



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL
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Office of the
Secretary

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Secretary's Order No. 2008-CZ-0019

Re: Application of Peninsula Compost Company, LLC for a Coastal Zone Act Permit to Manufacture Up to 250,000 Cubic Yards Annually of Compost, Topsoil and Mulch Products at 601 Christiana Avenue, City of Wilmington, New Castle County-CZA Project No. 374P

Date of Issuance: **May 15, 2008**

Effective Date: **May 15, 2008**

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department") by *29 Del. C. §§8001 et seq.*, *7 Del. C. Chapter 60* and the Coastal Zone Act in *7 Del. C. Chapter 70* ("CZA"), the following findings, reasons and conclusions are entered as an Order of the Secretary:

On January 9, 2008, the Department received an application from Peninsula Compost Company LLC. ("Applicant"), which the Department determined was complete on March 3, 2008. The Applicant seeks a CZA permit to manufacture up to 250, 000 cubic yards per year of compost, mulch and topsoil products on an eighteen acre site within the Coastal Zone at 601 Christiana Avenue, City of Wilmington, New Castle County ("Facility").

The Applicant proposes to construct a 15,000 square foot building to process the supplies used in the manufacturing, which consists of separated food waste sources, recyclable wood products, yard waste and soils. The proposed manufacturing is consistent with the local zoning laws and ordinances. The Applicant estimates that the manufacturing will require at least ten new permanent jobs, and approximately twenty

temporary construction jobs. The Applicant negotiated a “Community Benefits Agreement” with local community organizations to encourage hiring from within the nearby communities and other terms and conditions. The Applicant’s proposed manufacturing would release up to an estimated 1.9 tons per year of air pollutants, which the Applicant proposes to offset by paving the surface to reduce dust and by lowering the release of pollutants at the nearby Cherry Island landfill. The Cherry Island landfill would otherwise receive much of the supplies to be used in the proposed manufacturing of compost, and the Secretary’s Assessment preliminarily accepted the offset as satisfactory under the Department’s *Regulations Governing Delaware’s Coastal Zone, 7 DE Admin. §§1100 et seq.*, which require an applicant to “clearly and demonstrably” offset any negative environmental impacts that would be caused by the proposed manufacturing.

The Department held a duly noticed public hearing on February 28, 2008 at the Department’s Lukens Drive office in New Castle. Representatives from the Department, the Applicant and members of the public were present at the public hearing. The Department received public comments in support of issuing the permit based in part of the Applicant’s negotiation of a “Community Benefits Agreement.” One comment expressed concerns with the Facility’s operations, but this concern I find entails possible future enforcement action if the Applicant does not comply with the Department’s laws and regulations.

The Department’s Senior Hearing Officer, Robert P. Haynes, in a May 6, 2008 report (“Report”), which is appended hereto and incorporated herein, recommends issuance of the permit subject to such reasonable conditions the Department determines

are appropriate to protect the environment and public health consistent with the CZA and the Department's other laws and regulations.

I find and conclude that the Department should approve the issuance of a CZA permit to the Applicant, as recommended by the Report, which is hereby adopted to provide further reasons for this Order. This decision is based upon the Department's administrative record, including the public hearing record, and the technical expertise of the Department's personnel. I find that the Facility will benefit Delaware and the local economy. The Facility will bring ten permanent jobs to a community that could use employment opportunities. The Facility's operation as a recycling type manufacturing will reduce the use of Delaware Solid Waste Authority's Cherry Island sanitary landfill by allowing separated food waste items, yard waste, wood products and soils to be recycled into compost, mulch and topsoil for beneficial reuse as consumer products. The Department long has supported recycling as a good environmental policy for reducing the reliance on sanitary landfills for items that can readily be recycled. The food waste, yard waste and wood products that will be used in the manufacturing can and should be recycled through the Facility and not placed in Cherry Island for permanent landfill disposal, which would use diesel machinery and emit greenhouse gases and other pollutants. While the manufacturing will cause some negative impact to the air quality, the Department finds that the Applicant's proposed environmental offset satisfies the CZA's Regulations because it will reduce reliance on sanitary landfill and Applicant will also fund a nearby community environmental program administered by the Department and local organizations. The CZA's important goals will be served by issuance of the CZA permit. In sum, the proposed project satisfies the strict environmental standards

imposed by the CZA and approval of the CZA permit will benefit the economy and the environment. Accordingly, I direct that the permit be issued to the Applicant, and enter the following findings and conclusions:

1.) The Department has jurisdiction under its statutory authority to issue a CZA permit in this proceeding;

2.) The Department provided adequate public notice of the proceeding and the public hearing in a manner required by the law and regulations;

3.) The Department held a public hearing in a manner required by the law and regulations;

4.) The Department considered all timely and relevant public comments in making its determination; and

5.) The Department has considered all the factors that the CZA requires to be considered and after weighing the considerations determines that a CZA permit should be issued to the Applicant for the Facility based upon the application, subject to such reasonable conditions to protect the environment and public health consistent with the CZA.

s/John A. Hughes

John A. Hughes

Secretary

HEARING OFFICER'S REPORT

TO: The Honorable John A. Hughes
Secretary, Department of Natural Resources and Environmental Control

FROM: Robert P. Haynes, Esquire
Senior Hearing Officer, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: Application of Peninsula Compost Company, LLC for a Coastal Zone Act Permit to Manufacture Up to 250,000 Cubic Yards Annually of Compost, Topsoil and Mulch Products at 601 Christiana Avenue, City of Wilmington, New Castle County-CZA Project No. 374P

DATE: May 6, 2008

I. BACKGROUND AND PROCEDURAL HISTORY

This hearing officer's report is prepared for the Secretary of the Department of Natural Resources and Environmental Control ("DNREC" or "Department") pursuant to *29 Del. C. §6606*, *7 Del. C. Chapter §6004*, and the Coastal Zone Act, *7 Del. C. Chapter 70* ("CZA").

The Department held a duly noticed public hearing on April 3, 2008 at the Department's Lukens Drive office in New Castle, New Castle County in order to receive public comments on the revised CZA permit application submitted on January 9, 2008¹ by Peninsula Compost Company, LLC ("Applicant") for proposed manufacture of compost, topsoil and mulch at 601 Christiana Avenue, City of Wilmington, New Castle County ("Facility"). The Facility would be on an eighteen acre site owned by Alma Properties LLC.²

The Department's Offset Review Committee reviewed the application and prepared a memorandum dated February 19, 2008. On February 28, 2008, the Department issued a Secretary's Environmental Assessment Report that indicated the Department's preliminary

¹ An initial application was submitted on May 17, 2007 but was the subject of Department letters dated June 25, 2007 and August 21, 2007 that required additional information.

² This site was the subject of a CZA permit issued to Resource Recovery of New Castle, Inc, now known as Material Recovery, Inc., to manufacture up to 433,000 tons a year of aggregate recycling products. The site also was the subject of a "Brownfields" remediation to allow its reuse subject to certain conditions.

decision that the application was complete and that the offset was acceptable. In a March 3, 2008 letter, the Department notified the Applicant that the application was administratively complete. The Department provided legal notice of the application and the public hearing by publishing notices in *The News Journal* and *New Castle Weekly*.

The application seeks approval to manufacture up to 250,000 cubic yards annually of compost, topsoil and mulch. The products will be manufactured using separated food waste and recyclable materials, such as yard waste and wood products. The manufacturing process will use a proprietary system, which is used at approximately 170 facilities world-wide. The proposed facility in the Coastal Zone will be modeled after a facility in Everett, Washington. The products to be produced will be organic compost, topsoil, and mulch. The manufacturing will require constructing a 15,000 square foot steel engineered building for tipping the food waste and other supplies. This building will be similar to a transfer station for solid waste and will have robust air handling equipment and an engineered biofilter. The materials will be blended inside the building to ensure the proper mixture of carbon, nitrogen, and moisture. The blended material will be moved outside and placed in windrows and covered, which will control any odors. The materials will sit for four weeks and generate 160 to 170 degree temperatures, which will reduce any pathogens. The materials then will be moved and covered and allowed to cool for the remaining four weeks. The building will be emptied every evening and will be kept clean and subject to best management practices. The parcel is owned by Port Contractors, Inc, is within the City of Wilmington, and the proposed manufacturing is consistent with the local zoning ordinances.

