Civic League for New Castle County
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January
2014

COUNTY COMMENTS

CIVIC LEAGUE FOR NEW CASTLE COUNTY
Informed Citizens for Sound County Growth

Rescheduled due to weather :

Thursday Jan 30,2014
7:00PM
Gillian Building
77 Reads Way
New Castle, DE

~~**MEETING**~~
~~**Tuesday, January 21, 2014**~~
~~**7:30 PM**~~

~~Public Safety Building~~
~~3601 N. DuPont Hwy. (Route 13)~~
~~New Castle, DE~~

Agenda

Guest - Eileen Fogarty; NCC Land Use Director

PBF ENERGY'S DELAWARE CITY REFINERY AND THE DELAWARE COASTAL ZONE ACT

A 6/25/2013 OpEd essay by Joan Verplanck, then President of the Delaware Chamber of Commerce, included the following key remark: "Being a big employer does not give you a free pass when it comes to the environment and complying with the laws of our state." Thereby, Ms. Verplanck succinctly highlighted the need for a carefully reasoned balance among sometimes contradictory interests.

Delaware's Coastal Zone Act explicitly underscores that need at its outset, in its "Purpose" provision, 7 Del. C. 7001. Then in its allowable uses provision, it itemizes the concerns to be considered in reaching that balance, in 7 Del. C. 7004 at Subsections (b) (1) on environmental impact, (b)(2) on economic effect, (b)(3) on aesthetic effect, (b)(4) on support facilities and their impacts, (b)(5) on neighborhood effects, and (b)(6) on county and municipal zoning controls. For me, a key concern in considering how the first two of these dimensions interact relates to an organizational malady addressed below as background.

BACKGROUND. For many years, I have been observing the gradual spreading of an organizational malady that I've named "The MBA Disease." It is now metastatic. The symptoms of the disorder are situation-oriented - - whenever a program accomplishes a goal within budget and on schedule, the manager characterizes it as a "well-managed program." But when a program runs into achievement, budget or schedule problems, the manager says "My boys let me down." In other words, credit flows upwards on the organization chart, while blame flows downward. The MBA Disease has infested much of American industry today, occasionally shielded by deservedly respected management strategies known as "risk management" and "cost-benefit analysis."

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STATEMENT
OF
PRINCIPLE

Monitor and selectively evaluate government actions including laws, regulations and policy.

Provide appropriate forums for informing as well as soliciting input from the public.

Establish positions based on responsible studies consistent with the aims and purpose of the organization.

Advocate these positions.

Founded in 1962, the Civic League is a non-profit volunteer organization, which studies and illuminates County and State government actions concerning comprehensive developments and the quality of life and is a vocal advocate of relevant positions.

County Comments is the official publication of the Civic League for New Castle County.

Bill Dunn - President

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One Recent Manifestation. NASA often insists that crew safety outranks everything else. But history demonstrates clearly that budget ranks ahead of safety. For instance, that contributed to the deaths seven astronauts on the Shuttle Columbia. The role of management error in the deaths of 10 more during earlier adventures is easily argued, though less firmly provable.

Regarding the Columbia loss in particular, I fault NASA's higher management for the ABSENCE of a standing policy that would, had it been adopted, given force to their oft-announced policy of putting crew safety first. The CAIB (Columbia Accident Investigation Board) came quite close to condemning the hierarchy for its inactivity in this regard, but its report served as a strong rebuke. I would have argued for a manslaughter charge.

The Shuttle program was created to serve military, scientific and commercial launches, anticipating enough commercial revenue to recover the development costs. A sixty flight per year launch rate - - one every six days - - was the plan, both for production throughput capacity and the ground support system capability. That's why the Vehicle Assembly Building, 500 ft high on a 500 ft square footprint at the Cape can accommodate building up several flight vehicles simultaneously.

Nevertheless, NASA never instituted a STANDING policy not to launch a flight unless the next flight was within six days of launch-ready, thereby enabling a rescue mission if necessary. Indeed, they established such a policy for only one flight, which I believe (without certainty) was the Hubble repair mission.

Such a standing policy could have saved the lives of the seven Columbia astronauts. Quite obviously, in the first fiscal year after adoption of such a standing policy, NASA would have to pay for one more vehicle build-up than it would launch. It follows that adoption of such a standing policy is easily - - and perpetually - - postponed until NEXT year because the DOLLAR IMPACT ON THE CURRENT BUDGET RANKS AHEAD OF CREW SAFETY.

