



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. 2006-CZ-0059

Re: Amendment of Coastal Zone Act Permit No. 360 Issued to E.I. DuPont De Nemours & Company, Inc. to Produce an Upgraded Titanium Dioxide Product, IP1 (R948), at its 104 Hay Road, Edge Moor, Delaware Facility

Date of Issuance: December 18, 2006

Effective Date: December 18, 2006

Under the authority granted the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") under *7 Del C. §§6003, 7003 and 7005*, the following findings, reasons and conclusions are entered as an Order of the Secretary. This Order considers the request of E.I. DuPont De Nemours & Company, Inc. ("DuPont") to amend Coastal Zone Act ("CZA") Permit No. 360 issued April 19, 2005, for an expansion of the nonconforming uses at DuPont's chemical manufacturing facility at 104 Hay Road, Edge Moor, New Castle County ("Facility").

The request was the subject of a duly noticed public hearing held on October 25, 2006, and a December 14, 2006, Hearing Officer's Report ("Report"), a copy of which is appended hereto and incorporated herein. The Report discusses the legal issues, notes that there are no factual issues because the request relies on DuPont's application as originally submitted, and recommends granting the request to amend. DuPont requested that the Department amend CZA Permit No. 360 insofar as it imposed an annual production limit for the Facility's new titanium dioxide product, IP1 (R948). This product is an expansion of the Facility's nonconforming uses, and the Department

approved the expansion in Secretary's Order No. 2005-CZ-0023, issued April 27, 2005. This Order approved DuPont's application for a permit and authorized the Department to issue CZA Permit No. 360.

First, the Department has the inherent authority to amend CZA Permit No. 360. Based upon the circumstances presented by DuPont in its request, the Department should amend CZA Permit No. 360 because the requested amendment is supported by the record and the Order that approved CZA Permit No. 360. Second, an amendment is appropriate in order to correct an error in CZA Permit No. 360, which included a production limit that was not considered or approved in Secretary's Order No. 2005-CZ-0023. The amendment will make the permit and the Order consistent. The Order controls because it is where the Department sets forth and explains its position. The Order clearly did not order a limit, but instead approved DuPont's application. The application did not set forth a limit, and no limit was requested in any public comments, although the comments opposed any permit for an expansion. This amendment and the lack of any specific production limit will not alter DuPont's legal obligation under the CZA to seek a CZA permit for any other expansion or extension of the nonconforming uses at the 104 Hay Road, Edge Moor facility. Thus, the Department hereby amends CZA Permit No. 360 *nunc pro tunc* with language that does not contain a limit on the production of IP1.

I adopt the Hearing Officer's Report, its review of the record and its recommendations. In sum, as more fully described in the reasons and findings in the Report, I adopt and direct the following as a final order of the Department:

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, and held the public hearing in a manner required by the law and its regulations;

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

4. The record of decision supports amending CZA Permit No. 360 *nunc pro tunc* to correct and clarify the permit consistent with the intent of the Order that approved CZA Permit No. 360;

5. The Department shall issue an amended Coastal Zone Act Permit No. 360, which shall permit “The installation of tanks and pumps and associated equipment for the manufacture of IP1 (R948).” This permit language is approved *nunc pro tunc* as an amendment to CZA Permit No. 360; and

6. The Department shall provide notice of this Order to the persons affected by this Order, as determined by the Department, including those who participated in the hearings on the original permit and its amendment as authorized by the Order.

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: Request of E.I. DuPont De Nemours & Company, Inc. to amend Coastal Zone Act Permit No. 360

DATE: December 14, 2006

I. BACKGROUND AND PROCEDURAL HISTORY

The Department of Natural Resources and Environmental Control (“DNREC” or “Department”) held a public hearing on October 25, 2006, in order to consider amending Coastal Zone Act (“CZA”) Permit No. 360, dated April 29, 2005, which was issued to E.I. DuPont De Nemours & Company, Inc. (“DuPont”) for its industrial chemical manufacturing facility at 104 Hay Road, Edge Moor, New Castle County (“Facility”). CZA Permit No. 360 was authorized by Secretary’s Order No. 2005-CZ-0023, issued April 27, 2005 (“Order”), which adopted an April 26, 2005 Hearing Officer’s Report (“Report”). Given the prior Order and Report, this Report will address the events subsequent to issuance of CZA Permit No. 360 and incorporate the prior Order and Report.

