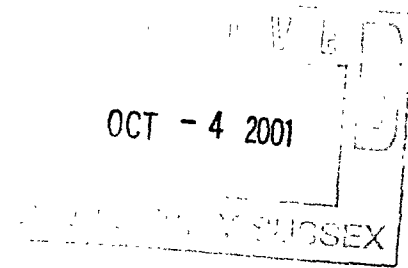


IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR SUSSEX COUNTY

FRIENDS OF THE NANTICOKE RIVER, : C.A. No. 00A-10-001  
Appellant, :  
v. :  
NICHOLAS A. DIPASQUALE, :  
Secretary of the Department of :  
Natural Resources and :  
Environmental Control, and :  
BEDCO, INC., :  
Appellees. :



MEMORANDUM OPINION

DATE SUBMITTED: June 22, 2001

DATE DECIDED: September 28, 2001

David J. Weidman, Esquire, 100 N. Bedford Street, Georgetown, DE 19947, attorney for Appellant Friends of the Nanticoke River

Jeremy W. Homer, Esquire, P.O. Box 598, Dover, DE 19903, attorney for Appellee BEDCO

Kevin P. Maloney, Esquire, 820 N. French Street, Wilmington, DE 19801, attorney for Appellee Nicholas A. DiPasquale

Graves, J.

This is an appeal from a decision of the Secretary ("Secretary") of the Department of Natural Resources and Environmental Control ("DNREC") to issue a permit for the building of the Nanticoke Marine Park ("Marina") in the town of Blades, Delaware. The Friends of the Nanticoke ("Appellant"), a non-profit environmental group, has brought the appeal.

This is my decision thereon.

#### FACTS AND PROCEDURAL HISTORY

The Marina is a project of the Blades Economic Development Corporation ("BEDCO") and has received significant support from the State of Delaware ("the State"). The roots of the project seem to lie in a September 1990 Nanticoke River Marina Feasibility Study which Andrews, Miller & Associates, a Cambridge, Maryland environmental consulting firm, prepared for DNREC after studying the feasibility of a marina somewhere on the Nanticoke River. However, interest in a marina in western Sussex County apparently predated the 1990 study since letters incorporated into the study contain references to presentations the Nanticoke River Yacht Club made to various towns in 1989.

It appears from the record that no further activity occurred regarding the Marina until October and December, 1995, when the State bought several parcels of land which eventually would be the location of the Marina.<sup>1</sup>

<sup>1</sup>The record does show two non-Marina related events occurring between the Feasibility Study and the 1995 purchase of the land. First, DNREC's Nanticoke River Study Committee published the Nanticoke River Basin Environmental Quality Assessment Report, dated December, 1990, which reviewed the characteristics of the

In July 1997, the State leased the land for a ten-year term to the town of Blades, which then subleased the site to BEDCO. About this same time, Andrews, Miller & Associates submitted to BEDCO a Siting and Design Study, and BEDCO drafted an operation and maintenance plan for the Marina. DNREC received BEDCO's permit application on September 2, 1997.

A public hearing was conducted on May 21, 1998, pursuant to 7 Del. C. § 6006. Robert R. Thompson, Esquire ("Hearing Officer") was the hearing officer. His role was to gather information - from the testimony at the hearing, from technical reports DNREC and BEDCO submitted - and submit a report based on that information to the Secretary, who then would make a decision based on that report. The burden was on BEDCO to show that there was compliance with the three applicable sets of regulations: Subaqueous, Wetlands, and Marina.<sup>2</sup> At the hearing, BEDCO, through its agent Andrews, Miller & Associates, gave a presentation of the project. Next, the Hearing Officer allowed for public comments on the project; representatives from several towns spoke in favor of the project and one person spoke about the dangers of the project. After the public comments,

river basin, fisheries resources, archaeological and historical resources, environmental and stream use conflicts, and overall environmental quality of the river basin. The second is a press release DNREC issued on June 11, 1992, announcing the creation of a partnership between Delaware and Maryland natural resource agencies, Federal natural resource agencies, and private environmental groups in Delaware and Maryland (including Friends of the Nanticoke).

<sup>2</sup>Laura Herr, with the Wetlands and Subaqueous Lands section of DNREC, stated that the Delaware Surface Water Quality Standards were applicable as well.

the hearing became more technical in nature, with presentations by DNREC scientists on various tests undertaken in planning the Marina.

