

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

IN THE MATTER OF:)
)
APPEAL FROM A DELAWARE)
DEPARTMENT OF NATURAL RESOURCES)
AND ENVIRONMENTAL CONTROL ORDER) Appeal No. CZ-2013-01
GRANTING AN APPLICATION BY THE)
DELAWARE CITY REFINING COMPANY)
FOR AN AMENDMENT TO AIR POLLUTION) Appeal from:
CONTROL PERMIT NUMBER 95/0471) DNREC Order No. 2013-A-0020

OPINION AND FINAL ORDER

Pursuant to due and proper notice of time and place of hearing served on all parties in interest, and to the public, the above-stated appeal came before the Coastal Zone Industrial Control Board (the "Board") on July 16, 2013, at the Delaware Technical & Community College Terry Campus, Room 727, 100 Campus Road, Dover, Delaware. This case involves an appeal filed by the Sierra Club and Delaware Audubon (collectively the "Appellants") challenging the issuance of Secretary's Order No. 2013-A-0020 (the "Secretary's Order" or "Order") by the Delaware Department of Natural Resources and Environmental Control ("DNREC"). The Order amended Air Pollution Control Permit Number 95/0471 (the "Permit") issued to the Delaware City Refining Company, LLC ("DCRC") pursuant to Chapter 60 of Title 7 of the Delaware Code.

A total of seven Board members were present, constituting a quorum pursuant to 7 *Del.C.* § 7006. Board members in attendance were: Chairperson Richard Legatski (the "Chair"), Albert Holmes, Pallatheri Subramanian, John Burton, Robert Wheatley, Stanley Tocker and Robert Bewick, Jr. Board member Alan Levin disqualified himself from consideration of this matter

and Board member Richard Killingsworth was absent (but not disqualified).

Deputy Attorneys General Peter Jamison, III and W. Harding Drane, Jr. advised the Board. Kenneth Kristl, Esquire represented the Appellants. Max Walton, Esquire and Matthew Boyer, Esquire represented DNREC and the Secretary of DNREC, the Honorable Collin P. O'Mara (the "Secretary"). Bart Cassidy, Esquire; Kathleen Vaccaro, Esquire; Somers Price, Esquire; Daniel Wolcott, Jr., Esquire; and Janine Hochberg, Esquire appeared on behalf of the Permittee/Intervenor DCRC.¹ Ms. Vaccaro and Mr. Cassidy were admitted *pro hac vice* in accordance with Delaware Supreme Court Rule 72 to appear in this matter and represent DCRC.

STATEMENT OF THE CASE AND PROCEEDINGS

Prior to the hearing and by agreement of all parties, the Board was provided an indexed chronology consisting of the complete record considered by DNREC and the Secretary in issuing the Order. The Chronology consisted of the following items:

- (1) Email response dated January 18, 2013 from Kevin Coyle, CZA Administrator, to Ravi Rangan, DNREC's Air Quality Section Engineer.
- (2) Application dated March 21, 2013 from Delaware City Refinery to amend its Air Pollution Control Permit 95/0471 for a Marine Vapor Recovery System (MVRS) Unit 15.
- (3) DNREC's Draft Air Permit APC-95/0471-Construction/Operation (Amendment 3) (LAER) (MACT)(NSPS) Marine Vapor Recovery System for Piers 2 and 3.
- (4) Transcript of DNREC's May 8, 2013 Public Hearing on DCRC's application to amend their Air Pollution Control Permit 95/0471 for a Marine Vapor Recovery System (MVRS) Unit 15.

¹ Prior to the hearing, DCRC filed a Motion to Intervene, which was not opposed by Appellants or DNREC and was granted by the Chair.

