

BEFORE THE COASTAL ZONE INDUSTRIAL CONTROL BOARD

STATE OF DELAWARE

IN THE MATTER OF:)

THE APPEAL OF THE)

DELAWARE AUDUBON SOCIETY)

) No. 95-1
)
)

Following proper notice, a hearing was held on July 12, 1995 concerning the May 30, 1995 appeal of The Audubon Society (hereinafter "Audubon"). Audubon opposed the decision of the Secretary of the Department of Natural Resources and Environmental Control (hereinafter "DNREC"), to grant authority to Oceanport Industries, Inc. (hereinafter "Oceanport"), to off-load 16 new dry products at its Claymont facility. The quorum of Board members consisted of the Chairman, Christine M. Waisanen, Fred McKee, Robert W. Coy, Jr., David Ryan and Donald J. Verrico. Oceanport appeared and was represented by Jeremy W. Homer, Esquire. Audubon was represented by June D. MacArtor, Esquire. The Secretary of DNREC was represented by Keith A. Trostle, Deputy Attorney General. Marsha Kramarck, Deputy Attorney General represented the Board.

SUMMARY OF THE CASE

In 1983, Oceanport purchased a grandfathered oil transport facility from Texaco. It is one of only two commercial ports in Delaware, and the only private facility. Oceanport purchased and has retained the nonconforming right to off-load oil at the site, although it has significantly downsized its capacity to handle this product.

Oceanport now seeks to add 16 new products to its list of products authorized for handling at its facility. Three of these products, magnesium oxide, ferrous sulfate and urea, are hygroscopic (i.e., humidity sensitive). Two products, soil and cement clinker, have the potential to carry hazardous waste materials if not properly inspected. Coal would represent the largest estimated annual tonnage. One new product, cement, has not yet received the necessary air permits for this activity.

The appellant, Audubon, expressed concern for the environmental impact, particularly to tourism and wildlife, that would be created by the additional products to be off-loaded at that site. It contends that the Secretary failed to consider the inability of the industry to "broom up" certain hygroscopic materials if they became wet. It further contends that particles of fewer than 10 microns in size have been identified in recent scientific literature as presenting far greater and more substantial risk of physical harm than originally had been known. Moreover, Audubon challenges the Secretary's failure to provide reasons for his May 14, 1995 decision, as required by law. It argues that the publication in the News Journal on May 14, 1995 was neither signed by the Secretary nor did it provide sufficient reasons for his decision as required by statute. Thus, it contends, DNREC failed to reach a timely decision on the permit application. These violations, they argue, should void the permits which were subsequently issued by the Secretary. Finally, Audubon contends that the decision of the Secretary

demonstrates an erroneous interpretation of the 1992 legislative amendment to 7 Del. C. § 7004 which allows expansion or extension of nonconforming uses by permit. Audubon suggests that the amendment is not applicable to bulk product transfer facilities such as Oceanport.

Oceanport, on the other hand, contends that the expansive application review process by the Secretary and the staff of the DNREC included full consideration of all relevant provisions of § 7004 of the Coastal Zone Act. It urges deference to the technical expertise of the Secretary and his staff on all matters of scientific and technological relevance. Oceanport disputes any requirement for an actual signature by the Secretary upon his decision, and contends that the May 14 publication did provide reasons therefor. Further, Oceanport argues that the Secretary adopted the Hearing Officer's Report dated May 11, 1995 in two ways: first by affixing a "post-it note" bearing the words "I concur", and second by signing an affidavit confirming this adoption. The Secretary's counsel offered as an Exhibit the Affidavit of Secretary Tolou dated June 30, 1995, which evidences the Secretary's concurrence with and adoption of the findings and conclusions in the Hearing Officer's Report of May 11, 1995.

The appellant in this case bears the burden of proof and the Board's decision must be based on substantial evidence from the record as a whole. Seven Del. C. § 7006 requires that a "[m]ajority of the total membership of the Board shall be necessary to make a final decision" on this permit request.

Following consideration of the testimony of all witnesses, including those members of the public who elected to comment, and after public deliberations which were properly noticed, the Board concluded by unanimous vote of the five members attending that the decision of the Secretary should be upheld with one modification and one suggestion to the company.

SUMMARY OF THE EVIDENCE

Audubon presented the testimony of Grace Pierce-Beck, President of The Delaware Audubon Society, who described her involvement in and opinions on the history of the Coastal Zone Act, including the regulations proposed in 1992 by then Secretary Toby Clark III. She felt that those regulations, if effective, would have required legislative amendment to permit expansion or extension by an existing nonconforming use, since the regulations substantially limited such expansion.

Pierce-Beck articulated concerns about possible environmental hazards from hygroscopic materials such as urea, and about whether cement clinker would be tested for PCB's, dioxin, or other toxins by Oceanport.

The Audubon Society had not received the Hearing Officer's Report in this case, prior to its appeal, despite its requests. Had it been made available, perhaps some of its questions could have been answered in advance. The essential objection of Audubon is the expansive nature of the permitted new product line, which it believes results from an overly broad interpretation of the 1992 statutory amendment. Further, Audubon

argues that Oceanport, as a bulk product transfer facility, is not covered by the 1992 amendment.

