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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DELAWARE DEPT. OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL, and DAVID S. SMALL, **Defendants-Below/ Appellants,** **v.** **W. WAYNE BAKER, CHRISTIAN HUDSON, JAMIN HUDSON, JOHN F. CLARK, HOLLYVILLE FARMS, LLC, ROUTE 24 CJ, LLC** **Plaintiffs-Below/ Appellees.**	**No. 552, 2015** ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR SUSSEX COUNTY C.A. No. S13C-08-026

APPELLANTS' *CORRECTED* OPENING BRIEF

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December 3, 2015

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NATURE OF THE PROCEEDINGS

This is an appeal from an Order of the Superior Court, in and for Sussex County, dated October 7, 2015, denying the Appellants' Motion for Summary Judgment, and granting the Appellees' Motion for Summary Judgment.[1] On October 27, 2015, the Appellants' Motion for a Stay of this Order was granted by the Honorable T. Henley Graves, and various contempt motions and a Rule 60 motion filed by the Plaintiffs were denied.[2]

As set forth in greater detail in the Statement of Facts, *infra,* DNREC's revised Sediment and Stormwater Regulations went into effect on January 1, 2014, pursuant to a final order dated July 18, 2013.

The Appellees filed a declaratory judgment action on August 23, 2013, asking the court below to declare the Regulations to be invalid. In the alternative, the Appellees sought as relief through a *mandamus* claim to force the formal adoption of some two thousand pages of technical guidance support documents ("TGD") as regulations.[3] Notably, the Appellees did not seek a stay of the Regulations, pursuant to 29 *Del.C.* §10144, which would have required a showing of substantial issues as to enactment and the threat of irreparable harm from enforcement.

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[1] D.I. #89; A21-66.
[2] D.I. #101-102; A67.
[3] D.I. #1.

On September 23, 2013, the Appellants filed a Motion to Dismiss the Complaint, due to the Appellees' lack of standing. The Motion was denied after argument on November 1, 2013.[4] An Answer was then filed on November 18, 2013, denying the allegations that the Regulations were "unlawful" and opposing the relief requested. The Appellants claimed various affirmative defenses, including lack of standing and failure to state a claim.[5]

The Appellants then filed a Motion for Judgment on the Pleadings and a supporting Memorandum, citing the lack of any factual dispute, the lawful adoption of the regulations reflected by the official record, and the exemption afforded the TGD by the APA.[6] On December 20, 2013, the Court deferred action on the Motion, in favor of limited discovery, and directed the Appellees to submit affidavits regarding standing.[7] Both the Appellees[8] and Appellants[9] then filed motions for summary judgment. In a letter dated July 7, 2014, the Court requested further briefing on the validity of the Regulations, citing various paragraphs referencing the TGD, and referring counsel to a line of New Jersey cases.[10] The Court denied the Appellants' request for a stay of briefing, pending the adoption of

[4] D.I. #10.
[5] D.I. #11.
[6] D.I. #12.
[7] D.I. #18.
[8] D.I. #25
[9] D.I. #27.
[10] D.I. #31.

curative amendments to the Regulations, responding to the Court's citation of problematic paragraphs.[11]

As set forth in greater detail in the Statement of Facts, *infra*, on October 15, 2014 DNREC formally adopted curative amendments to the Sediment and Stormwater Regulations. The Appellees responded by filing a second lawsuit, challenging the lawfulness of the curative amendments.[12] That case was subsequently consolidated with the earlier lawsuit, at Appellants' request, over the objection of Appellees.[13]

On January 16, 2015, the Court issued an interim Order finding that the Appellees with the exception of Peterman had standing, and consolidating briefing on dismissal of the allegations in the new lawsuit.[14] Appellees' motions for reargument and a stay were denied.[15] The Appellants filed a renewed Motion for Summary Judgment in the consolidated case and brief in support on April 30, 2015.[16] The Appellees renewed their motion for summary judgment as well.[17] The Court's decision on all pending motions was issued on October 7, 2015.

[11] D.I. #35.
[12] Civil Action #S14C-11-018.
[13] D.I. #44.
[14] D.I. #45.
[15] D.I. #63.
[16] D.I. #73-75.
[17] D.I. #78.

SUMMARY OF ARGUMENT

1. None of the remaining plaintiffs in the action below can claim standing as "aggrieved persons" to challenge the lawfulness of duly-enacted regulations, in that they have failed to document any instance of harm or prejudice from the regulations or the supporting technical guidance documents.

2. The adoption of revised regulations after seven years of workshops, hearings, and regulatory advisory committee meetings is not rendered "unlawful" by the agency's continued use of voluminous technical support materials for the guidance of regulated parties in preparing management plans.