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- (5) DNREC's Public Hearing Exhibits – May 8, 2013.
 - a. Exhibit 1 – Delaware City Permit Application - March 21, 2013.
 - b. Exhibit 2 – DNREC's Division of Air Quality Technical Support Memorandum and draft permit for DCRC's Vapor Combustor Amendment Project – April 5, 2013.
- (6) DCRC's exhibit submitted at DNREC's May 8, 2013 Public Hearing.
 - a. Exhibit 1 - Power Point Presentation.
- (7) Sierra Club's exhibit submitted at DNREC's May 8, 2013 Public Hearing.
 - b. Exhibit 1 – Letter from The Sierra Club to Secretary Collin O'Mara regarding the public hearing for the Delaware City Refinery Air Permit APC-95/0471.
- (8) Comments from the public received at DNREC's May 8, 2013 Public Hearing.
- (9) Letter dated May 22, 2013 from David S. Swayze, Esquire with comments on DNREC's May 8, 2013 hearing from Laborers Education and Cooperation Trust.
- (10) Email dated May 22, 2013 from Robert Muche of the DE City Refinery with comments on DNREC's May 8, 2013 hearing.
- (11) DNREC's Air Quality Response Document, dated May 22, 2013, by the Division of Air Quality to the comments received at DNREC's May 8, 2013 Public Hearing for DCRC's Vapor Combustion Amendment Project.
- (12) Hearing Officers Report, dated May 29, 2013, of the DNREC's May 8, 2013 Public Hearing regarding DCRC's application to amend Air Pollution Control Permit 95/0471 for the Marine Vapor Recovery System (Unit 15) at the Delaware City Refinery, Delaware City, New Castle County.
- (13) Secretary's Order No. 2013-A-0020 dated May 31, 2013 issuing DCRC an amendment to their Air Pollution Control Permit 95/0471 for a Marine Vapor Recovery System.
- (14) DCRC Air Permit APC-95/047-Construction/Operation (Amendment 3) (LAER)(MACT)(NSPS) for a Marine Vapor Recovery System for Piers 2 and 3.

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- (15) Notice of Appeal to the Coastal Zone Industrial Control Board and the Environmental Appeals Board dated June 13, 2013 (Letter from Kenneth T. Kristl, representing Sierra Club and Delaware Audubon appealing Secretary's Order 2013-A-0020 granting Delaware City Refinery Company, LLC an amendment to Air Pollution Control Permit 95/0471 for a Marine Vapor Recovery System.

On or about March 20, 2013, DCRC, which owns and operates a petroleum refining facility in Delaware City, Delaware ("Delaware City refinery"), submitted an application to DNREC requesting an amendment to its Unit 15 Marine Vapor Recovery System (MVRS) Operating Permit [DNREC Air Pollution Control Permit Number 95/0471] (the "Permit") "to allow for capture and control of displaced vapors occurring during the loading of crude oil from existing Piers 2 or 3 onto marine vessels." Chronology, Item 2, at 1. According to the application:

The Unit 15 MVRS currently controls vapors generated and displaced from gasoline loading at Piers 2 and 3. This project seeks to also capture and control vapors generated during crude oil loading.

Chronology, Item 2, at 1.

On May 8, 2013, Robert Haynes acting as Hearing Officer for DNREC, held a public hearing to solicit and consider public comment on DCRC's application for an amendment to the Permit. Following the hearing, the Hearing Officer prepared and submitted a report dated May 29, 2013 (Chronology, Item 9) to the Secretary. The report to the Secretary set forth the procedural history of the DCRC's application to amend the Permit, a summary of the record before the Hearing Officer, and his conclusions regarding the issuance of the requested amendment.

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On May 31, 2013, the Secretary issued Order No. 2013-A-0020 (the “Secretary’s Order”) directing that the permit amendment requested by DCRC be issued.

On June 14, 2013, Appellants filed with the Board a timely notice of appeal from the Secretary’s Order. The appeal challenged the legality and reasonableness of the Secretary’s Order. Specifically, the appeal challenged the Secretary’s determination that DCRC’s proposed use under the amended Permit is permissible under the Delaware Coastal Zone Act, 7 *Del.C.* Chapter 70, and does not require a Coastal Zone Act permit.

On July 5, 2013, DCRC filed with the Board a motion (and brief in support thereof) to dismiss the appeal on the grounds that the Board lacked subject matter jurisdiction and the Appellants lacked standing to bring their appeal.

On July 10, 2013, Appellants filed with the Board a brief in response to DCRC’s motion to dismiss.

On July 11 and 12, 2013, the parties filed with the Board pre-hearing memoranda addressing the legal and factual issues related to the appeal.

