EFiled: Jul 08 2015 09:56AM EDT
Filing ID 57515481
Case Number 216,2015D

**IN THE SUPREME COURT**
**OF THE STATE OF DELAWARE**

| | | |
|---|---|---|
| SIERRA CLUB and DELAWARE AUDUBON,<br>Appellants Below,<br>Appellants | ) | |
| v. | ) | No. 216,2015 |
| DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL and DELAWARE CITY REFINERY COMPANY, LLC,<br>Appellees Below,<br>Appellees. | ) | Appeal from Superior Court's March 31, 2015 Ruling in N13A-09-001 and N14A-05-002 |

# CORRECTED
# APPELLANTS' OPENING BRIEF

Date: July 8, 2015

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

*Counsel for Appellants*

## TABLE OF CONTENTS

TABLE OF CITATIONS .... i

NATURE OF PROCEEDINGS .... 1

SUMMARY OF ARGUMENT .... 2

STATEMENT OF FACTS .... 4

ARGUMENT .... 11

I. THE SUPERIOR COURT ERRED AS A MATTER OF LAW WHEN IT FOUND THAT THE CZICB DID NOT HAVE JURISDICTION OVER THE APPEAL .... 11

A. The Superior Court's Perfunctory Legal Analysis Did Not Correctly Formulate Or Apply The Relevant Legal Precepts. .... 11

B. The CZICB Has Jurisdiction To Hear This Appeal .... 12

1. The Decision Under § 7005(a) Language Must Be Ambiguous In Order To Include Status Decisions .... 14

2. The Ambiguity Of The Decision Under § 7005(a) Language Should Be Resolved In Favor of Including All Determinations of CZA Status .... 19

3. To The Extent That *Oceanport* Provides Any Guidance On Jurisdiction, It Confirms Jurisdiction In The CZICB .... 22

II. THE SUPERIOR COURT ERRED AS A MATTER OF LAW WHEN IT FOUND THAT THE EAB DID NOT HAVE JURISDICTION OVER THE APPEAL .... 24

A. The Statute Creating EAB Jurisdiction Does Not Support An Issue-Based Limitation On EAB Jurisdiction .... 24

B. *Oceanport* Does Not Compel A Finding Of No EAB Jurisdiction; But If It Provides Guidance On EAB Jurisdiction, It Also Establishes CZICB Jurisdiction .... 30

1. *Oceanport* Is Not Controlling Precedent On The Issue Of EAB Jurisdiction .... 30

2. To The Extent That *Oceanport* Provides Any Guidance On Jurisdiction, It Confirms Jurisdiction In The CZICB .... 31

CONCLUSION .... 35

# TABLE OF CITATIONS

## Cases

*City of Wilmington v. Parcel of Land,* 607 A.2d 1163 (Del. 1992)………………17
*Coastal Barge Corp. v. Coastal Zone Industrial Control Board*, 492 A.2d 1242 (Del. 1985), .................................................................. 14, 16, 17, 18, 19, 22
*DNREC v. Vane Line Bunkering, Inc.*, 2007 WL 4170810 (Del. Super. Nov. 19, 2007). .....................................................................................16
*Giuricich v. Emtrol Corp.*, 449 A.2d 232 (Del., 1982) .........................................27
*Linn v. Delaware Child Support Enforcement*, 736 A.2d 954(Del. 1999)……………………………………………………………11, 24
*Oceanport Industries, Inc. v. Wilmington Stevedores, Inc*., 636 A.2d 892 (Del. 1994) ........................................................3, 8, 9, 15, 22, 23, 24, 30, 31, 32, 33
*Sanders v. Sanders*, 570 A.2d 1189 (Del. 1990) .............................................11, 24
*Shevock v. Orchard Homeowners Ass'n, Inc.*, 621 A.2d 346 (Del. 1993)........11, 24
*State v. Retowski*, 175 A. 325 (Del. Gen. Sess. 1934)..........................................15
*Wilmington Country Club v. Delaware Liquor Comm'n*, 91 A.2d 250 (Del. Super. 1952) ....................................................................................................15
*Wilmington Trust Co. v. Barry*, 338 A.2d 575 (Del. Super. Ct., 1975), *aff'd.* 359 A.2d 664 (Del. 1976) ....................................................................................26

## Statutes

7 Del. C. § 4213 ………………………………………………………….26
7 Del. C. § 6037(f) ……………………………………………………….26
7 Del. C. § 6008(a)...........................................................................2, 24, 26, 27
7 Del. C. § 6313(a).................................................................................26
7 Del. C. § 7001 ..................................................................................19, 22
7 Del. C. § 7002(f) .................................................................................17
7 Del. C. § 7003 ........................................................................ 15, 21, 22, 29
7 Del. C. § 7004 ………………………………………………………15, 18
7 Del. C. § 7005(a)...........................................2, 12, 13, 14, 15, 16, 17, 18, 32
7 Del. C. § 7006 ....................................................................................... 7
7 Del. C. § 7007(a).............................................................................31, 32
7 Del. C. § 7007(b) ............................................................ 2, 12, 13, 14, 18, 19
7 Del. C. § 7210……………………………………………………………..26
7 Del. C. § 7411A ...................................................................................26
7 Del. C. § 7412(a)..................................................................................26
7 Del. C. §7416A(c).................................................................................26
7 Del. C. § 7419(c)..................................................................................27
7 Del. C. § 7716(a)..................................................................................27

7 Del. C. § 7904(4) ....................................................................................................27
7 Del. C. § 9110(b)(1)..................................................................................................27
7 Del. C. 9117(c) .........................................................................................................27

**Regulations**

7 Del. Admin. C. 1102.. ...............................................................................................28
7 Del. Admin. C. 1102 § 11.6……………………………………………….....28, 29
7 Del. Admin. C. 101 § 4.2…………………………………………………….29
7 Del. Admin. C. 101 § 4.5…………………………………………………….28
7 Del. Admin. C. 101 § 4.6…………………………………………………….29
7 Del. Admin. C. 101 § 6.3…………………………………………………….29
7 Del. Admin. C. 101 § 7.7 ..........................................................................................20

## NATURE OF PROCEEDINGS

This is an appeal of the Superior Court's March 31, 2015 Order (3/31/15 Decision) that simultaneously decided two appeals brought by Appellants Sierra Club and Delaware Audubon raising challenges to an Order of the Secretary of the Department of Natural Resources and Environmental Control (DNREC) approving an air permit amendment sought by Delaware City Refinery Company, LLC (Refinery). The first appeal, No. N13A-09-001 ALR in the Superior Court, appealed the decision of the Coastal Zone Industrial Control Board (CZICB) dismissing Appellants' challenge to the Secretary's Order before that Board on the grounds that Appellants had no standing. The second appeal, No. N14A-05-002 ALR in the Superior Court, appealed the decision of the Environmental Appeals Board (EAB) dismissing Appellants' challenge to the Secretary's Order before that Board on the grounds that the EAB lacked jurisdiction over the appeal. The 3/31/15 Decision affirmed the EAB decision on the issue of jurisdiction and affirmed the CZICB decision on the alternate ground that the CZICB lacked jurisdiction.

