Widener University
School of Law
Environmental and Natural Resources Law Clinic

June 13, 2013

Environmental Appeals Board
89 Kings Highway
Dover, DE 19901
Attention: Administrative Assistant to the Environmental Appeals Board

Re: Statement of Appeal to the Environmental Appeals Board for Secretary's Order No. 2013-A-0020 (Delaware City Refinery Air Permit Amendment re MVRS)

Pursuant to 7 Del. C. § 6008 and 7 Del. Admin. C. 100 105 §2.0, the Sierra Club and Delaware Audubon (collectively, Appellants) submit this written Statement of Appeal to the Environmental Appeals Board. Appellants appeal the Order of the Secretary of the Delaware Department of Natural Resources and Environmental Control (Secretary) No. 2013-A-0020 dated May 31, 2013 (Order) which authorizes the amendment of the air permit issued for the Delaware City Refinery so that the Refinery can modify a Marine Vapor Recovery System (MVRS) as part of a crude oil transfer operation the Refinery is commencing. A copy of the Order is attached to this Statement of Appeal. A $50.00 deposit for costs accompanies this Statement of Appeal.

The Appellants in this appeal are represented by Kenneth T. Kristl, Esq. and the Widener Environmental and Natural Resources Law Clinic (Clinic), located at the Widener University School of Law in Wilmington, DE. The Clinic provides representation and legal assistance to public interest organizations and individuals on environmental matters in Delaware and other Mid-Atlantic states.

This appeal is being filed under unique procedural circumstances. The Appellants are challenging only the portions of the Order in which the Secretary ruled on the status of the crude oil transfer operation under the Coastal Zone Act, 7 Del. C. § 7001 *et seq.* (CZA). As a result, the Appellants have filed an appeal of the Order under the CZA with the Coastal Zone Industrial Control Board (CZICB). Appellants believe that the CZICB is the appropriate forum to determine the applicability of the CZA to a particular activity, and intend to argue for such before the CZICB and this Board. However, because the Order is not on an application for a status decision or a permit under the CZA, there is at least a question that could be raised as to whether the CZICB has jurisdiction to hear the appeal. To avoid the situation where they file before the CZICB only and then find out too late that the CZICB does not believe it has jurisdiction, the Appellants are simultaneously filing this appeal as a prophylactic measure to assure that the CZA issues are decided on their merits (as opposed to being decided on the failure to file in the correct appellate forum within the statute of repose). The Environmental Appeals Board has jurisdiction because the Order is a final action by the Secretary, *see* 7 Del. C. 6008,

4601 Concord Pike Wilmington, DE 19801
(302) 477-2182 fax: (302) 477-2032

but may wish to defer to the CZICB on CZA issues (and will be asked to do so by the Appellants).

I. The interest that is affected.

The Sierra Club, founded in 1892, is the nation's oldest grass-roots environmental organization. The Club is dedicated to the protection and preservation of the natural and human environment, including the Delaware shoreline and its waters. The Club's purpose is: "To explore, enjoy and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environments."

There are many Sierra Club members in this region, including individuals who reside near the Delaware City Refinery and are directly impacted by the crude oil transfer operation, especially by the railroad operations by which the crude oil is brought to the Refinery. In addition, Sierra Club members recreate in the waters of the Delaware Bay and River, and would be affected by the barge and tanker traffic that would take place as a result of the crude oil transfer operation. Thus, the crude oil transfer operation at the heart of this appeal does and will adversely impact the interests of Sierra Club members.

The Delaware Audubon Society, founded in 1977, is a state-wide independent chapter of the National Audubon Society with approximately 2,000 members registered throughout the State. Part of Delaware Audubon's core mission is to protect the legacy of the Coastal Zone Act enacted by the late Governor Russ Peterson, who after leaving office became President of the National Audubon Society and honorary President of Delaware Audubon. Our members are proud of the Important Bird Area of Global Magnitude designation given to the Coastal Zone of Delaware and are extremely protective of the Continentally Important Bird Area designation of Pea Patch Island. Including Grass Dale at Fort DuPont, these important bird area recognitions stand out in the historic Delaware City area adjacent to the Delaware City Refinery.

Delaware Audubon members are drawn to this area frequently to enjoy these critical bird habitats. These members' recreational, aesthetic, and personal property interests will be adversely affected by the additional noise pollution from the new railroad offloading and loading processes and traditional train noises for traffic both to and from the refinery, and by the additional barge traffic on the Delaware Bay and River from shipments of crude oil from the Refinery.

