

BEFORE THE ENVIRONMENTAL APPEALS BOARD
STATE OF DELAWARE

Appeal of Delaware Audubon Society, et. al.)
)
November 4, 1987)

FINAL ORDER

This matter came before the Environmental Appeals Board on September 17, 1987. The following Board members were present: Thomas J. Kealy, Chairman, Mary Sheldrake, Harry Derrickson, and Clifton Hubbard. Grace Pierce appeared on behalf of Delaware Audubon Society. Also present was Jacob Kreshtool, Esquire, and Dr. Jerry Shields of Watch Our Waterways. Jeanne Langdon, Esquire, represented The Department of Natural Resources and Environmental Control ("Department") Mr. Walter Pepperman, Esquire represented Colonial Pipeline, the applicant. The Board was advised by Deputy Attorney General Ann Marie Johnson.

SUBJECT OF APPEAL

The sole question presented for appeal was whether the Secretary had erred in deciding that the appellant, Audubon Society's request for a hearing concerning a subaqueous land permit application to construct an underwater pipeline was not "meritorious" pursuant to 7 Del.C. sec.7208. Under sec. 7208, the Secretary shall hold a hearing if:

...a written meritorious objection to the application is received within 20 days of the advertisement of the public notice for the application.

7 Del.C. Section 7208(a)(3)

The question before the Board to decide was whether the public hearing request 1) exhibited a familiarity with the permit application and 2) contained a reasoned statement of the action's probable impact. 7 Del.C. Section 7208(a)(3) The Board found by a vote of a three to one that the appellant's public hearing request met both prongs of the statutory test, and that the Secretary erred in not holding a hearing.

SUMMARY OF THE EVIDENCE

Dr. Jerry Shields of Watch Our Waterways testified that the purpose of 7 Del.C. see 7208 was to protect the public, and that therefore, a lenient interpretation was required in order to maintain that protection. He maintained that a "reasoned" statement was one with "reason behind it" as opposed to one which was "reasonable". He stated that the Department held a meeting on May 13, 1987 to determine if a hearing was necessary, and that he attended that meeting. He testified that he was told that a spill could be detected in a few seconds. He stated that after hearing this, he had no objections to the permit. He later learned that Colonial had had spills which took several hours to detect. He stated at that point he changed his mind about supporting the application. On cross-examination, Dr. Shields

testified that he understood that the existing pipeline would be replaced.

Jacob Kreshtool testified next. He stated that the original version of chapter 60 enacted in 1966 provided that a hearing would be held on an application if any interested party requested one within 10 days. He further testified that 10 days was too short to review the record in most instances, and as a result, he or other interested parties would request hearings for applications. They would decide which to withdraw afterwards, when they had time to review the file. Subsequently, according to Mr. Kreshtool, and in an attempt to stop this practice, the statute was amended to require a "meritorious" request and to allow 20 days in which to make it. (Although this refers to sec.6004, the standard is identical to sec. 7208.) He stated that it was probable that the riverbed would be disrupted in this case and that the appellants had reviewed the file. This, he submitted, was sufficient to meet the standard posed by sec. 7208.

William F. Moyer, Environmental Engineer for the Division of Natural Resources was next to testify for the Department. He stated that he had personally evaluated the application for the permit. He stated that in the location in which the pipeline was proposed, there was a low shellfish and fish population because of pollution. He noted that the water in that area is freshwater and brackish and that the dredged materials were to be shipped to New Jersey. He stated that there had been no spills to his knowledge at the site of the other pipeline. He confirmed that

the Department had met with the appellants and said that he believed that the concerns of the group had been addressed. He also confirmed that Grace Pierce never withdrew her request for a hearing.

