

June 2017



COUNTY COMMENTS

Newsletter of the
CIVIC LEAGUE FOR NEW CASTLE COUNTY
Informed citizens for sound County growth

CLNCC Monthly Meeting June 20, 2017 7:00 PM Christiana Presbyterian Church 15 Old Baltimore Pike, Newark, DE 19702

Civic League For New Castle County
Founded in 1962.

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non-partisan,
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Editor will accept corrections and
comments, as well as articles from any
member including residents of member
civic associations.

Articles may be edited to conserve
space and should be about the County.

The Coastal Zone Edition

"I'm loyal to future generations" -Russell Peterson

The Coastal Zone Act is the legacy of visionary leadership. The inherent value of protecting our coastlines from new heavy industry was recognized, and by virtue of this legislation, miles of coastline were kept pristine and available for uses that do not pose the risk of contamination, but do promote economic growth, recreation and tourism. Peterson had the audacity to challenge the special interests of his time, for the sake of benefiting generations of Delawareans he would never know. A call for "eternal vigilance" remains ever pressing and is required now.

We've tried this experiment before. 94% of our waterways are polluted. Furthering environmental degradation for the sake of "jobs" should not be on our agenda. We need to dream a new dream. We need real leadership that looks for new industries to engage with, and has a vision for our future that looks forward, towards a sustainable, environmentally friendly economy that can create jobs and further innovation without decimating our ecosystems.

"Concern yourselves with the kind of state we want to pass on to our children and grandchildren. We have two great opportunities right now, but we can't capitalize on both of them. They are incompatible. One choice is to participate in one of the world's rapid industrializations, build refineries and port facilities, and live with all the growth and benefits and problems they will bring. The other choice is to leave most of the coast as it is, so people can enjoy the hunting, boating, fishing and peace and quiet, the quality of life the coast now affords us. I believe the second way is the better way. But let's have a statewide discussion of the choices."

The Civic League For New Castle
County meets the third Tuesday
of each month except July,
August and December.

Unless special events are being held,
the meetings are usually at the
Christiana Presbyterian Church Social
Hall on old Route 7 in Christiana.

The public is welcome to attend all
meetings which generally start at 7:00
P.M.

The agenda of the group is focused on
New Castle County government and
those State issues that impact County
government or our quality of life in
this County.

For further information, please visit
our website.

www.civicleagueformcc.org

**CIVIC LEAGUE FOR NEW CASTLE COUNTY
RESOLUTION on HOUSE BILL 190**

**AN ACT TO AMEND TITLE 7 OF THE DELAWARE CODE
RELATING TO THE COASTAL ZONE ACT**

WHEREAS, the Coastal Zone Act determined that the coastal areas of Delaware are the most critical areas for the future recreational and tourism needs of the State, as well as the quality of life for residents of the State for all subsequent generations, and

WHEREAS, the Coastal Zone Act declared the “public policy of the State to control the location, extent, and type of industrial development in Delaware’s coastal areas...to better protect the natural environment of its bay and coastal areas, and safeguard their use primarily for recreation and tourism”¹, and

WHEREAS, the CZA specifically cites 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”¹, and

WHEREAS, the coastal zone already permits “heavy industry” in operation June 28, 1971 to remain in operation and permits allowable conforming uses within the coastal zone including but not limited to “garment factories, automobile assembly plants, jewelry and leather goods manufacturing establishments, and on-shore facilities, less than 20 acres in size, consisting of warehouses, equipment repair and maintenance structures, open storage areas, office and communications buildings, helipads, parking space and other service or supply structures required for the transfer of materials and workers in support of off-shore research, exploration and development operations; as long as on-shore facilities do not include tanks farms or storage tanks”¹, and

WHEREAS, healthy air, water and land are vital to Delaware’s communities, and pollution is a risk to health, HB 190 places the valuable resource of the Delaware Bayshore at risk to industrial accidents and chemical spills that could foul the estuary and harm our recreational economy, and