3. Any doubt as to the role of the technical guidance documents was eliminated by the enactment of curative amendments to clarify that only the regulations mandate compliance, and plans that are functionally equivalent to the templates and examples provided for guidance will be approved, if they satisfy the criteria of the regulations for the control of stormwater and prevention of erosion and the deposit of sediment.

FACTS

DNREC adopted revised regulations implementing the statutory provisions of Chapter 40 of Title 7, "Erosion and Sedimentation Control", effective January 1, 2014. 17 *Del.Reg.* 240 (2013).[18] This was the culmination of a process that formally began on August 15, 2006 with the issuance of a Start Action Notice. The revision of 7 *Del.Admin.Code* §5101 was consistent with recommendations of the Governor's Task Force on Surface Water Management, issued in April of 2005. Proposed new regulations were originally published in 2012, and met with widespread support, albeit with varying suggestions on standards and criteria to be applied to the management of sediment and stormwater. *Id.* As a result of over 200 comments submitted, DNREC revised the proposed regulations to extend the time frame for plan approval, and to decrease the percentage reduction in impervious surface required of developers. The revised regulations submitted in 2013 improved the stormwater and sediment plan review process and updated the regulations to reflect current best management practices ("BMP"), as recognized by experts in the environmental community and the regulated industry.

In addition to promulgating the revised Sediment and Stormwater Regulations, DNREC's Division of Watershed Stewardship prepared an updated version of its handbook and background materials, known as the Technical

[18] Final Order adopting the revised regulations, Secretary's Order No. 2013-WS-26, issued on July 18, 2013; A14-18.

Guidance Document ("TGD"). These materials were intended to continue the practice of providing support to applicants through plan templates and project alternatives. Questions were raised during the review process, as to whether the TGD should be formally adopted as a regulation under the Administrative Procedures Act ("APA"). DNREC in response sought to clarify that the TGD had not been, and would not be, used as anything but an adjunct to the actual regulations.

> "The Department does not intend to use the TGD as a regulation that has the force and effect of law and which may be enforced as such. Instead, the TGD is an interpretive or advisory document that the Department will use to administer the regulation, and which will provide greater detail and explanation for the public. The TGD considers various types of stormwater and sediment plans that may be employed under the regulation, and shows how applicants can obtain approval through the use of an offset and other solutions to different and difficult stormwater and sediment management scenarios." *Id.*

DNREC, in an effort to alleviate the concerns about the function of the TGD, voluntarily provided public notice with the opportunity for comment on the TGD during the regulatory adoption process. The TGD, which runs to over 2,000 pages, is published on the DNREC web site, and regularly updated to reflect BMP's and novel plan alternatives available to applicants. In that sense it is a "living" document, whereas the Regulations are necessarily fixed.

Following the filing of the lawsuit by the Appellees, and an interim ruling by the Court[19] expressing concern over sections of the Regulations that appeared (in the view of the court below) to mandate compliance with the TGD, DNREC elected to pursue amendment of the offending sections. A Start Action Notice was issued on July 29, 2014, with the stated purpose of clarifying the role of the TGD by revising the language cited by the court below, and by emphasizing that plans setting forth measures that were functionally equivalent to templates set forth in the TGD would be acceptable. The curative amendments were initially published on September 1, 2014. 18 *Del.Reg.* 204-208 (2014). The changes included:

- removing references to the TGD in ¶1.5 regarding variances;
- changing "requirements shall" to "options may" in ¶1.7 on offset procedures;
- adding language to ¶1.13 and ¶1.14 clarifying the role of the TGD as a guide and reference to aid in compliance with the Regulations, and eliminating "shall comply" and "shall follow" references;
- adding the definition of "functional equivalency" to ¶2.0 to confirm that alternative measures consistent with the TGD examples would satisfy the Regulations;

[19] The Court's July 7, 2014 Order regarding further briefing; A19-20

- eliminating language in ¶3.11 mandating compliance with post construction verification document guidelines;
- rewording ¶4.1 to clarify the role of the TGD as a reference in preparation of construction site stormwater management plans;
- revising portions of ¶4.5 on soil stabilization procedures to emphasize the availability of alternative measures;
- rewording ¶5.1 to clarify the role of the TGD as a reference in preparation of post-construction site stormwater management plans; and
- amending ¶6.1.2 to remove "shall" in favor of providing that an Owner "may" refer to the TGD for purposes of construction site stormwater BMP's and review of management plans.[20]

After a public hearing and comments, on October 15, 2014, the Secretary promulgated the curative amendments to the Regulations, effective on November 11, 2015. 18 *Del.Reg.* 396-398 (November 2014).[21] The intent to clarify the limited role of the TGD (referred to as the "TD") was made explicit.

> "The changes reinforce the Department's stated intent that the TD was not to be a regulation. Instead, the TD was provided and cited in Regulation 5101 in order to provide the regulated community with assistance in understanding and implementing Regulation 5101,

[20] These are the same paragraphs cited by the Court in its Opinion, at 3.