Audubon next produced Arthur Seibel, a chemical engineer who served 34 years with the DuPont Company. Seibel testified that the Secretary failed to consider the most current scientific evidence that particles of fewer than 10 microns in size present great human health hazards. He did not dispute that current federal and state regulations govern particles of greater than 10 microns in size. He acknowledged that the federal EPA had not yet regulated smaller particles, but suggested that it was nearing revision of its regulations to reflect the latest research. He further suggested that Oceanport's process fails in the proper and safe handling of dusty materials included in 6 or 7 of the new products. He believes that facility is poorly equipped to handle or limit fugitive emissions of these materials. The potential for both human error and equipment failure creates clear pollution hazards, he said. He doubted that either Oceanport or DNREC staff recognized the potential that even otherwise "innocuous materials" present great hazards when they are transported in quantities utilizing small particulate size. He believes that current standards erroneously measure particulates by weight, rather than size in microns. He challenges certain of Oceanport's transmission points as high pollution sites. He believes that Oceanport's application reflects its attention to environmental regulatory compliance rather than health and safety issues.

Oceanport presented testimony from Brian Carbaugh, an engineer who has served with the Army Corp of Engineers, Cabe Associates and West Associates. He summarized key points from his extensive 1990 public hearing testimony. Oceanport, he stated, has demonstrated abundant procedural safeguards implemented to insure safe off-loading of materials, including the minimization of danger to humans and aquatic life. He monitored and assessed the off-loading operations and interviewed staff on site. He described Oceanport's procedures and various safeguards, and answered numerous questions from the Board. Certain equipment, he said, was added to improve safety, such as enclosed conveyor belts. Dust, he said, is controlled via a pneumatic operation which recollects fugitive materials. Hygroscopic materials are transmitted in this enclosed system, and thus avoid exposure to rain and winds. Oceanport's operating plan includes spill and clean up control, via staff on hand during unloading. Between 1993 and 1995, 17 vessels of rock salt and pumice were off-loaded without incident. Oceanport has observed DNREC recommendations to provide structural support for the tarp areas near off-loading sites. Carbaugh suggested that hygroscopic materials could be stored in a covered upland building to avoid exposure to rain or other elements.

Carbaugh reviewed the statutory factors in § 7004 of the Act which he contends were properly considered by the Secretary. He recalls that the Secretary found conformance to all environmental standards, and observed that neither scenic nor tourist areas

will be impacted by the 16 new substances.

In regard to air emission specifically, Oceanport represents that all potential emissions fall within the 10 micron limit for particulates, which is the finest particle size currently regulated. In addition to meeting environmental requirements, the Oceanport facility meets all applicable State standards, with the exception of the pending air permit for cement. The model used to test emissions was conservative, he said, and DNREC observed and approved its unloading process during rock salt off-loading. He disputed existing research demonstrating increased hazard from small particle size. He asserted that no definitive information on this speculative health impact is cited by Audubon.

Lee J. Beetschen, co-founder of Cabe Associates and formerly water resources manager at DNREC, testified next for Oceanport the safety of Oceanport's operation was considered assuming an open water malfunction. Even an actual spill would result in no toxic, acute or chronic impacts, he said. For hygroscopic materials such as urea, magnesium oxide and ferrous sulfate, there is a highly limited radius of influence from a spill or malfunction.

William Creighton testified as a member of Oceanport's Board of Directors. He anticipates a substantial revenue stream for Delaware as a result of Oceanport's permitted expansion. He described the highly industrialized site of Oceanport, where the nearest park is 1-2 miles distant. He agreed to the storage of

urea, magnesium oxide and ferrous sulfate in enclosed building on-site, to avoid exposure to water. He further agreed to investigate local emergency control procedures if the permits are approved by the Board.

Finally, three members of the public commented that the vicinity of the Oceanport site is a developing parkland area, which includes Fox Point Park and the Robinson House. The area will be negatively impacted by truck traffic, and threats of further water, air and noise pollution. Questions were raised as to whether the Legislature could have intended that a small rock salt facility could be expanded to be a major new port site, when it passed the 1992 amendment to section 7004 permitting expansion by nonconforming uses.

FINDINGS OF FACT

1. Oceanport has complied with all environmental, regulatory and statutory standards in its application for 16 new products.

2. No persuasive evidence has been presented to demonstrate significant health hazards, including particulate size, which were not considered by the DNREC Secretary.

3. The May 14, 1995 newspaper publication of the Secretary's approval effectively constituted his "decision" within the meaning of the law. Moreover, his affidavit regarding the "post-it note" removed any possibility of fraud or misrepresentation.

4. The application of and permits granted to Oceanport conform to the statutory requirements of 7 Del. C. § 7004.

5. The permit granted by the DNREC Secretary falls within the meaning of the statutory amendment in 1992, which clearly authorized expansion of all nonconforming uses, including bulk product transfer facilities such as Oceanport.

