

**BEFORE THE COASTAL ZONE INDUSTRIAL CONTROL BOARD
FOR THE STATE OF DELAWARE**

DELAWARE AUDUBON and)
LEAGUE OF WOMEN)
VOTERS OF DELAWARE,)
))
Appellants,)
))
v.)
))
DELAWARE DEPARTMENT OF)
NATURAL RESOURCES AND)
ENVIRONMENTAL CONTROL,)
))
Appellee,)
))
and)
))
DELAWARE CITY REFINING)
COMPANY, LLC,)
))
Intervenor /)
Appellee.)

Appeal No. CZ-2017-01

**Appeal from Secretary's Order
No. 2016-CZ-0050 (Permit No. 427)**

DECISION AND FINAL ORDER

Pursuant to due and proper notice of time and place of hearing¹ provided to all parties in interest, and to the public, a public hearing was conducted by the Coastal Zone Industrial Control Board (the "Board") on February 27, 2017, at the Kent County Administrative Complex, Kent County Levy Court Chambers, 555 S. Bay Road, Dover, Delaware 19901 concerning an appeal that challenged the issuance of Secretary's Order No. 2016-CZ-0050 (the "Secretary's Order" or "Order") by the Delaware Department of Natural Resources and Environmental Control

¹ Public notice published and posted in accordance with 7 *Del. C.* § 7007(d), 29 *Del. C.* § 10122 and 7 *Del. Admin. C.* § 101-16.2.2.

(“DNREC”). The Order authorized the issuance of a permit (the “Permit”) to the Delaware City Refining Corporation, LLC (“DCRC”) under the Coastal Zone Act, 7 *Del. C.* § 7001 et seq. (“CZA”). The Permit authorizes DCRC to utilize existing tank and existing marine loading equipment at DCRC’s existing facilities at 4550 Wrangle Hill Road, Delaware City, to enable denatured ethanol to be loaded from storage tanks to marine vessels and shipped to offsite facilities.

The appeal, docketed as Appeal No. CZ-2017-01 (the “Appeal”), was filed by Delaware Audubon and the League of Women Voters of Delaware (collectively the “Appellants”). DNREC, DCRC and Appellants are collectively referred to herein as the “Parties.”

The Board consists of a total of nine members, all of whom are voting members.² Six of the nine Board members were present, which constituted a quorum.³ Board members in attendance were Chairperson Richard A. Legatski (the “Chair”), Albert W. Holmes, Jr., John S. Burton, Sr., Pamela Meitner, Esquire, Robert “Dick” Bewick, Jr. and Robert C. Wheatley. Board members Bernice Whaley, Pallatheri Subramanian and Richard Killingsworth were absent (but not disqualified).

Deputy Attorneys General Frank N. Broujos and Julie Donoghue represented the Board; Kenneth T. Kristl, Esquire represented Appellants; Max B. Walton, Esquire, Matthew F. Boyer,

² 7 *Del. C.* § 7006. Five members are regular members appointed by the Governor and confirmed by the Senate. These regular members are Messrs. Richard A. Legatski, Robert “Dick” Bewick, John S. Burton, Sr., Pallatheri Subramanian and Ms. Pamela Meitner, Esquire. The remaining four members, serving *ex-officio*, are Messrs. Richard Killingsworth (Chairman of the New Castle County Planning Board), Albert W. Holmes, Jr. (Chairman of the Kent County Regional Planning Commission), and Robert C. Wheatley (Chairman of the Sussex County Planning and Zoning Commission) and Ms. Bernice Whaley (Acting Director of the Delaware Economic Development Office).

³ *Id.* This statutory provision provides, in part, that “[a] majority of the total membership of the Board less those disqualifying themselves shall constitute a quorum.

Esquire and Lauren P. DeLuca, Esquire represented DNREC and the Secretary of DNREC; Bart E. Cassidy, Esquire, Katherine L. Vaccaro, Esquire, Stephen D. Daly, Esquire and Joseph C. Schoell, Esquire represented DCRC. Ms. Vaccaro and Mr. Cassidy were admitted *pro hac vice* in accordance with Delaware Supreme Court Rule 72 to appear and represent DCRC in this administrative proceeding.

This written decision and final order is issued by the Board pursuant to 7 *Del. C.* § 7007(b) and 29 *Del. C.* § 10128.

STATEMENT OF THE CASE AND PROCEEDINGS

By way of a brief procedural background, on or about August 18, 2016, DCRC, which owns and operates a petroleum refining facility in Delaware City, Delaware (the “Refinery”), submitted an application to DNREC that requested the Permit so that DCRC could conduct its “Ethanol Marketing Project.” DCRC described this project as involving the “utilization of existing tanks and existing marine loading equipment to enable denatured ethanol to be loaded from storage tanks to marine vessels and shipped to offsite facilities.”

Following a determination by DNREC that the application was administratively complete, Robert P. Haynes, Esquire, acting as Hearing Officer for DNREC, held a public hearing on October 26, 2016, for DCRC to present its proposal to the public and to solicit and consider public comments on DCRC’s application for the Permit.

Following DNREC’s public hearing, the Hearing Officer prepared and submitted a report dated December 27, 2016 to the Honorable David S. Small, Secretary of DNREC (the “Secretary”). The Hearing Officer’s report to the Secretary set forth the procedural history of the DCRC’s application, a summary of the record (including public comments) before the Hearing

Officer, findings of fact and, lastly, conclusions and reasons in support of the issuance of the Permit.

On December 27, 2016, the Secretary issued the Order that authorized the issuance of the Permit to DCRC. The Secretary concluded that the “record supports approval of [DCRC’s application] because it complies with the CZA and the CZA Regulations and supports the requested expansion or extension of use of a nonconforming use(s).”⁴ The Order also directed that the Permit be issued to DCRC, with the condition that “[e]thanol throughput shipped out from [DCRC’s] loading piers, Piers 2 and 3, shall not exceed 10,000 barrels per day on an annual average basis.”⁵

On January 17, 2017, Appellants filed the Appeal⁶ that alleged that the Secretary, in issuing the Order and the Permit, erred as a matter of law and fact on the following seven grounds:⁷

- Count 1. The Order and Permit violate 7 *Del. C.* § 7003 and Section 4.2 of the CZA Regulations because that portion of the docking facility used to receive the ethanol is outside the footprint of the Refinery’s nonconforming use as set forth in Appendix B to the CZA Regulations.
- Count 2. The Order and Permit violate 7 *Del. C.* § 7003 and Section 4.5 of the CZA Regulations because they allow a bulk product transfer facility that was not in operation on June 28, 1971.
- Count 3. The Order and Permit violate 7 *Del. C.* § 7003 and § 4.6 of the CZA Regulations because they allow the conversion and use of an

⁴ Order at 8.

