

BEFORE THE ENVIRONMENTAL APPEALS BOARD  
OF THE STATE OF DELAWARE

Appeal of:

Knollwood Civic Association

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No. 88-02

This matter came before the Environmental Appeals Board on August 31, 1988 and October 20, 1988. The following Board members were present: Evelyn Greenwood; Mary J. Sheldrake; Harry Derrickson; Richard Sames. Deputy Attorney General Ann Marie Johnson advised the Board. Jacob Kreshtool, Esquire appeared on the behalf of the appellant, Knollwood Civic Association ("Knollwood"). Deputy Attorneys General Richmond L. Williams and Jean Langdon appeared on behalf of the Department of Natural Resources and Environmental Control ("DNREC"). Richard D. Kirk, Esquire, appeared on behalf of Citisteel, Inc.

SUBJECT OF THE APPEAL

The question presented for appeal was whether Secretary John Wilson properly entered into a Consent Order between Citisteel, Inc., dated June 1, 1988 on behalf of DNREC. This Consent Order placed certain obligations upon Citisteel, Inc. to study and propose clean-up and/or mitigate the hazardous effects of certain hazardous wastes at the site of the former Phoenix Steel Corporation plant. In consideration for this promise DNREC agreed to take no enforcement action at this time.

Knollwood states six reasons as grounds for its appeal. Essentially, Knollwood challenged the Secretary's authority to enter into the agreement, and questioned the Order's validity. The appeal also took issue with several aspects of the proposed actions to be taken by the Secretary. For the reasons stated below, the Board unanimously affirms the Secretary's decision.

#### STATEMENT OF FACTS

Paul Jones, Program Manager of the Hazardous Waste Management Section, testified for DNREC and provided the Board with most of the background information about the Consent Order. He testified that Phoenix Steel originally operated as a steel plant on the site. Citisteel, Inc. proposed to purchase Phoenix after Phoenix Steel had gone into bankruptcy. Because of the manner in which Phoenix Steel closed down operations, the plant had never been properly taken through the usual "decontamination process."

Mr. Jones further testified that a formal documentation and shutdown was not conducted at Phoenix in great detail because of DNREC's knowledge that there was an interested buyer for the site. Subsequently, he ordered Karen Mathison of his office to conduct a site inspection. The results of that site inspection are at Tab 16 in Board's Exhibit 1 (The Chronology) and are also attached to Board's Exhibit 2, the appellant's appeal letter. In his view, the electric arc dust and sludge were the most troublesome materials that were found by the inspection on site.

He stated that there had been no direct follow-up on testing, because the DNREC had information about a buyer. To the best of his knowledge, there are no public water supplies on site.

Mr. Jones noted that in order for hazardous wastes to be harmful, they need a migration path in order to be released into the environment and that they need somehow to be added to water or air. He also stated that an acid situation or leaking into water supply is necessary before waste resting on the ground becomes hazardous. He stated that even if the arc dust found on the property did migrate to the river, which would be the most likely migration path, this would not have a significant impact on the environment.

Mr. Jones explained that the purpose behind the Citisteel Consent Order was to get a study and to obligate a party who did own the property to do some clean-up of the waste on the site. In his view, the property would not qualify under the Superfund Statute, but he admitted that no such evaluation had been Actually done on the property. He noted that the removal of the asbestos on the property had been done by a licensed contractor. In his opinion, the Consent Order was the best alternative to other legal approaches to cleaning up the site. He went through the attachment to the Consent Order and explained the purpose behind each of the required actions and stated why they were, in his view, sufficient to meet the obligations of the statute. Also Mr. Jones stated that he had spoken to Mr. Lloyd, President

of Knollwood, and had attempted to meet them to explain the details of the order.

Mr. Jones stated that based on his experience the report was sufficient, and it had not been designed to be a total site characterization. The main thrust of the report was to identify some problems and characteristics generally at the site<sup>1</sup>.

