to look at one specific facility's plans.

In short, § 7002(b), 7002(e), and 7004 all view "use" in facility-specific terms. None of those sections contains any language to suggest that an activity falls within the statutory term "use."

Given this statutory language, the Board's conclusion that "use" can apply to an *activity* ignores the Act and violates every principle of statutory construction. An *activity* can be done in many places at the same time, and so its very nature cannot be facility-specific as required by §§ 7002(b), 7002(e), and 7004. This is perhaps most obvious with the permitting requirements in § 7004. If an *activity* can be a "use," how does the Secretary determine the environmental impact—by guessing how many entities will engage in the activity? How can the Secretary determine impacts of site drainage, or on neighboring land uses, or any of the other site-specific factors in § 7004(b), when there is the possibility that many sites—each with unique characteristics and surrounding uses—might (or might not) be involved? The only way that the Act makes sense and harmonizes all of its sections is to view "use" to mean one particular facility. That means that an *activity* cannot be a "use," and the Board erred in finding that oil lightering is a "use" and therefore a "nonconforming use" under the Act.

Violation of the express terms of the Act and the principle that statutory constructions must harmonize all sections is but the first of the legal errors in the Board's conclusion. The recognition that an *activity* can be a nonconforming use also violates the principles of liberal construction of the Act. The intent of the Act is clear: to prohibit heavy industry uses and bulk product transfer facilities. The nonconforming use provisions of the Act create an exception to those prohibitions by allowing an otherwise prohibited use to continue to operate. Thus, the liberal construction rule requires that the Act's nonconforming use provision be interpreted narrowly so as to maximize the protection afforded by the prohibition. Here, the Board adopted an expansive view of the nonconforming use exception, as illustrated by the fact that it would allow Vane Line's bulk product transfer facility to start up 35 years after the passage of the Act under an exception that requires lawful existence and active operation before June 28, 1971. The Board's violation of the liberal construction rule from *City of Wilmingto*n is a second reason that the Board's conclusion was an abuse of discretion.

Thirdly, the Board's holding that an *activity* can be a nonconforming use generates an absurd result and creates a dangerous precedent. For if it is the case that occurrence of an *activity* before June 28, 1971 makes that activity a nonconforming use, then <u>any</u> activity that was taking place on June 28, 1971 is entitled to that treatment. For example, the refinery at Delaware City was engaged in oil refining at that time. Under the Board's logic, the *activity* of oil refining is therefore a nonconforming use, and someone who now wants to build an oil refinery in the Coastal Zone should be entitled to argue that the new refinery is merely an "expansion" of the nonconforming use of oil refining. But that is absurd in light of the fact that § 7002(b) lists oil refineries as a specific example of a "heavy industry use" which is ultimately prohibited by §

7003. If the Legislature intended for a pre-existing *activity* to be entitled to treatment as a nonconforming use, then this provision makes no sense, because oil refining would automatically qualify as a nonconforming use, and the definition of an oil refinery as a prohibited heavy industry use would not stop one (or ten, or a hundred) new refineries from being built. Of course, oil refining is only one of many heavy industry activities that were occurring in the Coastal Zone at the time the Act was passed. Under the Board's view that activities can be nonconforming uses, the act is powerless to stop more facilities of any of these heavy industry activities.[5] That is an absurd result that reads nearly all of the protections out of the Act. *Coastal Barge* requires that interpretations producing absurd results be rejected in favor of interpretations that are more reasonable. A facility-specific interpretation of "use," in which only those facilities in existence and active operation on June 28, 1971 can qualify as nonconforming uses, protects the Coastal Zone against new refineries, steel mills, and chemical plants (i.e., new heavy industry) and oil lightering operations (i.e., new bulk product transfer facilities) consistent with the stated purpose in § 7001. Thus, the Board's analysis violates the golden rule of statutory construction, while the Secretary's original decision comports with it. The Board's legally-flawed analysis was therefore an abuse of discretion.

[5] The Board's claim that new refineries and chemical plants could not be built because they would satisfy the definition of heavy industry use under § 7002(b) and therefore be prohibited under § 7003, Order at 27, merely underscores the Board's legal error. At noted before, to be a nonconforming use, the use must be otherwise prohibited under the Act. Thus, the mere fact that something falls within the definition of a prohibited use does not end the matter. Under the Board's own analysis, if the *activity* was taking place on June 28, 1971, then the *activity* is the nonconforming use, and any new plan to engage in that activity is merely an expansion of the nonconforming use. Oil refining was taking place in the Coastal Zone on June 28, 1971, and therefore must be viewed as a nonconforming use so that a new refinery is merely an expansion of that nonconforming use. The Board cannot escape the logical consequences of its own analysis by pointing to only one half of the definition.

