



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-0010**

**Re: Application of Tapeta™ Footings, Inc. for a Coastal Zone Act Permit to Manufacture Up to 150,000 Tons Annually of Tapeta™ at 341 Pigeon Point Road, City of New Castle, New Castle County-CZA Project No. 375P**

Date of Issuance: **April 2, 2008**

Effective Date: **April 2, 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. Chapters 60 and 70*, the following findings and conclusions are entered as an Order of the Secretary:

On February 1, 2008, the Department received an application from Tapeta™ Footings, Inc. ("Applicant") seeking a permit under the Coastal Zone Act ("CZA"), *7 Del. C. Chap. 70*. The application seeks to manufacture up to 150,000 tons annually of Tapeta,™ which is a product used as a surface for horse racing tracks. The proposed manufacturing would occur on an 7.56 acre parcel at 341 Pigeon Point Road ("Facility"), within the City of New Castle, New Castle County, and the "Coastal Zone" as defined by the CZA. The proposed manufacturing will use an existing warehouse building, and the proposed use is consistent with the local zoning for the Facility. The Applicant estimates that the manufacturing will require at least seven new permanent jobs, and that possibly eighteen to twenty-two jobs at the Port of Wilmington based upon the expected foreign shipments of the product. The Applicant's proposed manufacturing would use diesel

engines, which would release an estimated 4.48 tons per year of air pollutants. The Applicant proposed to offset these air emissions by using air pollution credits obtained from the Delaware Economic Development Office and by providing funds for nearby environmental projects. The Department's *Regulations Governing Delaware's Coastal Zone* 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 and the Applicant were present at the public hearing, and one member of the public attended. The Department received one written comment and a petition signed by approximately 175 persons opposing the permit application. The Department's Senior Hearing Officer, Robert P. Haynes, in a March 27, 2008 report ("Report"), which is appended hereto and incorporated herein, recommended issuance of the permit subject to reasonable conditions to protect the environment and public health consistent with the CZA.

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. 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's close proximity the Port of Wilmington's overseas shipping facilities facilitate the product's shipment to foreign markets. The manufacturing will cause some negative impact in air quality, but the Applicant's proposed environmental offset satisfies the CZA's Regulations. The CZA's important goals will be served by issuance of the CZA permit, namely, the Coastal Zone's environment will benefit from the community grants and air pollution

credits, the CZA's goal of encouraging responsible manufacturing will be furthered by a new, relatively environmentally clean manufacturing business' re-location to Delaware to set up a base of operations for world-wide exports. In sum, the proposed project satisfies the strict environmental standards imposed by the CZA and its approval 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 Tapeta™ Footings, Inc. for a Coastal Zone Act Permit to Manufacture Up to 150,000 Tons Annually of Tapeta™ at 341 Pigeon Point Road, City of New Castle, New Castle County-CZA Project No. 375P

DATE: March 27, 2008

### I. BACKGROUND AND PROCEDURAL HISTORY

This hearing officer, acting on behalf of 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”) presided over a duly noticed public hearing held February 28, 2008 at the Department’s Lukens Drive office in New Castle, New Castle County.

The public hearing provided the public with an opportunity to be heard on Tapeta™ Footings, Inc. (“Applicant”) CZA permit application, which the Department received on November 20, 2007.<sup>1</sup> The Department submitted the application to its Offset Review Committee, which prepared a report on January 25, 2008. On February 1, 2008, the Department determined the application to be administratively complete, and published public notice of the application and the public hearing on February 3, 2008 and February 6, 2008 in *The News Journal* and *New Castle Weekly*, respectively. Following the hearing, I requested that the Department’s CZA program respond to the public comments, and the CZA Program’s March 18, 2008 response is attached hereto as Appendix A.

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<sup>1</sup> The Applicant submitted an earlier application on June 7, 2007, which was determined to be not complete and the November 20, 2007 application was submitted as a revised application.

The application seeks approval to manufacture up to 150,000 tons annually of a product known as Tapeta,<sup>TM</sup> which will be made by combining sand, wax, polymeric fibers, synthetic rubber, washed polyethylene and/or crosslink pvc . The product is sold as a soil substitute used primarily for horse racing tracks. The manufacturing will occur within an existing warehouse building located on a 7.56 acre parcel located at 341 Pigeon Point Road, New Castle, New Castle County (“Facility”). The parcel is owned by Port Contractors, Inc and is within New Castle County’s Heavy Industrial zoning district. 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. The Applicant made a presentation and its representatives answered questions, but only one member of the public attended. The Department submitted a written comment into the record on behalf of Kenneth T. Kristl, a Professor of Law at Widener University School of Law, who was unable to attend the public hearing. In addition, A.L. Moss submitted a petition signed by approximately 175 citizens who expressed concern over the air emissions and opposed any CZA permit.

