EFiled: Aug 04 2015 10:55AM EDT
Filing ID 57648344
Case Number 216,2015D

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

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

APPELLANTS' REPLY BRIEF

Date: August 4, 2015

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Regulations

ARGUMENT

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

All parties agree that the issue of CZICB jurisdiction rests upon the interpretation of 7 Del. C. § 7007(b)'s language granting aggrieved persons the right to appeal a final decision under § 7005(a) of the CZA.

As set forth in the Opening Brief, Appellants contend that the concept of a "decision under § 7005(a)" must be ambiguous because: (1) the express language of § 7005(a) discusses only CZA permits; (2) if § 7005(a) is unambiguous, so that it must be read and applied literally under the cannons of statutory construction, it would exclude status decisions, a practice recognized by DNREC, industry, and the courts; (3) thus, under *Coastal Barge Corp. v. Coastal Zone Industrial Control Board*, 492 A.2d 1242 (Del. 1985), the Court should treat § 7005(a) and the language concerning decisions under § 7005(a) in § 7007(b)'s creation of the right to appeal to the CZICB as ambiguous. Appellees' arguments against this logic are legally flawed and insufficient.

DNREC makes the most direct challenge to this argument by claiming that language within § 7005(a) shows status decisions are recognized in the section in addition to CZA permits, and that language in § 7007(a) confirms this duality. DNREC Br. 22-24. DNREC's claim based on the language of § 7005(a) involves

a significant misreading of the section prompted by convenient editing. The language DNREC selectively quotes appears as the *third* in the four step permitting process described in § 7005(a).[1] Thus, the Secretary's determination (DNREC's sole focus) in fact occurs under § 7005(a) *because* a CZA permit application has been filed. This is confirmed by § 7005(a)'s very next sentence, which states that the determination must be followed by a decision within 90 days "in reply to the request for permit." Formal Requests for Status Decisions do not involve "requests for permits." *Compare* CZA Regs § 7 (Request for Status Decision process) to § 8 (CZA permit application process). (A. 474-476). Thus, the determination of CZA status discussed in § 7005(a) occurs **as part of the CZA permit application process**, and § 7005(a) therefore only expressly recognizes CZA permits.

DNREC's reliance on § 7007(a) is problematic for at least two reasons. First, properly read in context and construing the CZA as a whole, § 7007(a) does not recognize status decisions as distinct from permit decisions. Note that Step 3 of the § 7005(a) permit process involves the Secretary, while considering the permit application (step 1) after the public hearing (step 2), first deciding whether or not § 7004(a) applies. Section 7005(a) describes three possible conclusions the

[1] Read in its entirety, that section requires (1) that "a request for [a CZA] permit" be made in writing; then (2) the Secretary "shall hold a public hearing;" then (3) the Secretary determines whether the proposed use is a heavy industry use, a use allowable by permit under § 7004, or a use requiring no action under the CZA; and (4) the Secretary "shall then, if she or he determines that § 7004 . . . applies, reply to the request for a permit within 90 days of receipt of said request."

Secretary can reach: (1) the proposed use is heavy industry prohibited under § 7003 (and thus no permit can be issued); (2) the proposed use is one to which the permitting process of § 7004 applies; or (3) the proposed use is something not covered by the CZA (and therefore requires no action by the Secretary at all). While the second of these possible conclusions involves the issuance of a CZA permit, certainly the third and possibly the first do not. In those, the Secretary is determining—based on the pending permit application—how the CZA applies to the proposed use. Thus, all § 7007(a) does is make sure the CZICB can review all of the possibilities that can arise in the § 7005(a) permit application process. It does not confirm that a separate status decision process is implicit in § 7005(a).

