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	)	
COASTAL ZONE INDUSTRIAL CONTROL BOARD of the STATE of DELAWARE,	)	**C.A. No.: 06A-12-002 RFS**
Appellee.	)	

DELAWARE NATURE SOCIETY'S APPELLANT REPLY BRIEF

Jennifer A. Murphy, Esq. (Delaware Bar #4893)
Kenneth T. Kristl, Esq.
Trevor Mohr, Legal Intern
Mid-Atlantic Environmental Law Center
4601 Concord Pike, PO BOX 7474
Wilmington, DE 19803-0474
Phone: (302) 477 – 2182
Fax: (302) 477 – 2032
ATTORNEYS FOR DELAWARE NATURE SOCIETY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

Vane Line Bunkering, Inc.'s Brief ("Vane Br.") suffers from numerous shortcomings. It completely ignores many arguments raised by Delaware Nature Society's Opening Brief. It fails to provide legal support for many of its arguments, and misstates the law on others. In short, Vane Line offers no real support for the Board's decision that Vane Line's proposed oil lightering operation is permissible under the Coast Zone Act, 7 Del. C. § 7001 *et seq.* ("CZA" or "Act"). The Board's decision is erroneous as a matter of law, and should therefore be reversed.

I. VANE LINE'S PROPOSED OIL LIGHTERING OPERATION IS A BULK PRODUCT TRANSFER FACILITY PROHIBITED UNDER THE ACT.

Vane Line offers little in the way of analysis to support the Board's erroneous conclusion that Vane Line's proposed oil lightering operation is not a bulk product transfer facility under the Act. Further, what little analysis Vane Line does offer is legally wrong.

A. Vane Line's Proposed Oil Lightering Operation Fits Within The Statutory Definition Of Bulk Product Transfer Facility.

The Act defines bulk product transfer facilities 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. C. § 7002(f). There is no dispute the Vane Line's proposed operation will involve the transfer of bulk quantities of oil between vessels. The Delaware Supreme Court, in *Coastal Barge Corp. v. Coastal Zone Industrial Control Board*, 492 A.2d 1242 (Del. 1985), specifically found that ships in Delaware Bay transferring bulk quantities of a substance (in that case, coal) between each other formed a "port facility" and an artificial "island" so as to fall within this

statutory definition, 492 A.2d at 1245, and that vessel-to-vessel transfers of bulk quantities of any substance fell within the definition as well. *Id*. at 1246. Thus, Vane Line's proposed oil lightering operation falls squarely within the statutory definition.

Vane Line points to the second sentence of § 7002(f) ("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") and calls it a "critical distinction," Vane Br. 8-9, without ever explaining why that language matters here. In fact, it has nothing to do with this case. What the second sentence excludes is a pier or docking facility "for a single industrial or manufacturing facility." Vane Line does not identify what "single industrial or manufacturing facility" would be associated with its oil lightering—in fact, it states that the lightered oil would go to *many* refineries. See Vane Br. at 3 (Describing lightering as transfer to smaller vessels "in order for the product to be transported to refineries in Delaware, Pennsylvania, and New Jersey that are located on the Delaware Bay and the Delaware River"). Thus, Vane Line cannot qualify for the exception in the second sentence of § 7002(f), and so its citation to that exception is both baffling and ultimately irrelevant to the analysis here.

Quite simply, Vane Line's proposed oil lightering operation falls within the statutory definition of a bulk product transfer facility, and is prohibited under § 7003 of the Act. The Board erred in finding otherwise.

B. *Coastal Barge* Compels The Conclusion That Vane Line's Proposed Oil Lightering Operation Is A Bulk Product Transfer Facility Under The Act.

Vane Line's attempt to distinguish *Coastal Barge Corp. v. Coastal Zone Industrial Control Board*, 492 A.2d 1242 (Del. 1985), Vane Br. 9-11, misstates the holding and adopts an unduly narrow view of what *Coastal Barge* holds. While *Coastal Barge* involved a proposal for coal lightering (that is, vessel-to-vessel transfers of coal) in Big Stone Anchorage, nothing in the

opinion suggests that the language of *Coastal Barge* only applies to coal lightering such that it can be ignored here.