[21] Although the changes were nonsubstantive and intended only to correct the technical errors cited by the court below, and thus could have been summarily adopted pursuant to 29 *Del.C.* §10113(b)(4), DNREC voluntarily chose to utilize the formal procedures for notice and a public hearing under the APA.

> particularly in the new provision whereby Sediment & Stormwater Plans may be approved using methods not contained in the TD if they provide "functional equivalency" to achieve the necessary environmental protection from urban stormwater runoff, which also poses a significant risk to public health and safety. Regulation 5101, as approved in the 2013 Order, was a comprehensive change to the sediment and stormwater regulation in Delaware after years of meetings and discussions with all interested participants." *Id.*

By Order of the court below, the lawsuit challenging the adoption of the curative amendments was consolidated with the original lawsuit. At the direction of the court below, the Appellees filed affidavits reflecting their respective backgrounds in land development, investments, construction, and politics. These affidavits generally recite the process of submitting plans and seeking permits with regulating authorities, and the engineering, design, and building costs necessary to achieve compliance. However, at no time did any Appellee cite an adverse experience with any version of the Regulations, or an unlawful application of the Regulations, that caused harm, prejudice, or other grievance. Nor have the Appellees, in the face of repeated demands from the Appellants, ever cited a concrete example of how the application of the Regulations, in conjunction with the TGD, could cause harm to them or to their business interests, in seeking plan approval. There is no evidence that any of the Appellees have submitted plans for approval, since the effective date of the revised Regulations, nearly two years ago. Nor has any Appellee cited an alleged misuse of the TGD under the prior version of the Regulations, over more than twenty years. The factual record is silent, other

than conjecture and hyperbole, as to how a regulated party would sustain damages as a result of the process mandated by law to reduce and contain the volume of erosion and stormwater runoff, and to protect water quality.

ARGUMENT

I. THE APPELLEES WERE NOT AGGRIEVED BY THE ADOPTION OF NEW SEDIMENT AND STORMWATER REGULATIONS, NOR DID THEY SUFFER PREJUDICE OR INJURY IN FACT, AND THEY THEREFORE LACK STANDING TO CHALLENGE THE REGULATIONS

A. Question Presented.

Can any of the Appellees claim standing as "aggrieved persons" to challenge the lawfulness of duly-enacted regulations?[22]

B. Scope of Review.

This Court held in *Nichols v. Coastal Zone Ind. Control Bd.,* 74 A.3d 636, 644 (Del.2013) that a person seeking to appeal to the Environmental Appeals Board from a decision of the DNREC Secretary much first show that they were "aggrieved" by the Secretary's action. *Compare* 7 *Del.C.* §7007(b). The identical test for standing applies here, under 29 *Del.C.* §10141, which requires that a person seeking to challenge the lawfulness of a regulation may bring an action for declaratory relief only if they are "aggrieved".

C. Argument.

The Court below erred as a matter of law in accepting the mere potential for harm as sufficient to convey standing on persons not citing adverse experiences with the regulatory process, when the applicable standard is higher, and requires a

[22] This question was preserved in the trial court through the Appellants' Motion to Dismiss that was denied by the Court, D.I. #10, and in the Answer raising standing as an affirmative defense, D.I. #11.

showing that appellees have sustained actual harm. The General Assembly set the same threshold for standing in appeals of regulations under the Administrative Procedures Act, 29 Del.C. §10141(a), as it did for appeals from decisions of the Coastal Zone Industrial Control Board, as in *Nichols*, *supra.* It was improper for the court below to "ignore" the holding in *Nichols,* Opinion at 11, as the General Assembly set identical "aggrieved person" tests for appeals of case decisions and regulations, and made no such distinction.

The Appellees, much like the plaintiff in *Nichols,* have failed to present evidence of any legally-protected interest that has been or will be injured by the revised Sediment and Stormwater Regulations. *Nichols, supra*, at 644. There is no evidence that DNREC has denied their permit applications in the past, or even that they have any projects pending approval. They have failed to articulate any instance of how the TGD would or could be applied to them, in a way that would undermine the Regulations, or unfairly prejudice an application. Nor have they shown how a particular project or plan has been subjected to "unlawful" use of the Regulations or the TGD. Their affidavits blandly cite generic design, engineering, and construction costs attributable to compliance with the erosion and sedimentation law, without attributing any such costs to improper application of the TGD. The revised Regulations have been in effect for nearly two years, and the Appellees fail to assert any example of harm or prejudice suffered from their

enforcement. The prior erosion and sedimentation regulations were also applied in conjunction with supporting technical guidance materials, in the manner that forms the basis for the Appellee's current objections, yet they cite no adverse experience with these prior regulations. They seek an advisory opinion from the Court on a theoretical issue.