On April 30, 2015, Appellants filed this appeal to challenge the 3/31/15 Decision.

## SUMMARY OF ARGUMENT

1. This appeal is about whether the CZICB and the EAB—administrative boards expressly created by the General Assembly—have jurisdiction to hear an appeal under the statutes for which they provide administrative review.

2. The CZICB, established to hear appeals of "final decisions of the Secretary" under § 7005(a) of the CZA, 7 Del. C. § 7007(b), has jurisdiction to consider the merits of the CZA issues in the appeal of the air permit issued to the Refinery. The "decision under § 7005(a)" language of the CZICB's statutory grant of jurisdiction is ambiguous because, read literally, it would exclude Requests for Status Decisions that are a staple of the regulatory regime and real-world practice under the CZA. This ambiguity is best resolved by an interpretation that includes final decisions on whether a CZA permit is required (exactly what this Secretary did in the Secretary's Order) regardless of whether that decision was within a formal Request for Status Decision or not. The Superior Court's perfunctory and unsupported conclusion that the CZICB did not have jurisdiction is therefore wrong as a matter of law. The 3/31/15 Decision should therefore be reversed on the issue of CZICB jurisdiction.

3. The EAB, established to hear appeals of "any action of the Secretary," 7 Del. C. § 6008(a), has jurisdiction to consider the merits of an appeal concerning

the air permit issued under Chapter 60 to the Refinery. Nothing in the statutory language nor in the holding of this Court's decision in *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc*., 636 A.2d 892 (Del. 1994), justifies the creation of an issue-based limitation on EAB jurisdiction that excludes consideration of issues arising under the Coastal Zone Act, 7 Del. C. § 7001 *et seq*. (CZA). To the extent that *Oceanport* says anything concerning jurisdiction of administrative boards, it supports a finding that the CZICB has jurisdiction to hear a determination of CZA status within the context of a Chapter 60 air permit. The EAB and the Superior Court therefore erred as a matter of law in finding no jurisdiction before the EAB. The 3/31/15 Decision should therefore be reversed on the issue of EAB jurisdiction.

## STATEMENT OF FACTS[1]

Appellee Delaware City Refining Company, LLC owns and operates a petroleum refinery located at 4550 Wrangle Hill Road, Delaware City (The Refinery). Pre-Hearing Order at ¶ 5, Stip. Fact A (A. 45).[2] The Refinery is subject to air permits under Chapter 60 of Title 7 of the Delaware Code, including one for air pollution control equipment known as the Marine Vapor Recovery System (MVRS) that the Refinery uses to capture escaping vapors released by the transfer of petroleum products from or onto marine barges. Stip. Fact D, I (A. 46).

On or about March 20, 2013, the Refinery submitted an application to DNREC requesting an amendment to its Air Pollution Control Permit No. 95/0471 covering the MVRS. Stip. Fact I (A. 46). The proposed amendment would allow for modification of the existing MVRS to accommodate the loading of crude oil onto marine barges at the Refinery's docks. Secretary's Order at 1 (A. 1). At least some of the crude oil would come from a large loop of rail track known as the "Double Loop Track" that can accommodate approximately 100 tank cars and is

---

[1] These Facts are drawn from a variety of sources that are set forth in the Appendix to this Brief. References to the Appendix pages shall be to "A. ___."

[2] Prior to and in connection with the proceedings before the CZICB, Appellants, the Refinery, and DNREC negotiated a Joint Final Pre-Hearing Order ("Pre-Hearing Order") to govern and streamline the hearing. The Pre-Hearing Order was signed by counsel for all parties and by CZICB Chair, Richard Legatski, on the morning of the hearing. The Pre-Hearing Order included an extensive set of Stipulated Facts in ¶ 5. References shall be to "Stip. Fact __." In connection with appeals below, the parties entered into a Stipulation concerning a version of the Pre-Hearing Order. The Appellants include that Stipulation in the Appendix, and request the Court take judicial notice of it for purposes of this Statement of Facts.

utilized for unloading crude oil from rail tankers. Stip. Fact K, S, O (A. 46 – 47). The Double Loop Track was constructed in 2012 and lies outside the footprint of the Refinery prior to its construction. Stip. Fact P, Q (A. 47). The crude oil unloaded from the rail tankers is transferred to a storage tank, and can be processed at the Refinery or moved by pipes to the docking facility, loaded aboard marine barges, and sent up the Delaware River to a sister refinery in Paulsboro, NJ. Stip. Fact S, T (A. 47). This is what Appellants call the "crude oil transfer operation."

DNREC held a public hearing on May 8, 2013 on the Refinery's application, Stip. Fact U (A. 47), during which the Sierra Club specifically raised the applicability of the CZA to the proposed permit amendment. Stip. Fact V (A. 47), Secretary's Order at 3 (A. 3). On May 29, 2013, the hearing officer issued a report to DNREC Secretary Collin P. O'Mara recommending the issuance of the permit amendment. Stip. Fact AA (A. 38). The Report itself is at A.8 – 27. The Secretary adopted the findings of this report. Secretary's Order at 2 (A. 2).

The Secretary's six page order includes over three pages dedicated to the Coastal Zone Act issues raised by the crude oil transfer operation of which the MVRS would play a part. The Secretary's Order contains several specific provisions relating directly to issues under the CZA, including:

- the proposed use to transfer crude oil to ships "is not a change of use under the CZA," Secretary's Order at 5 (A. 5);

- the Department "use[s] this [air] permit amendment to establish the limits of the Facility's shipment of crude from piers 2 & 3 for purposes of determining the [CZA] nonconforming use going forward" because "[t]his will allow the Department and others to measure any future changes or expansions of the use," Secretary's Order at 5 (A. 5);

- in Finding No. 1, sets a 7,000 barrel per hour/45,000 barrel per day limit on outgoing crude shipments to effectuate this limit for measuring CZA nonconforming use change/expansion, Secretary's Order at 5-6 (A. 5 – 6); and

- in Finding No. 2, specifically finds that the proposed activity is allowable and does not require a Coastal Zone permit because (a) it is an existing nonconforming use, (b) is not an expansion of the existing nonconforming use, and (c) is not an expansion of the nonconforming heavy industry use, Secretary Order at 6 (A. 6).

On June 14, 2013, Appellants simultaneously filed two appeals of the Secretary's Order: one to the CZICB (A. 28 – 30), and one to the EAB (A. 31 – 38). Appellants filed both appeals because of the jurisdictional issue at the heart of the CZICB appeal in an effort to ensure that at least one of these boards could hear and decide the merits of Appellants' contentions under the Coastal Zone Act. Both appeals challenge the Secretary's Order as violating the CZA because the crude oil transfer operation was either a bulk product transfer facility prohibited under the CZA or was an expansion of the Refinery's nonconforming use that required a CZA permit (which had not been obtained), and thus sought relief in the form of a prohibition of, or a permit for, the crude oil transfer operation.

