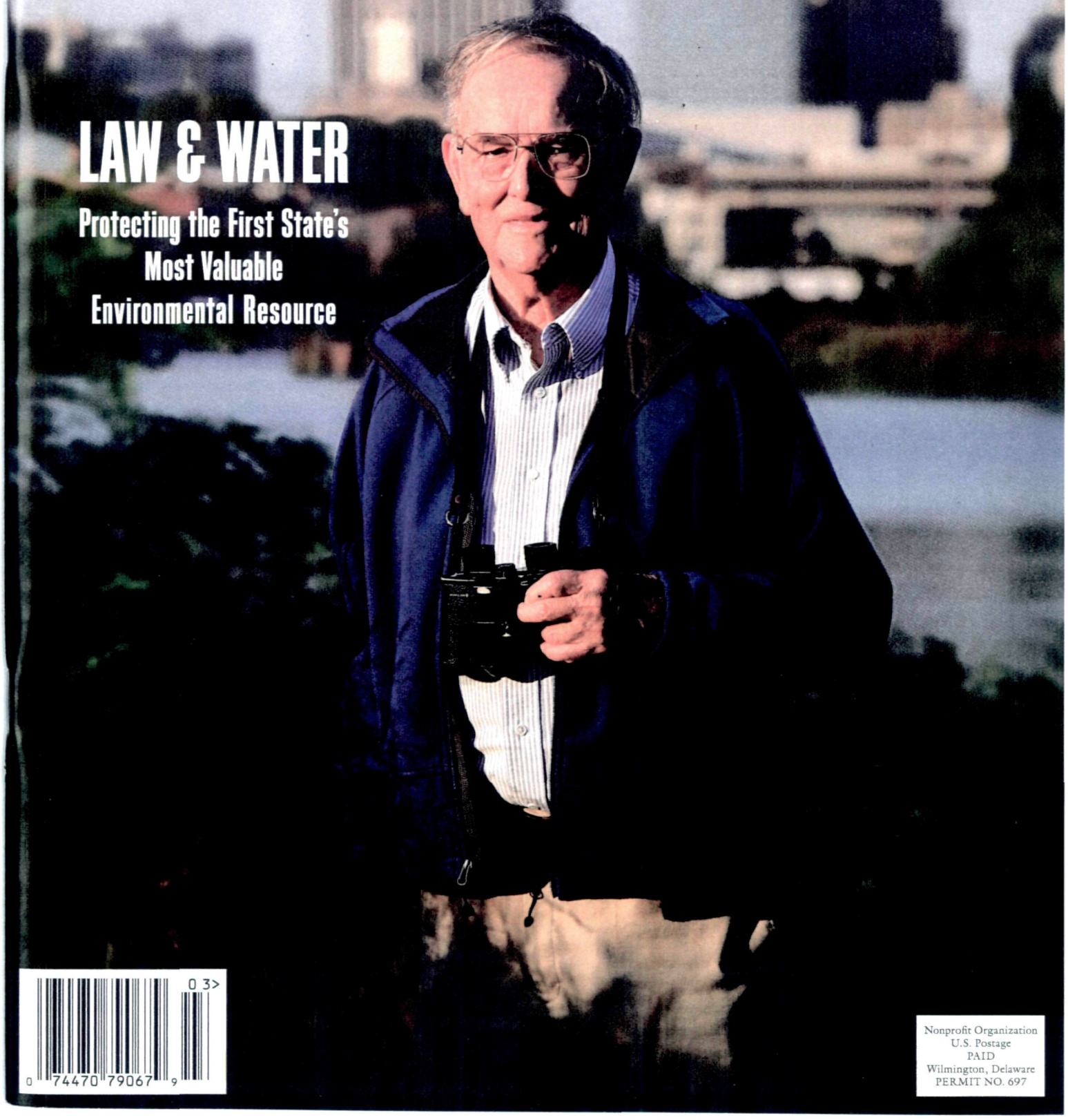
INSIDE: Q&A With Gov. Russell Peterson, Cleaning State Waterways, Brownfields Legislation

Delaware Lawyer

A PUBLICATION OF THE DELAWARE BAR FOUNDATION

VOLUME 25 ◆ NUMBER 3
$3.00 ◆ FALL 2007



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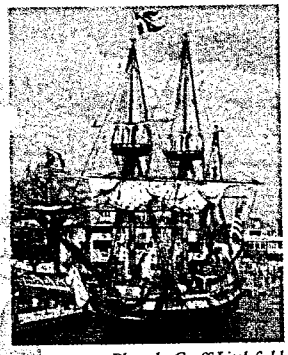

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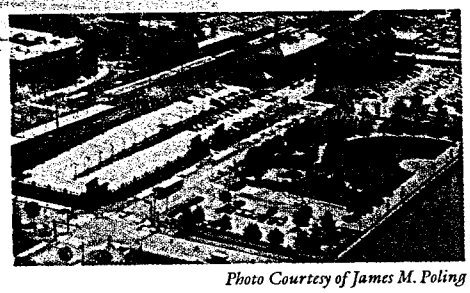

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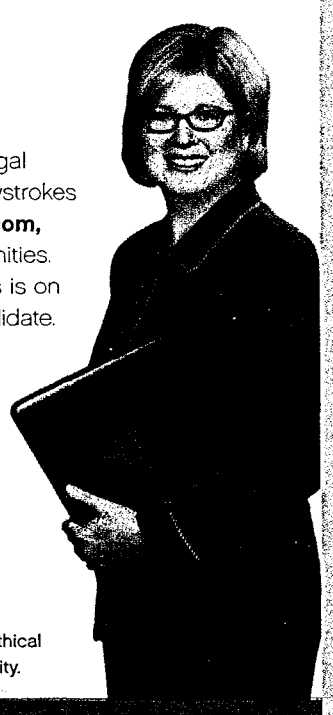

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is produced for the
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Media Two, Inc.
1014 W. 36th St. / Baltimore, MD 21211

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Art Director / Samantha Carol Smith

Subscription orders and address changes should be directed to:
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EDITOR'S NOTE

Peter E. Hess

Water has had a more influential role in Delaware's history than any other resource. A pristine estuary attracted the Swedish pioneers sailing the *Kalmar Nyckel.* Its modern replica is now Delaware's floating ambassador, crewed by volunteers like attorney Eric Boyle, who recounts these seafaring adventures.

Ironically, it was another Swedish American, Gov. Russell W. Peterson, who preserved the natural beauty that had beckoned his forefathers. It is now arguable that Peterson's sole term, 1969-73, accomplished more than any other Delaware governor. His courageous defense of our imperiled coastline led to passage of the nation's first coastal protection legislation, which had international impact and propelled Peterson to worldwide environmental prominence. He graciously sat down for more than six hours with *Delaware Lawyer* to share fascinating tales of his remarkable foresight.

This term's U.S. Supreme Court docket will delve into our Colonial history as it reviews New Jersey's challenge to Delaware's authority to regulate coastal development on the Jersey (river) shore. Deputy Attorney General Kevin Maloney and attorney Matt Boyer write about an unfolding interstate legal battle whose resolution entails examination of William Penn's 1682 charter for the Pennsylvania colony and the "three lower counties on the Delaware."

From our smallest streams to the state's largest waterways, protection of water quality remains problematic. Attorney Ken Kristl and student Taryn Lee Weiss of Widener's Environmental and Natural Resources Law Clinic describe its role as a leading advocate for cleaner water through litigation mandating compliance with environmental laws.

Today's dramatic urban renaissance along Wilmington's Christina Riverfront would never have been possible without the brownfields legislation creating incentives for the restoration of contaminated industrial lands. Department of Natural Resources and Environmental Control brownfields program administrator Jim Poling tells of the reclamation of one of our largest city's singular natural attractions.

A century earlier, forward-thinking city planners and philanthropists protected Wilmington's Brandywine Valley through the creation of one of the nation's first urban parks. Attorney Chuck Durante reviews a remarkable book recounting this story.

And yet, the Brandywine's urban tranquility would never have merited such protection had not its headwaters and tributaries been spared gross overdevelopment typical of American waterways. The Pennsylvania-based Brandywine Conservancy, ably assisted by Delaware lawyer Teddy Price, has led this never-ending battle to preserve the bucolic splendor for which the Brandywine Valley is renowned.

These stories collectively illustrate why no terms are as deserving of each other as "Law & Water."

Peter E. Hess

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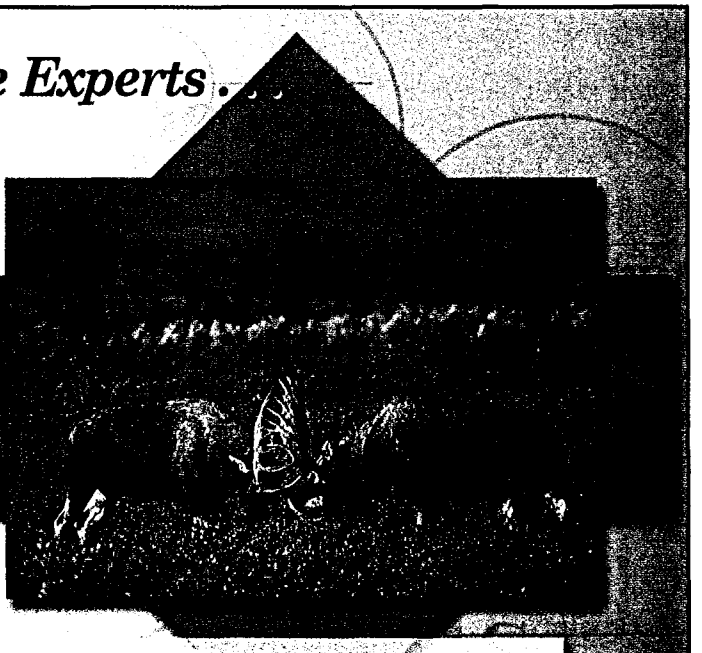

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FEATURE

Kenneth T. Kristl
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Now Comes the Hard Part: Cleaning Up Delaware's Streams, Rivers and Bays

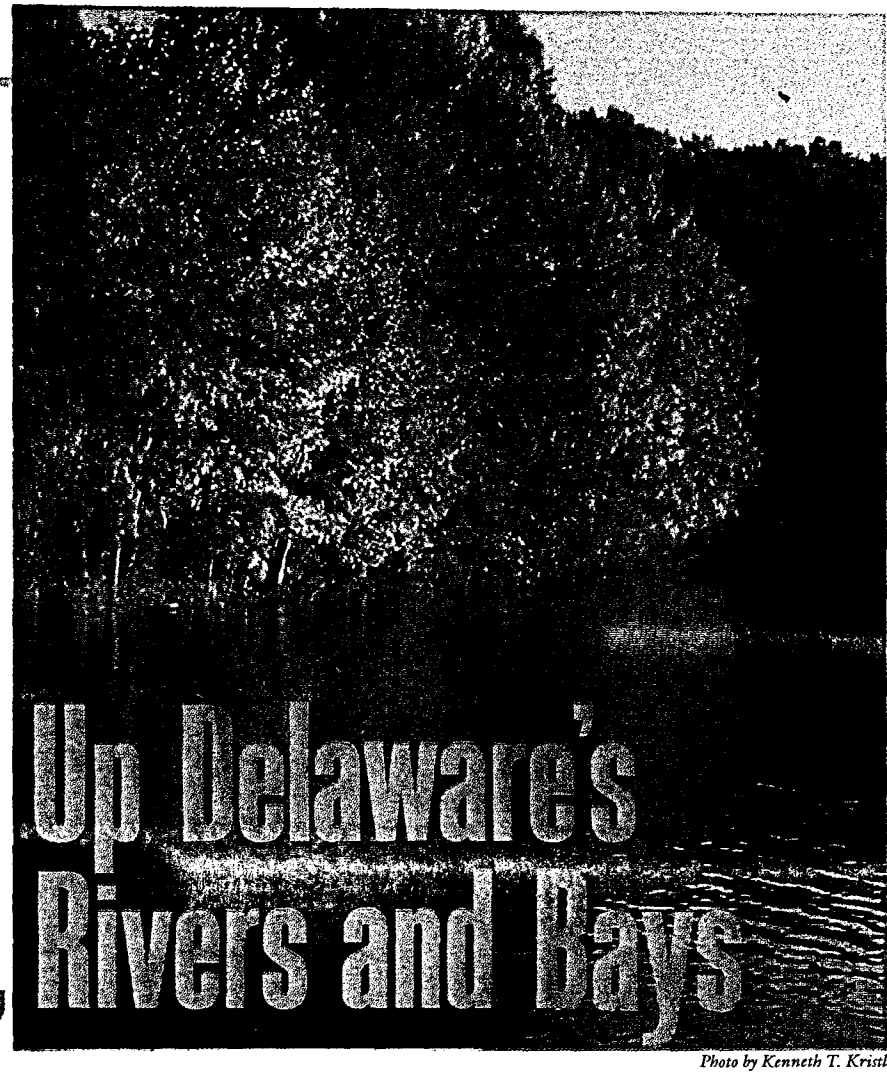

Photo by Kenneth T. Kristl

The effort to clean up Delaware's waters is a microcosm of the national problem.

The federal Clean Water Act seeks "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." In 1972, its drafters thought that the discharge of pollutants to our nation's waters could be eliminated by 1985. History has shown that the problem is far more difficult that anyone realized. The effort to clean up Delaware's waters is a microcosm of the national problem. Though much progress has been made to get the Clean Water Act's tools in place, the task of implementing those tools in Delaware is proving to be a battleground of competing interests.

What does the act do? The Clean Water Act requires that, every two years, Delaware must identify those waters with water quality that does not meet the water's designated use. For example, if you can't swim or fish in a stream that is supposed to be "swimmable and fishable," the state is required to identify that stream as "impaired" by the pollutants that prevent safe swimming and fishing. Currently, more than 90 percent of Delaware's waters are considered "impaired."

Once "impaired waters" are identified, the Act requires Delaware to figure out how much of the impairing pollutants are entering the water and set a new, lower amount of the pollutants that would allow the water body to eventually achieve its designated use and therefore no longer be impaired. The Act calls this new, lower amount a Total Maximum Daily Load, or TMDL, because it represents the maximum amount of a pollutant that can enter the water but still achieve water quality standards. TMDLs assign a certain part of the total amount to "point sources" (facilities that directly

discharge into the water) and "non-point sources" (like runoff from farms, lawns and streets, seepage from septic tanks, and other sources that indirectly find their way to the water). If the states fail to develop TMDLs, the Act requires the U.S. Environmental Protection Agency (EPA) to develop them. In theory, once TMDLs are promulgated, the pollutant loadings to the water will be reduced, the water quality will improve and the nation will be one huge step closer to meeting the Act's objective of "restoring" its waters.