⁵ *Id.*

⁶ DNREC received the Appeal at 5:26 p.m. on Friday, January 13, 2017. For docketing purposes, and by agreement of the parties, the appeal receipt date was deemed to be Tuesday, January 17, 2017, which was the following business day.

⁷ Each ground in the Appeal is referred to hereinafter as a “Count.” Prior to the February 27, 2017 public hearing, the Parties informed the Board that Count 1 had been resolved and therefore the Board no longer needed to consider this Count.

unregulated or exempted docking facility for the transfer of bulk products (i.e., ethanol).

- Count 4. The Secretary failed to consider all environmental impacts and effects on neighboring land uses – specifically, the environmental impacts and effects on neighboring land uses of shipping ethanol to the facility – as required by 7 *Del. C.* § 7004(a) and § 8.3.2 of the CZA Regulations.
- Count 5. The Secretary failed to consider any impacts of the proposed ethanol transfer activity on the Department’s environmental goals for the Coastal Zone and the environmental indicators used to assess long-term environmental quality within the zone as required by § 8.3.3 of the CZA Regulations, given that the Department has never articulated nor adopted such environmental indicators.
- Count 6. The Secretary erred as a matter of law and fact in that the Secretary failed to use a set of prioritized environmental indicators as a tool for assessing environmental impacts as required by § 5.3 and § 5.4 of the DNREC guidance found at “Appendix C to the Regulations Governing Delaware’s Coastal Zone,” given that the Department has never articulated nor adopted any such environmental indicators.
- Count 7. The Secretary erred as a matter of law and fact in that the Secretary failed to include well-defined and measurable commitments or accomplishments concerning the proposed offset proposal that are independently auditable by the Department and available to the public via the Freedom of Information Act, and failed to include inspection, reporting and notification obligations in the permit covering the offset proposal as required by § 5.8 of the DNREC guidance found at “Appendix C to the Regulations Governing Delaware’s Coastal Zone.”

On January 30, 2017, the Chair issued a Scheduling Order that established timeframes and deadlines for the submission of prehearing memoranda and other filings by the Parties. Pursuant to that Scheduling Order, the Parties made the following prehearing filings:

- On January 30, 2017, Appellants filed with the Board a prehearing legal memorandum that set forth their position with respect to the factual and legal issues presented by the Appeal.

- On February 7, 2017, DNREC and DCRC each filed with the Board a legal memorandum that set forth their respective positions on the factual and legal issues presented by the Appeal.
- On February 10, 2017, DNREC filed a “Motion to Dismiss Counts 1, 4, 5, 6 & 7 of the Appeal” as well as a proposed order. On the same day, DCRC filed a “Motion to Dismiss” the Appeal seeking dismissal of the same five Counts. DCRC also filed a legal brief and proposed order in support of its motion to dismiss.⁸
- On February 15, 2017, Appellants filed their response to the motions to dismiss.
- On February 23, 2017, the Parties jointly filed with the Board their “Joint Final Pre-Hearing Order,” setting forth, *inter alia*, stipulated facts, statements of legal issues presented, and exhibit and witness lists.

In addition, pursuant to the Scheduling Order, on February 2, 2017 DNREC provided the Board (as well as DCRC and Appellants) an indexed chronology of the complete record considered by the Secretary in issuing the Order (the “Chronology”). The Chronology consisted of the following items:⁹

- (A) Application for a Coastal Zone Permit dated 8/19/2016.
- (B) Secretary’s Environmental Assessment Report dated 9/28/2016.
- (C) Public Hearing Transcript dated 10/26/2016.
- (D) Public Hearing Exhibits.
- (D)(1) Application for Coastal Zone Act Permit (DNREC Exhibit 1).

⁸ Both motions to dismiss sought dismissal of the referenced Counts solely on the merits as matters of law.

⁹ The lettering / numbering of the Chronology items in this listing track the lettering / numbering of the items provided by DNREC to the Board, DCRC and Appellants.

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- (D)(2) Affidavit of Publication Announcing Receipt and Availability of the Coastal Zone Act Permit Application, published 8/28/ 2016 (DNREC Exhibit 2).
- (D)(3) Affidavit of Publication Announcing Receipt and Availability of the Coastal Zone Act Permit Application, published 8/31/2016 (DNREC Exhibit 3).
- (D)(4) Affidavit of Publication of the Revised Legal Notice Announcing the Receipt and Availability of the Coastal Zone Act Permit Application, published 9/4/2016 (DNREC Exhibit 4).
- (D)(5) Email to Thomas Godlewski, dated 9/5/2016, Requesting Additional Information (DNREC Exhibit 5).
- (D)(6) Email from Larry Boyd, to David Small, dated 9/21/2016, Providing Additional Information (DNREC Exhibit 6).
- (D)(7) Secretary's Assessment Report 9/28/ 2016 (DNREC Exhibit 7).
- (D)(8) Affidavit of Publication Announcing the Public Hearing and the Availability of the Coastal Zone Act Permit Application, published 10/2/2016 (DNREC Exhibit 8).
- (D)(9) Affidavit of Publication Announcing the Public Hearing and the Availability of the Coastal Zone Act Permit Application, published 10/5/2016 (DNREC Exhibit 9).
- (D)(10) Sign in Sheet (DNREC Exhibit 10).
- (D)(11) DCRC's 10/26/2016 Public Hearing Presentation.
- (D)(12) Sierra Club Letter dated 10/26/2016 (Sierra Club Exhibit 1).
- (D)(13) Delaware River Keeper Letters dated 10/26/2016 with Exhibits (Delaware River Keeper Exhibit 1).
- (D)(14) Delaware River Keeper E-Mails dated 10/26/2016 (Delaware River Keeper Exhibit 2).
- (D)(15) League of Women Voters Letter dated 10/26/2016 (League of Women Voters Exhibit 2).

- (D)(16) Delaware Audubon Letter dated 10/26/2016 (Delaware Audubon Exhibit 1 with Exhibits)
- (E) Delaware Audubon Letter dated 11/4/2016 (Delaware Audubon Exhibit 2 with Exhibits).
- (F) Sadot Email dated 11/4/2016 (Sadot Exhibit 1).
- (G) Email from Ravi Rangan to Kevin Coyle Dated 9/7/2016 and Forwarded to Robert Haynes on 11/15/2016.
- (H) DCRC's Letter and E-Mail in Response to Public Comments dated 11/7/2016.
- (I) Supplement to DCRC's Coastal Zone Permit Application dated 11/10/2016.
- (J) Withdrawal of DCRC's Coastal Zone Permit Application Supplement dated 11/22/2016.
- (K) Memorandum from Robert Haynes to Susan Love Requesting a Technical Response Memorandum Regarding Public Comments (sent on 12/1/2016).
- (L) CZA Program Technical Response Memorandum dated 12/27/2016.
- (M) Hearing Officer's Report dated 12/27/2016.
- (N) Secretary's Order dated 12/27/2016.
- (O) CZA Permit dated 12/27/2016.

