

BEFORE THE COASTAL ZONE INDUSTRIAL CONTROL BOARD OF

THE STATE OF DELAWARE

IN THE MATTER OF COASTAL)
ZONE PERMIT 403P) APPEAL NO. CZ 2003-01
ISSUED TO SUNOCO, INC.)

AMENDED DECISION AND ORDER

Pursuant to notice, a public hearing was held on July 16, 2003, at the Carvel State Office Building Auditorium in Wilmington, Delaware, concerning the appeals filed by Common Cause of Delaware, Green Delaware, Audubon Society of Delaware and John Kearney of a decision to grant Coastal Zone Act Permit 403P to Sunoco, Inc. All members of the Coastal Zone Industrial Control Board ("the Board") were present: Christine M. Waisanen, chair, John Allen, Paul Bell, George Collins, Albert Holmes, Judy McKinney-Cherry, R. Jefferson Reed, Victor Singer and Pallather Subramanian. Phebe S. Young, Deputy Attorney General, represented the Board.

Sunoco, Inc., was represented by David Swayze, Esq., and Michael Teichman, Esq., of Parkowski, Guerke & Swayze.

Keith Trostle, Deputy Attorney General, represented the Department of Natural Resources and Environmental Control ("DNREC") and DNREC Secretary John Hughes ("the Secretary").

At the hearing, Maryanne McGonegal appeared for the purpose of representing appellant Common Cause of Delaware, Alan Muller appeared for the purpose of representing appellant Green Delaware, Matt DelPizzo appeared for the purpose of representing appellant Audubon Society of Delaware and John Kearney appeared pro se.

BACKGROUND

The documents commencing the appeals are contained in two separate submissions, both dated June 2, 2003. One submission comprises a completed "Application to Appeal from a Coastal Zone Act Decision" signed by Maryanne McGonegal as Secretary of Common Cause of Delaware, a two page Statement of Reasons in the form of a letter on the letterhead of Common Cause of Delaware and a check for \$100.00. The Board has traditionally required this "Application" and a fee of \$100.00 to perfect an appeal to the Board. The reasons for the appeal stated in this submission relate exclusively to the conduct of the public hearing conducted by DNREC on March 13, 2003, concerning the permit application. No remedy is requested in this submission.

The other submission comprises an unsigned document of twelve pages, plus exhibits, captioned "Brief for Appellants" which begins with the statement, "The following Plaintiffs do hereby move to appeal the Sunoco Coastal Zone Act Permit Decision rendered by the Secretary of DNREC on May 12, 2003: Green Delaware, Audubon Society of Delaware, Common Cause of Delaware, John M. Kearney." This submission does not include an "Application" form nor does it include any payment whatsoever. This submission raises Constitutional and State law issues concerning the process by which the challenged decision was made, including the March 13, 2003, hearing, and also challenges the permit's compliance with the Coastal Zone Act and the validity of the regulations adopted by this Board pursuant to which the permit was granted. This submission requests amendment of the permit to require Lowest Achievable Emission Rate ("LAER") and to require meaningful offsets. It also requests

the remedy, "That DNREC be required to uphold basic immutable due process rights at all public judicial proceedings."

PRELIMINARY MATTERS

Preliminarily, the Board waives any procedural deficiencies and defects in form with respect to the appeal documents and accepts the submitted documents as perfecting appeals by the parties named therein.

Next, Sunoco has moved to dismiss the appeals of Green Delaware, Audubon Society of Delaware and Common Cause of Delaware, in part, on the grounds that they are represented by individuals who are not authorized to practice law in Delaware, i.e., who are engaged in the unauthorized practice of law. Sunoco concedes that Mr. Kearney, an individual, may represent himself *pro se*.

The challenged appellants are organizations, not individuals. There is no dispute that these entities may participate in administrative proceedings and may appear as parties before this Board when they have standing to do so. However, an organization, as opposed to a natural person, may not act *pro se*, a conclusion inherent in the definition of the term, *pro se*: "For himself; in his own behalf; in person." *Black's Law Dictionary*, Revised Fourth Ed. By its very nature, an organization must act through a representative. The issue we must decide is whether such representative, when appearing before this Board to represent an organization that is a named party in a hearing concerning an appeal of the Secretary's grant of a Coastal Zone Act Permit, is engaged in the practice of law. We note that we do not question the right of any citizen, individually or as spokesperson for an organization, to participate as a member of the public in administrative proceedings where public participation is permitted. We only address the

question of an organization's representation when that organization is a named party to an appeal under 7 Del. C. §7007.

