

BEFORE THE ENVIRONMENTAL APPEALS BOARD
OF THE STATE OF DELAWARE

The Appeal of:

Coalition for Natural Stream Valleys, Inc.

90-09

and

Robert J. Jordan

FINAL ORDER

This matter came before the Environmental Appeals Board on May 8, 1990. The following Board members were present: Thomas J. Kealy, Chairman, Richard Sames, Edward W. Cronin and Clifton H. Hubbard, Jr.; Roger A. Akin, Esq. appeared on behalf of appellant, Coalition for Natural Stream Valleys, Inc. ("Coalition") and appellant, Robert J. Jordan, appeared pro se. Deputy Attorney General Frederick Schrank represented the Department of Transportation ("DELDOT") Deputy Attorney General Jeanne Langdon and Deputy Attorney General Kevin Maloney represented the Department of Natural Resources and Environmental Control ("DNREC"). The Board was advised by Deputy Attorney General Donald E. Gregory.

SUBJECT OF THE APPEAL

The question presented for appeal was whether Edwin H. Clark, II, Secretary of DNREC, properly approved a subaqueous permit application by DELDOT for the reconstruction of a bridge. The appellant Coalition contends that:

1. The hearing officer's report was inadequate and therefore, the Secretary could not have made an informed decision.
2. The Secretary should have ignored the categorical exclusion and should have ordered an environmental impact study.

3. The Memorandum of Agreement between DNREC and DELDOT was prejudicial.

SUMMARY OF THE EVIDENCE

The Board submitted the Chronology, including the transcript of the permit hearing before the hearing officer, as Board Exhibit 1.

The background of the permit application shows that DELDOT initiated a project in 1983 to replace Bridge 218 which covers Hopkins Bridge Road across White Clay Creek. The current bridge consists of a one-span (90 ft) Bailey bridge which was installed temporarily in 1979 to replace a deteriorated truss bridge.

In 1984 E. I. duPont de Nemours and Company donated approximately 528 acres along White Clay Creek in New Castle County to the State of Delaware and approximately 1234 acres in Chester County to the State of Pennsylvania for a park for recreational use. The donated property was named the White Clay Creek Preserve ("Preserve") and the legislatures of both States created the White Clay Creek Preserve Bi-State Advisory Council ("Council") to advise the States on the use of the property.

In August of 1989 heavy rains and high water caused damage to the abutments which resulted in the closing of the bridge.

In August of 1989 a Memorandum of Agreement between DNREC and DELDOT concerning the bridge was drafted. (Chronology A)

In September 1989 DELDOT filed an application for a subaqueous lands permit to construct the bridge which would be located on the border of the Preserve (Chronology B). A public hearing was held on December 13, 1989 to receive public comments and the record was left open an additional 15 days to receive written testimony.

The hearing officer, Rodney Thompson, recommended approval of the permit (Chronology J, p. 7) on January 26, 1990. The Secretary subsequently issued the permit subject to certain conditions. (Chronology L, M)

The first person to testify was Ms. Dorothy Miller. Ms. Miller is corresponding secretary for the Coalition and a member of the Council. She stated that it is the Council's position that the bridge should be more modest in design in keeping with the character of the Preserve. Ms. Miller stated that bridge project would affect the "flow characteristics" of the creek and would cut a large path of vegetation destruction along the shoreline. She stated that vegetation destruction would affect natural filtration, wildlife cover, shade, and water temperature. She also expressed concern over fragmentation, especially its effect on a species of bird known as the Cerulean warbler.

Also expressing concern about the stream was Mr. Desmond Kahn, an assistant professor at the biology department at West Chester State College and president of White Clay Creek Fliers. Mr. Kahn stated the creek is a premier trout stream and that although it is stocked with trout by DNREC in the spring, there are some which hold over into summer and fall and that these trout would be affected by the increased water temperature that would result from the bridge project. He also expressed concern over channelization and the effect it would have on the trout population. Mr. Kahn stated that he was not familiar with the 26 "conditions" which were made part of the permit and conceded that these conditions could mitigate or alleviate the concerns raised by him.

