



STATE OF DELAWARE
**DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL**

89 KINGS HIGHWAY
DOVER, DELAWARE 19901

Office of the
Secretary

Phone: (302) 739-4403
Fax: (302) 739-6242

Secretary's Order No. **2005-CZ-0023**

Re: Application of E. I. DuPont De Nemours & Company, Inc. for a Coastal Zone Act Permit to Produce An Upgraded Titanium Dioxide Product, IP1 (R948), at its 104 Hay Road, Edge Moor, Delaware Facility

Date of Issuance: **April 27, 2005**

Effective Date: **April 27, 2005**

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") under 29 Del. C. §§8001 et seq., the following findings, reasons and conclusions are entered as an Order of the Secretary in the above-referenced Coastal Zone Act ("CZA") permit proceeding:

Based on the record, including the public hearing record reviewed in the April 25, 2005 Hearing Officer's Report ("Report") appended hereto, I find and conclude that a CZA permit should be issued. The Report reviews and summarizes the public hearing record, which was developed at the March 1, 2005, public hearing. The Report recommends approval of the requested permit, subject to the necessary and appropriate conditions the Department includes in a CZA permit to protect the Coastal Zone and enhance the Department's ability to enforce the permit. I agree with the Report and adopt it as part of this Order.

The proposed project will allow the permit applicant, E.I DuPont De Nemours and Company, Inc. ("DuPont"), to produce a new product at its Edge Moor facility,

which is located as an existing nonconforming industrial use within the defined Coastal Zone.¹ DuPont's Edge Moor facility is a heavy industrial facility and has been in existence since the 1930s. Consequently, it predates the CZA's June 28, 1971, date, which banned any new heavy industrial development within the Coastal Zone. As an existing non-conforming use, the proposed project must obtain a permit pursuant to the Coastal Zone Act, 7 Del. C. §7001 *et seq.*, and the Department's CZA regulations.

The proposed product is a variant of DuPont's "Ti-Pure" family of "Rutile Paper Slurry" products that the Edge Moor facility currently produces for the paper, printing and packaging industries. The new product is known as IP1 (R948) and is produced by mixing a surfactant, citric acid and a defoamer with DuPont's TiO₂ product. The new product will be marketed to the interior paint industry, and help replace the plant's production decline in its traditional products that are sold to the paper, printing and packaging industries, which DuPont describes as a declining market. The new product will allow the plant to retain employment for its approximately 325 employees, and to continue the local, state and national economic benefits through its approximate \$16 million in annual purchases and its approximate \$6 million annual payment in local and state taxes. The proposed project will not increase the overall production at the plant, which is currently limited under its existing CZA permit to 190,000 tons of TiO₂ production annually. DuPont currently estimates production of IP1 to be between 10,000 and 15,000 tons annually.

The proposed project will produce the air emission of a pollutant, Volatile Organic Compounds ("VOC"), based upon the presence of isopropyl alcohol, which is present in the surfactant added to the TiO₂ to enable its use by the interior paint industry.

¹ The Coastal Zone is defined at 7 Del. C. § 7002 (a).

The air release of VOC occurs when the IP1 is transferred to tanks for weighing and shipment. DuPont estimates one pound of VOC released for every day the IP1 is produced, which is estimated to be between 50 and 100 days annually. For purposes of the CZA application, DuPont conservatively estimated the release would occur every day, for a total maximum release of 365 pounds annually.

DuPont proposed offsetting the proposed project's air pollution by temporarily switching for ten days from burning No. 6 fuel oil to natural gas as the fuel burned in its ore roaster. The proposed switch would produce VOC reductions totally 1.25 tons annually, or well in excess of the maximum pollutants possible from the proposed project.

The Report raised concerns with the completeness of the application, but the Hearing Officer concluded that the errors and omissions do not rise to the level that warrants rejecting the application. I agree that the materiality of the errors and omissions do not justify such an action, although this does not condone the submission of applications that are not accurate and complete. DuPont provided the information to the Department and satisfied this concern. The Department relies on the information supplied and does not have the time in a CZA review to independently investigate the application to determine if it is accurate.

In conclusion, I approve issuance of the CZA permit and direct that the appropriate regulatory steps be taken to implement its issuance, including public notice pursuant to CZA Regulation 14.1.6, and enter the following findings and conclusions:

1. The Department has an adequate record for its decision, and no further public hearing is appropriate or necessary. The Hearing Officer properly ruled that

information on the sale of other Edge Moor products and the waste from the currently approved TiO₂ production and the past production of “Iron-Rich” were not relevant to the proposed IP1 production that is the subject of the pending permit application.

2. The Department provided, in a manner required by the applicable law and regulations, adequate public notice of the filing of DuPont’s application and its availability for public review, the receipt of an administratively complete application, and the March 1, 2005 public hearing.

3. The Department has considered the environmental impact of the proposed project and finds that the proposed release of no more than 365 pounds of VOC annually is adequately offset by the proposed reduction of VOC from the proposed fuel switching. The Department considers that any harm from this proposed pollutant is more than offset by the applicant’s proposed reduction of at least 1.25 tons annually of VOC. The proposed offset is to be achieved by switching, on a temporary basis of at least ten days, from burning No. 6 fuel oil to natural gas in the Edge Moor ore roaster. Moreover, the use of natural gas will occur during anticipated ozone alert days to the maximum extent possible, which will assist in reducing smog forming VOC during these time periods. Should DuPont decide to voluntarily burn natural gas on an ongoing, annual level above the ten days, then the quantified annual VOC reduction from this voluntary action may be considered in reviewing an offset review calculation as part of a future DuPont CZA permit application for the Edge Moor facility.

4. The Department has considered the economic impact and finds that the proposed project will: a) provide a positive benefit to the local and state economy; b) allow the existing facility to remain productive into the foreseeable future; c) allow the

facility to add a new product and retain the plant's employment for the approximately 325 workers; d) continue the purchase of goods and services in that benefit the local, state and national economies, and e) benefit the state and local government and their taxpayers from tax payments and payroll taxes.

5. The Department has considered the aesthetic effect of the proposed project, which is to use a small part of an existing industrial facility, and finds and concludes that there is no harmful aesthetic impact.

6. The Department has considered the proposed project's supporting facilities, which consist of small tanks and handling equipment, and finds and concludes that these will not harm the CZ or otherwise change the consideration of the other statutory considerations.

7. The Department has considered the proposed project's impact on neighboring land uses, and finds and concludes that the proposed project is located within a zoned industrial area, with the nearest residence a half mile away, and that the neighboring uses do not support denial of a CZA permit.

8. The Department has considered the proposed project's consistency with local comprehensive plans and finds and concludes that the proposed project is consistent with the local zoning and will assist in improving the air quality.

9. The Department's issuance of a CZA permit, as proposed by the Applicant and subject to the Department's conditions, is appropriate under the law and applicable regulations because the permit is supported by adequate offsets, as calculated by the Applicant and confirmed independently by the Department's Offset Review Committee.

10. The Department's issuance of a permit under the Coastal Zone Act and its CZA regulations is approved, subject to such appropriate and necessary conditions necessary to protect the environment. The conditions should include directing the burning of natural gas in the ore roaster for at least ten days every calendar year and during ozone alert days, to the maximum extent possible, and modifying any air quality permits to be consistent with this Order.

11. The Department considered all timely public comments and questions on the permit application, as presented to the Department in writing and orally at the public hearing, and its Staff's expert technical advice and investigation of the application in issuing this permit.

*s/John A. Hughes*_____

John A. Hughes
Secretary

HEARING OFFICER'S REPORT

TO: The Honorable John A. Hughes
Secretary, Department of Natural Resources and Environmental Control

FROM: Robert P. Haynes, Esquire
Hearing Officer, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: Application of E. I. DuPont De Nemours & Company, Inc. for a Coastal Zone Act Permit to Produce An Upgraded Titanium Dioxide Product, IP1 (R948), at its 104 Hay Road, Edge Moor, Delaware Facility

DATE: April 26, 2005

I. BACKGROUND

This Hearing Officer, delegated authority by the Secretary of the Department of Natural Resources and Environmental Control (“DNREC” or “Department”) pursuant to 29 Del. C. §§6606, and 8003 and 7 Del. C. §7005, presided over a duly noticed public hearing, commencing at 6:30 p.m., and held March 1, 2005 at the Department’s offices at Lukens Drive, New Castle, Delaware.

The hearing was held to consider public comments on the application filed September 23, 2004 by E. I. Du Pont De Nemours & Company, Inc. (“DuPont”) for a permit under the Coastal Zone Act (“CZA”). A CZA permit is required because: 1) DuPont wants to produce a new titanium dioxide (“TiO₂”) product called “IP1,” 2) the new production would result in the release of one pound per day of air pollutants, 3) the plant is located at 104 Hay Road, Edge Moor, Delaware, which is an existing non-conforming industrial facility built before the CZA’s effective date and is situated on a 123 acre tract located within the statutorily defined “Coastal Zone” (“CZ”).¹

DNREC published notice of DuPont’s application pursuant to CZA Regulation No. 14.1.4, and made the application available for inspection at its New Castle and Dover offices.

¹ The “coastal zone” is a geographic area defined at 7 Del C. §7002(a).

DuPont's application initially proposed an unspecified volatile organic compounds ("VOC") offset designed to reduce VOC emissions by .25 tons per year. DNREC's preliminary review found that this submission was not acceptable. Consequently, DuPont subsequently proposed installing a low NOx burner as an alternative, but, finally, in a submission dated January 13, 2005, DuPont proposed switching from No. 6 fuel oil to natural gas as the fuel burned in its ore roaster for ten days, which would reduce VOC emissions by 1.25 tons per year. This proposed offset was accepted by the Department's CZA Offset Review Committee. The proposed offset produces a more than a 6:1 offset, or well over the 1.3:1 offset generally used by the Department to support a CZA permit offset.

On February 3, 2005, DNREC determined that the application was administratively complete, which began the ninety day period for Department action on the application. On February 6, 2005, public notice of a March 1, 2005 public hearing occurred, which is required under Section 7005 of the CZA. 7 Del C. §7005.

The plant was built approximately in 1935, and produces titanium dioxide ("TiO₂") products as a water-based slurry referred to as "Rutile Paper Slurry." DuPont seeks to produce an upgraded TiO₂, which DuPont would market as part of the plant's production of paint pigments known as 'Ti-Pure.' Currently, the plant's production of TiO₂ is marketed as a paint pigment used by the paper, packaging and printing industries, which DuPont stated is a declining market. DuPont proposes to use the current plant's product and, with certain minor additives, to create a new product IP1 (R948) ("IP1"), which would be marketed to the interior paint industry.

The CZA was triggered by the new process' proposed release of an estimated one pound per day of VOC, and between 50 and 100 pounds annually based on IP1's estimated annual production. The release is from the isopropyl alcohol that would be added to TiO₂ as a surfactant to make IP1, and the release into the air would occur when the IP1 is transferred to

tanks for shipment and weighing. The only other new ingredients added to TiO₂ to make IP1 are citric acid and a defoamer. The total floor space for the new product will be 900 square feet. There is no waste product from the IP1, but the plant will generate waste from TiO₂ used to make IP1 and these wastes include ferric chloride and an iron-rich waste. The IP1 will not create any new waste and all waste from the TiO₂ production currently is shipped from the site to duly authorized waste disposal facilities outside the CZ.

The plant employs approximately 325 workers, purchases approximately \$14 million annually in goods and services, and pays approximately \$6 million a year in state and local taxes. The plant has a permitted production capacity of 190,000 tons per year, but it currently produces approximately 100,000 tons of TiO₂ annually. The new product will require five employees, but no new jobs would be created. Instead, the new production would help retain the plant's employment level. The proposed new product also would not change the plant's capacity, but would allow the plant to supplement the declining production of the paper packaging products with a new product to be marketed to the interior paint industry. The same IP1 product is made as DuPont's New Johnsonville, Tennessee plant. Currently, DuPont anticipates making the new product approximately ninety days a year, although the actual amount will depend upon actual market conditions. The current estimated production is between 10,000 and 15,000 tons per year, but the actual level will depend on the market demand. For purpose of the environmental offsets, the emissions were assumed to occur 365 days.

II. SUMMARY OF THE PUBLIC HEARING RECORD

The March 1, 2005 public hearing record consists of a 148 page verbatim transcript of the public hearing, and documents, marked as Exhibits ("Ex."), which were admitted into the record as hearing exhibits. The hearing record was left open until April 22, 2005 to allow participants

to propose the designation of portions the record from another DuPont DNREC proceeding to be included in this proceeding public hearing's record if relevant to the subject of this proceeding.

Dennis Brown, a Planner and the Department's Coastal Zone Act Administrator, made a slide/PowerPoint presentation and submitted the following Department hearing exhibits into the record:

DNREC Ex. 1. September 23, 2004, DuPont Application for a Coastal Zone Act Permit.

DNREC Ex. 2. Affidavit of Publication from the New Castle Weekly of DNREC's notice of receipt of the application and its availability for public review.

DNREC Ex. 3. Affidavit of Publication from The News Journal of DNREC's notice of receipt of the application and its availability for public review.

DNREC Ex. 4. Memorandum dated September 29, 2004, from Dennis Brown of the DNREC to three Department managers requesting their review of the application.

DNREC Ex. 5. October 14, 2004, e-mail from Peder Hansen of the DNREC's Water Resources Division commenting on the project and indicating that there were no water impacts.

DNREC Ex. 6. Letter dated January 13, 2005, from Thomas Anderson of DuPont to Dennis Brown explaining the applicant's revised offset proposal to use natural gas as a fuel in the ore roaster.

DNREC Ex. 7. Letter dated January 27, 2005, from Thomas Anderson to Dennis Brown clarifying the applicant's final offset proposal and withdrawing the previous two offset proposals.

DNREC Ex. 8. E-mail dated February 10, 2005, from Bill Harris of the DNREC AQM office regarding the current offset proposal.

DNREC Ex. 9. Memorandum dated February 1, 2005, from Dr. Harry Otto of the DNREC to Dennis Brown declaring the offset project to be clearly acceptable.

DNREC Ex. 10. Secretary's Environmental Assessment Report, signed by Secretary Hughes, and dated February 2, 2005 regarding DuPont's application.

DNREC Ex. 11. Affidavit of Publication from The News Journal providing proof of the publication of the legal notice announcing this hearing.

DNREC Ex. 12. Affidavit of Publication from the New Castle Weekly providing proof of publication of the legal notice announcing this hearing.

DNREC Ex. 13. A copy of DNREC's Power-Point presentation made at the hearing of March 1, 2005.

DNREC Ex. 14.² The February 3, 2005, letter from Dennis Brown to DuPont indicating that the application is 'preliminarily administratively complete' based upon the revised offset proposal.

Harry W. Otto, Ph.D. also was present from the Department in his capacity as the Chairman of the Department's CZA Offset Review Committee. Steve Ours was present from the Division of Air and Waste Management.

DuPont made a brief presentation and its representatives included its Plant Manager, Bland Dickey, Tom Anderson, Edge Moor's environmental manager, and Dave Aument, Edge Moor's research and development manager.

Several DuPont employees spoke in favor of the application, including Mack Shilling, the president of PACE Local 2-786 that represents workers at the Edge Moor plant. New Castle County Councilman John Cartier of the 9th District, in which the Edge Moor plant is located, was present and spoke in favor of using natural gas all the time as opposed to the proposed ten days. State Representative Diana McWilliams spoke in favor of the application, and also suggested that the Department require DuPont to use natural gas all the time as opposed to only ten days. She also asked questions about the newer DuPont sister plant in New Johnsonville, Tennessee, and was told that it produces a small amount of the IP1, but that Edge Moor would be the primary plant for this product.

Mary Ann McGonegal spoke and supported the increased use of natural gas. She also spoke about the plant's history of problems, and questioned the use of higher grade of ore at

² This was provided after the public hearing

other plants. She commented on the error in the application on the fish entrainment. James Bryant spoke about the need for DNREC to protect against cancer.

Glen Evers spoke at length about the need to protect the environment from dioxins, which he claimed are present in the ferric chloride byproduct from the TiO₂ process. He said that dioxin does not disappear, and that it accumulates in fat tissue. He recommended that all the ferric chloride byproducts should be neutralized, sent to a landfill, and not sold for commercial purposes. He described himself as a 'conscientious objector' who left the DuPont Edge Moor plant over this issue. He questioned various portions of the application whether they were accurate and complete. Specifically, he raised an issue whether the application accurately reflected all air emissions, and whether the process diagram and facility map documents in the application were correct. He provided his notes as exhibits.

Alan Muller of Green Delaware spoke about the need to remove dioxins, and he noted that the current waste from the TiO₂ production is currently sent to a solid waste landfill in South Carolina even though it contains dioxins that should be treated as hazardous waste. He questioned the amount of material delivered to the plant and its output, and referred to the 'legal loophole' that allowed the dioxin to be treated as solid waste as opposed to hazardous waste. He spoke about the level of uranium and thorium, which he said was not high enough to be regulated by the Nuclear Regulatory Commission ("NRC"). He said it should still be a concern even at a level that is one fifth of the NRC's regulatory threshold. He commented that allowing the new product would mean more dioxin waste would be produced. He mentioned DuPont's promise to cut dioxin production by 90% by 2007, but he said that no reduction had shown up on the federal Toxin Release Inventory Report. He provided Green Delaware Exhibits 1 through 3 for the record, which were Green Delaware materials on dioxins from the plant. Mr. Muller concluded

that the CZA should not be used to increase environmental harmful production simply because there are certain calculated offsets offered that he described as ‘selling permits for peanuts.’

John Kearney of Environmentalists for Truth spoke about the broad discretion of the Secretary to ban the sale of ferric chloride as a condition to a CZA permit. He commented on the application’s reference to no new hazardous waste being produced, which under questioning was clarified by DuPont to mean no new type of hazardous waste. Instead, DuPont acknowledged that the plant would continue to produce hazardous waste from TiO₂ production and that this waste is sent to a permitted disposal facility. Mr. Kearney questioned how much production would occur and DuPont estimated, based on its current projections, between 10,000 and 15,000 tons annually. He commented that dioxins were more cancer causing than plutonium. He followed up on Mr. Evers questioning about the possible lack of certain air emissions being reported in the application. He also questioned the offset ratio, and Dr. Otto informed him that it was based on what the calculation of offsets used by the United States Environmental Protection Agency. Mr. Kearney questioned the Department why the CZA regulations do not have environmental indicators, and he was informed that they had not been developed.

III. DISCUSSION AND STATEMENT OF REASONS

One of the purposes of the CZA is to strictly regulate industrial development activity within the CZ and, as part of the regulation, requires the Department to consider several factors in determining whether an existing activity should be permitted to expand. One purpose of the CZA is “to strike the correct balance” between the two policies of 1) protecting the CZ from heavy industry and preserving it for recreation and tourism, while 2) encouraging the introduction of new industry in Delaware. In striking the correct balance, the Department has determined that the CZA application process requires an applicant to prove that a project satisfies all the CZA’s factors, and that any environmental harm caused by a proposed industrial project

within the CZ is demonstrably offset by proposed environmental benefits. The record indicates more than ample support for issuance of a CZA permit.

DuPont's Edge Moor plant was built in the 1930's and is an existing, non-conforming use within the defined Coastal Zone before the CZA's June 28, 1971, date that banned any future heavy industry within the CZ. The CZA allows non-conforming uses of existing industrial facilities to expand only by a permit, and requires the Secretary to consider the factors, as set forth in Section 7004 (b) of the CZA, before issuing a permit. The factors are summarized as the proposed project's 1) environmental impact, 2) economic impact, 3) aesthetic effect, 4) the number and type of supporting facilities required and their impact on the CZA's other considerations, 5) the effect on neighboring land uses, and 6) the consistency with local comprehensive plans.

The Department administers the CZA, and the Secretary is required within ninety days of a completed application to issue a decision granting the request for a permit, denying it, or granting it with modifications. 7 Del C. §7005 (a). The CZA regulations set forth a permitting process in Section 8.0, and include in CZA Regulation 8.2 the applicant's preparation of an environmental impact statement. This requirement includes the identification of the raw materials, intermediate products, by products and final products and their characteristics from material safety data sheets ("MSDS") if available, including carcinogenicity, mutagenicity and/or the potential to contribute to the formation of smog. CZA Regulation 9.0 requires an applicant to propose an offset for any activity or facility that will result in any negative environmental impact. The offset proposal must more than offset the negative environmental impacts associated with the proposed project or activity requiring the permit. The regulation allows the Department to recognize an applicant's past voluntary efforts in calculating the amount of an offset. The regulation further directs that a preference be given to offsets within the CZ. Preferences also are

to be given to: 1) offsets in the same environmental medium; i.e., air pollution offset by air improvement, 2) offsets that occur at the same site, and 3) offsets that occur simultaneously with the implementation of the proposed project.

The Department's CZA application requires an applicant to provide all relevant and necessary information on the statutory considerations, and the DuPont application is DNREC Ex. 1, as supplemented by DNREC Ex. 6 and DNREC Ex. 7. Part 2 of the application provides information on the consistency with local planning. Part 5a provides the environmental impacts, and Part 5b provides the proposed offset reduction claims. Part 6 described the economic effects, Part 7 describes the supporting facilities, Part 8 describes the aesthetic effects, and Part 9 addresses the effects on neighboring land uses. The application in Part 5a's environmental impacts requires descriptions of the proposed project's impacts on the following: 1) air quality, 2) water quality, 3) water quantity, 4) solid waste, 5) hazardous waste, 6) habitat protection and 7) other environmental effects that include heat, glare, noise, vibration, radiation, electromagnetic interference and odor. The application in Attachment E provided all the MSDS for all of the new products materials, by-products and intermediate products as required by regulation. These include: citric acid, VGP27960 that includes the isopropyl alcohol VOC, and DEHYDRAN 1620 (an alcohol and polysiloxane adduct mixture used as a defoamer), "Ti-Coke," liquefied gas chlorine, titanium tetrachloride (a byproduct of TiO₂ production), phosphorus chloride, and ilmenite sand from Florida beaches.

In the present case, DuPont proposed production of IP1 will produce VOC air emissions estimated to be one pound per day. For purposes of calculating an environmental offset to this proposed harm, DuPont used a conservative assumption that the releases would occur 365 days based upon maximum annual IP1 production possible. The proposed release will occur from the open air transfer of the new product into tank cars or for weighing the product. The VOC is

caused by the evaporation of isopropyl alcohol, which is added to TiO₂ as a surfactant so that the IP1 product is suitable for the interior paint industry.

DuPont proposes to offset the VOC air pollutant by reducing VOC emissions by 1.25 tons per year. The offset consideration is not specified by the CZA, but is required by the CZA regulations and is consistent with the CZA's environmental impact consideration whereby the environment, preferably the CZ's environment, will be improved as an offset for any increased industrial production. DuPont's proposed offset would occur from switching from No. 6 fuel oil to natural gas as the fuel burned in its ore roaster for ten days a year. The Department accepted this proposed offset because the 1.25 tons of VOC reduction is well in excess of the 365 pounds of VOC maximum annual air release from the proposed project. The proposed offset is consistent with the regulatory preferences as it is in the same medium, is at the same site, and may occur at the same time as the proposed release of the pollutant.

During the public hearing, some questions were raised as to the accuracy of the information in the application. Specifically, the questions were on whether the application completely disclosed all of the new product's materials, byproducts and intermediate products, whether all the air emissions were identified, and whether the application was clear on the production of waste. DuPont provided additional information in an April 22, 2005 letter. My review of the application and supplemental information, as assisted by experts within the Department, finds that DuPont disclosed the new product's materials and emissions. The problem with the application may be attributable to the fact that the new process essentially is a minor modification to the TiO₂, which means that TiO₂ must first be produced and then modified to make its IP1 variant. DuPont supplemented its MSDS, and the Department reviewed this submission and did not find that their submission changed the environmental benefits from the proposed project in any material manner. The fact that the submissions were not included in

the original application is troubling as the Department relies on information from an applicant for its CZA application review, which must be undertaken in a very short period of time. The Department's technical personnel also investigated these claimed errors and omissions, but concluded that the application was sufficient and that the allegations did not change in a material manner, particularly where the proposed offset benefit was so much more than the proposed harm.

DuPont's submission of the supplemental information does raise an issue whether the application was complete when the public notice of the public hearing was published. The determination of "an administratively complete application" is required before public notice may occur pursuant to CZA Regulation 8.3.5. The CZA regulations also prevent changes to an application once it is determined to be administratively complete. The purpose of the public hearing process allows the public to comment on an application that is sufficiently complete to allow public comment, including alleging errors and omissions in the application. The public hearing does not end the Department's review, because the Department then may investigate the allegations and otherwise considers the public comments as part of its overall CZA review of the merit of the proposed project. Ultimately, the Secretary determines if a permit application is adequately supported, and whether the permit should be issued as requested, rejected, or issued with modifications. Based on my review and the expert advice of the Department's technical personnel, I find that the claimed errors and omissions raised during the public hearing are minor at best. They do not warrant rejecting the application as incomplete, which would require DuPont to file a new application in order to produce the new product, which may jeopardize the proposed project. The Department investigated the claims and concluded that any problems identified were not material and where the proposed project's offset environmental benefit is so evident.

The public comments included support for and opposition to the proposed project. The comments in favor were from workers associated with the plant, who wanted the permit to be issued primarily for economic reasons. It is evident that the plant faces severe competition and that the market for the plant's primary paper industry products is declining. Thus, the record is uncontested that a permit would allow the plant to produce a new product in a new market, and that this will allow the plant to better sustain its operations that without question have significant economic benefit to the local and state economies as a result of the plant's payroll, purchasing, and tax payments.

The public hearing also contained criticism of DuPont's sale of ferric chloride to the water and wastewater treatment industries. Ferric chloride is a byproduct of the TiO₂ production and is not included in the specific production process of IP1. I find that these concerns are not directly relevant to the pending application. Instead, they are relevant to the plant's ongoing operations in its TiO₂ production, which will continue whether this application is approved or rejected. I agree that more byproduct ferric chloride may be produced if the permit is issued, but that will be based upon the currently permitted production of TiO₂. The TiO₂ production currently is well below its permitted capacity level, and DuPont can lawfully produce TiO₂ up to its permitted limit. I also conclude that prohibiting the sale of ferric chloride as a condition to a CZA permit is not within the power of the Secretary to exercise in this permit proceeding.

The comments that oppose issuance of a CZA permit also seek to link the Iron-Rich site to the IP1 production. This link is even more remote than the attempt to link the CZA permit to the sale of ferric chloride. Iron Rich has not been produced at Edge Moor plant since the late 1990s, and there is absolutely no causal connection between IP1 production and the Iron Rich site. To the extent the comments focus on the waste from the plant's ongoing operations, which waste is being handled according to the law and regulations and will not change as a result of the

Department's action on the CZA permit application. The CZA is clear that the Department's regulatory review is limited in its scope to a specific proposed project's changes and does not allow the Department to open an investigation of the entire non-conforming uses' operations that have no connection to the proposed project except being located on the same tract of land and within an already permitted industrial process.

The comments in opposition focused on the continued existence of the plant as a source of waste products, including the former product "Iron-Rich." DuPont's "Iron-Rich" Staging Area site ("Iron-Rich site") is currently the subject of a Department's proposed closure plan under the Department's Voluntary Clean-up Program and pursuant to a court approved consent decree. The Iron-Rich site also was the subject of public hearings before this Hearing Officer on March 2, 3 and 9, 2005. In the interest of economy, I allowed public hearing participants in the CZA proceeding to propose designating those portions of the record developed in Iron Rich site proceeding to be included in the CZA public hearing record. The deadline for such proposed designation was April 22, 2005 and several new comments were received, but as new comments they were untimely and not considered. Mr. Muller moved to incorporate the entire record, and I reject this for, as discussed above, I find that the Iron-Rich record is not relevant to the CZA permit proceeding. Thus, the comments that seek to link the new product to the ongoing operations are not relevant, and certain participants' proposed incorporation of the record from the Iron-Rich site proceeding is denied.