On July 12, 2013, DCRC filed with the Board a reply brief in support of its motion to dismiss.

Neither DNREC nor the Secretary provided any written submissions to the Board in response to DCRC’s motion to dismiss, but they did, at the hearing on July 16, 2013, join in arguments made by DCRC in support of its motion to dismiss.

On July 16, 2013, the parties submitted a Joint Final Pre-Hearing Order governing conduct of the case.

MATTERS BEFORE THE BOARD

At the Board's hearing on the appeal conducted on July 16, 2013, prior to the hearing of evidence and argument on the merits of the appeal, the Board heard oral argument from the parties on DCRC's motion to dismiss for lack of subject matter jurisdiction and lack of standing.

Regarding the lack of subject matter jurisdiction, DCRC contended that the Secretary's determination set forth in the Order as to the applicability of the Coastal Zone Act to DCRC's proposed use under the amended Permit does not constitute a decision "under 7 *Del.C.* § 7005", and thus the Board does not have jurisdiction to consider the appeal. Concerning the alleged lack of standing, DCRC contended that Appellants are not parties "aggrieved by a final decision of the Secretary" as required under 7 *Del.C.* § 7007(b) and applicable case law and therefore do not have standing to appeal the Secretary's Order. Appellants opposed the motion, arguing that the Secretary's Order did, in fact, constitute a decision "under § 7005" because it addressed the applicability of the Coastal Zone Act to DCRC's proposed use, and that they had standing to pursue their appeal because they were aggrieved by the Secretary's determination. As noted above, the parties submitted prehearing briefs in support of their respective positions.

At the conclusion of oral argument on the motion to dismiss, the Chair made a motion that the Board find that it lacked subject matter jurisdiction over the appeal. Four Board members voted in favor of the Chair's motion, and three Board members voted against it. The Chair, however, concluding that 7 *Del. C.* § 7006 required an affirmative vote of at least five members of the Board to carry the motion and thereby dismiss the appeal, announced that the

motion had failed.² Tr. at 103.³ The Chair next made a motion that the Board find that Appellants lacked standing to pursue their appeal. As before, four Board members voted for the Chair's motion, and three Board members voted against it. The Chair, again concluding that 7 *Del. C. § 7006* required an affirmative vote of at least five members of the Board to carry the motion, announced that the motion had failed.⁴ Tr. at 104. There being no legally effective decision of the Board to grant DCRC's motion to dismiss, either for lack of subject matter jurisdiction or lack of standing, the Board commenced its hearing on the merits of Appellants' appeal.

SUMMARY OF THE EVIDENCE

Appellants' Case-in-Chief

During the presentation of Appellants' case-in-chief, the Board admitted into evidence, on motion by the Appellants, numerous documents, including aerial photographs and graphics of the Delaware City Refinery and surrounding areas at different times since 1954, engineered drawings of different parts of the Delaware City Refinery, an affidavit of David Carter (a former Environmental Program Manager for DNREC) regarding certain map exhibits that he prepared

² See 7 *Del.C. § 7006*, which states in pertinent part: "A majority of the total membership of the board shall be necessary to make a final decision on a permit request." See also *Sierra Club v. Tidewater Environmental Services, Inc.*, 2011 W.L. 5822636 at *3 (Del. Super.) ("...it is clear from studying the proposed amendments to the [Coastal Zone Act] that the General Assembly ultimately decided a majority of the Board's total membership should be required to make a final decision on a permit *regardless of whether any members were disqualified from a particular matter.*")(emphasis added).

³ The abbreviation "Tr." as used throughout this opinion refers to the transcript of the Board's hearing on July 16, 2013.

⁴ See fn. 2.

