7-9-92

BEFORE THE COASTAL ZONE INDUSTRIAL CONTROL BOARD

OF THE STATE OF DELAWARE

Re: APPEAL OF THE SECRETARY'S)
STATUS DECISION FINDING)
TEXACO'S PROPOSED RE-REFINING) 2605D
TO BE A NEW PROHIBITED)
HEAVY INDUSTRY)

A hearing was held on March 5, 1992, before the Coastal Zone Industrial Control Board ("Board") on the appeal by TEXACO ("Texaco") of a December 14, 1991, status decision by the Secretary ("Secretary") of the Department of Natural Resources and Environmental Control ("DNREC") holding that the proposed used oil refinery sought to be constructed by Texaco was "heavy industry", prohibited by 7 Del. C. ch. 700 ("Act"). Chairman Donald Crossan convened the hearing. The remaining Board members present were: John Allen, Eugene D. Bookhammer, John J. Casey, Jr., Harry M. Fisher, III, Fred McKee, David Ryan and John D. Super. Texaco was represented by R. Judson Scaggs, Esquire of the local firm of Morris, Nichols, Arsht & Tunnell, and by Thomas Reilly, Esquire in-house counsel for Texaco. The Secretary was represented by Keith A. Trostle and David L. Ormond, Deputy Attorneys General. The Board was represented by Marsha Kramarck, Deputy Attorney General.

SUMMARY OF THE EVIDENCE

Texaco seeks to incorporate a used oil refinery into the Port of Wilmington site where there is an existing pipeline infrastructure, and where other tanks already

stand. The refinery would expose used oil to a series of distillation process by which water, oil additives and heavy metals would be removed. These toxins would be incorporated into an asphaltic flux. The oil remaining would be suitable for use as marine diesel fuel or "bunker" fuel.

After the decision by the Secretary and following the pre-hearing conference in this matter, Texaco revised its proposed project to eliminate certain processes and equipment identified in its application ("Application") for a status decision from the Secretary. Specifically, Texaco argues that it has eliminated the proposed scrubbing towers and chemical processing equipment from its proposed project. Upon objection by the Secretary to the consideration of these revisions by the Board (since the Secretary had had no original opportunity to examine this redesign), Texaco conceded that the Board should evaluate the evidence presented in light of the information which had been contained in its application as reviewed by the Secretary.

Texaco argues that its new project will create no environmental hazard greater than the one now existing in the Port, since it will not increase the overall volume of oil flowing through the pipes currently in regular use. It contends that the Secretary must balance the competing objections of allowing or encouraging new industry against the protection of the environment. To this end, Texaco argues, the Secretary should note that there will be no impact upon aesthetics from the project, since the area will

be included in the site of an existing tank farm. Similarly, there will be no recreational impact it suggests, since no recreation now takes place on the existing project site. Moreover, Texaco contends that a positive environmental influence will be exerted by the utilization of used oil in this "recycling" effort, thus minimizing the opportunity for the toxic oil to find its way into landfills or sewers.

Texaco argues that the definition of "heavy industry" in 7 Del. C. sec. 7002 should be read to prohibit those adventures which utilize greater than 20 acres of space, and employ waste columns and smokestacks. Because Texaco's project will encompass less than one acre of land overall, it suggests that it cannot logically be included within the contemplation of what constitutes heavy industry.

Moreover, even if it is determined that the Texaco project is "heavy industry," Texaco argues that this process is merely "recycling", which it contends is expressly exempted from the Coastal Zone Act ("Act") by 7 Del. C. sec. 7003. Since it is anticipated that Texaco will accept used oil from members of the public for recycling at its facility, the argument goes, the project qualifies as a "public recycling facility."

Charles Harrison, a Chemical Engineer licensed in Texas, testified on behalf of Texaco, his employer since 1966. Mr. Harrison has been engaged as a design engineer in used oil re-refining since 1981. He has visited most of the refineries existing in the United States, Canada, British

Columbia and Mexico. He first reviewed Texaco's Coastal Zone application in January of 1992, although he had learned of the planned re-refinery in November, 1990. He recommended changes to be made in the proposed project at the Port of Wilmington, to incorporate in-house technology which would permit the elimination of the chemical pre-treatment process, and reduce the two distillation columns or "heaters" to one. These were, he contended, not substantive changes. A tank truck collection process would be used to gather the used oil feedstock, which would then be held in one of the plant's tanks. The feedstock would be charged to a uniform charge, waste water would be removed, and the remaining oil would be "fractionated" into components of marine diesel fuel and asphaltic flux. Harrison suggested that the process was "environmentally friendly" in that there were no land or water discharges. Air emissions will escape from a heater vent.