The record was held open for two (2) weeks, during which time additional information was submitted for the Hearing Officer's consideration. On June 11, 1999, he issued his report ("Report"). The Report recommended that a permit be issued for a smaller facility than proposed (35 to 40 wetslips instead of 87) unless BEDCO supplied additional information to remedy the deficiencies. The parties submitted additional information, and the Secretary issued an Order on October 1, 1999 ("Order") which directed his staff to issue a permit to BEDCO for the construction of an 87-slip marina.

The Secretary found and concluded as follows.

1. The primary objective of the Siting and Design Study ("SDS") under the Marina Regulations is the avoidance of impacts, followed by minimization and then the offsetting of all unavoidable adverse impacts to aquatic and terrestrial resources.
2. Any design for water-based vessel storage must be accompanied by alternative designs that explore combinations of wet and dry storage, including at least one alternative which uses only land-based vessel storage. This alternatives analysis must satisfy the sequencing of review criteria and may include other sites, other designs or both.
3. The Marina Regulations establish rebuttable presumptions that non-water based vessel storage has less adverse impact and that non-water based alternatives are available.
4. The Siting and Design Study must show that potential impacts have been or can be avoided to the maximum extent practicable when considering existing technology, infrastructure, logistics and costs in light of overall project purposes.
5. It is necessary to consider the public interest regarding activity affecting the uses of subaqueous lands including:

- \* potential effect on the public with respect to commerce, navigation, recreation, aesthetic enjoyment, natural resources and other uses;
- \* the extent to which any disruption of public use is temporary or permanent; and
- \* the extent to which the public at large would benefit or suffer detriment.

These public interest considerations are to be taken into account along with a variety of other regulatory factors. 6. A permit may be issued only for the alternative found to be the least environmentally damaging practicable alternative. In determining what is practicable, the economic viability of the project is an essential element.

The Secretary further found and concluded the following.<sup>3</sup>

\* After the Hearing Officer found the information supported a permit for 35 to 40 wetslips, various parties submitted additional evidence and comments. Based on this additional information, the Secretary found as follows. A more recent study (July 1999) showed a "break-even" point of 75 wetslips in order for the Marina to be financially self-sustaining in terms of operating costs. This study by Applied Technology and Management was more persuasive. Thus, the break-even point was 75 wetslips.

\* The record shows some positive economic benefits balanced against even less quantified fears about negative economic impact.

Given the break-even point of 75 wetslips, it appears that the project cannot be downsized from its present scope without jeopardizing its economic viability. Accordingly, the potential impacts have been avoided to the maximum extent practicable as required by Section II.C.2.a. of the Marina Regulations for a project of that scope and design.

<sup>3</sup>I rephrase at times, and at other times, I quote from the Order.

\* Land-based alternatives are not available as a practical matter.

\* There should be no problem with respect to navigation safety.

\* The additional vessels from the Marina would not have a significant impact on river traffic on the Nanticoke River.

\* Concerns about bottom paint toxins, fuel spills, engine emissions and anti-freeze discharges are legitimate but very difficult to quantify based on the record. Certain factors such as the availability of non-toxic paints and biodegradable antifreeze as well as the fact that the Blades site is in fresh water and is relatively well-flushed all help to mitigate these impacts. Also, the use of a boom across the travel lift will contain spills in that area.

\* The record does not reflect any site-specific data on the extent of secondary impacts, such as shoreline erosion and disturbance of critical habitat areas. Although there would be some adverse impact, it is not likely that the incremental impacts would be significant if no wake zones are enforced. "Other secondary effects including sewage discharges and re-suspension of bottom sediments are likewise hard to quantify based on the record but could be minimized with proper enforcement."

\* In terms of the public interest, the relatively small increase in vessel traffic from this project should not significantly affect other uses such as commerce, navigation, recreation and aesthetic enjoyment. The impacts on natural resources have been avoided, minimized and compensated for in accordance with the Marina Regulations. The record shows significant support for the project from elected representatives at the state and local level who presumably serve the public interest.

\* By using methods which the Marina Regulations sanction, BEDCO should be able to adequately mitigate the loss of wetlands. Boater education and the enforcement of regulatory requirements should address secondary impacts that are difficult to quantify.

\* "On balance, the public at large should not experience a detriment from this project as compared with the benefits of needed marina facilities, potential economic stimulus and centralized fueling and boater education facilities on the Nanticoke." The underutilized and unprofitable Salisbury Marina is too different from this one to be an example of predictable failure.

