IN THE SUPREME COURT
OF THE STATE OF DELAWARE

SIERRA CLUB and DELAWARE AUDUBON, Appellants and Cross-Appellees below, Appellants, v. DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL, and DELAWARE CITY REFINERY CO., LLC, Appellees and Cross-Appellants below, Appellees.	)	No. 216, 2015 Appeal from Superior Court's Decision dated March 31, 2015, in C.A. Nos. N13A-09-001 and N14A-05-002

ANSWERING BRIEF OF APPELLEE DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

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NATURE OF PROCEEDINGS

This is an appeal of a decision by the Superior Court holding that the statutes creating the Environmental Appeals Board ("EAB") and the Coastal Zone Industrial Control Board ("CZICB") do not confer on them power to review two appeals filed by the Sierra Club and Delaware Audubon ("Appellants"). The dispute arises from an application to amend an air permit filed by Delaware City Refining Company LLC ("DCRC") with the Delaware Department of Natural Resources and Environmental Control ("DNREC"). At a public hearing on the application pursuant to the Environmental Control Act, 7 *Del. C.* § 6001 *et seq.* ("Chapter 60"), the Sierra Club raised concerns relating to the Coastal Zone Act, 7 *Del. C.* § 7001 *et seq.* ("CZA"). In an order granting the application dated May 31, 2013 (the "Air Permit Order" or "Order"), DNREC Secretary Collin P. O'Mara responded to the CZA concerns but did not require a CZA proceeding.

On June 14, 2013, Appellants filed appeals in both the EAB and the CZICB, citing only CZA issues. On August 13, 2013, the CZICB dismissed its appeal for lack of standing. On April 8, 2014, the EAB dismissed its appeal for lack of subject matter jurisdiction. Appellants appealed both decisions to the Superior Court, which affirmed the decisions on grounds of lack of subject matter jurisdiction on March 31, 2015.

SUMMARY OF ARGUMENT

1. **Denied.** As this Court held in *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.* ("*Oceanport*"), "no party has a right to appeal unless the statute governing the matter has conferred a right to do so."[1] This appeal is about whether the General Assembly (1) in enacting the CZA, conferred upon the CZICB power to review decisions under Chapter 60, and (2) in enacting Chapter 60, empowered the EAB to review CZA objections.

2. **Denied.** The Superior Court correctly held that the CZA does not confer upon the CZICB jurisdiction to review a decision by the Secretary in a Chapter 60 proceeding. The CZA empowers the CZICB to review only the Secretary's decisions on CZA status requests and permit requests, not the Secretary's responses to public comments on the CZA in non-CZA proceedings.

3. **Denied.** Chapter 60 does not confer upon the EAB power to review CZA issues. The Superior Court correctly held that this Court's decision in *Oceanport* is "on point and controlling" in confirming that "the EAB does not have authority to consider appeals that center on CZA objections." A447-448.[2] Appellants misconstrue Chapter 60 and *Oceanport* in arguing to the contrary.

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1 636 A.2d 892, 900 (Del. 1994).

2 Appellants' Appendix is cited herein as "A[page number]."

STATEMENT OF FACTS

A. The Refinery, the Docking Facility, and the Rail Operation

DCRC owns and operates an oil refinery located on a 5,000 acre site approximately one mile from Delaware City (the "Refinery"). At the east end of the Refinery, on the Delaware River, lies a docking facility with three piers. The Refinery and its docking facility have been in operation since approximately 1956, well before the adoption of the CZA in 1971. A003.

To the west of the Refinery lies a rail operation by which North American crude is delivered to the Refinery. A046. Pursuant to a registration statement filed with DNREC in 2012, DCRC installed a rail loop, an offloading rack, and piping to receive crude and send it to storage tanks at the Refinery. A046-047. These alterations have not resulted in any increase in the throughput rate for processing at the Refinery. A048.

B. The Air Permit Application and the Secretary's Order

In 2012, DNREC was advised that DCRC would be making additional improvements at the Refinery and seeking a related air permit amendment. A256-258. On December 18, 2012, DNREC met to discuss issues relating to the Refinery, including proposed pump and piping modifications to accommodate the shipment of crude from its docks to a related refinery in New Jersey. A013. After discussion, DNREC staff determined that the proposed operation was not

prohibited by or subject to permitting requirements under the CZA. A013.[3] In January 2013, when DNREC's air quality management section received an initial air permit draft, DNREC's CZA staff confirmed that the proposal would not require a CZA status decision.[4]

On March 21, 2013, DCRC filed an application to amend its Unit 15 Marine Vapor Recovery System Operating Permit at the Refinery to allow for the control of displaced vapors occurring during the loading of crude oil from existing piers onto marine vessels (the "Air Permit Application"). A001. On April 8, 2013, DNREC published notice of the Air Permit Application and invited public comment. A008. On May 8, 2013, a DNREC hearing officer presided over a hearing at which public comments were received. A representative of the Sierra Club requested that the permit be rejected for several reasons including that a CZA permit had not been required. A011. On May 29, 2013, the hearing officer issued a report addressing the concerns raised at the public hearing, including the CZA concern, and recommending issuance of the permit. A008-015.

On May 31, 2013, Secretary O'Mara issued his Order approving the air permit amendment. A001-007. As to Chapter 60 issues relating to air quality, the

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3 *See* CZICB Record, Coastal Zone Appeal 2013-1, Chronology, Tab 1 (DNREC emails noting "considerable discussion" of possible CZA issues relating to DCRC proposal).

4 *Id.*

Secretary found that the modifications proposed would reduce the annual release of volatile organic compounds by almost 50 percent from the prior permit's authorized level. A002-003. The Secretary also responded fully to the CZA objection, explaining why the permit application did not require CZA review. A006.[5] While he agreed with DNREC staff's determination in December 2012 not to require an application for a CZA status decision or permit at that time, the Secretary directed that DCRC "request a Coastal Zone Status Decision if future physical or operational changes are intended or implemented." A006-007.

C. The Appeals to the EAB and the CZICB

On June 14, 2013, Appellants filed appeals from the Secretary's Order with both the EAB and CZICB, challenging only the Secretary's response to their CZA objection at the Chapter 60 hearing.[6] Appellants claimed that the CZICB was the "appropriate forum to determine the applicability of the CZA to a particular activity." A031. However, they admitted that "because the Order is not on an

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[5] The Secretary's responses were consistent with his general practice of responding to public concerns raised at Title 7 hearings. *See* A261-262 (testimony of Secretary that "[o]ne of the things that we've worked hard on over the last few years is making sure we are taking public comments seriously, and respond[ing] to them in the documents and not leaving questions unanswered"); and A266 ("Any time there . . . are public comments that are raised, they're usually because folks have legitimate concerns. And so we wanted to make sure those concerns were addressed and stated in a public way. So we . . . basically share our thinking with the members of the public that asked the question during the hearing").

[6] *See* EAB Appeal at A031 ("The Appellants are challenging only the portions of the Order in which the Secretary ruled on the status of the crude oil transfer operation under the Coastal Zone Act."); *see also* A030 (CZICB Appeal).

application for a status decision or a permit under the CZA," a "question . . . could be raised" as to whether CZA empowered the CZICB to review a decision in a Chapter 60 proceeding. A031. They stated that the EAB appeal was "a prophylactic measure," claiming that the EAB had jurisdiction because the Order was an "action by the Secretary" under § 6008 of Chapter 60. A031.

At a public hearing on July 16, 2013, the CZICB first addressed motions to dismiss for lack of subject matter jurisdiction filed by DNREC and DCRC. The members present voted 4-3 to grant the motions to dismiss, but the Chair concluded that the votes of at least five members were required to carry the motions. A389-390. After a full evidentiary hearing, the CZICB unanimously voted to dismiss the appeal for lack of standing. A402-405. On August 13, 2013, the CZICB issued a written decision setting forth its rulings. A384-406.

In the EAB appeal, DNREC and DCRC filed motions to dismiss for lack of subject matter jurisdiction over CZA issues. Following oral argument on January 13, 2014, the EAB unanimously granted the motions. In its written decision dated April 8, 2014, the EAB explained that Appellants' "expansive view" of its jurisdiction "would effectively confer jurisdiction over CZA matters on this Board, something the General Assembly has not done by statutory enactment." A425. The EAB also held that this Court's decision in *Oceanport* is "binding and

determinative" with respect to its jurisdictional limitations. A428. Noting that, under *Oceanport*, "a remand from [the EAB] to the Secretary to make a determination as to CZA applicability to a Chapter 60 permit is legally improper," the EAB reasoned that "if this Board cannot even remand the case to the Secretary due to its jurisdictional limitations then it certainly cannot hear the case on the merits to make the determination itself." A428-429.

D. The Superior Court's Decision

Appellants filed appeals in the Superior Court from the decisions of the CZICB and the EAB, and DNREC and DCRC filed cross-appeals in the CZICB case seeking affirmance on the alternative ground of lack of subject matter jurisdiction. The Superior Court consolidated the cases, considered extensive briefing and oral argument, and issued its decision on March 31, 2015.

Addressing first the question whether the EAB lacked jurisdiction over the appeal before it, the Court found that "the EAB properly relied upon the Supreme Court's decision in *Oceanport* as applicable and binding legal precedent." A447. *Oceanport* held that it was "legal error" to instruct the EAB to act on issues arising under the CZA. A447-448. Therefore, the Superior Court held, "[t]he *Oceanport* decision makes it clear that the EAB does not have authority to consider appeals that center upon CZA objections." A448.

Turning next to the issue of CZICB jurisdiction, the Superior Court held that the CZA empowers the CZICB to review decisions by the Secretary on requests for CZA status decisions and permits only. A448-449. Alluding to the Secretary's authority to determine whether to require an application for a status decision, the Court held 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 Decision." A450. Without reaching the issue of standing, the Superior Court affirmed the CZICB decision on the alternative ground of lack of subject matter jurisdiction.

ARGUMENT

I. THE EAB LACKS JURISDICTION OVER CZA ISSUES.

A. The Question Presented[7]

Whether the Superior Court correctly held that the EAB lacks subject matter jurisdiction over an appeal of a decision of the Secretary that raises only CZA issues.

B. The Scope and Standard of Review

The issue of subject matter jurisdiction is reviewed *de novo*.[8]

C. The Merits

The Superior Court, like the EAB, correctly held that the EAB lacks jurisdiction to review an appeal challenging only that portion of a decision of the Secretary in a Chapter 60 proceeding responding to public comments relating to the CZA. A446-448; A427-429. The relevant provisions in Chapter 60 and the Title 7 statutory scheme demonstrate the absence of such jurisdiction. Also, as the Superior Court recognized, this Court's decision in *Oceanport* is "on point and controlling" in holding that "the EAB does not have authority to consider appeals that center on CZA objections." A447-448.

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[7] As did the Superior Court, DNREC first addresses the question of whether the EAB has subject matter jurisdiction over CZA issues, and then the scope of CZICB jurisdiction under the CZA.

[8] *Oceanport*, 636 A.2d at 899, 907.

1. Section 6008 of Chapter 60 Does Not Authorize the EAB to Act on Issues Arising under the CZA.

Appellants erroneously claim that § 6008(a) of Chapter 60 permits the EAB to review "any action" of the Secretary so long as the party seeking review has standing and the appeal relates to an action of the Secretary.[9] Appellants' argument should be rejected because the "any action" phrase must be read in context. As the EAB recognized, because that tribunal is "created under – and derives its jurisdictional authority from – Chapter 60," the phrase "any action" is "limited to actions arising" under Chapter 60. A425. The phrase "any action" must be understood in the context of Chapter 60 because, as this Court has explained, "[t]he General Assembly passed [Chapter 60] as a whole and not in parts or sections. Consequently, each part or section should be read in light of every other part or section to produce a harmonious whole."[10]

Chapter 60 sets forth in logical progression a permitting process to regulate the use of air and water resources, the Secretary's authority to administer that process, and the EAB's jurisdiction to review decisions of the Secretary on issues

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[9] Appellants' Opening Brief ("OB") 24-25, citing 7 *Del. C.* § 6008(a) ("Any person whose interest is substantially affected by any action of the Secretary may appeal to the [EAB] . . . .").