Following the issuance of CZA Permit No. 360, DuPont questioned the permit’s language that permitted “[t]he installation of tanks and pumps and associated equipment for the manufacture of a maximum of 15,000 tons per year of IP1 (R948) product.” Specifically, DuPont sought clarification on the 15,000 tons per year because DuPont’s application did not reflect any production capacity limit on the product or the equipment to be installed. DuPont also questioned whether CZA Permit No. 360 was consistent with the Order. DuPont did not file an appeal, but instead requested that the Department administratively correct the permit.

The Department decided that DuPont should request a permit amendment, which DuPont requested in a September 18, 2006, letter. The Department also decided to follow its CZA procedures to consider DuPont's request. Consequently, the Department held a duly noticed public hearing on the amendment on October 25, 2006, at the Department's offices at 391 Lukens Drive, New Castle, New Castle County.

II. SUMMARY OF THE PUBLIC HEARING RECORD

The public hearing record includes the prior public hearing record, which was previously reviewed in the prior Report. That public hearing has been supplemented by the verbatim transcript of the public hearing on October 25, 2006, and the documents introduced into the record by the Department's Dennis Brown. These documents include the September 18, 2006, request, the public notices, CZA Permit No. 360, and documents already in the record, including the September 23, 2004, application. In addition, DuPont submitted a fact sheet. Only one member of the public attended, but did not oppose the requested permit amendment. The Department did not receive any written comments.

III. DISCUSSION AND REASONS

This matter entails a request to amend a permit issued under the Coastal Zone Act, *7 Del C. §§7000 et seq.* A review of the CZA finds no provision authorizing or prohibiting a permit amendment. The Department's general statutory provisions in Chapter 60 of Title 7 also do not provide any authorization or prohibition. Similarly, the CZA's regulations do not contemplate a permit amendment. Instead, they authorize the Department to take the following actions: 1) to grant, deny or condition a permit; 2) to grant a status decision on a proposed facility or use; 3) to withdraw or revise an application, 4) to transfer a permit, 5) to abandon a use and 6) to revoke a permit. Consequently, the authority to amend a permit must be implied as within the authority to

issue a permit. Based upon common law principles, I find and conclude that the Department does have the authority to amend an otherwise final permit under certain circumstances.

Court decisions support the conclusion that the Department has an inherent authority to amend a permit, either upon request or on its own motion, or *sua sponte*. A public body exercising judicial functions inherently has the power to reopen and reconsider its decisions. *Henry v. Department of Labor*, 293 A. 2d (Del. Super. Ct. 1972). The Department is not a quasi-judicial agency under the *Administrative Procedures Act*, 29 Del. C. §10101 et seq., but its hearing process may be, particularly under the CZA, which requires a public hearing.¹ Cases in other jurisdictions also support the Department's inherent power to amend a permit as an extension of the authority to issue or revoke a permit. *In Re Joe Brown*, 263 N.W. 887 (Mich. Supr. 1935), *Mike Little Gas Company, Inc. v. Public Service Commission*, 574 S.W. 2d 926 (Ct. Ap. Ky. 1978), *Burr Seaboard Air Line Ry. Co.*, 111 So. 391 (Fl. Supr. 1927). Consequently, I conclude that the Department has the inherent authority to review and revise its actions, albeit under certain circumstances.

The cases on the authority to amend indicate that one circumstance that must be present is whether the agency still retains jurisdiction over the matter. The fact that DuPont did not appeal the permit decision satisfies this requirement. If DuPont had appealed, then this administrative option would not be available. This issue could be decided by an appellate tribunal, whether the Coastal Zone Industrial Board or in a court, and the result could have been the same, namely, an amended permit. Thus, the authority to amend exists, but is limited to certain conditions warranting the exercise of the authority to amend.

¹ The quasi-judicial nature of an agency concerns the due process required for decision-making, not the inherent authority to act, and the Department as an executive agency has greater procedural freedom to act than a quasi-judicial agency.

