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David Small
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DNREC
89 Kings Highway
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Dear Secretary Small,

You have asked for an opinion concerning the impact of the Coastal Zone Act, 7 *Del. C.* § 7000 *et. seq.* ("CZA" or the "Act"), on the possible expansion of the Port of Wilmington ("Port") at four different locations. The locations under consideration that you have mentioned are: (1) expansion of the Port southward from its present location to include some use of the Pigeon Point area; (2) the Rivers Edge location south of the Delaware Memorial Bridge; (3) the former Evraz steel plant in Claymont; or (4) the closed Chemours titanium dioxide plant in Edgemoor. You have also advised that the proposed new facilities would move containers as the primary cargo.

I. Issues

As you know the CZA does not define the "Port of Wilmington" although the Port is located in the coastal zone as defined in 7 *Del. C.* § 7002 (h). A discussion of the boundaries of the Port is important because ... "docking facilities for the Port of Wilmington" are not included within the definition of "bulk product transfer facility" that appears in the Act.¹

Bulk product transfer facilities that were not in operation on June 28, 1971 (the date of the Act's adoption) "are prohibited in the coastal zone and no permit may be issued therefore." § 7003. The creation of new bulk product transfer facilities in the coastal zone has been deemed "against public policy" and such prohibition declared "imperative" by the General Assembly. §

¹ 7 *Del. C.* § 7002(b) states: "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.

7001. The interplay of these statutory provisions thus allows the establishment of new bulk product transfer facilities within the Port.

A discussion of the meaning of “bulk product” will also be necessary to the analysis which you have requested.

II. Discussion

A. What are the boundaries of the “Port of Wilmington?”

The CZA does not define the geographic extent of the Port although, as previously mentioned, it makes clear that the Port is within the coastal zone. The question of what constitutes the “Port of Wilmington” is of major significance because docking facilities for the Port, even if they are “bulk product transfer facilities” are not banned under the CZA. Some guidance is provided by history and prior interpretations of the term “Port of Wilmington.”

On April 13, 1883 a new charter for the City of Wilmington was adopted by the General Assembly, 17 Del. Laws, ch. 207, which established the city limits including therein land fronting on the Delaware River. Subsequently, on April 18, 1883 the General Assembly adopted “An Act for the Protection of the Harbor of Wilmington....” This area included the Christina River and “that part of the River Delaware upon which the City of Wilmington fronts.” 17 Del. Laws, ch. 206. That riverfront at the time included lands from 13th Street extended, at the north, to the present southern boundary line of the City. That land included what was then known as the Wilmington Marine Terminal on the Christina River and the Delaware River frontage that extended to the terminus of a former railroad line at a pier on Pigeon Point (depicted in red on Ex. A).

The City boundaries were later re-established by act of the General Assembly to include the bed of the Delaware River across to the mean low watermark on the New Jersey shore, 40 Del. Laws ch. 179, reflecting the outcome of *New Jersey v. Delaware*, 291 U.S. 361 (1933). The same boundaries appear in Title 1, Section 1 of the City code.² The southern boundary line adopted by this legislation ends at Pigeon Point (Ex. A)

² Both authorities state in pertinent part: ...”thence southeasterly parallel to “F” Street 7800 feet more or less to the southeasterly side of the right of way of the New Castle Branch of the P. B. & W. Railroad; thence in a southeasterly direction along the said right of way of the New Castle Branch of the P. B. & W. Railroad to its intersection with the northerly side of the right of way of the P. & R. Railroad; thence south 37 degrees 28 minutes east along the said northerly side of the right of way of the P. & R. Railroad (as the latter is established upon its plans between Stations 155 and 160) and continuing thence south 37 degrees 28 minutes east across the Delaware River to low water mark upon the easterly side of the Delaware River; thence northeasterly along the said low water line of the easterly side of the Delaware River to a point due east of the monument first mentioned upon the westerly bank of the said river; thence due westerly and re-crossing the Delaware River to the monument at the place of beginning.”

The term “Port of Wilmington” appears for the first time in the Wilmington Home Rule Charter adopted by referendum on November 3, 1964, pursuant to 22 *Del. C.* Chapter 8. Section 4-400 of the City Charter directs the Department of Commerce to promote “... commerce, industry and the Port of Wilmington” and in 84-400(a) to “encourage the increased use of the Port.” The term “Port of Wilmington” appears to be used in the City Charter synonymously with the “Harbor of Wilmington.”

After the CZA was adopted the meaning of the term “Port of Wilmington” has been discussed by the Delaware Department of Justice and in proceedings before the Coastal Zone Industrial Control Board (“CZICB”). Former Attorney General Laird Stabler, Jr. informally opined in a letter to the Director of the State Planning Office dated November 11, 1971 that:

“... it was the Legislature’s intent to exempt future, as well as, existing port docking facilities [within the City]. Therefore, the Port of Wilmington may build new docking facilities on filled land now owned by said Facility.”

(Ex. B-2)

A 1973 appeal to the CZICB by an advocacy group named Save Our Shores from a status decision by the State Planner (CZA Project No. 23) resulted in an agreement among the State Planner and the parties that limited the scope of the exemption under § 7002 (f) for docking facilities for the Port of Wilmington to mean only facilities within the city limits of Wilmington (Ex. D 1-3).³

Regarding F.A. Potts and Company’s application for a coastal zone status decision for a project adjacent to the Wilmington Marine Terminal (CZA Project No. 65, 1974), a deputy attorney general advised the State Planner in a letter dated October 22, 1974 that the exemption in § 7002 (f) “would seem” “at least to apply to docking and connected port facilities that are located within the city limits of Wilmington.” (Ex. E). In the Potts matter it was decided that the Marine Terminal was only a part of the Port and, therefore, that the § 7002 (f) exemption was not limited to not limited to the Marine Terminal but applied to all docking facilities in the coastal zone within the City of Wilmington.