*The CZICB Proceeding*

After intervening in the CZICB appeal, on July 5, 2013 the Refinery filed a motion to dismiss on four grounds: (1) Under the CZA the Board lacked jurisdiction over the appeal; (2) to the extent the Board had jurisdiction it was limited to the scope of the Order; (3) the contentions relating the rail operations were barred by federal preemption; and (4) the appellants lacked standing. Pre-Hearing Order at 1 (A. 42).

The CZICB conducted a public hearing in the underlying appeal on July 16, 2013, the transcript of which at A. 57 – 383 (TR.). The Board heard oral arguments from the parties on the Refinery's motion to dismiss. TR. 9 - 72 (A. 66 – 129). The Board Chair made a motion that the Board lacked subject matter jurisdiction over the appeal. TR. 103 (A.160). The motion failed as it received four votes in favor of dismissal and three votes against. *Id.*[3] The Chair then introduced a motion to dismiss the appeal for a lack of standing. Once again the motion failed, receiving four votes in favor and three against. TR. 104 (A. 161). The hearing was then conducted on the merits of the appeal.

After the completion of each party's respective case-in-chief, the Board conducted further oral arguments on the issue of the Appellants' standing. TR. 238

[3] Although not expressly stated at the time of the vote, the "failure" of the motion to carry is explained by the Chair's statement at the beginning of the hearing that, under 7 Del. C. § 7006, "a majority of the total Board—in other words, five votes—is required for the Board to reach a decision on any of the matters before [it] today." TR. 6 – 7 (A. 63 – 64).

– 253 (A. 295 – 310). The Board Chair then moved to accept the Refinery's motion to dismiss for a lack of standing, TR. 254 (A. 311), and all seven members voted in favor of the motion. TR. 255 (A. 312).

The CZICB issued its written Opinion and Final Order on August 12, 2013. (A. 384 – 406). The Board's Order only discussed the issue of standing. Appellants appealed this ruling to the Superior Court (No. N13A-09-001 ALR).

*The EAB Proceeding*

In Appellants' separate appeal to the EAB, both DNREC and the Refinery filed Motions to Dismiss arguing that the EAB lacked jurisdiction to hear the appeal because the EAB cannot consider issues arising under the CZA. After the parties briefed the motions, the EAB held a public hearing on January 13, 2014 to hear arguments on the motions. On that date, the EAB voted 6 – 0 to grant the motions. On April 8, 2014, the EAB issued its written Decision and Final Order (A.407 -435), finding that the Board did not have jurisdiction to hear Appellants' challenge to the issuance of the air permit amendment because of the language in 7 Del. C. § 6008 setting forth the EAB's jurisdiction, EAB Decision at 18 – 21 (A. 424 – 427), and this Court's opinion in *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892 (Del. 1994). EAB Decision at 21 – 23 (A. 427 – 429). Appellants appealed this ruling to the Superior Court (No. N14A-05-002 ALR).

*The Superior Court Proceeding*

During the briefing of the two separate appeals, the Superior Court determined that the issues in both appeals should be considered at the same time, and therefore heard oral arguments in both cases on February 12, 2015. On March 31, 2015, the Superior Court issued its written decision ("3/31/15 Decision") (A. 436 – 451), affirming the decision of the EAB that it lacked jurisdiction to hear the appeal and affirming the CZICB decision on the alternate ground that the CZICB had no jurisdiction to hear Appellants' appeal.

On the issue of EAB jurisdiction, the Superior Court found that the EAB "properly formulated and applied *Oceanport* as the appropriate legal precept" and that "*Oceanport* is on-point and controlling in this appeal" so that it is "clear than the EAB does not have authority to consider appeals that center upon CZA objections." 3/31/15 Decision at 11-12 (A. 447 – 448).

On the issue of CZICB jurisdiction, the Superior Court's analysis is very short. After noting that the Secretary expressly found that the proposed activity was allowable and did not require a CZA permit, 3/31/15 Decision at 13 (A. 449), and that the Secretary "issued an air permit, not a CZA permit or a Coastal Zone Status Decision," *id*., the Superior Court's CZICB jurisdictional analysis is set forth in two sentences:

> Subject matter jurisdiction of the Coastal Zone Board cannot be predicated upon the Secretary's conclusion that this proposed activity does not require a

> CZA permit or Coastal Zone Status Decision. The Coastal Zone Board properly relied upon statutory authority in finding that the Secretary's Order did not implicate a CZA decision within the jurisdiction of the Coastal Zone Board's review.

3/31/15 Decision at 14 (A. 450).

Finally, on the issue of standing (which was the subject of the CZICB's decision), the Superior Court held that, because it concluded that that the CZICB does not have subject matter jurisdiction, "any legal conclusions regarding the issue of standing need not be considered by the Court." 3/31/15 Decision at 14 – 15 (A. 450 – 451).

## ARGUMENT

### I. THE SUPERIOR COURT ERRED AS A MATTER OF LAW WHEN IT FOUND THAT THE CZICB DID NOT HAVE JURISDICTION OVER THE APPEAL

***Question Presented***: Did the Superior Court err as a matter of law when it found that the CZICB did not have subject matter jurisdiction over the Appellants' appeal? Suggested Answer: Yes. (N13A-09-001 Docket #36)

***Scope and Standard of Review***: On questions of subject matter jurisdiction, the standard or review is whether the court below "correctly formulated and applied legal precepts." *Shevock v. Orchard Homeowners Ass'n*, *Inc.*, 621 A.2d 346, 348 (Del. 1993); *Sanders v. Sanders*, 570 A.2d 1189, 1190 (Del. 1990). The scope of review is *de novo*. *Linn v. Delaware Child Support Enforcement*, 736 A.2d 954, 959 (Del. 1999); *Sanders*, 570 A.2d at 1190.

***Merits of the Argument***: On the issue of CZICB jurisdiction, the Superior Court erred as a matter of law in two fundamental ways. First, its perfunctory legal analysis of CZICB jurisdiction was not a correct formulation and application of legal precepts. Second, examination of the relevant legal concepts shows that the CZICB has subject matter jurisdiction over Appellants' appeal.

#### A. The Superior Court's Perfunctory Legal Analysis Did Not Correctly Formulate Or Apply The Relevant Legal Precepts.