Harrison suggested that the proposed process is mere recycling, since the refining effort does not produce the same lubricating oil grade component from which it began. Recycling, he said, is a simpler process, which provides fewer opportunities for mistakes. This project is not the re-refining of oil, which uses chemical processes to remove all impurities.

He described the size of the other re-refining facilities in existence, such as Shell Canada, Mohawk, and International Recovery. These plants encompass 5 or fewer acres

of land, and do not utilize traditional smokestacks, waste lagoons or chemical processing equipment. Recycling is not what historically occurred at the Getty oil refinery.

He attempted to distinguish the Texaco project from others where the Board has determined that the proposed use does not constitute heavy industry. Texaco will employ 16 people at the new plant. There will be no hydrogen generation or cracking units, both of which characterize an oil refinery, Harrison said. Texaco will produce some 3500 barrels of oil per day, in contrast to over 140,000 barrels per day at the Star refinery.

On cross-examination, Harrison conceded that the typical oil refinery produces multiple varieties of fuels. He described "refining" as a "purification process." The Texaco project was not refining, he said, because there were no chemical changes brought to bear upon the used oil -- but -- only a physical separation of its components. Texaco now proposes to eliminate scrubbing towers, smokestacks, and chemical pre-treatment processing from its project, and will require an air emissions permit prior to commencement of operations. He further agreed that there was "some" potential to pollute if either equipment malfunction or human error were to cause the dual feed tanks to discharge their 200,000 gallon contents. Because the river is located so nearby, Harrison conceded that the pollution potential is not insignificant. Upon a failure of the pump, or some pipe rupture, the oil would discharge onto the ground.

Harrison offered his opinion that mere distillation is not refining. He regards the application of chemical action as a necessary to the refining process. Reforming and hydroforming are characteristic of a refinery, while recycling has fewer components. The product planned to result from this project will be insufficiently refined to be useable as auto fuel, since it would not pass current emissions control standards. A marine vessel utilizing the Texaco product may release emissions which would pollute the air, he said.

Richard Zang was called to testify on behalf of Texaco. He holds a degree in Engineering, and has earned licenses to practice in New York, New Jersey and Connecticut. He has prior experience in sewage treatment plants, and has been employed at Texaco for 21 months.

Zang defines Texaco's proposed process as recycling, which he describes as an effort to remove materials from the waste stream to produce a product which has beneficial uses. Presently, the existence of used oil creates a problem for municipal water treatment authorities, since it tends to show up in sewage and is removed by flotation processes. Used oil discharged into the ground tends to reach the water table, creating an environmental hazard.

In reading Delaware's Coastal Zone Act, he believes that the exemption for recycling should not be limited to publicly-owned recycling facilities. In his experience, Municipal solid waste ownership does not necessarily imply

public ownership. It should include privately owned plants, he says, which process solid waste whose source is the general public. Similarly, he believes that "public recycling" may mean a plant where the public may deposit its used products for recycling. It would, he said, be contrary to the general policy of the Delaware Solid Waste Authority Act of 1975, whose goals include the recycling of used oil, to limit recycling in the Coastal Zone to those entities owned by the public or by government.

Zang conceded that he knew little about refinery operations. However, based on his understanding of the earlier testimony of Harrison, it was his opinion that the Texaco project was a recycling facility and not a refinery. Presently, there are limited permissible uses for used oil, he said.

A waste water treatment process generally removes 90% of water contaminants. He was unsure whether the waste water removed from the used oil in the Texaco project would contain contaminants. He reiterated that his area of expertise does not include petroleum products.

Most municipalities, he said, have insufficient volume to make used oil recycling highly efficient. He is aware that the Delaware Solid Waste Authority is a publicly owned recycling facility, but it utilizes only the combustible portion of the solid waste. In federal legislation, including the Clean Water Act of 1971, "Publicly owned Treatment Works" is limited to government-owned projects. In his

experience, there is no publicly owned treatment works facility which utilizes all waste materials generated by the public.

Texaco also submitted a brief with supporting documents, marked as Exhibit "A," to clarify and support its position.

Carl King testified as an interested citizen. He said that, relying upon his 15 years experience in Engineering, he concludes that the Texaco project may provide a useful means of recycling oil in the quantities proposed. The plans appear to permit construction of containment facilities to protect the environment and pose less risk of pollution. Ultimately, he perceived the project as meritorious, and, on balance, he could envision a net positive benefit from its approval.