### III. DISCUSSION

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 is charged with the administration of the CZA, and promulgated regulations consistent with the CZA's statutory purposes. *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 and all negative environmental impacts as a result of the proposed manufacturing. This duty to disclose assists the Department by allowing for a faster review of an application within the statutory ninety day review period, which begins when the application is determined to be administratively complete. If an application does have a negative impact, then the *CZA Regulations* require that the Applicant must propose an environmental offset that "more than offset 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 policy, as applied in its orders, requires an acceptable "more than" offset ratio of at least thirty percent, that is, the "clearly and demonstrably" provide 130% environmental benefits to offset the negative impacts from the proposed project. Moreover, the Regulations prohibit relying on any voluntary improvement undertaken in the past.

I find that the Facility will be within the "Coastal Zone," as defined by the CZA.<sup>2</sup> I also find that the proposed production of the Tapeta,<sup>TM</sup> 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)*. Based upon the Department's past regulation of similar manufacturing operations as manufacturing, I find that the proposed manufacturing entails a type of transformation of materials into a different product-Tapeta.<sup>TM</sup> Moreover, the transformation uses power-driven and material handling equipment. The Department's interpretation also is

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<sup>2</sup> The Department previously determined to waive the requirement of a status decision before every new manufacturing application. The Department's intent was to allow an opportunity for an applicant to seek a status decision when there was a jurisdictional uncertainty. I recommend that this regulation be waived for this permit application consistent with past Department's past waiver. The status decision should be a voluntary step a potential applicant may seek, similar to a petition for declaratory relief filed to obtain a judicial determination on jurisdiction.

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 also 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 Facility is inconsistent with the CZA’s definition of these types of industrial uses, which the CZA prohibits the Department from issuing a permit.

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:

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 impacts, including the release of 4.48 tons per year of air pollutants from operating a 29 horsepower diesel-fired boiler, and diesel-powered tractors used to move the Keenan mixers during the processing of the materials into the final product. The estimated negative impact was based upon conservative assumptions that the equipment would be used to its maximum potential for 2,000 hours a year, when the Applicant indicates that the actual operation will be far less. For example, the Keenan trailers are mobile and the Applicant plans of transporting them to the race tracks to allow Tapeta to be made at the race track’s location for domestic customers, and use the

Facility as a site for manufacturing when the product would need to be shipped, particularly to foreign customers.

The Facility will become the base of operations for manufacturing Tapeta™ and the location will allow the use of the nearby Port of Wilmington transportation facilities. The location near the Port of Wilmington is relevant to the CZA's second consideration, namely, the proposed economic effect. The application indicates that approximately seven fulltime positions will be at the Facility and estimates the positive tax benefit of over \$350,000 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 and the use of the Port of Wilmington to export the product, which may support an additional 18 to 22 workers that may be hired by the Port of Wilmington to load the product.

The third CZA consideration is the number and type of supporting facilities required and their impacts on all other factors, and the application discloses that no supporting facilities are required. 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 New Castle County indicating that the proposed use was consistent with the County's "HI-Heavy Industrial" land use.

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 diesel machinery to mix the

product. The application seeks approval to manufacture up to 150,000 tons per year, which reflects the equipment's usage up to 2,000 hours a year. No air permit is required for operating the equipment. The resulting negative impact is a total potential to emit 4.48 tons of air pollutants annually, including 0.16 tons of particulate matter ("PM"), 1.65 tons of carbon monoxide ("CO"), 2.64 tons of nitrogen oxide ("NOx"), 0.02 tons of sulfur dioxide ("SOx"), and 0.01 tons of volatile organic compounds ("VOC"). This is one of the smallest industrial air emissions proposed in the Coastal Zone, and the other "negative" impacts are even smaller, such as water usage, solid waste and wastewater. The Department's Offset Review Committee recommended that these impacts were not negative even though disclosed by the Applicant. I agree with this recommendation, and will focus on the air pollution negative impact.

The Applicant proposed an environmental offset based upon acquiring 3 tons of NOx and 3 tons of SOx annual air pollution credits from the Delaware Economic Development Office ("DEDO"), to fund tree maintenance projects in the nearby residential area as part of the South Wilmington Special Area Management Plan ("SWSMAP") and to implementing the recommendations of the SWSMAP's Wetland & Hydrological Assessment Summary Report. The six tons of annual air pollution credits to be acquired from DEDO will satisfy the annual air emissions negative impact of 4.48 tons per year and provide the "more than" to satisfy the *Regulations* and the Department's 130% offset policy.

The public comment from Professor Kristal questioned whether the proposed offset was an annual ongoing benefit as opposed to single year procurement of six tons of air pollution credits. The Applicant responded to this comment and indicated that the air pollution credit to be obtained will be based on ongoing, annual air pollution reductions as reflected by the credits. The Coastal Zone's Program also confirmed that the air pollution credit was ongoing pursuant to the Department's *Regulations Governing the Control of Air Pollution*.

I find the permit application meritorious because it is so strongly aligned with the Department's efforts to allow industrial manufacturing and consistent with economic development and job creation, particularly in a low income area where job creation is needed. The negative air impacts are very small and are more than offset by the Applicant's proposal, which I recommend by adopted and reflected as conditions to the permit.