Although the Superior Court acknowledged that its job under the relevant standard of review was to correctly formulate and apply legal precepts, 3/31/15

Decision at 8 (A. 444), its two-sentence legal analysis on the issue of CZICB jurisdiction, 3/31/15 Decision at 14 (A. 450), fails to meet that standard. It cites no legal authority or analysis to support its claim that "[s]ubject matter jurisdiction of the Coastal Zone Board cannot be predicated upon the Secretary's conclusion that this proposed activity does not require a CZA permit or Coastal Zone Status Decision," 3/31/15 Decision at 14 (A. 450). Further, the Superior Court's ruling that "[t]he Coastal Zone Board properly relied upon statutory authority in finding that the Secretary's Order did not implicate a CZA decision within the jurisdiction of the Coastal Zone Board's review," 3/31/15 Decision at 14, is wrong **because the CZICB never made any finding or ruling concerning subject matter jurisdiction**, having dismissed solely on the grounds of standing.[4] The Superior Court implicitly admits as much when it affirms the CZICB "on alternate grounds." Thus, the Superior Court's analysis fails to meet the standard and scope of review.

### B. The CZICB Has Jurisdiction To Hear This Appeal

Whether the CZICB has jurisdiction to hear Appellant's appeal turns on the meaning of two CZA provisions. The first, 7 Del. C. § 7007(b), specifies the requirements for an appeal to the CZICB. The second, 7 Del. C. § 7005(a), is at the heart of one of those requirements.

---

[4] If anything, the CZICB ruled it had jurisdiction by continuing to hear the appeal after the motion to dismiss on jurisdiction failed to garner the necessary five votes.

Section 7007(b) states:

> Any person aggrieved by a final decision of the Secretary of the Department of Natural Resources and Environmental Control under subsection (a) of § 7005 of this title may appeal same under this section. Appellants must file notice of appeal with the State Coastal Zone Industrial Control Board within 14 days following announcement by the Secretary of the Department of Natural Resources and Environmental Control of his or her decision. The State Coastal Zone Industrial Control Board must hold a hearing and render its decision in the form of a final order within 60 days following receipt of the appeal notification.

Thus, appeals to the CZICB must be about (1) a final decision of the Secretary (2) made under 7 Del. C. § 7005(a).

Section 7005(a) states the following:

> The Department of Natural Resources and Environmental Control shall administer this chapter. All requests for permits for manufacturing land uses and for the expansion or extension of nonconforming uses as herein defined in the coastal zone shall be directed to the Secretary of the Department of Natural Resources and Environmental Control. Such requests must be in writing and must include (1) evidence of approval by the appropriate county or municipal zoning authorities, (2) a detailed description of the proposed construction and operation of the use and (3) an environmental impact statement. The Secretary of the Department of Natural Resources and Environmental Control shall hold a public hearing and may request further information of the applicant. The Secretary of the Department of Natural Resources and Environmental Control shall first determine whether the proposed use is, according to this chapter and regulations issued pursuant thereto, (1) a heavy industry use under § 7003 of this title; (2) a use allowable only by permit under § 7004 of this title; or (3) a use requiring no action under this chapter. The Secretary of the Department of Natural Resources and Environmental Control shall then, if he or she determines that § 7004 of this title applies, reply to the request for a permit within 90 days of receipt of the said request for permit, either granting the request, denying same, or granting the request but requiring modifications; the Secretary shall state the reasons for his or her decision.

In the Superior Court, both the Refinery and DNREC argued that § 7007(b) is limited to decisions on formal CZA permit applications and formal Requests for Status Decision because only those two types decisions are "decisions under § 7005(a)" for purposes of § 7007(b). The Superior Court, without explanation, appeared to agree: "If the Secretary had considered an application for a CZA permit or issued a Coastal Zone Status Decision, there would be no question regarding the subject matter jurisdiction of the Coastal Zone Board." 3/31/15 Decision at 13 (A. 449). Applying recognized principles of statutory construction, however, this narrow view is wrong.

### 1. The Decision Under § 7005(a) Language Must Be Ambiguous In Order To Include Status Decisions

This Court has articulated the principles of statutory construction when interpreting the CZA. In *Coastal Barge Corp. v. Coastal Zone Industrial Control Board*, 492 A.2d 1242 (Del. 1985), the Court stated:

> To apply a statute the fundamental rule is to ascertain and give effect to the intent of the legislature . . . If the statute as a whole is unambiguous, there is no reasonable doubt as to the meaning of the words used and the Court's role is then limited to an application of the literal meaning of the words. . . However, it is undisputed that when a statute is ambiguous and its meaning may not be clearly ascertained, the Court must rely upon its methods of statutory interpretation and construction to arrive at what the legislature meant.

Id. at 1246. It is clear that, on its face, § 7005(a) does not refer to or otherwise cover status decisions. It refers to "requests for ***permits*** for manufacturing land

uses and for the expansion or extension of nonconforming uses," requires certain things in "such requests," allows the Secretary to request further information of "the applicant," and requires the Secretary to do certain things as part of the obligation to "reply to the request for a ***permit***." The CZA nowhere uses the term "status decision."[5] Nor can DNREC's regulations creating the Status Decision process amend or expand § 7005(a). *See State v. Retowski*, 175 A. 325, 326 (Del. Gen. Sess. 1934) ("[T]he power conferred to make regulations for carrying a statute into effect must be exercised within the power delegated, that is to say, must be confined to details for regulating the mode of proceeding to carry into effect the law as it has been enacted and it cannot be extended to amending or adding to the requirements of the statute itself"). *See also Wilmington Country Club v. Delaware Liquor Comm'n*, 91 A.2d 250, 255 (Del. Super. 1952). Read literally, decisions under § 7005(a) are only those on *permits* and thus do not and cannot include decisions on formal Requests for Status Decision.

However, despite the lack of any explicit statutory basis in § 7005(a), decisions determining the status of a particular project under the CZA are a fixture of the law. This Court recognized that status decisions are a mechanism for determining how projects are regulated by the CZA. *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 897 (Del. 1994). Courts have issued

[5] Indeed, in the other operant sections of the CZA—§§ 7003 and 7004—the only term used is "permit."

opinions in cases involving appeals of decisions by the Secretary on the status of an operation under the CZA. *See e.g., Coastal Barge Corp. v. CZICB*, 492 A.2d 1242 (Del. 1985); *DNREC v. Vane Line Bunkering, Inc.*, 2007 WL 4170810 (Del. Super. Nov. 19, 2007). No one—not the Appellants, nor the Refinery, nor DNREC, nor the Superior Court—questions the ability of such decisions determining status under the CZA to give the CZICB jurisdiction to hear an appeal about those decisions.

This, however, creates a problem: if § 7005(a) is literally limited to permit decisions, but everyone agrees and acts as if it includes decisions on status under the CZA, how can the Court square the words of the statute with how it is in fact practiced? While the Court could insist on a literal reading, and render the status decision tool much less useful,[6] Appellants respectfully suggest that the Court follow the example of *Coastal Barge* and find that § 7005(a) is ambiguous as to what decisions of the Secretary are subject to CZICB jurisdiction via § 7007.