Appellant appealed the Order. Because both parties stipulated to bypass the Environmental Appeal Board, the appeal went directly to the Superior Court pursuant to 7 Del. C. § 6008(g).<sup>4</sup> After reviewing the Secretary's findings of fact and conclusions of law, this Court determined that the Secretary had not considered all of the factors required under 7 Del. C. § 6604 when wetlands are involved. These factors in 7 Del. C. § 6604(b) are:

(b) The Secretary shall consider the following factors prior to issuance of any permit:

(1) Environmental impact, including but not limited to, likely destruction of wetlands and flora and fauna; impact of the site preparation on tidal ebb and flow and the otherwise normal drainage of the area in question, especially as it relates to flood

<sup>4</sup>In 7 Del. C. § 6008(g), it is provided:

At any time after the appeal to the Board, the parties may, by stipulation, proceed directly to Superior Court, in which case the Court may affirm, reverse or remand the Secretary's decision based on the record before the Secretary and the Board and whatever other evidence the parties may submit by stipulation.

control; impact of the site preparation and proposed activity on land erosion; effect of site preparation and proposed activity on the quality and quantity of tidal waters, surface, ground and subsurface water resources and other resources;

(2) Aesthetic effect, such as the impact on scenic beauty of the surrounding area;

(3) The number and type of public and private supporting facilities required and the impact of such facilities on all factors listed in this subsection;

(4) Effect on neighboring land uses, including but not limited to, public access to tidal waters, recreational areas and effect on adjacent residential and agricultural areas;

(5) State, county and municipal comprehensive plans for the development and/or conservation of their areas of jurisdiction;

(6) Economic effect, including the number of jobs created and the income which will be generated by the wages and salaries of the jobs in relation to the amount of land required, and the amount of tax revenues potentially accruing to the state, county and local governments.

Because the Secretary had not considered these factors, the Court remanded the matter to the Secretary to make the required findings. *Friends of the Nanticoke v. DiPasquale*, Del. Super., C.A. No. 00A-10-001, Graves, J. (April 11, 2001).

In response, the Secretary issued Supplemental Order No. 2001-W-0021 on May 17, 2001. I address that order below.

\* The major issue, in addressing § 6604(b)(1), with the wetlands regulations is that construction of the Marina will affect 0.45 acres of state-regulated tidal wetlands and 3.3 acres of federally regulated non-tidal wetlands. The Secretary points to several references in the Hearing Officer's Report to the destruction mitigation of wetlands. The Hearing Officer stated that there would be a two-to-one mitigation at an offsite area three



miles from the Marina, as well as at a site near the Marina which also would be used for dry storage.

\* As to § 6604(b)(2), which addresses aesthetic concerns, the Hearing officer and the Secretary both considered the Marina's location - in an industrialized section of Blades and Seaford which manufacturing, public works (including a sewage treatment facility), and commercial enterprises surround - as well as the fact that the Marina replaces an abandoned car dealership. They also noted that BEDCO designed the Marina so that it had greenways and public picnic areas which add to the aesthetic value. The extent of the "surrounding area" is not clear from the statute, and the Friends of the Nanticoke expressed concern that the increased boat traffic could decrease the aesthetic value of the rest of the river, which could be considered the "surrounding area". Apparently, the Secretary was not concerned that the entire river's aesthetic value would be compromised in light of the number of boats that would use a marina of this size.

\* The number of supporting facilities and their impact which must be considered pursuant to § 6604(b)(3) are few. They were considered as part of the overall plan of the Marina, and there is no contention from Appellant that the Secretary ignored their existence when making his decision. Appellant's concerns regarding these facilities focus on the potential harm to the environment that could result from an accident, such as a fuel spill at the fueling facilities. However, BEDCO has drafted an Operations and Maintenance Manual that accounts for such problems arising. While

Appellant contends that there is no guarantee that the guidelines in the Manual will be enforced, the Secretary made it clear in his Order that DNREC would continue to monitor the Marina and the surrounding area to detect and correct any potential problems. Also, the Marina and its supporting facilities are subject to DNREC's Marina Regulations, so there are detection and enforcement policies in effect.

\* The following comments are made regarding § 6604(b)(4) and (5). The record before this Court makes it clear that the Marina has the support of the Blades' community and the public at large. However, the major fact that supports the decision to issue the permit is that the Marina constitutes a better use of the land than was previously there, an abandoned car dealership. Thus, the Marina has the advantages of ridding the area of an eyesore and providing residents of the area with a place to congregate and access the river. The hoped-for visitors that the Marina might attract likely will bring increased business to the town's businesses. Indeed, the possible effect that the Marina might have on the neighboring area seems to be the primary motivation behind the project. Thus, the Secretary has adequately considered subsection (4). In addition, the Marina seems to support the zoning and comprehensive plans of the town, so the permit is in conformity with subsection (5).