Karen Mathison, of the Division of Air and Waste Management, Hazardous Waste Branch, explained the study of the site in more detail. Ms. Mathison is an environmental scientist. She admitted that she had not done a completely exhaustive review of the Phoenix property. Rather, she conducted a "multimedia inspection," and representatives from air, waste and water all participated in the inspection. Her methodology was to review all prior inspection reports on the site to look for areas of past concern. She also met with Mr. Meyer, the former Plant Manager, and asked him to identify hazardous wastes on the property. She reviewed an environmental study from BATA Associates which had been made for another potential buyer of the

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<sup>1</sup>For the purpose of the statement of facts, the Board is not reciting the facts as they necessarily were presented before them at the hearing. Actually, George Losse for Knollwood was the first to testify. After his testimony, the Board requested that the Department's witnesses testify next so that they might have a better understanding of the facts leading up to the Consent Order. After that State witnesses, Karen Mathison and Paul Jones, Tim Lloyd testified for Knollwood, and Joseph Hearn, Plant Manager for Citisteel, testified for Citisteel.

site. Some areas were not visually inspected because of the high grass and the size of the parcel. After her visual inspection, she asked for follow-up documentation and a site map, and she tried to determine the history of the waste management on the site. After reviewing the follow-up documentation, she felt satisfied that the former wastes produced on the property were properly shipped. She also stated that there was no follow-up testing done on the property because DNREC was notified that there was interested buyer for the site. The only hazardous waste on the site was the arc furnace dust. Other materials found, i.e. zinc, PCBs, oil, and asbestos are not considered "listed" hazardous wastes (they may be hazardous materials, however).

The next witness to testify for Knollwood was George Losse. Mr. Losse is a resident of Knollwood, a retired engineer and is self-employed. Mr. Losse took the Board through Exhibit A to the Consent Order and testified about inconsistencies he found between the Order and the Report submitted by the department (at Tab 16 of Board's Exhibit 1). One of Mr. Losse's continuing concerns was that the Order only referred to regulations but did not state which regulations. Mr. Losse felt that many of the areas referenced were not sufficiently tested. He felt that the Order was not sufficiently specific in order to give the public notice of its contents. He testified that the State of Delaware had made objections in the Phoenix Steel bankruptcy based upon

the existence of hazardous wastes at the site. Those objections were put in the record as Knollwood's Exhibit 2 and 4. However, later in cross-examination Mr. Losse admitted that he was not aware that these objections had been withdrawn. Knollwood's second witness was Tim Lloyd, President of Knollwood Civic Association. Mr. Lloyd demonstrated to the Board, by indicating on the map, where Knollwood development existed in relation to the Citisteel site. He estimated that the closest house was roughly 200 feet from where he claimed hazardous waste were produced. Mr. Lloyd also introduced some photographs into the record which purported to be photographs of arc dust being blown into the air (Knollwood's Exhibits 6 through 9). Knollwood's Exhibit 6, 7 and 8 are dated October, 1983. Exhibit 9, dated May, 1988, shows a view of the arc furnace. He stated that Knollwood residents had recently seen smoke emitting from the site. Mr. Lloyd referred to the E.P.A. report dated November 10, 1982 (DNREC Exhibit 1). Mr. Lloyd's basic contention was that this report indicated that there were hazardous wastes on the site. In Mr. Lloyd's view, the arc dust pile should be removed completely and not just capped or migration of the arc dust otherwise limited. Mr. Lloyd felt very strongly that the State's action was not in Knollwood's best interest. He stated that he had been to the Governor's Office and had contacted his State and National representatives. He felt that DNREC should have

advertised the Consent Agreement and held a public hearing at which he would have been able to express his opinion.

On cross-examination, and when taken through Exhibit A of the E.P.A. report (DNREC Exhibit 1), Mr. Lloyd admitted that the site inspection report, page 5 of 10, found no non-worker injury exposure, no worker injury exposure, no reported contamination of a water supply, no reported contamination of a food chain, and no reported contamination of surface water. Moreover, there was no contamination of air observed and no noticeable odors. The report did state that based on sample results of the on-site soil and pond water that there was a very high probability that shallow ground water was being contaminated by leaking of inorganic pollutants. Mr. Lloyd did admit that at minimum Exhibit A sought to require Citisteel to limit migration of the electric arc dust by "slope stabilization, cap, run-off control, monitor."