It is not sufficient for Appellees to claim merely that they "own property which they intend to develop and which would be controlled by the regulations", or that one "is a contractor who is subject to the regulations when he performs his work". Opinion at 18. More is required. Nor is standing conveyed on members of the "likely affected public". Opinion at 19. As this Court observed in *Oceanport Ind. v. Wilmington Stevedores Inc.*, 636 A.2d 892 (Del.1994), the General Assembly has adopted an appeals standard requiring a heightened interest, limiting the right of appeal to those actually affected by the Secretary's decision. *Id.* at 904. The legislature did not intend to open the floodgates to anyone who merely claimed an interest in the matter – such as Appellees here. *Id.* A failure to require proof of an "injury in fact" would result in an unworkable administrative structure. *Id.* It would be bitter irony for the Court to open those floodgates in a case involving stormwater regulations.

The court below expressed concern, Opinion at 18, that application of the "aggrieved person" standard mandated by the Administrative Procedures Act and

Nichols would deprive plaintiffs of the ability to challenge new or newly-amended regulations prior to enforcement. There are three reasons why that concern should not be present here. First, the Administrative Procedures Act specifically reserves the right of parties defending enforcement actions to raise the lawfulness of the applicable regulation, as an affirmative defense. 29 *Del.C.* §10141(d). This preserved defense for "as applied" regulations is a stated exception to the limitation period set forth in §10141(d). If any of the Appellees would actually experience harm as a result of the application of the Regulations or the TGD, at any future point, that person would have the absolute right to defend an enforcement action by raising the issue of lawfulness of the regulation.

The second reason why the "aggrieved person" threshold should not be abandoned here is that the interplay between the regulations and the supporting technical materials did not originate with the comprehensive amendments adopted in 2013. DNREC had published a handbook for stormwater permits and had accumulated thousands of pages of guidance materials to aid applicants in complying with the prior regulations. If in fact this interplay had caused harm to the Appellees or other regulated parties, it would be fair to expect that such instances would be cited, or that such "aggrieved persons" would be added as plaintiffs. Indeed, the revised Regulation have been in effect since January 1, 2014, nearly two years, yet not a single instance of "unlawfulness" has been cited.

The record is silent as to any such instances of harm under any version of the Regulations. The trial court was not free to assume that such harm would occur, in the absence of such evidence. The prevailing standard simply does not allow for hypothetical challenges.

Finally, if the goal of Appellees was truly to seek pre-enforcement review of the Regulations, they could have sought a stay, pursuant to 29 *Del.C.* §10144. That statute affords such plaintiffs the ability to delay enforcement, by showing in a preliminary hearing by the trial court that the issues presented are substantial, and that a stay is required to prevent irreparable harm. *Id.* The Appellees failed to pursue this step, despite an interval of five months between the final publication and effective date of the Regulations. In fact, they lacked evidence of irreparable harm, as they had not been aggrieved by the former or pending Regulations.

The rationale of *Oceanport*, *supra,* and the test set forth in *Assoc. of Data Processing v. Camp,* 397 U.S. 150 (1970), were properly applied in *Nichols*, *supra*. Given that the statutory standard applicable to this appeal is identical, the same test should be applied here. The Appellees have failed to demonstrate why they should be exempted from the application of the prevailing test for standing. Their affidavits contain mere speculation and conjecture, and lack concrete examples of harm sustained, and thus are woefully insufficient to establish injury in fact. In fact, Appellees have not been injured by the enactment of the revised Regulations,

and claim no injury from the prior regulations. The trial court should have dismissed their lawsuit(s) on that basis, for failure to comply with the "aggrieved person" standard.

II. THE NEW REGULATIONS WERE PROPERLY ADOPTED, AND FORMAL ADOPTION OF SUPPORTING ADVISORY MATERIALS WAS NOT REQUIRED

A. Question Presented.

Is an agency required under the Administrative Procedures Act to formally adopt as regulations supporting technical guidance materials, handbooks, templates, sample plans, and other similar materials that it does not intend to use for purposes of enforcement or to deny permits?[23]

B. Scope of Review.

Review of agency regulations under the Administrative Procedures Act is controlled by 29 *Del.C.* §10141(a), which provides first that the agency action shall be presumed to be valid, and that the complaining party shall have the burden of proof. Second, the plaintiff must prove either [1] that the action was taken in a substantially unlawful manner *and* the complainant suffered prejudice as a result; or [2] that the regulation was adopted without a reasonable basis in the record or is otherwise unlawful. Finally, the Court in making factual determinations must "…take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency acted." *Id.*

C. Argument.

[23] This question was preserved in the Appellants' Motion for Judgment on the Pleadings, D.I. #12, and Motion for Summary Judgment, D.I. #27.

