EFiled: Jul 20 2015 06:35PM EDT
Filing ID 57580007
Case Number 216,2015D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SIERRA CLUB and DELAWARE AUDUBON, Appellants below, Appellants, v. DELAWARE DEPARTMENT OF NATURAL RESOURCES and ENVIRONMENTAL CONTROL, Appellee below, Appellee, and DELAWARE CITY REFINING COMPANY LLC, Appellee below, Appellee.	)	No. 216-2015 Appeal from March 31, 2015 Decision of the Superior Court of the State of Delaware In and For New Castle County; Appeal Nos. N13A-09-001 ALR and N14A-05-002 ALR

APPELLEE DELAWARE CITY REFINING COMPANY LLC'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This case involves an appeal of the decision and final order issued by the Superior Court of the State of Delaware in and for New Castle County (the "Superior Court"), dated March 31, 2015 (the "Superior Court Opinion"). (A.436; *see also Sierra Club v. Del. Dept. of Nat. Resources & Envt'l Control*, 2015 Del. Super. LEXIS 168 (2015)). The Superior Court Opinion resolved two separate appeals (N13A-09-001 ALR and N14A-05-002 ALR) filed by Sierra Club and Delaware Audubon ("Appellants") related to an air pollution control permit (Permit No. 2013-A-0020) (the "Air Permit") issued on May 31, 2013 by the Delaware Department of Natural Resources and Environmental Control ("DNREC" or "the Department") to the Delaware City Refining Company LLC ("DCRC").

By way of background, on June 14, 2013, Appellants simultaneously filed two separate administrative appeals of the Air Permit: one with the Coastal Zone Industrial Control Board (the "CZICB"), and the other with the Environmental Appeals Board (the "EAB") (hereinafter referred to as the "Air Permit Appeals," for purposes of discussing the jurisdiction of both the CZICB and the EAB).

On August 13, 2013, the CZICB dismissed for lack of standing the Air Permit Appeal filed by Appellants with that Board. Appellants filed an appeal of the CZICB's decision with the Superior Court on September 3, 2013. On

September 12, 2013, DCRC filed a Notice of Cross-Appeal with the Superior Court, seeking a formal determination that the CZICB lacked jurisdiction to consider the Air Permit Appeal.

The EAB dismissed the Air Permit Appeal separately filed with that Board on the grounds that the EAB lacked subject matter jurisdiction over the Air Permit Appeal. The EAB issued its Final Decision on April 8, 2014. Appellants filed an appeal of the EAB's Final Decision with the Superior Court on May 7, 2014.

The Superior Court Opinion affirmed the EAB's decision that it lacked jurisdiction to resolve the Air Permit Appeal. The Superior Court Opinion also affirmed the CZICB's decision to dismiss the Air Permit Appeal, but did not reach the issue of standing because the Court concluded that the CZICB lacked subject matter jurisdiction over the Air Permit Appeal.

On April 30, 2015, Appellants filed the instant appeal of the Superior Court Opinion. Appellants initially filed their Opening Brief with this Court on June 18, 2015. On July 6, 2015, this Court issued a letter to Appellants identifying several deficiencies with the Opening Brief, and directing Appellants to file a corrected brief. Appellants filed their "Corrected Appellants' Opening Brief" with this Court on July 8, 2015.

SUMMARY OF ARGUMENT

1. Admitted. This appeal presents the distinct questions of (1) whether the CZICB has jurisdiction over the Air Permit Appeal under the Coastal Zone Act (the "CZA"); and (2) whether the EAB has jurisdiction over the Air Permit Appeal under the Environmental Control Statute. These questions must be resolved in accordance with the well-settled legal principles governing the doctrine of jurisdiction, which dictates that jurisdiction must not be presumed to exist; rather, the scope of jurisdiction of an administrative review body is expressly limited by the body's enabling statute (in this case, the CZA and the Environmental Control Statute, respectively).

2. Denied. The jurisdiction of the CZICB is expressly limited by its enabling statute, the CZA. Section 7007 of the CZA grants to the CZICB the authority to hear appeals of decisions of the Secretary made under Section 7005 of the CZA. Notwithstanding, as emphasized by Appellants, that Section 7005(a) does not reference the specific words "status decision," the CZA's implementing regulations make clear that decisions by the Secretary concerning permitting actions under Section 7005 of the CZA are of two specific types: permitting actions and status decisions. Therefore, prior decisions of the Delaware courts indirectly extending the CZICB's jurisdiction to review of status decisions are not inconsistent with the express language of Section 7005. Accordingly, Appellants'

contention that Section 7005(a) of the CZA must be read to extend to any "informal" interpretation of the CZA is unsupported both by the statutory language and prior decisions of the courts.

It is uncontroverted that the Air Permit constitutes neither a permitting action nor a status decision under the CZA, as Appellants themselves clearly conceded in their original appeal before the CZICB. Indeed, the facts clearly reflect that the scope and effect of the Air Permit was limited to authorizing minor modifications to preexisting air pollution control equipment at the refinery, and was issued by DNREC pursuant to the Environmental Control Statute – not the CZA. Because the Air Permit does not qualify as either a permitting action or a Status Decision pursuant to the CZA, the issuance of the Air Permit is not a decision under Section 7005 of the CZA; therefore, such action does not fall within the scope of jurisdiction of the CZICB as expressly granted by Section 7007 of the CZA.