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for the Appellants, and affidavits from sixteen persons each alleging how the operations of the Delaware City refinery, including the transfer of crude oil through the refinery, affected them. These sixteen affidavits were submitted by Appellants solely in support of Appellants' efforts to establish standing. Joint Pre-Hearing Order at 9. DNREC and DCRC stipulated to the admissibility of such affidavits, but not to the truth of the matters asserted therein, and reserved the right to challenge the factual allegations of the affidavits and to argue the legal effect and significance of any of the affidavits. *Id.*

The Appellants' exhibits consisted of the following:

- (1) Affidavit of David Carter (Appellants' Ex. 1).
- (2) Affidavit of Mark Martell (Appellants' Ex. 2).
- (3) Affidavit of Nancy Carol Willis (Appellants' Ex. 3).
- (4) Affidavit of Barbara J. Welsh-Rosenblaum (Appellants' Ex. 4).
- (5) Affidavit of Ann Rydgren (Appellants' Ex. 5).
- (6) Affidavit of Linda Jean Whaley (Appellants' Ex. 6).
- (7) Affidavit of Matthew DelPizzo (Appellants' Ex. 7).
- (8) Affidavit of Amy Roe (Appellants' Ex. 8).
- (9) Affidavit of Richard McCorkle (Appellants' Ex. 9).
- (10) Delaware City and Vicinity 1954 Map/Graphic (prepared by David Carter) (Appellants' Ex. 10).
- (11) Delaware City and Vicinity 1968 Map/Graphic (prepared by David Carter)(Appellants' Ex. 11).
- (12) Delaware City and Vicinity 1992 Map/Graphic(prepared by David Carter)

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- (Appellants' Ex. 12).
- (13) Delaware City and Vicinity 2012 Map/Graphic (prepared by David Carter) (Appellants' Ex. 13).
 - (14) Delaware City and Vicinity 2012 (Rail SIT Yard) Map/Graphic showing Storage in Transit Yard (prepared by David Carter) (Appellants' Ex. 14).
 - (15) Engineering Drawings for Loop Track Unloading Area prepared by Vandemark & Lynch, Inc. (Appellants' Ex. 15).
 - (16) Delaware City and Vicinity 2012 (Rail SIT Yard) Map/Graphic (prepared by David Carter) (Appellants' Ex. 16).
 - (17) Engineering Drawing for SIT Yard Area prepared by Vandemark & Lynch (Appellants' Ex. 17).
 - (18) Footprint of Refinery Nonconforming Use taken from DNREC website (Appellants' Ex. 18).
 - (19) Affidavit of John Irwin (Appellants' Ex. 19).
 - (20) Affidavit of Aivars Krasts (Appellants' Ex. 20).
 - (21) Affidavit of Stephanie Herron (Appellants' Ex. 21).
 - (22) Affidavit of Jennifer Wallace (Appellants' Ex. 22).
 - (23) Affidavit of Peter Roe (Appellants' Ex. 23).
 - (24) Affidavit of Kristina Lynn (Appellants' Ex. 24).
 - (25) Affidavit of Allen Denio (Appellants' Ex. 25).
 - (26) Affidavit of Bernard August (Appellants' Ex. 26).
 - (27) Slides from May 16, 2013 PBF Energy presentation ad Morgan Stanley Refining Corporate Access Day (Appellants' Ex. 27).

Appellants presented no testimonial evidence.

DCRC's Case-in-Chief

During DCRC's case-in-chief, the Board admitted into evidence, upon motion by DCRC and without objection, numerous documents consisting of (and marked as) the following:

- (1) CV of Michael J. Pollauf, petroleum refining and process operations consultant (Exhibit Intervenor ("I")1).
- (2) Current Title V Operating Permit No. AQM-003/00016 for Refinery, including introductory/identifying pages and relevant permit sections for MVRS and Crude Unit at refinery. (Exhibit I2).
- (3) Coastal Zone Act Permitting Authorizations for Crude Unit at Refinery (November 30 2004 CZA Permit and related revisions to special permit conditions, dated January 24, 2005) (Exhibit I3).
- (4) Diagram (1962) and accompanying photograph of check valves in transfer lines to docking facility at Refinery. (Exhibit I4).
- (5) Air Registration for Crude Oil Offloading from Railcars at Rail Loop Track submitted by DCRC to DNREC's Division of Air Quality; March 28, 2012 (Exhibit I5).
- (6) DNREC response to DCRC re: APFC-2013/0030 Air Registration; October 2, 2012 (Exhibit I6).
- (7) Screenshot from Sierra Club's website posting DNREC's response to DCRC re: APFC-2013/0030 Air Registration as of October 1, 2012, and July 25, 2012 website article acknowledging Sierra Club's Delaware Subchapter's awareness of rail operations of July 12012 (Exhibit I7).
- (8) Statements made by Sierra Club via Twitter related to Rail Loop operation at Refinery (Exhibit I8).
- (9) Aerial image of Refinery (1968) (Exhibit I9).
- (10) Aerial image of Refinery (2012)(Exhibit I10).
- (11) Photograph of Double Rail Loop (November 2012) (Exhibit I11).

