LWV Panel on Port Expansion
Dave Carter's Talking Points
Delaware Audubon Society

Thank you for the opportunity to express some perspective on the Port Expansion Projects.

The projects have very significant environmental impacts, and each will require some time consuming and costly environmental assessment prior to consideration of permits.

Tonight, I will first address the applicability of the Delaware Coastal Zone Act. Meeting the permit requirements will have some challenges for two of the sites, but I think the meeting the large number of other State and Federal requirements will be more burdensome.

After discussion the CZA, I will talk about the many Federal and State requirements, and particularly the applicability of the National Environmental Policy Act. Developing EIS and EA's are very complex, time consuming, and expensive efforts.

Finally, I will add my perspective on the economic considerations, as they must be done at a much larger scale than local to capture the shipping market. To meet some of the requirements and have the Corps of Engineers involved (as will be necessary to connect to the Federal Channel and for Dredge Disposal Sites), it must look at the regional market and port capacity, not just local economic impacts as part of the Benefit/Cost Analysis.

Coastal Zone Act

The Port of Wilmington is exempted from Delaware CZA.

Riveredge and Claymont proposal, if containers, are not likely to be prohibitive heavy industry. As such, they are not prohibitive use, unless they try to also conduct bulk transport activities, which are prohibited.

§ 7003 Uses absolutely prohibited in the coastal zone.

Heavy industry uses of any kind not in operation on June 28, 1971, are prohibited in the coastal zone and no permits may be issued therefor. In addition, offshore gas, liquid or solid bulk product transfer facilities which are not in operation on June 28, 1971, are prohibited in the coastal zone, and no permit may be issued therefor.

These two sites will be required to get a CZA permit. This includes meeting all the regulatory requirements, including offsets for environmental damage and the goals of the act.

I.1 Any application for a Coastal Zone permit for an activity or facility that will result in any negative environmental impact shall contain an offset proposal. Offset proposals must more than

offset the negative environmental impacts associated with the proposed project or activity requiring a permit. It is the responsibility of the applicant to choose an offset project that is clearly and demonstrably more beneficial to the environment in the Coastal Zone than the harm done by the negative environmental impacts associated with the permitting activities themselves.

§ 7004 Uses allowed by permit only; nonconforming uses

(b) In passing on permit requests, the Secretary of the Department of Natural Resources and Environmental Control and the State Coastal Zone Industrial Control Board shall consider the following factors:

(1) Environmental impact, including but not limited to, probable air and water pollution likely to be generated by the proposed use under normal operating conditions as well as during mechanical malfunction and human error; likely destruction of wetlands and flora and fauna; impact of site preparation on drainage of the area in question, especially as it relates to flood control; impact of site preparation and facility operations on land erosion; effect of site preparation and facility operations on the quality and quantity of surface, ground and subsurface water resources, such as the use of water for processing, cooling, effluent removal, and other purposes; in addition, but not limited to, likelihood of generation of glare, heat, noise, vibration, radiation, electromagnetic interference and obnoxious odors.

(2) Economic effect, including the number of jobs created and the income which will be generated by the wages and salaries of these jobs in relation to the amount of land required, and the amount of tax revenues potentially accruing to state and local government.

(3) Aesthetic effect, such as impact on scenic beauty of the surrounding area.

(4) Number and type of supporting facilities required and the impact of such facilities on all factors listed in this subsection.

(5) Effect on neighboring land uses including, but not limited to, effect on public access to tidal waters, effect on recreational areas and effect on adjacent residential and agricultural areas.

(6) County and municipal comprehensive plans for the development and/or conservation of their areas of jurisdiction.

Getting a CZA permit is not a simple thing like driving into a parking garage and pushing a button to get a parking permit. It is extremely complex, requires many detailed studies, and takes a great deal of time.

And the CZA permit is probably the easier part since these projects will be required to follow the far more complex National Environmental Policy Act. These projects require significant federal permits, much of what has been proposed has significant environmental impacts, and the

Corps must take direct federal action if the new port locations are connected to the Federal Navigation Channel. In fact, connecting to this channel will require a Congressional authorization. If all the NEPA requirements can be met, you then need an Act of Congress. (Port of Wilmington is already authorized by Congress)

The NEPA Review Process

As the National Environmental Policy Act, NEPA is designed to make sure that the decisions made by Federal agencies are environmentally sound. It's scope is really quite broad.

NEPA encourages early consideration of environmental impacts, in an open manner, with meaningful public participation which takes considerable time.

NEPA requires review of the effects of all Federal, federally assisted, and federally licensed actions, not just of those defined as "major" or as having "significant" impacts. The level of review given different kinds of projects varies with the likelihood of serious impact.

The courts have consistently found that **NEPA requires a "hard look"** at environmental impacts and at alternatives. It mandates a process for taking that "hard look" at what an action may do to the environment, and what can be done about it.

In general, and as expressed in different ways for different kinds of actions, the NEPA process entails:

- determining what need must be addressed,
- identifying alternative ways of meeting the need,
- analyzing the environmental impacts of each alternative, and
- armed with the results of this analysis, deciding which alternative to pursue, and how to pursue it, INCLUDING DOING NOTHING.