Finally, the requirements of § 6604(b)(6) were met. While BEDCO and the other Marina supporters offer various figures for the exact economic benefit, even the Secretary concedes that such positive and negative economic impacts of the Marina are difficult

to quantify. However, he ultimately concluded in his order that "the record shows some positive economic benefit balanced against even less quantified fears about negative economic impact."

The Secretary concluded that "all of the statutory factors of 7 Del. C. § 6604 were considered in reaching a decision on this permit application, but were subsumed under other regulatory programs and hence were not necessarily separately identified at the time of permit issuance."

#### DISCUSSION

Where the parties bypass the Environmental Appeals Board and come directly to this Court for a review of the Secretary's decision, "[t]he burden of proof is upon the appellant to show that the Secretary's decision is not supported by the evidence on the record...." 7 Del. C. § 6008(b) and (g).<sup>5</sup>

The statutory requirements that govern BEDCO's application are those pertaining to the wetlands, 7 Del. C. § 6604, and to the subaqueous lands, 7 Del. C. § 7201, et seq. In addition, DNREC has promulgated a set of Marina Regulations which establish requirements for the construction and operation of marinas.

#### A. WETLANDS

Any activity (with certain exceptions provided for in 7 Del. C. § 6606) that takes place in wetlands requires a permit from DNREC, and, as noted earlier, 7 Del. C. § 6604 sets forth the

<sup>5</sup>As explained in § 6008(g), "The standard of review for such an appeal shall be governed by subsections (b) and (c) of this section." Subsection (b) applies since it addresses appeals of a final decision by the Secretary.

factors which the Secretary must consider. Although the statute states that the Secretary "shall consider" the six listed factors, it does not mandate how the Secretary must weigh those factors. Thus, the Legislature left that decision to the Secretary, and this Court will give some deference to the Secretary's decision. See *Tulou v. Raytheon Service Company*, Del. Super., 659 A.2d 796, 804 (1995).

Although the Secretary did not specifically address the factors in his initial order, he clarified that he had addressed these factors in the supplemental order. The Court is satisfied that the Secretary considered all of the factors of § 6604(b). It is irrelevant whether the Court would have assigned different weights to the factors as it will not substitute its opinion for that of the Secretary's.

The Appellant has failed to show that the record does not support this decision in connection with the requirements of wetlands legislation.

#### B. SUBAQUEOUS LANDS

Title 7, Chapter 72 of the Delaware Code places the regulation of subaqueous lands under the purview of DNREC.

The purposes of this chapter are to empower the Secretary to deal with or to dispose of interest in public subaqueous lands and to place reasonable limits on the use and development of private subaqueous lands, in order to protect the public interest by employing orderly procedures for granting interest in public subaqueous land and for issuing permits for uses of or changes in private subaqueous lands.

7 Del. C. § 7201.

The chapter establishes the application and appeal procedures,

but it does not set out the criteria the Secretary must follow. However, § 7201 grants authority to the Secretary "to adopt rules and regulations to effectuate the purposes of the chapter...." The current set of subaqueous lands regulations ("Subaqueous Regulations")<sup>6</sup> establish the procedures to follow in applying for a permit (Section 2), the facts that must be considered in the decision to grant the permit (Section 3.01), and restrictions on the permitted activity which takes place on the lands (Section 3.02 through 3.07).

BEDCO and DNREC followed the application procedures set out in Section 2 of the regulations.

The evaluation considerations for such a permit are contained in Section 3.01, which states that "an application may be denied if the activity could cause harm to the environment, either singly or in combination with other activities or existing conditions, which cannot be mitigated sufficiently." The impacts which must be considered are divided into three categories: public use, environmental, and other. The public use considerations include: the value to the State in retaining an interest in the land and the loss to the public of the interest in the land, the alternative available to applicant's plans, and the effect on the public's use of the subaqueous area.