In *Coastal Barge*, the proponents of the lightering operation offered two arguments for why the lightering operation was permissible under the Act. First, they argued that the proposed lightering did not fall within the definition of a bulk product transfer facility in § 7002(f) because it did not involve a "port," "facility," or "artificial island" as required in the statute. 492 A.2d at 1245. The Court rejected this argument as being without merit, because based on common definitions of the terms, the proposed lightering operation "clearly . . . includes what is commonly defined as a port facility"[1] while the anchored ships involved in the lightering "resemble an island." 492 A.2d at 1245. This analysis applies with the same force here, for the physical reality of the lightering operations here and in *Coastal Barge* are exactly the same: ships tied together in Big Stone Anchorage transferring bulk quantities of material between each other. The fact that coal is involved in one and oil in the other has no relevance to the analysis used by the Supreme Court.

The proponent's second argument in *Coastal Barge* was that the proposed lightering did not fall within § 7002(f) because the statute only covers transfers "of any substance from vessel to onshore facility or vice versa." 492 A.2d at 1245. Here, the Supreme Court provided highly relevant analysis. It found that the language of § 7002(f), though literally limiting bulk product transfer facilities to those involving transfers "from vessel to onshore facility or vice versa," is ambiguous because to interpret it as excluding vessel-to-vessel transfers would lead to

[1] The Court stated: "As stated by the Board, the term "port" has been defined as a place of refuge in which protection and shelter are sought, *The Cuzco*, W.D.Wash., 225 Fed. 169, 176 (1915), and as a place intended for loading and unloading of goods, *The Baldhill*, 2nd Cir., 42 F.2d 123, 125 [1930]. In addition, the dictionary definition of "port" is "a place where ships may ride secure from storms", *Webster's Third New International Dictionary* 1767 (1976). "Facility" is defined as "something that promotes the ease of any action, operation, transaction, or course of conduct" *Id.* at 812." 492 A.2d at 1245.

unreasonable or absurd consequences in light of the expressed statutory purpose in § 7001 of the Act:

> The General Assembly set forth the purpose of the Coastal Zone Act as:
>
> 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 [. . .] 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. (emphasis added). 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 (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.

492 A.2d at 1246. 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. Note that the language of the *Coastal Barge* court is not unique to coal lightering; the concern is driven by the General Assembly's finding that *all* bulk product transfer facilities in the coastal zone represent a significant danger of pollution, and thus prohibition of *all* bulk product transfer facilities is "deemed imperative."

Having found that § 7002(f) was ambiguous, the *Coastal Barge* court applied what it called "the golden rule of statutory interpretation" to conclude the following:

> As previously explained, to give § 7002(f) 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. We, therefore, adopt appellee's construction and construe the "vessel to onshore" language of § 7002(f) as illustrative of a bulk product transfer facility. *We hold that port facilities for the transfer of bulk quantities from vessel to vessel are also included in the definition of "bulk product transfer facility" contained in § 7002(f).*

492 A.2d 1246 (emphasis supplied). Note, again, that the language of this analysis is not limited to coal lightering but applies to *any* "transfer of bulk quantities from vessel to vessel."[2]

In light of the universal nature of this quoted language, Vane Line's attempts to distinguish *Coastal Barge* are especially unavailing. The fact that the activity of coal lightering was not occurring at the time of the Act, Vane Br. at 9, or that coal lightering would have introduced an entirely new industry into the Coastal Zone, *id*. at 10, or that coal is transferred between vessels differently than oil, *id*. at 11, or that environmental impacts may be more controlled, *id*., are not discussed in *Coastal Barge* at all. The logic of the Act as interpreted by *Coastal Barge* is very simple and straightforward: (1) vessel-to-vessel transfers fall within the definition of bulk product transfer facilities; (2) bulk product transfer facilities are absolutely prohibited under the Act; (3) therefore, vessel-to-vessel transfers are absolutely prohibited under the Act. None of the factors cited by Vane Line to distinguish *Coastal Barge* have any relevance to this simple logic.

A reading of *Coastal Barge* makes it clear that the Board committed error when it found that this critical case does not control here, and Vane Line has offered no good reason to ignore the holding of *Coastal Barge* that vessel-to-vessel transfers are a bulk product transfer facility under §7002(f) that is prohibited by § 7003 of the Act. Application of the direct precedent of

[2] Further, given the fact that Coastal Barge held that vessel-to-vessel transfers fall squarely within the definition of bulk product transfer facilities, Vane Line's claim that "it is not immediately apparent whether this activity [oil lightering] falls within the scope of the Act," Vane Br. 7-8, misstates the law as interpreted by the Delaware Supreme Court.