Mr. Robert Lake, retired professional staff member of the department of entomology at the University of Delaware, also raised questions about the stream. Mr. Lake stated he has performed research in tributaries near the bridge and his primary concern was siltation. Mr. Lake conceded that he was not familiar with the conditions of the permit and whether these conditions fully addressed his concern.

Mr. Roland Roth, President of the Coalition raised avian concerns. Mr. Roth explained that there are 12 species of migrant bird, including the Cerulean warbler, in the vicinity of the bridge. He noted that 8 are neo-tropical birds who are area sensitive and are declining in population. Mr. Roth also stated that there is uncertainty as to what will happen to the birds if the permit grant is upheld. He also explained that none of the birds are on the federal endangered species list.

The second appellant is Mr. Robert J. Jordan. Mr. Jordan is the State Geologist and he pointed out that he was appearing in his individual capacity. Mr. Jordan stated that the area is in the 100 year flood plain and expressed concern over possible flooding if the bridge is constructed. He questioned whether the Memorandum of Agreement entered into by DELDOT and DNREC "compromised the situation."

Mr. Edward Cairns, a chemist and member of the Cecil County Planning Commission provided testimony regard the bridge design. Mr. Cairns asserted that the bridge, as proposed, was larger than it needed to be. He presented information from the American Associations of State Highway & Transportation Officials ("AASHTO") in support of this assertion (Coalition Exhibit "5").

Also commenting on the bridge design on behalf of the Coalition was Mr. Eldon Homsey, an architect. Mr. Homsey stated that although he is not a highway engineer, common sense indicates that the proposed bridge is larger than it needs to be. He pointed out single lane bridges on Casho Mill Road in Newark and near the Ashland Nature Center as evidence that a single lane bridge would be sufficient in this instance.

Mr. Charles Salkin who is employed by the Division of Parks and Recreation of DNREC stated that 2 1/2 to 3 years ago there was discussion that Bridge 218 was among priority in the State for replacement. He stated

that there is no reason to believe Hopkins Road will be the major roadway in the future. He added that DELDOT could not make additional improvements to the new bridge without DNREC approval and that DNREC and DELDOT are committed to eventual use of Hopkins Road as a park road. Mr. Salkin stated that DNREC was concerned over aesthetics, the size of bridge, and use of the bridge by trucks and that the modifications made to the bridge and prohibition of trucks satisfied these concerns.

Mr. William Moyer, Manager of the Wetlands and Aquatic Protection Branch of DNREC stated that in subaqueous matters DNREC primarily looks at water quality and navigation matters. He stated that in this bridge project any adverse effects to water quality will be short-lived. Mr. Moyer confirmed that the Secretary requested that the hearing officer make a decision as soon as possible. He also confirmed that the transcript of the hearing before the hearing officer was not transcribed until March 20, 1990, but that the concerns expressed at the public hearing were addressed in the conditions which were made part of the permit.

Mr. Raymond Harbeson, Deputy Director for Preconstruction, DELDOT explained that the project started out as a "normal rural bridge design" and was adjusted as concerns were raised by DNREC. He also stated that there were several open discussions concerning the scope of the bridge. Mr. Harbeson explained it was from discussions with Ms. Miller and others that the Memorandum of Agreement was drafted. Mr. Harbeson testified that the new bridge can be adapted to a park road in the future and current bridge design accommodates pedestrians and bicyclists. He pointed out that many of the changes made as of result of discussions with DNREC and the Council actually led to a wider bridge than that proposed by DELDOT. He also added that DELDOT has indicated a need for a new corridor in White Clay Valley area, but there has been no determination that Hopkins Road will be the corridor and in fact, the goal is to move the highway corridor out of the sensitive wildlife areas.

