

BEFORE THE ENVIRONMENTAL APPEALS BOARD  
APPEAL OF PERMIT GRANTED TO HELIX ASSOCIATES, INC.

DECISION

The Board met on May 27, 1987 at 9:00 a.m. The following members were present: Chairman Thomas Kealy and members Evelyn Greenwood, Clifton Hubbard, Harry Derrikson, Ray Woodward, and Mary Sheldrake. The Board was represented by Deputy Attorney General Ann Marie Johnson. The appellant William A. Oberle, was represented by Francis J. Trzusowski, Esquire. Jeanne Langdon, Esquire represented the Department of Natural Resources and Environmental Control (Department). John Laager, Esquire represented the permittee, Helix Associates, Inc. Numerous parties testified. For the appellant William Oberle, Dr. Jit Astjana, Bernie Dworski, Fred Herald, James Ramsey, James Sullivan, Mr. Rossman, Mrs. Peggy Tracy, Mrs. Lynn Fornadel, and Representative Oberle testified. For the Department, Robert Taggart, Phil Retallick, Gerard Esposito, James Ramsey, Gregory DeCowsky, Jacqueline Brown testified. For Helix Associates, Inc. Robert Heldt, Tom Stevens and Vaughn Ellerton testified.

This hearing was for an appeal of a permit that was granted by the Department to Helix Corporation to construct and operate a pilot plant at its Newark facility.

SUMMARY OF THE EVIDENCE

The Board submitted the chronology dated May 27, 1987 into evidence as Board's Exhibit-A. ("Bd.-A") Appellant's first witness, Dr. Jit Astjana, testified about the effect of the water run-off into the sewer after the Helix plant explosion. No

effect was observed. He noted that the County regulates some of the discharges that resulted from the explosion, and if asked, the state will evaluate such discharges in the absence of County regulations. The witness also testified that Helix has a waste water pre-treatment permit and that it maintains the parameters specified by the permit. The witness noted that the State advises as to the acceptability of these discharges and that this discharge is monitored on a periodic basis.

Bernie Dworski, Administrator, Water Resources, New Castle County testified that the question of industrial development at the Helix site had been a concern for years. Mr. Dworski testified that his concerns involved four issues 1) zoning 2) community concern 3) storage and use hazardous wastes and 4) "Right to Know" laws. He stated that it was his opinion that the proposed operation of a pilot plant might contaminate existing production wells near South Newark. Mr. Dworski admitted that this was the first time he had made this objection regarding the pilot plant and that these objections were not raised at the permit hearing. He testified that he was not aware of any leaching at the plant or any potential for explosion.

Fred Herald was the next witness to testify. Mr. Herald works for the City of Newark in Emergency Preparedness, and he noted that he was speaking in his own capacity. He reiterated that the Helix site was located over the aquifer water supply and, given the nature of the site and the possible chemicals used there, that there was a threat of contamination.

James Ramsey, the next witness was the Department Hearing Officer for the permit. He testified that in his order, (Bd.-A-33) the early warning system that he recommended was similar in nature to that used in other types of industrial plants. He testified that the reason for including this requirement was his personal feeling that every chemical plant should have an early warning system. He had no personal information on how this requirement was carried out by Helix. He testified that the scrubber permit decision focused upon the air permit, although statements made regarding hazardous wastes were taken into account by the Department.

James Sullivan, a chemist employed by the Hewlett Packard Research Development Company, was the next witness. Mr. Sullivan testified that he had been involved in a similar controversy a couple of years ago in the Newark area and that he was on a vacation day. He referred to appellant's exhibit- 2 (a map) and indicated that many students in New Castle County School Districts were located within 2 miles distance from the plant. He provided the Board with a list of all chemicals used on the plant from the Helix's "Right to Know" documents. The "Right to Know" document was admitted into evidence although Helix noted that it was not the most recent one prepared by the Company.

Mr. Rossman, a resident of Scottfield, testified to express his concern as a resident of the area. He did not testify at the permit hearing. He spoke about materials transportation and cited possible violations of Federal Regulations 49 C.F.R. parts 100 thru 147 and 49 C.F.R. sec. 171.101. The witness admitted

that these standards were applicable to shipment of hazardous materials only according to DOT regulations, were not relevant to the air permit application.

