

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

**In the Matter of Appeal No. CZ 2003-01
Appellants: Common Cause of Delaware,
Audubon Society of Delaware, Green Delaware,
And John M. Kearney.
Regarding: Permit 403P To Sunoco, Inc.
July 16, 2003; 2:00pm
Carvel State Office Building Auditorium
Wilmington, Delaware**

DECISION

Pursuant to notice, a public hearing was held on Wednesday, July 16, 2003 at the Carvel State Office Building Auditorium in Wilmington, Delaware. The meeting was called to order at 2:05 p.m. Members of the Coastal Zone Industrial Control Board ("the Board") present were: Christine M. Waisanen, chair, and all Board members: Paul Bell, R. Jefferson Reed, Victor Singer, Judy McKinney-Cherry, Pallather Subramanian, Albert Holmes, George Collins, and John Allen . Also present were Phebe Young, Deputy Attorney General representing the Board and Gail Donovan, Secretary to the Board. A court reporter transcribed the meeting for public record.

The purpose of the hearing was to consider appeals to the Board regarding the Secretary of the Department of Natural Resources and Environmental Control's ("the Secretary" or "DNREC" or "the Department") granting of permit 403P to Sunoco, Inc. Appellants were Common Cause of Delaware, Green Delaware, Audubon Society of Delaware and John M. Kearney. The issues raised by the Appellants considered primarily the procedural conduct prior to and at the previous DNREC hearing, including notice of new ground-rules and lack of public participation, but also touched on the substance of the permit itself, primarily to do with air quality and emission control levels.

At the hearing, Mary McGonegal purported to represent appellant Common Cause of Delaware, Alan Muller purported to represent appellant, Green Delaware, Matt Delpizzo purported to represent appellant Audubon Society of Delaware, and John Kearney appeared pro se. Representing Sunoco, Inc. were David Swayze, Esq. and Michael Teichman, Esq. of Parkowski, Guerke & Swayze. Keith Trostle, Deputy Attorney General, represented DNREC and the Secretary, who was not present.

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Sunoco and the Department had filed motions to dismiss the complaint upon the grounds that the Appellant was not a party to the proceedings below. Additionally, the Sunoco Motion to Dismiss argued lack of standing, lack of jurisdiction and the substantive issue of whether appellants had any due process rights to be asserted. Finally, Sunoco's motion to dismiss argued that appellants' representatives, by appearing before this Board, were engaging in the unauthorized practice of law, requiring dismissal of the appeals. The Board took all these issues under advisement.

After introductions, the Board first considered whether the Appellants' representatives could be heard. All such representatives, as well as Sunoco and the Department, were heard on the issue of whether non-lawyers could, under applicable Delaware Supreme Court Rules and decisions of that Court and the Superior Court represent an organization before the Board in view of the Coastal Zone Industrial Control Act's language that "any person aggrieved" could appeal to the Board. After considerable discussion, a Motion was made to accept all four appellants. The motion was defeated 5-4. A motion was then made to accept the pro se appeal of John Kearney, and unanimously accepted. A second motion to dismiss the other three appellants was also passed. Therefore, John Kearney appeared pro se, with the option to confer with the dismissed complainants. One, Mr. Delpizzo left the hearing, but the others remained. The Chairman stated that Gail Donovan, Secretary to the Board, would be passing out question cards to anyone who wished to have a question raised, and the Chair would then ask the question, unless it was duplicative or inappropriate. Question cards were distributed.

Mr. Teichman then made an argument on behalf of Sunoco that John Kearney lacked standing. Chairman Waisanen stated that preliminary materials showed that Mr. Kearney was a resident of Claymont and frequented the Robinson House nearby the Sunoco plant. It was then established that not all materials submitted by the parties had been made available to all parties or to the Board members. The record of proceedings below and other materials which had been submitted to the Board were formally submitted to the Board. A recess was taken and Board members perused the materials during the break.

Mr. Kearney's standing was recognized, and he presented his opening statement after the recess. He recited a list of several procedural problems at the Department's hearing, including lack of responsiveness to questions from the public, lack of notice of new "ground-rules", which were simply posted the day of the hearing, and that the Department and Sunoco appeared to be closely working together. He told of the impact of small particulates on sensitive populations, including his three-year old son, and urged the Board to require LAER ("lowest achievable emission rate") standards under the Clean Air Act, for Sunoco.

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Mr. Swayze countered by saying that the Clean Air issues of substance were not raised properly in the hearings below and were properly related to a Clean Air permit, the issuance of which had not been appealed. The issue-at-hand is the procedural rules. Mr. Trostle stated that the ground-rules and other changes were made for efficiency. He then stated that that is within the Secretary's discretion.

Questions on both the procedural issues and the technical issue were asked by the Board, and questions were read as delivered from the floor and all questions were answered to the Board's satisfaction. Ms. McGonegal was recognized for the purpose of asking a question, and proceeded to present her testimony, despite objections from the Board. She summarized her arguments, but went well over the time allotted, despite protest.

A motion was made by Commissioner Collins to dismiss the appeal. The Chair called the question, and the motion carried unanimously. The meeting was adjourned at 7:30 pm. A few post-hearing comments were given, and will be attached.


SO ORDERED this 1st day of August, 2003.

The following Board members concur in this decision.


Christine M. Waisanen
Chair

Date: Aug 1, 2003


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**Victor Singer
Board Member**

Date: 7/25/2003

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**George Collins
Board Member**

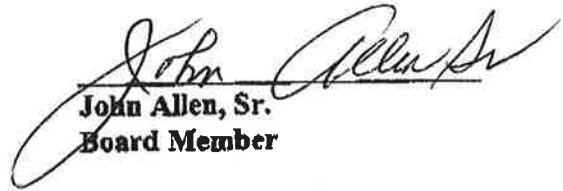
Date: 7/25/2003

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Judy McKinney-Cherry
Board Member

Date: 7.30.03

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**John Allen, Sr.
Board Member**

Date: 7/30/2003


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**Albert Holmes
Board Member**

Date: 7/31/03

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Pallather M. Subramanian
Board Member

Date: July 31, 2003

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J. Paul Bell
Board Member

Date: 7/30/03

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**R. Jefferson Reed
Board Member**

Date: July 29, 2003