PREHEARING MATTER BEFORE THE BOARD

Prior to the hearing, DNREC and DCRC made requests to the Board in the form of motions in limine to exclude and/or limit Appellants' introduction of certain evidence, testimony and

exhibits related to the merits of the Appeal.¹⁰ After consideration of DNREC's and DCRC's requests and Appellants' response, the Chair denied the requests in their entirety in order to allow Appellants to introduce this evidence, if otherwise admissible, at the hearing so that the Board could give it due weight and consideration. The Chair further ruled that DNREC and DCRC could raise objections at the time Appellants sought to introduce the evidence at the hearing and that, pursuant to 29 *Del. C.* § 10125(b), the Chair has the authority to "[e]xclude plainly irrelevant, immaterial, insubstantial, cumulative and privileged evidence" and "limit unduly repetitive proof, rebuttal and cross-examination."

MATTERS BEFORE THE BOARD

At its public hearing on February 27, 2017, prior to hearing argument on DCRC's and DNREC's motions to dismiss, and evidence and argument on the merits of the Appeal, the Board first addressed Appellants' standing.¹¹ Standing is a threshold jurisdictional issue that must be addressed and decided independently of the merits of the Appeal, and before the Board rules on

¹⁰ DCRC sought to exclude the introduction (1) of all testimony and evidence related to the Board's approval of the CZA Regulations, the alleged failure to develop indicators, and the purported purpose of environmental indicators; (2) any affidavits as inadmissible hearsay; and (3) any evidence and testimony concerning the Delaware City Environmental Coalition March 2012 Report. DNREC sought to exclude any testimony and exhibits by Appellants relating to the environmental impacts of transfer by barge/marine vessel as an issue not timely raised in the Appeal; and (2) any evidence related to the 1998 Memorandum of Understanding and the adoption of the CZA Regulations in 1999, as irrelevant to the Secretary's Order, the Permit and the Appeal.

¹¹ Neither DCRC's nor DNREC's motion to dismiss raised standing as a basis for dismissal of the Appeal; rather both motions sought dismissal of five of the seven Counts in the Appeal solely on the merits as matters of law. However, DCRC's prehearing memorandum raised standing as an issue by setting forth the applicable legal standard under Delaware law for associational standing, and by arguing that the Board had to dismiss the Appeal for lack of standing if Appellants failed to satisfactorily demonstrate each element of the standard.

the merits of the appeal.¹² A determination as to standing establishes who is a “person aggrieved” by the issuance of the Order and therefore has a right to bring an appeal before this Board pursuant to 7 *Del. C.* § 7007(b).¹³ Should the Board rule on any matter involving the merits of the Appeal prior to making a determination as to whether Appellants, individually or collectively, have standing, such ruling might constitute an impermissible advisory opinion that the Board is not statutorily authorized to give.¹⁴

Summary of Appellants’ Evidence on the Issue of Standing

Appellants’ presentation on the issue of standing consisted of Appellants calling three witnesses, Matthew DelPizzo, David Carter, and Mark B. Martell. In addition, Appellants introduced the affidavit of Matthew DelPizzo, the current President of Delaware Audubon and the affidavit of Jill Fuchs, the current President of the League of Women Voters of Delaware. Appellants did not call any additional witnesses or introduce any additional documentary evidence to establish standing.¹⁵

Summary of Affidavit of Jill Fuchs

Ms. Fuch’s affidavit was introduced and admitted into evidence without objection.¹⁶ As stated therein, Ms. Fuchs is the current President of the League of Women Voters of Delaware

¹² *Kearney v. Coastal Zone Indus. Control Bd.*, 2005 WL 3844219, at *5 (Del. Super. Mar. 18, 2005).

¹³ This section states, in part, “[a]ny person aggrieved by a final decision of the Secretary of the Department of Natural Resources and Environmental Control . . . may appeal same under this section.”

¹⁴ *Kearney*, 2005 WL 3844219, at *5.

¹⁵ Appellant’s counsel opted not bifurcate his standing presentation into separate parts for each of the two Appellants, presumably because Mr. Carter, according to his testimony, is a current member of both Appellants. Transcript (“Tr.”) at 5.

¹⁶ Appellants Ex. 2 (Affidavit of Jill Fuchs).

(“the “League”), which is a nonpartisan group of men and women that seeks to educate Delawareans on issues of importance to the State, and in the State’s best interest. The League has long supported the CZA and has long advocated for the preservation of the physical, chemical, and biological integrity of the ecosystem for the protection of the public health and environment. The League agreed to participate in the Appeal to further its mission and protect the environment and the CZA.

*Summary of Testimony of Matt DelPizzo on
Direct Examination by Appellants’ Counsel*

Mr. DelPizzo read his affidavit into the record.¹⁷ He then testified that he is the current president of Delaware Audubon, which has a current membership of approximately 1,800 members statewide, many of whom live in the Coastal Zone or [near] the rail lines that feed into the Delaware City Refinery. He stated that Delaware Audubon is concerned with protecting environmental assets throughout the state, particularly around the Delaware City Refinery and Pea Patch Island. He also testified that Delaware Audubon is concerned with the fish in the Delaware River, the River’s many tributaries, and air and water quality in the Coastal Zone. He further stated that Delaware Audubon stands on the legacy of the late Governor Peterson, who was responsible for the creation and passage of the CZA. Finally, Mr. DelPizzo stated that Delaware Audubon filed the Appeal as part of its core mission of protecting the Coastal Zone and its regulations.

Mr. DelPizzo also testified that he lives in Augustine Beach, Delaware and engages in recreational activity in the Coastal Zone. He frequents Delaware City and, specifically, restaurants

¹⁷ DCRC initially objected to the admission of Mr. DelPizzo’s affidavit because he was present at the hearing and available to testify and be cross-examined.

in Delaware City. He testified that he and his wife would only go there if the docks were clear. If he is at a Delaware City restaurant, Crabby Dick's in particular, and a barge is nearby that is offloading, he and his wife would not patronize that restaurant because of the fumes. He stated the fumes take away from his enjoyment of the leisure of eating out in Delaware City and enjoying the waterfront. For the same reasons (i.e. fumes), he would not release rehabilitated birds while a barge is offloading. Mr. DelPizzo testified that he would not visit Delaware City at all if the Permit were issued.