A Less Recent Manifestation. Union Carbide's ORGANIZATIONAL response to its disaster in Bhopal India (seehttp://en.wikipedia.org/wiki/Bhopal_disaster) was to reorganize many (if not most) of their operating plants into LLC's (limited liability corporations) so that if a disaster occurred at any one of them, the most that the victims could recover was the salvage value of that plant. The corporation as a whole thereafter carefully avoided putting its full faith and credit behind any of its operations.

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A Local Manifestation Less Than A Decade Ago. British Petroleum (BP) proposed the same LLC approach for its proposed Crown Landing LNG offloading and gasification facility on the NJ side of the Delaware River. By virtue of the location of the DE/NJ boundary - - the low water line on the NJ side of the river - - the offloading pier would have been in Delaware, and was therefore subject to the Delaware Coastal Zone Act (CZA). Our Department of Natural Resources and Environmental Control (DNREC) rejected the BP application for a CZA "status decision" and BP appealed to the Coastal Zone Industrial Control Board(CZICB), of which I was then a statutory member.

The scope of the status decision stopped short of the LLC issue, which is properly a part of a CZA permit proceeding. But I was anxious to assure inclusion of the LLC issue among permit proceeding issues, if the application reached that far. If BP's full faith and credit didn't stand behind the Crown Landing LLC, the LLC's insurance coverage was fair game. After all, the record of the status decision proceeding already showed that the river is 4000 ft wide at that location, and that in the unlikely event of an explosion, for whatever reason, of a fully loaded tanker, the fireball could have a RADIUS of a mile. I wanted to reach the issue of how much insurance coverage would be required under any reasonable operating permit, on the premise that if the risk was as low as BP said, the insurance premium for reasonable coverage should be low enough for BP to carry.

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The CZICB is empowered inherently under 7 Del. C. 7007(a) to question witnesses at its appeal hearings. Because the CZICB Deputy Attorney General refrained from anything beyond giving procedural advice to the CZICB, I rather than the Deputy AG cross-examined BP's vice president of engineering and also the chief project engineer for the Crown landing project. I tripped them both by pursuing whether the project was a manufacturing facility with incidental offloading operations (which is lawful under the CZA) or an offloading facility with incidental manufacturing operations (which is unlawful under the CZA).

The essence of my key question was: If the offloading facility were farther south (where the river is much wider) would the onshore facility be where BP proposed it. Both answered unequivocally that the onshore facility would be as far south as the offloading facility. All of that appears in the transcript of the proceeding, pages 138 to 154 for the Engineering VP and pages 180 to 185 for the Chief Project Engineer.

Upon completion of testimony by many others, I returned to the key question and moved to deny BP's appeal. The motion was seconded and adopted by the entire CZICB. That appears in the transcript from page 349 to page 355. Further appeals thru the courts, by BP, its successor, and the State of NJ, eventually reached the US Supreme Court, which upheld our denial. See http://en.wikipedia.org/wiki/Crown_Landing_LNG_Terminal So we never reached the issue I was looking to reach.

A Manifestation Two Years Ago in West Virginia. A substantial portion of West Virginia is among prominent candidate areas for natural gas production via fracking. Fracking became a 2012 issue during the 2012 election campaign. The usual parochial interests made the usual parochial arguments, with no effort to find a middle ground, except for one candidate in his first run for public office. He proposed that every hole that had been "fracked" be kept open for effluent collection after the end of production or termination of production efforts, until the effluent quality was sufficient for conventional disposal methods, and that sufficient pre-paid insurance coverage be required before the start of drilling operations to assure completion of this clean-up activity and other possible damages.

The prevailing prior practice was to seal the hole as soon as possible, and start a new hole on another site, with or without a change in corporate (LLC) identity. That prior practice assures that the fracking fluids and additives forced into the cracks at higher pressure than the weight of the overburden at the fracking depth, can escape only by diffusion thru that overburden. Keeping the holes open enables escape via a water-filled pipe at less than half the pressure. That candidate, my elder son, lost for unrelated reasons. But his innovative approach caught a lot of attention. Perhaps he will win next time.

