



IN THE SUPREME COURT OF THE STATE OF DELAWARE

DELAWARE DEPT. OF	:	No. 552,2015
NATURAL RESOURCES AND	:	
ENVIRONMENTAL CONTROL,	:	
and DAVID S. SMALL,	:	
	:	
Appellants,	:	On Appeal from the
	:	Superior Court of the
v.	:	State of Delaware,
	:	in and for Sussex County
W. WAYNE BAKER, CHRISTIAN	:	
HUDSON, JAMIN HUDSON,	:	C.A. No. S13C-08-026 THG
JOHN F. CLARK, HOLLYVILLE	:	
FARMS, LLC and ROUTE 24 CJ, LLC,	:	
	:	
Appellees.	:	

APPELLEES' ANSWERING BRIEF

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Dated: December 23, 2015

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS	iv
NATURE OF PROCEEDING	1
A. Proceedings Challenging The 2013 Regulations.....	1
B. Proceedings Challenging The 2014 Regulations.....	1
C. The Court Decision Invalidates The 2013 & 2014 Regulations	2
D. The Appeal.....	2
SUMMARY OF ARGUMENT.....	3
STATEMENT OF FACTS.....	4
I. Facts Regarding The 2013 Regulations.....	4
A. The Technical Document & Handbook Contain Mandatory Language.....	4
B. The E&S Regulations Are Adopted Without Even Defining The Technical Document & Handbook	6
C. The Hudsons: Builders, Developers, Contractors, Landowners, And Businessmen Who Are Directly Affected By The Regulations.....	8
D. Plaintiff Wayne Baker Will Also Be Affected By The Regulations; His Lands, Business Operations And Development Plans Will All Be Impacted	9
E. John Clark Is A Site Work Contractor, Requiring Him To Deal With The Regulations Every Day	11

II.	Facts Relevant To The 2014 Regulations.....	11
A.	DNREC Adopts An Incomplete, Second Set Of Regulations.....	11
B.	The 2014 Regulations Differ From The 2013 Regulations In Several Material Ways.....	13
1.	The Technical Document Is The Legal Standard, But It Is Still Not In the Regulations.....	13
2.	No “Handbook” Or “Functional Equivalent Measures” Legally Exist In The Regulations	15
3.	“Functional Equivalency” & Technical Document Content Further Cement Its Role As The Non-Regulation Legal Standard.....	16
	ARGUMENT	18
I.	THE DECISION CORRECTLY HELD THAT THE APPELLEES HAVE STANDING	18
A.	Question Presented	18
B.	Standard and Scope of Review.....	18
C.	Argument.....	18
1.	The Decision Held Standing Was Conceded & Established.....	18
2.	The Legal Standard: Injury May Cause Harm In The Future, It Need Not Cause Harm Now.....	20
3.	The Appellees Are Directly Affected By The Regulations	21

ARGUMENT25

II. THE DECISION CORRECTLY HELD THAT THE REGULATIONS WERE UNLAWFUL SINCE THE TECHNICAL DOCUMENT CONTAINED LEGAL STANDARDS THAT THE APA REQUIRES TO BE PROMULGATED AS REGULATIONS.....25

A. Question Presented25

B. Standard and Scope of Review.....25

C. Argument.....26

1. The Failure To Adopt The Technical Document In The Regulations Violates The E&S Act And The APA.....26

2. Details Of The E&S Act And The APA Support The Decision’s Invalidation Of The Regulations27

ARGUMENT31

III. THE DECISION PRESUMED THE 2014 REGULATIONS AMENDED THE 2013 REGULATIONS, BUT IT HELD THAT THE TECHNICAL DOCUMENT STILL ESTABLISHED LEGAL STANDARDS THAT MUST BE ADOPTED AS REGULATIONS.....31

