

DELAWARE'S COASTAL ZONE ACT: A CALL FOR MODERNIZATION



DELAWARE STATE CHAMBER OF COMMERCE

NOTES:



Delaware's Coastal Zone Act: Landmark Legislation

BY REBECCA BYRD, THE BYRD GROUP LLC

SIGNED ON JUNE 28, 1971, the Coastal Zone Act was a landmark piece of legislation. The Act created a zone, running the length of Delaware's coastline and including lands around the Chesapeake and Delaware Canal and Rehoboth Bay, in which no heavy industry was allowed unless it was in operation on June 28, 1971. It also created an elaborate permitting process for new industry allowed in the Coastal Zone.

At the time, many companies were interested in Delaware's coastline for industry. Shell Oil had existing properties on the coast and was acquiring land to build another facility near Bombay Hook. The U.S. Department of Commerce had spent years and significant resources planning to build artificial islands in the Delaware Bay for a large port operation including rail lines that would connect the islands to Delaware. There were also plans from Delmarva Power to build a nuclear plant adjacent to the C&D Canal.

Governor Russell Peterson, who was already interested in environmental issues, was approached by a group of Delawareans who were opposed to the new development proposals. The first step Gov. Peterson took was to set up a task force to study the issue and declare a moratorium on any development until the task force was completed. The task force's recommendations were for a coastal zone and some limitations on the industry in the zone, but for Peterson the recommendations did not go far enough.

The Governor's office proposed a more restrictive bill which is basically the law today. However, Peterson lost an argument about the goal of the legislation. Peterson, and his environmental allies, thought the current industry in the coastal zone should wither and die. The legislature however, disagreed, and the Act allowed current industry to remain as it was in 1971, but prohibit expansion. What the past 40+ years has demonstrated is that not allowing expansion and restricting the use of property has caused most of the industry from 1971 to wither and die. As we know, plant after plant has closed with the Evraz site and Chemours' Edgemoor plant being the latest victims.

Over the years numerous amendments have been proposed to reduce the impact of the Coastal Zone. The only attempt that was successful was the change to allow a two-year grandfathering provision for a steel manufacturing plant. That change was to accommodate the closing and sale of the Claymont Steel plant in the late 1980s. There have also been numerous court cases challenging the Coastal Zone; none have been successful in limiting its scope or the State's power in enforcing the Act. At the time Delaware was a pioneer in environmental regulation, but now, most of that regulation is at the Federal level. The Delaware Coastal Zone act was passed before the Federal Clean Air and Water Acts, the Federal Coastal Zone Management Act, and numerous other environmental protection laws. Given all the ensuing Federal regulation and the impact on Delaware business and industry it is time to modernize the Coastal Zone Act. ■

Delaware's Coastal Zone Act: Then and Now

BY WILLIAM SMITH, P.G. ENVIRONMENTAL ALLIANCE, INC.

THE COASTAL ZONE ACT (CZA), initially promulgated as an executive order in December of 1970 to halt the construction of a second oil refinery by Shell Oil, came into existence in 1971 with a strong push by then Governor Russell Peterson to protect one of Delaware's most precious resources, namely the coastal areas. Even to this day, the Act is seen as the landmark legislative piece of Governor Peterson's term, and helped to shepherd the environmental movement in Delaware and in the United States. To better understand the historical precedent of this comprehensive environmental regulation, we should reflect on the environmental movement that now we take for granted. Prior to the 1970's, The Federal Water Pollution Control Act of 1948 was the first major U.S. law to address water pollution. In 1972, the law was amended to address the growing public concern regarding water pollution, and became commonly known as the Clean Water Act (CWA). The CZA (June 1971) predated this significant change in the regulatory landscape. Additionally during this time period, the Department of Natural Resources and Environmental Control was created.