WHEREAS, HB 190 potentiates an increased risk of industrial pollution which places the health and welfare of Delawareans at risk by removing the main purposes as written of the Coastal Zone Act, which is the prohibition on new heavy industry and the prohibition on bulk product transfer, and

WHEREAS, HB 190 allows new heavy industry and new bulk product transfer in the Coastal Zone, which presents inherent dangers related to transferring hazardous materials from vessel to vessel or to shore, and by rail, and also attracts further accessory heavy industry to the Coastal Zone, increasing public health and ecosystem risks, and

WHEREAS, all fourteen sites of nonconforming use are in various stages of environmental remediation from previous and ongoing contamination from heavy industry uses, and

WHEREAS, elevated cancer census tracts have been identified by Delaware Division of Public Health near heavy industry and legacy pollution sites², and

WHEREAS, lung cancer continues to play an enormous role in Delaware’s overall cancer burden³, and Delaware Public Health estimates 46,000 adult Delawareans currently have asthma and as many 72,000 have had asthma at some time during their lives⁴, and

WHEREAS, Delaware Public Health confirms airborne pollution is a major trigger for asthma symptoms⁴ HB 190 is anticipated to increase airborne pollution in the coastal zone, and

WHEREAS, Delaware is one of only three states with both a large oil refinery that does not employ inspectors to oversee railroads⁵ and fuel shipments utilizing these tracks are likely to increase with the passing of HB 190, and

WHEREAS, legislation that significantly alters said purpose and protections of the Coastal Zone Act, such as HB 190, has not been fully vetted by all stakeholders, including but not limited to: fence line

communities, conservation groups, environmental groups, business groups, civic groups, sportsmen, regulatory agencies, or other legislators, and

WHEREAS, any changes considered to a law as successful as the Delaware Coastal Zone Act that is credited with protecting our coastal zone and contributing to Delaware's \$3.6 billion tourism industry demands a deliberate, transparent, and inclusive public process to ensure any changes are aligned with the vision of Delawareans and to safeguard against any unintended consequences of changes to the act on our communities,

NOW, THEREFORE:

BE IT RESOLVED by the Civic League for New Castle County that HB 190 be withdrawn.

BE IT FURTHER RESOLVED before any bill is submitted which intends to modify the Coastal Zone Act or any amendments are proposed to the Coastal Zone Act:

1. The Department of Natural Resources and Environmental Control (DNREC) should conduct a study of the environmental and economic benefits of the Coastal Zone Act.
2. An inclusive and public stakeholder evaluation should precede any proposed changes to the Coastal Zone Act.

Jordyn M. Pusey, President

Barry Shotwell, Corp. Secretary

¹ TITLE 7 Conservation Natural Resources CHAPTER 70. COASTAL ZONE ACT <http://delcode.delaware.gov/title7/c070/>

² Five-year Age-adjusted Cancer Incidence Rates by Census Tracts, Delaware, 2001-2005

http://dhss.delaware.gov/dph/dpc/files/cancer_cthilow_nc.pdf

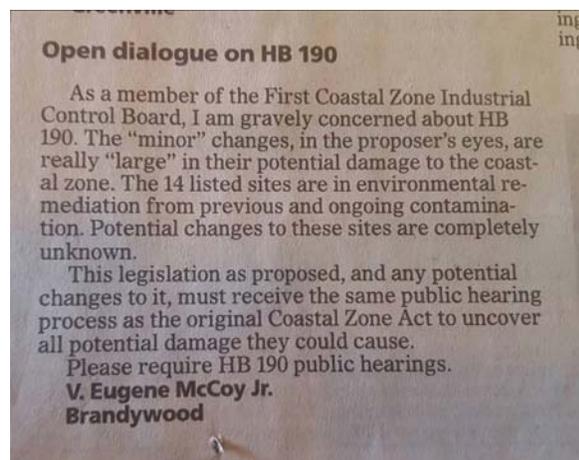
³ From 2006–2010, lung cancer accounted for 14.7% of all newly-diagnosed cancer cases

and 30.3% of all cancer deaths in the state. http://dhss.delaware.gov/dph/dpc/files/imreport_2006-10.pdf