3. Denied. As with the CZICB, the EAB's jurisdiction is limited by its enabling statute, the Environmental Control Statute. In *Oceanport Industries v. Wilmington Stevedores, Inc.*, this Court expressly interpreted the scope of the EAB's jurisdiction under the Environmental Control Statute in matters pertaining to the CZA. That case involved facts similar to those in the instant appeal, and this Court held that the EAB does *not* have jurisdiction to resolve a permit appeal

raising substantive challenges under the CZA. In so holding, this Court confirmed that it is not enough that the challenged DNREC action was taken pursuant to a statutory program conferring to the EAB jurisdiction over certain appeals; rather, it is also necessary that the subject matter implicated by the relevant challenge is governed by the statutes conferring jurisdiction to the EAB. Both the EAB and the Superior Court below recognized *Oceanport* as controlling and on-point in this case, and on that basis, concluded that the EAB lacked subject matter jurisdiction over the Air Permit Appeal.

In apparent disregard for this Court's prior holding in *Oceanport*, Appellants attempt to argue that the language of the EAB's enabling statute extends that body's jurisdictional scope to *any challenge*, on *any grounds*, to *any action* by the Secretary. In this way, Appellants propose a virtually boundless standard for the jurisdiction of the EAB, which directly contravenes the clear intent and scope of the Environmental Control Statute. There is no dispute that the Secretary's action in this case is the issuance of an air pollution control permit; however, the *only* objections to the Air Permit raised by Appellants are grounded *solely* in the CZA, as Appellants themselves admit. Accordingly, Appellants cannot demonstrate that their substantive objections to the Air Permit fall within the scope of the EAB's jurisdiction.

Nor can Appellants support an expansion of the EAB's clearly-defined jurisdictional bounds by simply pointing to a provision of DNREC's air pollution control regulations (Section 11.6 of DNREC's air quality Regulation No. 1102) which requires the Department to evaluate whether a proposed air project would violate any other Departmental rules and regulations. Because the EAB's jurisdiction is expressly limited by the Environmental Control Statute, any regulation promulgated thereunder – including Section 11.6 – must necessarily be interpreted consistently with this statutory authority. The Secretary cannot expand the jurisdiction of the EAB by regulation beyond that authorized by the relevant enabling statute.

STATEMENT OF FACTS

A. Factual Background

DCRC owns and operates a petroleum refinery (the "Facility" or "Refinery"), including supporting marine vessel docking equipment and loading facilities, located at 4550 Wrangle Hill Road, Delaware City, Delaware. Pre-Hearing Order ¶ 5.A.[1] (A.45). Among other air pollution control systems operated by DCRC at the Facility, DCRC operates the Marine Vapor Recovery System ("MVRS") to capture vapors displaced during certain material transfer activities conducted at the Docking Facility. *Id.* ¶ 3.C. (A.43). Prior to any events relevant to this proceeding, the operation of the MVRS was already authorized under existing Air Pollution Control Permit 95/0471 (the "MVRS Permit"). *Id.* ¶ 5.D., I. (A.46). DCRC's operation of the MVRS continues to be authorized by the MVRS Permit. *Id.*

On March 21, 2013, DCRC submitted to DNREC, Division of Air Quality ("DAQ"), an application to amend the MVRS Permit to allow for minor

[1] As reflected in Appellants' Opening Brief, as part of the proceedings before the CZICB, the parties negotiated a Joint Final Pre-Hearing Order. Counsel for each of the parties executed the Joint Final Pre-Hearing Order on the morning of the hearing before the CZICB. It is the parties' additional understanding that the Chair of the CZICB signed the Order before the formal hearing commenced. However, the CZICB did not provide to any of the parties a copy of the fully executed Joint Final Pre-Hearing Order. Accordingly, to facilitate use of the Joint Final Pre-Hearing Order in the context of the parties' challenges to the CZICB decision before the Superior Court, the parties entered into a stipulation, dated February 3, 2014, addressing the Joint Final Pre-Hearing Order in the form executed by all parties on July 16, 2013. The Joint Final Pre-Hearing Order is included in Appellants' Appendix at A.42-56.

modifications to the MVRS associated with barge loading activities at the Facility (the "Air Permit Application"). *Id.* ¶ 5.I. (A.46). Specifically, the Air Permit Application requested authorization for minor piping changes in support of crude oil loading from existing storage tankage at the Refinery to barges, and minor instrumentation adjustments to the MVRS to ensure the effective operation of the existing MVRS emission control system at the Docking Facility. *Id.* ¶ 3.E. (A.43). The Air Permit Application also proposed a significant reduction in the allowable emission rate for volatile organic compounds ("VOCs"), the regulated air emissions controlled by the MVRS, requested corresponding changes to the allowable limits for the air emissions created when the MVRS destroys VOCs, and clarified the use of the MVRS to control vapors displaced during the loading of crude oil onto barges. *Id.*

The Department convened a public hearing concerning the Air Permit Application on May 8, 2013. *Id.* ¶ 5.U. (A.47). On May 31, 2013, DNREC issued to DCRC Air Permit No. 2013-A-0020 and the associated amendment to the MVRS Permit (Amendment 3) (collectively, the "Air Permit"), authorizing DCRC to implement the requested minor modifications to the MVRS. *Id.* ¶ 5.J. (A.46).

The very limited modifications to the MVRS authorized through the Air Permit in no way authorize or govern any rail-related activities at the Refinery, and

the Air Permit constitutes the only substantive action by DNREC at issue in this case. *See id.* ¶¶ 3.E.-G., 5.I., 5.II., and 4.A.-B. (A.43, A. 45, A.46 and A.48).

On June 14, 2013, Appellants filed two separate Air Permit Appeals challenging the Air Permit: Appellants filed one appeal with the CZICB, and the other appeal with the EAB. Both Air Permit Appeals objected to the Air Permit solely on grounds under the CZA; Appellants raised no substantive objections to any air quality considerations implicated by the Air Permit. *Id.* at ¶ 5.EE. (A.48).

