2-10-2004

BEFORE THE COASTAL ZONE INDUSTRIAL CONTROL BOARD OF

THE STATE OF DELAWARE

IN THE MATTER OF COASTAL ZONE STATUS DECISION ON THE APPLICATION OF the Delaware Terminal Company	)))	APPEAL NO. CZ 2003-04

DECISION AND ORDER

Pursuant to notice, a public hearing was held on February 4, 2004, in the Conference Room of the Department of Natural Resources and Environmental Control Office, 391 Lukens Drive, New Castle, Delaware, concerning the appeal filed on December 15, 2003, by the Delaware Terminal Company of a status decision of the Secretary of the Department of Natural Resources and Environmental Control issued November 24, 2003. Members of the Coastal Zone Industrial Control Board ("the Board") present were: Christine M. Waisanen, Chair, John Allen, Albert Holmes, Judy McKinney-Cherry and Victor Singer. Absent were: Paul Bell, George Collins, R. Jefferson Reed and Pallather Subramanian. Phebe S. Young, Deputy Attorney General, represented the Board.

The Delaware Terminal Company was represented by David S. Swayze, Esq., and Michael W. 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").

PREMIMINARY MATTERS

As a preliminary matter, non-parties John M. Kearney and Maryanne McGonegal submitted a Petition to Intervene as parties. The Board voted unanimously not to entertain the Petition.

SUMMARY OF THE EVIDENCE AND FINDINGS OF FACT

The parties did not present new evidence to the Board but relied on the evidence in the record below.

The evidence in the record below establishes that the affected facility is a petroleum storage facility owned and operated by the applicant and located within the Port of Wilmington on privately owned land leased by the applicant. The facility has existed on the site since the 1920's. In 1979, the facility was enlarged by the construction of five oil storage tanks on land adjacent the then-existing tanks. In connection with that construction, the applicant had requested and received a status decision from the Office of Management, Budget and Planning ("the OMBP"), the State agency charged with administering the Coastal Zone Act from its passage in 1971 until 1981. In that decision, the Director of the OMBP found that the proposed construction was not a regulated use under the Coastal Zone Act because (1) it was not a "heavy industry" as defined by the Act and (2) it was part of the existing transfer facility which "is exempt from prohibition by reason of being part of the exempt Port of Wilmington."

The proposed project would remove seven existing petroleum storage tanks and construct twelve new tanks within the geographic boundaries of the existing perimeter containment dikes. The project would increase the storage capacity of the facility over that presently existing.

CONCLUSIONS OF LAW

Both the provisions of the Coastal Zone Act (7 Del. C. Chapter 70), ("the Act") and the Regulations Governing Delaware's Coastal Zone adopted May 11, 1999, as amended, ("Regulations") are binding on this Board.

Applicant urges that its facility is an unregulated facility and/or activity by virtue of Regulation §E.11. and/or §E.17. We agree. The facility is part of a "Docking Facility" as defined by Regulation §C.6.[1] and would fit the definition of "Bulk product transfer facility" of 7 Del. C. §7002(f) but for the exemption in the final sentence thereof.[2] Regulation §E. lists 20 uses which are not regulated under the Act, including the following:

> 11. Docking facilities used as bulk product transfer facilities located on privately owned lands within the Port of Wilmington which have been granted a status decision extending the bulk product transfer exemption prior to the effective date of these regulations.
>
> * * *
>
> 17. Any facilities which have received, prior to the promulgation of these regulations, a status decision which provided an exemption for the activity in question.

The Secretary argues that these unregulated uses include only such uses as have received the requisite status decisions since DNREC became the agency responsible for

---

1 "'Docking Facility' means any structures and/or equipment used to temporarily secure a vessel to a shoreline or another vessel so that materials, cargo, and/or people may be transferred between the vessel and the shore, or between two vessels together with associated land, equipment, and structures so as to allow the receiving, accumulating, safekeeping, storage, and preparation of cargoes for further shipment, and administrative maintenance purposes directly related to such receiving, accumulating, safekeeping, storage, and preparation of cargoes for further shipment."