What has Delaware done? Delaware — like most states during the 1980s and 1990s — developed its list of impaired waters but did little more. All that changed in June 1996, when the Environmental and Natural Resources Law Clinic at Widener School of Law's Wilmington campus helped represent several clients who sued EPA over the failure to promulgate TMDLs for Delaware's impaired waters. The suit, *American Littoral Society et al. v. EPA*, C.A. No. 96-330 (D. Del.), resulted in an Aug. 4, 1997 Consent Decree setting a schedule for development of TMDLs for all impaired waters on Delaware's 1996 Impaired Waters List. To its credit, Delaware, working with EPA, has complied with the Consent Decree schedule and has promulgated TMDLs for numerous Delaware waters, including the Appoquinimink River and its tributaries; the Nanticoke, Murderkill, Leipsic, Chester, Choptank, Marshyhope, Pocomoke, Broadkill, Smyrna and Christina rivers; Army Creek, Blackbird Creek, Broad Creek, Cedar Creek, White and Red Clay Creeks; the Inland Bays and the Delaware River and Bay.

As part of its strategy to implement its TMDLs, Delaware empowers citizens and interested parties to form Tributary Action Teams that seek to develop ways to reduce the amount of the pollutants entering the water body. Teams have been formed for the Appoquinimink, Broadkill, Christina and Nanticoke rivers as well as for the Inland Bays. Teams research the unique conditions in their watersheds and then propose Pollution Control Strategies (PCS) to implement the TMDL.

The hard part. Given all this focus and effort, one might presume that Delaware is well on its way to cleaning up its streams and rivers. What seems simple in theory, however, is complicated in the details. Delaware's Department of Natural Resources and Environmental Control (DNREC) states on its Web site that "most" of the impairments in Delaware's waters are caused by non-point sources. The problem is that, unlike point sources that are extensively regulated and subject to permitting under the Act, non-point sources are subject to little regulation, and so reducing pollutants from non-point sources requires voluntary efforts and creative solutions. Given the many types of non-point sources, the challenge of getting people to change their conduct voluntarily in order to reduce pollutant loadings, and the likelihood of clashes between private interests and the public interest in environmental improvement, both become clear.

Most of the impairments in Delaware's waters are caused by non-point sources, which are subject to little regulation.

A classic example is the fight over the PCS for the Inland Bays. The Bays are impaired for nutrients (nitrogen and phosphorus). Nutrients are problematic because, at excessive levels, they cause excessive growth of sea lettuce and other macro algae, cause micro algae blooms (some of which can be toxic) and reduce dissolved oxygen levels that can cause fish kills. The TMDL mandates an 85 percent reduction in non-point source nitrogen contributions and a 65 percent reduction in non-point source phosphorus contributions on the upper Indian River and 40 percent reductions of non-point source nitrogen and phosphorus contributions from the rest of the Indian River watershed and the Little Assawoman Bay watershed. The original PCS proposed 100-foot riparian buffers (i.e., vegetated areas along the water's edge that would help to absorb the nutrients before they enter the water) as one of several control strategies to meet the TMDL.

Developers immediately complained that having to provide 100-foot buffers would severely restrict development along the Bays and might interfere with property rights. DNREC suggested reducing the buffers to 50 feet, which developers found less objectionable but caused environmentalists and the Center for the Inland Bays to complain that 50-foot buffers were inadequate to protect and ultimately improve the water quality in the Bays. A third version of the PCS simply identified riparian buffers as a tool without specifying their size, leaving both developers and environmentalists disappointed because of the inherent uncertainty about how big and how effective the buffers ultimately will be. After objections (including a resolution in the Delaware Senate), that third version has been withdrawn, with DNREC promising a fourth version by Oct. 1, 2007.

While buffers are just one of several PCS approaches, this fight makes clear that any approach to cleaning up Delaware's waterways affects someone's rights. The proposed 100-foot buffers restrict developer's ability to develop their land, but benefit other property owners by improving the water quality. Smaller or nonexistent buffers might give developers more freedom, but could adversely impact other property owners who have to deal with the increased algae, fish kills and smell that impaired

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Inland Bays bring. Reducing the efficiency of buffers might require ratcheting up other PCS strategies that could impact farmers, septic system owners and others.

The Clean Water Act makes improving water quality the highest good, but each interest views the best path to that goal through a lens that often shifts the burdens to someone else. Striking the appropriate balance among these often competing interests is not easy, as the Inland Bays' buffer saga clearly shows. Yet it is precisely this hard task that Delaware must undertake if it really wants to clean up its streams, river and bays and achieve the Clean Water Act's goals. ◆

Widener's Environmental and Natural Resources Law Clinic

Started in 1989 by Professor David Hodas, and ably directed by Professor Jim May until 2004, Widener's Environmental and Natural Resources Law Clinic has represented environmental organizations from Maine to Puerto Rico, with a special focus on Delaware, Pennsylvania, Maryland and New Jersey, on matters arising under all major federal and many state environmental laws.

In addition to its suit concerning Delaware's lack of TMDLs, the Clinic also secured Consent Orders or settlements requiring TMDL development in Virginia, Pennsylvania and Maryland, as well as improvements in individual TMDLs in Florida, Pennsylvania, Delaware and New Jersey.

In Delaware, the Clinic has been active in monitoring the application of the Coastal Zone Act, the Subaqueous Lands Act and the permitting of facilities. The current director, Professor Ken Kristl, helps approximately 10-12 Widener students each year learn the practical skills of complex civil litigation that will assist them throughout their legal careers while helping to protect the environment.

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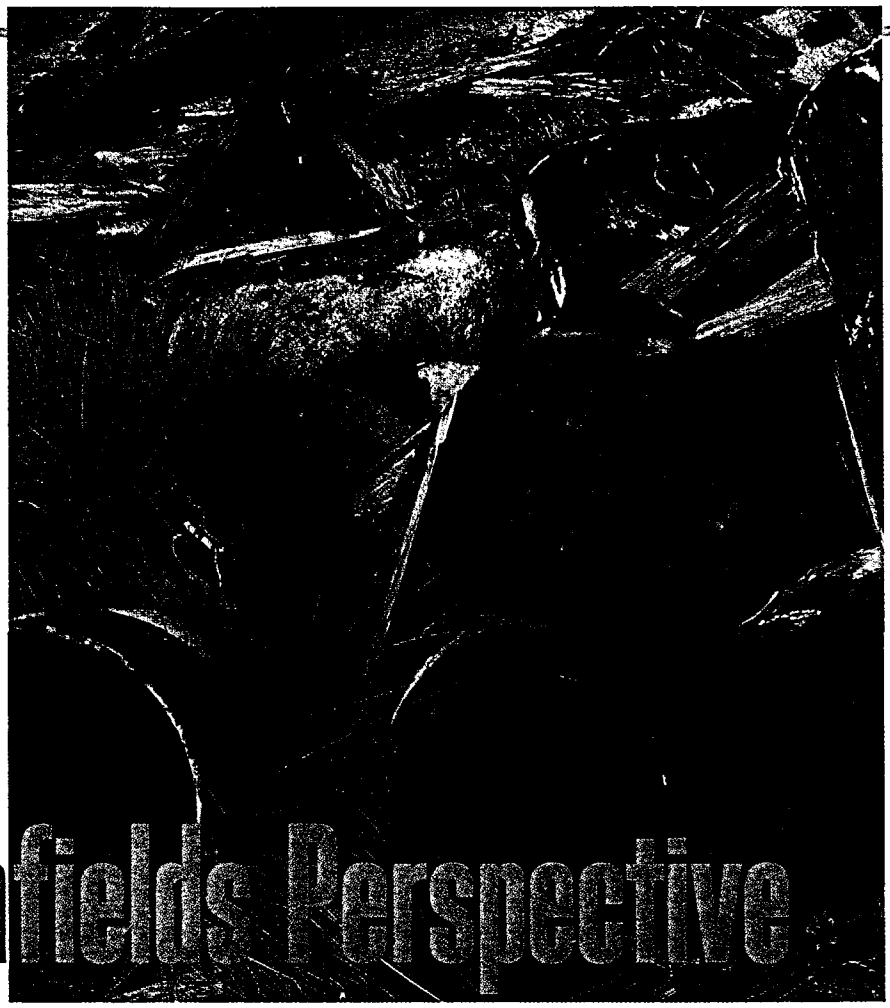

A Vision for the River: A Brownfields Perspective

Brownfields problems are a national issue and particularly affect areas with a rich industrial heritage.

The most successful environmental revitalization effort in Delaware began more than 10 years ago and is still breaking ground. Wilmington's Christina Riverfront exemplifies the best of brownfield/waterfront development practices through the marriage of environmental remediation and economic redevelopment. "Revitalization" because a once blighted economic entropic zone is now home to a thriving variety of mixed uses and tourist attractions. "Environmental" because the vast majority of the redeveloped land was contaminated and posed risks to human health and the environment.

For many years prior to this environmental revitalization effort, the riverfront was fraught with abandoned, vacant or under-utilized properties that prevented redevelopment because of the real or perceived fear of existing pollution at any one property and the associated legal and financial repercussions associated with them. Properties exhibiting these conditions are referred to as "brownfields." Brownfields problems are a national issue and particularly affect areas with a rich industrial heritage, especially those in proximity to riverfront, and rail transportation and trade venues.

This article will provide a brief history of the Riverfront Development Corporation's (RDC) role in this land use drama. It will then offer a more in-depth review of the Department of Natural Resources and Environmental Control's (DNREC or the Department) Brownfield Program's history and current status and its role in partnering with the RDC in the campaign to bring about positive change to this valuable landscape.

A vision for the rivers

The major driving force behind the Christina and Brandywine rivers redevelopment was *A Vision for the Rivers: The Final Report of the Governor's Task Force on the Future of the Brandywine and Christina Rivers* ("Vision") that was presented to Gov. Thomas R. Carper in October 1994. The Vision was the product of a two-year effort to find solutions to the serious problems plaguing a valuable under-utilized asset of the state, city and county. The enumerated goals of the Vision were to improve water quality; preserve historical, cultural and community attributes of the river corridors; protect and enhance wildlife; increase recreational opportunities; and promote sustainable economic growth through compatible economic uses.

The Riverfront Development Corporation was incorporated in 1995 pursuant to the creation of a task force to implement the future uses of the Brandywine and Christina rivers. The RDC's creation was prompted by the growing concerns of the health of the Rivers and the economic vitality of the surrounding communities. There are many successes to the work performed so far, including two art centers, an expanding outlet shopping mall, restaurants, four office buildings, two buildings, a 1.3-mile riverwalk, cultural amenities and the creation of an urban wildlife refuge on 200 acres. There is still much work to be done and many stakeholders will help remediate newly purchased properties that lay within the Vision's jurisdiction.

The RDC's task, however, was impeded by the scale of the brownfields within their master plan's scope. The riverfront brownfields are the product of a shifting economic base that moved the vital industrial base away from the rivers and into a commercial base located in central Wilmington. This remaining "entropic zone" was worsened due to the industrial history of the area and the regular occasion of using fill material that allowed land to be built upon. In sum, a large portion of the land that was under the RDC mandate was contaminated with a variety of pollutants.

Brownfields program and history

As intimated above, virtually every metropolitan center of any substantial size in the United States is affected by blighted areas comprised of brownfield sites. Wilmington is no exception. In a funding application to the Environmental Protection Agency (EPA), Wilmington officials estimated that 25 percent, or 1,700 acres, of lands within its municipal borders are likely brownfields.

A large portion of the land that was under the RDC mandate was contaminated with a variety of pollutants.

The uses that created these problems on the Christina River ranged from leather tanning, shipbuilding, rail yards, steel milling and other heavy industrial production. And yet almost any site that included dry cleaners, gas stations or any underground storage tanks in one capacity or another is likely to have created contamination problems. The social conditions in these areas also are often associated with problems of high poverty, high unemployment and high crime rates. In Wilmington, they are in or adjacent to census tracts comprised of minority and/or low-income residential areas.

Simultaneously, brownfield sites are often located in prime commercial areas. They are found near highly populated areas (proximate to labor pools), near intermodal transportation facilities (highways, rail lines, ports) and well-established infrastructure (roads, sewers). These qualities reflect the conditions in the Christina Riverfront area.

The genesis of Brownfields legislation in Delaware was the passage of the Hazardous Substance Cleanup Act (HSCA), (7 Del. C. Chapter 91) in 1990 (67 Del. Laws, c. 326). HSCA was modeled after the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), which among other things codified the "polluter pays" national policy.

HSCA, as an offspring of CERCLA, also brought with it draconian measures. Both have a strict liability legal regimen that determines violations without fault. Additionally, liability is joint and several and thus any number of potentially responsible parties (PRPs) can be found liable. These include disposal and storage facilities, transporters, generators and past and present owners of the property. More importantly for brownfield redevelopment, lenders and banks also can be held liable because the financial relationship they hold with their borrowers may place them in an inferred position as owners of the property upon certain proscribed acts.

HSCA was subsequently amended in 1995 to adopt the Voluntary Cleanup Program (VCP) (70 Del. Law, c. 218). The VCP moved HSCA away from a solely regulatory "command and control" framework to one which provided administrative and liability incentives to persons willing to conduct cleanups at contaminated sites. It also opened the doorway for the advent of prospective purchaser liability protections (see 7 Del. C., sub-sections 9105(e) and (f)). Prospective purchaser liability protection was provided to persons who did not cause or contribute to the contami-

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nation, cleaned the site to the satisfaction of the Department and obtained a Certificate of Completion of Remedy (COCR).

The codification of Brownfields policy into HSCA was introduced in 2001 (73 Del. Law, c. 183, SB 183). This enabling amendment created an official definition of a brownfield and gave the Department the authority to promulgate regulations and procedures for certifying properties as brownfields.

Brownfields elements in HSCA were enhanced in 2003 with the codification of prospective purchaser liability protection (74 Del. Law, c. 185, SB 157). This amendment followed the passage of the federal Small Business Liability Relief and Brownfields Revitalization Act, passed in January 2002.

While these amendments lessened the risks associated with developing brownfield sites, it did not offer full relief to parties that did not cause or contribute to the contamination in the first instance. Furthermore, while developers like the RDC were offered provisional liability protection, there was no mechanism to offset investigation and remediation costs.

Brownfields development

The Brownfields Development Program (BDP) was enacted in 2004 and comprises a separate sub-chapter within the Hazardous Substance Cleanup Act. (7 (Del. C. Chapter 91, Subchapter II, §§ 9121 -9126) It was the product of a two-year effort to resolve shortcomings of the existing program as directed by a task force consisting of real estate and development attorneys, developers, environmental consultants, representatives of local and state government and community members. The BDP's major thrust is to afford brownfield developers, including the RDC, (as defined in §9123(1)) full liability protection for past contamination under the stipulation that development only occur in accordance with an approved cleanup plan with the Department (§9125(a)(1)).