B. The CZICB Appeal

On July 5, 2013, DCRC filed with the CZICB a Motion to Dismiss, requesting dismissal of the Air Permit Appeal for lack of jurisdiction and failure to establish legal standing (the "Motion to Dismiss"). The CZICB held a public hearing on the Air Permit Appeal on July 16, 2013. Final Order at 1 (A.384). Prior to the commencement of the hearing on the merits, the CZICB entertained oral argument on the Motion to Dismiss. At the conclusion of oral argument, the CZICB's Chair moved that the CZICB should conclude that it lacked subject matter jurisdiction over the appeal. *Id.* at 6 (A.389). A majority of the CZICB members present (four of seven) voted in favor of the motion, finding that the CZICB lacked subject matter jurisdiction over the Air Permit Appeal. *Id.* However, the CZICB interpreted 7 Del. C. § 7006 to require at least *five* members of the CZICB to resolve any contention raised through a Motion to Dismiss.

Accordingly, the CZICB concluded that the Motion to Dismiss on jurisdictional grounds could not be granted. *Id.* at 6-7 (A.389-90).

Following the presentation of evidence on the record by all parties, the CZICB requested further oral argument on the issue of whether Appellants had demonstrated standing. *Id.* at 19 (A.402). DCRC and DNREC argued that Appellants had not met their burden of presenting sufficient evidence to support a finding by the CZICB that Appellants had standing. *Id.* The Chair then moved to grant DCRC's Motion to Dismiss for lack of standing relative to the sufficiency of the evidence introduced at the hearing. *Id.* at 21 (A.404). All seven CZICB members present voted in favor of the Motion to Dismiss. *Id.*

On September 3, 2013, Appellants filed with the Superior Court a Notice of Appeal of the Final Order of the CZICB, challenging the CZICB's decision to dismiss the case on the basis that Appellants' lacked standing to pursue the Air Permit Appeal. Superior Court Docket for N13A-09-001. On September 12, 2013, DCRC filed a Notice of Cross-Appeal with the Superior Court. *Id.* While supporting the CZICB's determination to dismiss the Air Permit Appeal due to Appellants' failure to establish standing, DCRC asserted that the CZICB committed legal error in failing to conclude that the Air Permit Appeal should be dismissed on the basis that the CZICB lacked subject matter jurisdiction over the Air Permit Appeal.

C. The EAB Appeal

On November 4, 2013, both DCRC and DNREC filed motions requesting that the EAB dismiss the Air Permit Appeal on the basis that the EAB lacked subject matter jurisdiction. The EAB held oral argument on these motions at a public hearing convened on January 13, 2014. At the conclusion of this hearing, the EAB's six members unanimously held that the EAB lacked subject matter jurisdiction and voted to grant the motions to dismiss. The EAB issued its Final Decision on April 8, 2014. (A.407 *et seq.*) Appellants filed a Notice of Appeal with the Superior Court on May 7, 2014. Superior Court Docket for N14A-05-002.

D. The Superior Court Appeals

The Superior Court reviewed the appeals filed in response to the decisions of the CZICB and the EAB and issued its decision on March 31, 2015. The Superior Court Opinion affirmed the EAB's decision that the EAB lacked jurisdiction to resolve the Air Permit Appeal. The Superior Court also affirmed the CZICB's decision to dismiss the Air Permit Appeal, on the alternate grounds that the CZICB lacked subject matter jurisdiction over the Air Permit Appeal. On April 30, 2015, Appellants filed with this Court their Notice of Appeal challenging the Superior Court Opinion.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY APPLIED THE LEGAL PRINCIPLES UNDERLYING THE JURISDICTIONAL DOCTRINE, RECOGNIZING THAT JURISDICTION CANNOT BE PRESUMED TO EXIST, BUT RATHER REQUIRES AN EXPRESS GRANT OF LEGISLATIVE AUTHORITY.

Question Presented: Did the Superior Court correctly apply the governing legal principles in finding that a right to an administrative appeal must be expressly conferred by statute, and on this basis, appropriately conclude that both the EAB and the CZICB lacked subject matter jurisdiction over the Air Permit Appeals? Suggested Answer: Yes. (13A-09-001 ALR Docket No. 27, pp. 10-11; 14A-05-002 ALR Docket No. 22, pp. 11-16)

Scope of Review:

On appeal from an administrative action, an appellate court "'must determine whether the agency ruling is supported by substantial evidence and free from legal error.'" *Andreason v. Royal Pest Control*, 72 A.3d 115, 125 (Del. 2013) (internal citation omitted). A higher appellate court must apply the same standard of review to an administrative decision as the intermediate appellate court that preceded it. *Stoltz Mgmt. Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992) ("[T]he higher court does not review the decision of the intermediate court but, instead, directly examines the decision of the agency.").

Issues of law, including determinations of the subject matter jurisdiction of an administrative board, are subject to *de novo* review by the appellate courts. *Kearney v. Coastal Zone Indus. Control Bd.*, 2005 Del. Super. LEXIS 454, at *11 (Del. Super.), *aff'd* 897 A.2d 767 (Del. 2006); *see also Oceanport Indus. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994) (stating that the applicable questions of law will be reviewed *de novo*). *De novo* review "accord[s] due weight" to an agency's legal interpretation of "a statute administered by it." *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 382 (Del. 1999).

