BEFORE THE ENVIRONMENTAL APPEALS BOARD

OF THE STATE OF DELAWARE

APPEAL OF:	)	Appeal Nos. 92-06
	)	92-08
TIDEWATER UTILITIES, INC., et al	)	92-09
	)	

FINAL ORDER

The Environmental Appeals Board ("Board") held a hearing on this appeal on January 26, 1993. The Board Members present were Thomas J. Kealy, Chairman, Mary Jane Willis, Clifton H. Hubbard, Jr. and Ray K. Woodward. Steven C. Blackmore, Deputy Attorney General, advised the Board. Appellant Tidewater Utilities, Inc. ("Tidewater") was represented by Richard J. Abrams, Esquire. The Secretary of the Department of Natural Resources and Environmental Control ("Secretary") was represented by Deputy Attorney General Kevin P. Maloney. The Permittee, Wilmington Suburban Water Corporation, was represented by Kathy L. Pape, Esquire. Intervenor, Martelli-Davidson Group, Inc. ("Martelli"), was represented by William D. Bailey, Jr., Esquire. The Board upholds the decision of the Secretary.

SUMMARY OF THE EVIDENCE

This appeal involves a dispute between two water utilities over service to the Drawyer's Creek sub-division in New Castle County. These utilities also have competing applications pending for Certificates of Public Convenience and Necessity

("CPCN") to service other nearby areas of southern New Castle County. The Secretary granted Wilmington's application for service to Drawyer's Creek in Secretary's Order No. 91-002 ("Order"). The Secretary then issued 90-CPCN-13 on November 19, 1991. At the time of the Order, Wilmington had another pending CPCN application for service to a nearby sub-division. Tidewater had applied for a CPCN to service a larger area, including the two sub-divisions Wilmington desired to serve. The Secretary had conducted a joint public hearing on all three applications. However, he only granted one CPCN which did not resolve the entire controversy. At the time of the hearing before this Board, the Secretary had decided some, but not all, of the related CPCN applications filed by these two water companies.

Tidewater contends, inter alia, that the Secretary should have decided all three applications initially since he held a hearing to consider all three applications. Tidewater wanted a comparative decision. Also, it objects to a decision which is contrary to the establishment of a regional water development policy, which would be in the best interest of the public. The other participants contend that the Secretary's decision should be affirmed since he did not err by granting the CPCN to Wilmington. Testimony was presented by John F. Alexander, President of Tidewater, and John P. Hollenbach, Assistant Manager of Wilmington. A portion of the testimony before the Board was devoted to applications filed after the issuance of

the Order, and other recent developments. While this testimony provided background information, the Board placed little weight on these later events. The Board will not provide an advisory opinion on other CPCN applications before the Secretary decides them.

FINDINGS OF FACT

1. Wilmington has an executed water service agreement with Martelli to provide water service to the Drawyer's Creek sub-division.

2. The Secretary indicated that Drawyer's Creek had a pressing need for water service and the Board does not doubt this conclusion.

3. The Drawyer's Creek water service agreement was entered into the record below after the Hearing Officer re-opened the record for this purpose. The Board does not find this to be arbitrary, erroneous or significant for the reasons that follow.

CONCLUSIONS OF LAW

This appeal primarily involves the language of Senate Bill No. 144 as amended, codified at 7 Del. C. sec. 6075 et seq. Senate Bill No. 144, enacted July 9, 1991, changed the rules regarding the issuance of CPCNs. It also applied these new rules to existing applications such as the ones at issue here. Senate Bill No. 144 made signed water services agreements an important focus of the Secretary's inquiry. Therefore, when the Hearing Officer reacted to Senate Bill No. 144 and reopened

the record to admit the signed water service agreement with Martelli, he did not act improperly. He was following Senate Bill No. 144. The public hearing on the competing applications had been held before passage of Senate Bill No. 144.

The Order indicates that it was limited in its scope due to the new guidelines from Senate Bill No. 144. The law regarding CPCNs is becoming more developed and the Secretary has issued other CPCNs and participated in two CPCN appeals to this Board. The Secretary has apparently decided to resolve the competing applications here on a piecemeal basis, as signed water service agreements are executed. While Tidewater argues that foresight and public policy should dictate acceptance of its large area CPCN application, it has received subsequent CPCNs for individual subdivisions.