The BDP offers additional incentives to enter into the Program, such as the transfer of protections and obligations, to successors (§9125(d). Correspondingly, there are limited constraints, particularly that the brownfields developer not exacerbate the existing conditions (§9125(b), and may not elude liability for any new release(s) that they may cause §9125(e).

The Brownfield Development Program provides further incentives in addition to legal releases. These are set forth in the *Hazardous Substance Cleanup Act Policy on Brownfield Grants Grant Policy* (Policy), signed by Secretary John Hughes on November 13, 2006. This policy replaces an earlier version in providing additional grant dollars and delineating how the monies may be used (the Grant Policy's Attachment A outlines eligible expenses). Currently, the Policy affords up to $5 million annually to eligible public and private Brownfield Developers. This Policy is complemented by an additional $1 million offered by the Delaware Economic Development Office (DEDO).

Conclusion

In summary, the Vision for the Rivers has been the product of the joint efforts of the RDC and DNREC's Brownfield Programs. Both entities are concerned with the revitalization of the riverfront while ensuring that human and environmental health risks are remediated. The two organizations have evolved in unison in response to legal and market forces. Together, with the boldness and deliberation of many stakeholders, the Vision is on a solid path towards fulfilling its mission.

Delaware, however, still has no shortage of brownfields. Although the full scope has not been ascertained, it is possible that as much as 5 percent to 20 percent of the land in most cities and towns in Delaware can be considered brownfields. Understanding the successful elements of the Christina Riverfront as a model, brownfield revitalization efforts should be able to be replicated throughout the State. ◆

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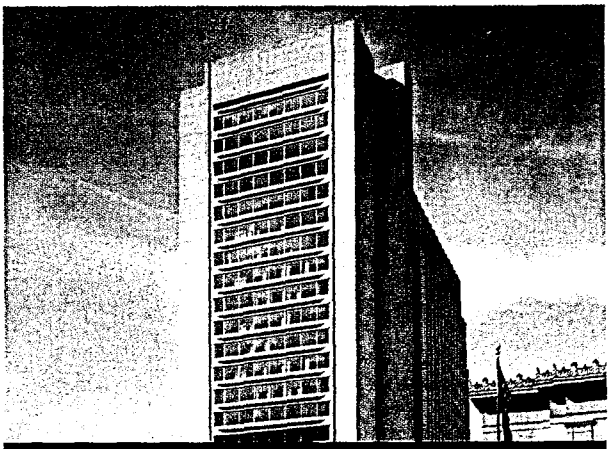
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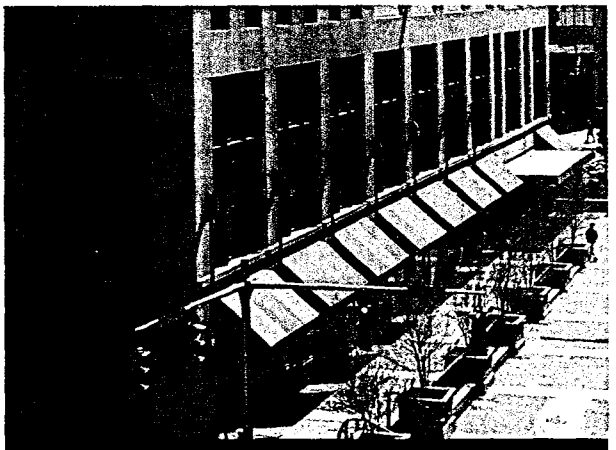
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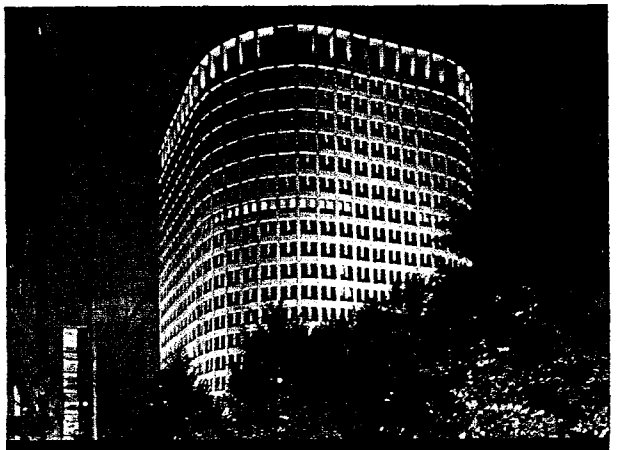
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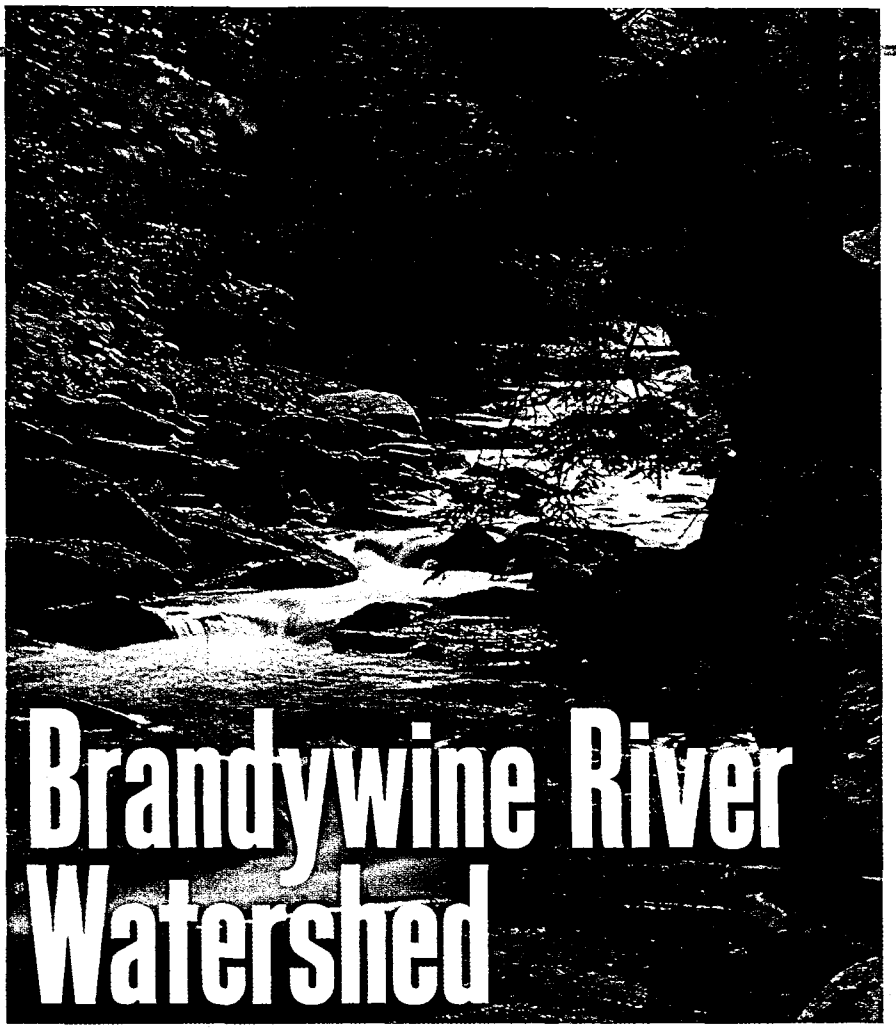


Protecting the Source: The Brandywine River Watershed

Traversing modern political boundaries, the drainage basin, or watershed area, of the Brandywine River encompasses approximately 325 square miles.

The Brandywine River, one of Delaware's most critical water resources, which provides a majority of the drinking water for the City of Wilmington, is located primarily in Pennsylvania. Beginning in the Welsh Hills of northern Chester County, Pa., the east and west branches of the Brandywine meander 45 miles through beautiful rural landscapes, industrial towns and villages dating as far back as the 17th century. The final 15 miles flow through Delaware, dropping 138 feet in elevation before joining the Christina River on the Atlantic plain in Wilmington.

Traversing modern political boundaries, the drainage basin, or watershed area, of the Brandywine encompasses approximately 325 square miles and is part of the larger 565-square-mile Christina Basin, which drains to the Delaware River. The Brandywine watershed extends across all or portions of 45 municipalities and four counties (Chester, Delaware, Lancaster and New Castle) in Pennsylvania and Delaware. In addition to providing drinking water for the City of Wilmington, the Brandywine and its tributaries are a major source of drinking water for urban communities in Pennsylvania, including Downingtown, Coatesville and West Chester, and provide surface water for commercial, agricultural and industrial uses.

Cooperation and innovation

The Brandywine and its entire watershed area have been the focus of intense study and cooperative planning and preservation efforts among private and public entities since the mid-1940s. During the economic expansion after World War II, several local leaders recognized

that the ability of the Brandywine to continue to supply water to the City of Wilmington depended upon the health of the river and the overall Brandywine Valley. Their foresight and more than 50 years of work by many parties have resulted in a multi-layered system of conservation that has raised water quality standards, preserved thousands of acres of open space and advanced the legal and regulatory framework of land use and property rights.

Multiple innovative protective measures have been taken over this period. Education has increased public awareness about water resource protection and has inspired many landowners to take voluntary conservation measures. New laws and regulations, conservation easements and fee ownership by land trusts and government entities have also contributed to protecting and improving water quality.

Many cooperative efforts have focused both the water quantity and quality of the Brandywine. Since the 1980s, several Christina Basin management projects have coordinated the surface water management policies of Delaware, Pennsylvania and the federal government. In 1986, one plan established a minimum stream baseflow threshold at Chadds Ford for managing releases from the upstream water supply at the Chambers Lake/Hibernia dam and the Marsh Creek reservoir.

Currently, interagency efforts coordinated by the Christina Basin Water Quality Management Committee and the Delaware River Basin Commission are developing estimates of nonpoint source pollutant loadings (total maximum daily loads, or TMDLs) that can be absorbed by the streams in the watershed while not impairing their state-designated uses.

Another example of a cooperative effort, the Christina Basin Clean Water Partnership is a multi-state, multiple-agency coalition of non-profits, government agencies and educational entities committed to implementing programs to protect and improve the water quality of surface and ground water in the Christina Basin. With a grant from the Environmental Protection Agency's National Watershed Initiative, the Partnership worked closely since 2000 with the Chester County Conservation District (CCCD) to implement agricultural best management practices (BMPs) on farms. Manure storage, contour strips, riparian buffers, crop rotation, terraces and grassed waterways help prevent pollution and excess nutrients from directly entering streams.

In 2003, the National Fish and Wildlife Foundation (NFWF), led by support from the National Oceanic and Atmospheric Administration (NOAA), awarded a grant to the Brandywine Conservancy to study the feasibility of bringing back shad and other migratory fish to the Delaware portion of the Brandywine River. Currently, the Conservancy is collaborating with DuPont, the Delaware Department of Natural Resources and Environmental Control (DNREC), Natural Resource Conservation Service (NRCS) and the City of Wilmington to implement fish passage on the dams they own. Work is under way with the remaining Delaware dam owners to develop site-specific concept and design plans to provide fish passage. NFWF has recently funded a feasibility study on dams in Pennsylvania to determine how best to restore migratory fish to the Pennsylvania portion of the Brandywine.

Progress begins with education

Education has raised public awareness about the vulnerability of the watershed and has helped catalyze water and land conservation measures. One of the key groups that has worked steadily to study, educate and promote natural resource conservation is the Brandywine Valley Association (BVA). BVA has collected data and published regular reports that provide both a snapshot of the watershed conditions and a view of longer trends. Recently, BVA worked with the Chester County Water Resources Authority to produce the comprehensive Brandywine Creek Watershed Conservation Plan in 2003 and the State of the Watershed Report in 2005. Along with "Watersheds," the water planning component of the Chester County comprehensive plan "Landscape," these reports assess the conditions in the of the Brandywine watershed and contain recommendations for future actions necessary to continue the progress made to date in improving water quality.

The Stroud Water Research Center in Avondale, Pa., pioneered influential studies demonstrating that the health of streams is critical to water quality downstream and that protecting surface water upstream is a smart economic investment. Stroud continues to conduct research to advance the knowledge of freshwater ecosystems and offers education programs to improve public understanding of stream ecology and promote the importance of conserving water resources.

In Delaware, the Delaware Nature Society (DNS) collects data on the Brandywine and the Christina Basin through its Stream Watch program. DNS trains volunteers, publishes reports and conducts numerous educational programs that allow residents to become engaged in preserving the watershed.

Designations

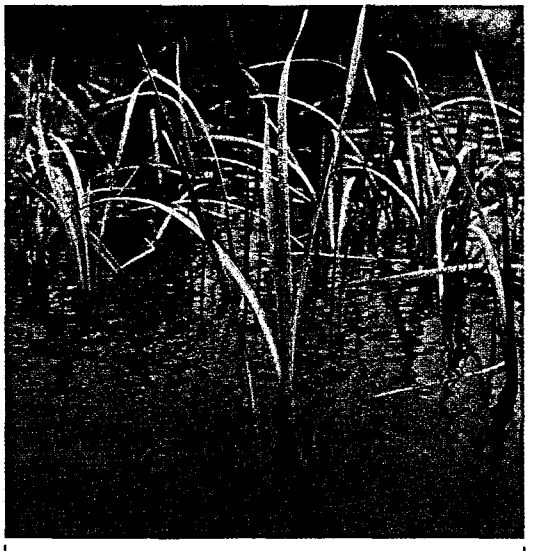
The Brandywine's special qualities have garnered it several formal designations. Pursuant to the federal Clean Water Act of 1972, the headwaters are designated "High Quality" (HQ) and Broad Run is designated "Exception Value" (EV) Pennsylvania Special Protection Designated Use Waters. These designations require that new or expanded activities do not degrade existing water quality and require anti-degradation review for proposed new discharges and individual rather than general permits from the Department of Environmental Protection (PADEP) in many cases.[1]

The Brandywine's northern headwaters also flow from within the federally designated Highlands Conservation Area. In the Federal Highlands Conservation Act of 2004, Congress recog-

nized the importance of protecting the forested upland of watersheds along the Atlantic coast and provided $10 million in federal matching funding over 10 years to preserve those lands.[2]

Designations in both Pennsylvania and Delaware recognize the beauty of the lower portion of the Brandywine. From the Delaware/Pennsylvania border upstream to the Mortonville Dam on the West Branch and to Downingtown on the East Branch, the Brandywine is designated a "Scenic River" in the Pennsylvania Scenic Rivers System. In Delaware, the scenic resources of the Brandywine have been recognized through National Scenic Byway designation for Routes 52 and 100. Much of the land along these corridors is permanently preserved.

The Brandywine Conservancy is working with stakeholders in both states to obtain National Heritage Area designation for the greater Brandywine watershed area, in recognition of its abundant cultural, historical and natural resources.