2 "'Bulk product transfer facility' means any port or dock facility, whether artificial island or attached to shore by any means, for the transfer of bulk quantities of any substance from vessel to onshore facility or vice versa. . . . Likewise, docking facilities for the Port of Wilmington are not included in this definition."

administering the Act and does not include a use or activity which has received a status decision from the Director of OMBP since the OMBP was never an agency charged primarily with environmental protection. However, this interpretation is not supported by the clear language of the Regulations in which there is no distinction between the possible sources of the qualifying status decision. We believe that the 1979 status decision issued by the Director of the OMBP qualifies applicant's facility for the exemptions from regulation under the Act described in Regulation §§E.11. and E.17.

Moreover, the Secretary has failed to show that the Director of the OMBP erred in interpreting the Act as extending the "Port of Wilmington" regulatory exemption to the applicant's facility.

BOARD'S DECISION

For the foregoing reasons, the Board, by an affirmative vote of 3 of the 5 members present, reverses the Secretary's decision and finds that the proposed project is a use and/or activity not regulated under the Act and does not require a Coastal Zone Act Permit.

Date: February 12/04

Christine M. Waisanen
Chair

Date: 2-10-04

Judy M. Cherry

Judy McKinney-Cherry
Board Member

Date: 10 Feb 04

Victor Singer
Board Member

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JOHN M. KEARNEY, Appellant,	)	
v.	)	C.A. 03A-11-008 JRJ
COASTAL ZONE INDUSTRIAL CONTROL BOARD, the **DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL**, and **E.I. DUPONT DE NEMOURS AND CO.** Appellees.	)	

Submitted: April 30, 2004
Decided: March 18, 2005

MEMORANDUM OPINION

Upon Appeal from a Decision of
the Coastal Zone Industry Control Board
AFFIRMED

John M. Kearney, *Pro Se*, 2108 Baynard Boulevard, Suite 3, Wilmington, Delaware 19802, Appellant.

F. Michael Parkowski, Esquire, and Jeremy W. Homer, Esquire, Parkowski, Guerke & Swayze, P.A., 116 W. Water Street, P.O. Box 598, Dover, Delaware 19903, Counsel for Appellee E.I. Dupont DeNemours and Co.

Phebe S. Young, Esquire, and Keith A. Trostle, Esquire, Department of Justice, 820 N. French Street, Wilmington, Delaware 19801, Counsel for Appellee, Department of Natural Resources and Environmental Control.

JURDEN, JUDGE

In this appeal from the Coastal Zone Industrial Control Board ("Board"), the Court holds that the Board's failure to address a pending motion to dismiss (that attacked the standing of objectors to challenge a Coastal Zone Act permit application) was clearly erroneous. However, because the Board made the correct legal interpretation on the merits, and because its factual findings are supported by substantial evidence, the Board's decision to issue a Coastal Zone Act permit to Dupont is **AFFIRMED**.

Facts

A. Background

Non-party Motiva Corporation ("Motiva") owns and operates an oil refinery on the banks of the Delaware River in Delaware City, Delaware.[1] The refinery has operated continuously since the 1950's, and has been "grandfathered" under numerous federal and state environmental statutes. Grandfathering means that the refinery is permitted to continue operations, including reasonable replacement and expansion, even though applicable statutes would forbid establishment of a new operation of the same type in the area it occupies. One such statute is the Coastal

[1] The Premcor Company recently purchased the Motiva refinery. Motiva owned the refinery during the permit application process, and the site is commonly known in Delaware as the Motiva refinery. For simplicity's sake, the Court will refer to the refinery's owner as "Motiva," even though Premcor may have been the true owner during a few of the more recent events identified in the fact recitation.

Zone Act[2] ("CZA" or "Act"), which forbids, *inter alia*, the establishment of new heavy industry sites along Delaware's coastline.[3]

Motiva's refining operation uses substantial quantities of "spent" sulfuric acid, *i.e.,* sulfuric acid that is chemically corrupted during the refining process. Spent acid has no industrial value, and presents significant environmental and safety hazards. It is therefore industry practice to "regenerate" spent acid. Regeneration is the chemical equivalent of recycling with chemicals. Recycling or regeneration involves subjecting an unwanted compound to a process by which a portion is transformed back into valuable chemical, and the remaining unsalvageable portion is isolated and safely disposed.