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(12) Photograph of MVRS at Docking Facility (November 2012) (Exhibit I12).

DCRC presented the testimony of five witnesses: Thomas Godlewski, Michael Pollauf, Mark Smith, Michael Gudgeon, and Patricia Kennedy.

Mr. Godlewski testified as follows:

- (1) He is employed by the Delaware City refinery as a senior environmental engineer. Tr. at 109.
- (2) He is responsible for the preparation and submission of permit applications for the refinery. Tr. at 109.
- (3) He helped prepare the application for the air permit amendment involved in this case. Tr. at 109.
- (4) The only physical changes that the refinery anticipated in connection with its application for the air permit amendment were changes near the refinery's oil storage tanks. Tr. at 111.
- (5) The application for the air permit amendment did not include a request to increase any air pollutant emissions. Tr. at 112.
- (6) The application for the air permit amendment did not include a request to increase the volume of crude oil that could be passed through the refinery's crude unit. Tr. at 115.
- (7) It was the determination of the refinery that the activities that were to occur pursuant to the air permit amendment did not constitute a new activity or the expansion of a non-conforming use for the purposes of the Coastal Zone Act. Tr.

at 117.

- (8) Certain piping modifications that the refinery had anticipated would be needed in connection with the air permit amendment ultimately were not required. Tr. at 117.
- (9) The refinery determined that the construction and operation of a “double loop” railroad facility for the receipt, staging, and unloading of railcars carrying crude oil was not subject to the permitting requirements of the Coastal Zone Act. Tr. at 119 – 21.
- (10) The refinery determined that the construction and operation of the “double loop” railroad facility was not subject to any air pollution permitting requirements administered by DNREC. Tr. at 119.

On cross examination by Appellants’ counsel, Mr. Godlewski testified that the refinery understood that DNREC’s response to a filing by the refinery regarding its double loop rail system did not constitute a determination by DNREC that DNREC’s air pollution permitting requirements did not apply to the double loop rail system. Tr. at 126 – 129.

Michael Pollauf, who DCRC presented as an expert witness on petroleum refining operations, Tr. at 129, testified as follows:

- (1) He has been employed in the petroleum refining business for over 33 years. Tr. at 131.
- (2) He served for over ten years as a refinery manager at two different petroleum refineries, including service as the refinery manager at the Delaware City refinery

for approximately 18 months beginning in 2004. Tr. at 131, 142.

- (3) The manufacturing process that occurs at a refinery is a highly dynamic process that is subject to frequent adjustments (usually by way of the operation of a complex computer system) in response to numerous variables, including the type of product to be refined (whether it be one of a variety of crude oils or feedstock), the availability of the product to be refined (which fluctuates constantly), the season during which the product is being refined, and the working condition of the equipment being used to refine the product. Tr. at 133 – 36.
- (4) It is intrinsic to a petroleum refinery's operation, and necessary to its economic viability, for the refinery to both import and export unrefined or partially refined products. Tr. at 139.
- (5) It is probable that unrefined and/or partially refined crude oil was being shipped both into and out of the Delaware City Refinery prior to 1971 [the year that the Coastal Zone Act was enacted]. Tr. at 143.

On cross examination by Appellants' counsel, Mr. Pollauf testified there are certain contracts that the refinery enters into (referred to as "Evergreen Contracts") that require the refinery to ship, on an ongoing basis, a fixed volume of crude oil to a customer. Tr. at 144 – 46.

Mark Smith testified as follows:

- (1) He is the manager of the economics and planning department at the Delaware City refinery. Tr. at 147.
- (2) He is responsible for (a) the economic evaluation of the products processed

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through the refinery, and (b) the planning for the production of those products to optimize their value to the company. Tr. at 147.