This Board interpreted Senate Bill No. 144 in an earlier CPCN appeal (In Re: Schulte), which should be consulted for additional references. In Schulte the Board concluded that the language of Senate Bill No. 144 authorizes the Secretary to issue CPCNs in six possible situations. See 7 Del. C. sec. 6077(a). Under this section, the Secretary is obligated to issue a CPCN when (1) he ascertains that the existing water supply does not meet human consumption standards; (2) he ascertains that supply is insufficient to meet projected demand; (3) the applicant is in possession of a "signed service agreement with the developer of a proposed subdivision or development, which subdivision or development has been duly

approved by the respective county government" (section 6077(a)(1)(i)); (4) the majority of landowners petition for service; (5) the applicant has approval of the local government; or (6) "[t]he Secretary determines, by findings and conclusions based upon a public hearing record, that sound and efficient water resource planning, allocation, management and regulation would be implemented by the certification of a water utility service territory comprising an area larger than a service territory authorized by paragraph (a)(1) of this section." 7 Del. C. sec. 6077(a)(2). Here, Wilmington qualified for the CPCN because it had a signed water services agreement for an approved development under section 6077(a)(1)(i). Therefore, issuance of this CPCN was mandatory.

Tidewater, however, contends its large area application should have been granted under section (a)(2), which it would like to use to override Wilmington's application. Tidewater's argument must fail. First, the preamble to Senate Bill No. 144 shows that CPCN applications by unwanted utilities to service large land areas should be discouraged. Thus, the "area larger than a service territory authorized by paragraph (a)(1)" language from Section 6077(a)(2) should be limited to situations where an applicant entitled to a CPCN under (a)(1) is granted additional territory. The primary goal of statutory construction is to search for the legislative intent. Coastal Barge Corp. v. Coastal Zone Industrial Control Board, Del.

Supr., 492 A.2d 1242, 1246 (1985). See also Schulte at 16-18. The language of Senate Bill No. 144 shows that it changed the rules behind issuance of CPCNs and it placed a premium on executed water service agreements.

Regardless, Section 6077(a)(2) only requires issuance of a CPCN after the Secretary determines, in his discretion, that a CPCN should issue. After reviewing the evidence, the Secretary did not make such a decision here. Tidewater wants this Board to conclude that the Secretary, in his discretion, should have determined that a large area certification was required and that Tidewater should service that area. While compelling the Secretary to use his discretion in favor of one applicant would be unusual to begin with, it is not justified by the record in this case. Assuming certification of large areas would be in the best interest of the public, such certifications are not mandatory and the Secretary did not decide to certify a large area here. The decision to make large area certifications mandatory must come from the General Assembly, not this Board. Senate Bill No. 144 requires issuance of the CPCN when the applicant is in possession of a signed water services agreement. Wilmington had such an agreement here and therefore the

issuance of the CPCN to Wilmington was compelled by statute.

Conclusion

The Board determines by unanimous vote that the decision of the Secretary should be affirmed.

Thomas J. Kealy, Chairman

Clifton H. Hubbard, Jr. 3/9/93

Mary Jane Willis

Ray K. Woodward 3/9/93
Ray K. Woodward

DATE: March 9, 1993

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Conclusion

The Board determines by unanimous vote that the decision of the Secretary should be affirmed.

Thomas J. Kealy, Chairman

Clifton H. Hubbard, Jr.

Mary Jane Willis

Ray K. Woodward

DATE: March 13, 1993

88-04

BEFORE THE ENVIRONMENTAL APPEALS BOARD

OF THE STATE OF DELAWARE

APPEAL OF TEXACO REFINING & MARKETING, INC.	)	No. 88-04
February 14, 1989	)	

FINAL ORDER

This matter came before the Environmental Appeals Board on September 15, 1988. A quorum of the Board was present, including the following board members: Thomas J. Kealy, Chairman, Clifton H. Hubbard, Evelyn Greenwood, Ray K. Woodward, and Richard Sames.

Richard D. Allen, Esq. appeared on behalf of the appellant Texaco Refining and Marketing, Inc. ("Texaco"). Deputy Attorneys General Kevin Maloney and Robert Kuehl appeared on behalf of The Department of Natural Resources and Environmental Control ("DNREC"). The Board was advised by Deputy Attorney General Ann Marie Johnson.

SUBJECT OF THE APPEAL

The question presented for appeal was whether Secretary John E. Wilson erred by denying a request by Texaco for a temporary emergency variance, ("TEV") under 7 Del. C. 6012, from Regulations V, XI, and XIV of The Regulations Governing The

Control of Air Pollution.[1] Texaco applied for a thirty day

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[1]The standard set forth in 7 Del. C. Section 6012 is as follows in relevant part:

... (b) A temporary emergency variance may be granted only after a finding fact by the Secretary that:
(1) Severe hardship would be caused by the time period involved obtaining variances pursuant to Section 6011 of this title;
(2) The emergency was of such an unforeseeable nature so as to preclude, because of time limitations, an application under Section 6011 of title;
(3) The conditions set forth in subsections (b)(1)-(b)(4) of Section 6011 of title are satisfied.

(c) Temporary emergency variances granted pursuant to this section not be extended more than once.