II. Allegation that the decision is improper.

The MVRS is a small part of a larger operation at the Delaware City Refinery in which crude oil from various sources (including the Bakken Fields in North Dakota and tar sands oil from Canada) are shipped via rail to the Refinery, unloaded, and then a portion used as raw material for the Delaware City refining operations and a portion is to be loaded onto barges for shipment to a sister refinery in Paulsboro, NJ (and perhaps to other refineries). As a result, the Refinery has built a large rail loop used for unloading the hundreds of tank cars coming into the refinery each week, expanded unloading facilities, and created a system for piping the crude to

the barges for shipment to Paulsboro (and potentially elsewhere), and plans to use certain existing docking facilities for making these crude oil shipments. The Appellants refer to this entire operation as the "crude oil transfer operation" because it is one integrated operation at the Refinery. The MVRS is designed to control emissions during the barge loading process—the last of several steps in the crude oil transfer operation. It is clear, therefore, that the MVRS is part of this larger crude oil transfer operation, and that without the infrastructure of the entire operation, the MVRS as proposed in the Order would not be needed or need to be permitted.

For the reasons set forth herein, the Appellants believe that the crude oil transfer operation is prohibited by the CZA and the regulations issued thereunder or requires a CZA permit which the Order makes clear has not and will not be issued. As a result, the issuance of the permit amendment in the Order for the MVRS was improper. *See e.g.*, 7 Del. Admin. C. 1000 1100 § 11.6 ("No permit shall be issued by the Department unless the applicant shows to the satisfaction of the Department that the equipment, facility, or air contaminant control device is designed to operate or is operating without causing a violation of . . . any rule or regulation of the Department . . .").

III. Reasons the decision is improper.

The Appellants believe that the portion of the Order in which the Secretary found that the Coastal Zone was not violated and did not require a CZA permit was improper for any or all of three reasons: (1) The crude oil transfer operation is a bulk product transfer facility prohibited by 7 Del .C. § 7003; (2) the crude oil transfer operation is not a nonconforming use under the CZA; and (3) if the crude transfer operation or the Refinery is a nonconforming use under the CZA, then a CZA permit is needed pursuant to 7 Del. C. § 7004(a) because the crude oil transfer operation is an expansion or extension of that nonconforming use. Appellants turn to each of these reasons in more detail.

A. The Crude Oil Transfer Operation is a Bulk Product Transfer Facility Prohibited under the CZA.

The Secretary erred in the Order when he found that that the crude oil transfer operation at issue was allowable under the CZA. Section 7003 of the CZA prohibits bulk product transfer facilities in the coastal zone:

> 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. **In addition, offshore gas, liquid or solid bulk product transfer facilities which are not in operation on June 28, 1971, are prohibited in the coastal zone, and no permit may be issued therefor.** Provided, that this section shall not apply to public sewage treatment or recycling plants. A basic steel manufacturing plant in operation on June 28, 1971, may continue as a heavy industry use in the coastal zone notwithstanding any temporary discontinuance of operations after said date, provided that said discontinuance does not exceed 2 years. An incinerator is neither "public sewage treatment" nor a "recycling plant" for the purpose of this chapter.

7 Del. C. § 7003 (emphasis supplied). The purpose section of the CZA emphasizes the point:

> It is hereby determined that the coastal areas of Delaware are the most critical areas for the future of the State in terms of the quality of life in the State. It is, therefore, the declared public policy of the State to control the location, extent and type of industrial development in Delaware's coastal areas. In so doing, the State can better protect the natural environment of its bay and coastal areas and safeguard their use primarily for recreation and tourism. Specifically, this chapter seeks to prohibit entirely the construction of new heavy industry in its coastal areas, which industry is determined to be incompatible with the protection of that natural environment in those areas. While it is the declared public policy of the State to encourage the introduction of new industry into Delaware, the protection of the environment, natural beauty and recreation potential of the State is also of great concern. In order to strike the correct balance between these 2 policies, careful planning based on a thorough understanding of Delaware's potential and the State's needs is required. Therefore, control of industrial development other than that of heavy industry in the coastal zone of Delaware through a permit system at the state level is called for. **It is further determined that offshore bulk product transfer facilities represent a significant danger of pollution to the coastal zone and generate pressure for the construction of industrial plants in the coastal zone, which construction is declared to be against public policy. For these reasons, prohibition against bulk product transfer facilities in the coastal zone is deemed imperative.**

7 Del. C. § 7001 (emphasis supplied).

The act defines a bulk product transfer facility as follows:

> "Bulk product transfer facility" means any port or dock facility, whether an 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. Not included in this definition is a docking facility or pier for a single industrial or manufacturing facility for which a permit is granted or which is a nonconforming use. Likewise, docking facilities for the Port of Wilmington are not included in this definition.