Second, even if § 7007(a) somehow shows that Secretarial actions other than decisions on CZA permit applications fall within § 7005(a), its language does not limit those actions to final decisions on formal Requests for Status Decision. Indeed, § 7007(a) gives the CZICB jurisdiction to "affirm or reverse the decision of the Secretary . . . with respect to applicability of any provisions of this chapter to a proposed use." Nothing in this language limits "decisions of the Secretary" to formal status decisions—all that is needed is a "decision of the Secretary" applying a provision of the CZA to a proposed use. In this appeal, the Secretary's Order is a "decision" which expressly determined "the applicability of the [CZA]" to the Refinery's crude oil transfer operation, finding that no CZA permit is needed, that

the operation would be part of a nonconforming use under the CZA, and setting parameters for what would constitute an "expansion" under the CZA. Thus, if § 7007(a) shows § 7005(a) covers more than permit decisions, it supports CZICB jurisdiction because the Secretary's Order fits within this statutory language.

Appellees' other arguments to support the claim that §7005(a) covers only CZA permits and formal Requests for Status Decision are legally defective. The fact that DNREC has created the formal status decision process by regulation, Refinery Br. 29-30, is irrelevant because, as the Refinery admits, "the Secretary cannot expand the [CZICB's] jurisdiction beyond its statutory limits by regulatory action." Refinery Br. 26. *See* DNREC Br. 13 n.21. Indeed, such an attempt to claim a regulatory bootstrap here is odd, given the Refinery's and DNREC's claims that jurisdictional grants must be interpreted narrowly. Refinery Br. 13, DNREC Br. 30. Nor does the Refinery's claim that permits and status decisions as "simply two different prongs of the same overarching Coastal Zone process" under § 7005(a), Refinery Br. at 30, comport with the statutory and regulatory language.[2]

Appellants do not advocate for a literal reading of § 7005(a); instead, given the extensive history of recognizing status decisions as within CZICB jurisdiction, Appellant respectfully suggest that the notion of a decision under § 7005(a) for

[2] For example, § 7005(a) is limited to "requests for permits" made in writing; by contrast, requests for status decisions involve a different application and set of regulations (CZA Regs § 7, (A. 474) than the completely separate process governing requests for permits (CZA Regs § 8 (A. 474-476). And Requests can result in determinations that the CZA does not apply or the use is prohibited—which do not involve permits at all.

purposes of § 7007(b) is ambiguous,[3] and therefore the "methods of statutory interpretation and construction" for ambiguous statutes articulated and applied by this Court in *Coastal Barge* must come into play, requiring adoption of interpretations that produce reasonable results and rejection of interpretations that produce unreasonable or absurd results. 492 A.2d at 1246.

The Secretary's Order in this case made a specific finding that a CZA permit was not needed. Secretary's Order at 5-6 (A. 5-6). This is precisely what the Secretary does disposing of formal requests for status decision. (*See* CZA Regs § 7.7 ("The Secretary shall then . . . determine whether or not a permit will be required and notify the applicant in writing of his determination" and publish the decision as a legal notice) (A. 474). Thus, the statutory interpretation question here boils down to which is a more reasonable interpretation of the statute: in addition to decisions by the Secretary on CZA permit applications, does "decision under § 7005(a)" include only decisions on formal Requests for Status Decision,

[3] DNREC's attempts to claim no ambiguity, DNREC Br. 28-31, fall flat. DNREC cannot deny that "status decisions" are not referred to the express language of § 7005(a); as noted above, DNREC's misreading of § 7005(a) does not justify finding them there. The 40+ years of judicial and regulatory recognition of status decisions, DNREC Br. 28-29, creates, rather than removes, ambiguity in light of the express language of § 7005(a). The claim of "no support," DNREC Br. 29, cuts both ways because this is a case of first impression. Appellants do not seek to create jurisdiction on their own, DNREC Br. 30; rather, the appeal exists because ***the Secretary*** chose to make a CZA permit determination in the Secretary's Order. That Appellants may have other remedies, DNREC Br. 30 n. 65—a questionable proposition at best—is of no moment; if the CZA creates a right to appeal, then that remedy exists in addition to any other remedies available. Finally, DNREC's string citation of general statutory construction principles, DNREC Br. 30-31, fails to apply them and ignores the CZA-specific principle of liberal construction found by this Court in *City of Wilmington v. Parcel of Land*, 607 A.2d 1163, 1166 (Del. 1992).

OR does it include formal determinations by the Secretary about whether or not a CZA permit will be required (which covers formal Requests for Status Decision as well as findings like the Secretary made here in a final order subject to public notice)?