*Summary of Testimony of Matt DelPizzo
on Cross Examination by DCRC's Counsel*

On cross examination by DCRC's counsel, specifically with respect to paragraph four of Mr. DelPizzo's affidavit that addresses some of the interests identified at Delaware Audubon as related to the CZA, Mr. DelPizzo testified that those interests include the donation of a large part of legal settlements related to the Delaware City Refinery, then known as the Texaco Refinery. Other interests include bird counts on Pea Patch Island and the effects of gun firing on the birds and anything that Delaware Audubon can do to protect Pea Patch Island. Mr. DelPizzo also testified that those interests were reflective of his own personal interests.

Regarding the Notice of Appeal, Mr. DelPizzo testified that he could not identify the first time he had seen the document but he believed he had seen it before it was filed with the Board. Mr. DelPizzo was asked how he would be individually harmed and what injuries he is alleging as a result of Counts 2 through 7 of the Appeal. He responded that he could re-read his affidavit, and that the harms to Delaware Audubon are his own.

In response to barges impacting his Delaware City restaurant visits, Mr. DelPizzo testified that the restaurant that he visited has had to clear its deck when there were incidents at the barge and that he believes people were taken to the hospital from exposure to what happened; however, he wasn't present at the time when the exposure incident occurred, and would not be able to provide a date if asked. When asked if he expected barge traffic to increase as a result of the Permit, he responded, "we will see" but added that he believed there would of course be an uptake in barge traffic. Mr. DelPizzo stated that based on his knowledge of the history of the Refinery and its prior owners, more barge traffic is certainly likely; however, he acknowledged that he had no evidence that barge traffic will increase.

Following Mr. DelPizzo's testimony, his affidavit was admitted into evidence without objection.¹⁸

*Summary of Testimony of David Carter
on Direct Examination by Appellants' Counsel*

Mr. Carter testified that he lives on Union Church Road in Townsend, Delaware, and was born and raised in New Castle, Delaware. He stated he lives less than a half mile from Route 9, which is part of the Coastal Zone.

Mr. Carter testified that he has enjoyed the Coastal Zone for his entire life and had worked at DNREC for 26 years, including in the Delaware Coastal Program as a senior resource planner. Then during his last 20 years at DNREC, he worked as manager of Delaware coastal programs. In connection with his DNREC employment, he was involved in the Northern Delaware Wetlands

¹⁸ Appellants Ex. 1 (Affidavit of Matt DelPizzo)

Restoration Program that restored, over decades, almost 10,000 acres in and around Delaware City and the Refinery. He retired from DNREC in September 2012.

Mr. Carter testified that he recreates and uses the Coastal Zone. He is a member of both the Delaware Audubon and the League of Women Voters of Delaware. He has served as President and Conservation Chair for Delaware Audubon. He is an avid duck hunter who owns two boats and nine kayaks. He routinely kayaks in the Delaware River near the Refinery, with the closest boat ramp located in New Castle.

Mr. Carter stated he spent a decade overseeing the study of herons and has devoted his life to them. He does a lot of nature photography. In order to see the birds when they are fledglings, he needs to go out either in a boat or kayak, and he provides kayak trips for the Delaware Audubon and the Sierra Club. He stated that members of the League of Women Voters of Delaware have come on such kayak trips as well.

Mr. Carter stated he kayaks to and from Pea Patch Island and is concerned about wakes from the barges. He stated that engines disturb the birds that he is trying to photograph. He does not like having the Refinery in the background of photographs he has taken of the birds.

In connection with his DNREC employment, Mr. Carter was involved in studies involving herons on Pea Patch Island and the entire area due to concerns about what was happening at the Refinery. He developed a special area management plan and conducted toxin studies involving heron embryos and eggs. These activities heightened his appreciation of Pea Patch Island and the heronry there.

Mr. Carter enjoys kayaking to Pea Patch Island and photographing heron. He stopped Parks and Recreation from firing canons there due to the effects on the birds. He stated marine

vessels and barges effect his kayaking and his photography. Specifically, the Delaware River current and the large ships affect navigation. He is always concerned about a possible spill and an explosion. He recalled an explosion in 1978 that involved a jet fuel barge. He also recalled an incident where his boat broke down in the channel as a barge was coming out and he was scared. His enjoyment of Pea Patch Island and kayaking on the Delaware River is impacted by the uncertainty of the barge traffic, and the noise from the Refinery. It affects his photography as well. He is also concerned about getting flipped by a wake while in his kayak and losing his camera equipment, which is valued at \$6,000.

Mr. Carter also stated that the barge traffic affects where he might eat dinner with his wife and/or with those he takes on his kayak tours. They and members of his tour group may eat in St. George's instead of Delaware City because of diesel fumes. If there is an increase in the number of boats, he would eat fewer times in Delaware City due to his concerns.

Mr. Carter is also concerned about erosion and spills affecting Pea Patch Island, particularly the bird area. Such erosion and spills could be caused by ships coming in and out of the Refinery, including those carrying ethanol.

Mr. Carter stated that he is impacted almost every day by the rail traffic that comes to the Refinery. He stated he gets "hung" behind "that train all the time." He does not know whether they are oil trains or ethanol trains. He is fearful for his mother, who lives near the train tracks, because of the risk of explosion and because she is older. He is annoyed by the trains and views them as an underlying threat.

*Summary of Testimony of David Carter
on Cross Examination by DCRC's Counsel*

Mr. Carter was asked if he had submitted an affidavit in connection with the Refinery-related matter before the Board in 2013. Mr. Carter stated he recalled doing so; however, he had not looked at it in a while. He was asked about the matters he had just testified about and whether he had been engaged in those activities for any period of time. He responded maybe he should have added more activities in that affidavit, but that did not mean that they did not exist.

In response to a question about what his understanding of the scope of the Permit was, Mr. Carter responded that it involved bulk transfer of ethanol and that he has “experienced negative impacts and suffered impacts historically and if it continues.”

Mr. Carter stated he has concerns because he has had to learn how to deal with spills of oil and trying to boom part of the Pea Patch Island heronry. Ethanol is a “whole new ball game” and he was not sure how ethanol will respond over time in the marine system. In addition, he stated that ethanol is explosive and potentially could cause a much worse scenario in terms of accidents.

Mr. Carter stated one of the positive things about the trains was that they got the barges off the Delaware River. He also stated he wouldn't be surprised to hear that there are no barges on the river carrying ethanol, but he also stated the Refinery doesn't always tell the truth.

Mr. Carter stated that he did not have any specific evidence about any increase in rail traffic as a result of the Permit, but added that it's a marketing decision.