The Appellees have failed to carry their burden of proof under the APA, and have not overcome the presumption of validity accorded the revised Regulations adopted in 2013 and in effect since January 1, 2014. They have not shown that the process of adoption of the Regulations, beginning in 2006, was "substantially unlawful"; nor have they shown that they have personally suffered prejudice as a result. Both prongs are required, and neither has been proved. Rather, the Appellants have demonstrated that the Regulations were adopted based on a detailed record developed over seven years of workshops, public hearings, comments, revisions, and committee review. The court below erred in failing to grant summary judgment to the Appellants.

The court below invalidated the Regulations based on the statement that "[a]s a practical matter, a party cannot draft a plan for dealing with sediment and stormwater without any reference to the [TGD] and expect to win approval thereof." Opinion at 24. While that statement would be true in many, if not all, instances, *reference* to supporting materials should not be conflated with mandatory *compliance* – which is not required by the Regulations. The court below erred in "cherry-picking" language from the TGD out of context, and concluding that the TGD set standards and criteria for compliance. That is not the case. It is the Regulations alone that set standards and criteria for limiting stormwater flow, erosion, and sedimentation. The TGD is a reference sets forth

proven ways that a regulated party may achieve compliance, by following detailed plans, or templates, that have gained approval in the past. This approach is no different from providing Bar applicants with questions and answers from past Bar Exams as a study guide. The Bar Examiners are not saying that the sample answers are the only acceptable way to respond. They are suggesting that following a proven approach may well be the easiest path to acceptance. As with the Regulations, there are other acceptable paths to compliance. The templates are not mandatory. The TGD does not foreclose alternative approaches, and in fact the Regulations, as amended, encourage innovation.

Chapter 40 of Title 7 of the Delaware Code, entitled "Erosion and Sedimentation Control", was originally enacted and effective on July 12, 1978. 61 Del.Laws Ch. 522 (1978). In amending the Chapter, effective June 15, 1990, 67 Del.Laws Ch. 234 (1990), the General Assembly made extensive findings, §4001(a), and broad statements of policy, §4001(b), and mandated a statewide stormwater management program. §4006(a). DNREC was tasked to cooperate with appropriate State and federal agencies, conservation districts, governmental subdivisions, and the regulated community, to develop a program taking into consideration water quantity and quality, integrating the existing erosion and sediment control programs to create a statewide sediment and stormwater program.

The Legislature gave DNREC broad and specific authority to enact regulations. 7 *Del.C.* §4006(c).

The General Assembly also gave DNREC the specific authority to "develop and publish, *as regulation components*, minimum standards, guidelines and criteria for delegation of sediment and stormwater components…." 7 *Del.C.* §4006(b)(2) (emphasis added). The agency was further given authority to "provide technical and other assistance to districts, counties, municipalities and state agencies in implementing this chapter". 7 *Del.C.* §4006(b)(1). The agency was also tasked to review the implementation of delegated components of the program, to require sediment and stormwater management provisions in all new plans, to cooperate with other agencies, to conduct research studies and educational programs, to obtain records and reports, and to review and approve designated watersheds.

The court below referenced as "seminal" the case of *Metromedia, Inc. v. Director, Div. of Taxation*, 478 A.2d 742, 749 (N.J.1984), which can readily be distinguished. The government agency attempted to implement a tax statute through a formula supported by *no regulation whatsoever*. The distinct issue there was whether the *ad hoc* assessment of taxes on radio stations was a case decision, rather than an exercise of regulatory authority. The court attempted to distinguish rulemaking from adjudication. The divided court found as a policy matter that

such formulations satisfied the criteria for regulations, and ought properly to be adopted pursuant to New Jersey's Administrative Procedures Act.

The Appellants have no quarrel with this result. The Appellees can take no comfort from it. In the case at bar, the record reflects that the adoption of the comprehensive amendments to the Sediment and Stormwater Regulations followed a rigorous and fully-transparent path, with full public participation, as mandated by both the Delaware APA and Title 7. Unlike the New Jersey Director of Revenue, the DNREC Secretary does not make *ad hoc* determinations on construction or development permits. The criteria set forth in these Regulations are detailed, such that the Handbook and the Technical Guidance Document have proven useful over the years as references to assist builders and developers in finding ways to comply and proceed with permits for their projects.

A New Jersey decision that is on point and should be persuasive authority is *In re NJDEP Adm. Order No. 2007-01,* 2009 WL 2391983 (N.J.Super.A.D., Aug. 6, 2009). The Court held that a Guidance Document issued by the New Jersey Department of Environmental Protection in support of stormwater management regulations was exempt from the rulemaking requirements of the state Administrative Procedures Act. The document in question provided written guidance concerning permissible encroachment into a shoreline buffer zone required to protect sensitive waters. In it the agency set forth an assessment

methodology that established a two-step process to determine maintenance, to the maximum extent practicable, of the functional value and overall condition of a Special Water Resource Protection Area. *Id.* at 4. The Court rejected the claim, identical to that made by present Appellees, that the Guidance Document improperly amended established rules or departed from established policy.