Until 2001, Motiva, pursuant to a Department of Natural Resources and Environmental Control ("DNREC") issued permit, operated two spent acid regeneration (SAR) plants at the refinery site to deal with the waste product its operations created. In 2001, a catastrophic accident at one of the SAR plants triggered an acid spill that killed an employee and caused massive environmental damage. Since then, Motiva has not operated its on-site SAR plants, even though one is still permitted, but instead has shipped all of its spent acid to a site in Louisiana for regeneration.

---

[2] 7 *Del. C.* § 7001 *et. seq.*

[3] 7 *Del. C.* § 7003 ("Heavy industry uses of any kind not in operation on June 28, 1971, are prohibited in the coastal zone and no permits may be issued therefor.")

After the accident, Motiva entered negotiations for Appellant, E. I. Dupont de Nemours and Co. ("Dupont"), to replace the old SAR plants with a state-of-the-art facility. This new facility would be within the fence line or, in environmental parlance, within the "footprint" of the refinery, and therefore not affect any new coastal zone land. The new technology requires sustained operations to run safely. Because oil-refining volume depends upon seasonal factors and price fluctuations, the parties anticipate that Motiva will, at times, be unable to supply adequate throughput for the new plant. Dupont therefore intends to regenerate spent acid from outside sources at the new plant, which it will sell for profit.

B. <u>The Permitting Process</u>

Dupont petitioned DNREC for a permit to run its new SAR plant pursuant to the Act. DNREC gave the proper twenty-days notice that a public hearing would be held regarding the project and, though it was not required to do so, also held a pre-hearing information session for the public during which Dupont engineers gave a presentation explaining the proposal. A week later, DNREC held a standard public hearing, during which documents regarding the permit were submitted into the record, Dupont personnel again explained the project, and members of the public asked questions, made statements and submitted written comments. The hearing officer also left the comment window open for ten days after the hearing,

so members of the public would have time to offer written comments based on what they had heard.

At the conclusion of the comment period, the Secretary entered a detailed order that concluded, *inter alia*, the project would cause a net decrease in pollution compared to the amount Motiva is permitted to produce under the permit for the old plants, and is therefore environmentally desirable. The order also found the new plant will be within the "footprint" of the refinery, and therefore does not constitute prohibited new industrial development within the costal zone.

Based on this order, DNREC issued Dupont a permit. Among other things, the permit requires Motiva to relinquish its permits for the old SAR plants,[4] and allows Dupont to run its SAR plant only as long as Motiva operates the refinery.[5] This means that the permit cuts the amount of pollution Motiva is permitted to expel, and does not extend the existing non-conforming use (heavy industry in a coastal zone) in space or duration.

John Kearney and Maryanne McGonnegal are residents of Wilmington, Delaware. Both attended the hearing and offered negative comments on the permit application. Appellants are particularly concerned that the project, while resulting in a decrease in overall pollution, will increase nitrous oxide emissions. Nitrous

---

[4] Delaware Coastal Zone Act Permit #406, Special Condition #1; App. To Appellee's Ans. Br. at B-111 (hereinafter "App. at _").
[5] Delaware Coastal Zone Act Permit #406, Special Condition #3; App. at B-111.

oxide is a key component of ozone, *i.e.,* smog, and Appellants fear that winds will carry the new emissions nine miles from the refinery to Wilmington, and worsen that city's already abominable air quality. Wilmington is classified as "severe non-attainment" status under the Clean Air Act for ozone, and endures many summer days in which smog is so severe that the State recommends children and the elderly refrain from leaving their houses for fear of damaging their health.

At the hearing, Appellants sought to be declared parties to the permit application. Party status would have entitled Appellants to all the rights of civil litigants, including enhanced notice and due process, discovery, and cross-examination of witnesses. The hearing officer denied this request, finding that the purpose of a public hearing, *i.e.*, allowing many people of different views to be heard on a matter of public interest, would be thwarted if everyone who showed up to the hearing was granted full party status, with concomitant due process and discovery rights. The hearing officer therefore interrupted Mr. Kearney numerous times when Mr. Kearney attempted to assert himself as a civil litigant by interrupting Dupont's presentation or other commenters with objections.