⁴ The Burden of Asthma in Delaware. (August 2005) <http://dhss.delaware.gov/dph/dpc/asthma.html>

⁵ Rail safety questioned as fuel shipments likely to go up. (May 26, 2017)

<http://www.delawareonline.com/story/news/2017/05/26/rail-safety-questioned-fuel-shipments-likely-go-up/96672684/>



COMMENTS ON HB 190 -- ITS PROVISIONS AND SOME BACKGROUND Vic Singer

KEY PROVISIONS OF EXISTING CZA

The Coastal Zone Act (CZA) in its present form defines a Heavy Industry (HI) land use as "characteristically involving more than 20 acres." The CZA directed DNREC to create a CZ Regulation (Reg), which was finally accomplished 27 years after the CZA was enacted. The Reg was given the force of law upon its approval by the CZ Industrial Control Board. The Reg delineates 14 sites on dry land wherein pre-existing HI activities are allowed to continue unless abandoned by their operators or successors. The CZA prohibits HI

uses larger than 20 acres in the CZ except as continuations of uses already ongoing in 1971 when the CZA was enacted. Expansion and/or extension of such pre-existing HI uses and all light industry (LI) uses are allowable under the CZA, but are made subject to CZ permits issued by DNREC.

The CZ Reg further requires that every permit authorizing expansion and/or extension of HI uses and every permit authorizing LI uses within the CZ must require that any potential for environmental damage to the CZ resulting from either normal operations or human or mechanical mishaps be more than offset by benefits to the CZ. The offsets need not be at the same site as the HI or LI uses.

SOME ECONOMIC REALITIES

Technology advances in recent decades have vastly expanded the amount of crude oil extractable from Bakken shales in the northwestern US and Canada at costs below the world market price. Inevitably the US will become a major petroleum exporter rather than importer as in recent decades. The cost of crude from shale has attracted billion dollar investments by US and Canadian industry in rail cars to transport crude to eastern users and coastal sites with export capability.

Foreign sales of US petroleum were authorized some years ago, and pipeline connections to Gulf of Mexico ports have just been authorized. Railroad tank cars will continue to be used, particularly for shipments upstream on the Delaware River, where large increases of lightering to deep draft ocean tankers will occur in the sheltered waters of Delaware Bay

Lightering is transfer of bulk material between shallow draft and deep draft vessels. At the floor of Delaware Bay is a narrow 55 ft minimum depth (low tide) trench parallel to but separated from the 45 ft. deep Delaware River channel. A mile wide portion of this trench, between 7 and 17 miles northwest of Cape Henlopen, known as Big Stone Anchorage, is a mile or more within the DE-NJ state line. Big Stone, easily accessible to fully-loaded deep draft ocean tankers, has been used for lightering petroleum for more than a half century because it is the only inland anchorage between Maine and Texas capable of sheltering lightering operations from ocean storms and high seas. The Anchorage is subject to all of Delaware's laws, including the Coastal Zone Act. The CZA forbids bulk product transfers of materials by floating vessels. Since lightering of petroleum has been ongoing at the Anchorage

since before the CZA was enacted, it is a "grandfathered" non-conforming activity. However, all expansions and extensions are subject to CZA conditions.

WHAT HB 190 SEEKS TO DO

HB 190 is intended to authorize, at any of the 14 dry land sites delineated by the Reg -- within which pre-existing HI uses are "grandfathered" -- adding further HI uses that were NOT already ongoing in 1971 when the CZA was enacted. But that authorization is NOT extended to HI uses beyond the 14 delineated sites. Therefore, if not for a provision of HB 190 discussed below, under the new Section 7014 to be added to the CZA, expansion and/or extension of grandfathered lightering activities at Big Stone Anchorage in Delaware Bay would continue under prior statutory and case law which in effect prohibits lightering by any operator other than the one with a grandfathered right to continue. Under prior law, that operator has a monopoly right to continue with no competition. Indeed, two companies involved with lightering elsewhere have sought CZ permits during the last 15 years but have been turned away because they had no grandfathered rights.