Merits of argument:

The concept of jurisdiction is characterized by certain foundational legal principles, the consideration of which is critical to the resolution of the issues before this Court. Initially, it is well-settled that jurisdiction is to be construed *narrowly*. *See, e.g., Palmore v. United States*, 411 U.S. 389, 396 (1973) ("Jurisdictional statutes are to be construed with precision and with fidelity to the terms by which Congress has expressed its wishes" (quoting *Chen Fan Kwok v. INS*, 392 U.S. 206, 212 (1968) (internal quotation marks omitted))); *Amoco Prod. Co. v. Wyo. State Bd. of Equalization*, 7 P.3d 900, 904 (Wyo. 2000) ("An agency does not have discretion in determining whether or not it has subject matter jurisdiction; subject matter jurisdiction either exists or it does not."). The Superior Court below correctly applied this standard, recognizing that "[w]hether there

should be a right to an administrative appeal is not an appropriate issue for judicial consideration. Rather, creation of such rights is strictly a legislative function. . . . The judicial function is limited to applying the statute objectively and not revising it." (Super. Ct. Op. at 9-10) (A.445-46). The Superior Court further noted that "jurisdiction cannot be waived, nor can subject matter jurisdiction be conferred by agreement." *Id.* at 8-9 (A.444-45).

It is with these fundamental premises in mind, therefore, that the jurisdiction of the EAB and the CZICB must be evaluated. *See, e.g., Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 907 (Del. 1994) ("*Oceanport*") (construing the jurisdiction afforded to administrative review boards as limited to decisions made pursuant to the statutory provisions conferring authority on such boards); *see also* Super. Ct. Op. at 9 (A.445) (quoting *Oceanport*).

The EAB and the CZICB are administrative entities and, therefore, each board's individual authority to resolve appeals of administrative actions is both established and prescribed by the relevant enabling statute. *See Kreshtool v. Delmarva Power & Light Co.*, 310 A.2d 649, 654 (Del. Super. 1973) ("The powers of an administrative entity must be exercised in accordance with the statute conferring power upon it."). The statute from which the EAB derives its authority is the Environmental Control Statute, 7 Del. C. § 6001 *et seq.*; the statute from which the CZICB derives its authority is the CZA, 7 Del. C. § 7001 *et seq.*

The scope of jurisdiction of the CZICB and the EAB must be interpreted consistent with these fundamental principles underlying the legal concept of jurisdiction. Any suggestion by Appellants, therefore, that it is nevertheless appropriate to deviate from the clear bounds of the jurisdiction of these administrative bodies, as expressly defined by their respective enabling statutes, directly contravenes the long-standing foundation of the jurisdictional doctrine. Indeed, the Superior Court confirmed the correct application of these relevant principles in "reject[ing] Appellants' position that either the Coastal Zone Board or the EAB 'should' have jurisdiction to consider Appellants' appeal." Super. Ct. Op. at 9 (A.445).[2] As the Superior Court concluded, jurisdiction cannot be inferred based on equitable principles, but must be expressly granted by clear legislative directive.

[2] Appellants' similarly restate in their Opening Brief before this Court that they "filed both appeals because of the jurisdictional issue at the heart of the CZICB appeal in an effort to ensure that at least one of these boards could hear and decide the merits of Appellants' contentions under the Coastal Zone Act." Appellants' Opening Br. at 6.

II. THE SUPERIOR COURT WAS CORRECT AS A MATTER OF LAW IN UPHOLDING THE EAB'S DETERMINATION THAT IT DID NOT HAVE JURISDICTION OVER THE AIR PERMIT APPEAL.

Question Presented: Did the Superior Court correctly determine as a matter of law to affirm the EAB's determination that the EAB lacks subject matter jurisdiction over the Air Permit Appeal? Suggested Answer: Yes. (14A-05-002 ALR Docket No. 22, pp. 16-29)

Scope of Review: As stated above, issues of law, including determinations of the subject matter jurisdiction of an administrative board, are subject to *de novo* review by the appellate courts. *Kearney,* 2005 Del. Super. LEXIS 454, at *11. (*See supra* pp. 12-13.)

Merits of argument:

A. The Delaware Supreme Court has clearly determined that the EAB does not have jurisdiction to resolve questions raised under the CZA.

This Court has already been called upon to define "the scope of the EAB's jurisdiction in matters pertaining to the CZA." *Oceanport*, 636 A.2d at 896. In its decision addressing a case similar to the instant Appeal, this Court held that the EAB does not have jurisdiction to resolve a permit appeal where the subject matter of the appeal relates to the CZA. *Id.* at 907.

Oceanport expressly considered a challenge before the EAB of an action by the Secretary of DNREC, where appellants sought the EAB's resolution of

substantive arguments based on the CZA. The Court directly and unequivocally resolved this question by concluding that the EAB had no jurisdiction to resolve questions requiring interpretation of the CZA or its implementing regulations.

Recognizing this clear directive from the Supreme Court, the EAB in the proceeding below determined that *Oceanport* constituted controlling authority, and therefore concluded that the EAB lacked subject matter jurisdiction over the Air Permit Appeal, because Appellants raised issues arising solely under the CZA. The Superior Court then confirmed "that the EAB properly relied upon the Supreme Court's decision in *Oceanport* as applicable and binding legal precedent." Super. Ct. Op. at 11 (A.447). The Superior Court further concluded "that *Oceanport* is on-point and controlling in this appeal. The *Oceanport* decision makes clear that the EAB does not have authority to consider appeals that center upon CZA objections." *Id.* at 11-12 (A.447-48).

In opposition to the well-supported decisions of both the EAB and the Superior Court that *Oceanport* is controlling in this case, Appellants insist that this Court's decision in *Oceanport* rested entirely on standing and, therefore, cannot be read as holding anything about the EAB's jurisdiction. Appellants' Opening Br. at 30-31. In this way, Appellants would have this Court regard as irrelevant its prior statements on the very issues presented in this case.