A. Question Presented31

B. Standard and Scope of Review.....31

C. Argument.....32

CONCLUSION34

TABLE OF CITATIONS

<u>Cases</u>	<u>Page</u>
<i>Baker v. Delaware Dep't of Natural Resources and Environmental Control</i> , 2015 WL 5971784, Graves, J. (Del. Super., Oct. 7, 2015).....	19, 26, 29, 30
<i>Brohawn v. Town of Laurel</i> , 2009 WL 1449109, Chandler, C. (Del. Ch., May 13, 2009).....	20
<i>Dover Historical Society v. City of Dover Planning Com'n</i> , 838 A.2d 1103 (Del. 2003).....	20
<i>Kaung v. Cole Nat'l Corp.</i> , 884 A.2d 500 (Del. 2005).....	18, 25
<i>Little Italy Neighborhood Ass'n v. City of Wilmington Zoning Bd. of Adjustment</i> , 2010 WL 2977989, Silverman, J. (Del. Super., July 30, 2010).....	20
<i>Nichols v. State Coastal Zone Indus. Control Bd.</i> , 74 A.3d 636 (Del. 2013).....	20
<i>O'Neill v. Town of Middletown</i> , 2006 WL 205071, Noble, V.C. (Del. Ch., Jan. 18, 2006).....	20
<i>Barley Mill, LLC v. Save Our County, Inc.</i> , 89 A.3d 51 (Del. 2014)(en Banc).....	18
 <u>Statutes</u>	
7 Del. C. Ch. 40	3, 11
7 Del. C. § 4002(6)	28
7 Del. C. § 4003(9)	28
7 Del. C. § 4003(a)	28
7 Del. C. § 4003(b)	29
7 Del. C. § 6004.....	14

29 Del. C. § 6004.....	14
29 Del. C. § 10111.....	14
29 Del. C. § 1014(a).....	21
29 Del. C. § 10141(c).....	21, 27

Other Authorities

7 Del. Amin. Code 5101.....	11
-----------------------------	----

Regulations

E&S Regulations § 2.0.....	6, 12, 16, 25
E&S Regulations § 9.0.....	12
2014 Regulations § 1.13.....	13
2014 Regulations § 1.14.....	6, 7, 15
2014 Regulations § 1.14.1.....	13
2014 Regulations § 1.14.3.....	14
2014 Regulation § 3.0.....	12
2014 Regulation § 4.0.....	12
2014 Regulations § 4.1.....	6, 7, 15
2014 Regulation § 5.0.....	12
2014 Regulations § 5.1.....	6, 7, 15
2014 Regulation § 6.0.....	12
2014 Regulations § 6.1.2.....	15
2014 Regulation § 7.0.....	12
2014 Regulation § 8.0.....	12
2014 Regulation § 10.0.....	12

NATURE OF PROCEEDING

A. Proceedings Challenging The 2013 Regulations

A Declaratory Judgment action was initiated on August 23, 2013 challenging the validity of the Final Sediment And Stormwater Regulations, 7 Del. Admin. Code 5101 (the “E&S Regulations”) adopted on July 18, 2013 and published on August 1, 2013. The Complaint alleged that the E&S Regulations violated the Delaware Administrative Procedures Act, 29 *Del. C.* Ch. 101 (the “APA”) by imposing mandatory requirements based upon a separate, non-regulation: 1) Handbook; and 2) Technical Document. Briefing on Cross-Motions for Summary Judgment was concluded on April 17, 2014. The Court requested supplemental submissions from the parties on July 7, 2014, and those were completed on October 20, 2014.

B. Proceedings Challenging The 2014 Regulations

A second action under the APA was initiated on November 26, 2014, in which the Plaintiffs lodged numerous challenges to the Sediment & Stormwater Regulations adopted by the Defendants effective November 11, 2014 (the “2014 Regulations”).¹ On January 13, 2015, the Court below consolidated the two

¹ The final, official version of the 2014 Regulations only contains odd numbered pages 1 through 19. No even numbered pages were approved, leaving a 9 page void which renders many provisions incomplete, such as the term “Technical Document.” In some instances provisions are completely missing, like the definition of the term “Functional Equivalency.”

actions. The parties thereafter engaged in limited discovery and briefed Cross-Motions for Summary Judgment, which was completed on July 15, 2015.