Richard Beck, a Mechanical Engineer for Gulf Oil and DuPont, now retired, testified on behalf of Delaware Audubon Society. He did not specifically oppose the Texaco project in its plan for recycling used oil. However, he believed that the Coastal Zone is too fragile to permit the dangerous potential for major pollution such as is presented by the Texaco project. A plant of this description can be placed anywhere in the State, except for the Coastal Zone, he said. He further offered the opinion that the project proposed is clearly an oil refinery, and is thus prohibited from existence in the Coastal Zone. By introduction of a letter prepared for submission to the Secretary of DNREC, marked as

Exhibit "C," he contends that Texaco has misrepresented its position in respect to pending legal action. While Texaco maintains that it has no outstanding action, it was sued and is subject to penalties in a U.S. District Court action by Delaware Audubon Society and the Natural Resources Defense Council. The lawsuit is known as C.A. 88-263-JRR. Finally, he indicated that Texaco's future plans do clearly include the addition of equipment for further fractionation of oil, all of which indicates a petrochemical distillation facility, prohibited by the Coastal Zone Act.

June D. MacArtor testified as an interested citizen. She is an attorney who has formerly served as counsel to the Secretary of DNREC and, in connection with an article recently published in an issue of Delaware Lawyer, she conducted extensive research on the Coastal Zone Act. She had not specifically examined the question of whether "public," as it appears in 7 Del. C. sec. 7003, modifies "recycling plants" as well as "sewage treatment" in that statute. She could not, in her research, locate the origin of that language in the legislative history of the statute. While the Texaco project is certainly not a poorly conceived idea, she said, it is best located outside the Coastal Zone. As an oil refinery, it is her opinion that its placement in the proposed location is prohibited by the Act.

The Secretary submitted a brief, marked as Exhibit "B", on the position of DNREC concerning Texaco's application and

appeal. He cites the definition of "refining" from the Howley's Condensed Chemical Dictionary, 11th Ed. (1987):

> [Refining is]... [e]ssentially a separation process whereby undesirable components are removed from various types of mixtures to give a concentration and a purified product. Such separation may be effected (a) mechanically, by pressing, centrifuging, filtering, etc., (b) by electrolysis; (c) by distillation, solvent extracting or evaporation; (d) and by chemical reaction....

DNREC thus argues that the mere fact that a traditional oil refinery may include processes such as catalytic cracking which are not included in Texaco's proposal does not eliminate the project from the general category of "oil refinery," such as is prohibited from location in the Coastal Zone. Rather, distillation forms one of the fundamental methods of refining. The fact that there is here presented a simpler form of refining cannot alter its character.

The statutory prohibition against any form of oil refinery in the Coastal Zone is further emphasized by the omission of the word "basic" as a modifier in 7 Del. C. sec. 7002(e), where "basic" is found to modify "steel" plants or cellulosic pulp paper mills only. Citing an earlier decision of the State Planner, Degussa Delaware, Inc., an Opinion and Order on Appeal from the State Planner (Nov. 12, 1973), DNREC contends that the Legislature intentionally omitted to use "basic" before "oil refinery" in order to clarify its position that any new oil refinery, of any character or description, is absolutely prohibited from

placement in the Coastal Zone. Thus, DNREC contends, Texaco's assertion that its project is less complex than a more traditional oil refinery is plainly irrelevant.

Moreover, DNREC asserts that all of Texaco's arguments concerning the general absence of harm to the environment are likewise irrelevant, since they apply to the permitting process only. Here, the statute prohibits the presence of oil refineries in the Coastal Zone, and the mere potential to pollute is itself adequate reason for denial of Texaco's application.

Concerning Texaco's argument that its proposed plan would occupy far less than the 20 acre area identified in the statute as a characteristic of heavy industry, DNREC argues that the Board must look to the overall intent of the statute. The characteristics of heavy industry suggested in 7 Del. C. sec. 7002 merely provide guidance to the Board in assigning a status to a project or proposal. The entirety of the project must be considered, including its potential to pollute, in considering its status. Here, DNREC contends that the Board is virtually required to assume that human error and/or equipment malfunction will occur, in evaluating an application. In that context, the environmental cost of a failure or error here would be catastrophic. To read the statute in the manner proposed by Texaco, DNREC argues, leaves the Coastal Zone open to the proliferation of 15 acre oil refineries, chemical plants and basic steel or pulp paper plants.