Oceanport involved an appeal, originally filed with the EAB, of three permits issued by DNREC: (1) an air permit for the construction of certain bulk transfer product equipment at the facility's pier; (2) a National Pollutant Discharge Elimination System ("NPDES") permit to discharge stormwater runoff into the Delaware River; and (3) a subaqueous lands permit for the construction of portions of a pier in subaqueous lands. 636 A.2d at 898. The Secretary had issued the air permit and the NPDES permit pursuant to the Environmental Control Statute (Chapter 60 of Title 7, Delaware Code), and issued the subaqueous lands permit pursuant to the Delaware Subaqueous Lands statute (Chapter 72 of Title 7, Delaware Code). *Id.* The appellant alleged (initially before the EAB) that the Secretary's actions in issuing the three permits violated the CZA. *Id.*

Prior to the case reaching the Supreme Court, the EAB dismissed the appeal filed by appellant, Wilmington Stevedores, Inc. ("WSI"). On appeal, the Delaware Superior Court remanded the case to the EAB, with instructions to remand, in turn, to DNREC for a review of the permitted project under the CZA. *Id.* at 899. The permittee appealed this decision of the Superior Court to the Delaware Supreme Court. Based upon consideration of the statutory provisions at issue, and their relevance to the jurisdiction of the EAB, the Supreme Court determined that the decision of the Superior Court was erroneous, because the lower court "confused

the application of the CZA . . . to [sic] the issuance of permits granted under the authority of Chapters 60 and 72." *Id.* at 896.

In essence, this Court recognized that two circumstances must be present in order for an administrative tribunal, such as the EAB, to exercise jurisdiction over a challenge to an action by the Secretary: (1) the relevant action by the Secretary must have been taken pursuant to a statutory program conferring upon the EAB jurisdiction to consider appeals of such action, *and* (2) the subject matter underlying such challenge must fall within the scope of the substantive issues governed by the statutes conferring the jurisdiction on the EAB. In *Oceanport,* the first of these two requirements was satisfied – the challenged actions by the Secretary were taken pursuant to statutes conferring upon the EAB jurisdiction to consider decisions by the Secretary under such statutory programs. However, the Supreme Court in *Oceanport* nonetheless determined that the EAB did *not* have jurisdiction over the appeals of these actions of the Secretary because WSI's challenges were grounded in – and required interpretation of – a statutory program that does not confer jurisdiction upon the EAB – the CZA. *Id.* at 907.

As in *Oceanport*, Appellants in this case are attempting to challenge before the EAB an air permit issued by the Secretary pursuant to the Environmental Control Statute, asserting substantive challenges grounded in the CZA. Indeed, throughout this proceeding, Appellants themselves have clearly stated that they are

"challenging ***only*** the portions of the [Secretary's] Order in which the Secretary ruled on the status of the crude oil transfer operation ***under the [CZA].***" Statement of Appeal at 1 (A.31) (emphasis added).[3] Therefore, there can be no question that the subject matter of the Air Permit Appeal in this case is based on the CZA, and that this Court has already determined that the EAB lacks jurisdiction over such an appeal.

Appellants can identify no provision of any Delaware statute granting to the EAB jurisdiction to resolve a challenge to an action taken by the Secretary where such challenge is based on grounds raised under the CZA. Moreover, to the extent that any question could remain regarding the EAB's jurisdiction to resolve appeals implicating substantive issues beyond the scope of the statutory authority granted to the EAB, the Superior Court and the EAB properly concluded that this Court's decision in *Oceanport* eliminates any such uncertainty. That decision governs the jurisdictional question before the EAB in this case, and dictates that the EAB does not have jurisdiction to address the Appeal.

B. Appellants' interpretation of the EAB's enabling statute – the Environmental Control Statute – would extend the EAB's jurisdiction to any substantive claim regardless of whether it arises under the Environmental Control Statute, thereby rendering the scope of the EAB's jurisdiction virtually boundless.

[3] Indeed, Appellants themselves have stated that they do not believe that the EAB is the appropriate forum to address such issues (arguing in favor of CZICB review). *Id.* at 1-2 (A.31-32).

Appellants advocate for a formalistic reading of the relevant language of the Environmental Control Statute which grants to the EAB jurisdiction to hear appeals of "actions of the Secretary." Specifically, Appellants point to Section 6008(a) of the Environmental Control Statute, which provides that persons substantially affected by any action of the Secretary may appeal to the EAB within 20 days after the Secretary's decision or publication of the decision. 7 Del. C. § 6008(a). According to Appellants, this provision functions to establish jurisdiction for the EAB in any action in which (1) the appellant is a person with a substantially affected interest, and (2) the Secretary has taken some action -- no other conditions need be satisfied. Appellants' Opening Br. at 25. Indeed, under Appellants' interpretation of the relevant statutory language, *any* challenge, on *any* grounds, to *any* action by the Secretary may properly be raised before the EAB. In this way, Appellants propose a virtually boundless standard for the jurisdiction of the EAB. Such construction is plainly inconsistent with the underlying statutory intent of Section 6008, as confirmed by both the Superior Court and EAB below.

As an administrative entity, the EAB's authority to resolve appeals of administrative actions is both established and prescribed by the EAB's enabling statute. *See, e.g., Oceanport*, 636 A.2d at 907 (construing the jurisdiction afforded to administrative review boards – specifically, the EAB – as limited to decisions made pursuant to the statutory provisions conferring authority on such boards);

Kreshtool, 310 A.2d at 645 ("The powers of an administrative entity must be exercised in accordance with the statute conferring power upon it."). The EAB derives its authority from the Environmental Control Statute to resolve (among other actions) appeals of air pollution control permits issued by the Secretary. *See* 7 Del. C. § 6008(a).[4] The EAB's jurisdiction is both clearly defined and expressly limited by this specific statutory grant of authority.