Yet Another Manifestation Just A Few Months Ago. Strange as it may seem, I have for several months been coaching a cousin in Canada, who is urging her Parliamentarian to work towards establishing a requirement in Canadian law for sufficient insurance coverage of hazardous operations. That was prompted by her interest in the recent Lac Megantic event, involving railroad delivery of unrefined petroleum. The railroad company, MM&A, filed for bankruptcy soon after the event. Since the Lac Megantic event, there have been several additional railroad accidents involving bulk oil shipments.

A Wikipedia article, at http://en.wikipedia.org/wiki/Lac-M%C3%A9gantic_derailment amply describes the Lac Megantic event and subsequent discoveries. That article is extensively detailed on a large variety of focal points. It evidently is being updated regularly - - twice on Aug 26 for example. Particularly interesting sections have the following headings: Political impact, Municipal reaction, Provincial reaction, Maine and the US, and Canadian Federal Impact. Under that last heading the following appears:

"In Canada, federal regulation requires rail carriers carry adequate third-party liability insurance but does not legislate a specific dollar minimum in coverage. The amount of coverage is not disclosed to the

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Public nor to municipalities along the line. MM&A was insured for $25 million in liability; a second policy exists but only covers damage to MM&A equipment and rolling stock. The federal government had been subject to intense lobbying by the Railway Association of Canada and the Canadian Pacific Railway prior to the disaster, with railway association lobbyists meeting with multiple federal officials 'to inform about the movement of dangerous goods, including voluntary and regulatory requirements, volumes, customers and safety measures to assure them that current regulations for dangerous goods transportation are sufficient.' "

In addition, under a section entitled "Aftermath," the following appears: "MM&A's bankruptcy petition disclosed an insurance policy valued at $25 million and an estimated cleanup cost, which excludes damages in tort, of $200 million."

IMPLICATIONS RE: DNREC AND PBF ENERGY'S DELAWARE REFINERY

At the outset, I must say that I regard the railroad switching and downloading activity as a completely lawful INDUSTRIAL land use - - NOT a HEAVY INDUSTRY land use forbidden by the Coastal Zone Act. Indeed, I said exactly that to the folks who appealed for relief to the Coastal Zone Industrial Control Board. But they didn't hear me. I believe that appeal failed because it didn't focus on what it should have focused on, and because its argument on the Standing question was too shallow to make headway.

I believe that an appropriate argument on the Standing question should be based on the Preamble of the US Constitution. The Preamble says that "We the People of the US . . . [for a variety of reasons] . . . do ordain and establish this Constitution for the United States of America." That umbrella covers all Federal law and all State law. Any argument that "We the People of the US' can have no role in enforcement of all standing law adopted under the Constitution that we ORDAINED AND ESTABLISHED must fail under that test.

Delaware's CZA itemizes, in 7 Del. C. 7004 at Subsections (b) (1) thru (b)(6) what must be considered in reaching an appropriate balance among sometimes competing concerns regarding what industrial development is allowable within the Coastal Zone. I believe that DNREC's finding that this allowable land use doesn't require offsets against the Coastal Zone damage potential from the expansion/extension of prior operations there, is clearly in violation of the Coastal Zone Regulation's offset provisions, at Section 9.0 Offset Proposals and its subsections. The Regulation, which has the force of law, was adopted by the CZICB on MY motion, according to my recollection. Somehow, the Minutes of that and numerous other important CZICB meetings haven't been found.

Further, the Regulation's Appendix "C" at Section 3.0 "Environmental Goals and Indicators" demands that DNREC "develop a set of Coastal Zone environmental goals and appropriate environmental indicators . . . to assist DNREC and project applicants by providing a means for evaluating the potential impacts of proposed changes in facility operations and proposed offsets on the Coastal Zone environment." The measurement system demanded by the Regulation doesn't yet exist; for more than a decade, prior DNREC Secretaries have malingered on that task, and Collin O'Mara is continuing that practice. It's too late to pursue O'Mara's predecessors for violating the Oath of Office prescribed by Delaware's Constitution, which binds O'Mara and me also. Pursuing O'Mara for that violation is getting more attractive every day.