C. The Court Decision Invalidates The 2013 & 2014 Regulations

On October 7, 2015, the Trial Court issued its “Memorandum Decision On Cross-Motions For Summary Judgment” and Order (the “Decision”). It held the 2013 and 2014 Regulations were “unlawful” under the APA since they established a “decision-making process” based upon a Technical Document that was not adopted in the formal Regulations as required.

D. The Appeal

On October 9, 2015, the Appellants initiated this appeal. The Appellants’ Corrected Opening Brief was filed on December 3, 2015. This is the Appellees’ Answering Brief on appeal.

SUMMARY OF ARGUMENT

- I. ***Denied.*** The appellees have Standing as members of the regulated community that are directly affected by the regulations being challenged. It is evident that no one must be actually harmed or injured before challenging the regulations, since the Administrative Procedures Act, 29 *Del. C.* Ch. 101 (the “APA”), requires that an action challenging the regulations be filed before they ever even took effect. Potential injury is all that the law requires.

- II. ***Denied.*** The Regulations are directly dependent upon the Technical Document, which therefore must be formally adopted pursuant to the APA. The 2013 Regulations mandated compliance with the Technical Document, but failed to include the Technical Document as part of the Regulations. The 2014 Regulations required either compliance with the Technical Document or measures functionally equivalent to the Technical Document, but again failed to adopt the Technical Document as regulations. Whether one must comply with the Technical Document or utilize it as the baseline standard for establishing compliance with the regulations matters not. Either way, the Technical Document contains mandatory legal standards that must be adopted as regulations under both the Delaware Erosion and Sedimentation Control Act, 7 *Del. C.* Ch. 40, and the APA.

- III. ***Denied.*** Nothing was “curative” and there were no “amendments” adopted in 2014. Instead, the 2014 Regulations adopted only the odd numbered pages of what purports to be a completely new, second, comprehensive set of regulations, without repealing any of the 2013 Regulations. In addition, the 2014 Regulations failed to cure the defect: the Technical Document must be adopted as part of the Regulations.

STATEMENT OF FACTS

I. Facts Regarding The 2013 Regulations

A. The Technical Document & Handbook Contain Mandatory Language

Articles 2 through 5 of the Technical Document contain; 1) a set of Policies And Procedures; 2) Plan Review And Approval requirements; 3) Construction Review And Compliance provisions; and 4) Permanent Stormwater Management System Maintenance standards. B-11 to B-41. Article 2 of the Technical Document mandates compliance with its contents to establish conformance with the E&S Regulations:

All activities subject to the Delaware Sediment And Stormwater Regulations shall follow the Regulations as well as Department policy, procedures, and guidelines established in this Technical Document. (emphasis added). B-14.

And numerous requirements contained in the Technical Document include the mandatory word “shall” in the descriptive sentences which establish permit application requirements. *See e.g.* B-14, B-16, B-17, B-18, B-20, B-22, B-23, and B-24.

The Delaware Erosion And Sediment Control Handbook (“Handbook”) is included at Article 3.06.1 in the Technical Document and is referenced in the Regulations. *See* B-12, B-30, B-108(§ 4.1), and B-112 (§ 6.1.2). Article 3 of the Technical Document provides that “all construction site stormwater management

practices shall be consistent with the standards, specifications, and details included in the current version of the Delaware Erosion & Sediment Control Handbook... ." B-17 at § 3.03. Any variance from the Handbook is at the discretion of DNREC. *Id.*

The Handbook contains mandatory requirements that persons applying for erosion and sediment control permit/plan approval must comply with. Indeed, it contains the "Standards & Specifications for Land Development Best Management Practices." B-43. These include: 1) Sediment Trapping Practices; 2) Dewatering Practices; 3) Water Control Practices; 4) Soil Stabilization Practices; 5) Waterway Construction Practices; and 6) Pollution Prevention Practices. B-43 to B-45 (§§ 3.1 through 3.6).