Coastal Barge to this case shows that Vane Line's proposed oil lightering operation would involve vessel-to-vessel transfers of oil, and thus what Vane Line has proposed is a bulk product transfer facility prohibited under the Act.

II. THE BOARD ERRED WHEN IT FOUND THAT THE ACTIVITY OF OIL LIGHTERING IS A NONCONFORMING USE UNDER THE ACT.

Vane Line's defense of the Board's unprecedented finding that the *activity* of oil lightering is a nonconforming use under the Act is not based on the statute or relevant principles of statutory construction; instead, it consists of taking misleading potshots at only some of the arguments offered by Delaware Nature Society in its opening brief. Indeed, the fundamental legal problems of the Board's analysis remain unaddressed, and justify this Court finding that the Board completely misapplied the law.

A. "Use" Has A Facility-Specific Meaning Under The Act.

The issue of whether the *activity* of oil lightering can be a nonconforming use is, at its core, a question of statutory interpretation. The Act defines 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). Because the Act does not define "use," the issue of statutory construction here is determining what the Legislature meant by these terms. As Delaware Nature Society's Opening Brief identifies, as Vane Line does not dispute, the Delaware Supreme Court has articulated three basic principles of statutory construction when considering the Act: (1) interpretations must harmonize the entire Act, *see Coastal Barge*, 492 A.2d at 1245; (2) the Act must be liberally construed (that is, one must err on the side of applying the restrictions and prohibitions of the Act broadly while applying exceptions narrowly because that best meets the legislative purpose set forth in § 7001), *see City of Wilmington v. Parcel of Land*, 607 A.2d 1163,

1166-67 (Del. 1992); and (3) one must favor interpretations with reasonable consequences over those with unreasonable consequences, *see Coastal Barge*, 492 A.2d at 1246. Vane Line fails to justify its (and the Board's) interpretation under these rules. In fact, interpreting the Act to allow an *activity* to be a nonconforming use is illogical and violates all three of these principles.

The first problem with the Board's ruling is its failure to recognize that the definition of nonconforming use requires that the "use" in question "not comply with the applicable use provisions of the Act." 7 Del. C. § 7002(b). 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 Act), or it is a manufacturing use which requires but does not have a permit (in which case it does "not comply" because such uses must have a permit under § 7004(a) of the Act). In short, **nonconforming uses are uses that would otherwise be prohibited under the Act** but for the fact that they were "lawfully in existence and in active use prior to June 28, 1971." This is the only way to harmonize §§ 7002(b), 7003, and 7004(a), 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. Yet neither the Board nor Vane Line ever identified what the otherwise prohibited use here is—indeed, both argue that Vane Line's proposed lightering operation is *not* a bulk product transfer facility, which excludes the possibility that a nonconforming use is involved. In short, the Board's reasoning is illogical, and Vane Line does not even bother to defend it.

More fundamentally, there is significant evidence in the text of the Act that nonconforming use cannot mean to refer to an *activity* but rather must be tied to a specific

facility. As set forth more fully in Delaware Nature Society's Opening Brief at 16-18, this evidence includes:

> 1. Section 7002(b)'s definition of nonconforming "use" as being use "of land or of a structure," which by its very nature must be a location-specific, facility-specific reference;[3]
>
> 2. Section 7002(e)'s definition of heavy industry "use" as involving facility-specific size, equipment, and potential to pollute considerations; and
>
> 3. Section 7004(a)'s reference to manufacturing "uses" eligible for permits, which must be assessed under § 7004(b) by examining facility-specific criteria including 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.

Vane Line fails to provide any analysis of this evidence from the Act itself that "use" has a facility-specific meaning. Instead, it simply (and incorrectly) declares that Delaware Nature Society's argument confuses the terms "nonconforming use" and "bulk product transfer facility," Vane Br. at 13, and that the terms "use" and "facility" have different meanings in the Act. *Id*. That, however, dodges the question: how can this Court determine what "use" in "nonconforming use" means in order to determine whether an *activity* like oil lightering can be a "nonconforming use"? The now-unrebutted record is that the Act, in at least three different places, employs a facility-specific meaning for the term "use." The only way to harmonize the entire Act (as *Coastal Barge* requires) is to assign "use" in the statutory term "nonconforming use" a similar facility-specific meaning, which of necessity excludes the notion that an *activity* can be a "nonconforming use."