[10] *Oceanport,* 636 A.2d at 900 (referring to Chapter 60 and Chapter 72 of Title 7, relating to subaqueous lands) (citing *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1245 (Del. 1985)); *see also In re Tri-Star Pictures, Inc., Litig.*, 634 A.2d 319, 326 (Del. 1993) (disapproved on other grounds by *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1038 (Del. 2004)) ("When interpreting a statute or rule of court, our objective is to give sensible and practical meaning to the provision as a whole so that it may be applied in future cases without difficulty.").

relating to that process. Each step of the way, the "actions of the Secretary" relate to Chapter 60 only.[11] No language in Chapter 60 suggests that the General Assembly, in creating the EAB to review actions of the Secretary under Chapter 60, intended to confer on the EAB unfettered power to review literally "any action" of the Secretary in administering other Title 7 statutes or beyond.

Appellants' expansive reading of the phrase "any action" in § 6008(a) further violates the principle that statutes should be construed to avoid "surplusage."[12] As the EAB noted, in every other statute in which the General Assembly confers upon the EAB power to act beyond Chapter 60, "it has done so explicitly." A425 and n.28.[13] If Appellants' reading of the "any action" phrase in § 6008 were correct, "all other provisions that confer jurisdiction on the Board" would be "surplusage (*i.e.*, redundant and unnecessary)," contrary to "[b]asic

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[11] For example, § 6003 identifies the water and air related activities that a person may undertake only after having obtained a permit from the Secretary; § 6004 sets forth the process for seeking a permit "required by § 6003 *of this title*" and authorizes the Secretary to "act . . . on any permit application that is specified *in this subsection*"; § 6005 gives the Secretary the authority to "enforce *this chapter*"; and § 6006(4) authorizes the Secretary to hold public hearings on "application[s] for a permit," "alleged violation[s] or variance request[s]," and on "regulation[s] or plan[s] proposed for adoption," and to issue orders that "will best further the purpose of *this chapter*." 7 *Del. C.* §§ 6003-6006 (emphasis added).

[12] A4225-426; s*ee, e.g., Clark v. State*, 65 A.3d 571, 578 (Del. 2013) ("We presume that the General Assembly intentionally chose particular language and therefore construe statutes to avoid surplusage if reasonably possible").

[13] The EAB identified provisions in six different Title 7 statutes in which the General Assembly found it necessary expressly to grant the EAB power to act review actions of the Secretary beyond those in Chapter 60. A425 n.28.

tenets of statutory construction." A425-426 and n.29. Appellants' unbounded reading of "any action" must be rejected for this reason as well.[14]

Appellants' argument also cannot be reconciled with the General Assembly's allocation of authority in the CZA and Chapter 60. From its enactment in 1971 and until 1981, the CZA was administered by the State Planner, not the Secretary of DNREC.[15] Therefore, when it enacted Chapter 60 in 1973, the General Assembly could not have intended "actions of the Secretary" to include actions under the CZA that the Secretary had no authority to take. So also, the General Assembly could not have intended that appeals from CZA decisions (then made by the State Planner) would go to the EAB. Moreover, the General Assembly created the CZICB in 1971 with specialized expertise in planning and economic development to address CZA issues.[16] Appellants' reading of § 6008(a)

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[14] Appellants erroneously invoke Chapter 79 of Title 7 in arguing that the General Assembly would have inserted an express "issue-based limitation" in § 6008(a) if it intended that section to relate to actions on issues arising under Chapter 60. OB 27. Chapter 79 is inapposite because it does not involve permit requests filed with the Secretary. Rather, Chapter 79 authorizes the Secretary to file a complaint directly with the EAB setting forth the "factual and legal basis on which a chronic violator determination is sought," etc., and then the EAB "is granted jurisdiction" to determine "the issues presented" in the complaint. 7 *Del. C.* § 7904(3) and (4).

[15] A426 (citing 59 Del. Laws, c. 212, § 1).

[16] The CZA requires that four of the nine voting members of the CZICB be *ex officio* members with expertise in economic development and/or planning: *i.e.*, the Director of the Delaware Economic Development Office and the chairpersons of the planning commissions of each county. 7 *Del. C.* § 7006. In connection with the doctrine of exhaustion of remedies, Delaware courts have noted the importance of such specialized expertise. *See, e.g., Buckson v. Town of Camden,* 2001 WL 1671443, at *5 (Del. Ch. Dec. 4, 2001) ("The doctrine of exhaustion

would yield the absurd result that, two years after adoption of the CZA, the General Assembly conferred redundant CZA jurisdiction on a different tribunal, the EAB, without such expertise,[17] thereby silently undermining its purpose in fashioning a specialized CZA tribunal.[18]

Similarly, DNREC's regulations governing air permits do not render CZA issues part of the "air permitting process" for the purposes of sweeping all CZA issues within the scope of EAB jurisdiction. *See contra* OB 28-29.[19] If that were the case, EAB review would also encompass any "issues relating to the health, safety, and welfare of the people of the State of Delaware," as DNREC also considers them under the same regulation.[20] Nor could this regulation expand the EAB's jurisdiction even if such a result were intended.[21]

In sum, Appellants' reading of § 6008(a) is without merit – and nothing in § 6008 gives the EAB jurisdiction over CZA issues.

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of administrative remedies . . . is the product of a recognition of the specialized nature of expertise held by administrative boards.").

17 *See* 7 *Del. C.* § 6007(a) (addressing composition of EAB without requiring economic development or planning expertise).

18 *See, e.g., Coastal Barge Corp.*, 492 A.2d at 1247 (stating that the "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").

19 *See* 7 *Del. Admin. C.* § 1102-11.6 ("regulation 11.6"). A460.

20 *Id.*

21 *See, e.g., 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.").

2. *Oceanport* Confirms that the EAB May Not Act on CZA Issues.