This Report summarizes the public hearing record and discusses the legal and factual issues and makes a recommendation for the Secretary, who will make the final decision.

II. SUMMARY OF THE PUBLIC HEARING RECORD

The public hearing record contains a verbatim transcript of the public hearing, and documents, marked as DNREC Exhibits (“Exh.”), which were admitted into the record as hearing exhibits. Elena Tkacz, the Department’s responsible employee for reviewing the Applicant’s application, presented the relevant documents in the Department’s files into the record as hearing exhibits and made a brief presentation. The exhibits included the application, the evidence of publication of the legal notices, the Secretary’s Environmental Assessment, the Department’s notice of a completed application, and the CZA Offset Review Committee’s memorandum.

At the public hearing, the Department’s representative, Elena Tkacz, made a presentation. The Applicants’ representatives, Nelson Widell, one of the Applicant’s principals, Brian Fuchs, the Applicant’s equipment supplier/consultant from W.L. GoreTM and Associates (“Gore”), and the Applicant’s consultant, Michael Logan of Compliance Plus Services, made a presentation. Several members of the public spoke, some in favor of the application and one opposed. The public hearing record consists of a 34 page verbatim transcript and hearing exhibits.

III. DISCUSSION AND REASONS

This application is for a permit issued under the CZA, which was enacted for the following stated statutory purpose:

It is hereby determined that the coastal areas of Delaware are the most critical areas for the future of the State in terms of the quality of life in the State. It is, therefore, **the declared policy of the State to control the location, extent and type of industrial development in Delaware’s coastal areas. In so doing, the State can better protect the natural environment of its bay and coastal areas and safeguard their use primarily for recreation and tourism...** While it is the declared public policy of the State to **encourage the introduction of new industry into Delaware**, the protection of the environment, natural beauty and recreation potential of the State is also of great concern. **In order to strike the correct balance between these 2 policies, careful planning based upon a**

thorough understanding of Delaware’s potential and her needs is required.

Therefore, control of industrial development other than that type of heavy industry in the coastal zone of Delaware through a permit system as the state level is called for....

7 Del. C. §7001(emphasis supplied).

The above purpose protects the Coastal Zone for recreation and tourism purposes, and controls industrial development within the Coastal Zone through a permit system consistent with the CZA’s two purposes, namely, protecting recreational and tourism uses of the Coastal Zone, but also encouraging the introduction of new industry in Delaware when justified under the CZA. The CZA achieves this purpose by requiring any new manufacturing or any expansion of any existing manufacturing within the Coastal Zone to seek a CZA permit from the Department. The CZA’s strict regulation of industrial activities also is highlighted by the prohibition against any new “heavy industrial use” or a new “bulk transport facility” within the Coastal Zone.

The Department administers the CZA, and promulgated regulations consistent with the CZA’s statutory purposes in *Regulations Governing Delaware’s Coastal Zone. 7 DE Admin. Code §§101 et seq.* (“Regulations”). The Regulations establish a rigorous permit application procedure, which ensures that if the Department issues a CZA permit that the permitted manufacturing will not result in an overall negative environmental impact to the Coastal Zone.

The Department’s application requires an applicant to disclose any negative environmental impacts as a result of the proposed manufacturing. If the Department determines that an application will have a negative impact, then an applicant must propose an environmental offset that “more than offsets the negative impacts of the project or activity that is the subject of the application for a Coastal Zone permit.” *CZA Regulation I.1.b.* The Department’s offset policy, as set forth in its orders, requires an offset ratio of at least thirty percent, that is, the offset “clearly and demonstrably” provides 130% environmental benefits to offset the proposed negative environmental impacts from the proposed project.