In *Coastal Barge*, the question was whether the statutory definition of "bulk product transfer facility"—which explicitly defines it as involving "the transfer of

---

[6] The Court could hold that § 7005(a) only covers CZA permit decisions, and thus CZICB jurisdiction is limited to appeals of CZA permits. Under this interpretation, because there was no CZA permit issued to the Refinery in this case, the CZICB had no jurisdiction. But in so ruling, the Court must also find that the formal Request for Status Decision process is improper at least to the extent that no formal status decision can be appealed to the CZICB. That in turn will undercut any incentive for persons to invoke the Request for Status Decision process because they would have no avenue for review of an adverse decision. It is in this way that such a ruling would render a useful tool under the Act much less useful.

bulk quantities of any substance from vessel to onshore facility or vice versa," 7 Del. C. § 7002(f)—applied to transfers of coal from one ship to another (that is, without any involvement of an "onshore facility"). The *Coastal Barge* court found that the definition did apply to ship-to-ship transfers despite the literal meaning of the statute because the statutory provision was ambiguous in that "a literal interpretation would lead to such unreasonable or absurd consequences" in light of the statutory purpose. 492 A.2d at 1246. As *Coastal Barge* makes clear, "it is undisputed that when a statute is ambiguous and its meaning may not be clearly ascertained, the Court must rely upon its methods of statutory interpretation and construction to arrive at what the legislature meant." 492 A.2d at 1246. One such rule of construction—often referred to as the "golden rule of statutory construction," *id.*—is "that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result." *Id.*[7]

Here, a literal reading of § 7005(a) leads to the unreasonable and absurd consequence that decisions on the status of a project under the CZA not involving

---

[7] Another rule this Court has articulated for construing the CZA is found in *City of Wilmington v. Parcel of Land*, 607 A.2d 1163, 1166 (Del. 1992):

> The Coastal Zone Act is an environmental protection measure designed to regulate closely the types of uses permitted and carried on in the area adjacent to the Delaware River, the Delaware Bay and the Atlantic Ocean. The legislative purpose of the Act is set forth in 7 Del. C. § 7001 … Given this broad statement of purpose and sweeping use of legislative authority, we conclude that the Act should be liberally construed in order to fully achieve the legislative goal of environmental protection.

a CZA permit cannot be appealed to the CZICB despite the fact that everyone—from the Secretary to this Court—believes and acts as if it does. As the *Coastal Barge* court stated, "[a]mbiguity may also arise from the fact that giving a literal interpretation to words of the statute would lead to such unreasonable or absurd consequences as to compel a conviction that they could not have been intended by the legislature." 492 A.2d at 1246. The language in § 7005(a) requires—albeit in the context of a permit application—that the Secretary consider the status of the project under the Act.[8] That clearly evidences a legislative intent to include determinations of CZA status within the purview of § 7005(a). Under the logic of *Coastal Barge*, making the language of "decision under § 7005(a)" ambiguous would bring such determinations within the scope of § 7007(b) regardless of whether a permit was involved—and thereby make it possible for status decisions to be subject to CZICB jurisdiction. In liberally construing the "decision under § 7005(a)" language found in § 7007(b) in order to effectuate the CZA's purpose, the Court should find this language ambiguous.

[8] "The Secretary of the Department of Natural Resources and Environmental Control shall first determine whether the proposed use is, according to this chapter and regulations issued pursuant thereto, (1) a heavy industry use under § 7003 of this title; (2) a use allowable only by permit under § 7004 of this title; or (3) a use requiring no action under this chapter." 7 Del. C. § 7005(a).

### 2. The Ambiguity Of The Decision Under § 7005(a) Language Should Be Resolved In Favor of Including All Determinations of CZA Status

Given the ambiguity of the "decision under 7005(a)" language in § 7007(b), the ultimate question here is how to resolve that ambiguity: must determinations of the status under the CZA be "formal" (that is, under the Regulation's Request for Status Decision Process) to fall within the purview of § 7005(a), or can informal—that is, a determination made outside the Regulation's Process—fall within its ambit as well? Here, again, *Coastal Barge* is instructive. In that case, this Court concluded that it was absurd and unreasonable that ship-to-shore and shore-to-ship transfers of bulk product would be covered, while ship–to-ship transfers would not be covered, in light of the fact that the environmental risks of such transfers were the same and in light of the CZA's "strongly worded statutory purpose" expressed in 7 Del. C. § 7001 to prohibit bulk product transfer facilities. 492 A.2d at 1246 (quoting § 7001 with emphasis on its language that "prohibition against bulk product transfer facilities in the coastal zone is deemed imperative"). In this matter, the bulk transfers of crude oil onto barges are identical whether or not they are the subject of a formal request for Status Decision. It is absurd that the question of whether the Refinery's crude oil transfer operation is a bulk product transfer facility can fall within CZICB jurisdiction if a formal Request for Status Decision is made, but outside CZICB jurisdiction if no formal Request is made.

The absurdity of a formal/informal distinction is further underscored by consideration of the substance of the Secretary's action in this case. With a formal Request for Status Decision, the Secretary would be required to issue a written decision. 7 Del. Admin. C. 101 § 7.7 (A. 474). Of course, the Secretary's Order is a written decision. All the Regulations require the Secretary to do in the decision on a formal Request for Status Decisions is to "determine whether or not a [CZA] permit will be required." *Id*. That is ***exactly*** what the Secretary did in the Secretary's Order: Finding No. 2 specifically states that "the proposed activity is allowable and does not require a Coastal Zone permit" for reasons enumerated in three sub-paragraphs of that finding. **It is a status decision** in substance and function. To determine CZICB jurisdiction solely by whether substantively and functionally equivalent decisions on CZA status were formal or informal is the height of irrationality and absurdity.

Further, the Secretary's Order in fact sets some enforceable CZA conditions. In Finding No.1 it sets limits on the amount of crude oil that can be shipped by barge up the Delaware River (45,000 barrels per day on average). In discussing this limit, the Secretary states:

> the Department will use this permit amendment to establish limits of the Facility's shipment of crude from piers 2 & 3 for purposes of determining nonconforming use going forward. This will allow the Department and others to measure any future changes or expansions of the use.

Secretary's Order at 5. The CZA requires that expansions or extensions of nonconforming uses can only take place by CZA permit. 7 Del. C. § 7003. Thus, by setting a 45,000 bbl/day limit, the Secretary is in effect defining what an "expansion" of the operation will be—clearly setting a standard for CZA purposes that has absolutely nothing to do with the air permit or compliance with air regulations. Presumably, this standard is enforceable in future CZA proceedings. If made within a formal status decision or CZA permit decision, the Superior Court and Appellees would admit the CZICB has jurisdiction. It is irrational and absurd to exclude from CZICB jurisdiction the exact same binding conditions and finding solely because they were made outside the formal Status Decision or CZA permit process. Indeed, to restrict CZICB jurisdiction to formal proceedings only would allow the Secretary to engage in CZA rulemaking and interpretation without any review at all simply by issuing such interpretations in something other than formal decisions on permit applications or Requests for Status Decision. That seems inconsistent with the Legislature's intent in creating the CZICB to review the Secretary's decisions.