C. <u>The Board's Decision</u>

Appellants appealed the issuance of the permit to the Coastal Zone Industrial Control Board pursuant to 7 *Del. C.* § 7007(b). The Board conducted an adversarial hearing on October 14, 2003, in which Appellants enjoyed full party

status. While Appellants raised numerous issues before the Board, only three were deemed substantial enough to warrant discussion in the Board's opinion. First, Appellants argued that the hearing officer's failure to grant them party status at the original hearing deprived them of procedural due process. Second, Appellants contended that the Act required Dupont to obtain all county zoning permits before submitting its permit application. Dupont only obtained an advisory letter from the county stating that its proposed facility fit the land-use designation for the site, deciding to leave more detailed zoning proposals, and the substantial work they entail, until after it was sure the new plant would receive the necessary environmental permits. Finally, Appellants contended that Dupont's project represents an expansion of the refinery in contravention of Appellants' interpretation of the purpose of the Act: to cause such non-conforming uses to "wither and die" so that tourism and environment-friendly enterprises make take their place within the coastal zone.

Dupont responded with a pre-hearing motion to dismiss for lack of standing. Appellants offered only two grounds for standing: (1) that they believe Wilmington is downwind from the refinery, and (2) they have visited Delaware City and plan to do so again in the future. Dupont argued that some showing of danger that the new emissions would indeed travel to Wilmington and worsen air quality there, and that the resulting negative impact would outweigh the substantial

net pollution decrease the project would cause, was necessary to establish standing. Without such a showing, standing would be based solely on Appellants' subjective, arbitrary fears, obliterating the "concrete and particularized injury" requirement of the United States Supreme Court's standing jurisprudence. Further, argued Dupont, Appellants' vague assertions of future intent to visit Delaware City were identical to those rejected as a standing basis in *Lujan v. Defenders of Wildlife*.[6]

For reasons unknown to the Court, the Board declined to rule on Dupont's motion to dismiss before the hearing. With all parties present and prepared to litigate the merits, Dupont suggested that the Board hear the entire case at once, and then address its standing argument in the decision. When asked if it wished to argue its motion to dismiss alongside the merits, Dupont chose to rest on its brief. Inexplicably, the Board took this to mean that Dupont abandoned its standing argument, and declined to address it in its final opinion.

On October 24, 2003, the Board issued an opinion affirming the Secretary's order. The Board interpreted the Delaware Administrative Procedures Act[7] to find that the only "parties" to a permit application decision are: (1) the applicant, and (2) one who properly moves to be admitted as a party based on a demonstrable right. Merely showing up at a hearing, in the Board's opinion, does not confer

---

[6] 504 U.S. 555 (1992).
[7] *See* 29 *Del.C.* §10101, *et. seq.*

party status. Since they could not have been parties, Appellants were only entitled to the basic notice requirements for a public hearing, which DNREC followed.

On substantive matters, the Board held that the county's advisory letter stating that Dupont's proposed use (heavy industry) matched the zoning of Motiva's site (heavy industry) adequately fulfilled the Act's requirement regarding zoning. The permit also contains a clause requiring Dupont to obtain all applicable zoning permits which, said the Board, ensures that Dupont cannot use the permit to escape land-use obligations.

The Board further found that the creation of a permitting process for expanding non-conforming uses shows that the Act's purpose is not, as Appellants argue, to cause those uses to "wither and die". Instead, the Act expressly contemplates a balancing test between the economics and environmental impact of a proposed expansion. The Board also found that the protection for non-conforming uses runs with the use, and may be transferred or assigned like any property right. Finally, the Board endorsed the Secretary's finding that the project will result in a net decrease in pollution, and is therefore environmentally desirable.

Appellant John Kearney properly appealed the Board's decision to this Court, which has jurisdiction pursuant to 7 *Del. C.* § 7008.

Standard of Review

The Court reviews agency findings of fact under the substantial evidence standard.[8] This limited review determines only whether the Board heard enough evidence to fairly and reasonably support its conclusion, regardless of whether the Court would have reached a different result in the first instance.[9] Phrased another way, this process measures the legal sufficiency of the evidence.[10]

This case also involves the Board's conclusions of law in construing applicable statutes and regulations. An agency's interpretation of its own regulations must be upheld unless clearly erroneous.[11] Statutory construction, however, is a pure question of law for which the Court exercises *de novo* review.[12] When construing statutes administered by agencies, the Court should give the agency's interpretation "due weight,"[13] *i.e.,* whatever weight the Court believes the interpretation to be worth. This, of course, is the essence of *de novo* review.