[3] Vane Line tries to make much of the fact that "land" and "structure" are two different terms here, Vane Br. at 14, completely misstating both Delaware Nature Society's and DNREC's arguments in the process. However, Vane Line fails to explain why that even matters here.

B. *Norfolk Southern* Does Not Compel A Different Conclusion.

Vane Line's argument for following *Norfolk Southern v. Oberly*, 822 F.2d 388 (3rd Cir. 1987), is wholly unavailing. As Vane Line is forced to admit, the language is in a footnote that does "not rise to the level of controlling precedent." Vane Br. at 17. Indeed, *Norfolk Southern* is not a case about the Coastal Zone Act at all; rather, it was a federal constitutional challenge to the Act by the coal lightering proponents in *Coastal Barge*.[4] No language in *Norfolk Southern* suggests that that the Third Circuit was saying anything about the legal meaning of the Act's terms under the Act itself. For this very reason, Vane Line is wholly incorrect when it claims that *Norfolk Southern* "is the only decision in which a court has even considered the applicability of the CZA to oil lightering," Vane Br. at 17, because no such consideration in fact took place. Thus, the reference in a footnote of the Background Facts section of the opinion[5] cannot be read as interpreting the Act in any way, and certainly cannot be read as interpreting the Act to mean that an *activity* can be considered a nonconforming use.

Nor is there any relevance to the fact that oil lightering is not specifically mentioned in the Act, *see* Vane Br. at 17. Many particular things are not specifically mentioned in the Act—for example, the coal lightering at issue in *Coastal Barge*—but that did not prevent the Supreme Court from finding that it fell within the terms of the Act. Indeed, what Vane Line advocates is a view of the Act that limits its applicability to mentioned terms even though the Act speaks in general terms of heavy industry uses, 7 Del. C. § 7002(e), bulk product transfer facilities that involve the transfer of "bulk quantities of any substance," 7 Del. C. § 7002(f), and states as its

[4] It is of course ironic that the Board and Vane Line find a case involving coal lightering not under the Coastal Zone Act (*Norfolk Southern*) is controlling, while at the same time arguing that the case actually under the Act about the same coal lightering operation (*Coastal Barge*) is distinguishable and not controlling.

[5] Nor does Vane Line rebut the notion that the Third Circuit's factual statement was literally true—that a corporate predecessor of Maritrans was in fact "grandfathered" by virtue of being a bulk product transfer facility on June 28, 1971.

purpose the prohibition of heavy industry and bulk product transfer facilities. 7 Del. C. §§ 7001, 7003. This is completely contrary to the interpretation of express terms of the Act to produce a harmonious whole required by *Coastal Barge* and to the liberal rule of construction required by *City of Wilmington*.

The Court should therefore find that *Norfolk Southern* does not control or compel a finding that the activity of oil lightering is a nonconforming use, and that the Board therefore erred as a matter of law in relying on *Norfolk Southern*.

C. DNREC's Alleged Lack Of Enforcement Is Legally Irrelevant To The Interpretation Of The Act.

Vane Line spends nearly two pages of its brief discussing the facts of DNREC's alleged awareness of multiple entities conducting oil lightering and alleged failure to enforce the Act, Vane Br. at 18-19, but offers absolutely no legal authority for why those facts matter. Nor does Vane Line offer any legal support for the Board's radical notion that the alleged failure to enforce amounts to a *legal interpretation* by DNREC that the *activity* of oil lightering is a nonconforming use. That is because there is no legal support for such a conclusion. Vane Line fails to respond to or rebut the legal authorities—from the United States Supreme Court on down—cited in Delaware Nature Society's Opening Brief at 22-23 clearly articulating the legal principle 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). Nor does Vane Line cite to any evidence to support the notion that DNREC made any legal interpretation about oil lightering, which is an essential fact for the Board's reasoning. Quite simply, the Board made a factual error when it found that DNREC made a legal interpretation, and made a legal error when interpreted an alleged lack of enforcement as having legal significance. Nothing in Vane Line's brief suggests otherwise.