Finally, J. R. Arnold, Project Coordinator for Colonial Pipeline spoke on behalf of the applicant. He testified that he is a registered engineer, and has been with the project for one year. He stated that the pipeline will be x-rayed twice, that it will be closely monitored and that divers will inspect the pipeline every five years. He testified that he attended the May 16th meeting and thought that all questions had been answered. He stated that the pipeline moves 30,000 barrels of oil per hour, and if there was a leak, the pipeline could be shut down in one minute. This would amount to a loss of 500 barrels of oil, a relatively small amount. He testified that the excavated material would get removed by the Corps of Engineers.

Walter Pepperman, attorney for the applicant, identified several experts and employees of Colonial Pipeline who were available to answer questions that the Board or the Appellants might have on any aspect of the pipeline project.

CONCLUSIONS OF LAW

Chapter 72 of title 7, adopted in 1986, governs subaqueous lands permits. Section 7201 defines the purpose of the act and states that "[s]ubaqueous lands within the boundaries of Delaware constitute an important resource of the State and require protection against uses or changes which may impair the public

interest in the use of tidal or navigable waters." The chapter gives the Governor and the Secretary joint jurisdiction over state-owned subaqueous lands, [sec.7201,7203] and empowers them to grant interests in such land in a manner that protects the public. [sec. 7201]

Applications for permits or leases must be advertised [sec.7207] and a public hearing shall be held if the lease term exceeds 10 years, if the Secretary determines that it is in the public interest, or if a written meritorious objection is made within 20 days of the advertisement. [sec.7208] The terms of 7 Del.C. Section 7209(a)(3) sets forth a two pronged test for determining when, and if, a request for a public hearing for the installation of a pipeline will be deemed meritorious. First, the applicant must exhibit some familiarity with the application. Secondly, the applicant must make a "reasoned statement of the action's probable impact."

The Board finds that Grace Pierce's letter requesting a hearing [Board's exhibit 1, Tab D] met both prongs of this test. The Board agrees with the Secretary that the letter exhibited a familiarity with the application. The Board further finds that Mrs. Pierce made a reasoned statement of the action's probable impact. Specifically, her letter states that "during the construction of the project, we are concerned about the removal of 510,000 cubic yards of material... that will require blasting and drilling. The potential disruption of the geological structure of the riverbed...should be addressed at a public hearing." Moreover, Mrs. Pierce also states that there

was a major concern about "... the adverse impact that a rupture or leak in the pipeline would have on the Delaware River environment."

There is no dispute that construction of the pipeline will require removal of riverbed materials and possibly blasting and drilling. Furthermore, the presence of a pipeline would reasonably create a probability of "leaks" in the pipeline. The standards of sec. 7208(a)(3) are to be read broadly, in order to carry out the intent of chapter 72 to protect the interest of the public to be informed of the use of state owned lands. The Board maintains that the reasoned statement required does not have to be technically specific, or even correct. It is sufficient to raise a concern that has some basis in reason. The role of the hearing is to air those concerns, and to allow the public to make them a matter of record. This is the only opportunity for a hearing in this case as in light of the ruling in World Wide Salvage the grant of a permit on subaqueous lands owned by the State cannot be appealed.¹ Moreover, this decision will not stay the effect of the lease or any action by Colonial Pipeline taken in reliance upon the lease, including construction of the pipeline. See 7 Del. C. sec. 6008 (f). The Board orders that a hearing must be held unless Ms. Pierce withdraws her request.

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The Board notes that there is no right of appeal from the permit process itself, see World Wide Salvage, Del. Super., C.A. No. 84A-OCI, January 30, 1986 and for this reason, there is no need for the appellant to create a record.

COMMENTS OF THE BOARD

The Board suggests that the Department use pre-hearing meetings as a means of clarifying questions and issues of concern, and not as a means of obviating the hearing requirement. These requests should be granted unless they are frivolous or without reasonable basis. If the Secretary must err, the Board feels it should be on the side of serving the public's interest in being informed.


Thomas J. Kealy, Jr., Chairman


Clifford Hubbard


Harry Derrickson


Mary Shelldrake


Evelyn H. Glenwood

Date: November 30, 1987