---

[8] *Mellow v. Board of Adjustment*, 565 A.2d 947, 954 (Del. Super. Ct. 1988), *aff'd*, 567 A.2d 422 (Del. 1989).
[9] *Id.* at 954 (citing *National Cash Register v. Riner*, 424 A.2d 669, 674-75 (Del. Super. Ct. 1980).
[10] DEL. CODE ANN. tit. 29, § 10142(d) (1997 & Supp. 2002).
[11] *Public Water Supply Company v. DiPasquale*, 735 A.2d 378, 383 (Del. 1999).
[12] *Page v. Hercules*, 637 A.2d 29, 32 (Del.1994).
[13] *Public Water Supply Company*, 735 A.2d at 382.

Discussion

A. Standing

I begin by noting that the Board's finding that Dupont had abandoned its motion to dismiss is clearly erroneous. At the Board Hearing, Dupont addressed the standing issue as follows:

> [Mr. Kearney] made a long argument about standing which I think properly should have been in the form of a brief filed with the Board. When it comes to standing, I'm going to stand on our brief. I don't think we want to get into any lengthy discussion of that, but I will say that I think Mr. Kearney is just plain wrong about the standing issue. Having said that, though, I would ask this Board to rule in this case on the merits because we do want to get – if there's an appeal, we want to get all the issues on the table before the Court and not have to put the Board back through another process.[14]

Nothing in the transcript indicates that Dupont withdrew its motion to dismiss or conceded standing. Indeed, Dupont stated the exact opposite, *i.e.,* that it believed Appellants were "just plain wrong" in their standing assertion.

Moreover, just because Dupont decided to rely on its brief for its standing argument, and addressed its closing statement to the merits of the case, it did not impliedly abandon its motion to dismiss. Court and agency dockets are simply too crowded to schedule oral argument for every matter, or to grant parties unlimited time orally to expound on every issue in a complicated case, lest the point be deemed conceded. The Superior Court Rules leave it to the Court's discretion

---

[14] Tr. of Oct. 14, 2003 Hr'g of State Coastal Zone Industrial Control Board at 233 (hereinafter Hr'g at _.); App. at B-289

whether oral argument will be granted.[15] Conversely, no Delaware court or agency has been granted discretion utterly to ignore properly filed, written motions.[16] In short, the Board's apparent assumption that arguments raised in briefing but not reiterated in oral argument are waived is incorrect.[17]

The Board's failure to address the standing issue leaves the Court in a troubling position. Standing is a threshold issue to be determined independent of the merits of the case.[18] It establishes, in essence, who has a right to complain about whatever conduct is at issue.[19] To expound upon a case in which a party has no right, or a challenged right, to complain is to render an impermissible advisory opinion. However, the Board has already issued a detailed decision on the merits that must be affirmed. To remand for a standing decision would further burden the litigants with yet another briefing and argument schedule. Since Appellants are going to lose whether they have standing or not, judicial efficiency would not be served by remanding to the Board for a ruling on standing. I therefore interpret the phrase "any person aggrieved" in § 7008 to provide Appellant Kearney[20] with

---

[15] Super. Ct. Civ. R. 78.
[16] *See e.g.* Super. Ct. Civ. R. 7 and 107.
[17] Perhaps the Board believed Dupont's desire for a determination on the merits, so that the case could be decided in one hearing, required it to ignore the motion to dismiss. That is also incorrect.
[18] *Oceanport Industries, Inc., v. Wilmington Stevedores, Inc.*, 636 A.2d 892 (Del. 1994).
[19] *Id.* at 900, *citing Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378 (Del.1991).
[20] Ms. McGonnegal did not appeal the Board's decision.

enough standing to bring this appeal under these particular circumstances, without deciding whether Appellants had standing before the Board.[21]

B. The Board Correctly Interpreted The Coastal Zone Act

1. The Act allows competitive expansion via permit

On appeal, the bulk of Appellant Kearney's argument is that the CZA should be interpreted as just another zoning act. Mr. Kearney cites numerous cases from other jurisdictions, and a few from Delaware, holding that the intent of zoning is to force undesirable land-uses out of existence by forbidding them from being expanded, upgraded, or transferred. Uses that cannot be improved or repaired will eventually be unable to compete with businesses in properly zoned areas, and will "wither and die" away.