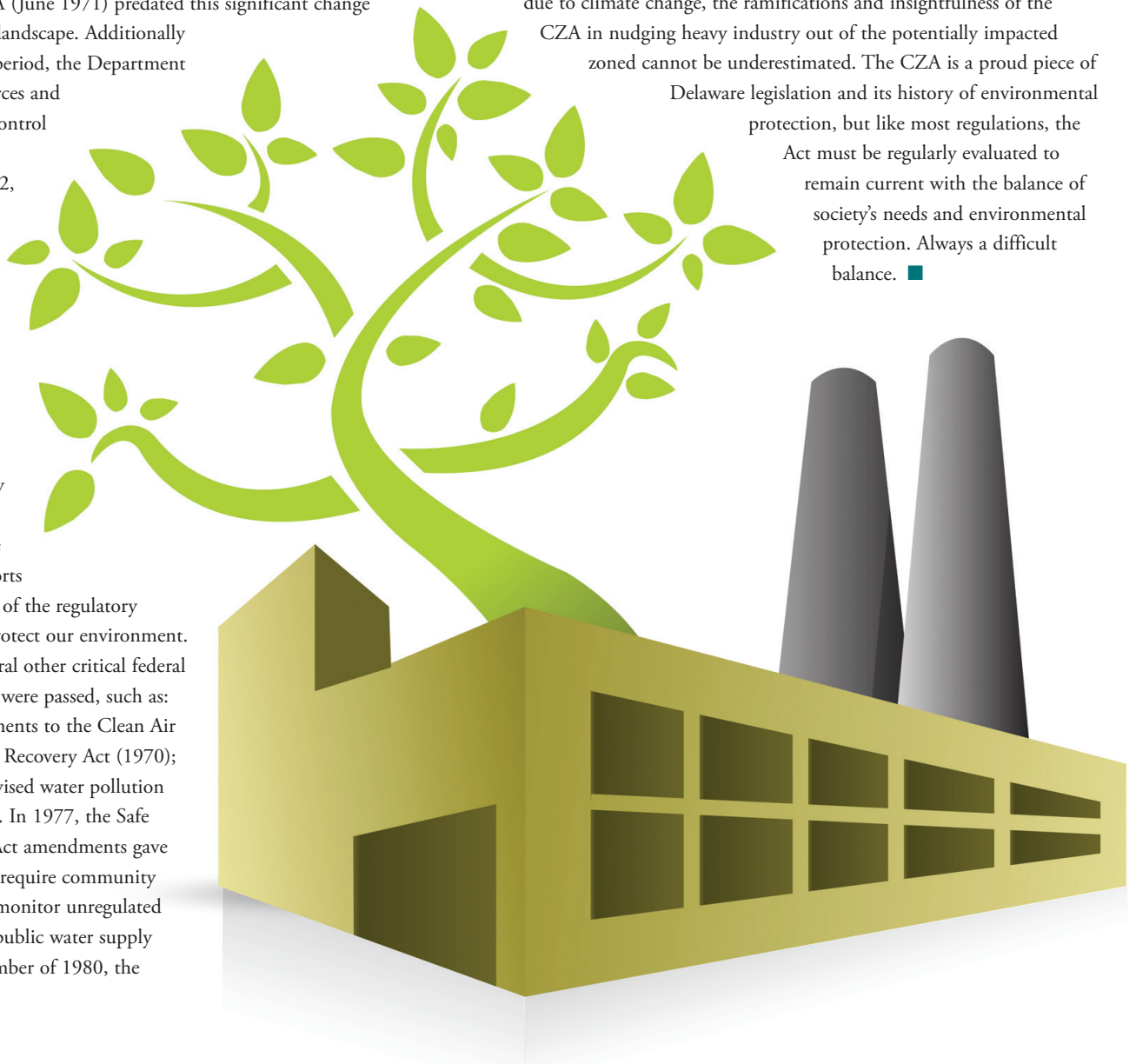
On December 2, 1971, the Federal Government decided to consolidate several separate governmental agencies into what became The Environmental Protection Agency (known as the EPA). All of these governmental efforts heralded the start of the regulatory intervention to protect our environment. Additionally, several other critical federal legislative actions were passed, such as: the 1970 amendments to the Clean Air Act; the Resource Recovery Act (1970); and the totally revised water pollution legislation (1972). In 1977, the Safe Drinking Water Act amendments gave EPA authority to require community water systems to monitor unregulated contaminants in public water supply systems. In December of 1980, the

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was created and adopted the word "Superfund," which had been applied to oil spill cleanup legislation. As demonstrated by the CZA, Delaware is and will continue to be a leader in the protection of human health and the environment. This is evident in the CZA as it is clearly articulated in the first section:

"It is hereby determined that the coastal areas of Delaware are the most critical areas for the future use 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."