Based on the controlling decision of this Court in *Oceanport*, the Superior Court held that the EAB lacks jurisdiction to review CZA issues. A careful review of that decision, in light of the EAB and Superior Court decisions underlying it, confirms that the Superior Court's analysis of *Oceanport* was correct.[22] Appellants' efforts to distinguish that case are without merit.

a. The *Oceanport* decision.

The *Oceanport* decision arose from a proposal by Oceanport Industries, Inc. to expand a pier at its Claymont terminal. In 1987, the Secretary issued a CZA status decision determining that the project was not regulated by the CZA.[23] In 1991, after public hearings, the Secretary issued an order granting Oceanport's application for air and water permits under Chapter 60 and a subaqueous lands permit under the Subaqueous Lands Act, 7 *Del. C.* § 7201 *et seq.* ("Chapter 72").[24] Like the Order at issue here, the Secretary's 1991 order under Chapters 60 and 72

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[22] Copies of the decisions of the EAB, the Superior Court, and this Court in *Oceanport* are attached hereto as Exhibits A, B, and C respectively.

[23] *See In re: Appeal of Wilmington Stevedores, Inc.*, Appeal Nos. 91-04, 91-05, slip op. at 2-3 (EAB Nov. 1, 1991) (herein, "*Oceanport EAB Op.*") (Exhibit A hereto).

[24] *Id.*, slip op. at 3.

responded to a CZA objection by Wilmington Stevedores Inc. ("WSI"), concluding that "the record did not warrant denial of these permits on that basis."[25]

WSI and the Delaware Audubon Society ("Audubon") appealed the Secretary's 1991 order to the EAB.[26] Oceanport moved to dismiss the appeals based *inter alia* on lack of standing and because "the [EAB] lacks subject matter jurisdiction to consider certain issues relating to the Coastal Zone Act."[27] In a decision dated November 1, 1991, the EAB held that Audubon had standing but that WSI did not.[28] With regard to the CZA, the EAB noted that "the entire thrust of the WSI complaint clearly indicates that the complaint belongs before the Coastal Zone Industrial Control Board and not the [EAB]."[29]

WSI next appealed the EAB's ruling to the Superior Court. On October 7, 1992, the Superior Court reversed the EAB's ruling that WSI lacked standing and addressed the EAB's comment on the CZA issue as follows:

> The [EAB's] problem arose because there is a split of appellate authority; appeals from decisions of the Secretary [of the DNREC] regarding the Coastal Zone Act are directed to one Board, the Coastal Zone Industrial Control Board, and appeals from decisions of the Secretary regarding permits of the type at

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25 *See Wilmington Stevedores, Inc. v. Envtl. Appeals Bd.*, Del. Super., C.A. No. 91A-11-03, Del Pesco, J., slip op. at 5-6 (Del. Super. Ct. Oct. 7, 1992) *rev'd*, 636 A.2d 892 (Del. 1994) (herein, "*Oceanport Super. Ct. Op.*") (Exhibit B hereto) (quoting Secretary's 1991 order).

26 *Oceanport*, 636 A.2d at 898.

27 *Oceanport Super. Ct. Op.*, slip op. at 2.

28 *Oceanport EAB Op.*, slip op. at 11; *Oceanport*, 636 A.2d at 898-99.

29 *Id.* at 899 (quoting *Oceanport EAB Op.*, slip op. at 5).

> issue here are directed to a different Board, the Environmental Appeals Board. *Quite naturally the Environmental Appeals Board considers it beyond the scope of its authority to review the CZA determination.*[30]

In an attempt to resolve the problem of the EAB's lack of authority to review the Secretary's response to WSI's CZA objection, the Superior Court held that the Secretary must "take a clear position as to whether or not the project as currently described violates the CZA"[31] and instructed the EAB to remand the matter to the Secretary "for a review of the status of [this] project under the CZA."[32] The Superior Court did not instruct the EAB to rule on the CZA (Appellants' requested remedy here), which it agreed was "beyond the scope of [the EAB's] authority." Nor did the Superior Court suggest that WSI could have appealed the Secretary's decision in proceedings under Chapters 60 and 72 directly to the CZICB, even though (as here) the Secretary responded to WSI's CZA concerns. Rather, the Superior Court sought, through the EAB, to require the Secretary to initiate a second CZA status decision proceeding.

This Court accepted an extraordinary interlocutory appeal to review both whether WSI had standing in the EAB and also whether the Superior Court could remand the case to the EAB "with instructions to remand in turn to the Secretary . .

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30 *Id.* at 899 n.6 (emphasis added); *see also Oceanport Super. Ct. Op.*, slip op. at 6.

31 *Oceanport Super. Ct. Op.*, slip op. at 7.

32 *Id.*, slip op. at 14.

. for a review of the status of Oceanport's project under the [CZA]."[33] In an opinion dated January 26, 1994, the Court stressed that both issues were important: "[t]he issue of standing is one of first impression, *as is the scope of the EAB's jurisdiction in matters pertaining to the CZA*."[34] The Court reversed on both issues, first, because WSI lacked standing, and second, because "[w]ith regard to the remand to consider the CZA status decision, the Superior Court confused the application of the CZA, found in Title 7, Chapter 70, of the Delaware Code, [with] the issuance of permits granted under the authority of Chapters 60 and 72."[35]

In part III of its opinion, addressing the EAB's jurisdiction, the Court pointed out the different purposes and requirements of Chapter 60 and the CZA.[36] Under this statutory scheme, the Superior Court, by attempting to require the EAB to direct the Secretary to rule on the status of the project under the CZA, had "confuse[d] the statutory framework and requirements of Chapters 60, 70 and 72."[37] As the Court explained, the two statutes operate independently:

> There is no statutory requirement that a permit applicant obtain a favorable CZA status decision before applying for Chapter 60 permits. Similarly, when determining an applicant's status under

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33 *Oceanport*, 636 A.2d at 896.
34 *Id.* (emphasis added).
35 *Id.* (in the original opinion, the word "to" appeared where "with" is inserted).
36 *Id.* at 907.
37 *Id.*

> the CZA, there is no requirement that the applicant have any status with regard to Chapter 60 permits.[38]

In light of this statutory scheme, the Court held that the Superior Court's "remand to the EAB in the posture of this case was erroneous regarding a determination of Oceanport's CZA status."[39]

b. The Superior Court correctly relied on *Oceanport*.