As Appellants explained in their Opening Brief, one CZA issue here is whether the Refinery's crude oil transfer operation is a bulk product transfer facility. *Coastal Barge* rejected as absurd and unreasonable an interpretation of the definition of bulk product transfer facilities that excluded ship-to-ship transfers because 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"). The legislature clearly created CZICB to review decisions by the Secretary to assure that the purposes of the statute are being carried out. It would be 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. Indeed, such a rule creates a gaping loophole by which the Secretary can undertake all types of actions under the CZA by simply making CZA status determinations and setting CZA conditions outside of a CZA permit or formal Request for Status Decision (like he

did here) without any review by the Board created by the legislature to review the Secretary's decisions. *Coastal Barge* most assuredly urges rejection of a statutory interpretation under which the CZA's strong public purpose to prohibit bulk product transfer facilities can be thwarted by making a Secretarial CZA status determination of an alleged bulk product transfer facility unreviewable solely because it is not made in a formal Request for Status Decision context. The better, more reasonable interpretation is to bring Secretarial decisions that are functionally equivalent to a formal status decision (like the Secretary's findings concerning CZA permitting status) within the CZICB's jurisdiction.[4]

Finally, as explained *infra* in Part II, *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc*., 636 A.2d 892 (Del. 1994)—to the extent it says anything about jurisdiction—is most reasonably interpreted as advising that CZA status determinations in Chapter 60 permit decisions are reviewable by the CZICB.

Thus, under a reasonable interpretation of the ambiguous statute, the Secretary's Order is a decision under § 7005(a) that triggers CZICB jurisdiction via § 7007(b). The Superior Court erred as a matter of law in finding otherwise.

[4] For this reason, the Refinery's argument, Refinery Br. 32-33, that is an air permit amendment and not a CZA permit or formal Status Decision adds nothing because it is premised on the notion that decisions under § 7005(a) are limited to those two categories when a reasonable interpretation of the ambiguity shows it is not.

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

All parties agree that the EAB's jurisdiction is determined by 7 Del. C. § 6008(a), which expressly states that "[a]ny 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 Secretary's Order granting an amendment to an air permit issued under Chapter 60 of Title 7, is clearly an "action of the Secretary." DNREC's and the Refinery's arguments attempt to impose additional terms and meanings upon this simple language so that it excludes CZA issues from EAB jurisdiction. These additional terms and meanings are not found in or consistent with the statutory language, and therefore DNREC's and the Refinery's arguments fail.

A. The Statutory Scheme Surrounding § 6008 Does Not Support Issue-Based Limitations

The essence of DNREC's and the Refinery's arguments—like that of the EAB—is that CZA issues cannot be considered by the EAB. DNREC supports its position by claiming that the "any action of the Secretary" language of §6008(a) "must be understood in the context of Chapter 60" because Chapter 60 creates a permitting process so that "[e]ach step of the way, the 'actions of the Secretary' relate to Chapter 60 only." DNREC Br. 10 – 11. Of course, given that the

Secretary's Order involves an air permit (an action of the Secretary under Chapter 60), DNREC's argument raises no barrier to EAB jurisdiction over this appeal.[5]

The problem for both DNREC and the Refinery is that their desire to expand this "relate to Chapter 60 only" notion so as to limit EAB jurisdiction to actions of the Secretary and *issues* under Chapter 60 has several flaws from a statutory construction perspective. First, §6008(a) contains no language setting limits on the issues which can be raised in an appeal of a Chapter 60 action to the EAB. The General Assembly knows how to create statutory limits on the issues the EAB can hear. *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").[6] Thus, the Refinery's premise that the statute must affirmatively state what issues are included, Refinery

[5] For this reason, the claims by both DNREC (DNREC Br. 11-12) and the Refinery (Refinery Br. 20-26) that the Appellants are trying to create "virtually boundless" EAB jurisdiction are simply straw men. Appellants are focused solely on an action taken by the Secretary under Chapter 60—the issuance of an air permit, and in this Court seek only to establish EAB jurisdiction in that context.