Even if Mr. Kearney's characterization of zoning is correct in a general sense, it ignores the plain language of the Act. Section 7004(a) of the Act provides that "all expansion or extension of nonconforming uses, as defined herein, and all expansion or extension of uses for which a permit is issued pursuant to this chapter, are likewise allowed only by permit." Subsection (b) provides that, when the Secretary makes a permitting decision, he must consider, "Economic effect,

[21] It would be inappropriate to rule on Dupont's Motion to Dismiss (filed pre-Board hearing) or Appellant, John Kearney's affidavit (on standing) because the Board did not consider them. The standing question not decided by the Board seems to be whether, since Appellants only asserted the Fourteenth Amendment as a basis for standing, the strict federal standing test (*Lujan*) or the more lenient Delaware test (*Oceanport*) applies.

including the number of jobs created and the income which will be generated by the wages and salaries of these jobs in relation to the amount of land required, and the amount of tax revenue potentially accruing to state and local government."

This language makes it clear that the General Assembly did not intend to doom every existing, non-conforming use in the coastal zone to extinction by attrition. Instead, the legislature clearly expects the Secretary to make a judgment call on any proposed expansions, balancing environmental and economic factors to reach the best result for Delaware and its citizens.

The reason for writing the Act this way is obvious. At issue is not a bar or junkyard whose loss would go unnoticed; it is a massive refinery directly or indirectly employing hundreds of people and providing millions of dollars in state tax revenues. Deciding to close it down by disallowing all competitive expansion, particularly expansion that lessens its pollution output, without considering all relevant factors, would contravene legislative intent.

2. <u>The Act only requires a permitted use, not completed local zoning</u>

Appellant Kearney's next and strongest legal argument is that the Act requires Dupont to obtain all zoning permits for the entire project before applying for the CZA permit. Section 7004(a) of the Act states that, "no permit may be granted under [the Act] unless the county or municipality having jurisdiction has first *approved the use* in question by zoning procedures provided by

law."(emphasis added). Here, Dupont obtained an advisory letter from the county stating that its proposed use (heavy industrial) matched the zoning for proposed site of the new SAR plant. There is no allegation that the procedure for issuing an advisory letter was unlawful. Moreover, it is clear that the county already approved two other SAR plants on the site of the proposed plant, and therefore that the county approves of SAR plants on that site. Finally, the permit specifically ties its own validity to Dupont obtaining full zoning permits once it finalizes a design plan. Under these facts, the use, a SAR plant, (1) has already been approved for the site (2) will attain the applicable zoning permits if properly designed, and (3) will lose its CZA permit if not properly designed to obtain county zoning. This satisfies both the language and spirit of § 7004(a).[22]

---

[22] That is not to say that the proper procedure for a CZA permit application is to obtain an advisory letter rather than a full zoning permit. It would have been preferable, based on the language of the Act, for Dupont to have completed a zoning plan before applying for the CZA permit. However, this case only involves replacing two properly zoned but pollution and accident-prone SAR plants with one state-of-the-art facility. Under the unique facts of this case, because it is so clear that the SAR plants are permitted on this site, and because of the enhanced protections tied to local zoning included in the permit, an advisory letter is legally sufficient.

Appellants have a similar, somewhat meritorious argument regarding preparation of a catastrophic incident management plan. Dupont informed DNREC that it was still too early to construct such a plan, but gave general details about the scope of damage that could occur from an accident, indicating it would be similar to what could occur at the existing, permitted SAR plants. The Secretary responded by including a special condition in the permit making it contingent upon Dupont creating an accident plan and implementing the correct safety procedures. Given the language of the Act, this was not the proper way to pursue the permit, *i.e.* Dupont "put the cart before the horse." However, again, under the unique, replacement-specific facts of this case, the process followed was legally sufficient.

