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DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL

OFFICE OF THE
SECRETARY

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MEMORANDUM

TO: Collin P. O'Mara

THRU: David S. Small *DS*

THRU: Lee Ann Walling *LAW*

FROM: Kevin F. Coyle, AICP CEP *KFC*

RE: Recommended CZA Status Decision for Cherry Island Renewable Energy, LLC

DATE: January 31, 2012

Introduction

Cherry Island Renewable Energy, LLC ("CIRE"), a subsidiary of Cummins Power Generation, submitted an application on December 21, 2011, seeking a Status Decision under the Delaware Coastal Zone Act ("CZA;" Chapter 70 of Title 7 of the Delaware Code) to determine if a Coastal Zone Act Permit is required to construct a 12-inch HDPE pipeline to convey landfill gas ("LFG") from the Delaware Solid Waste Authority's Cherry Island Landfill ("CIL") located in Wilmington, DE to various industrial end users. The LFG generated at the landfill will be utilized as an alternative energy and substitute to natural gas. The LFG will be used in combined heat and power applications (generation of electrical power to offset existing demand) and/or as an alternative boiler fuel.

Description of the Project

CIRE's proposed 12-inch HDPE pipeline will convey LFG generated at the CIL to various industrial end users that will use it as an alternative energy and substitute to natural gas in combined heat

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and power applications (generation of electrical power to offset existing demand) and/or as an alternative boiler fuel.

Prior to distribution via the proposed pipeline, LFG will be pre-treated with a hydrogen sulfide gas pre-treatment system located on the CIL property. The pre-treatment system will include tanks and a control system in a cargo container. The CIL site will also have a siloxane filter skid including a utility flare, and a "pigging launch station" which includes piping with valves. The remainder of the project area involves only the pipeline and associated valves. Construction of associated power generation facilities at the industrial end user locations is not included as part of this application and will be permitted separately by the end users. To date, one end user (Croda, Inc.) has filed an Application for a Coastal Zone Permit, which is under DNREC review at the time of this memorandum.

The pipeline will be installed in most areas by conventional open cut trenching. To avoid all direct impacts to wetlands and subaqueous lands, crossings of such areas will be accomplished by subsurface drilling. A plan set of the pipeline route is included as an attachment. The plan set provides specifications for the drilling method and information on the proposed sediment and erosion controls.

Project Analysis

Although the definition of "bulk product" in the CZA regulations and Reg. 4.5, arguably combine to bar the proposed project, reliance on the language of the statute itself should be the focus of the status decision.

According to the regulations:

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

CZA Reg. 4.0 states: The following uses or activities are prohibited in the Coastal Zone:

4.5 "Bulk product transfer facilities and pipelines which serve as bulk transfer facilities that were not in operation on June 28, 1971."

The language of the CZA is not as broad as the regulations in its limitations on establishment of bulk product transfer facilities (BPTFs), which are defined in 7 *Del. C.* § 7002(f): "'Bulk product transfer facility' means any port or dock facility, whether an artificial island or attached to shore

by any means, for the transfer of bulk quantities of any substance from vessel to onshore facility or vice versa.” It’s no stretch at all to say that the LFG project does not constitute a “port or dock facility”. If it’s not a port or dock, the issue of whether it’s vessel-to-vessel or vessel-to-shore doesn’t arise.

The regulations define “Docking Facility” as:

any structures and/or equipment used to temporarily secure a vessel to a shoreline or another vessel so that materials, cargo, and/or people may be transferred between the vessel and the shore, or between two vessels together with associated land, equipment, and structures so as to allow the receiving, accumulating, safekeeping, storage, and preparation of cargoes for further shipment, and administrative maintenance purposes directly related to such receiving, accumulating, safekeeping, storage, and preparation of cargoes for further shipment.

The proposed LFG project doesn’t fit that definition either. Therefore, the project is not a BPTF of any sort and isn’t barred by §7003.

§ 7003. Uses absolutely prohibited in the coastal zone

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

The Delaware Supreme Court in *Coastal Barge* construed § 7002(f)’s “from vessel to onshore facility or vice versa” language to be merely “illustrative” of a bulk product transfer facility, and held that vessel-to-vessel transfers are also included within § 7002(f)’s definition. Section 7003 specifically applies only to offshore BPTFs (vessel-to-vessel transfers) and was interpreted by the Delaware Supreme Court in *Coastal Barge* to include also vessel-to-shore bulk product transfer facilities.

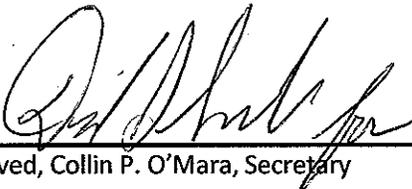
Any status decision would have to show that the Cherry Island project is not barred by the language of statute or by an applicable precedent. That could be done by citing the “any port or dock facility” of the statute itself. Neither *Coastal Barge* nor any other precedent applies to onshore LFG collection and distribution pipelines. The proposed project doesn’t involve vessel-to-vessel or vessel-to-shore transfer of gas.

Public Commentary

Legal notices announcing receipt of the Status Decision application were published in the News Journal on December 25, 2011, and the New Castle Weekly on December 28, 2011; in addition, an e-mail was sent to the Coastal Zone listserv on December 23, 2011. No comments were received from the public by the January 10, 2012, deadline.

Recommendation

Based on the analysis of the Deputy Attorney General assigned to represent the Department with respect to matters arising under the Coastal Zone Act in a letter dated January 17, 2012 (see attached), the proposed project is not regulated by the Coastal Zone Act because it is not a "heavy industry" or "bulk product transfer facility" as defined in the CZA. The project does not have the characteristics of a "heavy industry use" as defined in 7 Del.C. § 7002(e); nor does it match or resemble any of the examples of "heavy industry" facilities. The project is not a "bulk product transfer facility" since it is not a "port or dock facility." Thus, the proposed project is not prohibited by the CZA (7 Del.C. § 7003). Finally, CIRE's proposed project is not a "manufacturing use" that may be allowed only by permit. CIRE does not propose to perform any mechanical or chemical transformation of the LFG collected by the system. Gas will be collected at the landfill and distributed to end users who will burn it as fuel. That activity will presumably regulated by an "air permit." The construction of a new facility to use the CIRE pipeline could in the future be subject to the CZA and its regulations, but the construction of the collection system and distribution system is not.



Approved, Collin P. O'Mara, Secretary

Date

2/3/12