Now in light of the potential effects of sea level rise in our coastal zone due to climate change, the ramifications and insightfulness of the CZA in nudging heavy industry out of the potentially impacted zoned cannot be underestimated. The CZA is a proud piece of

Delaware legislation and its history of environmental protection, but like most regulations, the Act must be regularly evaluated to remain current with the balance of society's needs and environmental protection. Always a difficult balance. ■



DELAWARE'S COASTAL ZONE ACT: LOOKING FORWARD

BY REBECCA BYRD, THE BYRD GROUP LLC

WHILE THE COASTAL ZONE ACT (CZA) had, in 1971, laudable goals that are still relevant today, it has also had the affect of limiting industry in areas of the state, which have historically been hubs of industry. For example, in northern New Castle County, many properties from the PA-DE state line to the Chesapeake and Delaware Canal have been industrial sites for many years.

It is not in anyone's best interest to jeopardize the areas of Delaware's coastline that are pristine and an important tourism driver in our state. However, Delawareans must also realize that manufacturing and industry have been an important part of Delaware's economy and that must continue, even it means loosening some of the restrictions in the CZA. Delaware cannot continue to lose jobs and hinder economic development because of the CZA. There are three recent examples of how the CZA is impairing Delaware's economic development.

Chemours has announced they will be closing the Edgemoor facility. As they look for a buyer for the site, the CZA becomes a challenge because it cannot be used for any other heavy industrial use than what Chemours was using it for. This limitation greatly impacts them finding a buyer for the plant, even though this has been an industrial site for many years.

The former Evraz plant was bought and is being redeveloped by Commercial Development Corp. As they look at plans for potential uses, potential buyers, and potential lessees, the CZA is a hurdle to overcome. Due to CZA restrictions, the plant cannot be used for heavy industry, despite it being a steel mill for well over a hundred years. Commercial Development Corp. is cleaning up the site, and hopefully it will become a center for business development, but the CZA is one more barrier to that goal.

Without the ability to expand or retool these sites, industries are withering and dying. That is why the CZA needs to be reconsidered.

Sunoco is ready to expand its facility at the very top of the state. They can expand into Pennsylvania (which has no CZA or similar restrictions) or into Delaware. They would prefer to expand into Delaware, but that expansion may be impossible because of the CZA.

These three are just the most recent examples; there are several other abandoned industrial sites that are languishing because of the CZA restrictions. Without the ability to expand or retool these sites, industries are withering and dying. That is why the CZA needs to be reconsidered. It must be modernized so that existing companies can make the best use of their property and have a property that has the potential to be sold if needed.

In addition to hurting existing business, new businesses are not interested in coming to Delaware because of the CZA. Delaware cannot compete with nearby states like Pennsylvania and New Jersey who do not have such severe CZA restrictions.

For these reasons, it is imperative that policymakers and interested stakeholders take a careful look at how we can modernize the CZA. ■



Delaware's Coastal Zone Act: If No Coastal Zone Act Modernization, What's Next?

BY JAMES DECHENE

THE DELAWARE STATE CHAMBER of Commerce, along with others in the business community, have urged modernizing the Coastal Zone Act (CZA) in order to spur the next generation of economic growth in Delaware. The focus of modernization has been solely on existing industrial sites sitting abandoned or underutilized where redevelopment of the property is hindered by Delaware specific restrictions created by the Coastal Zone Act. Recognizing that any effort toward modernization will involve community education, the process has begun at the State Chamber and will continue in the coming months.

It may come as a surprise that Delaware has lost over 1000 jobs from companies located in the Coastal Zone in the last few years. These were quality jobs and are proving difficult to replace. Much of that difficulty stems from CZA regulations that serve as a barrier for companies interested in purchasing and redeveloping property in this state. One has to look no further than across the state line into Marcus Hook to see how Sunoco's \$2.5 billion expansion is providing quality jobs, yet the 44 acres sited in Delaware have seen no redevelopment, in large part due to the CZA.