- (3) He prepared an economic analysis for the refinery to support the construction and operation of the double loop rail system at the refinery. Tr. at 149.
- (4) His economic analysis in support of the construction and operation of the double loop rail system in no way depended upon a finding of economic benefit to the refinery in the shipment of crude oil out of the refinery. Tr. at 149.
- (5) Most of the crude oil received via the double loop rail system will not be shipped out of the refinery, but will be refined at the refinery. Tr. at 150.

On cross-examination by Appellants' counsel, Mr. Smith testified that he was responsible for preparing the economic justification for the construction of the double loop rail system and that system has received as much as 70,000 barrels per day of crude oil.

Michael Gudgeon testified as follows:

- (1) He is the technical manager of the Delaware City refinery and his responsibilities include management of (a) a group of chemical engineers charged with the optimization of the refinery's operations; (b) the refinery's product testing lab; (c) the refinery's instrumentation and control function; and (d) capital construction projects at the refinery. Tr. at 155 – 56.
- (2) The manufacturing process at the refinery consists of twenty different processing units, each creating a different product. Some of these products are shipped out of

the refinery facility without further processing, while others are processed further within the facility. Tr. at 157 - 59.

- (3) The piping system at the refinery by which crude oil is transferred onto and off of oil barges docked at the refinery's docking facility has been configured since at least February 1962 to allow for the transfer of crude oil both into and out of the refinery at its docking facility. Tr. at 163 – 64.
- (4) The refinery could have, but did not design the piping system at the refinery to allow for the direct transfer of crude oil from the double loop railroad system to the refinery's docking facility. Tr. at 165.
- (5) Crude oil from the double loop rail system is transferred directly into a storage tank on the east side of the refinery that is designated as "Tank 281." Tr. at 165.
- (6) Ninety percent (or more) of the crude oil transported to the refinery via the double loop rail system is consumed in the refining process occurring at the refinery. Tr. at 166.
- (7) The refining capacity of the refinery's crude oil processing unit is "significantly greater" than the volume of crude oil delivered to the refinery via the double loop rail system. Tr. at 167.
- (8) The only modification that the refinery made to its physical plant in connection with the air permit amendment involved in the present case was to modify instrumentation controlling the crude oil pump at Storage Tank 281 to ensure that the pump would shut down in the event that the Marine Vapor Recovery System

stopped operating. Tr. at 169 – 70.

- (9) The refinery installed the double loop rail system for the purpose of delivering crude oil to the refinery for the purpose of being refined at the refinery. Tr. at 171.

Mr. Gudgeon was not cross-examined.

Patricia Kennedy testified as follows:

- (1) She is the director of logistics at the Delaware City refinery. Tr. at 174.
- (2) The distance between the double loop rail system and the refinery is several miles. Tr. at 181.
- (3) The double loop rail system can accommodate approximately 100 rail cars. Tr. at 181.
- (4) The crude oil off loading operation at the double loop system can off load crude oil from twenty-five rail cars at a time. Tr. at 181.
- (5) There are no smokestacks, storage tanks, processing, or manufacturing activities occurring at the double loop rail system.
- (6) The double loop rail system is not the first rail system ever used to transport crude oil into the refinery. Rail systems have been used to transport crude oil into the refinery from the very beginning of its operation. Tr. at 182.
- (7) Rail cars are brought to the double loop rail system by Norfolk Southern and unloaded by a contractor (Savage Services) employed by the refinery. Tr. at 185.

On cross-examination by Appellants' counsel, Ms. Kennedy testified that the Storage in

Transit yard was built in 2011 and that she did not know what was there beforehand. Tr. at 188. She also testified that the Double Rail Loop was constructed in 2012 and put into service in 2013, and that farmland was on that site prior to construction of the loop. *Id.* On re-direct, Ms. Kennedy testified that she is aware that the Permit provides for a 45,000 barrel per day limit and that the number of tanker trips that would involve transporting that amount would depend on the size of the barge or the vessel. Tr. 188-189.