The New Jersey Court found that an agency, in fulfilling its statutory mandate, may choose between formal action, such as rulemaking or adjudication, and informal action, provided the choice complies with due process requirements and the APA. *Id.* The Court relied on the fact that the New Jersey legislature, like the Delaware General Assembly, specifically authorized the agency to develop and publish technical manuals in support of stormwater regulations. *Id.*at 5; *compare* 29 *Del.C.* §4006(b)(1) and (2).

The Delaware case cited by the court below as "remotely on point", *Free-flow Packaging Int., Inc. v. DNREC*, 861 A.2d 1233 (Del.2004), is consistent with the New Jersey authority in disagreeing with the premise that "all of what an agency does must culminate in a regulation or a case decision". *Id.* at 1236. This Court recognized that, apart from case decisions and regulations, government agencies carry out many other functions. Particularly where the agency implements a specific and detailed statutory directive, it may operate outside the scope of the APA. *Id.* DNREC, in issuing the Technical Guidance Document in

support of Sediment and Stormwater Regulations, was carrying out such a statutory directive, a function other than a case decision or a regulation, and exactly the same function as that of NJDEP in publishing a Guidance Document in support of stormwater regulations. Under the *Metromedia* test in New Jersey, and the guidance of *Free-flow* in Delaware, the materials published for guidance were not subject to formal adoption.

The legal standards and criteria governing stormwater management are expressly, clearly, and obviously set forth in the statute, 7 *Del.C.* Chapter 40, and the Regulations, and are not contradicted by the examples and templates provided by the TGD. These materials do not prescribe a new legal standard "that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization". *In re Freshwater Wetlands Statewide General Permit*, 80 A.3d 1132, 1152 (N.J.Super.A.D.2013). Not do these supporting materials reflect a new administrative policy "not previously expressed in any official or explicit agency determination", or constituting "a material and significant change from a clear past agency position" on the issue. *Id.* The supporting materials are entirely consistent with the stormwater policy enunciated by the legislature, and with the Regulations implementing that policy. They do not represent a departure from either. These materials do not express a general DNREC policy or interpretation of the law. *Id.* That is the job of the statutory

enactment of the General Assembly and the duly enacted Regulations, and there is no showing that the technical guidance materials have not been applied in harmony with the Regulations and Chapter 40.

It should also be noted that the variance procedures available to permit applicants in Delaware are consistent with the use of the TGD to interpret the Regulations. If the Secretary finds that good faith efforts to comply (including alternative procedures or interim control measures) have been made, and that the cost of compliance through necessary technology or alternative methods is disproportionately high, a variance may be granted, where continued operation is deemed essential and not harmful. 7 *Del.C.* §6011. With respect to stormwater control, the TGD would provide the basis for a permit applicant to make the required showing for a variance from the Regulations.

The Sediment and Stormwater Regulations, at Section 2.05, set forth in detail the process for regulatory interpretation, and for variances. The Rule spells out how DNREC will provide technical assistance to the governmental entities such as conservation districts, municipalities, counties, and other State agencies charged with implementing the provisions of Chapter 40 of Title 7, by developing standards, guidelines, and criteria for interpretation of the Regulations, pursuant to 7 *Del.C.* §4006(b)(1) and (2). The Rule sets forth straightforward procedures for local review and interpretation by a delegated agency, with the option of DNREC

informal and formal review of questions arising from issues with regulated parties submitted by local governments, as well as resolution of professional judgment disputes between professional consultants and delegated agencies, and alternative compliance review requests. An owner, contractor, or developer who cannot achieve compliance with the Regulations by following the forms, templates, or guidelines found in the TGD may propose an alternative method of compliance, and seek review by DNREC or the delegated agency, through an e-mail, memorandum, or plan review comment correspondence. 7 Del.Admin.C. §5101-2.05-2. If the applicant is not satisfied with the outcome of the review, the variance process is a further option, pursuant to 7 *Del.C.* §6011.

Contrary to the contentions of the Appellees, who cite no examples to the contrary, the Regulations thus incorporate the TGD in a way that does not mandate a single approach to regulatory compliance, but rather encourages review and alternative approaches and strategies to achieve what the statutes and the Regulations require. Note that this is far from the rigid, top-down process that Appellees (without reference to any actual adverse experience) imagine. Rather, it is a flexible, bottom-up approach that fosters cooperation with the delegated agencies and with developers, builders, and contractors submitting plans and seeking construction permits.