What is more rational and consistent with the intent of the General Assembly is to interpret "decisions under § 7005(a)" as covering all decisions—whether formal or informal—in which the Secretary articulates an interpretation of the CZA so that such decisions can be reviewed by the CZICB. Decisions

concerning issues such as whether something is heavy industry or a bulk product transfer facility (both expressly prohibited in §§ 7001 and 7003 of the Act), whether a CZA permit is required, and the conditions under which projects will be reviewed for CZA compliance, can then be reviewed by the Board created to do that very job so that the purposes of the CZA are fulfilled—regardless of whether there was a formal permit application or Request for Status Decision. In this case, the Secretary's substantively and functionally equivalent status decision on what Appellants contend is a prohibited bulk product transfer facility, and his setting of CZA rules concerning expansion, can and should be reviewed to assure that the Secretary complies with the purposes of the CZA. Such an interpretation is more reasonable and better serves the purposes of the Act, and under *Coastal Barge*, should therefore be adopted.

### 3. To The Extent That *Oceanport* Provides Any Guidance On Jurisdiction, It Confirms Jurisdiction In The CZICB

This Court's decision in *Oceanport,* being at the core of the Superior Court's holding concerning EAB jurisdiction, is discussed in the next argument section of this Brief *supra.* However, as explained more fully there, if *Oceanport* has anything to say about jurisdiction, the only way to interpret that case is to find that determinations of CZA status in Chapter 60 permit decisions are reviewable by the CZICB. As such, if this Court decides *Oceanport* provides guidance on the

question of jurisdiction in this case, it should find that *Oceanport* provides further support for finding that the CZICB has jurisdiction to hear Appellants' appeal.

Thus, the Superior Court's perfunctory review is wrong as a matter of law. The decision of the Secretary on CZICB jurisdiction should therefore be reversed, and the matter remanded back to the Superior to determine the issue of standing left unresolved by the 3/31/15 Decision.

## II. THE SUPERIOR COURT ERRED AS A MATTER OF LAW WHEN IT FOUND THAT THE EAB DID NOT HAVE JURISDICTION OVER THE APPEAL

***Question Presented***: Did the Superior Court err as a matter of law when it found that the EAB did not have subject matter jurisdiction over the Appellants' appeal? Suggested Answer: Yes. (N14A-05-002 Docket #14, 26)

***Scope and Standard of Review***: On questions of subject matter jurisdiction, the standard or review is whether the court below "correctly formulated and applied legal precepts." *Shevock v. Orchard Homeowners Ass'n*, *Inc.*, 621 A.2d 346, 348 (Del. 1993); *Sanders v. Sanders*, 570 A.2d 1189, 1190 (Del. 1990). The scope of review is *de novo*. *Linn v. Delaware Child Support Enforcement*, 736 A.2d 954, 959 (Del. 1999); *Sanders*, 570 A.2d at 1190.

***Merits of the Argument***: The Superior Court rested its conclusion that the EAB lacked jurisdiction by relying upon this Court's ruling in *Oceanport*. Neither the statute nor *Oceanport* support this conclusion.

### A. The Statute Creating EAB Jurisdiction Does Not Support An Issue-Based Limitation On EAB Jurisdiction

The source of EAB jurisdiction is 7 Del. C. § 6008(a), which states:

> Any person whose interest is substantially affected by any action of the Secretary may appeal to the Environmental Appeals Board within 20 days after receipt of the Secretary's decision or publication of the decision. The Board shall conduct a public hearing for all appeals in accordance with Chapter 101 of Title 29. Deliberations of the Board may be conducted in executive session. Each member who votes shall indicate the nature of his or her vote in the written decision.

The only limits expressly set forth in this statutory grant of jurisdiction are (1) standing (person "whose interest is substantially affected"), which is not at issue in this Court, and (2) that there is an "action of the Secretary."

The Secretary's Order clearly satisfies the "action of the Secretary" requirement. The Order grants the Refinery's request for "an amendment to Air Pollution Control permit 95/0471 for the Marine Vapor Recovery System (MVRS) (Unit 15) at its petroleum refinery and docking facility located at 4550 Wrangle Hill Road, Delaware City, New Castle County (Facility)." Secretary's Order at 1. (A. 1). This is evident on the face of the Secretary's Order, not only in the description of the Refinery's request as quoted above, but in these specific findings made by the Secretary in issuing the Order:

> 3. The Department has jurisdiction under its statutory authority to issue **the air pollution control amendment in this proceeding**; . . .
>
> 7. The Department has considered all the factors that the law and regulations require to be considered and determines that **the air pollution control permit amendment should be issued to the Applicant** based upon the draft permit amendment, as attached to the [Hearing Officer's] Report, that includes reasonable conditions to protect the environment and public health consistent with the Department's responsibilities . . .

Secretary's Order at 7 (A. 7) (emphasis supplied).

Air permits are issued under Chapter 60 of title 7 in the Delaware Code—what is sometimes referred to as the "Environmental Control Statute." The EAB

has always taken jurisdiction over decisions by the Secretary on air permits, and thus this appeal falls squarely within that long-recognized jurisdictional ambit of the Board set forth in § 6008(a). Indeed, the EAB's Order admits "[i]t is undisputed that the EAB appeal is a challenge to an amended air pollution control permit issued under Chapter 60." EAB Order at 19 (A. 425). But the EAB rejected jurisdiction because it created out of thin air a new requirement: that the "basis of the appeal"—in other words, the issues raised in the appeal—must also arise under Chapter 60. *Id*.

This requirement of a Chapter 60 issue being the basis for the appeal is neither supported—and indeed is contradicted—by the statutory scheme in Title 7. First, nothing in the language of § 6008(a) imposes such an issue-based limit. Indeed, it cannot, as numerous other environmental statutes expressly create jurisdiction in the EAB by reference to § 6008,[9] and thus a Chapter 60 issue

[9] *See* 7 Del. C. § 4213 ("any action or determination by the Department under this chapter shall be subject to appeal to the Environmental Appeals Board ***in accordance with the provisions of § 6008 of this title***" (emphasis supplied)); 7 Del. C. § 6037(f) ("[a]ny affected party may appeal a decision by the Secretary concerning a replacement water supply petition to the Environmental Appeals Board ***in accordance with § 6008 of this title***" (emphasis supplied)); 7 Del. C. § 6313(a) ("[a]ny person whose interest is substantially affected by any action of the Secretary [concerning Hazardous Waste Management] may appeal to the Environmental Appeals Board ***in accordance with § 6008 of this title***" (emphasis supplied)); 7 Del. C. § 7210 (appeals under Subaqueous Lands Act "shall be ***governed by §§ 6008 and 6009 of this title***" (emphasis supplied)); 7 Del. C. § 7411A ("A person whose interest is substantially affected by an action of the Department pursuant to a provision of this chapter or the regulations promulgated under this chapter may appeal to the Environmental Appeals Board ***in accordance with § 6008 of this title***" (emphasis supplied)); 7 Del. C. § 7412(a) ("[a]ny person whose interest is substantially affected by any action of the Secretary may appeal to the Environmental Appeals Board ***in accordance with § 6008 of this title***" (emphasis supplied)); 7 Del. C. § 7416A(c) ("[a]ny person whose interest is