7 Del. C. § 7002(b). The crude oil transfer operation at the Refinery will transfer bulk quantities of crude oil for use at the Refinery and for shipment to Paulsboro (and potentially other refineries). It therefore falls squarely within the definition of a bulk product transfer facility, and is therefore prohibited under the CZA.

B. The Crude Oil Transfer Operation is Not a Nonconforming Use Under The CZA

The Secretary erred in the Order when he found that the crude oil transfer operation at issue was a nonconforming use under the CZA. The Act defines nonconforming use as follows:

> "Nonconforming use" means a use, whether of land or of a structure, which does not comply with the applicable use provisions in this chapter where such use was lawfully in existence and in active use prior to June 28, 1971.

7 Del. C. § 7002(f). The prohibition in § 7003 only applies to bulk product transfer facilities "which are not in operation on June 28, 1971"—in other words, are not a nonconforming use. Section 7004(a), the permitting section of the CZA, reaffirms this conclusion: "Any nonconforming use in existence and in active use on June 28, 1971, shall not be prohibited by this chapter." The Secretary found in the Order that the docking facility at which crude oil will be loaded onto barges for shipment to Paulsboro (and potentially other refineries)—which is only the final part of the much larger crude oil transfer operation being built at the Refinery—is a nonconforming use. However, the crude oil transfer operation is not a nonconforming use under the CZA so as to avoid the prohibition in § 7003.

The Secretary's error arises out of the erroneous assumption that the docking facility alone is the nonconforming use. There are at least three reasons why this is erroneous. First, the Regulations issued under the CZA, set forth at 7 Del. Admin. C. 100 101 (CZA Regulations), speak in terms of the "footprint" of nonconforming uses. *See* CZA Regulations § 4.2. The CZA Regulations define "footprint" as follows:

> **"Footprint"** means the geographical extent of non-conforming uses as they existed on June 28, 1971 as depicted in Appendix B.

CZA Regulations, § 3.0. Appendix B consists of a series of aerial-type photographs of various nonconforming uses with lines depicting the boundaries of each nonconforming use. DNREC, on its own website, provides a folder with links to these photos. *See*

http://www.dnrec.delaware.gov/Admin/CZA/Coastal%20Zone%20Act%20Documents/Forms/AllItems.aspx?RootFolder=%2FAdmin%2FCZA%2FCoastal%20Zone%20Act%20Documents%2FFootprints%20of%20Non-Conforming%20Uses&FolderCTID=0x012000DC5437C5D7D2604EB7A81596D0611D82&View={156ECF75-D312-4840-A38B-0E3FEF96C99E}

The docking facility at the Refinery is not listed as a separate nonconforming use in Appendix B or on the DNREC website. Thus, the Secretary erred in finding that the docking facility itself is a nonconforming use because that docking facility is not recognized as such a use under the CZA Regulations. In order to claim any benefit from a nonconforming use, the docking facility would instead have to fall within the nonconforming use of the Refinery itself (which is listed as "StarEnterprise" in these documents because that was the name of the owner of the Refinery at the time)—an issue that is dealt with in the third reason explained below.

Second, the definition of nonconforming use states that it is a "use of land or of a structure . . . where such use was lawfully in existence and in active use prior to June 28, 1971." In connection with the crude transfer operation, the use of land and the structures of the rail loop for sure and probably some if not all of the related unloading facilities were not in existence and active use in 1971; instead, they have been built in the last six months. Thus, the infrastructure of the larger crude oil transfer operation the Refinery now seeks to run cannot satisfy the definition of a nonconforming use.