In Delaware, the definition of what constitutes the practice of law has been left to the exclusive province of the Delaware Supreme Court. *Delaware Optometric Corporation v. Sherwood*, 128 A.2d 812 (Del. Supr. 1957), *Delaware State Bar Association v. Alexander*, 386 A.2d 652 (Del. Supr. 1978). In *Alexander*, The Delaware Supreme Court adopted definitions of the practice of law which had been articulated in other jurisdictions, including:

The practice of law (in addition to conduct of litigation in courts of record) consists generally, in the rendition of legal service to another, or legal advice and counsel as to his rights and obligations under the law, calling for a degree of legal knowledge or skill, usually for a fee, or stipend, i.e. that which an attorney as such is authorized to do; and *the exercise of such professional skill certainly includes the pursuit, as an advocate for another, of a legal remedy within the jurisdiction of a quasi judicial tribunal.*

* * *

The weight of authority, where such issue has been presented, is that *the character of the service and its relation to the public interest, determines its classification, not whether compensation be charged therefore.*

386 A.2d at 661 (citations omitted, emphasis added). In this proceeding, Ms. McGonegal, Mr. Muller, and Mr. Delpizzo, who concede that they are not licensed to practice law in Delaware, seek to pursue a legal remedy as advocates for their respective organizations. This comes squarely within the definition of the practice of law quoted above.

Moreover, the Delaware Supreme Court has established a Board on the Unauthorized Practice of Law and has promulgated rules for that Board. Rule 4 of that board provides guidance on what constitutes the unauthorized practice of law, including,

“ . . . (ii) drafting legal documents or pleadings for a person or entity (other than one’s self) reflecting upon Delaware law, for use in a Delaware legal tribunal *or governmental agency*, unless the drafting of such documents or pleadings has been supervised by a person authorized to practice law in the State of Delaware, (ii) *appearing as legal counsel for, or otherwise representing a person or entity (other than one’s self) in a Delaware legal tribunal or governmental agency. . .*” (emphasis added).

Additionally, Rule 72 of the Delaware Supreme Court provides a procedure for, and extensive restrictions on, the admission *pro hac vice* before administrative agencies of this State of attorneys admitted in other jurisdictions. It is difficult to imagine that attorneys admitted to practice in other jurisdictions would be required to undergo this admission procedure in order to represent others before administrative agencies in this State if individuals who are not attorneys at all could represent others without restriction.

While it is tempting to allow organizations such as these appellants to choose their own representatives at their own peril, this Board does not have that latitude, for it has been held that a decision based on a hearing that involved the unauthorized practice of law may be void for that reason alone. *Marshall-Steele v. Nanticoke Memorial Hospital, Inc.*, 1999 WL 458724 (Del. Super. 1999). For these reasons, the Board rules that Green Delaware, Audubon Society of Delaware and Common Cause of Delaware may not appear as parties/appellants in a hearing before this board without representation by an attorney admitted to practice in Delaware. Since they are not so represented, their appeals are dismissed.

Finally, Sunoco moves to dismiss the appeal of Mr. Kearney on the grounds that he lacks standing in the matter. The relevant statute, 7 Del. C. §7007(b) provides that,

“*Any person aggrieved* by a final decision of the Secretary of the Department of Natural Resources and Environmental Control under subsection (a) of §7005 of this title may appeal same under this section.” (emphasis added). Mr. Kearney testified that he lives, works and engages in recreational activities in locations affected by the permitted facility. The Board finds this evidence sufficient to establish that he is a “person aggrieved” with standing to appeal the Secretary’s decision.

SUMMARY OF THE EVIDENCE

The record of proceedings below includes, among other entries, the Secretary’s Assessment Report dated February 26, 2003, affidavits of publication of notices announcing the public hearing, a transcript of the public hearing of March 13, 2003, the Hearing Officer’s Report dated May 8, 2003 and the Secretary’s Order dated May 12, 2003.

Mr. Kearney testified that the existing Sunoco refinery does not have a sulfur recovery unit for processing hydrogen sulfide, a hazardous by-product of the refining process. Rather, Sunoco historically has transferred the hydrogen sulfide to a nearby facility operated by General Chemical for processing. That facility, however, will cease operations by the end of September, 2003. Thus, Sunoco quickly must have other arrangements for processing hydrogen sulfide such as the project in question. (Transcript of July 16, 2003, hearing, at pp. 144-45). Further, he testified that technology exists which would permit the same outcome while emitting fewer pollutants than the project in question. (Id, p. 146). Thus, according to Mr. Kearney, the project does not achieve the “lowest achievable emission rate” or “best available control technology” (“BACT,”) both standards employed by the federal Clean Air Act. (Id, p. 149).

Mr. Swayze emphasized that the proposed project uses the best technology available within the time allowed given the cessation of business by General Chemical and the necessity to avoid even temporary processing of hydrogen sulfide through “flaring” or burning. Moreover, the conditions imposed by the Air Quality Management Permit, with which the facility also must comply, are more stringent than those imposed by the Coastal Zone Act Permit addressed by this appeal. (Transcript of July 16, 2003, hearing, at pp. 179-80).

Mr. Kearney and Ms. McGonegal testified at length as to the procedural deficiencies they perceive in the conduct of the March 13, 2003, public hearing.