The Superior Court correctly held that *Oceanport* "is on-point and controlling" in "mak[ing] clear that the EAB does not have authority to consider appeals that center upon CZA objections." A447-448. *Oceanport* bars the EAB from asserting even a little authority in CZA matters by directing the Secretary to require an application for a status decision under the CZA. *A fortiori*, *Oceanport* precludes Appellants' more aggressive claim here that the EAB may directly *rule on* CZA issues.[40] OB 35.[41]

In an effort to minimize *Oceanport*, Appellants mistakenly contend that the decision "should not be read as holding anything about jurisdiction" because it is allegedly "about standing, not jurisdiction." OB 30-31. As shown above,

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38 *Id.*

39 *Id.*

40 As the EAB explained, "*Oceanport* instructs us that a remand from this Board to the Secretary to make a determination as to CZA applicability to a Chapter 60 permit is legally improper. And logically it follows that if this Board cannot even remand the case to the Secretary due to its jurisdictional limitations then it certainly cannot hear the case on its merits to make the determination itself." A428-429.

41 As discussed in Argument II.C.3 below, *Oceanport* also does not support Appellants' alternative claim that the CZICB is empowered to review decisions in air permit proceedings.

Oceanport is plainly about both. Appellants' misreading relates to the Court's statement at the close of part II of its opinion that WSI was dismissed from the case "solely on standing grounds." OB 30. Appellants misinterpret this statement as indicating that part III of the opinion, addressing the question relating to the EAB's jurisdiction over the CZA, can simply be ignored. This argument overlooks that part II addresses issues relating to *WSI* whereas part III addresses the second issue of first impression that the Court separately certified for review: *i.e.*, whether the *EAB* could take action under the CZA.

In stating that it was dismissing WSI for lack of standing only, the Court made clear that it did not to address the EAB's statement that WSI's complaint "belonged" before the CZICB, which the Court had discussed in part I of its opinion setting forth the background of the case.[42] The ruling that WSI lacked standing rendered any other issue specific to WSI "moot."[43] However, the standing ruling did not render moot whether the Superior Court could order the EAB to direct the Secretary "to review the status of Oceanport's project under the

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42 636 A.2d at 899 and n.6 and 907.

43 636 A.2d at 907 n.20.

CZA," which the Court proceeded to answer in the negative in part III of its opinion, as explained above.[44]

In sum, the Superior Court correctly affirmed the decision of the EAB granting DNREC's and DCRC's motions to dismiss Appellants' appeal to the EAB raising CZA issues only.[45]

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[44] *Id.* at 907; *Super Ct. Op.* at 14. The Court's ruling in part III, clarifying the limits of EAB jurisdiction, also was not moot because the Audubon's pending appeal in the EAB had been stayed during the resolution of WSI's appeal. *See Oceanport Super. Ct. Op.*, slip op. at 2.

[45] Appellants' fallback argument, that "if *Oceanport* has anything to say about jurisdiction," it creates new, unprecedented CZICB jurisdiction over decisions by the Secretary in Chapter 60 proceedings (OB 22; *see also* OB 30-34), is addressed in Argument II.C.3 below.

II. THE CZA DOES NOT AUTHORIZE THE CZICB TO EXERCISE JURISDICTION OVER AN AIR PERMIT ORDER.

A. The Question Presented

Whether the Superior Court correctly held that the CZICB lacks subject matter jurisdiction over an appeal of a decision by the Secretary in a proceeding under Chapter 60.

B. The Scope and Standard of Review

The issue of subject matter jurisdiction is reviewed *de novo*.[46]

C. The Merits

Under the plain terms of the CZA, the CZICB is authorized to review only the Secretary's status decisions and decisions on permit requests in proceedings under § 7005. Therefore, the CZICB lacks subject matter jurisdiction over an appeal from a decision by the Secretary in a Chapter 60 proceeding. Appellants' argument that CZICB review may be triggered by a public comment in a Chapter 60 proceeding, to which the Secretary responds, should be rejected because it is contrary to the CZA and principles of statutory construction. Also, Appellants' contention that, if *Oceanport* says anything about jurisdiction, it sanctions CZICB review of Chapter 60 decisions, fails for several reasons.

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[46] *Oceanport*, 636 A.2d at 899, 907 (addressing jurisdiction over matters pertaining to the CZA as an issue of law).

1. The CZA Limits CZICB Jurisdiction to Review of Status and Permit Decisions under 7 *Del. C.* § 7005.

"[N]o party has a right to appeal unless *the statute governing the matter* has conferred a right to do so."[47] For that reason, courts employ a "strict interpretation against the exercise of the power" by administrative bodies, require that jurisdictional powers "must be 'plainly' expressed," and do not permit such powers to be "inferred" or taken "by implication."[48] Under these principles, the Superior Court correctly held that the CZICB lacked jurisdiction over appeals from Chapter 60 proceedings.

Sections 7005(a) and 7007 of the CZA define the CZICB's jurisdiction. Section 7005 provides that DNREC "shall administer this chapter" and directs that "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."[49] Section 7005 then recognizes that threshold issues may arise as to whether a project is prohibited or not subject to permitting, stating in pertinent part:

> The Secretary . . . shall *first determine* whether the proposed use is, *according to this chapter and regulations issued pursuant thereto*:

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47 *Oceanport*, 636 A.2d at 900 (emphasis added).

48 3 NORMAN J. SINGER AND J.D. SHAMBIE SINGER, STATUES AND STATUTORY CONSTRUCTION § 65:2 (7th ed. 2014).

49 7 *Del. C.* § 7005(a)(1).

> a. A heavy industry use under § 7003 of this title;
> b. A use allowable only by permit under § 7004 of this title; or
> c. 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.[50]

Thus, under § 7005 the Secretary may make "first determin[ations]" as to the status of a proposed use under the CZA (also known as status decisions), and then make decisions on "request[s] for a permit" if a permit is required. Although permit requests must be directed to the Secretary, nothing in § 7005 precludes a party from requesting a status decision first.