The Brandywine's northern headwaters also flow from within the federally designated Highlands Conservation Area.

Protecting the land to protect the water

In the mid-1960s, the historic Brandywine Valley around Chadds Ford, Pa., began to face a wave of development. The impact, especially in flood plain and watershed areas, would have been devastating to the landscapes, water supplies and ultimately the people living in southeastern Pennsylvania and northern Delaware. Appreciating the need for action, a group of local residents purchased land threatened with development and founded the Brandywine Conservancy in 1967.

In the early 1970s, the Conservancy researched and documented the relationships between land use changes and the quantity and quality of stream flows. That research and continuing studies of surface and groundwater in the Brandywine and nearby watersheds confirmed the need for innovative approaches to land use and water management. These studies have demonstrated that preserving open space in developed and rural areas can protect water supplies. To that end, conservation easements and assistance to municipalities programs initiated in the 1970s and 1980s remain key elements of the Conservancy's Environmental Management Center's work today and are bedrocks of the policies of Chester County embodied in "Landscapes" and the County's and Pennsylvania's easement acquisition grant programs.

A framework of protections

Conservation easements: A conservation easement is a legal agreement between a landowner and a qualified organization that permanently protects a property's conservation values. Recognized by statute in both Pennsylvania and Delaware (Conservation and Preservation Easements Act, Act 29 of 2001, 32 PA. C.S.A. §§5051, et seq. and DE Code Title 7, Chapter 69), conservation easements have become an important land preservation tool. Perpetual stewardship obligations on the part of the easement grantee ensure that an easement's protections endure.

Prior to the passage of the Act, Pennsylvania courts firmly upheld the validity of conservation easements. In *Natali v. Schwartz, 151 F. Supp. 2d 562 (E.D. Pa. 2001)*, Natali purchased property eased to the French and Pickering Creeks Conservation Trust and proceeded to construct a house even after the Trust took action to stop the construction. The Trust eventually prevailed, sought and obtained demolition permits, and the house was demolished and removed.

The Brandywine Conservancy now holds conservation easements on more than 21,000 acres in Chester County, the majority donated on land in the Brandywine watershed. Other land trusts, including the Natural Lands Trust, and the County hold additional thousands of acres of easements. These permanently protected lands benefit the watershed by reducing the amount of impervious coverage and stormwater runoff and provide buffers from pollution from developed areas.

Controlling storm water runoff: Three major programs at the federal and state levels mandate reducing polluted stormwater runoff — the new Environmental Protection Agency National Pollutant Discharge Elimination System (NPDES) Phase II Stormwater permitting program, the development of TMDLS for water quality impaired stream segments and the Section 319 (Federal Clean Water Act) Nonpoint Source Management Program. The Phase II Rule obligates municipalities to reduce the discharge of pollutants in their separate storm sewer systems, or "MS4s," to the "maximum extent practicable." It also requires the 923 small covered municipalities to obtain NPDES permits for

land development projects that disturb one acre or more.

In December 2006, the Pennsylvania Department of Environmental Protection (PADEP) published a new Stormwater Best Practices Manual. Intended as a guide to local governments, the manual includes some of the most innovative standards available in the nation for design and management of stormwater. The manual promotes use of a site's natural resources to reduce, capture, treat and recharge stormwater runoff.

Municipal Requirements: At the municipal level, zoning and subdivision and land development ordinances regulate land use and construction and protect natural resources including floodplains, wetlands, woodlands and steep slopes. Agricultural zoning districts help preserve farmland. In addition, innovative Transfer of Development Rights (TDR) programs, which the Conservancy is working to promote, enable municipalities to focus development and protect more sensitive land. Finally, careful local and county review of subdivision and land development plans can provide a very practical, effective method of regulating development in a rational fashion and thereby protecting water resources.

Conclusion

Maintaining the health of the Brandywine watershed is a critical goal embraced by many parties in both Pennsylvania and Delaware in an increasingly sophisticated enterprise. Although many areas of the watershed in Chester County have come under intense development pressure, it is hoped that these concerted efforts to protect a vital resource will enable the quality of the Brandywine River, and its uniquely beautiful drainage basin, to continue to improve. ◆

For more information about the Conservancy's programs and services, call 610-388-2700 or visit the Conservancy's Web site at www.brandywineconservancy.org.

FOOTNOTES

1. 25 Pa. Code §§ 93.4a-93.4d.
2. P. L. No. 108-421, 118 Stat. 2375.

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Interview by Peter E. Hess

A Conversation With the Conscientious Rebel: Gov. Russell W. Peterson

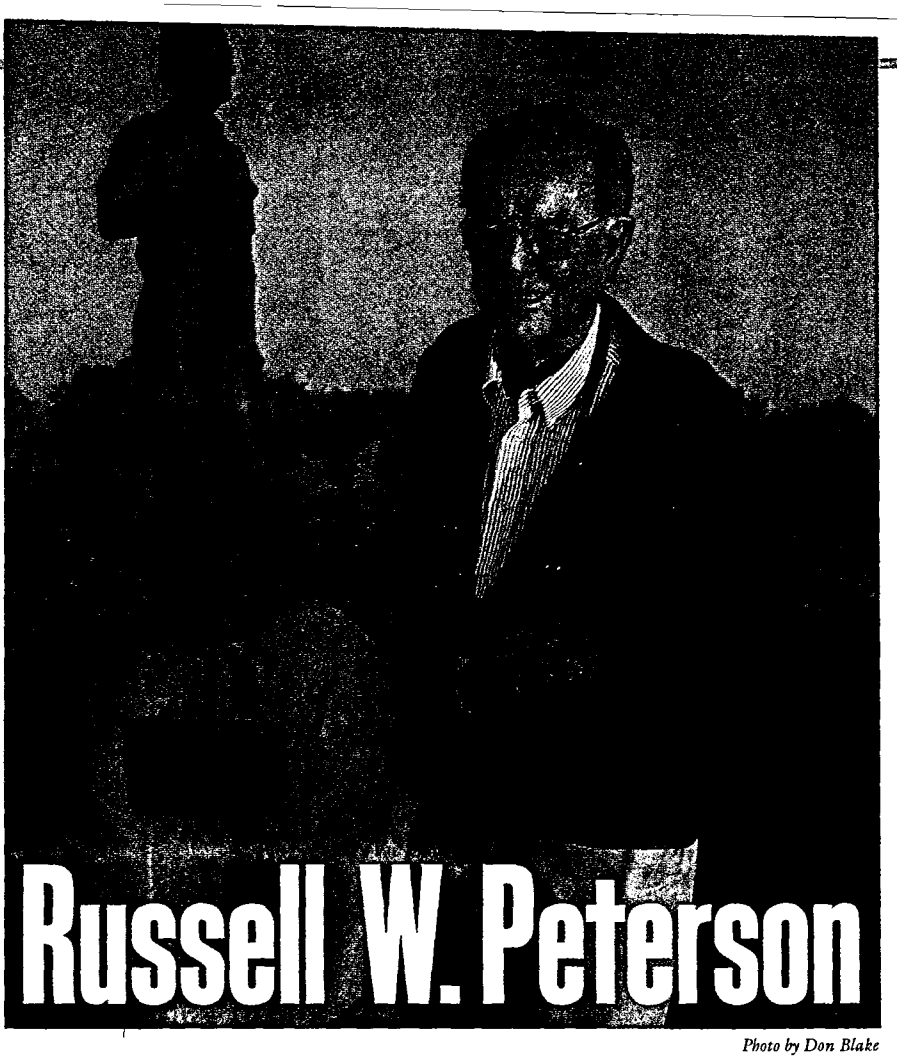

Photo by Don Blake

The former governor's role in championing Delaware's Coastal Zone Act provided permanent protection for our pristine coastline.

On two sun-spangled days in May 2007, *Delaware Lawyer* issue editor Peter E. Hess and Wilcox & Fetzer reporter Eleanor Schwandt sat down with former Delaware Gov. Russell W. Peterson in his Greenville, Del., home. The edited text of the full conversation is available online at www.delawarebarfoundation.org. Peterson's role in championing Delaware's Coastal Zone Act and the permanent protection it has provided for our pristine coastline was the focus of a far-ranging conversation that detailed his illustrious career.

In 1942, Russell W. Peterson was recruited as a Wisconsin Ph.D. chemist by E.I. duPont de Nemours & Co. to work at its Experimental Station. He arrived in Wilmington with his wife Lillian, a young son, a newborn baby and no money. Shortly thereafter, the Petersons rented a home in forested utopian village of Arden, where Peterson quickly became heavily involved in the lively politics of that community. His activism with Wilmington's First Unitarian Church in the 1950s and 1960s raised his social consciousness, making him acutely aware of the economic inequities facing Delaware's black citizens and the racial powder keg that was Wilmington.

A rising star at duPont, he sought to promote some of the 60 black laborers under his authority at the company's Chestnut Run facilities to positions such as typist, driver or lab assistant. Invited to a private dinner with duPont management, Peterson was complimented and told that he was slated for the top position in the company. But duPont's leaders were now concerned about his stability because of his plan to promote black employees. After a heartfelt discussion with Lillian, the Petersons concluded that his future lay

elsewhere. He spent nine more years with duPont, but became increasingly active in community and civic affairs.

As President of the Kiwanis Club, Peterson integrated and brought the first women into the organization. He spearheaded a successful statewide campaign to reform Delaware's antiquated prisons. Already established as a successful Republican Party recruiter, Peterson — virtually unknown to the voters — was nominated in the tumultuous year 1968 as the Republican challenger to the incumbent Democrat, Charles L. Terry Jr.

GOV. PETERSON: Remember, I ran for governor in 1968, just at the time young blacks were rioting all over America, the very thing that I had seen coming in Delaware. I went to the Republican convention in Miami, and a lot of people were demonstrating, tear gas all over the place. When rioting broke out in Delaware, Gov. Terry did the unbelievable thing of putting the National Guard on the streets of Wilmington for nine and a half months, by far the longest time that's ever been done in our country.

Elected on a reform platform, Peterson quickly and adroitly began to dismantle the commission form of government whereby the state's various functions were overseen by 142 commissions largely independent of the state's chief executive. The cabinet form of government installed by Peterson endures to this day. But even more far-reaching legislation was in the works.

DELAWARE LAWYER: You are a man of some vision, whether it is in business endeavors, social justice and, particularly, in environmental protection, for which you've received your greatest reputation and acclaim. Can you describe the inspiration that led you to spearhead Delaware's pioneering coastal zone legislation?

GOV. PETERSON: It was my 9-year-old son Peter, the new baby we brought to Delaware. Nine years later, he is getting up before the sun comes up in the morning to see what birds sing first. I went out with him one morning to see what he was doing out there. Before long he and his older brother Glen and I became active birders, traveling all over the Delaware coast, looking for birds. Then I got tied up with a bunch of other scientists at the Experimental Station who were also birders. As a group we would leave before sunup on Saturday morning, work down the state and end up in Ocean City, Md. We'd spend the night, and then work back up the next day, visiting all types of bird habitat. The objective was to see the maximum number of species you could in 24 hours. The net result was I got to know the Delaware coastal zone and fell in love with it.

During this period we went down to Florida for a few days vacation. We joined an Audubon Society tour of the Everglades and saw 60 species of birds I never knew existed before. I signed up as a member and fell in love with the National Audubon Society. But it was my falling in love with our coast that made me rebel when I saw the plan for a major industrialization of our coast.

The Shell Oil Company had planned to build a big refinery in our unspoiled coastal area. A citizen group called Delawareans for Orderly Development fought Shell's plan. The case went all the way up to the Delaware Supreme Court, which voted to give Shell the authority to proceed.

This happened while I was campaigning for governor. I learned that it wasn't just Shell that was involved. There was a total of 13 international oil and transportation companies, including one company headed and owned by a guy named George H. W. Bush. At that time, he was also head of the National Republican party.

Almost all the unions in Delaware, obviously, were behind this because they wanted the jobs that would come from it. And nearly every law firm in Delaware was signed up by an oil company to help them.

But as the months went by, I began to see the tremendous magnitude of this effort to industrialize the Delaware coast. I got called by the U.S. Secretary of Commerce, Maurice Stans *[of subsequent Watergate infamy-Ed.]*, to come down to see him. He had 25 people in his office and said to me, "These people have been working for 10 years to develop the Delaware coast. It is super important to us. Your Chamber of Commerce in Delaware is behind it, and all your big companies up there are behind it." He walked over and pointed at me and said, 'Governor, you are being disloyal to your country.' " And I jumped up and said, "Hell, no. I'm being loyal to future generations."

I decided to try to find at least one union that would support me — probably UAW, United Auto Workers. When I called the union, I found out they had an environment committee, so I got together with the chairman of that committee. We talked about how fundamentally important the coast was to all their workers, how they and their family, for nothing, could enjoy a great place for swimming and boating or just lying out in the sun. That view spread throughout their organization.

So they supported me. The first time I ran for office, I visited Chrysler and General Motors big plants, early in the morning, shaking hands on shift change. Almost nobody would shake my hand. "Get lost" *[in the auto workers' vernacular, no doubt. Ed.]*, they would say, stuff like that. It was really kind of hard to take. Four years later, though, when I ran for re-election, the leadership, the union workers, were all out there with me, and everybody shook my hand.

When I became governor, we didn't have a detailed plan for saving the coast like I did for reforming the commission form of government. But I just had to do something about this super controversial threat. I just barely won the election, as you know. Almost certainly, if I had made saving the coast an issue, I would have been in trouble with the business community.

Immediately after my election, during the time before I was sworn in, now I'm beginning to think, okay, what are we going to do, and that's when I decided, damn it, I'll declare a moratorium. Later

when I was sworn in and talked to my staff they said, "You can't do that, Governor. You can't just declare a moratorium." "The hell I can't," I said. So I declared a moratorium. No more building of heavy industry in the coastal zone until we decide what we will do.

DELAWARE LAWYER: What was the legal authority for the moratorium?

GOV. PETERSON: It was a temporary plan of the governor and no one challenged it. Fletcher "Sandy" Campbell was my counsel. He had just recently graduated from Harvard Law School. Super competent guy. I put him in charge of helping to work on a Coastal Zone Act. He and I would meet repeatedly — I would say, "Sandy, the thing we've got to be concerned about is the commerce clause of the Constitution, and you have to write our legislation to avoid that issue," which he did. It really held up. *[The "dormant" commerce clause provides that legislation cannot be designed to promote home state businesses while discriminating against out-of-state businesses. Ed.]*

"I declared a moratorium. No more building of heavy industry in the coastal zone until we decide what we will do."

When I did declare that moratorium, boy, all hell broke loose. I signed that bill into law in late June 1971. Within one month, plus or minus a couple of weeks, I got invited to New York to the Waldorf Astoria for a black-tie dinner of the World Wildlife Fund. They gave me their gold medal for what we had done in Delaware. The chairman at that time was Prince Bernhard of the Netherlands. He and I got to be very good friends over the years after that. But he said to the group that night, "This is the first time in the world that any community has won such a battle with the oil companies." Remember, his family was big shareholders in the Royal Dutch Shell Oil Company, too.