Mrs. Peggy Tracy, of 7 Toronto Circle, Piermont Woods testified. She is the Zoning Chair of the Greater Newark Zoning Council. She testified that she, on behalf of the Council, took a position against Helix in the M-2 zoning application. She noted that it was her position that the Helix plant was not appropriate in an M-2 zone. She testified that the zoning code in New Castle County is "lukewarm" in dealing with chemical companies.

Mrs. Lynn Fornadel, a Scottfield resident, also testified. Her home is located approximately 1,000 yards from Helix. She testified about her recollection of the plant explosion and its effect upon her 4 1/2 year old child, and her neighbors. She stated that she had reported sighting smoke coming from the plant several times prior to the explosion, and that the Department had not responded to these complaints.

Representative William A. Oberle, appellant, appeared last. He stated that in his view, the hearing before the Board, was an opportunity to determine the purpose and intent of 7 Del.C. Ch. 60. He testified that the Department had not given adequate attention to the water issue and as a result, were not honoring the intent of Chapter 60. He likened this failure to an auto tune-up in which one only examined the spark plug but not the engine. He testified that he had not tried to directly contact

Helix regarding his concerns about water contamination. He regarded such communications as a conflict because of the appeal.

Robert Taggart, Supervisor of the Engineering and Compliance Branch, Air Resources, was the Department's first witness. He testified that because the Helix permit was complicated, it had merited special consideration. The Department wanted a thorough evaluation of the scrubber unit, particularly in light of the explosion. He stated that he was present at the initial hearing, had heard concerns of neighbors, and that they had been taken into account. He noted that Helix had built the plant without obtaining a construction permit, but had agreed to pay a fine and resolve the violation. He testified that Helix hired an independent safety consultant in order to make recommendations on how to insure safety of the plant.

According to his statements, the Department does address the question of "multi-media" effect. Specifically, in this case, as a result of the explosion, the Department was aware of some water discharges of hazardous wastes. For the purposes of the pilot plant permit application, however, the Department determined that no permit for water discharge was required. He noted that there is communication among the various divisions within the Department when a company applies for a permit. He testified that compliance with the air permit was determined on the basis of a "per batch" analysis, that an early warning system is in order and is an audible alarm outside the plant, and that the permit granted to Helix was one of the strictest ever issued by the Department.

Phillip Retallick, Director of Division of Air & Waste Management, appeared next. Mr. Retallick testified that there was an internal departmental process to insure that all aspects of an application were reviewed. He stated that the managers of the various divisions within the Department exchange information at staff meetings particularly where there is an unusual situation as in the case of Helix. He testified that this kind of inter-departmental consideration was conducted for the Helix application and that it was determined that no hazardous waste permit was needed. This was because even though some wastes were being deposited into the sewer system they were not hazardous by definition because they were treated, and they met requirements of the municipal authority. It was his opinion that a RCRA permit was not needed. Mr Retallick also noted that that he was very much concerned with cross-media impact. He stated that there were many aquifers throughout the State and that several chemical companies were located near aquifers, including DuPont, Amoco, and Standard Chlorine.

Gerard Esposito, Deputy Director of Water Resources and a prior Deputy Director of Division of Environmental Control appeared next. He testified that although he had never seen the Helix plant, that his files indicated that the pre-treatment discharge for the scrubber would have to have a pH adjustment. In the event of a violation, New Castle County takes enforcement action, but the State can use its authority and the EPA has ultimate pre-treatment authority.

He noted that in 1984, the Environmental Protection Agency delegated the authority to regulate pre-treatment discharge to the City of Wilmington and New Castle County. He went on to testify that the Department would get involved when there was a potential for ground water pollution, as in the case of an emergency such as an explosion. He noted that many locations in Delaware would have potential to contaminate ground water because there is so much ground water close to the surface. He testified that he was aware that Helix sits on "cone of influence" for the Newark Aquifer but was not sure of the relevance of that fact. He went on to testify it was one of the strictest permits ever issued by the Department.

