

**BEFORE THE COASTAL ZONE INDUSTRIAL CONTROL BOARD  
FOR THE STATE OF DELAWARE**

JOHN A. NICHOLS	)
	)
Appellant,	)
	)
v.	) Appeal No. 2012-01
	)
SECRETARY COLLIN P. O'MARA	)
and the DELAWARE DEPARTMENT	)
OF NATURAL RESOURCES AND	)
ENVIRONMENTAL CONTROL,	)
	)
Appellees.	)

**OPINION AND FINAL ORDER**

Pursuant to due and proper notice of time and place of hearing served on all parties in interest, and to the public, the above-stated cause of action came before the Coastal Zone Industrial Control Board ("Board") on June 13, 2012, at the Delaware Technical & Community College Terry Campus, Room 727, 100 Campus Road, Dover, Delaware.

Members of the Board present and constituting a quorum were: Richard Legatski (Chairperson), Albert Holmes, Pallatheri Subramanian, John Burton, Robert Wheatley, Stanley Tocker and Robert Bewick, Jr. Deputy Attorney General Peter Jamison, III represented the Board. Appellant John A. Nichols appeared *pro se*. Deputy Attorney General Robert F. Phillips represented the Delaware Department of Natural Resources and Environmental Control ("DNREC") and DNREC Secretary Collin P. O'Mara ("Secretary"). Joseph C. Schoell, Esquire and Shawn P. Tucker, Esquire appeared on behalf of the permittee, Diamond State Generation Partners, LLC ("Diamond State").

**STATEMENT OF THE CASE AND PROCEEDINGS**

On November 15, 2011, Diamond State submitted an application to DNREC

requesting a permit for the construction of a fuel cell electrical power generation facility in Delaware's coastal zone in the area of New Castle, Delaware. According to the application, the facility (to be called the "Red Lion Energy Center") would generate up to 47 megawatts of electrical energy that would be distributed to the PJM electrical grid.

On March 6, 2012, Robert P. Haynes, acting as Hearing Officer for DNREC, held a public hearing to solicit and consider public comment on Diamond State's permit application. Following the hearing, the Hearing Officer prepared and submitted a report to the Secretary dated April 13, 2012. The report to the Secretary set forth the procedural history of the permit application, a summary of the record before the Hearing Officer, and his conclusions regarding the issuance of the requested permit.

On April 30, 2012, the Secretary issued an order (Order No. 2012-CZ-0013) directing that the permit requested by Diamond State be issued.

On May 15, 2012, the appellant filed with the Board a timely notice of appeal from the Secretary's order. The appeal, in essence, challenged the legality and reasonableness of the Secretary's order.

On or about May 22, 2012, Diamond State filed a motion with the Board to dismiss the appeal on the grounds that the appellant lacked standing.

On May 23, 2012, the appellant filed with the Board a response to Diamond State's motion to dismiss.

On or about June 4, 2012, the appellant filed a further response to Diamond State's motion to dismiss.

Neither DNREC nor the Secretary made any written submissions regarding the issue of the

appellant's standing, but they did, at the hearing on June 13, 2012, join in arguments made by Diamond State in support of its motion to dismiss.

### **MATTERS BEFORE THE BOARD**

At the hearing on June 13, 2012, prior to the hearing of evidence and argument on the merits of the appeal, the Board heard oral argument from the parties (and offered the parties an opportunity to present evidence) on the motion to dismiss. At the conclusion of the oral argument on the motion to dismiss, the Board announced that it would defer decision on the motion to dismiss until after the parties' presentation of evidence on the merits of the appeal.

#### **Summary of the Evidence**

In his case-in-chief, the appellant presented the testimony of two witnesses: David T. Stevenson and Richard Timmons.

Mr. Stevenson testified that:

(1) He is the director of the Center of Energy Competitiveness at the Caesar Rodney Institute. Tr. at p. 60.<sup>1</sup>

(2) He holds a Bachelor of Science degree from Rutgers University in Agricultural Economics. Tr. at p. 59.

(3) He was employed 23 years by the DuPont Company in "various sales, marketing, and business management, technical management positions." Tr. at p. 59.

(4) While employed by DuPont, he conducted numerous analyses regarding the economic viability of proposed business ventures. Tr. at p. 60.

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<sup>1</sup>The abbreviation "Tr." shall be used throughout this opinion and order to refer to the transcript of the Board's hearing on June 13, 2012.

(5) He was an official intervenor in a Delaware Public Service Commission hearing involving Diamond State's Red Lion Energy Center. Tr. at pp. 61 - 62.

(6) In his opinion, the Red Lion Energy Center would not have a net benefit economically to the State of Delaware. Tr. at p. 70.

