

**BEFORE THE COASTAL ZONE INDUSTRIAL CONTROL BOARD OF  
THE STATE OF DELAWARE**

IN THE MATTER OF COASTAL                    )  
ZONE PERMIT 406P                            )  
ISSUED TO E.I. DuPont DeNemours & Co.)      APPEAL NO. CZ 2003-02 & 03

**DECISION AND ORDER**

Pursuant to notice, a public hearing was held on October 14, 2003, at the Carvel State Office Building Auditorium in Wilmington, Delaware, concerning the appeals filed by Maryanne McGonnegal and John Kearney of a decision to grant Coastal Zone Act Permit 406P to E.I. DuPont DeNemours & Co. ("DuPont"). Members of the Coastal Zone Industrial Control Board ("the Board") present were: Christine M. Waisanen, Chair, John Allen, Paul Bell, Albert Holmes and Victor Singer. Absent were: George Collins, Judy McKinney-Cherry and R. Jefferson Reed. Board member Pallather Subramanian was disqualified from consideration of the matter. Phebe S. Young, Deputy Attorney General, represented the Board.

DuPont was represented by F. Michael Parkowski, Esq., and Jeremy W. Homer, 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").

Appellants Maryanne McGonegal and John Kearney appeared pro se.

**SUMMARY OF THE EVIDENCE**

Before the hearing the board members reviewed the record of proceedings below including, among other relevant entries, the Coastal Zone Permit Application dated

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January 3, 2003, the Secretary's Assessment Report dated May 15, 2003, the transcript of the public hearing held June 11, 2003, post hearing submissions from the public, a letter dated June 18, 2003, from Motiva Enterprises to DNREC, a document dated July 29, 2003, responding to various issues raised in post hearing submissions, the Hearing Officer's Report dated August 11, 2003, the Secretary's Order and Amendment, both dated August 14, 2003 and Coastal Zone Act Permit 406 dated August 14, 2003.

The evidence in the record below establishes that the proposed facility will be built on the site of the existing Motiva refinery in Delaware City, will process spent sulfuric acid and H<sub>2</sub>S from the Motiva refinery, will import spent acid from sources outside the Motiva refinery in order to maintain the throughput necessary for facility operation and will export reprocessed fresh sulfuric acid to users outside the Motiva refinery. Motiva presently possesses a valid permit for rebuilding an existing on-site acid plant that legally would, at the permitted production levels, produce air emissions in quantities greater than what will be produced by the facility proposed by DuPont. Motiva has represented that it will utilize the existing permit to restart its own facility if DuPont is not allowed to build and operate the proposed facility.

Attachment D to the permit application is a copy of an August 2, 2002, letter from the New Castle County Department of Land Use verifying that the proposed use is consistent with the zoning of the Motiva site. However, the letter does not affirmatively express County approval for the use in question.

At the hearing, Mr. Alan Muller, both as a witness called by Mr. Kearney and in his own public comment, testified about a citation of DuPont by the Environmental Protection Agency relating to DuPont's operations of another acid facility. While he did

read into the record what he represented to be the findings contained in a letter dated April 23, 2003, he declined to enter the letter into the record.

Joe Skurla, Venture Development Manager, testified on behalf of DuPont. He stated that the Process Safety Management Program cannot be completed until after design of the facility and that the Process Safety Management Program will address the possible modes of mechanical failure and human error and their consequences and establish procedures for mitigating such consequences. He testified that DuPont understands that Special Condition #4 to Permit 406 means that operation under the permit requires DNREC's prior approval of all aspects of the Process Safety Management Program. DuPont has represented that emissions from the proposed facility would not exceed 95 tons per year SO<sub>2</sub>, 11 tons per year acid mist, 12.2 tons per year NO<sub>x</sub> and 26.4 tons per year CO. Mr. Skurla testified that DuPont intends these emission limits, on a rolling 365 day year, to be absolute maximums and that the facility would be shut down for as long as required if that were necessary to meet these emissions limits.

Stephen Birkel, Plant Manager, testified on behalf of DuPont that the secondary containment system will consist of a dike with a contained volume equal to the largest tank plus allowances for the maximum expected rainwater plus 6 inches.

During the proceedings below and at the hearing before this Board, both appellants emphasized what they claimed were procedural irregularities at and following the June 11, 2003, public hearing that preceded the Secretary's decision.