Third, in finding a nonconforming use, the Secretary relied upon the fact that the docking facility was used in 1971 presumably to accept shipments of crude oil for processing at the Refinery, and while the crude oil transfer operation would now be used to ship crude oil out from the Refinery (to Paulsboro and potentially other refineries), the "direction" of flow does not matter for purposes of nonconforming use status. However, in order to reverse the flow of crude so that the Refinery could have crude oil to ship out requires the use of land and structures that did not exist in June 1971--specifically the rail loop and unloading facilities. Thus, the crude oil transfer operation cannot be a nonconforming use under the CZA, and the Secretary erred in finding it so.

C. To the Extent That The Crude Oil Transfer Operation Falls Within Some Nonconforming Use, The CZA Requires that a CZA Permit Because It Is an Expansion or Extension of Such Nonconforming Use.

Even if the crude oil transfer operation is a nonconforming use under the CZA, or if it falls within the Refinery's nonconforming use, the Order is still improper under the CZA because it found that no CZA permit was needed. Section 7004(a) of the CZA governs permitting under the Act. It states:

> Except for heavy industry uses, as defined in § 7002 of this title, manufacturing uses not in existence and in active use on June 28, 1971, are allowed in the coastal zone by permit only, as provided for under this section. **Any nonconforming use in existence and in active use on June 28, 1971, shall not be prohibited by this chapter and 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.** Provided, that no permit may be granted under this chapter unless the county or municipality having jurisdiction has first approved the use in question by zoning procedures provided by law.

7 Del. C. § 7004(a) (emphasis supplied). The CZA itself does not define "expansion" or "extension" within its own terms. However, the CZA Regulations provide some guidance as to what can constitute an expansion or extension of a nonconforming use. As noted before, § 4.2 of the CZA Regulations speaks in terms of "expansion" of nonconforming uses beyond their "footprint(s)," where "footprint" is defined as the "geographical extent" of the nonconforming use as depicted in the aerial photographs in Appendix B. CZA Regulations § 3.0. As noted before, there is no photograph or listing for the crude oil operations at the Refinery in the

Regulations—which strongly supports the conclusion that it is not an independent nonconforming use. But even if the crude oil transfer operation is viewed as a nonconforming use, it is clear that parts of the crude oil transfer operation—especially the rail loop necessary for the unloading of the rail cars bringing in the crude oil that ultimately end up at the docking facility—did not exist in 1971 and therefore expands the footprint beyond what existed in 1971. Thus, if the docketing facility component of the crude oil transfer operation is viewed as a nonconforming use, it is clear that the new, larger crude oil transfer operation will operate beyond the 1971 geographical extent of the docking facility, and is therefore an expansion under the CZA Regulations.

Consideration of the Refinery's status as a nonconforming use comes to the same conclusion. The footprint for the Refinery (listed as "Star Enterprises") can be found at

http://www.dnrec.delaware.gov/Admin/CZA/Coastal%20Zone%20Act%20Documents/Footprints%20of%20Non-Conforming%20Uses/StarEnterprise.pdf

Part of the crude oil transfer operation—especially the rail loop necessary for the unloading of the rail cars bringing in the crude oil—operates outside the Refinery footprint as defined in this Appendix B image, and is therefore an expansion beyond the 1971 geographical extent of the Refinery.

Thus, regardless of which nonconforming use is used, there has been an expansion beyond its 1971 geographical extent, and therefore under the CZA Regulations an "expansion" has occurred for purposes of § 7004(a) requiring a CZA permit for the crude oil transfer operation. The Secretary therefore erred in finding that no CZA permit was needed for the crude oil transfer operation. Without such a permit, the crude oil transfer operation is operating in violation of the CZA.

For the foregoing reasons, the Order should be reversed or remanded with instructions to DNREC to comply with the Coastal Zone Act and its implementing regulations. Appellants reserve their right to supplement this statement of appeal, if necessary, to clarify the reasons for their appeal and the relief requested.

IV. Estimate of the number of witnesses and time involved.

Appellants estimate that they will each call 1 – 5 witnesses to establish standing and then 1 – 4 witnesses to establish the facts necessary to support the merits of the appeal. Appellants estimate that the presentation of its testimony will extend for 4-6 hours, exclusive of cross-examination or re-direct, if any.

Respectfully submitted,

The Sierra Club, Delaware Audubon

By: _____
One of its attorneys

Kenneth T. Kristl, Esq. (DE Bar # 5200)
Widener Environmental and Natural Resources Law Clinic
4601 Concord Pike
Wilmington, DE 19803
(302) 477-2053
(302) 477- 2032 (fax)
ktkristl@widener.edu