DNREC's Case-in-Chief

During DNREC's case-in-chief, the Board admitted into evidence, on motion by DNREC and without objection by the Appellants, the following exhibits:

- (1) Delaware Coastal Zone Act (DNREC Ex. 1).
- (2) Regulations Governing Delaware's Coastal Zone (DNREC Ex. 2).
- (3) Delaware City Refining Company Vapor Combustor Project Application dated March 20, 2013 (DNREC Ex. 3).
- (4) Hearing Officer's Report, In Re: Marine Vapor Recovery System, dated May 29, 2013 (DNREC Ex. 4).
- (5) DNREC's Secretary's Order No. 2013-A-0020, In Re: Marine Vapor Recovery System, dated May 31, 2013 (DNREC Ex. 5).
- (6) Map of Delaware City & Vicinity dated 1992 (DNREC Ex. 6).
- (7) Maps of DuPont-Edgemoor & Uniqema Facilities (DNREC Ex. 7).
- (8) Historical Delaware City Refinery Information dated 1956 - 1957 (DNREC Ex. 8).

DNREC presented the testimony of one witness, the Secretary, who testified as follows:

- (1) He has been Secretary of DNREC for approximately four years. Tr. at 191:

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- (2) DNREC has imposed upon the refinery a production limit of 191,000 barrels of crude oil per day. Tr. at 197.
- (3) Soon after DCRC filed an application with DNREC for an air permit amendment, staff members in DNREC's air quality program met with staff members who administer in DNREC's coastal zone program to discuss the applicability of the Coastal Zone Act to activities described in the application. It was the consensus of that meeting's attendees that the Coastal Zone Act did not apply to the activities described in the application. Tr. at 201.
- (4) In the Secretary's opinion, operation of the modified air pollution control instrumentation anticipated by the DCRC's application would not constitute a regulated activity under the Coastal Zone Act. Tr. at 211 – 15.
- (5) He personally drafted "the majority of Coastal Zone Act [portion of the Order] [him]self because [he] wanted to think through the logic and make sure that [he] was very clear about [his] thinking. Tr. at 216 – 17.
- (6) Because the double loop rail system was not raised at the public hearing before the Secretary's hearing officer, he did not consider it in his order. Tr. at 220.
- (7) In his opinion, the operation of a rail transportation system by which crude oil (or any product) is delivered to a facility in the coastal zone is not an activity that is (or ever has been) subject to regulation under the Coastal Zone Act. Tr. at 222 – 29.

The Secretary was not cross-examined.

DCRC's Motion to Dismiss
on the Ground that the Appellants Lack Standing

After all parties rested their respective cases, and the record was closed, the Board heard further oral argument from the parties on the issue of whether Appellants had standing to bring the appeal. DCRC and DNREC argued that Appellants had not presented sufficient evidence to support a finding by the Board that Appellants had standing. Appellants conceded that the only evidence in the record as to standing was evidence that Appellants had submitted in the form of affidavits, but argued that the representations of the affiants (which detailed how the affiants were adversely affected by the operation of the refinery and the double loop rail system) was sufficient to support a finding by the Board that the Appellants had standing.

Seven *Del.C.* § 7007(b) states, in pertinent part:

Any person aggrieved by a final decision of the Secretary of the Department of Natural Resources and Environmental Control under § 7005(a) of this title may appeal same under this section.

There is no case law in Delaware addressing the standing requirement under section 7007(b). However, in *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892 (Del. 1994), the Delaware Supreme Court considered the standards for evaluating standing in administrative appeals from orders of the Secretary under Chapters 60 and 72 of Title 7 of the Delaware Code and held as follows:

First, a party must have suffered an injury in fact, which is the invasion of a legally protected interest within the zone of interest sought to be protected or regulated by the statute. The invasion must be 1) concrete and

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particularized, and b) actual or imminent, not conjectural or hypothetical. Second, there must be actual connection between the injury and the conduct complained of-the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Finally, it must be likely that the injury will be redressed by a favorable decision, rather than merely speculative.

Oceanport Industries, Inc. v. Wilmington Stevedores, Inc., 636 A.2d at 904, see also, *Ropp v. King*, 2007 WL 2198771 at *3 (Del. Ch. 2007) (holding that, where a statute allows an "aggrieved" party to appeal an administrative decision of a state official, "[the] party seeking to establish standing must satisfy the test of whether: (1) there is a claim of injury-in-fact; and (2) the interest sought to be protected is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question.")