He stated that he had reviewed the Permit application and the Hearing Officer's report issued in this matter, but it had been a while since he had done so.

Mr. Carter stated that he did not have any specific evidence about any increase in barge traffic as a result of the Permit, but added that it didn't matter to him, that "if there is a barge there, that's a problem. It affects me."

Mr. Carter was asked about the relationship between the Permit action and the allegation in the Appeal regarding the environmental indicators. He stated he had previously communicated to DNREC regarding his concerns about the indicators. His objective was for DNREC to implement environmental indicators with the Coastal Zone Permitting Program.

*Summary of Testimony of Mark Martell
on Direct Examination by Appellants' Counsel*

Mr. Martell testified that he is a longstanding member of Delaware Audubon. He lives in Emerald Ridge, Bear, Delaware, "within the blast radius" of the Refinery. He stated he believes that Emerald Ridge is the closest development to the Refinery. He testified he lives close to the railroad tracks going in and out of the Refinery and his plot backs up towards where the trains run directly across Route 72 to the Refinery. He hears the trains at all hours, and he is impacted by them because he is a terrible sleeper. As a tax professional, most of the time he works out of his house.

Mr. Martell stated that he served on the Refinery's Community Advisory Panel until he was thrown off but the Refinery was very generous in that they put in a quiet zone within the Refinery's footprint. He stated quiet zones deal with the rail lines that feed into the refinery. He stated that the Refinery dealt with local traffic patterns and agreed not to run trains around 7:00 a.m. or so to accommodate school buses and school traffic.

Mr. Martell also stated that trains come in between 2:00 a.m. and 3:00 a.m. and cross several roads on route to the Refinery. There are two whistle blows, about five minutes apart. With the first whistle blows, the train is further away from his home, but when the second whistle blows, he knows the train is coming near his house. It is this second whistle blow that constantly keeps him awake. He heard these train whistles “last night.” He stated this affects the way he lives and he fears it will get worse.

Mr. Martell also stated the noise resulting from train activity at night causes him to keep his windows closed in the spring and in the fall, which affects his ability to minimize his energy bills.

He also testified about the diesel fumes, and his concerns about cancer clusters around Delaware. He stated that those fumes resulted in his and his wife’s decision to stop gardening because of the atmosphere around their house and what was coming down. He stated that the Refinery had conducted some air emission tests in Emerald Ridge a few years ago. He concluded by stating that there were clearly air emissions that are impacting the enjoyment of his home.

*Summary of Testimony of Mark Martell
on Cross Examination by DCRC’s Counsel*

On cross examination, Mr. Martell was asked if he had any specific basis or evidence that, as a result of the Permit, there would be any increase in rail activity as it related to his home. He responded he was not sure and that there are market factors involved. He also stated that there is trust factor, given the Refinery’s third-party distribution activities with respect to the transfer of oil that was not part of a Secretary’s order, and which was being litigated separately. He stated that what the Refinery tells its investors seems to be different from what it is telling the community.

Mr. Martell stated he had read the documents, including the Permit application, submitted and reviewed by DNREC as part of the Permit request and also stated he did not believe the claim that rail traffic would remain neutral. He believes the Hearing Officer's report discussed the net activity of the rail traffic at the Refinery. Mr. Martell testified he was not producing as part of his testimony any air emissions data from the testing conducting by DNREC within his development.

At the conclusion of Mr. Martell's testimony, Appellants' counsel concluded his presentation on the issue of standing.¹⁹

DCRC'S MOTION TO DISMISS APPEAL FOR LACK OF STANDING

At the conclusion of Appellants' presentation of witness testimony with respect to standing, DCRC's cross-examination of those witnesses, and counsels' arguments on the evidence, DCRC moved to dismiss all Counts in the Appeal on the basis that Appellants did not establish standing.²⁰

DCRC's Argument Against Standing

In support of its motion to dismiss for lack of standing, DCRC argued that Appellants have not met their burden to establish standing because all they showed were hypothetical concerns and issues that were unrelated to the Permit action that was before the Board. DCRC argued that Appellants had not shown harm that is both concrete and particularized, and actual or imminent. DCRC also argued that the alleged harm could not be conjectural or hypothetical, there must be a

¹⁹ Tr. at 97 (Mr. Kristl: "Nothing further. No redirect. And I think at that point, Mr. Chair, that's our presentation on standing in terms of the evidence in support."). Given the Chair's prehearing ruling on the motions in limine (communicated to the Parties prior to the hearing and set forth in the Joint Final Pre-Hearing Order), Appellants were not restricted by the Board or otherwise in presenting any further evidence with respect to standing, subject to the Chair's ruling on any objections.

²⁰ Tr. at 30, 108. DNREC did not join in DCRC's motion to dismiss the Appeal for lack of standing or otherwise raise the issue of Appellants' standing.

connection between the injury and the specific conduct that was being complained about, and the injury must be redressable by some action of the Board. DCRC further argued that there was no witness testimony showing, as a result of this Permit action, there will be an increase in rail or barge traffic, and no testimony that any harm would occur as a result of any increase.

Appellants' Argument in Favor of Standing

In opposition of DCRC's motion to dismiss (and in support of standing), Appellants argued that the testimony showed there were people already being affected by the existing barge traffic and trains that run to the Refinery currently. Because the Refinery is currently using 2,000 barrels per day for refining purposes and the Permit authorizes the Refinery to ship up to 10,000 barrels of ethanol per day, an increase in rail and barge traffic was self-evident. According to Appellants, it strained credulity that there would not be an increase in rail or barge traffic given the Refinery was going to bring into its facility five times more ethanol than was currently being used for refining purposes. The injuries alleged and suffered by the witnesses, according to Appellants, were that they did not dine out anymore; that it was harder for them to kayak on the Delaware River; and that they cannot sleep at night. Appellants contend that standing was established because what was happening at that time is already hurting them, and increased activity would hurt them even more.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In light of DCRC's motion to dismiss for lack of standing made at the conclusion of Appellants' presentation on standing, the sole issue for consideration by the Board at that stage of the proceeding was whether Appellants had standing.

Following the Board’s consideration of the parties’ presentations and arguments, and after deliberations, Board Member Meitner made a motion to deny DCRC’s motion to dismiss for lack of standing of Appellants. However, the remaining five Board members (Messrs. Legatski, Burton, Wheatley, Holmes and Bewick) voted to dismiss the Appeal on the basis that Appellants’ lacked standing to bring the Appeal. Therefore, by a majority vote of 5 to 1, the Board granted DCRC’s motion to dismiss the Appeal for lack of standing.²¹ The following is the Board’s rationale.