[6] DNREC's attempt to distinguish this citation because it does not involve a permit request, DNREC Br. 12 n. 14, is a distinction without a difference. The statutory interpretation question is whether the General Assembly intended to impose a limit on EAB jurisdiction to *issues* arising under Chapter 60. What 7 Del. C. § 7904(4) shows is that the General Assembly knows how to limit the issues the EAB is to hear in an appeal. The fact that it did so in § 7904(4) but did not place any issue-limiting language in § 6008(a) 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).

Br. 22-23, gets it backwards.[7] If anything, the burden should be on the Refinery and DNREC to affirmatively show statutory language creating an issue limitation because, under a literal reading of § 6008(a), the Secretary's Order is an "action of the Secretary" under Chapter 60 and therefore triggers EAB jurisdiction. They utterly fail to meet this burden.

Second, §6008(a) does not control EAB jurisdiction for Chapter 60 permits only; as Appellants pointed out in their Opening Brief, §6008(a) governs appeals under numerous other chapters in Title 7. *See* Opening Br. 26-27 n. 9 (citing language in 11 statutory sections in 6 other Chapters). If "actions of the Secretary" applies to Chapter 60 issues only, then those 11 statutory sections are meaningless, as appeals under those sections involve non-Chapter 60 issues which could not be raised. Delaware courts routinely reject statutory interpretations that render provisions meaningless. *See e.g., Murphy v. Bd. Of Pension Trustees,* 442 A.2d 950, 951-52 (Del. 1982); *Murtha v. Continental Opticians, Inc.*, 729 A.2d 312, 318 (Del. Super. 1997), *aff'd*, 705 A.2d 244 (Table) (Del. 1988). Neither DNREC nor the Refinery offer any substantive explanation of how their Chapter 60 issues only interpretation of § 6008(a) reconciles with these 11 other statutory provisions. The Refinery's argument, Refinery Br. 24, that these multiple sections would be

[7] The Refinery's citation to *Worldwide Salvage, Inc. v. EAB*, 1986 WL 3650 (Del. Super. 1986), Refinery Br. 22, provides no support for the Refinery's claim. In that case, the court found no right to appeal because 7 Del. C. § 6008(e) specifically precluded an appeal. It was this statutory barrier—not issues raised under the CZA or some other statute—that determined the outcome. It says absolutely nothing about what "action of the Secretary" means under § 6008(a).

unnecessary or surplusage fundamentally miscomprehends Appellants' arguments here. Appellants certainly acknowledge that each of these sections serve to make other, non-Chapter 60 Secretarial actions subject to EAB jurisdiction—as § 6008(a) does for Chapter 60 Secretarial actions like the air permit here. But what these sections' citation to and reliance on § 6008(a) show is that § 6008(a) cannot possibly contain an implicit limitation to Chapter 60 issues lest it renders appeals under those sections meaningless.

DNREC's claim that Appellants' interpretation suggests the General Assembly conferred "redundant CZA jurisdiction," DNREC Br. 12-13,[8] underscores the fundamental inconsistency in DNREC's argument in two ways. First, DNREC's argument assumes there is an "action under the CZA" or a "CZA decision," DNREC Br. 12, that would trigger jurisdiction under the CZA—a position DNREC and the Refinery expressly disavow in their arguments on CZICB jurisdiction. In other words, the only way § 6008(a) can create a "redundancy" is if the CZICB has jurisdiction over this appeal; if (as Appellants contend) the

[8] DNREC's related argument—that the CZICB has some special expertise compared to the EAB, DNREC Br. 12-13 and n. 16—is an enormous stretch. Five CZICB members (a majority of the Board) are appointed by the Governor, 7 Del. C. § 7006—exactly like the seven members of the EAB. 7 Del. C. § 6007. Thus, EAB members have as much "specialized knowledge" as a majority of the CZICB. While the three county planning commission chairs and the Director of the Delaware Economic Development Office (the other four members of the CZICB) may have some particular knowledge, "economic effect" and "county and municipal comprehensive plans" are merely two of six factors to be considered in the issuance of a CZA permit. *See* 7 Del. C. § 7004(b). As such, their "expertise" is extremely limited in the CZA context, and thus the CZICB does not have much "specialized expertise" beyond the EAB. However, to the extent that this does show the CZICB is the better place to raise CZA issues, it merely supports Appellants' claim that the CZICB is the first and preferred board to hear the merits of their appeal.