[Actually, any refinery that can show it has been receiving crude oil lightered at Big Stone since before 1971 can apply to be declared to hold a grandfathered right. That applies to refineries on the Delaware River or in other eastern seaboard states. But such a grandfathered right would apply narrowly, only to crude delivered to the particular refinery. It could not be so broad as to apply to ALL crude oil lightered at Big Stone. That's what creates value for the grandfathered MONOPOLY right of the company now lightering at Big Stone.]

Section 7 of HB 190 would add to the CZA a new Section 7014 "Conversion permit" requirement that would legalize DNREC's prior Order enabling Delaware City Refinery Company (DCRC) to export ethanol to a sister refinery across the river. It would also legalize DNREC's pending order to enable DCRC to export much larger quantities of ethanol to other refineries; that Order is the subject of a pending appeal by DE Audubon and LWV to the Superior Court, seeking remand to the Coastal Zone Industrial Control Board.

DNREC's prior Orders enabling DCRC's export of crude oil or ethanol violate the CZA according to the interpretation of the CZA in a 1985 decision by the Delaware Supreme Court -- the

"Coastal Barge" case -- wherein the Court prohibited reverse lightering of coal at Big Stone Anchorage -- from shallow draft vessels coming down-river to deep draft ocean colliers -- because lightering COAL is not "grandfathered" as an activity ongoing before the enactment of the CZA in 1971. Lightering PETROLEUM was grandfathered because it WAS pre-existing activity.

[After the Coastal Barge decision, the coal lightering advocates took their case to the federal level Third Circuit Court of Appeals on purported federal law (and constitutional) grounds. The Third Circuit Court of Appeals, sitting 'en banque,' found no violation of Federal law.]

Note that petroleum and coal are both minerals. Ethanol is of vegetable origin, not petroleum origin. Therefore it is NOT grandfathered according to the DE Supreme Court's Coastal Barge decision, which said that not even another mineral was grandfathered. DNREC avoided this pesky Supreme Court decision by merely not mentioning it at all in documentation of its Orders. Note also that DNREC has imposed a penalty upwards of \$140,000 on DCRC for shipping crude oil to refineries other than its sister refinery across the river. DCRC insists vehemently that it already has authority to ship anywhere it chooses, which of course DNREC disputes.

Should the ethanol export issue reach the courts, it will be quite amusing to see DNREC argue that the CZA and prior adjudications forbid DCRC from exceeding the DNREC Order under the CZA that granted DCRC permission for activity that the CZA forbids.

HB 190 also says at the new CZA Section 7014(b) that:

". . . a conversion permit may be issued only for the transfer of products that are produced or will be used within the coastal zone, **unless the product is a grain . . . in which case it may be transferred without regard to origin or destination. . .**"

The underlined and emboldened portion of that quote, if enacted by the Legislature, would make the \$140,000+ penalty a penalty for doing what the law authorizes before the law authorized it. It's likely or at least within the realm of possibility that the Court would respond

by chastising DNREC for wasting the Court's time.

Under the CZA as it exists today, DCRC's bulk product transfer rights to receive crude oil and to ship manufactured petroleum products by tanker or barge are grandfathered. HB 190 leaves intact the existing definition of "Bulk product transfer facility" at 7 Del. C. 7002(b); that definition specifically exempts "a docking facility or pier for a single industrial or manufacturing facility for which a permit is issued or which is a nonconforming use."

But the portion of the above quote from HB 190 that is NOT underlined and emboldened effectively raises the ante in this poker game involving DCRC's rights. It prohibits any DNREC Order which would enable two kinds of EXPORT activity by DCRC: exporting its own manufactured bulk products to any location beyond Delaware's coastal zone unless it was doing so prior to 1971; and exporting crude oil received by rail and shipped to any location outside Delaware's coastal zone (not grandfathered because in 1971 the refinery was receiving rather than shipping crude).