Mr. Michael Angelo, Supervising Engineer, DELDOT testified that bridges are designed in accordance with AASHTO standards. He explained that Hopkins Road is a rural road under AASHTO and that the proposed bridge cannot be made smaller, still meet AASHTO standards and handle the anticipated traffic increase 8-10 years from today. Mr. Angelo explained that Mr. Cairns used the wrong AASHTO table in determining bridge requirements. Mr. Cairns used "Collector Road Tables" when he should have used "Local Road Tables" of AASHTO. He stated that Hopkins Road is rated as a local road. Bridges for local roads are larger than those for collector roads. (DELDOT Exhibit 3) Mr. Angelo noted that one lane bridges are unacceptable under AASHTO and therefore, no standards exist for such bridges. He stated many design changes were made, including stone facing the bridge at a cost of \$100,000.00., to accommodate DNREC and the Council

Joseph Wutka, Location Studies and Environmental Engineer, DELDOT commented that construction of the bridge is a federal aid project, but that the process would not have been significantly different if the federal government was not providing aid because the state and federal requirements are very much the same. He explained that an environmental impact study was not performed because a categorical exclusion was granted the Federal Highway Administration under the National Environmental Policy Act. Mr. Wutka explained that a categorical exclusion is granted under federal regulations when the Federal Highway Administration determines that no substantial environmental controversy exists. He further stated that the Federal Highway Administration reviewed the project in 1988 and renewed the categorical exclusion and in his view, this was correct.

Mr. Robert Wheeler, Realty and Highway Specialist, Federal Highway Administration testified that he had previously discussed the issue of whether an environmental study was needed with Ms. Miller. He explained that the categorical exclusion granted initially in 1984 and reaffirmed earlier in 1989 was still valid after the public hearing. He added that it was his opinion that

just about everyone involved agreed that a new bridge was needed and that the issue was not an environmental issue, but whether Hopkins Road would be a major corridor in that area.

Mr. Robert Park, Director of Planning for DELDOT, testified that traffic on Hopkins Road was already at the level predicted 5 years ago for the year 2000. He stated that the existence of the Hopkins Road bridge would not be a factor in determining where the corridor will be located. He also added that no upgrading of the bridge or road beyond that found in the permit is anticipated.

Mr. George Pierson, a resident of the area expressed concern about the increased use of Chambers Rock Road. He stated that Chambers Rock Road was dangerous and urged the Board to approve the permit to provide relief to Chambers Rock Road.

The final person to testify was Mr. Eugene B. Snell, a Newark resident. He asked that the Board approve the Secretary's decision to assist residents who need access to Hopkins Road.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action was brought pursuant to Chapter 72 of Title 7, the scope of which is broad. Its purpose is to . . . "deal with or dispose of interest in public lands and place reasonable limits on the use and development of private subaqueous lands, in order to meet the public interest by employing orderly procedures for granting interest in public subaqueous and for issuing permits for uses and changes in private subaqueous lands." In the Statement of Policy in the Regulations Governing the Use of Public Subaqueous Land the policy of the State is declared to be "(1) the development, utilization and control of the water resources and public subaqueous lands shall be directed to make the maximum contribution to the public benefit, and (2) the State, in its exercise if its sovereign power, acting through the Department of Natural Resources

and Environmental Control, shall control the development and use of the water resources and subaqueous lands of the State so as to effectuate full utilization, conservation, and protection of these resources."

Chapter 72 and the regulations do not strictly prohibit use of subaqueous lands where the environment may be somewhat adversely affected, but rather they require a balancing of two interests. Those two interests being the maximization of the public benefit and the protection of the subaqueous lands.

The regulations further provide that in processing applications for permits, DNREC is required to evaluate an application "in light of its overall policy and its recognition of sound estuarian conservation practices, as well as a due regard for the general interest and welfare of the people of the State. (Regulation §1.07) Public projects such as bridges "shall have a minimum detrimental affect on water pollution, navigation, fish and wildlife and public and riparian rights (Regulation §4.02).

Thus, in the present matter the Secretary was required to balance the general interest and welfare of the public in the safe transportation of goods and people against the effects on the environment.

Based upon the record before it the Board makes the following findings:

1. The Board finds that the evidence before the hearing officer, Mr. Thompson, was sufficient to support his conclusion and recommendation. In his report Mr. Thompson stated that he considered the policy, scope and purpose of the regulations governing subaqueous land use and water quality. He also stated in his report that he considered the environmental issues which were raised, the responses of DELDOT to these issues (including the post-hearing concerns raised by DNREC) and he determined that the bridge project was adequate under DNREC policy and regulations.