The authority to amend is an exercise of the Department's discretion. The courts have ruled that an amendment may be made without further notice and opportunity to be heard under certain circumstances. *Burr v. Seaboard Air Line Ry. Co.*, 111 So. 391 (Fl. Supr. 1927). In the present case, the Department provided notice and an opportunity to be heard through the public hearing. I agree that the CZA require such procedures, particularly since the time to appeal the original Order has expired. I find that the Department properly followed its CZA procedures based upon the request to amend CZA Permit No 360. I find that there was no need for a new application when DuPont sought to have its prior application accurately reflected in the permit.

Further support for the Department's exercise of its authority to amend a permit is shown by the Department's previous actions to amend permits. The Department issued on February 2, 1979, a CZA permit to Standard Chlorine of Delaware, Inc., but the CZA permit included conditions that conflicted with other Department regulations. Consequently, the Department amended the permit on February 26, 1979. In Standard Chlorine, the conditions to the permit were revised in order to eliminate ambiguity and possible conflicting regulatory language. This standard to support a permit amendment is consistent with common law, where amendments are to correct errors or to eliminate ambiguities. In *Mike Little Gas Company, Inc.*, *supra*, the error was significant, but the amendment was upheld as the error was an obvious clerical error. The court went on to state that an administrative agency can be prevented from correcting a mistake on so-called equitable grounds. *Id. at 927*. The Department also has amended other permits without requiring the submission of a full permit application when such actions are required to comply with court or appellate tribunal orders.

I find that DuPont's request is supported by the record below, where the application sought approval of a new titanium dioxide product, which DuPont called IP1, or R948. This product was for the interior paint market, which was a new market for DuPont's titanium dioxide

products. This new product is produced by a minor change to the titanium dioxide, which DuPont has produced at the Edge Moor facility since 1935. Under the CZA, the facility is a heavy industrial nonconforming use since it is a chemical manufacturing facility that has been in existence and in active operation since June 28, 1971, which when the CZA date determines if a nonconforming heavy industrial use exists under the CZA. As a nonconforming heavy industrial use, the Facility is subject to CZA permit process regulation in Section 7004 of the CZA for “all expansion or extension of uses.” 7 Del C. §7004. The IP1 product is an “expansion or extension of use” since it did require the installation of new equipment, namely, tanks and pumps for the coating that is applied to the titanium dioxide for it to become the IP1 titanium dioxide product. The new equipment would not increase the amount of the titanium dioxide that the Facility could produce, but it would allow DuPont to market a new product that uses the titanium dioxide that the Facility already produces. So if the new product was successful, then the titanium dioxide production could increase, but the total production of titanium dioxide is limited to 190,000 tons per year in the Facility’s Air Pollution Control Title V permit.²

I also find that the Order and Report do not discuss imposing any production limit in the permit. The Order refers to the 190,000 ton permit limit at the facility, and makes no mention of imposing a limit of 15,000 tons per year of IP1. The Order also directed issuance of a permit based upon the approval of the application as submitted by DuPont. Order at 5. Thus, I find that the production limit was not contemplated by the Order, and that the Order directed the permit to be issued without any limit.

The Order also refers to the facility’s overall production limit of 190,000 tons annually, and that the new product would use existing capacity within this limit. Order at 2. The Order has

² The Order incorrectly cited this limit as being in an existing CZA permit. The limit is in Air Pollution Control permit Condition 3-Table 1(z)(ii)(A) “Operational Limits,” which the Department issued under Title V of the federal Clean Air Act , as amended, in, and the state authority to protect air quality.

no discussion on the need to limit IP1 production. In contrast, the Department in Secretary's Order No. 2004-A-0058, issued November 30, 2004, discussed the permit condition to the Coastal Zone Act permit that limited production of a facility. Clearly the imposition of a production limit in a Coastal Zone Act permit would have been discussed in an Order if that was what the Department intended to impose in a permit.

The issue of a production limit also was not raised in any public comments, although comments requested that the Department deny the permit. Instead, the public hearing record includes DuPont's estimate of an annual production level between 10,000 to 15,000 tons. This estimate also was based upon then current market conditions, which DuPont indicated could change. Indeed, the likelihood of change is obvious from the operation of any market, but reliance on estimates is particularly inappropriate for a new product and where DuPont is entering a new interior paint market.