CZICB has jurisdiction, then there is no need to consider EAB jurisdiction. But if the CZICB does not have jurisdiction to hear an appeal of a determination of CZA status within a Chapter 60 permitting proceeding, then no "redundancy" exists. DNREC cannot have it both ways.

Second, the other half of DNREC's redundancy argument—based on the *timing* of the passage of § 6008(a), *see* DNREC Br. 12-13—is likewise off the mark. When creating § 6008(a) in 1973, the General Assembly clearly intended that "actions by the Secretary" would at the very least cover air and water permit actions under Chapter 60. No "redundancy" existed because, in 1973 the State Planner made decisions under the CZA. The more relevant time is in 1981, when the General Assembly transferred the State Planner's duties under the CZA to the Secretary, and modified § 7007(b) and § 7005(a) of the CZA to reference decisions made by the Secretary. This Court has recognized that a statute should be construed in a way that will promote its apparent purpose and harmonize it with other statutes within the statutory scheme. *See e.g.*, *Terex Corp. v. Southern Track & Pump, Inc.*, No. 704,2014, 2015 WL 3657593 at *5 (Del. June 15, 2015); *LeVan v. Independence Mall, Inc*., 940 A.2d 929, 933 (Del. 2007).[9] Viewed through this

[9] These cases apply this rule in the context of construing ambiguous statutes. To the extent that the Court finds "any action of the Secretary" to be unambiguous—which means that the Secretary's Order triggers EAB jurisdiction because it is an "action of the Secretary"—there is no need to resort to this rule of construction. *See General Motors Corp. v. Burgess*, 545 A.2d 1186, 1191 (Del. 1988) ("when no ambiguity exists, and the intent is clear from the language of the statute, there is no room for statutory interpretation or construction," quoting *Giuricich v.*

prism, what the General Assembly did was to create a careful scheme of *complementary* appellate jurisdiction: if the Secretary's action is a "decision under § 7005(a)" of the CZA (as Appellants contend in this case), then jurisdiction lies with the CZICB. But if the Secretary's action is not a "decision under § 7005(a) (as Appellees contend in this case) but is an action on a Chapter 60 permit, then jurisdiction lies with the EAB. This harmonizes the two sections, creates no "redundancy," and insures the Secretary's actions are reviewed by an administrative board. In fact, given the numerous sections throughout Title 7 making Secretarial decisions subject to administrative board review, it seems unlikely that the legislature would intend for a Secretarial decision to escape *any* administrative board review simply because the Secretary used a Chapter 60 vehicle to make findings and rulings under another Chapter of Title 7.

The Refinery's and DNREC's attacks on Appellants' citation to § 11.6 of the Air Regulations, Refinery Br. 25, DNREC Br. 13, completely miss the point. Section 11.6 is relevant only if—despite the lack of any statutory basis—there is some Chapter 60-only issue limitation built into § 6008(a), for then the failure to comply with Chapter 60 regulations like § 11.6 is certainly a "Chapter 60 issue" that would satisfy this requirement. The fact that § 11.6 requires compliance with

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Emtrol Corp., 449 A.2d at 238). Appellants cite it here because the only way that the Appellees can get to arguing for the Chapter 60 issues only limitation they advocate here is to view § 6008(a) as ambiguous and in need to further construction.

the CZA does not take it outside the Chapter 60 context because determining compliance with the CZA *is part of the air permitting process*. The Secretary testified as much at the hearing before the CZICB,[10] and the Hearing Officer found that it in fact took place on the Refinery's permit here. Hearing Officer Report at 6 (A. 21). As a result, failure to comply with § 11.6 because of the failure to comply with the CZA puts this appeal within even the narrow, Chapter 60 only view of § 6008(a) advocated by Appellees.

Thus, there is no statutory basis for a requirement that appeals to the EAB are limited to Chapter 60 issues. The Superior Court's decision that the EAB cannot hear this appeal of a Chapter 60 air permit because the issues arise under the CZA has no support in the statute.