With the focus on job growth, what sometimes gets lost in the discussion is what happens if businesses, impeded from redeveloping their former sites, ultimately fail to uphold their environment responsibilities. Who is responsible for maintaining containment of mobile contamination when a company fails to uphold their obligation? What will be the cost to DNREC, DEDO, and Delaware taxpayers for continued involvement in these properties over the long-term?

There exists a case study for these questions in the former Syntech site in Newark. Between 1981 and 1987, Helix Associates operated a specialty chemicals manufacturing and processing facility which reportedly recovered iodine from waste sulfuric acid solutions. In 1986, an explosion in a 750-gallon reactor vessel destroyed a portion of the manufacturing building and eventually led to closure of the Helix facility. In July 1989, Synthesis Technologies, Inc. (Syntech) began operations by manufacturing specialty batch diazo compounds, including dyes for cloth, color photography, 4 and biological tis-

sue staining until its closing in February 1991. In 1990, a reactor leaked vapors containing heptanes and nitric acid into the outside atmosphere. As a result of releases of hazardous substances, groundwater has been contaminated. The site is awaiting redevelopment, but as of now no plans have been filed to do so.

The State of Delaware now owns that site, and others like it, in and around the Coastal Zone, forcing continued investment in environmental monitoring and potential remediation. The plan is that modernizing the CZA for redevelopment will result in jobs for Delawareans with the additional benefit of reducing the financial impact of monitoring these sites, but we aren't there yet.

As the State Chamber has said before, we believe the role of the CZA was not to have industrial sites in the zone wither and die or to handcuff existing facilities by creating barriers that result in limiting expansion or improvement. It is only through modernizing the Coastal Zone Act in industrial areas to make Delaware more competitive and attractive for redevelopment that jobs and investment will flow. The alternative, to make no changes to the Act, will insure that there will be an increase in abandoned or underutilized sites resulting in fewer jobs for Delawareans and will cripple the state's long-term economic growth. ■



Delaware's Coastal Zone Act: Path Forward

BY COLLIN O'MARA

"I HAD NO IDEA that Delaware has all this!" exclaimed Interior Secretary Ken Salazar during a flight over the Delaware Bayshore that we took together with Governor Markell and Senator Carper in 2012. Secretary Salazar had enjoyed past visits to Wilmington, Newark, and our beaches, but he was simply blown away flying over mile after mile of pristine wetlands and meandering creeks—punctuated by thousands upon thousands of shorebirds dotting the shoreline. His utterance reflected an immediate appreciation of the vast ecological and economic value of this remarkable region, which he declared a "national treasure."

It was this tranquil beauty of our state's coastal resources that Governor Russ Peterson sought to preserve from industrial development when proposing the Coastal Zone Act in 1971. And it's indisputable that the Act has achieved this primary purpose. Yet a lot has changed in 45 years. Extreme storms and sea-level rise threaten to inundate Delaware's tidal wetlands and coastal communities. Abandoned industrial facilities scar Route 9, while their legacy pollution contaminates ground water supplies. Landmark environmental laws, like the Clean Air Act and the Clean Water Act, minimize pollution to our air, waterways, and land. And the biggest driver of land conversion is housing—not commercial development.

At the same time, our economy is changing rapidly. Under Governor Markell's tireless leadership, Delaware has experienced significant job growth since 2008 and our unemployment rate is currently the lowest in the region. There has been steady job growth in the service sectors, especially financial services, but a shrinking proportion of well-paying manufacturing, construction, and research and development jobs—and, as a result, average wages are lower than a decade ago. As some Delawareans take lower wage jobs, others are opting out of the labor force, leaving many families struggling and increasing demand for government assistance (costs for which are outpacing sluggish and increasingly shaky revenues).

Some of these shifts are a direct result of global economic forces and corporate consolidations; others are specific to Delaware, such as underinvestment in infrastructure; a complex local, county, and state regulatory environment; limited locations to site industrial facilities; and an emerging—but underdeveloped—innovation and entrepreneurship culture.