“The term ‘standing’ refers to the right of a party to invoke the jurisdiction of a court [or an administrative board] to enforce a claim or to redress a grievance.”²² “Standing is a threshold question that must be answered by a court [or administrative board] affirmatively to ensure that the litigation before the tribunal is a ‘case or controversy’ that is appropriate for the exercise of the court’s [or administrative board’s] judicial powers.”²³ “The issue of standing is concerned only with the question of *who* is entitled to mount a legal challenge and not with the merits of the subject matter of the controversy.”²⁴

Under the CZA, the General Assembly has directed that only an “aggrieved party” has standing to file an appeal of a decision of the Secretary to this Board.²⁵ As stated by the Delaware

²¹ Because the Board voted to dismiss the Appeal on standing, it need not (and cannot) address the merits of the Appeal. However, had the Board concluded that Appellants established standing, the Board would have next heard arguments on DCRC’s and DNREC’s motions to dismiss certain Counts of the Appeal, and thereafter proceeded to hear the merits of the Appeal on any remaining Counts.

²² *Dover Historical Soc’y v. City of Dover Planning Comm’n*, 838 A.2d 1103 (Del. 2003)(citing *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991)).

²³ *Id.*

²⁴ *Id.* (emphasis in original).

²⁵ 7 *Del. C.* § 7007(b).

Supreme Court, “[a]ny right [a party] has to appeal the decision of the Secretary of DNREC to grant [a] CZA Permit is derived from title 7, section 7007 of the Delaware Code. Section 7007(b) states that ‘[a]ny person aggrieved by a final decision of the Secretary of [DNREC] under § 7005(a) of this title may appeal same under this section.’”²⁶

Appellants, who seek to invoke the jurisdiction of this Board to hear their Appeal, have the burden of establishing their standing under § 7007(b).²⁷ In other words, Appellants have the burden of show that they (or one of them) are a “person aggrieved” by the Secretary’s Order.

Appellants are organizations (i.e., non-persons). The legal standard for organizational standing²⁸ is well-established under Delaware law. An organization must prove each of the following elements to establish standing: (1) the organization must have “members [who] would otherwise have standing to sue in their own right;” (2) the interests the organization seeks to protect “are germane to the organization’s purpose;” and (3) “neither the claim asserted nor the relief requested requires the participations of the organization’s individual members.”²⁹ Here, Appellants (or one of them) must establish each one of these three elements to have standing to file the Appeal and have it heard by this Board.

With respect to the first element (above) related to the individual standing of a member of an organization, the legal standard in Delaware is likewise well-established. To establish individual standing the Delaware Supreme Court has held that:

²⁶ *Nichols v. State Coastal Zone Indus. Control Bd.*, 74 A.3d 636, 642 (Del. 2013)

²⁷ *Dover Historical Soc’y*, 838 A.2d at 1109 (Del. 2003).

²⁸ “Organizational standing” is also known as “associational standing.”

²⁹ *Dover Historical Soc’y*, 838 A.2d at 1115 (quoting *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 343 (1977)).

First, the party must have suffered an injury in fact, which is the invasion of a legally protection interest within the zone of interest to be protected by the statute. The invasion must be 1) concrete and particularized, and b) actual or imminent, not conjectural or hypothetical. Second, there must be an actual connection between the injury and the conduct complained of; the injury has to be traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Finally, it must be likely that the injury will be redressed by a favorable decision, rather than merely speculative.³⁰

It is these foregoing legal requirements for standing to which the Board applied its findings of fact to reach its decision on the issue of whether Appellants had standing to challenge the Order.

The Board accepts as its findings of fact Appellants' testimony provided by its three members, the affidavits of Mr. DelPizzo and Ms. Fuchs, and the Chronology. No further testimony or other evidence was introduced by DCRC (or elicited by DCRC from the witnesses) to substantially contradict that testimony. Based on that testimony, and applying the legal requirements for standing, *infra*, the Board finds that Appellants have not met their burden of proof to establish standing.

The Board heard no evidence to conclude that any of the "injuries" of the testifying members of Appellants constituted an "injury in fact" for purposes of establishing individual standing in this matter.

³⁰ *Oceanport Industries v. Wilmington Stevedores, Inc.*, 636 A.2d 892 (Del. 1994). The Delaware Supreme Court in *Oceanport* used this standing requirement to construe the term "substantially affected" as it appears in 7 *Del. C.* §§ 6008(a) and 7210 to determine whether the complaining party had standing to appeal to the Environmental Appeals Board. In *Nichols v. State Coastal Indus. Control Bd.*, 74 A.3d 636 (Del. 2013), the Delaware Supreme Court applied this same standing requirement to construe the term "any person aggrieved" as it appears in 7 *Del. C.* § 7007(b) and to determine whether the complaining party had standing to appeal to this Board under the CZA.

All of the “injuries” complained of by the members related to the Refinery’s current operations and were not connected, or otherwise traceable, to activities authorized under the Permit, namely the transshipment of ethanol. Although Appellants argued that as a result of the Permit an increase in rail and/or barge traffic is “self-evident,” the Board heard no evidence that such traffic will increase due to activities authorized under the Permit. Likewise, the Board heard no evidence that air emissions will increase due to activities authorized under the Permit.

The contention that existing “injuries” to the members will occur more frequently or with more severity in the future as a result of activities authorized under the Permit is unsupported by the evidence. No evidence was presented that showed the members’ “injuries” would be any worse, or any different, or occur more frequently if the Permit were granted. Therefore, any connection or causation between the members’ existing “injuries” and Permit-related activity is merely conjectural and hypothetical.

The Board heard no testimony from the members that their “injuries” were concrete and particularized so as to distinguish them from the type of “injuries” that are suffered by the public at large. Further, no evidence was presented from the members that their “injuries” would be redressed (i.e. remedied) by a decision of this Board in favor of Appellants (i.e. if the Permit were to be denied). And any such “injuries,” which as described by the members are presently occurring and ongoing, would presumably continue even if the Board were to deny the Permit.³¹

³¹ Because the Board concludes that none of the three members of Appellants met the “individual standing” requirement for organizational standing, the Board finds it unnecessary to analyze the other two requirements. If the individual members of Appellants cannot meet the individual standing requirements on their own, the organization itself will consequently fail to meet the requirements of standing.