The last witness to testify was Joseph Hearn, Plant Manager at Citisteel. Prior to his employment by Citisteel on June 3, 1988, he was employed by Phoenix Steel. Mr. Hearn stated that he was familiar with the electric arc furnace dust piles and stated that the material had existed on the site prior to 1980. After 1980, Phoenix was required by regulation to remove the electric arc dust which was created on the site. He stated that the source of the billowing smoke which had been seen by Knollwood residents recently was the furnace, which had been refurbished by

contractors. Apparently sparks had ignited on the oil spill and there was a very short fire which was extinguished in ten minutes. He stated that DNREC had not given them a citation for this.

On cross-examination, Knollwood presented a letter dated March 27, 1985 from Mr. Robert Touhey, of DNREC, to Mr. John Meyers, of Phoenix Steel, stating that approximately 35 tons of electric arc dust had been improperly stored at the facility in a waste pile. Mr. Hearn stated that he was unfamiliar with the letter, that Mr. Myers was no longer working for Citisteel, and that the tanks containing the arc dust had been since emptied in 1985. He stated that while working at Phoenix Steel it was not uncommon for a manager to take this action without his knowing it.

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

As DNREC agreed to provide the appellant with copies of applicable regulations referred to generally in the Consent Order, this issue of concern is no longer before the Board. The Board finds that the Secretary has the authority to enter into Consent Orders when he seeks to further the ends of Title 7. Section 6001 (b) states that the policy underlying Chapter 60 is to protect, conserve and control the State's natural resources in land, water and air to assure their "reasonable and beneficial use in the interest of the people of the State." The provisions of Chapter 60 are to be broadly construed with the protection of



the environment and the lives, health, safety, and welfare of the citizens of the state as the first priority, see Hindt v. State, Del. Supr., 421 A2d. 1325 (1980).

Section 6003 prohibits any persons from causing or contributing to the discharge of air and water contaminants.

Chapter 63 further regulates the treatment of hazardous waste:

. . . The stated policy of this section is (1) to protect the public health and safety, the health of organisms and the environment from the effects of the improper, inadequate or unsound management of hazardous waste; (2) to establish a program of regulation of the storage, transportation, treatment and disposal of hazardous waste; and (3) to ensure the safe and adequate management of hazardous waste within this state...

7 Del. C. Section 6301.

The Board finds that the Consent Order served to memorialize an agreement between Citisteel, Inc. and DNREC in which Citisteel promised to clean-up and/or provide a plan to minimize the effect of and regulate certain hazardous and other waste on its site. The Board finds that Citisteel, Inc. was not responsible for those wastes being present on the site. The Board is mindful of the fact that the Consent Order was a negotiated arrangement and may not represent the best of all possible worlds as far as either party is concerned. However, the Board notes that the order contains many changes which protect DNREC's right to monitor the outcome of the study and clean-up. Citisteel must comply with State and Federal laws and regulations with regard to any future activities on the property, and must obtain all the

necessary permits to operate the property as a steel mill. The parties must agree to negotiate a subsequent Consent Order should Citisteel cease to actively use the property for a steel mill for more than one year or is converted to another use. Citisteel must submit a plan to the Secretary which includes the methodology to be employed in carrying out the tasks to be performed and a projected timetable for completion of the work, and must report to the Secretary if an unknown condition at the property that creates a danger to the public is found. Any soil contamination caused by hazardous wastes must either be removed or isolated to minimize migration. Finally, the Order also states that if the parties fail to negotiate such an agreement, DNREC may take whatever legal action was originally open to them prior to the Order. These protections are broad.