All over the world, back at the very time that I became governor, 1969, world environmental groups were up in arms about what was happening. Remember, in this country, there was even a river that caught on fire, it had so much oil on it. The United Nations had planned their first environmental world conference, and President Nixon had signed some of the most important environmental laws we have ever had — Clear Air Act, Clean Water Act, National Environmental Policy Act, Endangered Species Act, all those things. The environmental movement was just blowing up.

So what we were doing in Delaware, unbeknownst to me, was being talked about all over the world. Here, this little state was taking on all these world companies and a key environmental issue that we consider so super important now. As soon as I signed the bill, almost immediately I get these awards. And since that time, I've been awarded 16 honorary doctorates. Every time I get one, somebody refers to the Coastal Zone Act. This was a worldwide event, and what we were doing was being watched way outside of Delaware, not only in the United States but worldwide.

In subsequent years, I became deeply involved internationally, heads of several international groups. Of course, no governor could make the coastal zone act happen by himself. It required community support and especially support of the legislature.

We just barely got that bill through both the House and the Senate. In each case, the final vote came between 11 and 12 o'clock at night, beating down a killer amendment by one vote. On the last day, the leadership of the Senate was convinced they had their 10 votes, and they broke up for dinner. After dinner one of my aides came running into my office, "Governor, Governor, the lobbyists have turned around two of your senators." So we got the top two people in the Senate and these two senators in my office, and for two hours we talked to them and convinced to go with us. Immediately, the leadership of the Senate went down and called the Senate into session before the lobbyists could get to the Senators again. They voted, and we got it through.

It was a much bigger picture than I had appreciated at the time, certainly more than the Delaware people had appreciated at the time. It was super important to us. But we didn't realize the role we were playing in a big-world scene.

DELAWARE LAWYER: It seems to me that the time that this coastal zone proposal was most vulnerable was during that year and a half of the governor's moratorium when it was basically you standing up in front of the oil companies and saying no, while the legislation was in the process of being created, but there was no strict legal authority. In retrospect, do you have any insight as to why there was no challenge to your the moratorium itself?

GOV. PETERSON: Well, I think that they were absolutely convinced that this

bill would never get passed. And they had such tremendous number of lobbyists down here. Remember, the whole Chamber of Commerce, heads of companies like duPont and others were fighting for this industrialization of our coast. I think all those people thought — just like my staff did at the start — "Come on, Governor, that's not going to fly."

DELAWARE LAWYER: You described this period as kind of a genesis of modern environmental law. Within a year after Delaware passed the Coastal Zone Act, Congress passed the federal Coastal Zone Management Act. What role do you think Delaware and your administration played as impetus or catalyst for the passage of national legislation?

GOV. PETERSON: Well, I went down on at least two, maybe three times to testify to Congress about their Coastal Zone Management Act. Maybe what we were doing did stimulate some of the people in Washington.

Apparently Peterson had indeed gotten the attention of Washington, D.C. Following a heartbreaking 1972 election loss to Democrat Sherman Tribbett, Peterson quickly achieved prominence at the national level when appointed by President Nixon as the chairman of the Council on Environmental Quality, an agency established by the National Environmental Policy Act, best known for its mandate of an Environmental Impact Statement for any endeavor utilizing federal funding or participation. Serving with distinction and with characteristic commitment to the protection of the environment irrespective of its political popularity, Peterson clashed with President Gerald Ford's Chief of Staff, Dick Cheney, and, ironically enough, even bore the criticism of his former colleague, then-duPont CEO Irving Shapiro.

Appointed to lead the Congressional Office of Technology Assessment in 1976 — a job that drew on both his scientific and political background — Peterson was shortly thereafter heavily recruited by the National Audubon Society to become its president, a self-described "dream job." Hiring professional fundraisers, Peterson invigorated the organization, markedly

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increasing its budget and its membership and quickly asserting Audubon as an environmental entity to be reckoned with. One of his first opportunities arose here in Delaware, in defense of the landmark Coastal Zone Act he had championed as governor.

DELAWARE LAWYER: Did you get the National Audubon Society to play a role in defending and upholding the Coastal Zone Act?

GOV. PETERSON: Absolutely. I learned that when Norfolk Southern Railroad had applied for a permit to build a coal lightering operation in Delaware Bay – a plan to take coal from barges, transfer it to big ocean-going colliers *[illegal under the Delaware CZA as a prohibited "bulk product transfer facility." Ed.]*, the then secretary of the Department of Natural Resources and Environmental Control [Secretary John Wilson], had given Norfolk Southern permission to go ahead, and he did that upon the advice of Charles Oberly, then the attorney general of Delaware.

But we had set up in that act the Coastal Zone Industrial Control Board as a way to have a check on the secretary of DNREC's decisions, and they voted against the secretary. Then Norfolk Southern sued the state. The two people who represented the state were Wilson and Oberly. Regina Mullen was an assistant attorney general. She was assigned the job of defending the board's decision. She and I talked a lot. She was very much concerned about how little help she had. The data that she needed for her argument had to come from DNREC, whose secretary was opposed to what we were doing.

And so I called up my good friend, John Adams, who was head of the Natural Resources Defense Council, the most potent environmental group in the country, if not in the world — made up of many lawyers and scientists, established in 1969, just when I became governor — and I told John we needed their help.

I arranged a meeting in my house in Wilmington. John Adams came down from New York with two of his people. U.S. Sen. Caleb Boggs came, as did several people from DNREC and several other environmental leaders. We talked about what we needed to do. First of all, we needed the Natural Resources Defense Council to bring their legal talent and citizen activism to bear. John Adams asked me if I would help him raise money toward this effort. I said I would. He wrote a letter to his constituents and asked me to write a letter which he included in the fundraising appeal, and they got over a hundred thousand dollars, the most they had ever received for such a request.

John put a couple of full-time lawyers on the job. What is more important, he signed up a big law firm in New York City to work *pro bono* on the job. So now we had the power, without which we wouldn't have had a snowball's chance

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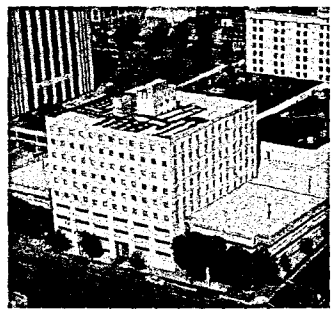

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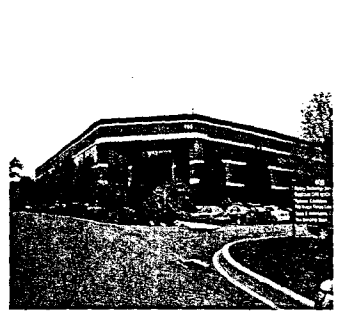

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in hell of winning that battle against Norfolk Southern.

Our case was approved by the U.S. District Court, and then by the U.S. Court of Appeals. According to our lawyers, Norfolk Southern decided it would be a waste of time to go to the Supreme Court. They could never win that case. So we had met the challenge, which I had worried about way back when we were drafting the act. We had been tested under the Commerce Clause of the U.S. Constitution and had won.[1]

DELAWARE LAWYER: In retrospect, some 30-odd years after passage of the act, how do you view Delaware's Coastal Zone Act in its role in the birth of the modern environmental movement?

GOV. PETERSON: There was no question about it, the environmental movement and its leadership knew about the battle over our Coastal Zone Act and considered it an extremely significant test, taking on such huge international oil and transportation companies, the U.S. Department of Commerce and the Chamber of Commerce.

What we did here was a big shot in the arm to the environmental movement, not only the United States but around the world.

It is a good example of what can be done to save our global environment. And it's good to receive awards for what we did. But it's super important to recognize that we must be eternally vigilant.

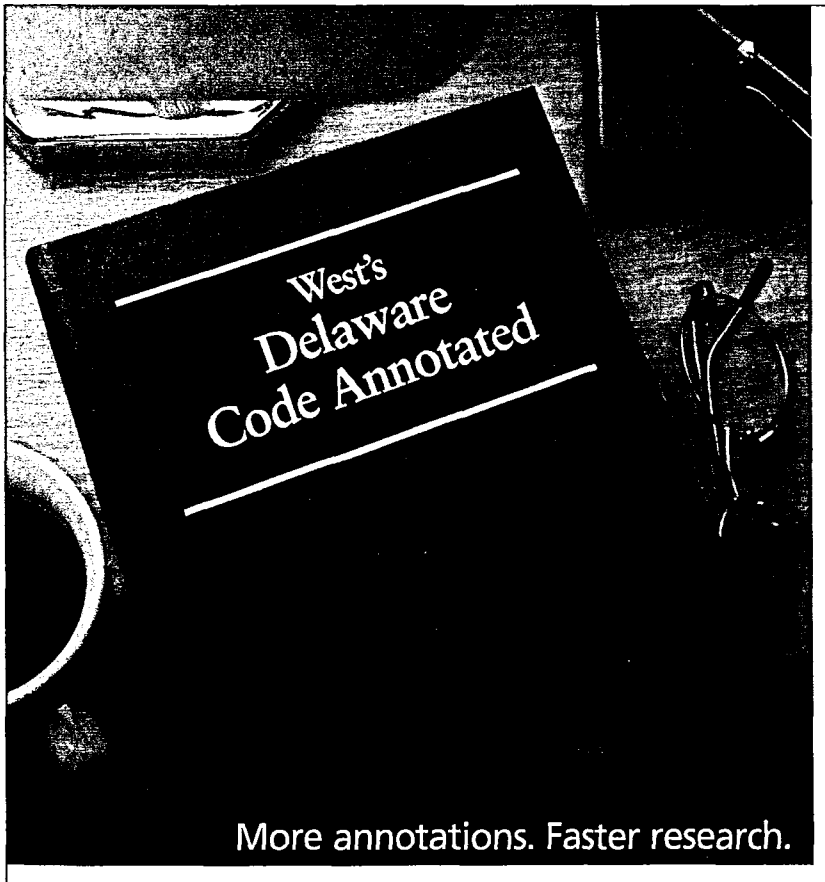
I remember well the night that I received the Environmentalist of the Year award from the World Wildlife Fund. It was a very moving occasion, with a huge crowd in this Waldorf Astoria ballroom, and so many leaders from around the world on environmental issues in attendance. I got up and told the audience that I thought our job in fighting to protect the environment called for eternal vigilance. I've talked about eternal vigilance as indispensable to the protection of the global environment, because we are dealing with the long range future. If permitted, the construction of one power plant or one refinery on the Delaware coast would just open the floodgates for others to follow.

At that dinner, I said, "As many of you know from personal experience, our gains in defending natural areas have to be defended continually. Such battles can be lost only once. One hundred times, we can prevent the damming of the Grand Canyon and clear cutting of a rain forest, the extinction of a species, the loss of a cherished way of life. But if we lose the 101st battle, that defeat is likely to be permanent." ◆

FOOTNOTE

1. *Norfolk Southern Corp. v. Oberly*, 822 F. 2d 388 (3d Cir 1988).

Delaware Lawyer *gratefully acknowledges the assistance of Wilcox and Fetzer in the transcription of this interview with Gov. Russell W. Peterson.*



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FEATURE

Matthew F. Boyer
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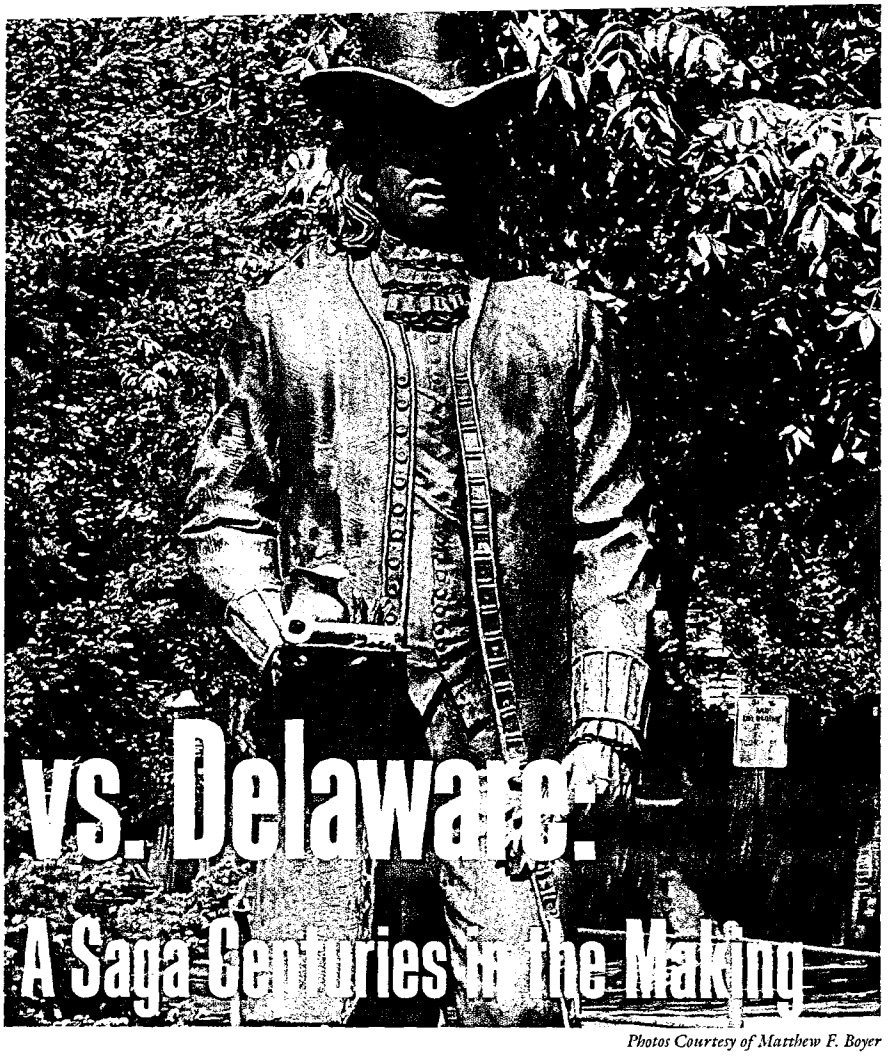
New Jersey vs. Delaware: A Saga Centuries in the Making



Photos Courtesy of Matthew F. Boyer

Rivers know this:
there is no hurry.
We shall get there
some day.