Under the regulations, the "detailed statement" called for by NEPA is called an Environmental Impact Statement (EIS). It must be prepared on all "major Federal actions significantly affecting the quality of the human environment."

This project requires federal permitting, an action that triggers a NEPA evaluation for project that can significantly impact the environment. **Dredging or filling of large areas of the River, Blasting Rock, Creating a Dredge Disposal Area, and other impacts will trigger the NEPA process.**

At a minimum, the projects will trigger an "Environmental Assessment" (EA). This assessment leads either to the decision to prepare an EIS, or to issuance of a "Finding of No Significant Impact" (FONSI, FoNSI, or FNSI).

An EA is "a concise public document" briefly providing the evidence and analysis necessary to make a threshold determination. The EA document must include brief discussions of the proposal's necessity, alternative proposals, environmental impacts of the proposed and alternative actions, and a list of agencies and private parties consulted. Environmental agencies and the public must be involved in the preparation of an EA "to the extent practicable".

If an agency's threshold determination is challenged, a critical factor in judicial review is the degree to which other agencies and the public participated in the determination. Case law also indicates that these additional tests are often used by the courts:

Irretrievable commitment test- the long-term commitment of resources (makes actions irreversible)

"**irrational or unwise**" test - proposed action is so dependent on subsequent phases "that it would be irrational, or at least unwise, to undertake the first phase

"independent utility" test under which the environmental effects of proposed actions must be considered together

Economics:

NEPA requires an economic analysis for activities involving national navigation projects that is focused on the national interest. The local analysis done to date is unlikely to meet the requirements of the Benefit/Cost requirements.

There are a total of 52 ports on the East and Gulf Coast of USA; nonetheless 14 of those collectively account for over 90% of all the container traffic that occurs in these regions of the country, and much if not most increased cargo is likely to be absorbed by these ports.

As of 2012, the USACE had has "*17 active studies investigating possible port improvements, most associated with the desire to be post−Panamax ready*". Current plans for improvement in the infrastructure of East and Gulf Coast ports exceeds US $20 billion, two thirds of what was spent in total on ports in the 50 prior years.

Whether or not such massive investments, publicly financed in most cases, provides sufficient returns on capital for each and every port remains to be seen, but is unlikely. New project will face even more challenging economic competition.

Two sets of attributes need to be considered for adequate consideration of port economics.

1) Attributes for infrastructural preparedness of a port for handling increased Post-Panamax cargo

- Port depth by 2020
- Number of Post-Panamax Cranes at the port and percentage thereof that are
- Number of Interstates (and/or US Highways for Category II) within 20 miles of port
- Number of Class I railroads serving the port with presence of intermodal facility(ies)
- Are significant dredging/infrastructure enhancement project(s) in progress at the port?
- Is the port considered PPR by 2020 per USACE (2012) Classification?

2) Business-related attributes aimed at capturing the port's current market stature.
   - Annual cargo volume in TEUs
   - Number of shipping lines that call on the port
   - Number of Top 12 shipping lines that are Master Carriers at the port (50 shipping companies' w/6000 ships, 1/3 of market with the top 12.
   - Is OSCAR Data Compiled by USDA for the Port? (Ocean Shipping Container Availability Report from USDA to help with match backs).

"Cascade Effect" is for the lower tier of ports like those on the Delaware, but may be irrational exuberance for most locations. The competition will be stiff. Port activities will be highly contested markets. The tier one, post panX ready ports will increase efficiency and absorb most of the increased cargo.

Also, an important consequence of the increasing ship sizes to keep in mind is that, until volume levels rise substantially (if the do), ports will likely see fewer—not more—ship calls, with each ship call accounting for a larger fraction of a port's traffic. And this will not be distributed evenly.

A major unknown is the Fee Structure for Panama Canal. If high, ship numbers will be lower.

Shipping and Port Calls is a highly contested National market. West Coast Ports will respond with lower pricing and increased efficiency/automation, as well as railroads. Even on the east coast, ports will heavily competitive. We do not have a good handle on the current capacity to absorb any increased cargo. It is highly likely that the infrastructure expansion, 20 billion worth, in the past few years has already surpassed the capacity to meet any increase in demand. This means that local ports may be spending large sums of funds to steal business from each other, not actually increasing jobs and economic group in the local region.

Coast Wide Capacity to meet cargo handling is key – it is simply the law of Supply and Demand.

Unfortunately, Benefit/Cost Analysis (BCA) is often supplemented or replaced at local government levels by an economic impact analysis that investigates how port transportation benefits spread through the local or regional economy in the form of jobs and economic growth. These Economic impact studies focus on local and regional jobs created, payroll taxes collected,

changes in business revenues and land values, wages paid for construction of the project, and new businesses supported.

However, the increases in jobs and revenues reported in many local economic impact studies are relocated from other ports and communities, as when a carrier transfers its operations from another port to the local port because of the project in question. Thus, an increase in jobs and revenues shown by a local economic impact analysis of a port project does not necessarily translate into a comparable increase in jobs and revenues at the coast wide or national level. And due to competition may be unlikely to occur.

Regardless, the BCA for the EIS and NEPA must be done at the greater than local scale, and one that at least represents the geographic footprint of the actual market, which is national and international – not just the Delaware River.

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