These current environmental and economic realities must inform any discussions about the Coastal Zone Act or regulations, so we prioritize solutions that will

both strengthen the economy and enhance our renowned natural resources. Here are four specific areas that should be part of any conversation:

Cleaning up abandoned industrial sites: It was never the intention of the Coastal Zone Act to leave behind an industrial graveyard of abandoned facilities. Worse yet, the soils under many of these sites are leaching toxic pollution into the groundwater—and in some cases our drinking water. Cleaning up these specific sites through DNREC's highly effective Brownfields program, which leverages private sector investment, and then allowing the sites to be redeveloped and reused would be a win-win: a healthier environment and more places to create well-paying jobs.

Improving the predictability of the regulatory process: States across the country are working hard to provide a predictable and efficient process to foster economic development. By comparison, there remains uncertainty about which activities are allowable under the Coastal Zone Act regulations, combined with a confusing offset program and a multi-layered



Delaware's Coastal Zone Act: Path Forward

BY COLLIN O'MARA

Continued...

appeals process that often takes multiple years—all of which can dissuade even the cleanest operations from creating jobs in the region. Allowing the remediation and reuse of existing contaminated sites (while continuing to preserve undeveloped land), having appeals go directly to the Courts rather than through an intermediary board, and replacing the current offsets process with a simpler and more predictable mitigation fee—would collectively catalyze economic development and help restore our natural resources.

Investing in resilience: Natural defenses, like wetlands, dunes, and living shorelines, provide invaluable protection for coastal communities and facilities during extreme storms. We can drive investments in resilience (as well as site remediation) by shifting away from the complex current regulatory offset program and allowing the “net-environmental benefit” requirement to be fulfilled through a straight-forward mitigation fee or clean up and resilience improvements. Also, given our vulnerabilities to storms and sea-level rise, we should be much more mindful about where (and how) we build housing and facilities, so we're not putting families or workers in harm's way and creating future taxpayer liabilities.

Building our Bayshore ecotourism economy: Every year, millions of visitors race down Highway 1 to get to our world-class beaches. As Secretary Salazar noted, folks have no idea that they are passing some of the most amazing birding, hiking, canoeing, biking, fishing, and duck hunting opportunities on the East Coast. By building upon the tourism invest-

ments by Governor Markell, we could attract tens of thousands of visitors to enjoy the region's unique ecotourism opportunities, which would create thousands of jobs and strengthen our picturesque Bayshore communities.

Delaware's Coastal Zone Act is one of our most important laws and any proposed change to the regulations or statute should not be taken lightly. By making improvements that remediate damaged natural resources and bolster coastal resilience, while spurring much-needed job creation, we will leave a legacy of which we can all be proud. ■



Collin O'Mara served as Delaware's Secretary of Natural Resources and Environmental Control from 2009-2014 where he worked to restore Delaware's natural resources and strengthen Delaware's economy. He currently serves as President and Chief Executive Officer of the National Wildlife Federation, America's largest conservation organization with more than six million members and affiliates in 50 states and territories.

KEEP UP WITH THE STATE CHAMBER'S LEGISLATIVE PRIORITIES

www.DSCC.com/LegislativeJournal

Delaware's Coastal Zone Act: A Call for Reform

BY ROBERT W. WHETZEL

DELAWARE'S COASTAL

ZONE is nationally and internationally recognized for its beauty, diversity, and protected open space. The Coastal Zone Act was intended to strike a careful balance between economically and environmentally beneficial activities—protecting open space from industrial development while controlling both new and existing industrial uses.

In 1971, there were dozens of thriving industrial and manufacturing facilities in the coastal zone. Those plants employed thousands of Delawareans, and many of us have friends and relatives that worked in those plants or in the businesses that supported those manufacturing facilities. The Coastal Zone Act filled an important void in the environmental regulatory arena—environmental regulation was virtually nonexistent, and comprehensive permitting programs like those in the current Clean Air Act and the Clean Water Act did not exist. Laws regulating hazardous wastes, and imposing liability for improper disposal of hazardous substances, simply were not yet in place.

Suffice it to say, much has changed since the adoption of the Coastal Zone Act in 1971. Many of the formerly vibrant industrial or manufacturing sites in the coastal zone are shuttered and deteriorating, leaving behind industrially blighted sites of little or no productive use. Over the 45-year life of the Coastal Zone Act, a significant number of the large industrial uses in the coastal zone have ceased operation, and those that remain are challenged to compete with newer, more modern facilities elsewhere. Since the Coastal Zone Act prohibits new heavy industry and significantly limits new manufacturing uses, new investment in these sites is limited.