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

Both the Refinery and DNREC rely heavily on *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc*., 636 A.2d 892 (Del. 1994), claiming it is binding and

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[10] One of the things that does come up is a lot of our statutes have a requirement that when a program is issuing a permit, that the activities being permitted are consistent with other programs in the department. You don't want a water permit, for example, to violate an air permit condition or the air regulations. And so there's kind of a check across the agency that happens. So when the air program, for example, a permit they'll check with their counterparts in the Coastal Zone program or water program just to make sure there's nothing that's at cross purpose in the application.

Tr. 193-194 (A. 249-250).

controlling precedent. *See* Refinery Br. 16, 17, 20; DNREC Br. 18. There are at least two flaws in Appellees' analysis.

First, the Refinery, DNREC, the EAB, and Superior Court all fail to explain how *Oceanport* can have any precedential effect when the *Oceanport* court itself expressly stated that "the question whether WSI erroneously appealed to the [EAB] rather than the Coastal Zone Industrial Control Board" had been "***render[ed] moot***" by the Court's conclusion "***solely on standing grounds*** that WSI could not pursue the appeal to the EAB or the Superior Court." 636 A.2d at 907 and n. 20 (emphasis supplied).[11] The Refinery fails to address the mootness finding at all, while DNREC fails to address it in any meaningful way.[12] A finding of mootness is not some inconsequential legal trifle that can be ignored; as this Court has previously stated:

> "Mootness arises when controversy between the parties no longer exists such that a court can no longer grant relief in the matter." The function of this Court—as well as the Superior Court—is to decide actual, live controversies. ***Thus, we do not answer questions that have become moot***.

State Farm Mut. Auto. Ins. Co. v. Davis, 80 A.3d 628, 632 (Del. 2013) (citations omitted) (emphasis supplied). Or, as the Court put it in *American Littoral Soc.,*

[11] For this reason, DNREC's long and impressive description of the EAB and Superior Court proceedings in *Oceanport*, DNREC Br. 14-16, is irrelevant. What matters is what this Court did—which was to find the jurisdictional question moot. Likewise, the fact that the Court identified the question of jurisdiction as a matter of first impression, 636 A.2d at 896, cited in Refinery Br. 16 and DNREC Br. 17, does not matter in light of the mootness determination.

[12] DNREC's claim that the question of the propriety of the Superior Court's remand was not moot, DNREC Br. 19-20, misapprehends the actual mootness finding, which specifically deals with the question of the correct board (CZICB or EAB) to hear the appeal.

Inc. v. Bernie's Conch LLC, 954 A.2d 909 (Table), 2008 WL 2520634 (Del. June 24, 2008), once an issue is rendered moot "[a]ny judicial pronouncement on the merits . . . would be purely advisory." 2008 WL 2520634 at * 2. Having proclaimed the question of the appropriate place to file the appeal "moot," any statements in *Oceanport* concerning EAB jurisdiction cannot be the "binding precedent" and "holdings" that the Refinery, DNREC, EAB, and Superior Court claim them to be. Quite simply, *Oceanport* did not "answer the question" of the appropriate place to file an appeal.

Thus, the question of *Oceanport's* relevance in this appeal boils down to interpreting what *Oceanport* actually says about the issue of EAB and CZICB jurisdiction. The relevant section of the opinion is Part III, 636 A.2 at 907,[13] and is clearly focused on the Superior Court's remand to the EAB. A close reading of the section reveals that nowhere in Part III does the *Oceanport* Court discuss the jurisdiction of the EAB or any principles for determining or defining the jurisdiction of administrative bodies—indeed, the word "jurisdiction" does not appear at all. The extensive jurisdictional concepts and findings that the Refinery and DNREC try to superimpose on the case are not discussed at all.

[13] The *Oceanport* Court does discuss what the EAB and Superior Court said about EAB jurisdiction earlier in the opinion, 636 A.2d at 899 n. 6, but that was clearly in the nature of factually reporting what happened below, and not any form of substantive analysis.