The Report recognized the need for operational flexibility to respond to market conditions by stating that "the actual level will depend on the market demand." Report at 2. The Report discussed the existence of a 190,000 ton production annual permit limit and that the plant currently was producing 100,000 tons of titanium dioxide a year. Report at 3. The Report also noted that the estimated production of IP1 was approximately ninety days a year, but that "the actual amount will depend upon actual market conditions." Report at 3. The Report also cites the new product's importance to maintaining the facility's production, which will retain employment for the facility's approximately 325 employees. The Report states that "a permit would allow the plant to produce a new product in a new market, and this will allow the plant to better sustain its operations..." Report at 12.

The Report also discussed the fact that IP1 merely is a spin off product created by adding surfactant to allow use in the interior paint market. Consequently, in theory, IP1 production

could continue up to the Facility's capacity to produce titanium dioxide, which is 190,000 tons. The record does not show how much the equipment that has been installed for IP1 production is capable of producing, but a literal reading of the permit could mean a limit on the equipment's capacity and not the production. Consequently, the permit is ambiguous and contrary to the record, which primarily was based upon DuPont's application.

DuPont's original application included an environmental impact and the offset. For purposes of the project's environmental impact, DuPont indicated for its emissions calculations that 1 lb per day of volatile organic compounds would be released, and calculated the total emissions based upon operating 365 days of production of IP1, which still provided an environmental offset calculation supporting the expansion. This assumption of full operating capacity is at odds with the imposition of the 15,000 ton annual limit, which was based upon approximately ninety days of operations, as estimated based upon the then market demand for the new product. The application discloses that the only new equipment to be installed were several small tanks and associated pumps/controls for the surfactant (dispersants) and a defoamer, which is added to DuPont's existing titanium dioxide product to give the product an improved coating. Application at 7. This estimate also noted the need to allow production flexibility based upon market condition. There is no discussion of any production limit. I find that the amendment to the permit is consistent with the original application. The CZA and this Department will continue to protect the coastal zone from unregulated expansion of industrial activity by requiring DuPont to seek a permit for any expansion or extension of the nonconforming use at the Facility, including the expansion approved by Secretary's Order No. 2005-CZ-0023 and CZA Permit No. 360, which approve an expansion of the Facility and production of IP1 as set forth in DuPont's application.

I find that good cause exists to amend the permit based upon DuPont's request. I further find agree with this action will correct an error in a manner that is consistent with the Order's clear intent not to impose any limit, and the record as a whole. There is no support in the record for the 15,000 ton limit, particularly one with no explanation. I recommend that the Department exercise its inherent authority to amend CZA Permit No. 360 *nunc pro tunc* by the issuance of a new amended CZA Permit No. 360 to replace the incorrectly issued permit. I find that the amendment process for Permit No. 360 followed the proper procedures to allow for public comment, but there were no comments on the request.

IV. RECOMMENDED FINDINGS AND CONCLUSIONS

Based on the record developed, I find and conclude that the record supports approval of the permit amendment. In conclusion, I recommend the Secretary adopt the following findings and conclusions:

1. The Department has jurisdiction under its inherent authority to amend CZA Permit No. 360 when necessary and appropriate;
2. The Department provided adequate public notice of the proceeding and the public hearing in a manner required by the law and its regulations;
3. The Department held a public hearing in a manner required by the law and its regulations;
4. The Department considered all timely and relevant public comments in making its determination;
5. The Department has the inherent authority to amend a permit when appropriate and upon good cause to correct an error, to properly reflect the intent of the Order and in a manner that otherwise is consistent with the Department's statutory purposes. The Department, upon DuPont's showing of good cause, amends CZA Permit No. 360 to correctly reflect the intent of

the Order, and hereby Coastal Zone Act Permit No. 360 is amended *nunc pro tunc* to remove the language that includes a 15,000 tons per year limit, which is replaced by the following language: “The installation of tanks and pumps and associated equipment for the manufacture of IP1 (R948) product”; and

6) The Department shall serve and publish this Order on all affected persons in a manner consistent with the service and publication of Secretary’s Order No. 2005-CZ-0023, and as supplemented by persons who have participated in this amendment proceeding.

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