In conclusion, the Delaware Supreme Court has held that “the *Oceanport* standing requirements must be satisfied to establish that a person is “aggrieved” as that term is used in the CZA.”³² Because Appellants’ members have failed to meet the standing requirements for individual standing under *Oceanport* (i.e. one of the three required elements of organizational standing), Appellants have failed to establish that either of them is a “party aggrieved” under 7 *Del. C.* § 7007(b). Therefore, the Board finds that Appellants lack standing to challenge the issuance of the Secretary’s Order authorizing the Permit and accordingly, the Appeal is dismissed.³³

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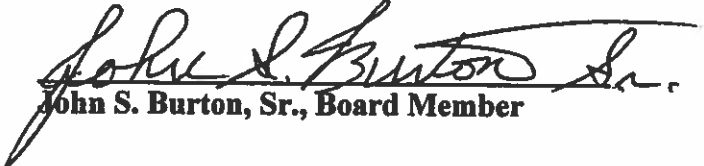
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³² *Nichols*, 74 A.3d at 644.

³³ Board Member Pamela Meitner, Esquire, voted to deny DCRC’s motion to dismiss and did not join with the majority in this decision dismissing the Appeal for lack of standing of Appellants. Ms. Meitner prepared a “Dissenting Opinion” that she has signed in her capacity as a Board member and that is attached to this decision.

IT IS SO ORDERED, this 16th day of March 2017.

Dated: MARCH 13, 2017 
Richard A. Legatski, Board Member and Chair

Dated: 3/13/17 
John S. Burton, Sr., Board Member

Dated: _____
Albert W. Holmes, Jr., Board Member

Dated: _____
Robert C. Wheatley, Board Member

Dated: _____
Robert D. Bewick, Board Member

IT IS SO ORDERED, this 16th day of March 2017.

Dated: _____
Richard A. Legatski, Board Member and Chair

Dated: _____
John S. Burton, Sr., Board Member

Dated: March 13, 2017 _____
Albert W. Holmes, Jr., Board Member

Dated: _____
Robert C. Wheatley, Board Member

Dated: _____
Robert D. Bewick, Board Member


Coastal Zone Industrial Control Board
Appeal No. CZ-2017-01

IT IS SO ORDERED, this 16th day of March 2017.

Dated: _____
Richard A. Legatski, Board Member and Chair

Dated: _____
John S. Burton, Sr., Board Member

Dated: _____
Albert W. Holmes, Jr., Board Member

Dated: 3/15/17 _____

Robert C. Wheatley, Board Member

Dated: _____
Robert D. Bewick, Board Member

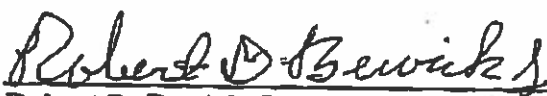
IT IS SO ORDERED, this 16th day of March 2017.

Dated: _____
Richard A. Legatski, Board Member and Chair

Dated: _____
John S. Burton, Sr., Board Member

Dated: _____
Albert W. Holmes, Jr., Board Member

Dated: _____
Robert C. Wheatley, Board Member

Dated: 03/15/17

Robert D. Bewick, Board Member

Before the Coast Zone Industrial Control Board on February 27, 2017

Dissenting Opinion:

The Delaware City Refining Company (the “Refinery”) moved to dismiss the appeal asserting that Delaware Audubon and League of Women Voters of Delaware (“Appellants”) lack standing. In its prehearing memorandum, Refinery laid out the requirements for standing, and there seems to be little dispute about the relevant case law.¹ The parties agree² that *Dover Historical Soc’y v. City of Dover Planning Comm’n*³ provides the applicable standard. In order for an organization to sue on behalf of its members, it must establish: (1) the organization has members who “would otherwise have standing to sue in their own right;” (2) the interests that the organization “seeks to protect are germane to the organization’s purpose;” and (3) the case does not require the “participation of individual members.”⁴

¹ See Prehearing Memorandum of Intervenor/Appellee Delaware City Refining Company, LLC, 36-38.

² *Delaware Audubon and League of Women Voters of Delaware v. Delaware Dep’t of Natural Res. and Env’tl. Control and Del. City Refinery Co, LLC*, Before the Coastal Zone Industrial Control Board, February 27, 2017, Transcript of Proceedings, at 13:1-13 (hereinafter “Hearing Transcript”); Prehearing Memorandum of Refinery, 37.

³ 838 A2d 1103, 1109-10 (Del. 2003).

⁴ *Id.* at 1115 (quoting *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 343 (1977)).

I will address the second and third prongs of the standard first as they required limited discussion. Then I will address the first prong, which requires more discussion.

Delaware Audubon seeks to protect interests related to its purpose. Matt Del Pizzo, President of Delaware Audubon, testified that the protection of the northern most heronry in North America on Pea Patch Island is an Important Bird Area of global significance which they have long worked to protect.⁵ He went on to testify that a core mission of Delaware Audubon is to protect the Coastal Zone Act and the CZA regulations as far as protecting these Important Bird Areas and environmental assets.⁶ Accordingly, protecting the heronry on Pea Patch and the surrounding waters and aquatic life are a long standing interest of Delaware Audubon.⁷ Therefore, the interests that Delaware Audubon seeks to protect are germane to its purpose.

Turning to the third prong of the analysis, the Delaware Supreme Court provided guidance in *Oceanport*. There, the Court explained, where the organization is not claiming monetary damages or seeking other relief in which its members would be actively affected by a positive disposition, participation of

⁵ Hearing Transcript, 22:1-13

⁶ See Del Pizzo Affidavit, ¶4; Hearing Transcript at 22:14-17, 26:2-6+15-19.

⁷ *Oceanport Ind., Inc. v. Wilmington Stevedores, Inc.*, 636 A.3d 892, 902 (Del. 1994) (noting this prong provides “a weak standard, barring only those whose litigation goals and organization’s purposes *are totally unrelated*” (emphasis in original) (internal citation omitted)).

individual members is not necessary.⁸ Here, the organization is challenging the issuance of a Coastal Zone permit to ensure the Secretary lawfully complied with applicable law. No money damages are alleged. Accordingly, member participation is unnecessary, and the organization has met the third prong of the analysis.

As mentioned, the first prong requires additional analysis. To determine, who has standing to sue, the Coastal Zone statute proves instructive. The statute provides “[a]ny person aggrieved by a final decision of the Secretary of the Department of Natural Resources and Environmental Control under § 7005(a) of this title may appeal same under this section.”⁹ The meaning of “aggrieved by” is not defined by statute. However, by enacting the standing provision the General Assembly adopted a standard for appeal requiring a heightened interest beyond just being a citizen of the State. Considering this statute and similar environmental statutes, the Delaware Supreme Court opined on the meaning of a party “substantially affected” in *Oceanport*. The Court looked to the test provided by the U.S. Supreme Court in *Data Processing Svc. Orgs. v. Camp*.¹⁰ In order to establish standing, the Court required two things: “1) a claim of injury in fact; and

⁸ *Id.* (“WSI challenged the issuance of permits, the ultimate objective of which is to ensure that the Secretary has lawfully complied with his duties.”).