Instead, the actual discussion of the EAB in Part III of *Oceanport* occurs *in a single sentence.* After discussing in three paragraphs how Chapter 60 and the CZA have different purposes and statutory requirements, *Oceanport* states in its penultimate paragraph:

> 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. § 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 Refinery, DNREC, the EAB, and the Superior Court offer no valid explanation for the interplay between the references to the CZICB and the EAB in this quotation. The *Oceanport* Court clearly advises that, with regard to a Chapter 60 permit, the Secretary should make a determination on the applicant's CZA status. That is exactly what the Secretary did in this case—making a Finding that a CZA permit was not needed. Secretary's Order at 6 (A. 6). The very next sentence refers to the appellate jurisdiction of the CZICB under § 7007. The only reasonable interpretation of this language is that the *Oceanport* Court thought that the determination of CZA status for a Chapter 60 applicant could be appealed to the CZICB—otherwise, the sentence makes no sense because it would be totally unnecessary. And, just as importantly, the last sentence declaring an error for remanding back to the EAB makes sense because the Court thought appeal could

and should instead be to the CZICB. DNREC's contortions to avoid this reading, DNREC Br. 33 and n. 76, are wholly unpersuasive.[14] Thus, to the extent that *Oceanport's* "purely advisory" language provides any guidance where to file an appeal of the Secretary's determination of CZA status in the context of a Chapter 60 permit, the most reasonable interpretation of the actual language of *Oceanport* is that such a determination is appealable to—and therefore within the jurisdiction of—the CZICB.

In summary, Appellants respectfully suggest that the Court view the two jurisdictional provisions at issue here—7 Del. C. §§ 6008(a) and 7007(b)—as complimentary to each other in this case. If the Secretary's Order determining that a CZA permit is not needed is a decision under § 7005(a), then jurisdiction lies with the CZICB. Appellants believe that the Secretary's Order is a decision under § 7005(a) because: (1) the language of § 7005(a) is ambiguous (in order for status decisions to fall within CZICB jurisdiction), (2) such ambiguity is best resolved by

[14] DNREC's claims that the language of second and third sentences was the Court "point[ing] out that the Secretary could require and issue a status decision" under the CZA, DNREC Br. 33, and that "the Court recommended that the Secretary exercise his authority under § 7005," *id*. n.76, are inconsistent with the opinion text. While DNREC wants to superimpose elaborate meanings on the text, in fact nothing in the penultimate paragraph says anything about § 7005(a) or the status decision process. Indeed, given that the paragraph is speaking about not treating Chapter 60 and the CZA "in isolation," the more reasonable interpretation is that the Court is advising the Secretary to make the determination of CZA status *in the context of a Chapter 60 application.* What DNREC has not and cannot rebut is the fact that, in whatever process the CZA status decision is made, *Oceanport's* language only makes sense if that determination of status can be appealed to the CZICB.

including CZA determinations like the Secretary's Order within that jurisdiction, and (3) *Oceanport* suggests that decisions on CZA status in the context of a Chapter 60 permit can and should be appealed to the CZICB. If however, if the Secretary's Order is not a decision under § 7005(a) (and, thus, the CZICB has no jurisdiction under § 7007(b)), then it is an action of the Secretary under Chapter 60 that gives the EAB jurisdiction pursuant to § 6008(a) because: (1) § 6008(a) gives the EAB appellate jurisdiction over actions of the Secretary taken under Chapter 60; (2) nothing in the language of § 6008(a) imposes a restriction on issues raised in the appeal; and (3) even if § 6008(a) could somehow be read to impose a limitation to issues arising under Chapter 60, the alleged failure to comply with § 11.6 of the Air Regulations issued under Chapter 60 clearly satisfies this requirement. The Superior Court therefore erred in finding neither the CZICB nor the EAB had jurisdiction over Appellants' appeal, and therefore its decision should be reversed.

Finally, Appellants note that the reversal of the Superior Court they seek will not decide the merits of the underlying appeal. All the Court need do in this appeal is decide that in fact the Appellants have a forum in which to pursue their appeal—and that is all that the Appellants can and do seek at this time.

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,

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CERTIFICATE OF SERVICE

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

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