Pursuant to Executive Order No. 36, DNREC received lengthy comments relevant to the CZA. DNREC's four line response to these comments (pg 50 in the 6/27/2013 report) is ludicrous and insulting to those who took the time to respond to the hearing call. My comment, read into the record and provided (with attachments) in hard copy, proposed that DNREC make a valiant effort to determine if a system resembling what was contemplated by the CZA and the CZ Reg would work if DNREC by some miracle were to start trying to use it. The report doesn't mention that at all. But it DOES say that ". . . in the coming

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months, the Department will convene stakeholder groups to discuss . . . revisions to . . . the Coastal Zone Act . . ." (but not the CZ Regulation)(pg 44 of the report).

Now that many months have passed, convening such groups should be imminent. I expect to attend the CZA meetings whether invited or not. FOIA gives me that right. It would appear that the confluence of considerations reflecting the MBA Disease, the LLC issues unexplored in the BP LNG appeal, the Lac Megantic disaster, and the PBF Energy Refinery beg for thorough and rational treatment, though they could become incendiary.

Clearly, however, DNREC isn't up to it.

Vic Singer

COASTAL ZONE ACT
TIME TO REVIEW/REFINE

One view held in regard to the Coastal Zone Act is that the County, under the County UDC (code) is required to give approval beforehand to new or expanded Industrial facilities within the Coastal Zone. And the County, believed delinquent in that charge, should be held accountable. Though malingering by County Government or conveying ignorance of the UDC Code by those elected to office, that view holds that the County should be held to their responsibilities and proven negligent. (A recent decision by the Court to deny rezoning and invalidate an earlier vote, was argued that a Councilman was ignorant of that required traffic study and voted favorably for the rezoning.) Would eliminating the County (and, further, DNREC) from Land Use review be “throwing the baby out with the bath water”?

Currently, the Governor/DNREC operating at their own discretion, absent input of economic comparative analysis of environmental harm to economic advancement, continues “slap on the hands” penalties in fines, producing State income, rather than closing the doors of the environmental abusers.

Prior to enactment of the Coastal Zone Act, political accommodation granted the continued operation/expansion of the Port of Wilmington and to include on site manufacturing (North American Smelting, Georgia-Pacific gyp board, etc.) and the offloading of coal/storage of coal ash (Potts Co.). Some years into the Act, such exception was reviewed in a Claymont port facility request to continue, and the applicant (Oceanport) prevailed in Court. One must remember that throughout WWII there were multiple docking locations in Delaware --- from Worth Steel/Claymont, thru Wilmington, New Castle and thence Fort du Pont/Delaware City.

As “Phoenix arose from the ashes”, drastic economic improvement in recent years has come to such East Coast Ports as Charleston, S.C., such also, substantially, due to the Port expansion. Witnessing such causes one to look further, noting little Coastal Northern Delaware is at a critical access of road, rail, air, and, certainly, an expanded Port---Wilmington, (as well as Claymont, and Delaware City.) The Coastal Zone Act must be re examined both in both specificity of language/lack of regulatory language thereof, and the motivation/thinking behind the Act.

One side commentary from Russ Peterson over lunch in downtown Wilmington forty two years back, he the new Governor, was a focused concern over the stench in fall out from Getty Oil. No mention was made of the ongoing smell from nearby Cherry Island, wind shift refinery smell from Marcus Hook, or the near continuous manufacturer’s plume from North Baltimore during that dead summer day. And the emissions from du Pont Experimental Station, understandably, were absent from his comment.

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(His, until recent, Corporate Chiefs at du Pont were soon to ostracize him, anyway). Governor Peterson was focused on heavy production industry, not onshore Ports and their accessibility. He was concerned about a proposed (Zapata Corp.) artificial island, providing an off shore transshipment facility near Port Mahon and he intended to move toward stopping such. He succeeded.

Vagueness in language of the Act, requires further definition of such Act, provision of regulatory specificity and, mandatory, results to be set under State Code. Setting to Code must also be applied to standards for our roads, schools, and much infrastructure. Provisions being under an agency and not the State, cost DNREC the loss of buffer zones by Court action in Sussex County. With State Code memorialization , no longer would an agency, even any one Governor, plead ignorance to existing law or inadequate legal representation to properly control the environment. (Or a school dump a caravan of school busses directly onto an interstate rather than a secondary road system.)

And, hopefully, to this author, provision should be made to accommodate Delaware's opportunities through expanded Coastal Ports. Regarding continued air contamination due to our existent high road traffic, we'll discuss that later?

CHARLIE WEYMOUTH, AIA