— A.A. Milne,
Pooh's Little Instruction Book

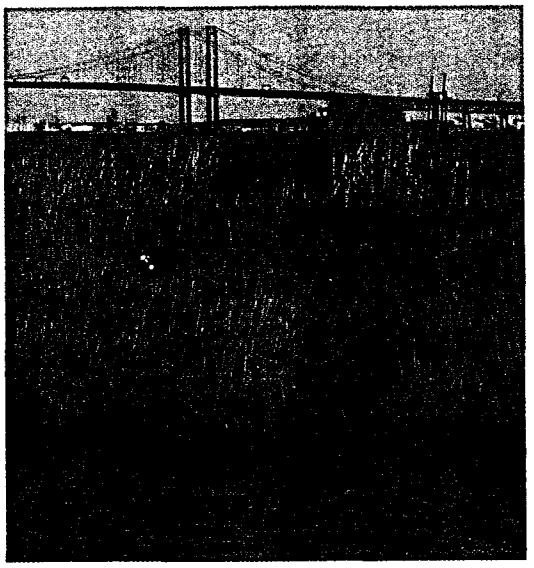
On Oct. 28, 1682, two attorneys arrived in New Castle, Del., to memorialize the conveyance to William Penn of the lands and waters within a 12-mile circle around the town. In an ancient ceremony called livery of seisin, they delivered to Penn "turf and twig and water and Soyle of the River of Delaware," intending to leave him "in quiet and peaceable possession thereof."[1] Little could Penn have imagined how many attorneys would dispute the rights conveyed that day, or how little peaceable possession he and his successor-in-interest, the State of Delaware, would enjoy.

In the 1700s, Penn's sons successfully rebuffed a decades-long challenge to their father's grant by Lord Baltimore in the English Court of Chancery. Soon after the American Revolution, when Delaware took Penn's grant as its birthright, the first of many disputes arose between Delaware and its neighbor to the east. Today, Delaware is defending the third original jurisdiction action brought against it by New Jersey in the United States Supreme Court since the Civil War. All three suits have challenged the scope and validity of Penn's grant, directly or indirectly, and, in particular, the "twelve-mile circle" that crosses over to the mean low water mark on the eastern side of the River, just knee-deep from New Jersey's shore.

The latest Supreme Court case began in 2005, shortly after Delaware determined that a proposal by British Petroleum (BP) to build a boundary-straddling liquefied natural gas (LNG) terminal was prohibited by the Delaware Coastal Zone Act (DCZA).[2] BP turned to New Jersey for help, and in papers filed with the Supreme Court on July 28, 2005, New Jersey claimed that it had exclusive jurisdiction to regulate piers

extending from New Jersey into the river, regardless whether they entered Delaware territory. After nearly two years of litigation, on April 12, 2007, the court-appointed special master, Ralph I. Lancaster Jr., issued a 100-page report recommending that the court reject New Jersey's claim. He wrote: "Delaware, as the sovereign owner of the land outshore of the low water mark on the eastern shore of the Delaware River within the 12-mile circle, is entitled to exercise police power jurisdiction over improvements extending onto its territory."[3]

As this article went to press, New Jersey had filed objections to the report, and BP had filed a friend-of-the-court brief supporting New Jersey's claim. Delaware was preparing to respond to these filings, and lawyers representing both states were anticipating yet another argument in Washington, D.C., over the states' respective rights on the river. The colorful events and keen legal minds that have participated in this saga are as abundant as the fish that once leapt in the river near old New Castle, awakening Penn from his slumber.



As this article went to press, New Jersey had filed objections to the report, and BP had filed a friend-of-the-court brief supporting New Jersey's claim.

BP's Plan for an LNG Terminal

In 2004, BP approached Delaware for a permit to construct an LNG terminal on the river just north of Wilmington, within the 12-mile circle. The project called for a 2,000-foot-long, 50-foot-wide pier extending from the New Jersey bank of the river well into Delaware territory. To build the pier and accommodate the supertankers that would berth there, the project would require dredging 1.24 million cubic yards of riverbed — affecting approximately 29 acres of Delaware soil. The supertankers, over a football field long, would transport 200,000 cubic meters of volatile LNG up the river and under the Delaware Memorial Bridge to their offloading point across from Claymont.

BP knew that obtaining a status determination under the DCZA to build the project would not be easy. Due to the foresight of Gov. Russell W. Peterson, who signed the DCZA into law in 1971, the DCZA sets forth strict provisions banning certain types of industrial development, including liquid bulk transfer offloading facilities, unless they met very limited, statutorily defined exceptions.[4] Peterson rightly judged that if such prohibitions were loosely defined or subject to broad discretion, they would prove ineffective in the face of powerful economic forces.

On Feb. 2, 2005, John A. Hughes, secretary of Delaware's Department of Natural Resources and Environmental Control (DNREC), issued a decision concluding that the LNG terminal constituted a type of bulk product transfer facility that is prohibited under the DCZA. BP took an appeal to the Delaware Coastal Zone Industrial Control Board, but the Board unanimously agreed with DNREC. BP then turned to New Jersey, which agreed to file a Supreme Court case to challenge — for the third time — Delaware's jurisdiction over the river arising from Penn's deed.

The River, Penn's Deed and Legal Challenges

Prior to the arrival of the European settlers, the Lenni Lenape lived on both sides of the Delaware River, paddling their dugout canoes to harvest its fish with woven nets, spears and sometimes even their bare hands.[5] While fur trading and whaling brought the first Europeans in the 17th century, explorers and early settlers could not help but notice the uncommon abundance of fish in the river. Thomas Yong, sailing for England in 1634, compared the climate to that of Italy, and of the fish he noted, "heere is plenty, but especially sturgeon all the sommer time." Peter Lindeström, who came over in about 1650 as part of the New Sweden Colony, described shad for his masters in Stockholm as "a kind of large fish like the salmon, runs against the stream like a salmon ...; a very fine flavored and excellent tasting fish." And within a year of his arrival on the Delaware, Penn wrote to friends back in England that "the sorts of fish in these parts are excellent and numerous. Sturgeon leap day and night that we can hear them ... in our beds."[6]

Delaware's unusual boundary started with the royal grant of Pennsylvania. The Duke of York had seized New Castle and the surrounding land from the Dutch in 1664.[7] The Duke wanted to protect his

major administrative center on the western side of the Delaware River, so in 1680, his secretary proposed a circle boundary from the town as a territorial buffer. The territory, including the 12-mile circle, was transferred two years later, in 1682, by deed and lease to Penn. Today, just steps from the center of that circle, stands a statue depicting the livery of seisin to Penn (photo page 26).

Soon after the American Revolution, when Delaware proclaimed its statehood and set its borders to the reaches of Penn's grant, a dispute arose, literally, from the waters of the Delaware River. In about 1783, there appeared at low tide in the river, about five miles below New Castle, a small muddy exposure of soil "about the size of a man's hat."[8] The exposure became larger and larger until it formed an island of about 87 acres. Based on a tradition that a vessel laden with peas had once sunk on the spot where the island rose, the island got the name Pea Patch. In 1784, New Jersey officials granted the island to private parties; but during the War of 1812, Delaware conveyed the island to the federal government, which began to build a fort upon it. Thereafter, a controversy arose as to the right to the island between a New Jersey resident who held under the title of New Jersey, and the United States, claiming to have rightfully received title from Delaware. In 1848, an arbitrator issued a detailed opinion in favor of the United States, ruling that Delaware inherited Penn's rights to the limits of the 12-mile circle, including Pea Patch island, and thus had good title to convey. As Justice Benjamin Cardozo later noted in *New Jersey v. Delaware II*, although the "opinion by the arbitrator ... [was] a careful and able statement of the conflicting claims of right," "the controversy would not down."[9]

In 1903, at New Jersey's request, the states again attempted to resolve the litigation by negotiating an interstate compact.

New Jersey v. Delaware I (1877-1905)

In 1871, Delaware enacted a statute that required non-Delaware residents to get a $20 annual license to fish in the river, while requiring Delaware residents to pay only $5 for the same license. On May 2, 1872, Delaware arrested several New Jersey residents who were fishing east of the middle of the river without the required license. As one of the Jerseymen described it, a tugboat named the *Falcon* came across the water from Wilmington with officers on board, and when some fishermen refused to submit to arrest, one officer "drew a pistol and pointed it at the person so refusing, and said if he ... did not come on board on the [tugboat], he would make him."[10]

The arrests immediately ignited oratorical salvos from both sides of the River. New Jersey Gov. Joel Parker put "all persons" [read, Delaware] on notice of New Jersey's jurisdiction "easterly of the middle line of said river." Delaware's Gov. James Ponder responded that Delaware did not regard her jurisdiction to the low water mark on the east side of the river "as an open question."[11] Eventually, commissioners were appointed to negotiate an interstate compact between the two states, but their efforts failed.

In 1877, New Jersey filed *New Jersey v. Delaware I*, alleging that Penn's title was flawed and that, with the American Revolution, New Jersey came into ownership of the river to its midpoint. New Jersey also alleged that it had gained jurisdiction under the doctrine of prescription and acquiescence, akin to adverse possession. In support of this claim, New Jersey pointed to its acts of sovereignty on the eastern half of the river, including its authorizing New Jersey residents to build piers that extended beyond the low water mark into the river.

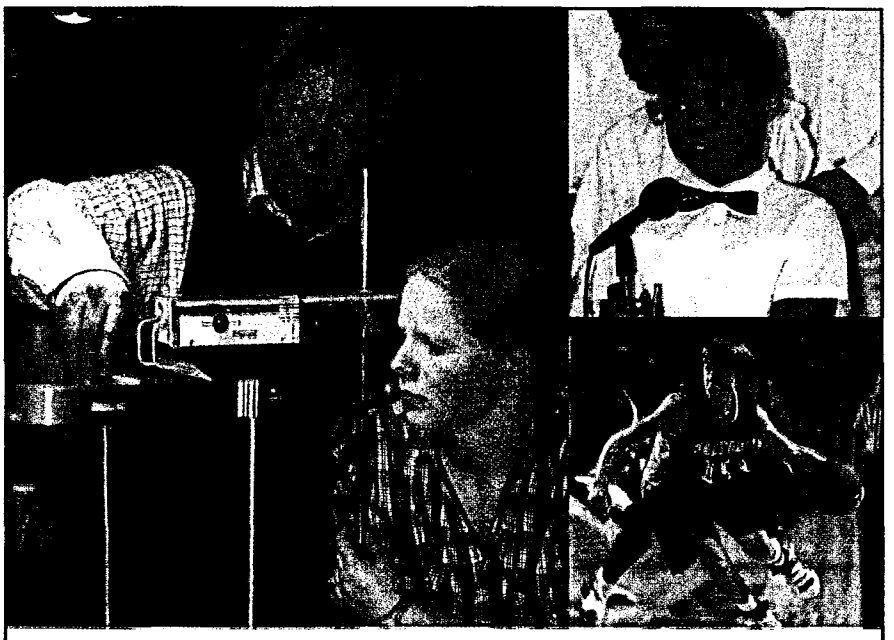
New Jersey quickly obtained a preliminary injunction against Delaware's enforcement of its fishing laws, despite the efforts of Delaware's distinguished counsel, Thomas F. Bayard. But after the 1877 injunction eliminated the threat of violence on the river, the case went into a slumber of Van Winklean proportions, for nearly 25 years. Finally, in 1901, a clerk of the court urged the parties to press the matter to conclusion. Later that year, Delaware filed an answer to the 1877 Complaint, defending its title based on the deed to Penn and arguing that New Jersey's alleged acts on the eastern half of the River had not impaired Delaware's sovereignty or jurisdiction.

The Compact of 1905

In 1903, at New Jersey's request, the states again attempted to resolve the litigation by negotiating an interstate compact. Throughout the case, Delaware had been represented by distinguished counsel with experience negotiating treaties and other international agreements on behalf of the U.S. government. Some of these international arrangements included *modus vivendi* provisions, whereby the sovereigns agreed to "a way of living together" despite their differences as to their claims of sovereignty.[12]

Such experience was to influence the arrangement that the States finally agreed upon in the Compact of 1905, which Delaware counsel would present to the Court as a *modus vivendi*. In the Compact, the States did not settle their overarching dispute as to boundary and jurisdiction. However, they set forth declarations designed to resolve the fishing dispute that had caused the litigation. In Article III, the states expressly declared that the inhabitants of each state "shall have and enjoy a common right of fishery" in the river. In Article IV, they put in place a process by which the states would regulate that common right of fishing. The process involved the appointment of commissioners to negotiate uniform fishing laws within two years. Article IV provided that, after these uniform laws were adopted, "Each State shall have and exercise exclusive jurisdiction within said river to arrest, try, and punish its own inhabitants for the violation of the concurrent legislation relating to fishery."

The Compact went on to address other matters as to which there was no practical dispute at the time, such as oystering and the building of wharves, in language that stopped short of declaring jurisdictional rights. In Article VI, the Compact allowed each state to continue to regulate the shellfish industry under its own laws. And in Article VII, the Compact agreed to permit the states to continue taking actions regarding piers and wharves, providing that: "Each State



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may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases and conveyances of riparian lands and rights under the laws of the respective states." Notably, in Articles VI and VII, the drafters chose not to employ the precise, rights-declaring language that they had used in Articles III and IV, such as the phrase "shall have and exercise exclusive jurisdiction."[13] Instead of declaring rights, the drafters simply permitted the continuation of actions that had not resulted in practical disputes that required definitive resolution. And in Article VIII, the Compact made clear that none of the states' competing claims as to territorial limits, rights or jurisdiction would be affected by the Compact "except as herein expressly set forth."

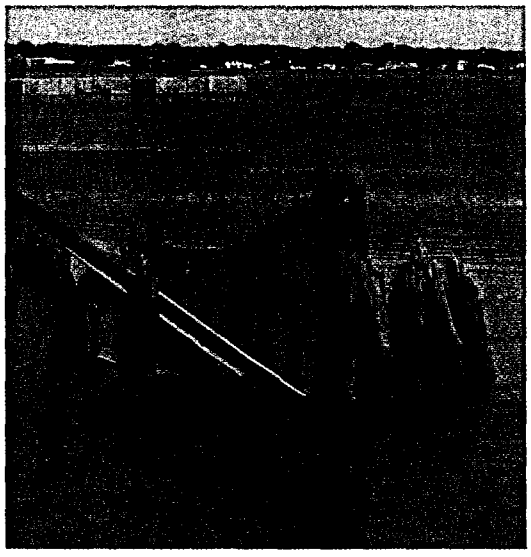
At the time, no one suggested the argument New Jersey would advance 100 years later: i.e., that, through Article VII, Delaware surrendered to New Jersey as much jurisdiction within the 12-mile circle as it wanted to take, simply by making grants of territory therein, regardless whether the Supreme Court later confirmed that such territory belongs to Delaware.

In 1905, both States adopted the Compact, and in 1907 Congress formally approved it. However, the Compact never achieved its goal of resolving the fishing dispute, as the states could not agree upon uniform fishing laws. Also, the Compact failed to avoid a second litigation over the boundary dispute. Finally, by application of Murphy's Law, the Compact inadvertently sparked a third litigation, this time over the meaning of the Compact itself, in the wake of the resolution of the boundary dispute.