limitation would render those appeals meaningless (or, under the EAB's logic, lead to the absurd conclusion that they are outside the EAB's jurisdiction). Second, in at least one instance, the General Assembly did expressly create an issue-based limitation on EAB jurisdiction. *See* 7 Del. C. § 7904(4) (EAB "is granted jurisdiction to hear and determine the issues presented in an administrative complaint from the Secretary on chronic violator status, on such notice as is legally required"). The omission of such issue-limiting language in § 6008 compared to § 7904(4) means it is reasonable to assume the General Assembly intended the omission. *See Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982); *see also Wilmington Trust Co. v. Barry*, 338 A.2d 575, 579 (Del. Super. 1975), *aff'd.* 359 A.2d 664 (Del. 1976). Thus, there is no statutory basis for imposing an issue-based limitation on Chapter 60 appeals. Because this case involves an appeal of an air permit—something that even the EAB admits falls within its jurisdiction—the

---

substantially affected by any action of the Secretary may appeal to the Environmental Appeals Board ***in accordance with § 6008 of this title*** " (emphasis supplied)); 7 Del. C. § 7419(c) ("[a] person whose interest is substantially affected by any action of the Secretary taken pursuant to subsection (a) of this section may contest the imposition of a lien to the Environmental Appeals Board ***in accordance with § 6008 of this title*** " (emphasis supplied)); 7 Del. C. § 7716(a) ("[a]ny person or persons whose interest is substantially affected by any action of the Secretary may appeal to the Environmental Appeals Board ***in accordance with § 6008 of this title*** " (emphasis supplied)); 7 Del. C. § 9110(b)(1) ("Any person or persons, aggrieved by any decision of the Secretary rendered pursuant to this chapter, may appeal the decision to the Environmental Appeals Board ***in accordance with § 6008 of this title*** " (emphasis supplied)); 7 Del. C. § 9117(c) ("[a] person whose interest is substantially affected by any action of the Secretary taken pursuant to subsection (a) of this section may contest the imposition of a lien to the Environmental Appeals Board ***in accordance with § 6008 of this title*** " (emphasis supplied)).

EAB has jurisdiction over this appeal, and the EAB was wrong as a matter of law to find otherwise.

Even if some Chapter 60 issue limitation could be said to exist, the appeal here satisfies that requirement because consideration of Coastal Zone Act compliance *is part of the air permitting process.* The Secretary's Order, by virtue of its adoption of the Hearing Officer's Report, *see* Secretary's Order at 2 (A. 10), specifically states that the permit application was reviewed under Delaware's *Regulations Governing the Control of Air Pollution*, which are found at 7 Del. Admin. C. 1101 *et seq*., and "complied with the regulatory requirements" of those regulations. *See* Hearing Officer Report at 5 (A. 20). Those regulations, at 7 Del. Admin. C. §1102,[10] includes a provision at § 11.6 which states in pertinent part:

> No permit shall be issued by the Department unless the applicant shows to the satisfaction of the Department that the equipment, facility, or air pollution control device is designed to operate or is operating without causing a violation of the State Implementation Plan, *or any rule or regulation of the Department* . . . .

(A. 460) (emphasis supplied). Among the "rules and regulations of the Department" are the regulations concerning the Coastal Zone Act (found at 7 Del. Admin. C. 101) which include the prohibition against new bulk product transfer facilities (*see* 7 Del. Admin C. 101 § 4.5 (A. 471)), the prohibition against expansion of non-conforming uses beyond their footprints as set forth in the

[10] For the convenience of the Court, a copy of these Air Regulations, as well as the later-referenced CZA Regulations, are included in the Appendix.

regulations (*id.* at § 4.2 (A. 471)), the prohibition against conversion or use of existing unregulated, exempt, or permitted docking facilities for the transfer of bulk products (*id*. at § 4.6 (A. 471)), and the requirement that any expansion or extension of a nonconforming use apply for and obtain a Coastal Zone Act permit (*id.* at § 6.3 (A. 473) and found in 7 Del. C. § 7003). In order for the Secretary to consider "all the factors that the law and regulations require to be considered" when issuing an air permit amendment (*see* Secretary's Order Finding No. 7 quoted above), the Secretary needs to have considered compliance with the Coastal Zone Act regulations. In fact, the Hearing Officer's Report specifically states that:

> [DNREC's Division of Air Quality, Engineering and Compliance Section (DAQ)] did meet the Department's CZA Program on December 18, 2012 to discuss possible CZA issues with the proposed oil transfers, and the CZA Program proved DAQ with an email explaining that the deck facilities were exempt from CZA regulation because the dock facilities were part of the refinery's operation and would not be considered regulated bulk product transfer facility under the definition of that term in the CZA.

Hearing Officer Report at 6 (A. 21). Thus, for purposes of the air permit at issue here, the permitting process actually included a review of CZA compliance as required by § 11.6. Finally, Appellants' Statement of Appeal specifically cited § 11.6 (A. 33). Thus, far from changing the review of an air permit (squarely within the EAB's jurisdiction) into a Coastal Zone Act issue somehow outside the EAB's jurisdiction, consideration of CZA issues is part and parcel of the air permit review process, and thus within the purview of this Board's appellate review. Quite

simply, there is no statutory basis for concluding that the EAB lacks jurisdiction to hear an appeal of an air permit raising issues of compliance with the CZA.

### B. *Oceanport* Does Not Compel A Finding Of No EAB Jurisdiction; But If It Provides Guidance On EAB Jurisdiction, It Also Establishes CZICB Jurisdiction

The Superior Court did not attempt to explain or defend the EAB's issue-based limitation on EAB jurisdiction. Instead, it relied upon the EAB's second basis for its decision: this Court's holding in *Oceanport*. Appellants respectfully suggest that *Oceanport* does not control on the issue of EAB jurisdiction. However, if its language has some impact on EAB jurisdiction, then it also supports finding CZICB jurisdiction in this matter.

#### 1. *Oceanport* Is Not Controlling Precedent On The Issue Of EAB Jurisdiction

*Oceanport*—although complicated in its factual background—is a case about standing, not jurisdiction. Wilmington Stevedores appealed an air permit, NPDES permit, and Subaqueous Lands Act permit issued to Oceanport Industries, and the EAB granted Oceanport's motion to dismiss on both standing and jurisdictional grounds. 636 A.2d at 898-99. In reversing the Superior Court's decision finding standing and remanding back to the EAB, this Court made clear that its decision rested entirely on standing: "As a result, we conclude ***solely on standing grounds*** that WSI could not pursue the appeal to the EAB or the Superior Court." *Id.* at 907 (emphasis supplied). Indeed, to emphasize the point that its ruling said nothing

about the jurisdiction of the EAB, the Supreme Court dropped a footnote off this quoted language which said "[t]his ***renders moot*** the question whether WSI erroneously appealed to the EPA[11] rather than the Coastal Zone Industrial Control Board." *Id*. n. 20 (emphasis supplied). Thus, the *Oceanport* decision should not be read as holding anything about the EAB's jurisdiction. As a result, the Superior Court—which did not discuss this language—is simply wrong when it states that *Oceanport* is "on-point and controlling in this appeal." 3/31/15 Decision at 11-12 (A. 447 – 48).