Sediment Trapping Practices include detailed specifications and descriptions for items such as straw bale barriers, silt fences, sediment traps, inlet protection, and temporary sediment basins. B-43 to B-45 and B-47 to B-69. Many of these items include required Construction Notes, design details, and dimensional specifications. The same holds true for certain Water Control Practices and Soil Stabilization Practices pages of the Handbook. B-44 and B-70 to B-79.

The E&S Regulations themselves do not contain any detailed design criteria or minimum standards and specifications. *See* B-100 to B-117. Instead,

§§ 1.14, 4.1, and 5.1 mandate compliance “with the design criteria and...minimum standards” set forth in the Technical Document and Handbook. B-102, B-108, and B-109.

B. The E&S Regulations Are Adopted Without Even Defining The Technical Document & Handbook

On July 18, 2013, Secretary’s Order No. 2013-WS-0026 was adopted. B-164. And on August 1, 2013 it was published in the Delaware Register of Regulations. B-194. The 2013 Regulations did not: 1) cite to a weblink or specify what “Handbook” and “Technical Document” were referred to; 2) include definitions of “Handbook” or “Technical Document” in § 2.0, the definition section; or 3) attach either document as an exhibit or appendix. B-100 to B-117.

Sections 1.14 and 4.1 of the 2013 Regulations only refer to “accompanying technical documents,” but no accompanying documents were included. Section 4.1 refers to the “Delaware Erosion and Sediment Control Handbook,” but does not provide a year of publication or any other specific, descriptive information on its identity.

Numerous sections of the 2013 Regulations, the Handbook, and the Technical Document make it clear beyond *peradventure* that all three (3) publications contain legal requirements:

- § 1.14 expressly provides that “[a]ll activity subject to these regulations **shall** comply with the design criteria and meet the minimum standards developed and published by the Department and **shall** follow Department policy, procedures, and guidelines as set forth in accompanying technical document.” B-102.
- § 4.1 of the E&S Regulations states that “[a]ll construction site stormwater management Imps **shall** conform to the design criteria and meet the minimum standards and specifications contained in the Delaware Erosion and Sediment Control Handbook, and approved supplements.” B-108 to B-109.
- § 5.1 indicates that “[a]ll items under this section, including design construction of stormwater management systems, **shall** conform to the design criteria and meet the minimum standards and specifications established by the Department policy, procedures, and guidelines as set forth in accompanying technical documents.” B-109.
- Article 2 of the Technical Document provides that “[a]ll activities subject to the Delaware Sediment And Stormwater Regulations **shall** follow the Regulations as well as Department policy,

procedures, and guidelines established in this Technical Document.”

B-14.

- Article 3 of the Technical Document states that “[a]ll construction site stormwater management practices shall be consistent with the standards, specifications and details included in the current version of the Delaware Erosion & Sediment Control Handbook... .” B-17.
 - Specifications contained in the Handbook include the mandatory term “shall.”²
- C. The Hudsons: Builders, Developers, Contractors, Landowners, And Businessmen Who Are Directly Affected By The Regulations

Christian and Jamin Hudson (the “Hudsons”) are brothers who own a number of businesses that are directly and materially affected by the E&S Regulations. B-354 at paras. 3-6. Specifically, the Hudsons own Plaintiff Route 24 CJ LLC, which is the title owner of 5 subdivided commercial parcels located near Rehoboth in Sussex County that are being actively marketed for development with improvements to be constructed in the future. *Id.* at para. 3. In addition, the brothers are owners of a residential construction company that regularly purchases building lots and builds spec houses on them. *Id.* at para. 5. Numerous other commercial and residential development projects have been

² Emphasis has been added to the word “shall” in the quoted excerpts.

undertaken by them on parcels of land located in Sussex County. *Id.* at para. 4. And in 2014, the Hudsons were in the process of developing a 94 room hotel near Rehoboth. *Id.* at para. 6.