Consistent with well-established principles of statutory construction, if the Delaware General Assembly had intended to confer upon the EAB the authority to review challenges raising arguments under, and requiring interpretation of, the CZA, it would have done so expressly. *Worldwide Salvage, Inc. v. EAB*, 1986 WL 3650, at *4 (Del. Super.) (observing that, where the legislature has intended to create appeal rights from decisions of the Secretary, it has done so expressly). The statutory provisions from which the EAB derives its general authority do *not* confer jurisdiction upon the EAB to consider challenges under the CZA, regardless of whether Appellants attempt to assert such challenges through the Air Permit Appeal. Similarly, the CZA includes no grant of authority to the EAB. *Id.* (distinguishing the Environmental Control Statute, which "broadly prohibits the

[4] In addition, other Delaware statutes expressly grant to the EAB jurisdiction over actions of the Secretary taken pursuant to those specific statutory programs. *See, e.g.,* 7 Del. C. § 7210 (conferring EAB jurisdiction over actions of the Secretary under Chapter 72 governing subaqueous lands); 7 Del. C. § 7412(a) (conferring EAB jurisdiction over actions of the Secretary under Chapter 74, the Delaware Underground Storage Tank Act); 7 Del. C. § 7716(a) (conferring EAB jurisdiction over actions of the Secretary under Chapter 77, the Extremely Hazardous Substances Risk Management Act).

discharge of pollutants into the environment without a permit", from the CZA, which "require[s] permits for certain activities to be conducted in the coastal zone").

DCRC acknowledges that the action of the Secretary in this case is the issuance of the Air Permit, under Chapter 60 of the Environmental Control Statute. However, simply because Appellants filed an appeal of the Secretary's action in issuing an air permit, the EAB does not thereby secure jurisdiction relative to *any* issue that Appellants might seek to raise in the context of a purported challenge to the Air Permit. Appellants must also demonstrate that the scope of the EAB's jurisdiction properly extends to the *substantive objections* to the Air Permit raised by Appellants. Because the *only* objections to the Air Permit raised by Appellants are grounded solely in the CZA, Appellants cannot make such requisite showing. To conclude otherwise would be to disregard the well-established legal concept that jurisdiction is to be construed narrowly and precisely.

Section 6008(a) of the Environmental Control Statute must therefore be properly interpreted as limiting the EAB's jurisdiction to reviewing challenges of actions of the Secretary taken *under the Environmental Control Statute*. In contrast to Appellants' open-ended jurisdictional theory regarding the intent and scope of Section 6008(a), construing the bounds of the EAB's jurisdictional grant as consistent with the substantive breadth of the Environmental Control Statute is

consistent with the multiple other statutes which expressly grant to the EAB jurisdiction over actions of the Secretary taken pursuant to those specific statutory programs. (*See supra* note 4.) If, as Appellants contend, the Environmental Control Statute granted to the EAB jurisdiction over any action by the Secretary, the Legislature's subsequent statutory grants of jurisdiction to the EAB would not only be unnecessary but also countervailing.

Moreover, an interpretation of Section 6008(a) which defines the EAB's jurisdiction as limited to challenges arising under that specific statute prevents the absurd consequences that would result from Appellants' contention that the EAB's jurisdiction extends to *any* action of the Secretary.[5] Indeed, under Appellants' premise, the EAB could be the forum to resolve challenges to innumerable actions by the Secretary, including something as routine as the Secretary's decision to hire a DNREC employee.

Appellants argue that the EAB wrongly created an issue-based limit on its jurisdiction, because, Appellants insist, the relevant statutory scheme supports no bounds on the EAB's jurisdiction if the challenge relates to an action by the Secretary. Appellants' Opening Br. at 26. To the contrary, the EAB's decision was necessarily grounded in, and entirely consistent with, the express legislative

[5] The longstanding absurdity doctrine requires the interpretation of the language of a statute in a manner that avoids absurd results. *Ingram v. Thorpe*, 747 A.2d 545, 547 (Del. 2000) (a "statute must be construed as a whole in a manner that avoids absurd results"). *See also LeVan v. Independence Mall, Inc.* 940 A.2d 929, 932 (Del. 2007).

grant of jurisdiction to the EAB, as defined by the statute from which the EAB derives its authority – the Environmental Control Statute. Accordingly, the EAB's jurisdiction under Section 6008(a) is necessarily limited to actions of the Secretary under the Environmental Control Statute and, therefore, cannot extend to decisions of the Secretary under the CZA.

Appellants also rely upon a regulatory section promulgated pursuant to the Environmental Control Statute as a means of supporting their claim regarding the breadth of the scope of the EAB's jurisdiction – specifically, Section 11.6 (7 Del. Admin. Code § 1102-11.6). The purpose of this regulatory provision is to provide for the consideration by the Department of whether an applicant for an air pollution control permit has demonstrated that the proposed air equipment, facility, or air pollution control device will not cause a violation of the Department's requirements, including under its rules and regulations. Appellants argue that this regulation provides for the Department to consider, as part of the air permit review process, whether the proposed air project would violate the CZA and its implementing regulations. Appellants therefore contend that the compliance of the project with the CZA is a requirement of the air regulations, and must then fall within the scope of the EAB's jurisdiction. But Appellants take their analysis too far, apparently seeking to use Section 11.6 as a "back door" to raise before the EAB *CZA-based* objections to the Air Permit.