D. Vane Line's Policy Arguments Do Not Support The Board's Interpretation Of The Act.

Vane Line's brief concludes with a series of policy arguments (Vane Br. at 19 – 26) that, when properly analyzed, do not support the Board's erroneous conclusion that the *activity* of oil lightering can be a nonconforming use. These arguments are: that the Act provides for a balancing of industrial and environmental interests, Vane Br. 19-22; that a "parade of horribles" in the form of additional oil refineries or other heavy industry cannot occur, *id*. at 23-24; and that the Board's interpretation avoids a "state-sponsored monopoly," *id*. at 24-26. Delaware Nature Society considers each of these non-meritorious arguments in detail.

1. The Act Does Not Allow For A Balancing Of Interests When Bulk Product Transfer Facilities Are Involved.

Like the Board, Vane Line selectively reads the purpose language of § 7001 to support its claim that development and industrial interests must be balanced. Section 7001 states in full the following (with Vane Line's selected language in italics):

> 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. Read in its entirety, the intent of § 7001's language could not be clearer: "construction of new heavy industry" is "prohibit[ed] entirely," and the "prohibition" of all bulk product transfer facilities is "imperative." These absolute prohibitions are then codified in § 7003. 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. Vane Line's selective quotation referring to "balance" fails to include the Act's next sentence, which makes clear that the notion of a "balance" of interests comes into play only for "control of industrial development other than that of heavy industry." Because this matter involves a bulk product transfer facility, and § 7001 clearly states that the purpose of the Act is to prohibit all bulk product transfer facilities, it is incorrect for the Board and Vane Line to claim that any balancing of interests is appropriate here.[6]

Of course, even if balancing of interests were somehow appropriate, Vane Line offers absolutely no argument about how a balancing of interests affects the analysis here. Instead, Vane Line raises a straw man—the specter that Martitrans (the one company whose oil lightering operation is in fact a nonconforming use because it was in operation on June 28, 1971) could expand its operations without any control. That is not what Delaware Nature Society advocates, nor is it the logical result of the Delaware Nature Society's position. Section 7004(a) clearly requires that any "extension" or "expansion" of a nonconforming use have a permit. If in fact

[6] Vane Line's citation to *City of Wilmington*, *see* Vane Br. at 20, does not alter this analysis. *City of Wilmington* involved a question of whether a proposed flourspar processing facility would qualify as a "manufacturing use" under the Act—i.e., a non-heavy industry use that is expressly allowed under § 7004(a). Thus, *City of Wilmington* is about the one category of industrial development where balancing is appropriate. But it says nothing about balancing when prohibited heavy industry uses or bulk product transfer facilities are involved.

Maritrans is expanding its nonconforming use, the Act provides a permitting process to handle that event. Precisely because the Act has such a mechanism, there is no need to read into the Act an interpretation that the *activity* of oil lightering is the nonconforming use so that *anyone* can expand it by permit.

2. *Vane Line's "Parade Of Horribles" Argument Is Logically And Legally Inconsistent.*

Vane Line attempts to denigrate Delaware Nature Society's legitimate concerns about the consequences of the Board's decision by claiming that a "parade of horribles" such as unlimited construction of new refineries could never occur because new refineries are barred as heavy industry under §§ 7002(e) and 7003. Vane Br. at 23-24. This argument is logically and legally inconsistent, and should therefore be rejected.

It is important to understand the context of this argument. Nonconforming uses are "not prohibited" by the Act. 7 Del. C. § 7004(a). As noted above, 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 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.**

The Board below found that, because a corporate predecessor of Maritrans was conducting oil lightering operations on June 28, 1971, the *activity* of oil lightering was a nonconforming use, and thus Vane Line's proposed oil lightering operation—even though it would start some 36 years after passage of the Act—would merely be an "expansion" of that nonconforming use. The logical extension of this reasoning is that any *activity* taking place on

June 28, 1971 (such as oil refining) should likewise be treated as a nonconforming use. Indeed, there is nothing in the Board's reasoning to suggest that the "activity as a nonconforming use" view adopted by the Board is or can be limited to particular activities. Thus, a new oil refinery should be able to claim that, because the *activity* of oil refining was occurring at Delaware City in 1971, the new refinery would simply be an "expansion" of that nonconforming use.