C. The Agency's Factual Findings Are Supported By Substantial Evidence

The Board made two factual findings that are particularly relevant to this appeal. First, the Board endorsed the Secretary's finding that this project will result in a net decrease in air pollution, and is therefore environmentally desirable. Second, the Board implicitly found that the new SAR plant is not a substantively different use than the old SAR plants that the permit forces Motiva to surrender, and therefore does not constitute "new heavy industry" within the coastal zone.

On the first point, the hearing officer, and eventually the Secretary and the Board, found the following:

> [T]he record must show that offsets [i.e. positives] exist which are clearly and demonstrably more beneficial than any harm from the project. That seems readily apparent since the record reflects SO2 reductions from 219 tons per year [t/y] to 95, the elimination of 2,700 t/y of sodium sulfate wastes and reductions in potable water consumption of 30,000 gallons per day. On the negative side, permitted NOX emissions may increase by 12 tons per year, as would emissions of CO (26.4 t/y) and acid mist (11 t/y) ... [T]he "clearly and demonstrably more beneficial" standard would appear to be easily met, despite some small variations in final numbers at this early stage.[23]

Even if the Court had any power to overturn the Agency's determination that the negative impact of an 11 t/y increase in NOX emissions outweighs the positive impact of an 124 t/y reduction in SO2 emissions, Appellants did not submit evidence suggesting that this is the case.[24] As it is, the language of the Secretary's

---

[23] App. at B-91; Hr'g Officer's Report of August 11, 2003 at 23.

[24] Interestingly, Appellant Kearney appears to be employed by the Clean Air Council, as he has used that group's Wilmington office as a filing address. The absence in this case of the non-profit organizations that have consistently battled Motiva and defended Delaware's environment, the Clean Air Counsel, Delaware Nature Society, Sierra Club, National Resource Defense Counsel, and Mid-Atlantic Environmental Law Center, to name a few, is telling. It seems not an

order, and the corresponding Board decision, indicates that the Agency's decision is supported by substantial evidence.

Moreover, by granting Dupont a permit to construct its SAR plant, the Board implicitly found that the new SAR plant is not a new and different use than that already in existence at the refinery before 1971, the year of existence prior to which non-conforming uses were grandfathered. Appellants' only argument to the contrary is that Dupont will import spent acid into the site to keep its SAR plant running during Motiva's downtime. The issue of whether this new acid importation is significant enough to disqualify the new plant from existing use status requires specialized knowledge of the industry uniquely within the purview of the Board.[25] Given that the decision on this issue was a judgment call based upon the Board's expertise, the Court is satisfied that the substantial evidence standard was met here as well.[26]

---

unreasonable inference that some or all of these groups are aware of the proposed SAR plant, would have standing to contest it, and have chosen not to do so because the project actually will reduce air pollution.

[25] Appellants claim that Dupont's intended acid importation must be a new use because Motiva never imported acid or sold it for profit. There is no record evidence to support this charge, and Motiva submitted documents to the Board suggesting the precise opposite.

[26] Appellants argue that the Board's decision could not have been based upon substantial evidence because they (Appellants) were not granted "party" status at the original hearing, and therefore were not able to enter all the evidence that they wished. The reasons that the process afforded Appellants was adequate are further discussed below. Appellants also complain that Motiva submitted a letter eight days after the hearing, apparently based upon comments made therein, stating that its current system of shipping spent acid to Louisiana is unprofitable, and that if Dupont is not granted a CZA permit it will reactivate its two SAR plants. Appellants fail to note, however, that Motiva was not a party to the permit process, and was as entitled as any other citizen to submit written comment during the ten-day post-hearing window. Moreover, the only change the letter could have made to the Secretary's analysis was from "Motiva has an

D. The Process Afforded Appellants Was Adequate

Finally, Mr. Kearney argues that the hearing officer's failure to grant Appellants party status at the original hearing tainted the entire permitting process such that the Board's decision must be reversed as arbitrary and capricious. This argument reflects a misunderstanding of the law and the permitting process.