Today, sites lie vacant and abandoned, often contaminated by their former use, without available economic resources to address the environmental impacts that may exist. Ironically, the limitations imposed by the Coastal Zone Act now result in an adverse impact to the coastal environment, as these sites remain vacant, deteriorating, and polluted. Of even greater concern are the human consequences of this industrial demise. These now-abandoned coastal industrial sites once employed thousands of Delawareans, many of whom are left unemployed or under-employed. The economic and social costs of this job loss are enormous.

The Coastal Zone Act was enacted to protect our coastal areas and preserve open space for recreation and tourism. The driving force behind the Act was to preserve the existing, undeveloped areas of the coastal zone and to control the conversion of those open spaces for industrial use.



Significantly, the Coastal Zone Act was not intended to cause the existing industrial and manufacturing properties to wither and die. But that's exactly what has happened.

There are solutions, but only through careful, considered, and courageous action. Sites that were once industrial can and should continue as industrial—and the widely acclaimed Delaware Brownfields program provides a model for redevelopment and reuse of these sites. A “Coastal Brownfields” program would allow the reuse (with regulatory oversight) of prime industrial real estate, while addressing the existing contamination on those sites and providing desperately needed economic activity (and jobs).

The Coastal Zone Act holds a special place in Delaware and should be respected and embraced. Like all regulatory programs, it must evolve to reflect the changing times. In 1971, when the Coastal Zone Act was signed into law, environmental regulation was in its infancy, and vast stretches of the Delaware coastline were unprotected from industrial development. Since that time, environmental regulation has flourished, while the facilities that once employed thousands have nearly disappeared.

The Coastal Zone Act has served its purpose well: to protect and preserve the coastal resources of the State of Delaware. The Coastal Zone Act did not envision a legacy of abandoned and polluted eyesores. Let's encourage the cleanup of these sites and their productive use into the future. Coastal Zone Act reform is another opportunity for us to demonstrate that we can protect the environment and create jobs—for the benefit of all Delawareans. ■



Robert W. Whetzel is an attorney with Richards, Layton & Finger, and leads the firm's environmental practice. Bob is the Chair of the State Chamber's Environmental Committee, and he has been involved with coastal zone issues for more than 30 years.

The Coastal Zone Balancing Act

EARLY LAST YEAR the Delaware Business Roundtable commissioned the national economic development consulting firm, Tip Strategies, to create a forward-looking economic development plan for our state. With many hundreds of hours of research and meetings, with well over 100 individuals representing the numerous stakeholders impacted by decisions in Dover, Tip Strategies and the Business Roundtable released the Delaware Growth Agenda in July of 2016.

As one of the 100+ stakeholders involved, the Delaware Contractors Association (DCA) was pleased to play a roll in helping shape a new direction for Delaware's economy. For those unfamiliar with the DCA, it is Delaware's premier construction trade association, consisting of both Union and Open Shop construction companies, supported by related business that provide goods and services to the construction industry. Shaping government policy is a key aspect of the DCA's charter and, in fact, a primary reason for the association's existence. Adding to the already strong mission statement, the DCA adopted four foundational principles, each focused on issues critical to its membership and the state.

One of the principles, improving the state's economy through a vibrant and aggressive Economic Development strategy, is today's focus.

This DCA principle states:

"DCA members recognize and strongly support increased opportunity and growth in Delaware. Working through partnerships with political leadership and the state's other leading business and nonprofit organizations inspires solid ideas and creates solid policy. Equally important is the identification and removal of the policy and regulatory obstacles that inhibit growth."

Based on this DCA principle and the Agenda for Growth, a broad coalition including the State Chamber, Committee of 100, Delawareans for Environmental and Economic Development (DEED), and many of Delaware's environmental interests, is now working diligently, finding common ground to support modifications to Delaware's iconic Coastal Zone Act.

Much has been written about former Governor Russ Peterson's prescient legislation, enacted in 1971, at a time when little regulatory control existed for the protection of our environment. This was before the creation of the EPA, the Clean Water Act and other state and regulatory agencies that, today, provide stringent environmental regulatory

oversight. Finding the right balance between regulatory oversight and proper economic development is always a challenge.