Seven Del. C. Section 6011 states, in relevant part, that:

(b) The variance may be granted if the Secretary finds that:
(1) Good faith efforts have been made to comply with this chapter.
(2) The person applying is unable to comply with this chapter because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient time or the financial cost of compliance by using available technology is disproportionately high with respect to the benefits which continued operation would bestow on the lives, health, safety and welfare of the occupants of this State and the effects of the variance would not substantially and adversely affect the policy and purposes of this chapter;
(3) Any available alternative operating procedure or interim control measures are being or will be used to reduce the impact of such source on the lives, health, safety, or welfare of the occupants of this state; and
(4) The continued operation of such source is

(Footnote Continued)

temporary variance on June 28, 1988. Secretary Wilson denied that request, in full, on July 8, 1988. For the reasons stated below, the Board MODIFIES the Secretary's decision and AFFIRMS the Secretary's decision to deny the 30-day request for a variance. However, the Board stays all asessment of administrative penalties pending the resolution of the Conciliation Agreement between the parties dated June 8, 1988 [Texaco-Ex. 8]. If the parties fail to reach a consensus on any matter outlined in the Conciliation Agreement, then the Secretary may proceed with such administrative penalties as he deems appropriate. If the parties do reach consensus under the agreement, and all requirements of the agreement are complied with in full by Texaco, the Board orders that no further action with regard to administrative penalties shall be taken for the violations during the period of the requested variance.

SUMMARY OF THE EVIDENCE

As is its customary practice, the Board submitted the Chronology as Board Exhibit 1. The ill-fated history of the Fluid Coker Unit is by now, well known to the Board. According to the conciliation agreement entered into by the parties to this appeal on June 8, 1988 [Texaco-Ex.2], and testimony before the Board, the unit was shut down in March and April of 1987 for a

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(Footnote Continued)

necessary to national security or to the lives, health, safety or welfare of the occupants of this State.

voluntary shut-down. After roof tube failures on September 13, 1987, Texaco took the unit off-line, and the Secretary granted a 10 day TEV to complete repairs. Subsequently, the unit experienced wall tube failures, and the Texaco requested, and received, another four day TEV. When the unit, five days later, and after having been on line for 12 hours, experienced a third failure, this time in the superheater tubes, the Secretary denied the TEV request. This denial was reversed by the Board, and is currently on appeal in Superior Court.

Six months later, in April of 1988, the unit experienced yet another tube failure, in its superheater section, of a tube which had been replaced in September of 1987. The parties entered into the above conciliation agreement, in an attempt to find a solution to what was now a chronic problem. However, before any option for action had been agreed to by the parties, [Texaco-Ex-2, para. 5], the unit experienced a tube failure in a screen tube, a part of the super-heater. Texaco's request for a thirty day TEV, the subject of this appeal, was denied. [Bd. Ex-1, sec. 3].

Richard Beldyk, of Texaco, explained the purpose of the screen tube to protect the superheater from the shock of the heat, as one end is buried in the refractory. Mr. Beldyk stated that the refractory had been visually inspected during the turn-around, and that it had not had any discernible problems since the turn-around. Given the fact that this tube was

insulated inside the refractory, Mr. Beldyk indicated that there would be less reason to expect a failure in this tube.

Also testifying for Texaco was Cliff Herseim, Supervisor of Environmental Health and Safety, who talked about the events leading up to the TEV request and the conciliation agreement. In his view, the unit had a good operating history, and it has only been in the current run that the performance has been not acceptable.

Robert C. Mifflin, Assistant Plant manager, testified about Texaco's joint-venture relationship with Delmarva Power. He explained that under this joint venture, Texaco would either supply power or could buy power from Delmarva, as needed. He further explained that the cost to Texaco to purchase the power that it is not producing when the boiler is down is $25,000.00 per day. When asked about cutting operating rates, as an alternative measure, Mr. Mifflin replied that there was no measurable impact on air quality when they reduced rates, and that to do so would be very costly, ranging from $1.7mm to $2.3mm.

Finally, Mr. Richard Ladd testified about the history of air monitoring by the State and Texaco. He pointed out that the Secretary's Order [Bd.-1, tab 3] contained some incorrect information, in that the cyclone units which Texaco had installed cut the emissions in half. Thus, paragraph four of the Secretary's finding of fact should more correctly read estimated emissions of 280 tons of CO and 12 tons of TPS.

For DNREC, Dave Murphy, an environmental engineer, air resources division, explained the air monitoring data which DNREC introduced as its first exhibit. Terri Henry, an environmental scientist, air resources division, testified that she had tested the coker fly ash from the unit, and that it was petroleum coke. However, she could not verify that the ash was from the Texaco plant, but only that it came from a truck that was hauling the coke to the Marine Terminal.