He went on to explain that even though there was some ground water contamination as a result of the explosion at Helix, that these discharges were not related to the industrial process. He noted that discharge permits were required when such discharges were related to the industrial process.

Gregory Decowsky, of the RCRA branch of the Department testified that he was familiar with the plant and had inspected it on 3 or 4 occasions. He testified that there were some solvents being stored on the premises of Helix in drums, but that that the company was not presently in violation of any law regarding storage requirements.

Next to testify was Jacqueline Brown, Complaints Officer of New Castle County. Ms. Brown testified that as far as she knew a Certificate of Compliance was still in effect for Helix and that as Complaints Officer, she had the power to revoke Helix's

certificate of compliance for failure to comply with the zoning requirements. She noted that she had visited the site of Helix in November of 1986 after the explosion, when the plant was not in operation. At that time, she couldn't assess whether or not it was in violation of M-2 zoning. She reiterated that based on information provided to them by Helix, the pilot plant was in compliance with M-2 zoning currently, and at the time of the permit application.

Helix had two witnesses testify. First, Robert Heldt, of Helix testified. He made general comment about the history of Helix, most of which was already noted at the permit hearing. He stated that an industrial development bond had been issued and used to capitalize the plant. He noted that when they made application for the plant they were given a choice of sites and were steered to this site by New Castle County. He reiterated that Helix had paid a \$7,000.00 fine for building the reactor system without a construction permit.

Vaughn Ellerton was Helix's next witness. Mr. Ellerton is responsible for Environmental Operations. He described the process for batch monitoring and stack sampling and noted that Helix is required to sample their water discharge weekly and report quarterly. He testified that New Castle County monitors them regularly for purposes of zoning violations. He reiterated that they were steered to the site and they knew it was M-2 zoning.

Last to testify was Tom Stevens, president and owner of Process Industries Inc., the next door neighbor of Helix. Mr.



Stevens testified that in his opinion that Helix was managed very well.

CONCLUSIONS OF LAW

The Honorable William A. Oberle, Jr., argued that the Secretary erred in granting a permit in that:

1. The decision did not properly consider, nor apply, the standards set out in 7 Del.C. Sec. 6003(c).
2. The decision did not properly consider, nor apply, the standards as set out in 7 Del.C. Sec. 6003(a)(2).
3. The decision did not properly consider, nor apply, the standard as set out in 7 Del.C. Sec. 6003(b)(2).

Mr. Oberle further argued that Helix had failed to demonstrate that it had zoning approval in New Castle County. Helix and the Department argued that the Department had granted an Air Permit and therefore water discharge issues were not relevant to the Air Permit. The Department had determined that a water permit was not necessary. They further argued that there was adequate proof of zoning compliance before the Hearing Officer.

The Board finds:

That the Secretary, in making his decision, was entitled to rely on the recommendations of his staff including those of his hearing officer Mr. Ramsey. The evidence before Mr. Ramsey regarding the issue of zoning compliance and hazardous wastes discharge was sufficient to support his conclusion that the proposed system, with safeguards, was adequate under DNREC regulations. Mr. Ramsey stated in the record that he considered all the evidence before him, and in reviewing this evidence, the

Board finds that Mr. Ramsey's conclusions were substantially based on the evidence before him. Therefore, the Board concludes that neither the Secretary nor Mr. Ramsey erred in finding that the permit issued Helix Pilot plant was adequate under 7 Del.C. sec. 6003(c), 6003(a)(2) and 6003(b)(2).

#### DISCUSSION

Section 6003(c) of Title 7 requires in relevant part:

The Secretary shall grant or deny a permit required by subsection (a) or (b) of this section in accordance with duly promulgated regulations and no permit may be granted unless the County or Municipality having jurisdiction has first approved the activity by zoning procedures provided by law.

The record before the Board indicates that the Secretary gave considerable consideration to the issue of zoning. A certificate of compliance was submitted with the Helix application.