In the present matter, since the subaqueous lands of the Marina would be created from dry land, the public would not be

<sup>6</sup>The current set of regulations were adopted May 8, 1991, and amended September 2, 1992.

denied the use of subaqueous lands. Also, because the Marina is designed for use by the public, the public use criteria of these regulations are satisfied.<sup>7</sup>

The environmental impacts that DNREC must consider include: effects on water quality, especially those that cause violation of the Surface Water Quality Standards; effects on marine plant and animal life; and effects on natural surface and groundwater hydrology. The Secretary acknowledged that these impacts are difficult to quantify and conceded they will necessarily have some detrimental effect. However, he concluded that mitigation efforts, such as the creation of new wetlands, and monitoring efforts, such as a pre- and post-construction inventory of the plant and animal life at the site and frequent measures of the dissolved oxygen levels, would minimize the environmental harm. Also, the Secretary established bonding requirements to ensure site restoration and wetlands mitigation. The Subaqueous Regulations set no definite requirements and only state that the Secretary must consider certain impacts. From the record and the Secretary's orders, this Court is satisfied that the Secretary, in reaching his decision, factored in and considered all of the potential problems.

Other considerations set out in the Subaqueous Regulations include: the amount of encroachment onto public lands, the quality of the design and of materials used in the project, how well the project fits in to the surrounding area, whether the project will

<sup>7</sup>This provision of the regulations is of more consequence when the use of the subaqueous lands is private or commercial.

comply with the State's Surface Water Quality Standards, and the effects of the project on shellfish beds and finfish activity in the area.

As stated above, the amount of encroachment on public lands appears to be minimal.

The design of the Marina included sloped edges so that it would be flushed every three days. Other designs were considered, but this was determined to be the best design for the area.

The effect of the construction of the Marina on the Surface Water Quality Standards is difficult to determine, but DNREC plans to monitor the water quality in and around the Marina as one of the permit conditions.

Finally, with respect to the impact on shellfish and finfish in the area, the Secretary decided that the increased impact on aquatic life would be only marginal in light of the current heavy use of the river by commercial and recreational boaters.

The Appellant has failed to show that the record does not support this decision in connection with the requirements of subaqueous lands legislation.

#### C. MARINA REGULATIONS

The Secretary additionally was required to follow the Marina Regulations, which are a set of guidelines DNREC promulgated that "establish minimum requirements for the siting, design, construction, and operation of marinas to serve the needs of boaters, while properly managing the State's natural resources, and protecting public health." These regulations require an in-depth

process and provide more detailed criteria for the consideration of a permit for a marina, and they combine considerations from the wetlands and subaqueous lands acts.

The review criteria is: "The Department will evaluate permit applications based on their predicted impact to Delaware's land, water, underwater, and air resources in order to ensure proper management, protection, conservation, and utilization of those resources in accordance with 7 Del. C., Chapters 60, 66, and 72." Marina Regulations I.D.1.3.(1).

Most important is that applications for new marinas must contain a Siting and Design Study ("SDS"). Marina Regulations II.B.2. provides:

The primary objective of the SDS shall be avoidance of impacts. It shall document all efforts to avoid adverse impacts, and to minimize and offset unavoidable adverse impacts to aquatic and terrestrial resources. Such documentation shall be in the form of an objective alternatives analysis that satisfies this sequencing of review criteria and provides an evaluation of practicable alternate sites and/or designs for Department consideration.

The SDS siting requirements include vessel storage, water quality assessment, and the cumulative impacts on wetlands, shellfish resources, submerged aquatic vegetation, benthic resources, critical habitats, recreational water use areas, and mitigation measures. There are also extensive planning and design requirements, such as marina flushing, dredging and dredged material disposal, shoreline protection structures, navigation and access channels, and stormwater management.

The permit application included the required description of



the project, and the Hearing Officer and the Secretary were satisfied that BEDCO and its consultant designed the Marina in accordance with the Marina Regulations.

The Appellant has failed to show that the record does not support this decision in connection with the requirements of the Marina Regulations.

#### CONCLUSION

The process that has led up to this decision was long and complicated. Those who are for the Marina and those who are against it have reasonable grounds for their respective positions. Each side can articulate strong positions, but only one will prevail. There was a huge volume of information developed for this decision and the regulations that guided the Secretary's decision were extensive. The complexity and extent of all of the facts and regulations made it difficult to address each of them individually in this opinion, but the Court carefully reviewed them all. The extensive findings made in the preparation of the permit application and the vigorous debate on the matter make it clear that potential problem and considerations were brought to light and the Secretary considered them. The Secretary did not abuse his discretion in deciding to issue the permit. He did not commit any error of law. The Appellant has not shown that the record does not support his findings and conclusions.

The Court affirms the decision of the Secretary.

IT IS SO ORDERED.