6. The May 14, 1995 decision of the DNREC Secretary was based on substantial evidence in the record.

7. The 60 day decision deadline imposed by statute upon the Board does not allow it to await the issuance of new regulations by the Secretary.

Next, the Board addressed the appellant's contentions serially. It was agreed that, while it is desirable and required that the Secretary of DNREC provide reasons for his decision, his simple concurrence as expressed in the June 30, 1995 affidavit with the decision of the Hearing Officer dated May 11, 1995 was sufficient. He did affix a post-it note identifying his approval of the findings of the Hearing Officer to that Report prior to the May 14, 1995 newspaper notice of his decision. The Board urges a more formal process in the future, but finds no legal defect or prejudice to Audubon from the process here.

The 1992 amendment is clear on its face and the Board finds no ambiguity in its terms. It provides, in relevant part:

[A]ny nonconforming use in existence and in active use on June 28, 1971, shall not be prohibited by this chapter and all expansion or extension of nonconforming uses, as defined herein, and all expansion and extension of uses for which a permit is

issued pursuant to this chapter, are likewise allowed only by permit....

7 Del. C. §7004(a).

The original Act defined "nonconforming use" to mean:

[a] use, whether of land or of a structure, which does not comply with the applicable use provisions in this chapter where such use was lawfully in existence and in active use prior to June 28, 1971.

7 Del. C. §7002(b).

The Board finds that Oceanport's facility was in active use in 1971 by its predecessor, Texaco, and was nonconforming in that its handling of oil would otherwise have been prohibited in the Coastal Zone. Where there is no ambiguity, statutes must be interpreted as written. Coastal Barge Corp. v. Coastal Zone Indust. Control Board, Del. Supr., 492 A.2d 1242 (1985). There is no indication that the Legislature intended to exclude Oceanport, as the single bulk product transfer facility besides the Port of Wilmington, from the amendment.

Although Audubon contends that the purpose of the Coastal Zone Act, 7 Del. C. ch. 70, was not considered by the Secretary of DNREC, it is clear that the Act calls for balancing (in the sense of "considering") competing forces of industry and the environment. The Board finds that most of the expansion permitted to Oceanport is less hazardous than its existing authority to off-load oil. While Oceanport has not surrendered its oil permit, it has indicated a clear preference for these new products. Because it has eliminated some of its oil storage tanks, another permit application would be required to increase

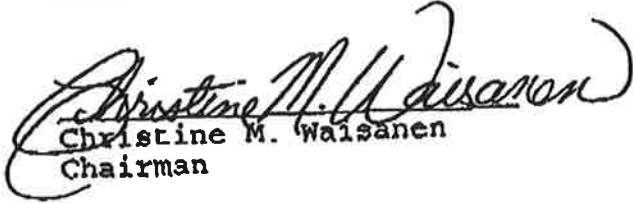
its oil handling capacity.

The Board therefore finds that the Hearing Officer's Report, adopted by the Secretary, adequately addresses these issues and finds negligible impact likely to result in the Coastal Zone from this expansion, if properly managed with the Board's modifications. It further finds limited aesthetic impact on this industrialized area, but Delaware's Division of Parks and Recreation, and community volunteers, are challenged to continue to improve the aesthetics of this area.

Next, Appellants contend that the absence of current regulations pursuant to 7 Del. C. § 7005 prevent the Secretary from granting permits since he is without guidance as to the meaning of the statutory provisions. The Board finds that the Secretary must be guided by the provisions of the Act, whether or not regulations exist. DNREC is the agency authorized to administer the statute. Its interpretation of its provisions merit deference, even in the absence of regulations. Vassallo v. Haber Electric Co., Del. Super., 435 A.2d 1048 (1981). The Board has already urged the Secretary to resubmit regulations to it for consideration.

Therefore, considering all of the testimony, evidence and exhibits presented, it was the unanimous decision of the five Board members present on July 19, 1995 that the decision of the Secretary be upheld. The Board does, however, modify the permit as issued to include the requirement that Oceanport must at all times store off-loaded urea, magnesium oxide and ferrous sulfate

in enclosed structures on site at its Claymont facility.
Finally, the Board strongly encourages Oceanport to participate with its local emergency response committee, so that in the event of human error or act of God appropriate measures will be as swift and sure as possible.


Christine M. Walsanen
Chairman

Fred McKee

David Ryan

Robert W. Coy, Jr.

Donald J. Verrico

July 28, 1995

AFFIDAVIT OF SERVICE

STATE OF DELAWARE)
) SS:
NEW CASTLE COUNTY)

Robin Truitt, being first duly sworn, deposes and says that:

1. She is a secretary with the Department of Justice.

2. That on July 28, 1995 she caused to be hand delivered or placed in the United States Mail from the Carvel Building, Wilmington, Delaware, true and correct copies of the within document:


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Robin Truitt

SWORN TO AND SUBSCRIBED before me this 28th day of July, 1995.



Deputy Attorney General
Pursuant to 29 Del. C. § 4328