Mr. Timmons testified that:

(1) He holds a Bachelor's degree in Chemical Engineering and a Bachelor's degree in Chemistry, both from the University of Delaware. Tr. at p. 84.

(2) He worked for Diamond Shamrock Chemical Company (now doing business as "Oxidental Chemical Company"). Tr. at pp. 84 - 85.

(3) As an employee for Diamond Shamrock, he worked as a production superintendent, production manager, maintenance manager, and technical manager and "was involved in pretty much all phases of chemical engineering." Tr. at p. 85.

(4) As an employee of Diamond Shamrock, his job responsibilities often involved issues relating to the management and procurement of electrical power from the PJM grid. Tr. at pp. 86 - 87.

(5) The EPA has established that the use of natural gas in the generation of electricity (by any process) produces 117 pounds of carbon dioxide per one million BTUs. Tr. at p. 94.

(6) He back-calculated from the data that Diamond State included in its application to the Secretary to determine what assumption Diamond State was making regarding the carbon dioxide produced by its facility and came to the conclusion that Diamond State was assuming (erroneously in his opinion) that its facility would produce 102 pounds of carbon dioxide per one

million BTUs. Tr. at p. 94.

(7) Diamond State, in its application to the Secretary, exaggerated the cleanliness of its facility (in terms of its impact on the environment) by comparing it to coal-fired and oil-fired electrical generation facilities. According to Mr. Timmons, the appropriate comparison would be to the “next increment of energy”, which, in his opinion, would be a combined-cycle natural gas facility. Tr. p. 95.

(8) The fuel cell facility at the Red Lion Energy Center would not compare favorably (in terms of environmental emissions) to a combined-cycle natural gas facility. Tr. at p. 95.

In its case-in-chief, Diamond State presented the testimony of two witnesses: William Brockenborough and Jeffrey M. Bross.

Mr. Brockenborough testified that:

(1) He is General Manager of Bloom Electronics, which manufactures the fuel cell servers to be installed at the Red Lion Energy Center. Tr. at p. 153.

(2) Fuel cells produce electricity “through a combination of oxygen and a fuel without combustion, without flame.” Tr. at p. 154.

(3) “The raw materials in the process are utility natural gas and air, and at startup of the installation, the initial startup, a small amount of water.” Tr. at p. 154.

(4) The by-products of the fuel cell electrical generation process “are principally carbon dioxide and water vapor and very small amounts of nitrous oxides, sulfur oxides, and volatile organics....” Tr. at p.154.

(5) The Bloom process does not generate any hazardous waste. Tr. at p. 155.

(6) “[E]lemental sulfur is present as an odorant in utility natural gas in the form of mercaptan,” and the mercaptan is removed from the gas through the use of a resin bed that “absorbs the mercaptan....” Tr. at p. 155.

(7) The mercaptan that is removed from the utility natural gas “is nontoxic.” Tr. at p. 155.

(8) No hydrogen sulfide is used in the fuel cell electrical generation process. Tr. at pp. 155 - 56.

(9) “Underwriters Laboratory has examined the design and manufacture of [Bloom’s fuel cell] and has found it to be in conformance with ANSI [American National Standards Institute] standard SC1 for the construction of fuel cells.” Tr. at p. 158.

(10) “Bloom meets two standards of the National Fire Protection Agency, NFPA 853, which governs the construction and installation of fuel cells, and NFPA 70, which is the National Electric Code.” Tr. at p. 159.

(11) The Bloom fuel cell meets the “very stringent” emission standards of the California Air Resources Board. Tr. at p. 160.

(12) There is a catalyst in the Bloom fuel cell box that creates an electrochemical reaction, and he could not disclose the nature of the catalyst, because it is proprietary information. Tr. at p. 171.

(13) “The catalyst...is not in any way consumed or used up or discharged or emitted during fuel cell operation. The fuel cells, the very thin ceramics that act as the electrolytes and sandwich over time...degrade physically and become less effective and less efficient. They’re entirely within the enclosure. The fuel cell stack mass, when it leaves the a site, is identical to its mass, when it came in. None of the material is discharged in any way.” Tr. at p. 186.

Mr. Bross testified that:

(1) He is Chairman of the Board of and consultant with Duffield Associates, which is an environmental sciences and geosciences consulting firm. Tr. at p. 198.

(2) He conducted a study of the average emissions from all electrical generation facilities currently providing energy to the PJM grid and that the emissions from the Red Lion Energy Center's fuel cell electrical generators compared favorably to those average emissions. Tr. at pp. 208 - 09.

(3) The Red Lion Energy Center, in terms of its impact on surrounding wetlands, complies with state and county wetland preservation requirements. Tr. at pp. 217 - 18.