The petition submitted is based upon the air emissions and the CZA permit will be issued based upon air pollution credits that have the legal effect of cleaning the air in theory. The Department understands the concerns of local residents, but the CZA does not prevent industrial manufacturing in the Coastal Zone or ban air emissions. In fact, the CZA has no authority to prohibit a truck terminal or warehouse usage with more truck traffic than anticipated by this project, which would vastly increase the air emissions than the operation of three small diesel-powered engines. Thus, on balance I find the proposed usage will have a considerable benefit on the State and local community economies and will have a relatively small negative impact on air quality when compared to other non-regulated uses that could use the warehouse.

Based upon the entire record, including the public hearing record, I find that a CZA permit should be issued with special conditions to ensure that the permit is consistent with the CZA, the Department's regulations, 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 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, and the following special condition:

a) The Applicant shall be allowed to manufacture up to 150,000 tons of Tapeta™ product, as described in Applicant's CZA application, in any twelve month period, beginning with the commencement of manufacturing operations, and shall submit an annual report to the Department on its production level within one month following each twelve month annual period.

*s/Robert P. Haynes*

Robert P. Haynes, Esquire  
Senior Hearing Officer

## MEMORANDUM

**TO:** Robert P. Haynes

**THRU:** Philip J. Cherry

**FROM:** Elena M. Tkacz

**RE:** Response Document to Public Commentary on Tapeta™ Footings, Inc.

**DATE:** March 18, 2008

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### **Introduction**

On February 28, 2008, a public hearing was held for Tapeta™ Footings, Inc. on the matter of their Coastal Zone Act (CZA) Permit application for a new manufacturing facility in New Castle. The Department received written comments from Kenneth T. Kristl and Greg Benson in lieu of their attending the public hearing later that night. This memorandum serves to respond to the conclusion made by Mr. Kristl and Mr. Benson in their February 28, 2008 memorandum.

### **Analysis**

Tapeta™ Footings, Inc. (Tapeta) applied for a CZA Permit to operate a new manufacturing facility in Delaware's Coastal Zone. The facility would blend raw materials to create their Tapeta™ product, which is used for horse race track surface material. As a result of the manufacturing operations, Tapeta would be producing 4.48 TPY of new air emissions.

In order to offset these new air emissions, Tapeta acquired six air emission reduction credits from Delaware's Economic Development Office (DED0) and will provide a financial contribution to support the South Wilmington Special Area Management Plan. The applicant claims that this offset proposal will more than offset any environmental impacts that will occur as a result of this new manufacturing facility. In a memo dated January 25, 2008, Dr. Harry Otto, Chair of the Environmental Offset Committee, also concludes that the environmental impacts associated with this project have been clearly and demonstrably offset by the offset proposal.

Legal Counsel was requested during this application review process. Robert F. Phillips, Deputy Attorney General, was assigned to review both the application and the offset proposal for compliance with the Coastal Zone Act and the corresponding Regulations Governing Delaware's Coastal Zone. Mr. Phillips states that a properly supported scientific or technical determination that the positive effects outweigh the negative effects would be sufficient in offsetting the environmental impacts.

Mr. Kristl and Mr. Benson argue that the offset proposal is not sufficient in offsetting the proposed impact based on their analysis of DED0 air emission reduction credits. They

incorrectly state the air emission reduction credits are a “one time purchase” and as such, would not clearly and demonstrably offset the annual air emissions which would result from this new operation. They conclude that Tapeta should be required to purchase these credits on an annual basis in order to offset their annual air emissions.

When the applicant was notified of Mr. Kristl and Mr. Benson’s conclusion, they responded with a letter to defend their position. Tapeta agreed with Mr. Kristl and Mr. Benson’s position that annual air emission reduction credits should be required to offset annual air emissions. They point out that DEDO air emission reduction credits are an annual and not a “one time” credit as suggested. This is reflected in the Offset Proposal Matrix which is Attachment I in the CZA Permit application. Both the letter from Tapeta and the Offset Proposal Matrix are attached to this memorandum.

Regulation 34 of Delaware’s Regulations Governing the Control of Air Pollution details the Emission Banking and Trading Program by which the air emission reduction credits were obtained. This Regulation is consistent with the Federal Clean Air Act and the State Implementation Plan (SIP) for Delaware. In Section 2 of Regulation 34, Emission Reduction Credits are defined as an actual emission reduction equal to one whole *ton per year* of a particular pollutant from an emission unit that has been certified by the Department as enforceable, permanent, quantifiable, real and surplus. Tapeta has obtained six emission reduction credits, as per this program, which are real, quantifiable and serve to offset six tons per year of air emissions as part of their offset proposal.

### **Conclusion**

The Department has reviewed the application and the environmental offset proposal including the acquisition of DEDO air emission reduction credits. Since the DEDO air emission reduction credits are an annual emission credit, the Department finds it appropriate to use the annual air emission reduction credits to offset the new annual air emissions that would occur as a result of this manufacturing facility. The applicant has addressed all issues sufficiently throughout this permitting process and should be granted this CZA Permit for a new manufacturing facility in the Coastal Zone.

Attachments (2)