2. The Coalition contends that there was substantial controversy regarding the permit and the Secretary should have read the transcript of the hearing before making a decision. The Board finds that the Secretary in making his decision was entitled to rely on the recommendation of the hearing

officer. The Board further finds that the information before the Secretary (i.e. permit application, letters from public, the hearing officers report and post hearing modifications) was sufficient to enable him to make an informed decision.

The secretary must be able to rely on the hearing officer's report and whatever evidence is before him. He is not required to read every transcript of a hearing.

3. The Coalition's next argument is that substantial controversy exists and therefore there was an improper grant of the categorical exclusion by the federal government. The Coalition stated that the Board does not have "jurisdiction" to reverse the federal action, but that the Board should examine the basis for granting the categorical exclusion and find that no proper basis existed.

The Board agrees that it has no authority to reverse the categorical exclusion. The Board is also satisfied after a review of the record and testimony, especially that of Mr. Wheeler of the Federal Highway Administration, that there was a proper basis for granting the exclusion.

4. Both appellants argue that the Secretary had predetermined his decision and point to the Memorandum of Agreement to support their claim. There is no allegation of secrecy regarding the execution and existence of the Memorandum of Agreement and the Board finds that none exists. The evidence indicates that the "agreement" actually arose out of open discussions between the Council, DELDOT and DNREC.

The appellants also appear to place much weight upon a notation appearing on a copy of the memorandum appointing the hearing office (Coalition Exhibit 9). The note is from one DNREC employee Robert Zimmerman to another employee, William Moyer and the note states:

"Jerry informed me that Toby wants to be able to make a decision on this project on the 14th. Do you envision any problems with that? See me ASAP."

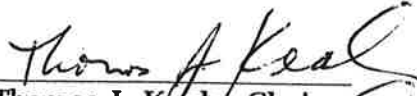
(Testimony revealed that "Jerry" was reference to Gerard Esposito a DNREC employee and "Toby" was reference to the Secretary). This notation is not sufficient to support the allegation of the appellants. The Board notes that the hearing officer did not make an immediate decision, but left the record open to receive additional comment from the public. The hearing officer did not make his decision until January 26, 1990 which was more than one month following the public hearing. The Board is not persuaded that the Secretary had predetermined his decision.

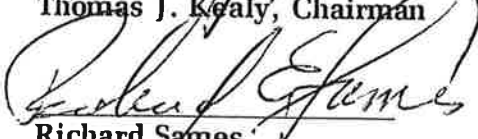
5. The Coalition's next argument was that the bridge design was larger than it needs to be. Testimony was provided by Mr. Cairns that a smaller bridge could be built and by Mr. Homsey that a one lane bridge could be built. The testimony of the DELDOT engineers refuted the testimony of Mr. Cairns and Mr. Homsey. The engineers' testimony showed that a one-lane bridge is unacceptable by AASHTO and a that Mr. Cairns, a non-expert, applied incorrect information in reaching his conclusion that a smaller bridge could be built. There was also evidence that the bridge was somewhat larger because of design changes made in response to concerns of the Bi-State Council and DNREC. Therefore, the Board finds that the Secretary properly approved the permit for the bridge as it is currently designed.

6. The Board finds that the Secretary properly balanced the public interest in a bridge to safely transport people and goods and the need to protect the environment. The Board also finds that public concerns were addressed by the incorporation of the conditions into the permit. With the addition of these conditions, the bridge will have a minimum detrimental affect as required by Regulation §4.02.

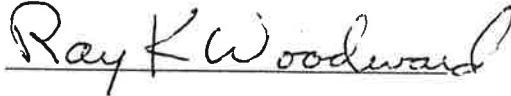
STATEMENT OF BOARD ACTION

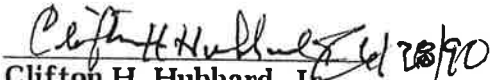
For the foregoing reasons, by a vote of 3 to 1, the Board hereby
AFFIRMS the decision of the Secretary.


Thomas J. Kealy, Chairman


Richard Sames


Edward W. Cronin




Clifton H. Hubbard, Jr.

DATED: June 28, 1990