New Jersey v. Delaware II (1929 – 1939)

In 1929, after a dispute broke out over an oyster bed in the Delaware Bay, New Jersey returned to the court seeking a definitive ruling on the boundary. Delaware was represented by Clarence Southerland, who went on to become the first chief justice of the separate Supreme Court of Delaware. In a 1934 opinion, the U.S. Supreme Court unanimously confirmed Delaware's sovereignty to the low water mark on the New Jersey side of the River within the 12-mile circle. South of the circle, the Court held that the boundary followed the "thalweg," or main shipping channel.[14]

For several years thereafter, New Jersey asked the court to reconsider its decision through motions to reopen based an alleged new evidence of defects in Penn's title. Although the Court denied these motions, in retrospect they were harbingers that the controversy still "would not down."



Delaware retains the right to require that any pier entering its territory, including BP's proposed terminal, comply with the DCZA.

New Jersey v. Delaware III

For several decades following the boundary decision in *New Jersey v. Delaware II*, the states adopted a cooperative approach to boundary-straddling projects. As New Jersey stated in plans filed under the Federal Coastal Management Act, adopted in 1972,[15] "any New Jersey project extending beyond mean low water must obtain coastal permits from both states."[16] Since 1969, only three riparian structures have been built in the disputed territory, and Delaware has regulated all three.[17]

This era of cooperation ended with BP's proposed project, which stirred passions reminiscent of the days of the tugboat *Falcon*. Following Delaware's ruling that BP's project was not permitted under the DCZA, several New Jersey officials introduced a bill threatening to withdraw state pension funds from Delaware banks. Two Delaware legislators introduced a bill to authorize the National Guard to protect Delaware's borders from encroachment. Not to be outdone, one New Jersey legislator explored the seaworthiness of the decommissioned battleship *New Jersey* "in the event the State was forced to repel an armed invasion by Delaware."[18]

On the legal front, New Jersey argued, as noted above, that Article VII of the 1905 Compact surrendered to New Jersey exclusive authority to regulate any and all piers that extend from New Jersey into the 12-mile circle, including even the right to convey Delaware land for the building of such piers. Delaware responded that the 1905 Compact only permitted New Jersey to "continue ... to exercise" jurisdiction in the absence of a final resolution of the boundary, and that Delaware never conceded the right

to convey its own lands or to regulate structures entering its territory for the benefit of its citizens. Further, Delaware contended that even if jurisdictional rights had been conceded, New Jersey gained only "riparian" jurisdiction. Therefore, Delaware retained all general police power to regulate other aspects of projects entering onto its territory, including the right to enforce the DCZA in order to vindicate the State's environmental concerns relating to its fragile coastal zone.

The proceedings reached their climax on Feb. 22, 2007, when counsel for both states appeared for oral argument in Philadelphia, where the Compact had been drafted more than a century ago. Delaware was represented by Collins J. Seitz Jr. of New Castle[19] and David C. Frederick of Washington, D.C. Delaware Attorney General Joseph R. (Beau) Biden III was in attendance, as were several high officials from New Jersey. The excitement was palpable as counsel made eloquent presentations and deftly fielded questions from Lancaster, who presided over the hearing with grace and wit.[20]

Construing the Compact in light of its historical context and the States' course of conduct over the years, Lancaster rejected New Jersey's claim to exclusive authority to regulate piers entering Delaware. Under his analysis, New Jersey's authority to make grants of lands extends no further than its boundary. While New Jersey may authorize the construction of piers that extend beyond its boundary within the 12-mile circle, those structures become subject to Delaware's regulatory oversight once they enter Delaware. Thus, Delaware retains the right to require that any pier entering its territory, including BP's proposed terminal, comply with the DCZA.

More than 70 years ago, Justice Cardozo noted that the special master in *New Jersey v. Delaware II* had rendered an "able and comprehensive report" and that "[a]ll that matters most in this keen but amicable controversy is there set forth at large, and there and in the supporting documents the student of our local history can live it over when he will."[21] The same holds true for the report of Lancaster in *New Jersey v. Delaware III*. And yet, there is still at least one more chapter to be written in this historic legal trilogy spawned by Penn's grant, to confirm whether Delaware retains intact the sovereignty conveyed by delivery to William Penn of turf and twig, and the waters and soil of the river, so long ago. That chapter will bewritten by the U.S. Supreme Court this term. ◆

FOOTNOTES

1. *New Jersey v. Delaware II*, 291 U.S. 361, 364-365 (1934) (Cardoza, J.) (internal quotations omitted).

2. Del. Code Ann., tit. 7, § 7001 *et seq.*

3. Report of the Special Master, April 12, 2007, at p. 84 (herein, "Report"). Mr. Lancaster is a partner in the law firm of Pierce Atwood, based in Portland, Maine. The Report and all other proceedings before the special master can be found on the unofficial docket maintained on the firm's Web site: http://www.pierceatwood.

4. The DCZA declares that "the coastal areas of Delaware are the most critical areas for the future of the State in terms of the quality of life in the State." Del. Code Ann., tit. 7, § 7001. Under the Act, the public policy of Delaware is "to control the location, extent and type of industrial development in Delaware's coastal areas." *Id.* The Act specifically finds that "offshore bulk 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." For these reasons, the Act declares that an absolute "prohibition against bulk transfer facilities in the coastal zone is deemed imperative." *Id.* Section 7003, "uses absolutely prohibited in the coastal zone," implements this policy by providing that "offshore gas, liquid or solid bulk product transfer facilities which are not in operation on June 28, 1971, are prohibited." Del. Code Ann., tit. 7, § 7003.

5. This historical background is gleaned from the expert report of Carol E. Hoffecker, Ph.D., filed in proceedings before the special master (herein, "Hoffecker Report"). The Hoffecker Report is posted on the special master's web site (see n.1, *supra*) as an exhibit to New Jersey's Motion to Strike, filed November 26, 2006 (see also Case Management Order No. 15, dated December 11, 2006 (denying motion)). The Hoffecker Report, which was prepared with the able assistance of Barbara E. Benson, Ph.D., is also expected to appear in a forthcoming issue of *Delaware History*, a publication of the Historical Society of Delaware.

6. Hoffecker Report at 5-6.

7. Hoffecker Report at 7.

8. *Case of Pea Patch Island*, 30 F. Cas. 1123, 1123 (1848).

9. *New Jersey v. Delaware II*, 291 U.S. at 377.

10. *New Jersey v. Delaware I*, No. 1 (Orig.) (1877) (affidavit dated February 13, 1877).

11. Report at 4.

12. Lead counsel George H. Bates had participated in negotiations with representatives of Great Britain and Germany, including Otto von Bismark, in a successful effort to preserve the status quo with regard to valuable island ports in the South Pacific. Bates's mentor and Delaware's original counsel in the case, Thomas F. Bayard, led negotiations with Great Britain to resolve a dispute over fishing rights off the coast of Newfoundland. These negotiations resulted in the Bayard-Chamberlain Treaty of 1888 and *modus vivendi* arrangements pending Senate consideration of the Treaty. Another commissioner, also counsel in the case, was Herbert H. Ward, a long-time partner of U.S. Senator and Third Circuit Court of Appeals Judge George Gray. Gray, who had served as Delaware counsel in *New Jersey v. Delaware I* in the 1890's, served on an 1898 commission negotiating with Canada over fishing rights in the Great Lakes and as a member of the commission to arrange terms of peace between the United States and Spain to end the Spanish-American War. In 1900, President McKinley appointed Gray to serve as a judge at the International Court of Arbitration at The Hague.

13. Similarly, although the drafters had borrowed language from an 1834 compact between New Jersey and New York as to other matters, they declined to adopt language in the 1834 compact stating that New Jersey "shall have the exclusive jurisdiction of and over the wharves, docks, and improvements ... on the shore of the said state." See Report at 66.

14. *New Jersey v. Delaware II*, 291 U.S. 361 (1934).

15. 16 U.S.C. 1451 *et seq.*

16. *See* Report at 72-73.

17. Report at 73-76.

18. Report at 21.

19. By coincidence, the hearing was held in a courtroom within the Third Circuit Court of Appeals that is named after Seitz's father, former Third Circuit Judge Collins J. Seitz.

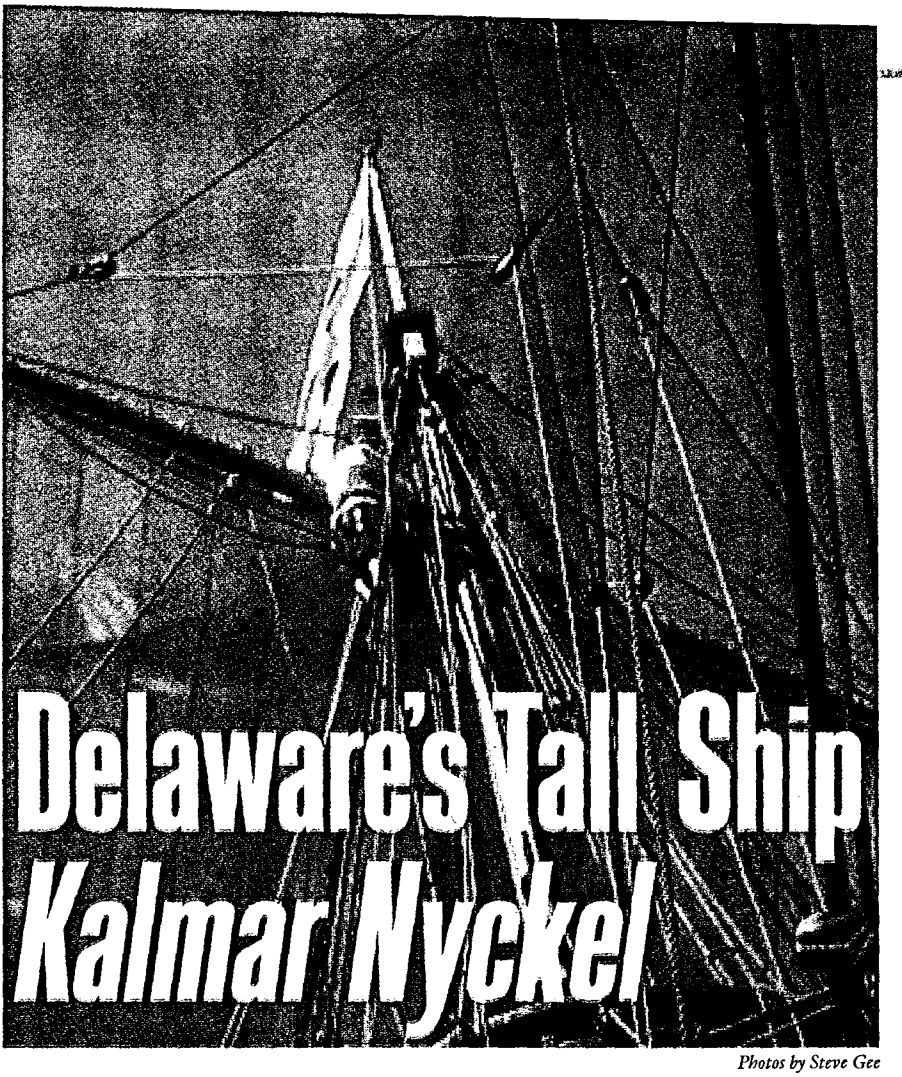
20. Lancaster had previously served the Supreme Court as special master in an original jurisdiction dispute between Virginia and Maryland over the Potomac River. See *Virginia v. Maryland*, 540 U.S. 56 (2003).

21. 291 U.S. at 378.

FEATURE

Eric D. Boyle

40 Hours Before the Mast: Sailing on Delaware's Tall Ship Kalmar Nyckel



Photos by Steve Gee

In the summer months, a beautiful, living symbol of Delaware's history and maritime heritage sails the waters of the Delaware Bay and beyond.

A legal review of Delaware's coastal zone and its maritime heritage would not be complete without delving into the history of the State and its coastal beginnings. We need look no further than East Seventh Street in Wilmington near the site of the landing of the first Swedish settlers in Delaware. Well, in the winter anyway, for in the summer months, a beautiful, living symbol of Delaware's history and maritime heritage can be seen sailing the waters of the Delaware Bay and beyond. The *Kalmar Nyckel* is a recreation of one of the vessels that brought the first Swedish traders and settlers to the Christina River. Visitors can not only walk on her decks, but also take a sail on the river or into the bay from Lewes. For people looking for adventure, one can sign up as part of the ship's volunteer crew, which I did in 1999.

The original ship was built in Holland in 1627. She was an armed merchant ship and was just the thing the Swedes needed for their navy in 1629. This was the height of the Thirty Years' War and the Swedes were in the thick of it. The king of Sweden, Gustavus Adolphus, wanted to expand his navy and started a program requiring cities to build or buy ships for the navy. Smaller cites pooled their resources to purchase suitable ships. One of these cities was Kalmar, and the ship purchased from the Dutch was renamed the *Kalmar Nyckel*, or "Key of Kalmar." Gustavus Adolphus was killed at the battle of Lutzen in 1632 and his daughter Christina became queen. Well, not yet, since she was only 6 years old, so a regent was appointed until she turned 18. It was this regent, Axel Oxenstierna, who gave the green light for a Swedish

expedition to the new world.[1]

The man who led this expedition was Peter Minuit, who was formerly employed by the Dutch as the governor-general of New Netherlands. Popular history credits him with the purchase of Manhattan Island from the Indians for $24 worth of beads. However, it is more likely that his predecessor was the Dutchman who concluded the deal. Nevertheless, because of his experience with the established colonies in the 1620s, he had an intimate knowledge of the east coast and knew exactly where the Swedes could slip in-between the Dutch and the English colonies to establish a trading post.

This was the Christina River, or what was then called the Minquas Kill. Once the settlement was established, both the fort and river were named for the new queen. Eventually the *Kalmar Nyckel* made four voyages to New Sweden, the most trips of any of the Colonial vessels. In 1644, after her last voyage, the ship was brought back into military service for the Swedish-Danish War. She survived the war, including a battle with a Danish ship, and was eventually sold in 1655 to a merchant; beyond that, her fate is unknown.

She participates in several pirate festivals annually, where the crew is encouraged to dress the part.

The current *Kalmar Nyckel* was launched in September 1997, commissioned and embarked on her maiden sailing season in the summer of 1998. In fact, a week after her commissioning ceremony, she sailed to Lewes to participate in the filming of an Italian pirate movie called "Caraibe." Not surprisingly, she participates in several pirate festivals annually, where the crew is encouraged to dress the part. I attended the commissioning ceremony on May 9, 1998 and decided to attend the next crew training class.