The better view, DNREC suggests, is to examine the statute as a whole, including its purpose. Such a view would observe that the application of Texaco includes smokestacks, tanks, distillation or reaction columns, chemical processing equipment and scrubbing towers in its proposed equipment. Such a list includes five of the seven examples of that equipment identified in the Act as characteristically employed by heavy industry. Not all of these equipment types are necessary to compel the conclusion that heavy industry is involved. Even viewing the proposed amendments in design which Texaco suggests are possible, three of the seven examples will remain in use. These factors, taken together with the prohibition against oil refineries in the Coastal Zone, should be adequate for the Board to conclude that the decision of the Secretary was proper.

Next, DNREC argues that Texaco's project constitutes re-refinery, not recycling. Even if it were to be viewed by the Board as recycling, however, Texaco may not avail itself of the exemption in 7 Del. C. sec. 7003 for "recycling plants" because it is not a "public" recycling plant. DNREC argues that principles of statutory construction require that the antecedent "public" be read distributively to modify the consequent "recycling plant." Had the Legislature intended to separate "public sewage treatment" from any form of "recycling plant," it would have used a comma as punctuation after "public sewage treatment." Since it did

not, it is more logical to assume that the legislature intended a unified phrase. To read it otherwise leaves the phrase "public waste treatment" as an awkward noun, rather than as an adjective modifying "plants." Likewise, nowhere else in the Coastal Zone Act is there contemplated any private enterprise which may be exempted from the Act or exist outside the jurisdiction of DNREC's status or permit process.

Finally, DNREC challenges Texaco's argument that its plan to accept used oil from the general public for recycling renders the proposed project a "public recycling plant." DNREC argues that in Chapter 700, "public" must mean "owned by the people," as it does in other sections of the Delaware Code. This is particularly true, DNREC suggests, in the context of the Coastal Zone Act, since, for example, sewage originates with the public at large. Thus "private sewage treatment" would employ a clear redundancy. Under all of the circumstances, DNREC suggests, the decision of the Secretary was proper and should be upheld.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

We first address Texaco's contention that its project is exempt from the ambit of the Coastal Zone Act because it employs "recycling" which must be regarded as "public" because it will accept public contributions of used oil to its feedstock. It is clear that recycling is not defined in the Act. "Words used in a statute that are undefined should be given their ordinary, common meaning." Coastal Barge

Corp. v. Coastal Zone Industrial Board, Del. Supr., 492 A.2d 1242, 1245 (1985)(citations omitted). Recycling is commonly understood to imply those operations which collect, treat or process discarded or waste materials in order to recover useful materials. There can be no question that Texaco's project will serve the useful purpose of re-refining used oil. This can generally be viewed as a recycling effort. At issue, however, is whether such an adventure may properly and lawfully be located in the Coastal Zone or whether it constituted "heavy industry" as is prohibited by 7 Del. C. sec. 7003.

In addition to leaving the work "recycling" undefined, the 1971 Legislature which crafted the Coastal Zone Act doubtless had little example of the course recycling efforts would subsequently take. We are thus compelled to interpret the Act and its words in a way which respects internal harmony. To this end, we note its fundamental purpose.

> The purpose of the statute is to control the location, extent and type of industrial development that is most likely to pollute Delaware's bay and coastal areas.

Kreshtool v. Delmarva Power and Light Co., Del. Super., 310 A.2d 649, 651 (1973).

The statute itself:

> ...seeks to prohibit entirely the construction of new heavy industry in its coastal areas, which industry is determined to be incompatible with the protection of the natural environment in those areas.

7 Del. C. sec. 7001.

Neither party can point to the Legislative origins of the insertion of the recycling exemption into the statute. Nowhere in the Act is there any reference to specific private operations which may be exempt. Since the issue of whether "public" in section 7003 modifies the word "recycling" is ambiguous and not susceptible of a single interpretation, we resort to traditional aids for statutory interpretation.

> Where a sentence contains several antecedents and several consequents, they are to be read distributively. The words are to be applied to the subjects that seem most properly related by context and applicability.

2A Sutherland, Statutes and Statutory Construction, sec. 47.26 (5th Ed. 1992). Similarly, "[w]hen the intent [of the legislature] is uncertain, punctuation may be looked to as an aid...." Id., sec. 47.15. We conclude that the absence of a comma between "public waste treatment" and "recycling plants" implies that they were intended to be read distributively, and thus "public" modifies "recycling plants." To read it otherwise yields an awkward phrasing: "public sewage treatment" is left without a noun. Likewise, to separate "sewage treatment" from recycling results in a strained and illogical conclusion. It suggests that the Legislature intended that private recycling concerns, regardless of their potential for environmental disaster, were expected to exist within the Coastal Zone.