As discussed above, the bounds of the EAB's jurisdiction are defined by the EAB's enabling statute, and the Environmental Control Statute does not extend such jurisdiction to evaluation of substantive questions under the CZA. Regulations promulgated pursuant to the Environmental Control Statute, including Section 11.6, must be interpreted consistent with statutory authority. Indeed, the Secretary cannot expand the EAB's jurisdiction beyond its statutory limits by regulatory action. *See Am. Ins. Ass'n v. Dep't of Ins.*, 2008 Del. Super. LEXIS 2 at *19 (Del. Super.) (Department of Insurance could not extend its authority through Commissioner's regulation). Therefore, any question about the scope and effect of Section 11.6, as it pertains to the EAB's jurisdiction, must be interpreted within the bounds of the well-defined statutory grant of jurisdiction to the EAB. Section 11.6 cannot be used as a vehicle to create an additional jurisdictional pathway to the EAB; to interpret Section 11.6 as having the jurisdictional consequences advocated by Appellants would effectively trump the separate statutory provisions in the Environmental Control Statute and the CZA, which define the scope of the jurisdiction of the EAB and CZICB, respectively.

For all of the foregoing reasons, the Superior Court's decision that the EAB lacked subject matter jurisdiction over the Air Permit Appeal was correct as a matter of law and should therefore be affirmed.

III. THE SUPERIOR COURT CORRECTLY CONCLUDED THAT THE CZICB LACKED SUBJECT MATTER JURISDICTION OVER THE AIR PERMIT APPEAL, ON THE BASIS THAT THE AIR PERMIT DOES NOT CONSTITUTE A REVIEWABLE ACTION BY THE CZICB UNDER THE CZA.

Question Presented: Did the Superior Court correctly find as a matter of law that the CZICB lacked subject matter jurisdiction over the Air Permit Appeal? Suggested Answer: Yes. (13A-09-001 ALR Docket No. 27, pp. 10-29; 13A-09-001 ALR Docket No. 38, pp. 11-17)

Scope of Review:

As stated above, issues of law, including determinations of the subject matter jurisdiction of an administrative board, are given *de novo* review by the appellate courts. *Kearney,* 2005 Del. Super. LEXIS 454, at *11. (*See supra* pp. 12-13.)

Merits of argument:

Like the EAB, and consistent with the most basic principles governing subject matter jurisdiction, the scope of jurisdiction of the CZICB is expressly limited by its enabling statute, in this case, the CZA. Section 7007 of the CZA provides that the CZICB is authorized to hear appeals only "from decisions of the Secretary made under Section 7005 of the CZA." 7 Del. C. § 7007(a). We therefore agree with Appellants that the question of whether the CZICB has

jurisdiction over the Air Permit Appeal hinges solely on the question of what actions of the Secretary are governed by Section 7005(a) of the CZA.

The statutory text is clear on this issue and cannot be circumvented by Appellants' attempt to interpret the statutory language as not extending to status decisions by the Secretary regarding the applicability of the CZA. Because, as Appellants concede, the Air Permit does not qualify as a either a CZA permitting decision or a status decision, the Air Permit Appeal is outside the scope of jurisdiction of the CZICB. The Superior Court's decision that the CZICB lacked jurisdiction over the Air Permit Appeal should therefore be affirmed.

A. Section 7007 of the CZA limits the jurisdiction of the CZICB to hearing appeals of the two types of decisions contemplated under Section 7005 of the CZA: permitting actions and status decisions.

Appellants initially opine that, read literally, Section 7005(a) would strictly limit the CZICB's jurisdiction to challenges to actions by the Secretary in issuing or denying permit applications. Appellants insist that, because the relevant statutory provision does not actually use the words "status decision," a strict reading of the jurisdictional grant would preclude a finding of CZICB jurisdiction over a formal status decision by the Secretary under the CZA. Appellants' Opening Br. at 15. Appellants then quickly attempt to dispel such notion, arguing that a literal reading of the statute would "lead[] to the unreasonable and absurd consequence" that the CZICB's jurisdiction would not extend to an appeal of

formal status decisions under the CZA regulations "despite the fact that everyone – from the Secretary to this Court – believes and acts as if it does." *Id.* at 17-18.

Appellants' argument overlooks a fundamental point: if Section 7005(a) must be read literally to exclude status decisions, then that would necessarily mean that the CZA's implementing regulations, which clearly detail the specific procedures for requesting a status decision from the Department, were promulgated by DNREC absent the requisite legal authority.

More specifically, 7 Del. Admin. Code § 101-7.0, entitled "Requests for Status Decisions," expressly provides the opportunity to a project proponent to request a status decision to determine whether a proposed activity or facility is a heavy industry and, similarly, whether a proposed activity requires a Coastal Zone permit. 7 Del. Admin Code §§ 101-7.1 and 101-7.2. Subsection 7.3 details the specific information that must be included in a status decision request, including but not limited to, specific forms supplied by the Department and an impact analysis of the proposed project relative to specific criteria identified in the CZA regulations. 7 Del. Admin. Code § 101-7.3. The remaining subsections of Section 7.0 address the manner in which the Secretary must respond to a request for status decision. 7 Del. Admin. Code §§ 101-7.5 – 101-7.7.[6]

[6] Indeed, the very next section within the CZA regulations, Section 8.0, addresses "permitting procedures" – i.e., the only other type of action by the Secretary covered by Section 7005(a), in addition to status decisions.

In promulgating this extensive status decision regulatory program – as a formal precursor to submittal and review of a CZA permit application – the Department expressly identified Section 7005 of the CZA as the relevant statutory authority. 7 Del. Admin. Code § 101-1.0. If Section 7005(a) cannot be read to extend to status decisions, then DNREC improperly promulgated Section 7.0 of the regulations pursuant to such underlying statutory authority. In any event, the legality of DNREC's promulgation of regulatory provisions governing status decisions pursuant to the CZA is not before this Court.