⁹ §7007.

¹⁰ 397 U.S. 150, 153-43 (1970).

2) the interest sought to be protected is arguably within the zone of interest to be protected or regulated by the statute.”¹¹

The Delaware Supreme Court explained in *Oceanport* that future activities are subject to scrutiny. There, the opening of the Oceanport facility caused increased oil tanker traffic and Wilmington Stevedore (“WSI”) claimed that it would increase the likelihood of an oil spill.¹² WSI argued that such a spill would close the Delaware River to shipping traffic and thus cause economic damage to its interests.¹³ The Court held “such an injury, if it occurred, would have a direct impact on WSI, thereby satisfying” that the alleged injury must actually affect the plaintiff in a personal and individual manner. The court went on to state:

[t]he claim is not conjectural or hypothetical. Although contingent, it is based upon the chance occurrence of some event which WSI has demonstrated will be appreciably increased by the Opening of the Oceanport facility. It is not necessary for the event about which plaintiff complains to have actually occurred, only that it not be so conjectural as to be more creative imagination than fact.”¹⁴

The parties dispute whether there is a sufficient claim of an injury in fact. The Delaware Audubon Society offered the testimony of one of its members, David B. Carter, to establish its claim of an injury. Mr. Carter testified that he goes into the coastal area for purposes of photographing birds and taking tourists to Pea

¹¹ *Gannett Co., Inc. v. State*, 565 A.2d 895, 897 (Del. 1989) (citing *Data Processing*, 397 U.S. at 153-154).

¹² *Oceanport*, 636 A.3d at 905.

¹³ *Id.*

¹⁴ *Id.* at 905-06 (citations omitted).

Patch Island.¹⁵ He is often concerned that he will get flipped over in his kayak and lose \$6,000 or \$7,000 in camera equipment.¹⁶ Additionally, he had an experience where his motor boat broke down as a barge was coming out and it scared him.¹⁷ Appellants further argued that there are barges on the river that affect the members now and if barge traffic increases as a result of the permit, members will be adversely impacted. Moreover, prior to the issuance of the permit at issue, the Refinery used 2,000 barrels of ethanol a day to blend with gasoline. However, under the permit, they can ship up to 10,000 gallons per day on an annualized basis.¹⁸ Simple logic indicates that the increased capacity will increase the barges on the river.

The Refinery makes two counter arguments. First, the Refinery argued that the only evidence in the record relating to barge movement specifically supports the conclusion that there will be no increase.¹⁹ Second, the Refinery argues that since there has been no increase in traffic to date, Appellants cannot point to an injury in fact for an injury cannot be “conjectural or hypothetical.”²⁰ Both are unavailing.

¹⁵ Hearing Transcript, 50:4-24+51:1-2.

¹⁶ Hearing Transcript, 60:10-13.

¹⁷ Hearing Transcript, 58:24-59:3.

¹⁸ See Chronology for Appeal No. 2017-1 Appendix O CZA Permit Issued Dec. 27, 2016, Special Condition 1; Hearing Transcript, 103:12-21.

¹⁹ Hearing Transcript, 106:10-16.

²⁰ *Lujan v Defenders of Wildlife*, 504 U.S. 555, 583 (1992).

The Refinery's first argument lacks a basis in fact and defies logic. After carefully reviewing the record, I found no factual basis to support the assertion that there will not be an increase in traffic.²¹ This argument was made in the Refinery's closing argument to the Board.²² However it lacked a factual basis and no witness was offered to provide this testimony to the Board. Moreover, logic dictates otherwise, given the permit allows an annualized increase in shipments of 10,000 gallons a day on an annualized basis.

The parties also dispute the scope of the zone of interest of the statute. The Coastal Zone statute provides its purpose:

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.²³

The General Assembly also required in §7004(b)(1) of the Act that the Coastal Zone Industrial Control Board consider environmental impact, including water pollution likely to be generated during mechanical malfunction and human error.

Appellants again offered Mr. Carter to establish that this matter falls under the scope of interest of the Coastal Zone statute. Mr. Carter testified he is

²¹ The record could have been further developed had we heard testimony on the merits.

²² Hearing Transcript, 106:13-16.

²³ 7 *Del C.* §7001.

concerned about a possible spill or an explosion. In particular, he is concerned with the increased shipping of ethanol, which is highly flammable (much more flammable than gasoline).²⁴ This concern is supported by the Refinery's application for a Coastal Zone permit dated August 19, 2016. Attachment C to the Application, the Safety Data Sheets for Ethanol Section IV, sets forth "Special Fire Fighting Procedures: Unusual Fire and Explosion Hazards".

The increased risk of fire and explosion is real. The more barges filled with ethanol that come into the Coastal Zone Area, the higher the potential for a fire or explosion. Such an event could cause a profound effect on the environment, recreation, and tourism in the area and thus falls within the zone of interest of the statute.

The Refinery raised an additional concern presumably based on *Lujan* requiring that "the injury will be redressed by a favorable decision," rather than the remedy being speculative.²⁵ The Refinery argued that the Board has no way of addressing the injuries.²⁶ I disagree. The Board has the authority to deny or modify the permit.²⁷ A denial of the permit would eliminate the transshipment of ethanol, which would address Appellant's concerns and eliminate the increased risk of fire or explosion. There also is a dispute as to whether there will or will not

²⁴ Hearing Transcript, 57:18-23. I note an error on line 22 "decanol" should be "ethanol".

²⁵ *Lujan*, 504 U.S. at 561.

²⁶ Hearing Transcript, 100:19-23.

²⁷ 7 *Del. C.* §7007(a).

be an increase in barges leaving the Refinery. If as the Refinery suggests there will be no increase in shipments, modification of the permit to specify such restriction would remedy the concern and prevent future changes in the Refinery's position. Accordingly, there are at least two ways that the Board could address the claimed injury.

Finally, there is one more pronouncement of the Supreme Court in *Oceanport* germane to these proceedings. The Court explained that environmental regulations are designed to protect the public and protect "the environmental quality of our natural resources."²⁸ "This includes a role for the citizens for whose protection the statutes are designed."²⁹ In order to ensure these protections, the General Assembly established procedures for review of the Secretary's decisions. Appellants properly availed themselves of those procedures.

I respectfully dissent in the decision of the Coastal Zone Industrial Control Board to deny standing to Appellants. They are entitled to their day before the Board.

²⁸ *Oceanport*, 636 A 2d at 906.

²⁹ *Id.*

Coastal Zone Industrial Control Board

Appeal 2017-01

Date 3/15/17



Pamela Meitner

Pamela Meitner

Member