The class was held at the shipyard on East Seventh Street beginning in January 1999. Led by the late Captain David W. Hiott, subjects ranged from sailing theory of tall ships to names and locations of all the lines (ropes that control the sails are called lines on a ship). To study the lines, the crew is provided with a "belaying plan," which shows where each line is located on the ship and its purpose. The ship carries eight sails totaling 6,873 square feet of sail area, and each sail may have eight separate lines to set and control it.[2] The plan shows where each line is stored, or belayed, on the deck. Soon you will be able to distinguish the function of the eight miles of riggings on the ship.

Of course, you may have guessed that the nautical lexicon is also a must to learn! Yes, "avast" is a real term meaning, essentially, to freeze or stop what you are doing. For six Saturdays, I attended classes that cumulated in a written exam and the dreaded knot tying examination. Much of the class time is hands on, as the best way to learn the complex rigging is on board the ship, just as the 20-plus knots are best learned with practice, practice and more practice. Actually once past the test, there are only five or six knots you'll need while sailing (sounds like the bar exam!).

After taking the class, passing the exams and putting in 40 hours of volunteer time (there is constant maintenance to be done on a wooden ship), you become part of the sailing crew. Sailing as crew on the *Kalmar Nyckel* can be a short three-hour day sail on the Delaware Bay or a weeklong voyage to Virginia or up the East Coast to New England. As I have noted, one of the requirements to sail is a minimum of 40 hours of volunteer time. Mostly this means maintenance, but could also be tour guide, office work or night watch. There is someone onboard at all times and staying overnight is a good way to learn about the ship, and there is the ship's cat, Toolbox, to keep you company.

All of the painting, chipping and varnishing will be rewarded during the sailing season. Fortunately, unlike her predecessor, the current ship has many modern synthetic materials that are made to look like manila and cotton, but last much longer and resist the effects of the sun and salt spray. The *Kalmar Nyckel* is 89 feet long (139 feet, including the bowsprit) and her mainmast is 108 feet tall. She is so tall that sailing under the I-495 Bridge requires the top parts of the mast to be lowered to enable the ship to pass underneath it.

So just what is it like to sail on a tall ship?

A typical sail for the crew starts with muster, where the Captain assigns you to a watch and deck assignment. This is helpful because on a given sail you only have to be familiar with that part of the rigging and lines where you are stationed. Several 21st-century tools are available to assist the crew, including navigation electronics and computerized

crew assignments and rosters. The ship is also fitted with two Caterpillar auxiliary diesel engines, which enable the ship to travel regardless of wind conditions.

Even though there are concessions to modern mechanical conveniences, the basic sailing of the ship is done much in the same way as the original was sailed in 1638. There is the windlass, which is used to raise the anchor, assist with setting sail and raise the masts after passing under the bridge. This windlass is powered by muscle and mechanical advantage, much like the block-and-tackle rigging. Each section of the crew works as a team to handle docking, setting sail and to perform maneuvers under sail. In other words, everyone has a job to do.

One job is the helmsman or quartermaster. Any crewmember can learn to steer the ship, which, by the way, is not done with a wheel. In 1638, large ships had a whipstaff, which is a long vertical pole connected to the tiller and rudder. This is a job that takes getting used to because you can't actually see the where you are headed. The captain, standing higher on the quarterdeck, gives you steering commands and you learn to judge when the ship is turning, or has stopped turning, to properly steer her. Certain crewmembers are qualified to climb the masts to loose and take in the sails. Essentially, you must have the will to climb 65 plus feet on rope ladders (ratlines and shrouds) and pass a chin-up test. To climb into the "fighting top," you use your arm strength because you are actually angled toward the water.

Another modern concession is to safety, in many ways, and the climbers have belts to clip in to the rigging while working aloft. We also have footropes under the yardarms to balance on while loosing the sails. In the 17th century, before the advent of footropes, sailors had crawl out on the yard. As you might imagine, the younger, more agile crewmembers were the ones going aloft in those days.

On long voyages the crew is divided into two watches, port and starboard. One watch is on duty at all times and some circumstances require "all hands on deck." For example, we were sailing off of Lewes when a lookout spotted a boat on fire. The captain ordered sails to be taken in and fired up the engines to go and assist the stricken vessel. Each crewmember reported to their emergency stations for a fire and, using the ship's fire hoses, they were able to assist the Coast Guard in dousing the flames.

Taking a day or a week to sail on a tall ship is sometimes a lot of work — between climbing and hauling on lines, much different from a modern sailboat — however, it is very rewarding. Coming on deck in the morning to seeing dolphins swimming along in the ship's bow wave, or watching the stars at night while sailing with only the sounds of the wind in the rigging and century's old tradition around you is worth all the hard work. There are hundreds of people who volunteer as crew, as guides or in the gift shop.

Many crewmembers have no sailing experience when they sign up for the sail training class. In fact, one of the current ship's officers, Chief Mate Sharon Litcofsky, started out as a volunteer. Together with Captain Lauren Morgans and Mate Cory Young, she is now part of the professional crew leading the volunteers on the *Kalmar Nyckel's* mission as Delaware's goodwill ambassador.

Whether you come aboard for the day or volunteer to sail as crew on an off shore voyage, sailing with the *Kalmar Nyckel* is a rewarding experience and a lesson on the history of Delaware. ◆

For more information and the sailing schedule visit the Kalmar Nyckel *Foundation Web site at www.kalmarnyckel.org.*

FOOTNOTES

1. Historical references from *A Man and His Ship: Peter Minuit and the* Kalmar Nyckel, Weslager, C.A., The Kalmar Nyckel Foundation, 1989.

2. Statistical references from, Kalmar Nyckel *Fact Book for Docents and Crew Members*, Quigley, H. and "Kalmar Nyckel *Crew Training Manual*," Hiott, D., *et. al.*

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Charles J. Durante

Within the Reach of All: An Illustrated History of Brandywine Park
By Susan Mulchahey Chase

Creating Wilmington's Green Mile

Imagine a public undertaking in Wilmington comparable in quality to those in New York, Baltimore and Philadelphia. It exists. Brandywine Park, the verdant quiet jewel of the city, begun and has been maintained for more than 125 years with a combination of public muscle and private vision.

The park is the subject of a recent authoritative, affectionate biography by urban historian Susan Mulchahey Chase, an important addition to the Delaware bookshelf. Carefully researched and well edited, its 140 pages reveal as much about the civic leadership and the city's way of doing business as about the monuments, crevices and gardens in this most democratic of public works.

The Reform Era faced conditions even more daunting than those of this day. Sooty new industries sucked a generation of workingmen off farms (Sussex was Delaware's most populous county through the 1840s) and gave work to veterans. Seventy-hour workweeks were common, paid vacations non-existent. The weekend began on Saturday afternoon at 4 p.m. More fortunate families lived in 12-foot-wide row houses, the likes of which remain on Bennett and Spruce streets. Foliage was an accident.

Beginning after the Civil War, visionaries proposed that the city purchase land along its northern edge, the Brandywine River, to provide "running water, level lawn, grove, forest, playgrounds, walks drives and beautiful vistas" for all citizens, lest the non-industrialized portion be swept into private hands. As in any era, the proposal encountered reflexive, penurious hostility. Some feared the long-term costs; others disdained public projects altogether. By 1883, the General Assembly was persuaded to authorize public parks for Wilmington, enable their acquisition and create a governing commission.

The city had neither the money to create the park, nor the authority to get the money. The General Assembly had to authorize the city to borrow the $150,000. Acquiring the land required negotiation with dozens of owners, but the bludgeon of condemnation was never threatened. Within 10 years, the current park was largely assembled. By 1910, the entire 179-acre park had taken shape, a green mile from Market Street to Augustine Cutoff (named for Augustus Jessup, a Massachusetts transplant who built the Jessup & Moore mill, where the Brandywine Park condominiums now sit).

The designer was the era's leading landscape architect, Frederick Law Olmsted, whose conceptions shaped municipal parks, college campuses, villages and rural preserves throughout North America. He emphasized the valley's natural landscape — the stream, rocks, hills and undeveloped features — as the river drops 20 feet in elevation, over two waterfalls and remnants of a third.

Once established and designed, the park had to be maintained. That Wilmington's central park attained and retained its vitality is a story of civic volunteers, public administrators and citizen activists of uncommon dedication and talent.

Prime among them were Quaker cousins William Marriott Canby and William Poole Bancroft. If, as Bill Frank wrote, Pierre S. du Pont was the outstanding Delawarean of the 20th century, similar claims could be made for Canby or Bancroft in the 19th century. Bancroft was president of WSFS, an industrialist and humanitarian; Canby was also a botanist (after whom a dozen species are named) and early environmentalist (on projects with John Muir) who lured his friend Olmsted to conceive the Brandywine project.

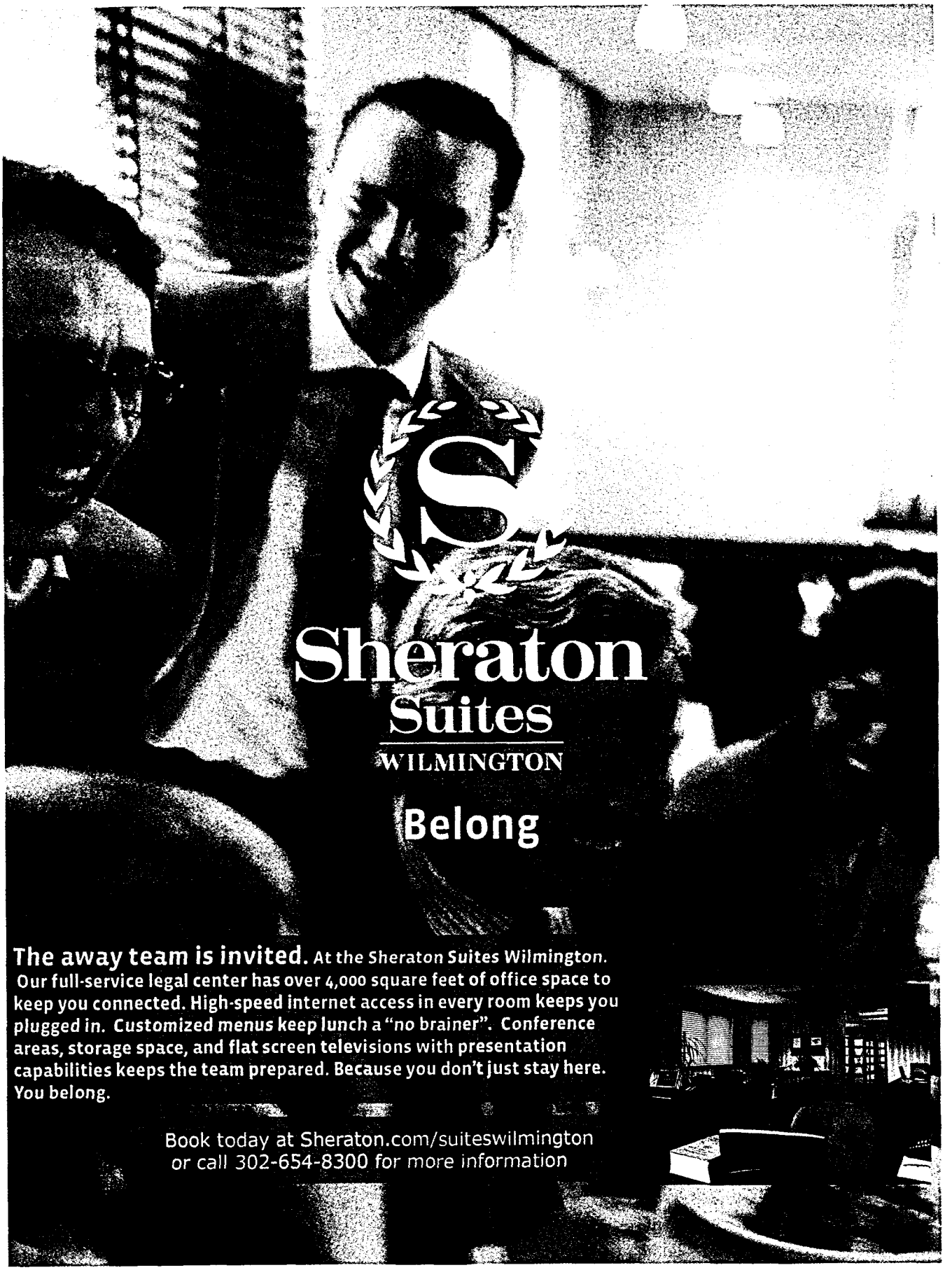
William and Samuel Bancroft ran the family textile plant. Samuel gave the art museum its pre-Raphaelite collection. William endowed the Wilmington Institute library and created Woodlawn Trustees, to this day a steward of land and housing, among his many activities. Together they donated the park's core 65 acres. William negotiated the purchase of much of the rest, sometimes buying tracts with his own funds from intransigent owners, and helped direct the park's operations for nearly a half-century.

Until the City Charter took effect in 1967, a Board of Park Commissioners ran the park. The commission form of government fell into deserved disrepute in Dover, but the city park commission provided stellar leadership and elicited broad community support. Edgar Haynes, a commissioner until his death at 95, created the Rose Garden. Samuel H. Baynard, developer of the north side of the river, contributed in wisdom and wealth, helping open the zoo and building the state's most storied stadium at the northwest corner of the park, which now bears his name. Col. Henry A. du Pont's gunpowder company made the cornerstone gift to establish Rockford Park. After failing to prevent the State Highway Commission from slashing the interstate highway through the city, M. du Pont Lee successfully negotiated the most minimal intrusion into the park feasible.

Public participation abounded, most memorably in contributions by attorney J. Ernest Smith, who donated the Josephine Fountain in honor of his wife; DuPont Vice President Jasper Crane, who gave the first 670 plants to the Rose Garden; and committees that raised funds for other fountains and sculptures. Such citizen involvement has returned over the past 15 years, institutionalized in Friends of Wilmington Parks, the legacy of civic activist Sandy Poppiti, which channels public energy and advocacy into a resource for the park's professional managers.

The work was carried out by salaried public officials, some of whom served for decades: Edwin Koester, Edward Mack, Bill Dougherty, Edward Laverty, Ralph Cryder and Bill Kapa. In 1971, the city ceded administration to the newly formed New Castle County government, then full of promise, but once Cryder retired, stagnation set in. A decade ago, the state took over park administration, bringing back its deserved level of care.

Canby had a park named for him — after he died. That was how things were done. Bancroft Parkway, Baynard Boulevard and Haynes Park were likewise named for folks not in a position to argue, either after their death or their retirement. Naming rights have never been for sale in Wilmington's parks. The selfless spirit of the Reform Era persists in the park it begat. Susan Mulchahey Chase deserves thanks for the extensive research that enabled her to tell this story lucidly to 21st-century readers. ◆



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