III. THE 2014 AMENDMENTS TO THE REGULATIONS CLARIFIED THAT THE SUPPORTING TECHNICAL ADVISORY MATERIALS WERE NOT REGULATIONS, WERE NOT MANDATORY, AND WOULD NOT BE USED FOR PURPOSES OF ENFORCEMENT OR DENIAL OF PERMITS, THUS REMOVING ANY QUESTION AS TO INTERPRETATION OR RISK OF HARM

A. Question Presented.

Where a state agency has issued curative amendments to regulations, in direct response to judicial review in a pending case, should such amendments be considered for purposes of interpreting the revised regulations and determining lawfulness?[24]

B. Scope of Review.

The standard for review of the curative amendments to the Sediment and Stormwater Regulations is as set forth in Section B of Argument II above.

C. Argument.

This case presents an example of the checks and balances inherent in the separation of powers mandated by the Delaware Constitution. The legislature adopted a comprehensive policy of stormwater management, 7 *Del.C.* Ch. 40, and conferred discretion on the executive branch, through the cabinet secretary, to implement the statutory scheme through regulations. The secretary, after workshops, hearings, and extensive committee review, created and subsequently revised a permitting process through regulations. The judicial branch then

[24] This question was preserved in Appellants' Motion for Summary Judgment, D.I. #73-75.

expressed reservations as to the interrelationship of duly adopted regulations and supporting technical materials, not formally adopted. In response, the secretary revised the regulations in a way that recognized the specific criticisms rendered by the court below, removing ambiguity as to the role and scope of the supporting materials for purposes of permits and enforcement. A potential problem was identified in the context of litigation, and promptly (relative to the constraints of formal administrative procedure) repaired. The goal sought by the complainants was achieved, and further litigation should have been avoided. Yet in this case, no good deed goes unpunished. The Appellees, having achieved what they originally sought, promptly filed suit, again. Such irresponsible conduct should not be rewarded.

The New Jersey Court, in *In re N.J.A.C. 7:1B-1.1, supra*, took issue with that state's attempt in its briefing to "rehabilitate its web postings…by asserting additional explanations in its brief." *Id.* at 645. "An appellate brief is no place for an agency to try and rehabilitate its actions." *Id.* Agreed, that no amount of legal argument can change the language of a regulation to which a court has taken exception. However, an agency may take appropriate action, under the APA, to clarify through amendment language called into question by a court. And, where the facial challenge to the Rules as a whole does not rely on a particular incident or violation, the amendment, when final, may be considered prospectively by the

Court. At all times the challenge in this case has been to the Regulations as promulgated, rather than as applied. To the extent that DNREC's position has been enhanced through clarification, the amended Rules would be the basis for decision.

In its July 7, 2014 letter to counsel, the court below cited nine sections of the Sediment and Stormwater Regulations as containing "mandates regarding compliance with the Technical Document and Handbook". The provisions cited, Sections 1.5.3, 1.7.3, 1.14, 3.11.2, 4.1, 4.5.2, 4.5.3, 5.1, and 6.1.2, have been amended to remove language that could be construed as mandating compliance with supporting materials that were intended to be advisory and to provide guidance, rather than establish mandates. The proposed amendments reinforce the arguments set forth herein, that reflect the practice of the agency in applying the Regulations since 1991, in conjunction with the technical guidance materials and the handbook, without complaint from an aggrieved party.

The Appellees alleged below that the process utilized by DNREC for the adoption of the curative amendments was deficient. This allegation is based on a misapprehension. The curative amendments dealt only with the wording of a handful of provisions, nothing more, for purposes of clarification. As set forth in the official record, the intent of the amendments was limited to curing ambiguities

perceived by the Court. As was clear from the start, there was no intent to undertake a comprehensive revision of the Regulations.

DNREC, acting prudently and with transparency, observed the requirements of the APA for the adoption of amendments to regulations, despite the fact that the curative amendments were exempt from the procedural requirements of the APA, and could have been adopted informally. *See* 29 *Del.C.* §10113(b)(4),(5),(6). The record reflects that the curative amendments were properly noticed, and that a public hearing and comment period occurred before formal promulgation and publication. 29 *Del.C.* §§10115, 10116, 10117, 10118.

Chapter 40 of Title 7 tasks DNREC with developing a state stormwater management program, in conjunction with appropriate state and federal agencies, conservation districts, other governmental subdivisions of the State, and the regulated community. 7 *Del.C.* §4006(a). The stormwater management program is integrated with the amended state erosion and sediment control program to create a sediment and stormwater program. *Id.* This is the process undertaken by DNREC beginning in 2006, which culminated in the adoption of the plan and integrated program effective January 1, 2014. That process included the elements set forth in 7 *Del.C.* §4006(c), namely a regulatory advisory committee and the participation of regulated parties, governmental agencies, and interested members

of the public in workshops and hearings, prior to formal adoption of the sediment and stormwater plan.