**2. To The Extent That *Oceanport* Provides Any Guidance On Jurisdiction, It Confirms Jurisdiction In The CZICB**

Despite the clear language of *Oceanport* that the issue of whether filing before the EAB was rendered moot by the Court's ruling on standing, the EAB (and, presumably, the Superior Court) focused on language in the opinion discussing the Superior Court's remand back to the EAB in that case. After discussing how Chapter 60 and the CZA have different purposes and statutory requirements, the *Oceanport* Court stated:

> Notwithstanding the difference in the statutory schemes, however, it is perhaps hypertechnical to treat them in isolation. In order to determine the correct posture with regard to both Chapter 60 permits and CZA status, in the future the Secretary should make the DNREC's position clear on an applicant's CZA status. As we noted, the Coastal Zone Industrial Control Board handles the appeals from decisions of the Secretary. 7 Del. C. §

[11] Although the opinion as published says "EPA" it is clear from the context that the reference here is to the EAB.

7007(a). Thus, a remand to the EAB in the posture of this case was erroneous regarding a determination of Oceanport's CZA status.

636 A.2d at 907. The Board (and the Refinery and DNREC advocating before the Board and Superior Court) focus solely on the language of the last sentence. Yet that sentence must be put into the context of the entire paragraph. The first sentence says that Chapter 60 permits and CZA status should not be treated in isolation. The second sentence makes clear that in future Chapter 60 permitting settings (like the air permit in this case), the Secretary should determine a Chapter 60 permit applicant's CZA status—exactly what the Secretary did by making Finding No. 2 in the Secretary's Order. By its context, the third sentence can only mean that such decisions on CZA status within a Chapter 60 permit proceeding can be appealed to the CZICB; any other interpretation makes this language meaningless.[12] The final sentence, in this context (that is, "in the posture of this case"), then merely notes that CZICB is the better place to take an appeal of CZA status, and remand back to the EAB might not make sense because the CZICB is

[12] For example, it seems highly improbable that the Court merely meant that the right to appeal to the CZICB must be evaluated under its separate statutory grant of jurisdiction—in effect, adopting the CZICB jurisdictional position of the Superior Court and the Appellees. As noted, the second sentence clearly envisions the Secretary making a determination of an applicant's CZA status in a Chapter 60 permit process. If an appeal to the CZICB would be impossible because, having been made in a Chapter 60 permitting process, a 7 Del. C. § 7005(a) final decision has not occurred, why would the Court note that "the Coastal Zone Industrial Control Board handles the appeals from decisions of the Secretary"? That statement is a meaningless nullity if an appeal to the CZICB is impossible. The more reasonable interpretation is that the citation to 7 Del. C. § 7007(a)—which grants the CZICB jurisdiction to hear actions of the Secretary under 7 Del. C. § 7005(a)—shows the *Oceanport* Court was recognizing the jurisdiction of the CZICB to hear such an appeal.

there to handle such an appeal. Thus, to the extent that *Oceanport* says *anything* about jurisdiction, it speaks to both EAB and CZICB jurisdiction: jurisdiction to hear determinations of CZA status within the context of a Chapter 60 permit resides in the CZICB—exactly what the Appellants contend and discussed in the previous section of this brief. As a result, to reach the conclusion (as the Superior Court did) that neither the CZICB nor the EAB have jurisdiction to hear appeals of CZA status determinations requires repudiation, not acceptance, of *Oceanport*.

In sum, Appellants respectfully suggest that *Oceanport* impacts this appeal in one of two ways. *Either Oceanport* has no impact on the question of EAB jurisdiction (given that the *Oceanport* Court expressly found moot the question of whether the appeal should have been filed with the EAB or the CZICB), *or Oceanport* finds that questions of CZA status in the context of a Chapter 60 permit appeal should go to the CZICB, which has jurisdiction to hear such an appeal. Both of these impacts favor the Appellants' position in this appeal, and support finding jurisdiction in one of the two administrative appeal boards established by the General Assembly. The EAB and the Superior Court therefore erred as a matter of law in concluding *Oceanport* supports a finding of no jurisdiction, and the 3/31/15 Decision should therefore be reversed.

Finally, the Appellants recognize the unusual nature of this proceeding, and the fact that it appears Appellants are arguing for simultaneous jurisdiction in two administrative Boards. To be clear, Appellants are not looking for two separate hearings on the merits of their appeal—only one. As is evident from the Application to Appeal filed with the CZICB and the Statement of Appeal filed with the EAB, Appellants have always believed that the most appropriate administrative Board to hear the merits of this appeal is the CZICB because it was established to hear appeals of the Secretary's actions under the CZA. Appellants therefore respectfully suggest that the Court view the jurisdictional issues here sequentially—that is, first consider the issue of CZICB jurisdiction, and only if it finds that the CZICB does not have jurisdiction, turn to the issue of EAB jurisdiction. Such an approach best respects the choices made by the Legislature while resolving the jurisdictional conundrum this case presents.

## CONCLUSION

For the reasons set forth above, Appellants Sierra Club and Delaware Audubon respectfully request that this Court reverse the Superior Court's March 31, 2015 decision and, if the Court finds that the CZICB has jurisdiction to hear Appellant's Appeal, then remand the matter back to the Superior Court for resolution of the issue of standing, or if the Court finds that the EAB has jurisdiction to hear Appellant's Appeal, then order the Superior Court to remand of the matter back to the EAB for consideration of the merits of the Appeal.

Respectfully submitted,

SIERRA CLUB and DELAWARE AUDUBON

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

*Counsel for Appellants*

## CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he caused a copy of the foregoing APPELLANTS OPENING BRIEF and APPENDIX to be served upon

Max B. Walton
Matthew F. Boyer
Connolly Gallagher LLP
The Brandywine Building
1000 North West Street, Suite 1400
Wilmington, DE 19801
*Counsel for Department of Natural Resources and Environmental Control*

Joseph C. Schoell
Drinker Biddle & Reath LLP
222 Delaware Avenue, Suite 1410
Wilmington, DE 19801

Bart E. Cassidy
Katherine L. Vacarro
Manko, Gold, Katcher & Fox,LLP
401 City Avenue, Suite 901
Bala Cynwyd, PA 19004

*Counsel for Delaware City Refinery Company, LLC*

Through electronic service via File & ServeXpress, on June 18, 2015.

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