Thus HB 190 gives DCRC the gift of legalizing bulk product transfers of ethanol not manufactured at its grandfathered facility, regardless of where it came from or where it's going. But at the same time, HB 190 eliminates any future DCRC activity to sell either crude oil or its own products in bulk -- by sea or pipeline -- to any customers outside Delaware's Coastal Zone.

Section 2 of HB 190 requires under its alteration of CZA Section 7003 that all expansions and/or extensions of grandfathered HI uses after 1971 are to be subject to the newly created Section 7014 Conversion Permit process without recognizing the validity of expansions and/or extensions authorized after 1971 by prior DNREC Orders, none of which are grandfathered by HB 190. .

Whether or not HB 190 would affect lightering now lawfully under way at Big Stone Anchorage is an interesting issue to debate. Since the Anchorage is not included in the 14 dry land HI sites listed in the CZ Reg and cited in HB 190, it is excluded. But prior DNREC and Court proceedings clearly regard lightering as grandfathered under the CZA. And since the new CZA Section 7014 that HB 190 would add, requires Conversion Permits for HI activities under the CZA, which cannot be issued

beyond the 14 sites, the entire issue appears designed to thicken the wallets of attorneys.

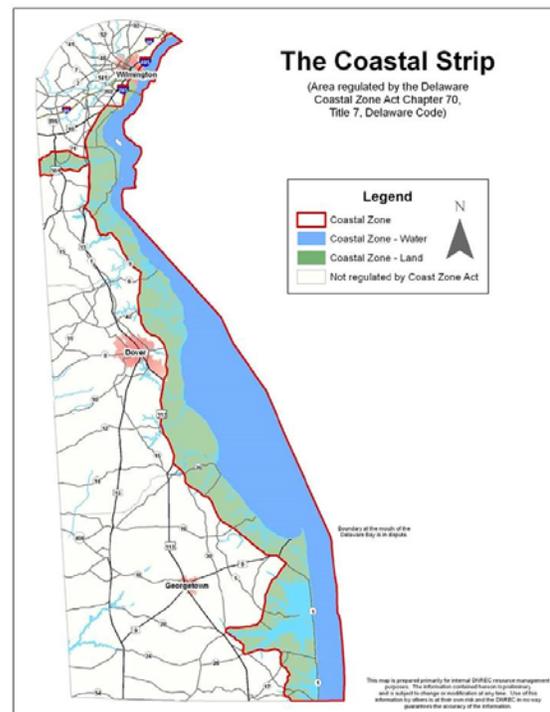
Obviously the General Assembly has the authority to forbid any activity it chooses to forbid, at any time forward from the effective date of the enactment. But terminating a hitherto lawful activity that is the basis for a lucrative ongoing business is a seizure, and costs associated with unrealizable revenues and profits are recoverable. These costs ought to appear in a fiscal note. But they don't. .

LESS CONSEQUENTIAL COMMENTS ON HB 190

<> Section 2 of HB 190 designates its definition of "Heavy industry use site" as a change to CZA Section 7002(g) rather than a new Section 7002(i).

<> Section 7 of HB 190 requires at the new CZA Section 7014(c)(5) that every applicant for a conversion permit for any of the 14 HI sites listed in the CZ Reg must show "a plan to prepare the site for the potential impacts of sea level rise and coastal storms." No advice is given about how much rise or how far into the future must be planned for. Though it's a nice touch, there's no guidance on what is required or on what basis a plan could be rejected.

<> Section 7 of HB 190 at the new CZA Section 7014(c)(6) requires that negative environmental impacts be more than balanced by offsets that directly benefit Delaware. Whether this is in addition to or in lieu of the offsets required by the current CZ Reg that must be "clearly and demonstrably more beneficial to the environment in the Coastal Zone than the harm done by the negative" impacts.



Let's Keep The Coastal Zone Protected for Future Generations. Oppose HB 190!

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