Although Section 7005(a) does not expressly use the term "status decision," it is clear from the CZA's implementing regulations that decisions by the Secretary concerning permitting actions under Section 7005 of the CZA are of two types, with Section 7.0 of the CZA regulations addressing Requests for Status Decisions, and Section 8.0 addressing Permitting Procedures, respectively. 7 Del. Admin. Code §§ 101-7.0 and 101-8.0. That is, decisions on permits and status decisions are simply two different prongs of the same overarching Coastal Zone permitting process pursuant to Section 7005 of the CZA. Section 7005 was clearly intended to address actions of the Secretary on permitting issues, and that includes actions in responding to status decisions.

Accordingly, it must be the case that Section 7005(a) can, and should, be read as authorizing the Secretary to make formal status decisions under the CZA

regulations and to extend the jurisdiction of the CZICB to consider challenges to formal CZA status decisions. By contrast, this conclusion does not support Appellants contention that Section 7005(a) must also be read to extend to *any* "informal" action the Secretary may take that merely "articulates an interpretation of the CZA." Appellants' Opening Br. at 21. Rather, a straightforward interpretation of the relevant statutory and regulatory provisions, as discussed above, demonstrates that Section 7005(a) contemplates only two types of actions by the Secretary under the CZA: permitting actions and status decisions.

Because Section 7007 of the CZA expressly limits the CZICB's jurisdiction to hearing appeals from decisions of the Secretary made pursuant to Section 7005, the CZICB's jurisdiction is strictly limited to reviewing formal permitting actions and status decisions by the Secretary under the CZA. Consistent with this limitation on the CZICB's jurisdiction, Appellants have not identified a single decision of the Delaware state courts supporting the proposition that either the CZICB or the Courts may entertain review of any challenge raised under the CZA, other than in response by the Secretary to either a permit application or a request for Status Decisions under the CZA regulations.

B. Under no circumstances can the Air Permit be considered to be either a permitting action or a Status Decision pursuant to Section 7005 of the CZA.

It is uncontroverted that the Secretary's action in issuing the Air Permit is neither a Coastal Zone permitting action nor a Status Decision under the CZA. Indeed, Appellants themselves state in their appeal filed with the Board that ***"the [Secretary's] Order does not decide a Request for Status Decision or a permit application under the CZA . . . ."*** Appellants' Statement of Appeal at 2 (A.32). Therefore, the parties agree and the record reflects that the Secretary's issuance of the Air Permit does not constitute an action by the Secretary in response to either a request for a Status Decision or a permit application under the CZA.

The Secretary issued the Air Permit pursuant to DNREC's authority and standards under the Environmental Control Statute and the regulations promulgated thereunder. *See* 7 Del. Code § 6001 *et seq.* Further, DNREC took the action of issuing the Air Permit in response to DCRC's application *for a modification to an existing Air Pollution Control Permit*, and for the express purpose of amending such *air permit*. In addition, the Air Permit was intended to authorize, and had the limited effect of authorizing, minor modifications to *air pollution control equipment* at the Facility – the MVRS. Therefore, the Department clearly did not act pursuant to the CZA in issuing the Air Permit.

By contrast, DCRC did not submit to the Department any of the application forms and/or supporting information required pursuant to the implementing regulations under the CZA for either a permit application or a request for a Status Decision. *See* 7 Del. Admin. Code §§ 101-7.0 and 101-8.0. Indeed, the Hearing Officer's Report accompanying the Air Permit clearly states that DCRC "did not file an application for a CZA permit or for status decision." Hearing Officer's Report at 6, attached to Appellants' Statement of Appeal at 6 (A.13). Instead, DCRC submitted an application to amend the Facility's existing air pollution control permit for the MVRS, using the specific forms and supplying the required supporting information, in accordance with the Division of Air Quality's required procedures for submitting *air permit applications*. 7 Del. Admin. Code § 1102-11.0.

Because the Air Permit does not constitute a permitting action or a Status Decision pursuant to the CZA, the issuance of the Air Permit is not a decision under Section 7005 of the CZA; therefore such Departmental action does not fall within the scope of jurisdiction of the CZICB as granted by Section 7007 of the CZA.

CONCLUSION

For the foregoing reasons, Appellee DCRC respectfully requests that this Court affirm the Superior Court's determination below that both the EAB and the CZICB lack subject matter jurisdiction over the Air Permit Appeal. Longstanding legal doctrine limits the subject matter jurisdiction of an administrative review body to the bounds of the jurisdictional grant established through the body's enabling statute. The jurisdictional questions in this case must therefore be resolved against this backdrop. This Court has already determined, in *Oceanport*, that the EAB does not have jurisdiction to resolve a permit appeal where the subject matter of the appeal relates to the CZA. Consistent with this holding, the Environmental Control Statute, which grants to the EAB the authority to hear appeals of actions of the Secretary under that statute, cannot be read as extending the EAB's jurisdiction to *any* action the Secretary may take. Rather, statutory construction principles clearly support a reading of the Environmental Control Statute that requires that the substantive objections raised in an appeal to the EAB must fall within the scope of the EAB's jurisdictional grant. The Air Permit Appeal fails to meet this standard.

Likewise, the Air Permit Appeal cannot properly be considered by the CZICB, because the CZA limits the CZICB's reviewing authority to challenges of actions taken by the Secretary pursuant to Section 7005 of the CZA. Because the

Air Permit constitutes neither a permitting action nor status decision under the CZA, it is not a reviewable action by the CZICB.

Respectfully submitted,

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July 20, 2015

CERTIFICATE OF SERVICE

On this 20th day of July, 2015, the undersigned hereby certifies that a copy of the foregoing Appellee Delaware City Refining Company LLC's Answering Brief has been caused to be served, via electronic mail and File & Serve Xpress, upon counsel for all parties in the underlying proceeding:

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