But, as is always the case, the passage of time and the progressive shift in thought and policy require a new look at old ideas. Delaware's economy in 2017 is far different than that of 1971.

Think back to that time... The economy was led by DuPont, Phoenix Steel, General Motors, and Chrysler – all classic manufacturing interests and today, gone. And each of these companies created an environmental legacy with which we all must deal, including cleanup costs far beyond what the state or any government jurisdiction can possibly afford.

Understanding the need for change, the coalition has identified just over 4,000 acres and 43 parcels, with one exception, all located above the Chesapeake and Delaware Canal. The properties, all either current or former manufacturing sites, are ideal for remediation and re-development

within the Coastal Zone. The 43 parcels comprise, in total, less than 2% of the total area within the zone.

Think about the jobs decimated over the years, the impact on the middle-class and its former reliance on well-paying manufacturing jobs. Now fast forward to today with the largest employer in the state of Delaware being the state itself. Think back to 1971 when State employment was not the preferred choice of career that it is today. While the Delaware economy has now shifted to a service-based economy, we have the opportunity to diversify and attract new opportunities for manufacturing. Amending the CZA to re-purpose Brownfields will greatly improve these prospects.

We need to fix this.

And why is this important to the Delaware Contractors Association? With over 300 employer members representing all disciplines of construction in Delaware, this association represents thousands of Delaware residents, all of who live, pay taxes, spend money and vote in Delaware. The DCA membership is a major economic driver for what is good for Delaware.

We can fix this.



Bill Freeborn Executive Director of the Delaware Contractors Association.



LEGISLATIVE PRIORITY

Modernizing the Coastal Zone Act

BY JAMES DECHENE

FOR MORE THAN 40 YEARS, the Coastal Zone Act has set Delaware apart for companies looking to conduct business on Delaware's coast. Whether it was meant to eventually force manufacturing and industry to "wither on the vine" or to balance the types of allowable companies with keeping our natural resources pristine, it has created a logjam in the process. Regardless of the intent of the legislation, it is clear that Delaware's Coastal Zone Act must be modernized in order for Delaware to grow.

There are a number of large economic development projects underway in and around Delaware, including the redevelopment of Sunoco's Marcus Hook site, of which 40-plus acres are located in Delaware. To date, Sunoco has not indicated any plans for development on that ground, most notably due to conforming to the Coastal Zone Act. The redevelopment of the former Claymont Steel plant is another potentially huge economic development project to bring jobs to Delaware, and hurdles continue to mount for next stage planning.

The world economy has changed significantly since 1971, and the manufacturing world has changed with it.

It is readily apparent that manufacturing is not as it once was, and for modern manufacturing plants, whether making cars, medical equipment or other products, the focus is on clean and efficient production. Companies looking for manufacturing and production sites expect the process to be clear, timely, and reasonable, and unfortunately right now that is not a process Delaware can provide.

There is a balance to be reached between protecting the thousands of acres of land within the Coastal Zone that have not seen, and should not see, commercial development and allowing those sites sitting abandoned, underutilized or other properties that have a history of commercial use prior to the Coastal Zone Act enactment in 1971 to be actively, and easily, used. Plans do not, and would not, include refineries or

smelting plants as acceptable in the Zone, but instead focus on bringing high tech, efficient manufacturing and other related businesses to Delaware.

Delaware is currently at a crossroads in its history. The four-legged stool that has been the primary backbone of our economy in recent years—cars, chemicals, chickens and credit cards—has



changed dramatically. As our jobs shift away from the chemical industry, Delaware must make itself as attractive as possible in order to bring new business to the state, and modernizing the Coastal Zone Act is a lynchpin to that success. To that end, the State Chamber will begin, and lead, the discussions and debate surrounding how to modernize the Coastal Zone Act. The continued future of economic development in Delaware will be predicated upon the outcome of what will be undoubtedly be a heated debate. Our message is, and will remain clear: Delaware cannot afford to have its economic policy dictated by extreme or unreasonable elements of the environmental activist community if there is to be the future successful economic growth this state needs to survive.