Section 7007 then grants the CZICB power to hear appeals from these – and only these – two types of decisions. Section 7007(a) states:

> (a) The [CBICB] shall have the power to hear appeals from decisions of the Secretary of the Department of Natural Resources and Environmental Control made under § 7005 of this title. The Board may **[1]** *affirm or reverse the decision of the Secretary of the Department of Natural Resources and Environmental Control with respect to applicability of any provisions of this chapter to a proposed use*; [and **2**] it may modify any permit granted by the Secretary of the Department of Natural

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50 7 *Del. C.* § 7005(a)(2)(emphasis added).

> Resources and Environmental Control, grant a permit denied by the Secretary, deny a permit or confirm the Secretary's grant of a permit. . . .[51]

Provision [1] above refers to the power to review the Secretary's status decisions under § 7005, and provision [2] refers to the power to review the Secretary's permit decisions under § 7005. Section 7007(b) confirms that only such status and permit decisions may be appealed to the CZICB by stating that "[a]ny person aggrieved by a final decision of the Secretary [of DNREC] *under § 7005(a) of this title* may appeal same under this section."[52]

Consistent with statutory language directing DNREC to develop regulations governing status decisions and permit decisions, with CZICB approval,[53] DNREC has adopted regulations setting forth specific procedures to be followed by applicants in seeking CZA status decisions[54] and permits.[55] These regulations provide that the Secretary may request a status decision application:

> The Secretary may, if he has cause to suspect an activity within the confines of the Coastal Zone is prohibited or should receive a permit under these regulations, request of the person undertaking that activity to apply for a status decision as described in this section. Failure of the person to respond to the Secretary's request shall subject

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51 7 *Del. C.* § 7007(a) (emphasis added).

52 7 *Del. C.* § 7007(b) (emphasis added).

53 7 *Del. C.* § 7005(a)(2) (first determinations); § 7005(b) (permit requests, hearings, and CZICB approval).

54 7 *Del. Admin. C.* §§ 101-7.0-7.7 (titled "Requests for Status Decisions"). A474.

55 7 *Del. Admin. C.* § 101-8. A474-476.

> said person to enforcement procedures as contained in the Act and/or Section 18.0 of these regulations.[56]

The Secretary's authority to determine, *inter alia,* when to request an application for a status decision is consistent with the legislative intent that the Secretary administer the CZA.[57] The CZA regulations (like the CZA itself) allow appeals of status decisions and decisions on permit applications according to the procedures set forth in the CZA.[58]

By this statutory scheme, the General Assembly granted to the Secretary the authority to administer the CZA through proceedings on requests for status decisions and permit decisions and to render decisions in those proceedings that are subject to CZICB review. The Secretary is the point person and gatekeeper in this process. Nothing in the text or statutory scheme of the CZA suggests that the General Assembly thought it a wise idea to delegate to any citizen or group the authority to trigger status decision proceedings. Nor does the CZA provide that a person may circumvent the CZA process by filing a public comment in a non-CZA proceeding as a means to trigger CZICB review.

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56 7 *Del. Admin. C.* § 101-7.5 (1999).

57 *Opinion of the Justices*, 246 A.2d 90, 94 (Del. 1968) (recognizing that the General Assembly may "enact a law . . . declaring the policy of the law, fixing the principles which are to control in given cases, and, at the same time, delegate to an administrative body the power to ascertain the facts which will determine when the power exercised by the act shall take effect and be enforced.").

58 7 *Del. Admin. C.* § 101-16.1. A480.

In rejecting Appellants' claims, the Superior Court noted that the judicial function is not to decide whether Appellants "should" have jurisdiction somewhere, but rather "is limited to applying the statute objectively and not revising it." A445-446. The Superior Court correctly held that the CZICB's "jurisdictional authority is limited to appeals of the Secretary's decisions made under 7 *Del. C.* § 7005." A448. Further, "[s]ubject matter jurisdiction of the [CZICB] cannot be predicated upon the Secretary's conclusion that this proposed activity does not require a CZA permit or Coastal Zone Status Decision." A450. In so ruling, the Superior Court confirmed that the CZA and its implementing regulations authorize the Secretary to act as a gatekeeper in administering the CZA, including by deciding when to require a request for a CZA status decision under § 7005, and limit CZICB review to decisions taken pursuant to § 7005.

Appellants erroneously attempt to dismiss the Superior Court's legal analysis as "perfunctory." OB 11. Fairly read, the decision devotes five pages to Appellants' claim of jurisdiction in the CZICB, not two sentences as they claim.[59]

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[59] *See* A444-46 (analyzing law governing review of subject matter jurisdiction claims) and A448-50 (analyzing Appellants' specific jurisdictional arguments). The Superior Court took a thorough approach to entire litigation as demonstrated by the fact that it granted Appellants' request to consolidate these two cases, reviewed no fewer than twelve briefs (with appendices and compendia) on two appeals and one cross-appeal, and accommodated oral argument that stretched over three hours. See Appellants' Appendix, Tab 1, docket entries 46-50 in CZICB appeal (N13A-09-001) relating to oral argument.

The Superior Court succinctly applied the statutory scheme as written and exposed the flaws in Appellants' contentions.[60]

In sum, the Superior Court correctly applied the CZA in holding that the CZICB lacked jurisdiction over Appellants' appeal from a Chapter 60 proceeding.