FINDINGS OF FACT

On September 23, 2002, Sunoco, Inc., applied for a Coastal Zone Permit to construct and utilize a sulfur recovery plant within the Coastal Zone at its existing refinery. On February 14, 2003, the application was determined to be preliminarily administratively complete. By date of February 26, 2003, the Secretary provided a written assessment of the likely impact of the proposed project on the factors listed in 7 Del. C. §7004(b) and referenced in Coastal Zone Regulation H.3(b), i.e., environmental impact, economic effect, aesthetic effect, requirement for supporting facilities, effect on neighboring land uses and consistency with county and municipal comprehensive plans, as well as a preliminary determination that Sunoco’s offset proposal was adequate. A public hearing was properly noticed by publications dated February 16, 19 and 26 in the *News Journal*, the *New Castle Weekly* and the *Delaware State News* and was held on March 13, 2003. Thereafter, by letter of March 25, 2003, further information was

requested of the applicant and, according to the report of the hearing officer, received April 1, 2003.

The Board has had the opportunity to review the Secretary's evaluation of the factors enumerated in 7 Del. C. §7004(b) and Coastal Zone Regulation H.3(b) and concurs in that evaluation. Additionally, the Board has had the opportunity to review the proposed offsets to the project's negative environmental impact and finds that the net reduction in air emissions is adequate to support the Secretary's decision to grant the permit.

CONCLUSIONS OF LAW

This Board has the power to hear this appeal from the Secretary's decision to grant a Coastal Zone Act Permit. The possible actions the Board may take in response to such an appeal are set forth in the statute: the Board may affirm the Secretary's decision, modify the permit or deny the permit. 7 Del. C. §7007(a). Mr. Kearney does not ask this Board to deny the permit. ("We agree that construction of these plants is desirable, but want the facilities permitted in accordance with the requirements of Delaware and Federal law." Brief for Appellants, p. 10). However, he argues that the evaluation required by 7 Del. C. §7004(b) requires that the project achieve the "lowest achievable emission rate" or "best available control technology," both standards employed by the federal Clean Air Act. (Transcript, p. 149). He seeks to have the Board modify the permit to require the project to meet those federal standards. However, the Coastal Zone Act does not require that a project meet particular Clean Air Act standards to qualify for a State Coastal Zone Act permit and we decline in this instance to impose those standards on the project in question.

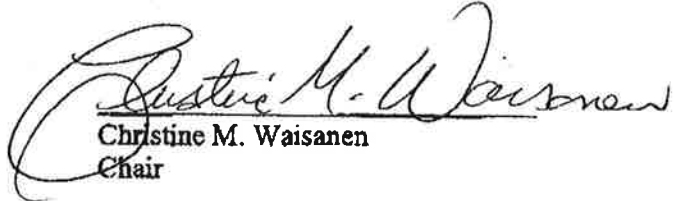
Coastal Zone Industrial Control Board
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Mr. Kearney has also requested that this Board order, "That DNREC be required to uphold basic immutable due process rights at all public judicial proceedings." We decline to issue such an order in response to this appeal.

BOARD'S DECISION

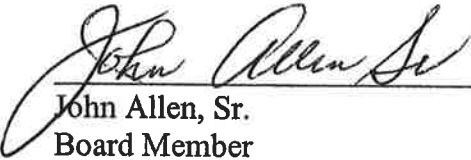
Having concluded, as did the Secretary, that the proposed project will have a positive overall environmental impact and otherwise meets the relevant requirements for a Coastal Zone Act Permit, this Board affirms the Secretary's decision to grant the requested permit.

Date: 10/17/03


Christine M. Waisanen
Chair

Coastal Zone Industrial Control Board
Appeal CZ 2003-01


Date: 10-20-2003



John Allen, Sr.
Board Member

Coastal Zone Industrial Control Board
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Date: 10/24/23



J. Paul Bell
Board Member

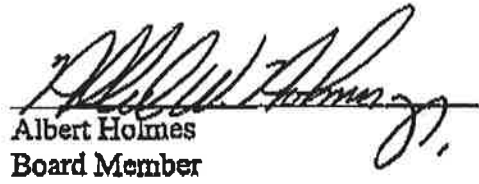
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Date: 10/28/2003


George Collins
Board Member


Coastal Zone Industrial Control Board
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Date: 10/23/03


Albert Holmes
Board Member


Coastal Zone Industrial Control Board
Appeal CZ 2003-01

Date: Oct 27, 2003


Judy McKinney-Cherry
Board Member

Coastal Zone Industrial Control Board
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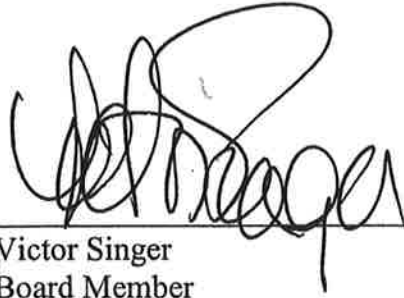
Date: 10/28/03



R. Jefferson Reed
Board Member

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Date: 10/18/03



Victor Singer
Board Member

Coastal Zone Industrial Control Board
Appeal CZ 2003-01

Date: 10/18/2003



Pallather M. Subramanian
Board Member