First, it must be clear that Appellants did not submit any pre-hearing statement of interest or averment of property right that the hearing officer ignored. Instead, Mr. Kearney argues that they were "parties" because they showed up at the hearing, and not liking what they heard, demanded the enhanced procedural due process that party status affords. Even then, Appellants did not make any statement of right that would have entitled them to party status at that early stage, but instead relied upon the two interests (living in Wilmington and intending to visit Delaware City) that are likely insufficient grounds for standing.

A measure of Appellants' interest is inextricably intertwined in the standing analysis that the Court has decided not to entertain. However, it is important to note that even if the Board had determined over Dupont's objection that Appellants

---

absolute right to restart its SAR plants at any time," to "Motiva intends to restart its SAR plants if this permit is not granted." That difference is not important enough to say that the Board's decision was not based upon substantial evidence. Finally, Appellants also wanted to submit a letter in which a DNREC inspector recommended not classifying the new SAR plant as a "recycling" device because it would emit some new air pollution, in apparent contravention of the definition of recycling or pollution control apparatus in various CZA regulations. Neither DNREC nor the Board classified the new plant as a recycling project, but instead universally referred to it as a "heavy industry" use and judged it accordingly.

had standing to challenge the permit before the Board, there are important procedural reasons why they were not and should not have been granted party status at the initial DNREC hearing.

The Board found that, before a permit is granted, the only parties are (1) the applicant and (2) anyone who petitions the Board in order to protect a meritorious property right.[27] The reason for this restriction is obvious; during the initial stages of a permit application, it is essential for DNREC to keep an open dialogue with the applicant so that agency's concerns can be quickly addressed. This back-and-forth often occurs through phone calls with agency staff, comments at site visits, or an exchange of emails. If everyone who attends a public hearing were to become a party during the permitting process, this simple, efficient exchange would be compromised. Instead, every proposed design change or Agency suggestion would have to be made in writing or memorialized, reviewed by counsel, and served upon a multitude of semi-interested parties, who then could seek discovery, all of which would bog down the permit process.

It is little wonder, then, that DNREC believes that party status should accrue only to those with a definable property interest in the permit process, or to anyone aggrieved by a completed permitting decision. This is especially logical because members of the public with a negative view of a project will have a complaint only

[27] App. at B-166; Oct. 24, 2003 Order of Coastal Zone Industrial Control Board at 7.

if the Secretary decides to grant a permit. Affording them party status before then would slow the process for permits that will ultimately be denied, a tremendous waste of Agency resources. It will also hamper consideration of environmentally friendly, clearly meritorious applications in order to placate the ever-present "NIMBY" bloc, who could be easily disposed during appeal on standing grounds.

Appellant Kearney suggests that DNREC does not want any public participation in the permitting process because it is biased in favor of polluters. The record does not support that charge. DNREC followed all statutory notice requirements, and even held an extra information session to assist the public in planning comments for the public hearing. Appellants not only participated fully at the public hearing, but also enjoyed their full panoply of rights during the appeal process, and "had their day in court" by presenting significant evidence and obtaining detailed rulings, such as this one, on their legal arguments. The mere fact that the Board decided in Dupont's favor does not mean that Appellants received inadequate process. Instead, it means the Board decided that this project is meritorious and should be permitted.

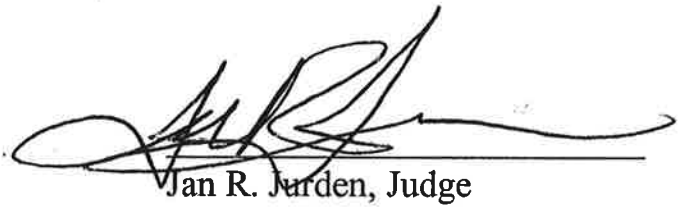
With that in mind, the Court finds that the Board correctly interpreted the CZA and the Delaware Administrative Procedures Act, and that Appellants were not entitled to party status during the initial DNREC hearing. The Court further finds that the process afforded Appellants during the appeal to the Board was

adequate, and that Appellants' allegations of irregularities in that hearing are unsupported by the record.

Conclusion

For all these reasons, the decision of the Coastal Zone Industrial Control Board is hereby **AFFIRMED**.

IT IS SO ORDERED.



Jan R. Jurden, Judge

oc: Prothonotary