2. Appellants' Claim that the CZA Must Be Fixed to Avoid "Absurd Results" Is Without Merit.

In an effort to create ambiguity in the CZA that might open the door to their arguments that the Court should empower the CZICB to review Chapter 60 decisions, Appellants take an indirect route. First they focus on a question not at issue in this case—whether the CZA, read literally, allows for CZICB review of status decisions that are not the result of permit requests. OB 14-18. They argue that because § 7007(b) allegedly does not "literally" authorize review of stand-alone "status decisions," the courts must read into the CZA a CZICB right to review in order to avoid absurd results. OB 14-15. They use this alleged ambiguity as a springboard to contend that, even though § 7007(b) does not authorize the Board to review decisions by the Secretary under Chapter 60, the

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[60] Appellants also erroneously claim that the Superior Court's ruling was "wrong" because it refers to a "finding" by the CZICB that it lacked jurisdiction over the Secretary's Order. A450; OB 12. In fact, a majority of the CZICB members present did vote that the CZICB lacked jurisdiction, but the Chair concluded that the vote was insufficient under 7 *Del. C.* § 7006. A389-90. At most, the use of the word "finding" was harmless error because (1) the Superior Court correctly stated that the CZICB dismissed the appeal "for failure to establish legal standing" (A443) and (2) as Appellants admit, the Superior Court reviewed the issue of jurisdiction *de novo*. OB 11; A444 ("the Court reviews the issue of subject matter jurisdiction *de novo*.").

Court should read such authority into § 7007(b). The allegedly absurd result that would otherwise occur, they say, is that the Secretary's response to their CZA concerns in a Chapter 60 proceeding would fall outside CZICB jurisdiction, while if the Secretary determined to conduct a CZA proceeding and issue a § 7005 status decision, his response would fall within CZICB jurisdiction. OB 20.

This argument is fundamentally flawed for at least five reasons. First, Appellants cannot create a "problem" with stand-alone status decisions (OB 16) because none exists. Appellants say that status decisions are not in the CZA because "the CZA nowhere uses" those magic words. OB 15. However, as set forth above, CZA clearly authorizes the Secretary to issue status decisions under § 7005 and empowers the CZICB to review them under § 7007. Numerous cases (as well as the CZA regulations) recognize that fact and employ the term status decisions.[61] Appellants cite to no case in which anyone has disputed the validity of that process in the 40+ year history of the CZA.[62] Under the principle of *stare*

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[61] As noted above, the CZA regulations approved by the CZICB adopt that term in detailing how the process works.

[62] While *Oceanport* stated that the status decision process was "administratively created," the Court did not question that the process fell within the scope of § 7005(a). 636 A.2d at 897 (noting that "Oceanport requested a Coastal Zone Status Decision, an administratively created mechanism for the determination of whether or how proposed projects are regulated by the CZA.").

decisis, the reviewability of status decisions is beyond doubt.[63]

Second, Appellants' reading of § 7007(b) to create CZICB jurisdiction over Chapter 60 decisions has absolutely no support in the statute, legislative history, or the subsequent history of the CZA. To be clear: Appellants are asking for an unprecedented judicial expansion of the CZA that would allow, for the first time in over forty years, a citizen or group to bring a CZICB appeal in the absence of a decision by the Secretary on a request for a CZA status decision or permit. Also, Appellants do not explain why any purported ambiguity with respect to status decisions, which are clearly referred to the text of the statute, warrants opening the door to CZICB review of decisions in multiple Title 7 statutes where there is absolutely no textual support for such an approach.

Third, even if there were some purported ambiguity in §§ 7005 and 7007, Appellants' attempt to invoke the "absurdity doctrine" fails here because nothing in the CZA supports such an expansion. The General Assembly could have created a private right of action to enforce the CZA but chose not to do so. Instead, the General Assembly delegated to the Secretary authority to administer the CZA,

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63 *State v. Barnes*, 2015 WL 3473382, at *6 (Del. June 2, 2015) ("When a statute has been applied by courts and state agencies in a consistent way for a period of years, that is strong evidence in favor of that interpretation.").

including the status decision process.[64] Here, after careful review by DNREC staff, the hearing officer, and the Secretary, the Secretary chose not to call for a status decision application. This is how the process is designed to work. Appellants' proposal would flip the statute in its head by allowing Appellants (instead of the Secretary) to trigger CZICB proceedings by raising CZA issues in any proceeding, counting on the Secretary to respond to them.[65]

Fourth, Appellants' proposal to expand the jurisdiction of the CZICB violates at least four well-established principles of statutory construction: (1) that courts will not create administrative jurisdiction by "implication,"[66] (2) that the absurdity doctrine must be cautiously applied,[67] (3) that *stare decisis* requires that any ambiguity be resolved in favor of long-standing practice with respect to the scope of CZICB jurisdiction,[68] and (4) that courts will not accommodate a litigant's objection to a perceived unfair result by engaging in impermissible

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64 7 *Del. C.* §§ 7005 (a)(2) and 7007(c).

65 *See* n.3 *supra*. Appellants also overlook that individuals and groups have several options if they wish to pursue a CZA concern arising out of proceedings under other statutes. They may request that the Secretary initiate the status decision process. 7 *Del. Admin. C.* § 101-7.5. A474. They may petition the Attorney General's Office to issue a cease and desist order. 7 *Del. C.* § 7010. They may file a mandamus action to compel the Secretary to address a perceived violation of the CZA. In fact, the Sierra Club recently filed a mandamus action against the Secretary and DNREC on an unrelated issue. *See Delaware Riverkeeper Network et al. v. State*, C.A. No. N13M-10-009 (DCS) (Del. Super. Ct.) (closed).

66 *See supra* n.48.

67 *Wilmington Finishing Co. v. Leary*, 2000 WL 303320, at *3 (Del. Super. Ct. March 8, 2000).

68 *See supra* n.63.

judicial legislation.[69] This case demonstrates the wisdom of these principles by reference to the dubious benefits of Appellants' proposal.[70] Appellants are free to pursue their proposal to expand appeal rights through legislation but not litigation.

Finally, the Court's decision in *Coastal Barge, supra,* does not support Appellants' proposal as they contend. OB 14-22. In *Coastal Barge*, the Court addressed a vessel-to-vessel operation that did not appear to fall within the CZA's definition of a prohibited bulk product transfer facility ("BPTF") because it did not involve a transfer from "vessel to onshore facility or vice versa."[71] Noting that a literal interpretation of the BPTF definition would lead to "absurd consequences," contrary to the clear legislative purpose of the CZA to prohibit offshore BPTFs, the Court concluded that the "vessel to onshore" language was ambiguous and must be read so as not to exclude a prohibition on vessel-to-vessel BPTFs.[72] Here, a plain

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69 *Williams v. Geier*, 671 A.2d 1368, 1385 (Del. 1996) ("if we were to engraft . . . an exception to the statutory structure and authority in order to accommodate [a litigant's] objection to [a] result, we would be engaging in impermissible judicial legislation"); *see also Sussex Cnty. Dept. of Elections v. Sussex Cnty. Republican Comm.,* 58 A.3d 418, 427 (Del. 2013) (stating that it is impermissible to judicially "attach[ ] statutory consequences to a procedure not contemplated by the statute"); *Olson v. Halvorsen*, 986 A.2d 1150, 1162 (Del. 2009) (Courts "will not do by judicial implication what the General Assembly itself has declined to do by express legislation.").