(Bd.-A-10.) The New Castle County Complaints Office stated that Helix was not currently in violation in a letter dated January 19, 1987. (Bd.-A-29.) In response to a request for clarification by the Secretary, (Bd.-A-31), the Complaints Officer again stated that based upon information provided to her by Helix, that the pilot plant complied with New Castle County Zoning Laws. She went on to intimate that the office was prepared to take appropriate enforcement action should a violation occur. (Bd.-A-32.)

Mr. Ramsey stated in his recommendations to the Secretary, that the pilot plant, while it was not in operation, was in compliance with New Castle County Zoning. He went on to indicate that the pilot plant could be in violation if it used certain prohibited chemicals. (Bd.A-33.) The Secretary's Order found

that there was no current violation of County Zoning. The permit protected against the possibility of a future zoning problem by stating as a condition of the permit that it "may be revoked at the Department's discretion if at any time the applicant is found to be in violation of any Department rules or regulations or the New Castle County Zoning Code". (Bd. A-34.) Thus, there was sufficient evidence before the Secretary to indicate that the permit application complied with the zoning requirements, and sufficient procedural safeguards to protect against possible future violations of zoning laws.

Appellant's next argument was that the Secretary failed to properly consider and apply sections 6003 (a)(2) and (b)(2).

Sections 6003 (a)(2) states that:

No person shall, without first having obtained a permit from the Secretary, undertake any activity:

...(2) In a way which may cause or contribute to discharge of a pollutant into any surface or ground water...

Section 6003 (b)(2) states in relevant part:

... No person shall, without first having obtained a permit from the Secretary, construct, install, replace, modify or use any equipment or device or other article:

...which may cause or contribute to the discharge of a pollutant into any surface or ground water...

The appellant argued that Helix was required to have a permit to discharge pollutants and that the Secretary failed to issue such a permit. At no point did the appellant argue that the air permit granted by the Secretary was in itself improper,

The only testimony put on before the Board by appellant related to the possibility of water contamination in the event of an explosion or discharge at this site.

Testimony before the Board is sufficient to sustain the Department's position that a hazardous wastes discharge permit was not needed by the plant. The Department indicated that the Helix application was given careful consideration, and that a safety consultant was hired and an early warning system proposed and installed. The Department indicated that only process related discharges required permits, and there was no indication of a process related, hazardous discharge requiring a permit by Helix.

Furthermore, testimony before the Board by the Department indicates that the Department did discuss and consider the issue of hazardous wastes discharge but determined that a permit was not required in this case. The Board is satisfied that the Department gave adequate attention to this matter and that the Secretary is entitled to rely upon the expertise of the Department in making a permit determination.

The Hearing Officer found that the potential ground water contamination issue was not one that could be addressed in an air permit application which was before him. The Secretary incorporated this finding, and also states in his order that the applicant's permit may be revoked at the Department's discretion if at any time the applicant is found to be in violation of any Department rules or regulations. Therefore, in the event that a pollutant is discharged and such discharge of pollutant would

require a permit, the Department has both the option of requiring Helix to obtain a permit for said discharge, or revoking the Air Permit pursuant to the Secretary's Order, and may subject Helix to penalties for improper discharge.

DETERMINATION

The Board affirms the Secretary's Order.

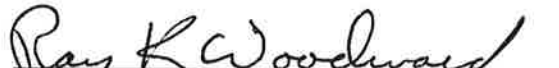
COMMENTS

The Board is not insensitive to the issue of potential water contamination caused by industrial facilities, and shares the appellants' concern about the future of the State's water supply. However, where this contamination is not the result of industrial process discharge, the Department can not require a permit. Regulation of the location of such facilities must be by county, and city authority, and hopefully through a clearly drafted , and current zoning code.

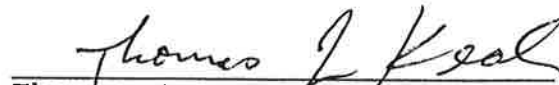
  
Evelyn Greenwood

  
Clifton Hubbard 7/22/87

  
Harry Derrikson

  
Ray Woodward

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Mary Sheldrake

  
Thomas J. Kealy

*Vote to override  
the decision of the Secretary  
Mary Sheldrake  
7-22-87*

Date: July 22, 1987