#### FINDINGS OF FACT

Permit 406 allows the construction and use of a replacement sulfuric acid regeneration ("SAR") facility with a maximum throughput capacity of 550 tons per day

to be located on the premises of the Motiva Delaware City Refinery at 2000 Wrangle Hill Road, Delaware City, Delaware. The Motiva refinery is a heavy industry use which was lawfully in existence and in active use prior to June 28, 1971. The proposed SAR facility is an expansion or extension of the Motiva refinery nonconforming use.

If DuPont is not permitted to build and operate the proposed SAR facility, Motiva will construct and/or repair and operate its own permitted acid regeneration plant. The proposed DuPont SAR facility will have significantly less overall air emissions than what Motiva would be able legally to produce under its existing permit. The increase in emissions of some air contaminants from the proposed DuPont SAR facility is more than offset by the reduction in other contaminants that would be emitted from a reconstructed Motiva acid plant. Thus, the overall environmental effect of the proposed facility is positive.

The Secretary accepted the representation in DuPont's permit application that there is no practical way to estimate the environmental effect of mechanical malfunction or human error prior to completion of the design of the facility. DuPont represented and the Secretary found that the requirement of a detailed Process Safety Management Program addressing that question, subject to DNREC's review prior to operation, represents a reasonable consideration of the environmental impact of the proposed use during mechanical malfunction and human error. The Board agrees with this finding. Mr. Skurla testified, during examination by the Board, that the above-described emissions budget for the proposed facility is sufficient on a rolling 365 day year basis to cover air emission results of mechanical and human errors. The Board considers that testimony, in

combination with the design of the secondary containment system as evidence of adequate mitigation of any environmental effect of error or malfunction.

#### CONCLUSIONS OF LAW

Prior to the hearing, DuPont filed a motion to dismiss the appeals based, in part, on the grounds that appellants lack the required legal standing. At the hearing, however, DuPont did not raise the standing issue and requested that the Board rule on the merits of the Secretary's decision. The Board therefore deems the original DuPont motion to dismiss as being withdrawn.

Both appellants contend that procedural errors in the DNREC permitting process, including the public hearing, require the Board to reverse the Secretary's decision to grant the permit. Appellant Kearney contends that he was a party to the permit application proceedings and that he was entitled to all the procedural rights accorded a party in a contested judicial proceeding. The Coastal Zone Act ("CZA"), at 7 Del. C. §§7004 and 7005, addresses the procedural requirements the Secretary is required to meet in administering the CZA. Additionally, 7 Del. C. §7005(b) permits DNREC to adopt, subject to the approval of the Board, regulations further setting forth its rules of practice and procedure, specifically the procedures for hearings on permit requests. Accordingly, the Coastal Zone Regulations describe the process for receiving, reviewing and deciding Coastal zone permit applications. *See, generally*, Coastal Zone Regulations G – O and Q. Both the CZA, at §7005(a), and the regulations, at H.3(e), require that DNREC hold a public hearing as a part of the process of reviewing an application for a CZA permit. While the rest of the permit review procedure is not subject to the requirements of the APA (29 Del. C. §10161), Regulation O(4) specifies that the hearing shall be "conducted

in accordance with the Delaware Administrative Procedures Act (29 Del. C. Chapter 101)” although it does not specify the subchapter of the APA.

Therefore, we must first determine which subchapter of the APA governs public hearings on CZA permit applications. While one could argue that the definition of “case decision” (“... agency proceeding or determination that a named party . . . is or is not in compliance with any existing requirement for obtaining a license or other right or benefit”) fits a decision on an application for a CZA permit, leading to the conclusion that Subchapter III would be applicable, the most logical fit within the APA scheme is to consider a CZA permit a “license” (“the whole or part of any agency permit, certificate, approval, registration, charter or similar form of permission required by law. . .”), and apply Subchapter IV in processing the permit application. The only provision of Subchapter IV applicable to procedures for hearings on license applications is the 20 day notice requirement of §10131(d). In the absence of any more detailed rules governing such hearings, the law requires that the parties be afforded a hearing that complies with the basic requirements of due process: notice and an opportunity to be heard.