70 Appellant's proposal raises many policy concerns. Would such new jurisdiction create a disincentive for a Secretary to respond to concerns raised by citizens? Would it tax volunteer tribunals by resulting in large numbers of burdensome appeals from decisions by the Secretary pursuant to numerous Title 7 statutes? Would even a letter or email trigger CZICB jurisdiction where the Secretary implicitly rejects a CZA concern by not addressing it?

71 *Id.* at 1246.

72 *Id.*

reading of the statutory provision as written does not lead to an absurd result contrary to some strongly-worded statutory purpose. On the contrary, such a reading is consistent with the General Assembly's express intent that the Secretary administer CZA status and permit proceedings.[73]

In sum, the Superior Court correctly held that the CZICB lacks subject matter jurisdiction over a decision by the Secretary in a Chapter 60 proceeding.

3. *Oceanport* Does Not Create New CZICB Jurisdiction.

Oceanport does not support Appellants' argument that the CZICB may review the Secretary's response to CZA concerns raised in a Chapter 60 decision. OB 31. As noted above, the only jurisdictional issue that the *Oceanport* Court certified for interlocutory review, and ruled upon, was whether the Superior Court had taken an overly-expansive view of the *EAB's* jurisdiction.

In the course of that ruling, the Court commented on the problem noted by the EAB and the Superior Court in determining the "correct posture" of a proposed use "with regard to both Chapter 60 permits and CZA status" in light of the fact that WSI had raised CZA concerns in the underlying proceeding under Chapters 60 and 72. But the Court in no way suggested that appeals from proceedings under Chapters 60 or 72 could go to the CZICB. Rather, the Court referred to the

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73 7 *Del. C.* § 7005(a).

solution already in the text of the CZA in recommending that, "in the future *the Secretary* should make the DNREC's position clear on an applicant's CZA status."[74] To emphasize its point, the Court cited § 7007(a), which empowers the CZICB to review status and permit decisions of the Secretary under § 7005.[75] In other words, the Court pointed out that, under the governing statutory scheme, the Secretary could require and issue a status decision under § 7005 on a proposed use, which could result in review by the CZICB.[76] This recommendation is entirely consistent with the Court's holding that, under the statutory scheme, the EAB must stay in "its own lane" with respect to its jurisdiction under Chapters 60 and should not stray into matters delegated to the Secretary under the CZA.

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74 *Id.* (emphasis added).

75 As explained above, § 7007(a) empowers the CZICB "to hear appeals from decisions of the Secretary . . . made under § 7005" including "the decision of the Secretary . . . with respect to applicability of any provisions of this chapter to a proposed use."). The Court also referred back to its prior explanation that "appeals from decision of the Secretary . . . regarding the coastal Zone Act are directed to one Board, the coastal Zone Industrial Control Board," whereas appeals from Chapter 60 permit decisions go to the EAB, stating "[a]s we noted, the [CZICB handles appeals from decisions of the Secretary." *Id.* at 899 n.6, 907.

76 If the Court had intended to say, as Appellants contend (OB 32 and n.12), that "in the future" the Secretary should issue a "determination of an applicant's CZA status in a Chapter 60 permit process" so as to open the door for parties like WSI and the Appellants to appeal a Chapter 60 decision "to the CZICB," the Court could have said so directly by pointing out that WSI could have filed such an appeal in the very case before it. After all, the Secretary's 1991 Chapter 60/72 decision addressed WSI's CZA concerns. But the Court did not recognize a right to appeal Chapter 60 decisions to the CZICB either in the case before it or in the future. Rather, the Court recommended that the Secretary exercise his authority under § 7005, where appropriate, to issue status decisions under the CZA. Such a reading does not render the Court's statement a "meaningless nullity" (OB 32 n.12), because the applicant or other proper party to a CZA proceeding that results in a status decision could then appeal to a tribunal with jurisdiction, the CZICB.

As a postscript to *Oceanport*, DNREC, with the approval of the EAB and the CZICB, has developed regulations to address the concerns noted by all three tribunals in that case. In its air permit regulations, DNREC makes clear that it will not grant an air permit until it is assured that the permit will not result in the violation of another DNREC rule or regulation.[77] Here, DNREC's Division of Air Quality staff conferred with its CZA staff to confirm that the Air Permit Application would not trigger CZA review. Also, the CZA regulations expressly recognize the Secretary's authority to request an application for a status decision.[78] That process worked here. Appellants' disagreement in this case with the Secretary's decision that a formal CZA process was not required does not justify expanding the CZA and upsetting the statutory and regulatory review process now in place.

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77 7 *Del. Admin. C.* § 1102-11.6. A460.

78 7 *Del. Admin. C.* § 101-7.5. A474.

CONCLUSION

Underlying all Appellants' arguments is the flawed premise that a comment at a public hearing on an air permit, which the Secretary dutifully addresses, must trigger administrative appellate jurisdiction somewhere, if not in the EAB, then in the CZICB. The right to an administrative appeal to either the EAB or the CZICB must be evaluated under the separate grants of jurisdiction provided to each board by statute, and absent statutory authorization, there is no right to an administrative appeal. As the Superior Court correctly held, neither Chapter 60 nor any other statute confers upon the EAB jurisdiction to hear CZA issues, and the CZA provides for CZICB review only of status decisions and permit decisions by the Secretary in proceedings under § 7005. For the foregoing reasons, DNREC respectfully requests that the Court affirm the decision of the Superior Court.

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