

BEFORE THE ENVIRONMENTAL APPEALS BOARD
STATE OF DELAWARE

APPEAL OF)
)
JOHN H. NICKLE, JR., et al.)

FINAL ORDER

This matter came to a hearing before the Environmental Appeals Board on July 2, 1986. Present were Board members Thomas J. Kealy, Clifton H. Hubbard, Jr., Evelyn Greenwood, and Richard C. Sames. John H. Nickle, Jr. and Jacob Kreshtool, Esquire, appellants, appeared on their own behalf. The Department of Natural Resources and Environmental Control was represented by Robert Thompson, Deputy Attorney General. The Board was advised by Barbara MacDonald, Deputy Attorney General.

SUBJECT OF APPEAL

The sole question presented for appeal was whether the Secretary had erred in deciding that appellants' request for a hearing concerning a permit application by Standard Chlorine of Delaware, Inc. to construct tanks for the storage of chlorinated benzene was not "meritorious" under the meaning of 7 Del. C. §6004(b). The question for the Board's decision therefore was whether the public hearing request filed by appellants 1) exhibited a familiarity with the permit application and 2) contained a reasoned statement of the permit's probable impact. 7 Del. C. §6004(b). The Board finds that the appellants' public hearing

request did not meet the second prong of the this statutory test, and therefore the Board upholds the Secretary's decision.

SUMMARY OF THE EVIDENCE

Mr. Kreshtool testified that two of the four appellants have doctorates in chemistry. He testified that at prior meetings with R. Wayne Ashbee of the Division of Water Resources the appellants had learned that representatives of the Department of Natural Resources and Environmental Control were evidently wrongly informed of the slope of the land around the proposed tank site which would affect the direction of the flow of any material from the tanks in the event of leakage. Mr. Kreshtool argued that the standards of 7 Del. C. §6004(b) are to be interpreted in the light of the statute's intent to make the hearing process accessible to laymen and thus should be not be read narrowly. Mr. Kreshtool argued that a request for a hearing should be granted so long as it is evidently made in good faith and is not arbitrary or frivolous.

Mr. Nickle testified that the members of the Delaware City Advisory Committee are all volunteers. Mr. Nickle referred to previous occasions of pollution by Standard Chlorine. Mr. Nickle testified that he had had some difficulty in obtaining the applicable water regulations from the Department of Natural Resources and Environmental Control.

Mr. Nickle testified that the proposed diking referred to in the Standard Chlorine permit application is sufficient to

contain only the contents of one tank. Therefore if all four tanks rupture at once, as happened previously, the contents may overrun the diking and enter the creek. Mr. Nickle proposed as an alternative to this diking the construction of an earthen berm which would contain the effluent from all four tanks in the event that they burst at once.

R. Wayne Ashbee, the Director of the Division of Water Resources, testified that the storage tanks at Standard Chlorine which erupted on January 5, 1985 had not been under DNREC control as they predated DNREC jurisdiction. Mr. Ashbee testified that the permit application met with current DNREC standards which call for sufficient diking to contain 110% of the contents of the largest tank. He testified that it is highly unlikely that tanks built according to these standards would be subject to multiple simultaneous rupture. Mr. Ashbee testified that he advised the Secretary that the appellants' request for a hearing was not meritorious in that all issues raised had been addressed in the permit request. Mr. Ashbee testified that the Department is in the process of obtaining a Consent Decree against Standard Chlorine which may impose additional restraints.

Mr. Ashbee testified that he met twice with the appellants. At those meeting the appellants recommended extra containment in the form of an earthen berm. Mr. Ashbee testified that DNREC regulations do not address whether the Department may require such berms. Mr. Ashbee testified that the current standards imposed by DNREC are those recommended by the National Fire

Protection Association and are recognized nationwide as industry standards.

CONCLUSIONS OF LAW

Under the terms of 7 Del. C. §6004(b), a public hearing request "shall be deemed meritorious if it exhibits a familiarity with the application and a reasonable statement of the permit's probable impact." The Board finds that the request for public hearing submitted by the appellants (Board's Exhibit 1, Tab D) met the first prong of this test. However, the request's only reference to the possible impact of the permit application is contained in ¶vii which reads:

By Standard Chlorine's own statements, the diking around the tanks will not contain the contents of all of the tanks should they burst. By the January 5 incident, it has been proven beyond a doubt that one tank's rupture can lead to multiple failures.

Thus, the necessary statement of environmental impact is limited to a statement of the inadequacy of the containment barriers in the event all four of the requested tanks burst at once. The Board finds that this is not a "reasoned statement of the permit's probable impact" in that the Board finds it to be very improbable that more than one of the proposed tanks will rupture simultaneously. The Board accepts Mr. Ashbee's testimony that the standards according to which the new tanks are to be constructed make such multiple failures extremely unlikely. Since the request for a hearing alleges inadequacy of the permit application only in the unlikely event of multiple failure, it does not contain "a reasoned statement of the permit's probable


impact." It was therefore not a meritorious request and the Secretary did not err in failing to hold a hearing.

SO ORDERED.


Thomas J. Kealy, Jr., Chairman


Evelyn Greenwood


Clifford Hubbard


Ray Woodward


Richard C. Sames

Dated:

