

PETITION OF DELAWARE CHAPTER OF THE SIERRA CLUB FOR REVIEW OF ACTION BY DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL, DIVISION OF AIR QUALITY

The Delaware Chapter of the Sierra Club (“Sierra Club”), on behalf of itself and its members, and Amy W. Roe, a member of Sierra Club, hereby petition for review of the action of the Department of Natural Resources and Environmental Control, Division of Air Quality (“DNREC”) in holding a public hearing in a facility that it had reason to know was insufficient in size to handle the number of citizens likely to attend. In support of this petition, petitioners respectfully represents as follows:

DNREC scheduled a public hearing on an application of Delaware City Refining Company to renew a 7 DE Admin. Code 1130 permit to be held beginning at 6 p.m. on June 4, 2013 at the Delaware City Community Center Auditorium (“Auditorium”), 250 5th Street, Delaware City. The capacity of that facility is approximately 175 persons.

Prior to the hearing, DNREC had reason to know that the facility was too small to hold most of the citizens who wanted to attend. Prior to the hearing, the Delaware City Manager, Richard Cathcart, had stated publicly that 2000 people were expected to attend the hearing. Sierra Club had, through counsel, asked representatives of the Department of Justice to advise DNREC that the hearing needed to be rescheduled to a larger facility because 2000 citizens were expected. On information and belief, the Department of Justice discussed that fact with representatives of DNREC, and DNREC declined to reschedule or move the hearing to a larger facility.

DNREC dealt with the expected overflow crowd by erecting loudspeakers outside the Auditorium. More than 10 years ago the Attorney General opined that, as a general rule, speaker systems placed outside the room where a public meeting is held do not satisfy the open meeting

requirements of the Freedom of Information Act, 29 *Del. C.* § 10004(a), if an overflow of citizens can reasonably be anticipated. *See* April 2, 2002 Opinion *Re: Freedom of Information Act/Middletown*, 02-IB09.

On information and belief, prior to the hearing DNREC knew of the prevailing law expressed in the Attorney General's Opinion. Nevertheless, it refused to move the hearing to a larger facility. During the hearing itself, petitioner Amy Row read from the Attorney General's Opinion and again asked DNREC to relocate the hearing. The hearing officer stated that the hearing would not be moved.

Wherefore, petitioners respectfully request that Department of Justice find that DNREC violated the requirement of 29 *Del. C.* § 10004(a) that "[e]very meeting of all public bodies shall be open to the public except those closed" for a permissible executive session, and that DNREC is required to hold an additional public hearing on the Delaware City Refining Company application, this time in a facility large enough to hold all members of the public who are reasonably likely to attend.

s/Richard H. Morse

Richard H. Morse, Esquire (I.D. #531)
American Civil Liberties Union Foundation of Delaware
100 West 10th Street, Suite 603
Wilmington, Delaware 19801
Telephone: (302) 654-5326 ext. 103
rmorse@aclu-de.org
Attorney for Petitioners

Dated: June 24, 2013