The Board's and Vane Line's claim that new oil refineries could never be built under the "activity as nonconforming use" analysis is simply wrong. While oil refineries are specifically cited in the definition of heavy industry and should therefore be barred by the Act's prohibition on heavy industry, the Board and Vane Line ignore the fact that, under the Act, **being a nonconforming use trumps the prohibition**. Thus, if the *activity* of oil refining is a nonconforming use (as it must be under the Board's interpretation of the Act), then a new refinery (or ten or a hundred) can be built as an "expansion" of the nonconforming use of the activity of oil refining. This underscores the logical inconsistency of the Board's and Vane Line's position: they both want to uphold the primacy of the nonconforming use when it comes to the activity of oil lightering, but deny that primacy when the logical consequence of their "activity as nonconforming use" analysis is applied to any other activity. The Board and Vane Line cannot have it both ways. Under the Board's holding that an *activity* can be a nonconforming use, the "parade of horribles" is not only inevitable, it is unstoppable.

The legal inconsistency of the Board's and Vane Line's "activity as nonconforming use" analysis is the violence it does to the Act. Vane Line is right to point out that § 7002(e) includes oil refineries (and chemical plants, steel mills, etc.) in the definition of "heavy industry uses." What Vane Line fails to recognize is that the "activity as nonconforming use" view adopted by the Board produces the absurd result of rendering those provisions of § 7002(e) meaningless

because the *activity* of oil refining, chemical manufacturing, and steel manufacturing —on-going since 1971—converts those pre-existing activities into nonconforming uses that are not prohibited under the Act. This violates *Coastal Barge*'s golden rule of statutory interpretation. It creates a gaping hole in the coverage of the Act, in violation of the liberal construction rule promulgated in *City of Wilmington*. It fails to harmonize the clear legislative intent to prohibit refineries and other heavy industries evident in §§ 7001 and 7002(e) with the language about nonconforming uses in §§ 7002(b) and 7004(a), in violation of *Coastal Barge*. Quite simply, the "activity as a nonconforming use" position of the Board and Vane Line violates every recognized principle of statutory construction under the Act. The legislature can therefore never have intended that an *activity* be a nonconforming use, and the Board erred in interpreting the Act in this way.

3. Vane Line's "State-Sponsored Monopoly" Argument Is Meritless.

Vane Line's last policy argument is to claim that allowing only Maritrans (as a nonconforming use) to conduct oil lightering creates a "state-sponsored monopoly" that is arbitrary in violation of equal protection principles. Vane Br. 24-26. This constitutional argument fails for at least four reasons.

First, the Act satisfies the "rationally related to a legitimate state interest" constitutional test identified by Vane Line. As the United States Supreme Court has repeatedly held:

> When local economic regulation is challenged solely as violating the Equal Protection Clause, this court consistently defers to legislative determinations as to the desirability of particular statutory discriminations . . . Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statuotry discriminations and require only that the classification challenged be rationally related to a legitimate state interest.

City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976). Here, the state's interest is clearly articulated as "declared public policy" in § 7001 of the Act: "to control 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." The Act seeks to execute that public policy through prohibitions on new heavy industry uses and bulk product transfer facilities, while allowing such uses that were "in lawful existence and active use" to continue to operate as nonconforming uses. Vane Line, which bears the burden of proof on this issue, *see Minnesota v. Clover Leaf Creamery Co*., 449 U.S. 456, 464 (1981), offers no explanation of how the prohibitions on new heavy industry and bulk product transfer facilities (like Vane Line's proposed oil lightering operation) are not rationally related to Delaware's clearly expressed interest in controlling industrial development in the coastal zone.[7]

Second, contrary to Vane Line's vague assertions, the view of nonconforming use as applying to or "grandfathering" only a few specific facilities (in this case, Maritrans' oil lightering operation) is not arbitrary. *City of New Orleans* involved an ordinance which prohibited pushcart vendors from selling food in the French Quarter in order to preserve the character of the area for tourists and protect its economic vitality. 427 U.S. at 299-300. The ordinance also contained a "grandfather provision" for vendors who sold for more than eight years prior to the ordinance, and this had the effect of allowing only two vendors to keep selling. *Id*. at 300. The Court rejected the argument by vendors barred under the ordinance that this "grandfather provision" was totally arbitrary and irrational, stating:

---

[7] Vane Line's citation to *Hoff v. State*, 197 A. 75, 84 (Del. Super. 1938), is wholly inappropriate because there is no evidence to suggest that the "real purpose" of the Coastal Zone Act was to create the "monopoly" Vane Line alleges here. Rather, § 7001 makes clear that the purpose of the Act was to prevent certain development in the coastal zone in order to protect the coastal environment.