We must then determine who are the “parties” to a CZA permit application. Under the CZA and the Coastal Zone Regulations, the public hearing is only one step in the multistep process for acting on permit applications. While public notice is required at several steps along the way, the hearing is the first time that members of the public are allowed input into the review process. Applying the APA’s definition of “party” (“each person or agency named or admitted in an agency proceeding as a party, or properly seeking and entitled as of right to be admitted as a party to an agency proceeding”) (emphasis added), it seems that only the applicant is a party entitled to all the protections

of due process during the review of an permit application unless another person or agency (1) properly seeks to be admitted as a party and (2) shows a right to be so admitted.

Clearly, showing up and speaking at the public hearing is insufficient to confer party status.

Thus, the procedural requirements for the DNREC public hearing are few: the various notice provisions must be met, including the 20 day notice required by 29 Del. C. §10131; the hearing must be public, i.e., members of the public must be allowed to attend the hearing; the hearing must provide the applicant with an opportunity to be heard in support of its application. There is no allegation that any of these requirements were not met in the CZA permit application process which led to the Secretary's decision. Consequently, we find, as a matter of law, that there were no procedural deficiencies in the proceedings below that require reversal of the Secretary's decision.

Appellant McGonnegal contends that the absence of correspondence between DNREC and the Deputy Attorney General assigned to represent DNREC from the DNREC record is error. DNREC asserts that such documents are subject to an attorney-client privilege. The Board agrees that such correspondence is privileged but also finds that such correspondence would be of no consequence in the Board's review on appeal of the Secretary's decision.

A number of substantive legal issues raised by the parties remain to be addressed:

DuPont contends that Attachment D to its application complies with the requirement of 7 Del. C. §7004(a) that “. . . no permit may be granted under this chapter unless the county or municipality having jurisdiction has first approved the use in question by zoning procedures provided by law . . .” The second condition incorporated

into the permit states, "Issuance of this permit does not relieve the permittee of the legal obligation of complying with all building permit, subdivision and other applicable code requirements of the county and municipality wherein the permitted project is located."

The Board finds that this condition on the permit, together with the cited letter, is sufficient to meet the statutory requirement.

The CZA allows expansion or extension of a nonconforming heavy industry. 7 Del. C. §7004(a). Mr. Kearney's citation to zoning cases for the proposition that heavy industry may not be permitted to expand or extend within the Coastal Zone ignores the plain language of the statute.

The Board finds no prohibition on the transfer to a third party of the right to expand or extend a nonconforming use so long as the resulting use otherwise conforms to the requirements of applicable law and regulations.

For purposes of Coastal Zone Regulation I.1, the proposed facility can be viewed as having no negative environmental impact, due to its overall decrease in emissions. Alternatively, it can be viewed as having a negative environmental impact in the increase of some emissions which is more than offset by the greater decrease in other emissions. In either event, Regulation I.1 is satisfied without a separate and distinct offset proposal.

DuPont contends that the proposed facility is pollution control equipment exempted from permitting requirements by Coastal Zone Regulation E.16. Because the Board finds that the Secretary's decision on the permit application is appropriate, we need not reach the question of whether the facility could be built and operated without a permit.

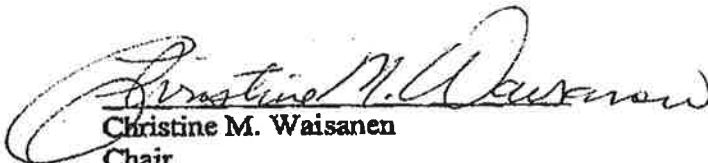


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**BOARD'S DECISION**


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: \_\_\_\_\_

  
Christine M. Waisanen  
Chair

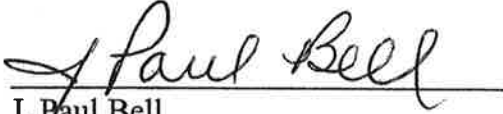
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Date: 10/24/03

  
John Allen, Sr.  
Board Member

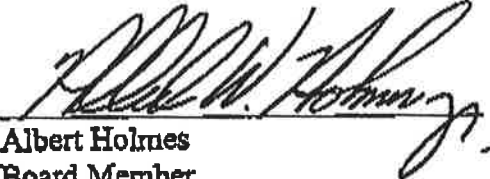
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Date: 10/23/03

  
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J. Paul Bell  
Board Member


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Date: 10/24/03

  
Albert Holmes  
Board Member

Coastal Zone Industrial Control Board  
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Date: 10/24/03



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Victor Singer  
Board Member