The public hearing record did include requests to increase the plant's usage of natural gas in the ore roaster beyond the ten days. The record indicated that the Department's Air Quality Management permit process would require that the natural gas be used on ozone alert days. This is an excellent measure to provide an environmental benefit when it is needed the most. Unfortunately, the record does not have the economic impact of the cost of the fuel switch other

than “considerable.” The Edge Moor plant may lose its economic advantage to other DuPont facilities or other competitors if its costs are higher, and a condition requiring fulltime conversion to natural gas should not be made without all the economic information. DuPont provided the Department with an estimate of the cost difference, which supports the position that a change to permanent use may jeopardize the IP1 production. Any change to increase the fuel switching above the level offered by DuPont is not justified based upon this record.

Should DuPont voluntarily convert to fulltime use of natural gas, I recommend that the Department credit DuPont in any future CZA application for this site with the environmental benefit from such a conversion. The crediting is consistent with the regulation’s preference to an applicant’s past voluntary actions, but it is recommended that the preference be a quantified credit in the offset calculation. Thus, there will be a regulatory incentive for DuPont to benefit the environment immediately, as opposed to the marginal benefit necessary to receive a CZA permit under the CZA offset review’s calculations.

The offset environmental saving is consistent with the Department’s regulations and the CZA. While the CZA does not require any offsets, it does require the consideration of the factors. The application sets forth the factors, and the Department’s preliminary review found them to be satisfactory. My review of the application and the public hearing record finds that all the factors support issuance of the requested permit. The public hearing record did not raise any issue recognizable under the CZA to change the preliminary Department review that the application was complete and the Secretary’s assessment that the environmental offsets were sufficiently more than any environmental harm.

IV. RECOMMENDED FINDINGS AND CONCLUSIONS

Based on the record developed, I find and conclude that the record supports approval of the permit and I recommend the Secretary adopt following findings and conclusions:

1.) The Department provided adequate public notice of the hearing in a manner required by the law and regulations.

2.) The application is for a proposed project is located within the Coastal Zone, as defined by statute, and is at an existing industrial use built before the June 28, 1971 CZA date that bans any new heavy industry within the CZ.

3.) The Department has considered the environmental impact of the proposed project and finds that the proposed release of no more than 365 pounds of VOC annually. The Department concludes that any harm from this proposed pollutant is more than offset by the proposed reduction of at least 1.25 tons annually of VOC. The proposed offset is through switching, on a temporary basis of at least ten days, from burning No. 6 fuel oil to natural gas in the plant's ore roaster. Moreover, the use of natural gas will occur during anticipated ozone alert days to the maximum extent possible, which will assist in reducing smog forming VOC during these time periods. Should DuPont decide to voluntarily burn natural gas on an ongoing, annual level above the ten days, then the quantified annual VOC reduction from this voluntary action may be considered in reviewing an offset review calculation as part of a future DuPont CZA permit application for the Edge Moor facility.

4.) The Department has considered the economic impact and finds that the proposed project will: a) provide a positive benefit to the local and state economy; b) allow the existing facility to remain productive into the foreseeable future; c) allow the facility to add a new product and sustaining employment for the approximate 325 employees; d) continue the purchase of goods and services in that benefit the local, state and national economies, and e) benefit the state and local government and their taxpayers from tax payments and payroll taxes.

5.) The Department has considered the aesthetic effect of the proposed project, which is to use a small part of an existing facility, and concludes that there is no harmful aesthetic impact.

6) The Department has considered the proposed project's supporting facilities, which consist of small tanks and handling equipment, and finds and concludes that these do not support denial of CZA permit.

7) The Department has considered the proposed project's impact on neighboring land uses, and finds and concludes that the proposed project is located with a zone industrial area, with the nearest residence a half mile away, and that the neighboring uses do not support denial of a CZA permit.

8) The Department has considered the proposed project's consistency with local comprehensive plans and finds and concludes that the proposed project is consistent with the local zoning and will assist in improving the air quality.

9) The Department's issuance of a CZA permit, as proposed by the Applicant and subject to the Department's conditions, is appropriate under the law and applicable regulations because the permit is supported by adequate offsets, as calculated by the Applicant and confirmed independently by the Department's Offset Review Committee.

s/ Robert P. Haynes

Robert P. Haynes, Esquire
Hearing Officer