Delaware’s Regulations Governing the Coastal Zone, 7 *Del. Admin. Code* §101 (the “Regulations”), adopted on May 11, 1999 provide only a pictorial definition of the boundaries of the Port in §3 by stating that “‘Port of Wilmington’ means those lands contained within the footprint shown in Appendix B” of the Regulations (Ex. F). That footprint encompasses lands outside of the Wilmington city limits to the south and west plus filled land along the Delaware riverfront that is within the City limits. The regulations also state in §5.10 that

Bulk product transfer operations at dock facilities owned by the Diamond State Port Corp. (“DSPC”), or acquired by the DSPC at

³ During the CZICB hearing on the SICO appeal it was clear that the boundaries of the Port had not been established by the State Planner or by the CZICB. (Ex. D 4-5)

any time in the future, and which are located within the Port of Wilmington as shown in Appendix B "[to the Regulations]" are unregulated by the Act and the Regulations.

The General Assembly later declared in 29 Del. C. § 8782(5) (regarding the DSPC) that the "Port of Wilmington" means all wharves, piers, slips, ferries, anchorages, docks, dry-docks, bulkheads, dock-walls, basins, car-floats, float-bridges, grain or other storage elevators, warehouses, cold or heated storage, tracks, yards, sheds, switches or other buildings, structures or facilities or improvements or appurtenances operated as of the date of creation of the [Diamond State Port] Corporation by the Wilmington Department of Commerce as the Port of Wilmington and Wilmington Marine Terminal Wharf and such other facilities, structures, improvements or appurtenances as may be developed, constructed or operated on land contiguous to, adjacent to or proximate to the Port of Wilmington as may be acquired by the Corporation or the City of Wilmington for the purpose of port development.

The foregoing definition certainly contemplated the future expansion of the Port. The lands owned by the DSPC within the City limits are depicted in Exhibit G.

A review of the foregoing vague and inconclusive attempts to define the extent of the "Port of Wilmington" indicates that the only certainty is that the Port includes land within the City limits that fronts on the Christina and Delaware Rivers.⁴ Expansion of the Port's facilities within the City limits to include a new bulk product transfer facility or facilities would not be prohibited by the CZA.

B. What is a "bulk product transfer facility"?

First, a bulk product transfer facility means any port or dock facilities, whether an artificial island or attached to the shore by any means, for the transfer of bulk quantities of any substance from vessel to onshore facility or vice versa. §7002 (f).

"Bulk" is not defined in the CZA and, applying established rules of statutory construction, would therefore be given its ordinary meaning. The term "bulk" is defined as "in a mass; loose; not enclosed in a separate package or divided in separate parts". Webster's Third New International Dictionary of the English Language (1993 Ed.). There are a number of cases in accord with the dictionary meaning of the word "bulk", thus it has been held to mean "neither counted, weighed, nor measured", *Riggs v. State*, Neb. Supr., 121 N.W. 588 (1909); "of indefinite proportion", *Naftalin v. John Wood Co.*, Minn. Supr. 116 NW 2d 91 (1962). The term

⁴ While the City boundaries include the bed of the Delaware River extending from the city limits of Wilmington to the mean low watermark on the New Jersey side, adopting that boundary for purposes of the CZA would negate at least some of the purposes of the Act. For instance, that definition would allow vessel-to-vessel transfer of bulk products anywhere in the Christina or Delaware Rivers that is within the City limits. The creation of an artificial island in the Delaware River for the transfer of bulk products, even if on the New Jersey side of the river, would be permissible under the CZA if within the extended boundary lines of Wilmington.

"laden in bulk" means loose in the hold [of a vessel] or not included in boxes, bales or casks, *Standard Oil*, supra. The cited cases use the commercial definition of the term. Terms in a statute relating to trade or commerce are presumed to be used in their trade or commercial sense. 2A Sutherland, Statutory Construction (Sands 4th ed. 1973) § 47.31. In this case, the commercial and the dictionary meanings are in accord. Therefore, the prohibition in 7 *Del. C.* § 7003 against offshore gas, liquid or solid bulk product transfer facilities would not refer to individual products or packages, such as shipping containers.

The definition of "bulk product" in the Regulations is similar:
"Bulk Product" means loose masses of cargo such as oil, grain, gas and minerals, which are typically stored in the hold of a vessel. Cargoes such as automobiles, machinery, bags of salt and palletized items that are individually packaged or contained are not considered bulk products in the application of this definition.

III. Conclusion

As you have advised, the nature of the cargo proposed to be shipped from any new port facilities is unknown. Since only the Port of Wilmington enjoys the §7002 (f) exemption from the ban on new bulk product transfer facilities in the coastal zone, it is not currently possible to expand the Port outside its current boundaries unless the new facility ships only containerized cargo. Such freight could include shipping containers and items of the type listed in the various definitions of "bulk product", but could not include shipments of grain, stone, oil, gas, or any other cargo that is normally stored loosely in the hold of a vessel.

Absent a statutory amendment or annexation of land by the City of Wilmington, three of the proposed sites you have mentioned, Evraz Steel in Claymont, the former Chemours/DuPont plant in Edgemoor, and the Rivers Edge location south of the Delaware Memorial Bridge are not good candidates for expansion of the Port unless it is certain they will handle only containerized cargo.

I hope this letter adequately addresses the issues presented. If not, I know you will contact me for further information.

Very truly yours,



Robert Phillips
Deputy Attorney General

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