Joe Kliment, a project manager with the Division of Air and Waste Management testified that in July of 1987, the EPA adopted new standards for measuring the impact of emissions on the public. This criteria, called PM-10 data, measures the concentration of particles in the air which are 10 microns or below, and are deemed to be more dangerous than other particles. He explained that as the closest air monitoring station to Texaco is located at Governor Bacon Health Center, and depending upon the wind direction on a given day, that the DRNEC could not safely conclude that there was no impact on the public from the additional emissions. The additional emissions also resulted from the fact that the electrostatic precipitator was not in operation. On cross, Mr. Kliment admitted that to the best of his knowledge, the Secretary had much of the same data available to him when he made his prior decisions.

Robert Taggart, Air Resources Program Manager of the Program Compliance Branch, testified that in his view, given the history of tube leak problems at Texaco, that the leak was foreseeable.

He stated that he had been in contact with officials in Avon, CA, who operate a similar refinery, and they have not experienced similar maintenance problems with their refinery. Thus, the implication is that Texaco is not using proper maintenance techniques.

He also confirmed that the DNREC had requested a reduction in emissions from Texaco, but that Texaco was unwilling to comply with this request. In his opinion, there is an impact upon the environment when the rate of emissions are reduced. He stated that the DNREC was disappointed with Texaco's unwillingness to reduce rates. He stated that while he couldn't remember an occasion when the Secretary ordered that such a reduction in emissions be undertaken, and that often in the past, when a TEV had been granted, Texaco voluntarily reduced emissions.

Robert French, Program Administrator from Air Resources testified that he agreed that an increase in emissions has an adverse impact on air quality. He believes that the purpose of the laws in Delaware is to protect air quality. He stated that he recommended denial of the TEV because of the apparent lack of good faith efforts to cooperate by Texaco, as exhibited by the refusal to cut back emissions, even temporarily, and the over-all problems with leaks generally.

Phillip Retalick, of Air and Waste Management confirmed that he understood that the California refinery which is similar to the Texaco refinery has had fewer problems. He stated that the conciliation agreement signed in June between the DNREC and

Texaco had been his idea, as a means of addressing the request for TEV made for violations which had occurred in May and April. He felt that the agreement might help to address the underlying problems that Texaco was having with the unit by encouraging Texaco to conduct a study and develope a plan for improvement.

On rebuttal, Mr. Mifflin testified that his understanding of the Avon, CA plant was that it used duct work in the back-up unit to take out particulates, and that Delmarva power has taken the position that this was not feasible for the Delaware unit. Mr. Hersheim testified that he had had discussions with DNREC about rate reduction, but was never led to believe that such reductions were required, only desired. The Secretary's Order did not require reduction of admissions as a condition for obtaining a TEV.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The requirements of sections 6011 and 6012 enable the Secretary to exercise some discretion with regard to his determinations of compliance under the statute. The provisions of this chapter are broadly construed, and the protection of the environment and of the lives, health, safety and welfare of the citizens of Delaware is its first priority. See Hindt v. State, Del. Supr.,421 A.2d 1325 (1980).

Pursuant to 7 Del. C. Section 6008(a) the Environmental Appeals Board is authorized to "affirm,modify, or reverse the decision of the Secretary" in an appeal brought by "any person whose interest is substantially affected by any action of the

Secretary...." In making its decision, the Board is required to "enter an order that will best further the purpose of [chapter 60]," 7 Del. C. Section 6006(4). Thus, the Board is not required to narrowly affirm or reverse the Secretary's decision,but is free to enter whatever decision, based on the entire record, will best further the purposes of the Chapter 60.

The Board finds that the source of the leak, in this case, was due to the failure of a screen tube. The Board further finds that the "emergency" was unforeseeable, as required in section 6012. However, Texaco is required to meet each of the four prongs of section 6011, and has failed to do so. The Board finds that Texaco's failure to voluntarily reduce operating rates, even for a short period of time is a failure to meet the third prong of section 6011. The language of section 6011 is clear. It states that "any available alternative operating procedure or interim control are being used." Section 6011(c), emphasis added. As far as the Board is concerned, some reduction in operating rates is an available alternative for Texaco, and voluntary compliance with such a requirement is an indicia of good faith. There was no dispute in the Record that reduced rates would reduce the particulate level in the atmosphere, and that to do so would benefit the citizens of Delaware. The Board does not reach a determination on whether Texaco met the first, second and fourth prong of the test, in light of the above discussion.

STATEMENT OF BOARD ACTION

The Board MODIFIES the Secretary's decision and AFFIRMS the Secretary's decision to deny the 30-day request for a variance. However, the Board stays all assessment of administrative penalties pending the resolution of the conciliation agreement between the parties dated June 8, 1988 [Texaco-Ex. 8]. If the parties fail to reach a consensus on any matter outlined in the conciliation agreement, then the Secretary may proceed with such administrative penalties as he deems necessary.

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