DCRC argued at the hearing that Appellants failed to prove any of the three elements necessary to establish standing to appeal: (1) identification and demonstration of actual and concrete harm, (2) demonstration of the connection between the challenged conduct and that harm, and (3) demonstration that the Board is in a position to redress that harm through a relief that the Board can afford. Tr. at 238. With regard to the first element necessary to establish standing, DCRC argued that the affidavits presented only concerns and potential issues that might in theory result from the actions complained of, but failed to establish actual harm. By contrast, DCRC argued that the evidence presented by Mr. Godlewski was that the specific activity allowed by the Order would reduce, not increase, environmental harm. With regard to the second element, DCRC contended that the concerns expressed in the affidavits related to

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barge and rail traffic, along with certain other refinery activities. DCRC argued that Appellants did not show any connection between those activities and the challenged conduct that would be authorized by the air permit. Finally, DCRC asserted that the Board had no power to redress any alleged harm, because the allegedly offensive activities complained of by Appellants pre-date the permit, and the Board is without authority to prohibit them in this proceeding involving limited changes to an air pollution control device.

Appellants argued that the evidence they presented on the issue of standing (the affidavits of sixteen persons alleging how they were adversely affected by the operations of the refinery and the double loop rail system) did satisfy the elements required to establish standing. According to Appellants, the harm identified in the affidavits (health-related harm and harm to recreational activities) is concrete, has been caused by the refinery's activities here, and would be redressed by an Order of the Board subjecting the activities to the regulation of the Coastal Zone Act.

Following the Board's consideration of the parties' arguments on the issue of whether the Appellants carried their burden to establish standing, the Chair made a motion, seconded by Mr. Bewick, "to accept the motion to dismiss made by the refinery's counsel." All seven board members present voted in favor of the motion, thereby accepting DCRC counsel's argument that Appellants failed to establish the legal elements of standing, and the appeal should be dismissed. Accordingly, for the reasons stated by the DCRC in support of its motion to dismiss, and given

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the hearsay nature of the evidence presented by the Appellants on that issue, the Board grants DCRC's motion to dismiss the appeal for lack of standing.⁵

⁵ Appellants have asked the Board to rely exclusively upon affidavits (hearsay evidence) to make a finding of standing. DCRC and DNREC stipulated to the admission of the affidavits into evidence. DCRC's stipulation, however, was limited. When queried by the Board Chair as to the hearsay nature of the affidavits, DCRC's counsel responded that, although DCRC was agreeable to the admission of the affidavits into evidence, it was not stipulating to the truth of the matters asserted or that the affidavits had any probative value on the critical factual issues necessary to a finding of standing. Tr. at 246 - 47. The courts of this State, including the Supreme Court, have held that an administrative board or agency cannot rely exclusively on hearsay evidence when making a finding of fact. See, *Crooks v. Draper Canning Co.*, 633 A.2d 369 (Table), 1993 WL 370851 at *1 (Del. 1993)(noting that "[w]hile the propriety of admitting hearsay evidence in administrative hearings presents a question not subject to easy answer, Delaware courts have held that administrative rulings may not rest solely upon such evidence"); accord, *Gehr v. State*, 765 A.2d 951 (Table), 2000 WL 1919467 at *1 (Del. 2000) (holding that the Industrial Accident Board could consider inadmissible hearsay in making its findings, but could not "base its decision solely on the inadmissible evidence"). Accordingly, the lack of any factual evidence, apart from hearsay, to support Appellants' argument on standing, provides a separate, independent legal basis for the Board's finding that Appellants failed to carry their burden of proof on the issue of standing.

IT IS SO ORDERED this 13th day of August, 2013.

COASTAL ZONE INDUSTRIAL CONTROL BOARD

BY: */s/ Richard Legatski*
Chair

/s/ Robert Wheatley
Member

/s/ Albert Holmes
Member

/s/ John S. Burton, Sr.
Member

/s/ Pallatheri Subramanian
Member

/s/ Stanley Tocker
Member

/s/ Robert Bewick, Jr.
Member