> Rather than proceeding by the immediate and absolute abolition of all pushcart food vendors, the city could rationally choose initially to eliminate vendors of more recent vintage. This gradual approach to the problem is not constitutionally impermissible . . . The city could reasonably decide that newer businesses were less likely to have built up substantial reliance interests in continued operations in the [French quarter] and that the two vendors who qualified under the grandfather clause—both of whom had operated in the area for over twenty years rather than only eight—had themselves become part of the distinctive character and charm that distinguishes the [French Quarter]. We cannot say that these judgments so lack rationality that they constitute a constitutionally impermissible denial of equal protection.

Id. at 305. Thus, provisions that grandfather only a few operators and exclude others do not violate the equal protection clause. Here, Vane Line does not provide any explanation or analysis of why the concept behind *City of New Orleans'* holding that a grandfather provision passes the rational relationship test does not apply with full force here. The Act clearly allows nonconforming uses to continue to operating even though they are otherwise prohibited. The Legislature could have rationally decided that the state's interest in protecting the coastal environment can be met by prohibiting new bulk product transfer facilities first while waiting for nonconforming uses to slowly disappear through attrition, for "[l]egislatures may implement their program step by step . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations." *Id*. at 303.

Third, Vane Line's position undercuts its own "parade of horribles" argument. As noted above, the Board and Vane Line both argue that the Act could never allow more oil refineries because § 7002(e) includes oil refineries in the definition of "heavy industry use" and thereby subjects a new oil refinery to the prohibition of § 7003. Yet that argument results in Delaware City being the only refinery allowed in the coastal zone—and therefore a "state-sponsored monopoly." Vane Line never explains why it is permissible to have only one refinery in the

coastal zone but not permissible to have only one oil lightering operation. The inconsistency of Vane Line's position is further evidence that its argument is without merit.

Fourth, Vane Line never bothers to establish that granting Maritrans status as the only nonconforming use in fact prevents Vane Line from conducting oil lightering. Under the position originally adopted by the Secretary and advanced by Delaware Nature Society here, Vane Line can lighter oil anywhere that is not in the coastal zone. The fact that Vane Line wants to do it where Maritrans has lightered does not create a "state-sponsored monopoly" any more than the perfectly acceptable practice of preventing someone from building a plant in the same location as a currently-existing plant.

Vane Line's "state-sponsored monopoly" argument is unsupported, unsound, and without legal merit. It certainly does not support an erroneous interpretation of the Act allowing the *activity* of oil lightering to be a nonconforming use.

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,

DELAWARE NATURE SOCIETY

By:_____
One of its attorneys

Jennifer A. Murphy, Esq., Del. Bar #4893
Kenneth T. Kristl, Esq.
Trevor Mohr, Legal Intern
Mid-Atlantic Environmental Law Center
4601 Concord Pike
Wilmington, DE 19803
(302) 477-2182

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

DELAWARE NATURE SOCIETY,	)	
	)	
Petitioner,	)	
	)	**No. 06A-12-002 RFS**
v.	)	
	)	
COASTAL ZONE INDUSTRIAL CONTROL BOARD,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

I, JENNIFER A. MURPHY, ESQ., hereby certify that on this 21st day of March 2007, I have caused copies of the foregoing Reply Brief to be mailed via U.S. Mail upon the following.

Robert F. Phillips, Esquire
Deputy Attorney General
Department of Justice
820 North French Street
Wilmington, DE 19801

Vincent Poppiti, Esquire
Blank Rome
Chase Manhattan Centre, Suite 800
1201 North Market Street
Wilmington, DE 19801-4226

_____

Jennifer A. Murphy DE Bar #4893
Mid-Atlantic Environmental Law Center
P.O. Box 7474, 4601 Concord Pike
Wilmington, Delaware 19803-0474
Ph: (302) 477-2086
Fax: (302) 477-2032
Email: jamurphy@widener.edu