b. *Norfolk Southern* Does Not Support The Board's Analysis

The Board's citation to *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388 (3rd Cir. 1987), Order at 24, does not alter this analysis. *Norfolk Southern* involved a federal constitutional challenge to the Act by the same parties who sought permission for the coal lightering operation that the Delaware Supreme Court held violated the Act in *Coastal Barge*. The Third Circuit was not required to and did not engage in any interpretation of the terms of the Act itself. As such, *Norfolk Southern* does not offer any insight into the meaning of the Act's terms. In fact, the language in *Norfolk Southern* about oil lightering being "grandfathered" occurs in a footnote to the statement of the background facts of the case, *see* 822 F.2d at 391 n. 3, and is literally true—there was an oil lightering operation in existence on June 28, 1971 (operated by the corporate predecessor of Maritrans) that was therefore "grandfathered" under the Act. However, the recognition by the Third Circuit of the background fact that one oil lightering bulk product transfer facility was in existence and therefore "grandfathered" cannot be read as a statement of the law under the Act adopting the novel view that the *activity* of oil lightering was "grandfathered" so that new lightering operations 35 years later would likewise satisfy the definition of nonconforming use. Quite simply, *Norfolk Southern* offers no support for the Board's conclusion that the *activity* of oil lightering is a nonconforming use under the Act.

c. The Board Erred In Its Inference That DNREC Deemed Oil Lightering A Nonconforming Use

The Board's final argument for its legally-unsupported conclusion that the *activity* of oil lightering is a nonconforming use is the creation out of whole cloth of an inference that DNREC deemed it to be so. In particular, the Board stated:

> DNREC's knowledge of alleged non-grandfathered entities illegally conducting oil lightering at the Big Stone Anchorage and DNREC's failure, to date, to regulate or otherwise act (if for no other reason, to protect the environment) in response to the alleged illegal activity creates 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".

Order at 24. This "inference" is inaccurate in at least two ways.

First, although the Board makes much of the "fact" that entities other than Maritrans have engaged in oil lightering and that DNREC knew of these other entities, this alleged lack of enforcement of the CZA has no legal significance. It is a long-standing and well-established principle of law that "where the state police power is found to exist, it is not lost by non-exercise but remains to be asserted as local exigencies may demand." *Kelly v. Washington*, 302 U.S. 1, 14 (1937). *See Doris v. Police Commissioner of Boston*, 373 N.E.2d 944, 949 (Mass. 1978) ("It would indeed be a most serious consequence if we were to conclude that the inattention or inactivity of government officials could render a statute unenforceable and thus deprive the public of the benefits or protections bestowed by the Legislature . . . The public interest in the enforcement of the laws of the Commonwealth cannot be defeated by failures of public officials to perform their duties"); *Commonwealth v. Barnes and Tucker Co*., 319 A.2d 871, 884 n. 13 (Pa. 1974) (quoting *Kelly*); *Flowers v. South Carolina Dept of Highways & Pub. Trans*., 419 S.E.2d 832, 834 (S.C. Ct. App. 1992) (failure to enforce law for 16 years held not to prevent enforcement); *Lackawanna Refuse Removal, Inc. v. Dept. of Environmental Protection*, 442 A.2d 423, 426 (Pa. Cmwlth. 1982) ("in enforcing these environmental enactments DEP is exercising a governmental function, so that even had its agents been mistakenly indulgent or lax in enforcing the laws, DER cannot now be prevented from performing its duty of enforcing the statutes"). This comports with common sense; just because the police do not catch every speeder does not

mean that the next speeder can avoid the application of the law. In short, nothing of legal significance should be read into the "fact" that others may have lightered oil besides Maritrans.

Second, there is no legal support for the Board taking DNREC's supposed lack of enforcement diligence and deriving an inference that DNREC interprets the Act as meaning that the *activity* of oil lightering is a nonconforming use. Not only is the there no factual basis for any conclusion that DNREC made any interpretation of the Act based on prior oil lightering,[6] but the Board cites to no legal precedent to support the notion that failure to enforce must be interpreted as a legal interpretation by the enforcement agency that the action is permissible under a construct of particular provisions of the law. Indeed, *Kelly* and the other cases cited above rebut that notion. Likewise, common sense rejects the Board's facile approach; just because the police do not catch every speeder or every criminal, we do not hold that the police have determined that the act of speeding or committing a crime is legally permissible so that a violator can escape the application of the law. Furthermore, the Board's reasoning ignores the text of the Act itself, and thereby fails to harmonize the sections of the Act clearly making "use" and nonconforming use be facility-specific. This inference is directly contrary to the liberal rule of construction for the Act, for it converts the interpretation of the text of the Act into an inquiry into how aggressively DNREC has enforced the law. It leads to the absurd result that, for sections that someone determines DNREC has not enforced aggressively enough, the Act's provisions can be read so as to permit things otherwise prohibited under the Act. There is simply no legal basis for the Board's inference that DNREC interprets the Act as recognizing the activity of oil lightering is a nonconforming use under the Act. The Board therefore abused its

[6] The only evidence the Board cites are facts which suggest that DNREC was aware of oil lightering activity by others besides Maritrans. There is no evidence—because there were no DNREC witnesses and no

discretion in reaching such a conclusion.

CONCLUSION

For the reasons set forth above, Appellant Delaware Nature Society respectfully requests that this Court reverse the November 16, 2006 decision of the Coastal Zone Industrial Control Board and reinstate the Secretary's September 12, 2006 Status Decision finding that Vane Line's proposed oil lightering operation is a bulk product transfer facility prohibited under the Coastal Zone Act.

Respectfully submitted,

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documentary evidence—about how DNREC interpreted the Act in connection with these other lightering operations.