> Where language of a statute is ambiguous, it must be contrived to accomplish the legislative purpose.

Wilmington Trust v. Malcolm, Del. Super., 405 A.2d 701 (1971). We are thus prohibited from reaching such an absurd result. Coastal Barge, supra, at .

Therefore, having concluded that "public" modifies "recycling," we next turn to the issue of what is intended by a "public recycling" facility. Again, the word "public" is not defined in the Act. Again, to construe the phrase "public recycling" to mean a private concern which accepts feedstock donations, however small from the public, strains its plain meaning. Consistent with the purpose of the Act, we conclude that "public recycling" means an entity which is government-sponsored or owned "by the people." To read it otherwise would imply that private environmentally hazardous enterprises may exist in the Coastal Zone. Such a result would contravene the overall purpose of the Act to protect the environment. Thus, we conclude that Texaco's project, even if recycling, constitutes a private rather than a public enterprise. It is not therefore exempted from the Act under section 7003.

We turn next to the question of whether the Texaco project is "heavy industry" as is therefore prohibited in the Coastal Zone. Heavy industry means:

> ...a use characteristically involving more than 20 acres, and characteristically employing some but not necessarily all of such equipment such as, but not limited to, smokestacks, tanks,

> distillation or reaction columns, chemical processing equipment, scrubbing towers, pickling equipment and waste treatment lagoons; which industry, although conceivably operable without polluting the environment, has the potential to pollute when equipment malfunctions or human error occurs. Examples of heavy industry are oil refineries, basic steel manufacturing plants, basis cellulosic pulp-paper mills, and chemical plants such as petro-chemical complexes.

7 Del. C. sec. 7002 (emphasis added).

By its terms, the statute regulates heavy industry. The equipment listed and the processes identified are intended only to exemplify the types of operations meant to be prohibited in total. Here, even viewing Texaco's proposed modifications which it contends would render it a "state of the art" facility, the project utilizes tanks, distillation or reaction columns and smokestacks. These are plainly the types of equipment which suggest heavy industry. The mere fact that the proposed project occupies fewer than 20 acres of land cannot salvage it from classification as a heavy industry. Nor does the fact that Texaco elects to characterize its effort as "recycling" remove it form the category of "oil refinery." These are not mutually exclusive concepts. We find that the Secretary properly considered the potential to pollute in weighing the project.

An oil refinery of any kind is wholly prohibited. That Texaco's process is simpler than a full blown refinery does not alter its fundamental character. We find that its purpose in attempting to recycle used oil is laudible. Even

so, however, it cannot lawfully be operated in the Coastal Zone, where it creates so great a risk to the environment. We find that the Texaco project fully meets the statutory definition of heavy industry. Distillation is refining, and refining of oil is prohibited in the Coastal Zone. The recycling of used oil necessarily requires that it be refined. A small refinery whose capacity includes 200,000 gallons on-site storage, and the production of 3500 barrels of marine diesel each day represents "heavy industry," and a significant hazard to the delicate environment of the area where it proposes to reside.

We need not reach the question of how the Texaco project differs from those earlier found not to be heavy industry by earlier Boards. Regardless of the character of earlier projects, none were similar to the process Texaco will employ. Irrespective of other characterizations of other projects, we conclude that the project planned by Texaco is heavy industry.

AFFIDAVIT OF SERVICE

STATE OF DELAWARE)
) SS:
NEW CASTLE COUNTY)

Robin Truitt, being first duly sworn, deposes and says that:

1. She is a secretary with the Department of Justice.

2. That on July 9, 1992 she caused to be hand delivered or placed in United States Mail, Carvel State Office Building, Wilmington, Delaware, true and correct copies of the within document:

Keith A. Trostle
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Robin Truitt

SWORN TO AND SUBSCRIBED before me on this 9th day of July, 1992.

Deputy Attorney General
Pursuant to 29 Del. C. sec. 2508

CONCLUSION

We find that the decision of the Secretary to classify the application of Texaco as "heavy industry" was proper. We therefore affirm and uphold the decision of the Secretary of DNREC.

Donald F. Crossan, Chairman

Harry M. Fisher III

John D. Super

Eugene D. Bookhammer

John J. Casey, Jr.

John Allen

David Ryan

Fred McKee