I find that the Facility will be within the “Coastal Zone,” as defined by the CZA. I also find that the proposed production of the compost products as described in the application, is manufacturing, which the CZA defines as “the mechanical or chemical transformation of organic or inorganic substances into new products, characteristically using power-driven machines and material handling equipment, including establishments engaged in assembling component parts of manufactured products, provided the new product is not a structure or other fixed improvement.” 7 Del. C. §7002 (d).³ Based upon the Department’s past regulation of similar composting operations as manufacturing within the meaning of the CZA, I find that the proposed manufacturing entails a type of transformation of materials into a different product, namely, the compost, topsoil and mulch products. Moreover, the transformation will use power-driven and material handling equipment. The Department’s interpretation also is consistent with the intent of the CZA, which is to strictly regulate any industrial activity within the Coastal Zone in order to preserve the coastal zone for recreation and tourism activities.

I also find that the proposed manufacturing is not a prohibited use in the CZA because it will not be a “heavy industry use” or a “bulk transfer facility,” as these terms are defined by the CZA. The nature and size of the proposed manufacturing and the Facility does not fall within the CZA’s definition of heavy industrial use or a bulk transfer facility.

The Department evaluates a CZA application based upon weighing the statutorily mandated considerations. The first consideration is environmental impact, which is defined broadly as follows:

³ The Department in prior Orders determined to waive the *Regulations* insofar as they may require a status decision before every new manufacturing application. This action is based on the Department’s intent in the *Regulations* to allow an opportunity for an applicant to seek a status decision when there was uncertainty on whether a permit was needed, not to add an unnecessary regulatory step when the need for a permit is obvious. I recommend that this regulation be waived for this permit application consistent with past Department’s past waivers and that status decisions be voluntary regulatory step a potential applicant may seek to resolve regulatory uncertainty, similar to a petition for declaratory relief filed to obtain a judicial determination on jurisdiction.

including but not limited to, probable air and water pollution likely to be generated by the proposed use under normal operating conditions as well as during mechanical malfunction and human error; likely destruction of wetlands and flora and fauna; impact of site preparation on drainage of the area in question, especially as it relates to flood control; impact of site preparation and facility operations on land erosion; effect of site preparation and facility operations on the quality and quantity of surface, ground and subsurface water resources, such as the use of water for processing, cooling, effluent removal, and other purposes; in addition, but not limited to, likelihood of generation of glare, heat, noise, vibration, radiation, electromagnetic interference and obnoxious odors.

7 Del C. §7004 (b) (1).

The Applicant has set forth in the Department's CZA application the proposed environmental impacts, including the release of 1.9 tons per year of air pollutants. The air release is from operating the equipment used to blend and move the materials from location to location and from "upset" conditions if the food waste stagnates in the receiving building.

CZA's second consideration is the proposed economic effect. The application indicates that approximately ten fulltime positions will be needed at the Facility and that approximately 20 temporary construction jobs will be needed during the construction period. The Applicant estimates the positive tax benefit of over \$150,000 annually paid to state and local governments. I find the positive economic benefit consistent with the CZA's purpose to encourage industrial development in Delaware. The Applicant also executed a "Community Benefits Agreement," which while not part of the application was introduced into the hearing record and supports that many job openings will be available to local residents.

The third CZA consideration is the number and type of supporting facilities required and their impacts on all other factors, and the application discloses the supporting facility to be built and the paving and other improvements that will reduce dust and odors. The fourth CZA consideration is aesthetic and the application discloses that the project is visible from public roads, but not from any residential area, public park or public meeting place. The fifth consideration is the effects on neighboring land uses, and the application states that there would

be no adverse impacts and that the closest residential property is 0.25 miles from the location. The sixth consideration is that the county and municipal comprehensive plans, and the application submits a letter from the City of Wilmington indicating that the proposed use was consistent with the City zoning as a special exception.