The record offers no support for Appellees' claim below that the curative amendments constituted the implementation of a new state stormwater management program, pursuant to 7 *Del.C.* §4006(a). Such a program was implemented by the previous wholesale changes to the existing regulations over more than seven years, taking effect on January 1, 2014[25]. Mere curative amendments to the existing plan do not require the participation of a regulatory advisory committee or public workshops, as even a cursory review of Chapter 40 of Title 7 would make clear. The curative amendments did not change any of the criteria set forth at §4006(c), nor did DNREC modify any of the actions set forth at §4006(b). Given this very limited scope, and the lack of any changes of substance, the curative amendments were not governed by §4006(c). The curative amendments were instead governed by §4006(d), which specifically permits such amendments. The public hearing mandated by §4006(d) was indeed held, as reflected in the official record. Thus, the procedural requirements for the adoption of the regulations were fully satisfied, and the curative amendments are not subject to collateral attack on procedural grounds.

[25] The recent amendments added the correct effective date of January 1, 2014 for the previous amendments, replacing language reading "on the effective date" for purposes of clarity. The curative amendments themselves took effect on November 11, 2014.

Under the APA, supporting and background materials are exempt from the procedural requirements for regulations, and may be adopted informally. 29 *Del.C.* §10113(a). As the curative amendments made clear, the TGD fulfills the purposes set forth at §10113(b)(1),(2),(3), and (6), in that the materials now posted online include a description of DNREC operations and procedures for obtaining information, rules of practice and procedure used by the agency in reviewing applications, delegation of authority to conservation districts and municipalities, and a collection of principles derived from past decisions. DNREC's publication of the TGD more than fulfills the APA option of informal adoption.

In particular, useful material from prior decisions and rulings is collected and regularly updated to reflect changes in approach by regulated parties. Any question as to the binding nature of such material was laid to rest by the curative amendments proposed, consistent with §10113(4) and (5), but nevertheless formally adopted at the option of DNREC. The TGD provides a useful roadmap for developers and contractors seeking to comply with the Regulations, but the regulated parties are free to pursue their own road to compliance, through functionally-equivalent plans of their own design.

The language revised through the curative amendments was intended to alleviate the concerns of the court below, and to eliminate ambiguity and doubt as to the regulatory approval process. It was not intended to change prevailing

practice, wherein DNREC provided through the TGD examples and templates through which to satisfy the standards and criteria set forth in the Regulations. There has been no showing - not a single case or example cited - to support the notion that DNREC has or could use the Technical Document to deny a permit. Nevertheless, DNREC has taken the extraordinary step of clarifying its past practice and confirming that no part of the TGD will be used to trigger a mandatory duty of compliance with the Regulations. The Appellees' argument has thus lost its underpinnings. DNREC has acted in good faith to rectify a perceived problem. Any risk of confusion or misapplication has been removed. The perceived defects in the text of the Regulations have been cured.

CONCLUSION

The interplay of the Sediment and Stormwater Regulations, old and new, with supporting technical advisory materials violates no law, and has caused no demonstrable harm to any regulated party. The 2013 revision of the Regulations did not change this relationship. The amended Regulations were duly adopted pursuant to the Administrative Procedures Act and the added mandates of Title 7, for a regulatory advisory committee comprised of members of the regulated community and other affected persons, holding public workshops and hearings. The technical materials continue to be posted online by DNREC as a reference, and are updated periodically to reflect new templates and options for achieving compliance and for obtaining approval of plans. The handbook and sample plans provide assistance to regulated parties in designing projects that would conform to the mandates of the Regulations. As these advisory materials do not mandate compliance, formal adoption was not required under the Administrative Procedures Act.

The 2014 amendments to the Regulations had the sole purpose of clarifying that the technical support documents did not define mandatory standards and criteria, did not require compliance, and would not be used as a basis for enforcement or denial of plans. Regulated parties were encouraged to pursue innovative measures that were substantially equivalent to the templates provided in

the technical support documents, in order to comply with the Regulations themselves. The Appellees have failed to show any instance in which the technical support materials were used by DNREC to deny plan approval or to supplant the Regulations. Nor have the Appellees demonstrated that the Regulations were improperly adopted or applied or enforced. Mere abstract speculation is insufficient to establish harm, injury, or prejudice. The Appellees have failed to meet their burden of showing how the Regulations could be misapplied by reference to the technical support materials. The trial court erred as a matter of law in granting summary judgment to the Appellees, and, as there are no issues of fact to preclude judgment, the trial court should be instructed to enter judgment for the Appellants.

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Dated: December 3, 2015

TRIAL COURT'S JUDGMENT AND RATIONALE

The appeal seeks reversal of the Opinion and Order of the Superior Court (A21-66), in and for Sussex County, the Honorable T. Henley Graves, in C.A. No. S13C-08-26 (THG), issued on October 7, 2015, and attached hereto.