The Board also finds that the appellants provided no expert testimony which indicated that any of the proposed methods of clean-up were insufficient to protect the public pursuant to the standards of Title 7. The Board specifically rejects Items 1 through 3 of the appellant's reasons for appeal which state that the Consent Order is unenforceable due to the contingency upon Citisteel's obtaining good title to the property, getting all permits, and use of the property. Although there was no expert testimony on the legality of the agreement, the Board concludes that even so, these contingencies do not render the agreement void. Even if any of the conditions are not met by Citisteel,

the public is protected because the Secretary has all of the enforcement options open to him that he had prior to entering into the agreement. The Board also finds that the Secretary has the authority to waive any aspects of the Order by showing of good cause, if he deems this to be a desirable undertaking.


Finally, the Board finds that a hearing was not required under the hazardous waste regulation sub-part D of Section 260.11. This section requires the Secretary to "publish and provide at least 30 days for public comment on any proposed settlement of the state enforcement action." There was no evidence before the Board to indicate that any enforcement action had been undertaken against CitySteel, Inc.


STATEMENT OF BOARD ACTION

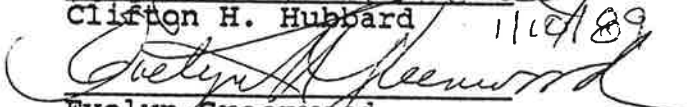
For reasons stated above, the Board affirms the Secretary's decision.

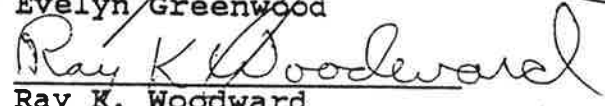
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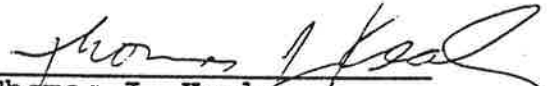
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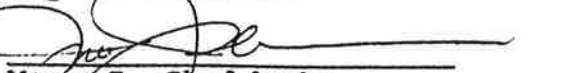
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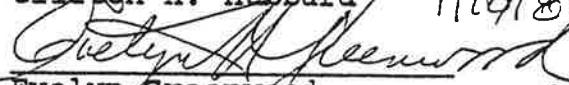
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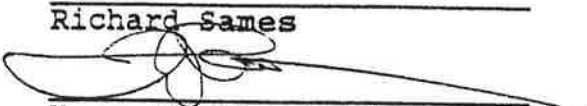
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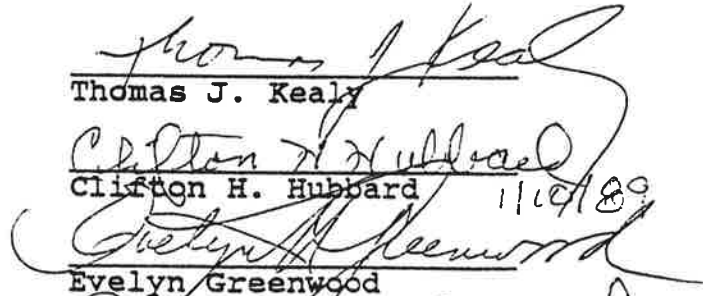
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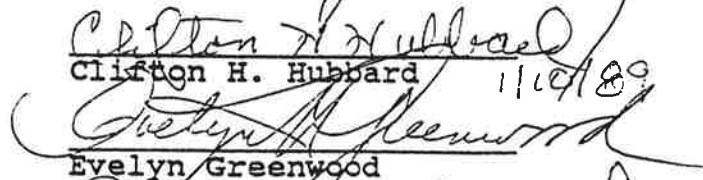
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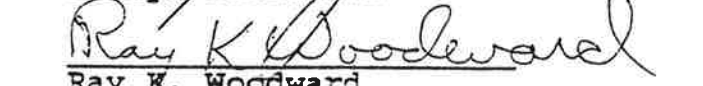
  
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### COMMENTS

The Board recommends that whenever a controversial matter of interest to the public is resolved by Consent Order, as was the case here, the public should be given some opportunity to comment even when this opportunity is not required under statute or regulation. While the Board is aware that a full-fledged hearing may place an administrative burden on DNREC, in many instances much time and effort may be saved by using this process and giving the public its opportunity to comment. At minimum, the Board feels that publication with time for notice and comment would be helpful.