I find that the Applicant adequately has disclosed the environmental impacts based upon completing the Department's CZA permit application. The Applicant's proposed manufacturing would cause certain quantified negative environmental impacts, albeit very minor, based primarily on using electric machinery to mix the supply materials in the manufacturing process. The application seeks approval to manufacture up to 250,000 cubic yards per year. No air pollution control permit is required for operating the equipment. The resulting negative impact is a total potential to emit 1.9 tons of air pollutants annually, including 1.4 tons from "upset" conditions that would not occur during normal operations. The Application discloses relatively small negative environmental impacts. The Department's Offset Review Committee recommended that these impacts were offset by the reductions set forth in the Applicant's "Environmental Offset Plan." I agree with this recommendation.

The Applicant proposed an environmental offset based upon the recycling of food waste that otherwise may go into a landfill, such as the nearby Cherry Island landfill. The Applicant also claims the reduction in the greenhouse gases released at the landfill, although the same releases would occur in the composting. The Applicant also entered into a "Community Benefits Agreement" with the South Wilmington Coalition, and the Applicant will fund a tree maintenance project in the nearby residential area as part of the South Wilmington Special Area Management Plan ("SWSMAP"). I find that the Applicant's proposed offset satisfy the "more than" requirement in the *Regulations*.

I find the permit application meritorious because it is so strongly aligned with the Department's efforts to allow the CZA's permit authority to promote responsible industrial manufacturing within the Coastal Zone and its benefit of economic development and job creation, particularly in a low income area where job creation is needed. The negative air impacts from the compost operations would be very small under normal operating conditions. I find that the environmental impacts are more than offset by the Applicant's offset proposal.

The application sets forth numerous best management practices and other practices that the Applicant intends to follow. If the Secretary approves the application and issues a permit, then I recommend that the Department hold the Applicant to its statements in the application. My concern is that there may be a regulatory gap created because the Facility will have certain characteristics of a solid waste transfer station, but it will be exempt from the Department's current regulation as a solid waste transfer station. Nevertheless, the Department may exercise its authority under 7 Del C. Chapter 60 over recycling. The Department currently issues a Beneficial Use Determination ("BUD") under this authority, and this is the appropriate place to exercise regulation over the Facility's operations to ensure that the Facility operates consistent with protecting the environment and public health from harm. I recommend the CZA permit, if issued, be conditioned upon the Applicant's compliance with the Department's other regulations.

The Department appreciates and applauds the Applicant's effort to satisfy the local residents' concerns by negotiating the Community Benefits Agreement. This effort is extraordinary for a CZA permit and not required by the Department. Nevertheless, it is an agreement the Department supports as furthering a good working relationship from the very beginning and avoiding problems in the future. Thus, the application is consistent with the twin purposes of the CZA insofar as the project will benefit on the State and local economies and will

have a relatively small negative impact on air quality that is more than offset by the environmental factors from recycling.

Based upon the entire record, including the public hearing record, I find that a CZA permit should be issued, such to such reasonable permit conditions to ensure that the permit is consistent with the CZA, the Department's regulations and policies, and the Department's statutory purposes and policies.

IV. RECOMMENDED FINDINGS AND CONCLUSIONS

Based on the record developed, and the above stated reasons, I find and conclude that the record supports approval of the issuance of a Coastal Zone Act permit to the Applicant, subject to such reasonable conditions the Secretary determines are appropriate and consistent with the CZA.

In conclusion, I recommend the Secretary adopt the following findings and conclusions:

- 1.) The Department has jurisdiction under its statutory authority to make a determination in this proceeding;
- 2.) The Department provided adequate public notice of the proceeding and the public hearing in a manner required by the law and regulations;
- 3.) The Department held a public hearing in a manner required by the law and regulations and the requirement to seek a status decision should be waived for this application and any future applications;
- 4.) The Department considered all timely and relevant public comments in making its determination and makes its decision to modify the proposed offset through additional special conditions based in part on the public comment;
- 5.) The Department has considered all the factors that the CZA requires to be considered and after weighing the considerations determines that a CZA permit should be issued

to the Applicant subject to the Department's standard CZA conditions, including limiting the production to the level set forth in the application if approved by the Secretary.

s/Robert P. Haynes
Robert P. Haynes, Esquire
Senior Hearing Officer