(4) New Castle County has approved of the storm water management plan for the Red Lion Energy Center. Tr. at pp. 218 - 19.

(5) New Castle County has confirmed that the electrical generation activities to occur at the Red Lion Energy Center would be permissible uses of the land in question under the zoning laws of the county. Tr. at p. 220.

In its case-in-chief, DNREC presented the testimony of one witness—Kevin Coyle.

Mr. Coyle testified that:

(1) He is employed as a principal planner by DNREC.

(2) He provides administrative support to DNREC in connection with the preparation of legal notices, the drafting of environmental assessment reports and other similar documents. Tr. at p. 234.

(3) The buffer between the Red Lion Energy Center and surrounding wetlands would protect the wetlands from nitrogen and phosphorous runoff from the center. Tr. at p. 239.

(4) If Diamond State were to violate the terms of the permit issued by DNREC for the construction and operation of the Red Lion Energy Center, DNREC could take action to revoke the permit. Tr. at p. 241.

**Diamond State's, DNREC's and the Secretary's Motion to Dismiss**

In their motions to dismiss, Diamond State, DNREC and the Secretary request that the Board dismiss the appellant's appeal on the ground that the appellant does not have standing pursuant to the standing requirements set forth in 7 Del.C. § 7007(b)<sup>2</sup> and 7 Del. Admin. Code § 101-16.1.1<sup>3</sup>. According to the moving parties, a party does not have standing to appeal from a decision of the Secretary under the Coastal Zone Act unless the party can show that the decision injures him or her in a concrete and particularized way, and the appellant has neither alleged or shown any such injury. In his response to the motion to dismiss, the appellant takes issue with the requirement that a party appealing a decision of the Secretary should have to prove a concrete and particularized injury. The appellant argues that the standard is too onerous, not capable of being met under any circumstances, and should not be applied here. The appellant further argues that, because the Act was designed to protect the flora and fauna of the Coastal Zone, none of which can speak for themselves, he should be granted standing to speak for them.

In *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892 (Del. 1994),

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<sup>2</sup> 7 Del.C. § 7007(b) states, in pertinent part: "Any person aggrieved by a final decision of the Secretary of the Department of Natural Resources and Environmental Control under § 7005(a) of this title [which authorizes the Secretary to administer the Coastal Zone Act] may appeal same under this section.

<sup>3</sup> 7 Del. Admin. Code § 101-16.1.1 states "Any person aggrieved by any permit or other decision of the Secretary under the Act may appeal same under Section 7007 of the Act and this section of the regulations.

the Delaware Supreme Court considered the standards applicable to standing in administrative appeals from orders of the Secretary under chapters 60 and 72 of title 7 of the Delaware Code and held as follows:

First, a party must have suffered an injury in fact, which is the invasion of a legally protected interest within the zone of interest sought to be protected or regulated by the statute. The invasion must be 1) concrete and particularized, and b) actual or imminent, not conjectural or hypothetical. Second, there must be actual connection between the injury and the conduct complained of-the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Finally, it must be likely that the injury will be redressed by a favorable decision, rather than merely speculative.

*Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d at 904, see also, *Ropp v. King*, 2007 WL 2198771 at \*3 (Del. Ch. 2007)(held that, where a statute allows an “aggrieved” party to appeal an administrative decision of a state official, “[the] party seeking to establish standing must satisfy the test of whether: (1) there is a claim of injury-in-fact; and (2) the interest sought to be protected is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question.”)

In the instant case, the appellant, who has the burden of proof on the issue of standing, has not identified or presented any evidence relating to any legally protected interest that he possesses that has been or will be invaded upon by the permit issued to Diamond State. In his response to the motions to dismiss, the appellant alludes to potential injury to the flora and fauna in the coastal zone, but fails to make any connection between that potential injury and his own legally protected interests. Further, factual averments in the appellant’s response to the motion to dismiss (as well as factual averments in his notice of appeal) do not constitute evidence. They are merely

allegations and assertions. When presented with the opportunity to present evidence on the issue of standing at the hearing before the Board on June 13, 2012, the appellant presented no evidence whatsoever that might be relevant to his standing to bring the present appeal. Having no evidence before it to support a finding that the appellant has standing to bring the appeal, the Board must, and hereby does, grant the motions of Diamond State, DNREC and the Secretary to dismiss for lack of standing.

IT IS SO ORDERED this 13th day of July, 2012.

COASTAL ZONE INDUSTRIAL CONTROL BOARD

BY: /s/ Richard Legatski  
Member

/s/ Robert Wheatley  
Member

/s/ Albert Holmes  
Member

/s/ John S. Burton, Sr.  
Member

/s/ Pallatheri Subramanian  
Member

/s/ Stanley Tocker  
Member