In addition to being active builders, developers, and construction contractors who must deal with the Regulations on a regular basis, the Hudsons have set forth additional impacts that will be caused to them. B-354 to B-355 at paras. 7-10. As they conduct their regular business operations in the future, they will be required to obtain permits from the Sussex Conservation District, which will in turn be dependent upon compliance with the non-regulation Handbook and Technical Document. B-354 at paras. 7-9. The Hudsons will also be caused to incur additional costs arising from the non-regulation design criteria in the form of additional engineering costs and construction costs incurred in performing future projects. B-355 at para. 10.

D. Plaintiff Wayne Baker Will Also Be Affected By The Regulations; His Lands, Business Operations And Development Plans Will All Be Impacted

Plaintiff W. Wayne Baker (“Baker”) is a significant landowner, businessman, and developer of real estate. B-357 at paras. 3-6. Specifically, he has previously developed parcels of land in Sussex County with offices and gas stations for the business he owns, Wilson Baker, Inc. (“WBI”). *Id.* at para. 4. As a part of WBI’s petroleum distribution business, Baker intends to develop parcels

of land in Laurel and Greenwood, Delaware with additional gas stations. *Id.* at para. 5. And he owns parcels of land in Lewes, Rehoboth, Georgetown, Ellendale, and Seaford, Delaware which he wishes to redevelop with new buildings and improvements. *Id.*

Baker's landholdings include a 125 acre parcel of land which is the subject of an approved 178 lot residential development plat and 1,300 acres of land in Sussex County owned by his LLC, Hollyville Farms, LLC. B-357 at paras. 3 and 6. The 178 residential building lots will be developed, necessitating conformance with the Regulations and the non-regulation Handbook and Technical Document. In addition, the 1,300 acres of land will be detrimentally affected by the Regulations and the non-regulation Handbook and Technical Document; the uncertainties caused by DNREC's ability to unilaterally change the legal requirements overnight negatively impacts land value. *Id.* at para. 6.

Further, Baker will be required to obtain plan approvals and permits from the Sussex Conservation District pursuant to the Regulations. B-357 at para. 7. And he will experience impacts and additional costs as the result of the Regulations and the non-regulation Handbook and Technical Document. *Id.* at paras. 9 and 10.

E. John Clark Is A Site Work Contractor, Requiring Him To Deal With The Regulations Every Day

Plaintiff John F. Clark (“Clark”) is a contractor that owns a business known as Clark’s General Contractors, Inc. B-360 at para. 3. In that capacity, he performs site development work – *i.e.* construction of improvements to land in order to prepare it for development with commercial and residential buildings – on a regular basis. *Id.*

The Regulations and the non-regulation Handbook and Technical Document expressly set forth the detailed design criteria that must be complied with by Clark in order for him to successfully perform his business operations in the field of site work. B-360 at para. 3. Plans and permits must be approved by the Sussex Conservation District in order for Clark to do site work. *Id.* at para. 5. And the requirements contained in the non-regulation Handbook and Technical Document will have a direct impact on his business operations and his construction of development projects. *Id.* at paras. 6 and 7.

II. Facts Relevant To The 2014 Regulations

A. DNREC Adopts An Incomplete, Second Set Of Regulations

On October 15, 2014, DNREC, via Small, issued an order formally approving the Final Sediment And Stormwater Regulations, 7 Del. Amin. Code 5101 (the “2014 Regulations”), pursuant to the Erosion And Sedimentation Control Act, 7 *Del. C.* Ch. 40 (the “E&S Act”). B-202. It was designated as

“Secretary’s Order No. 2014-WS-0022” (the “2014 Order”). *Id.* The 2014 Regulations constitute a separate set of regulations, in addition to the Delaware Sediment And Stormwater Regulations adopted in 2013 (the “2013 Regulations”). *See* B-205 to B-216. The 2014 Regulations did not amend or modify the 2013 Regulations. *Id.*

The 2014 Regulations consist of 10 odd numbered pages 1 through 19; they do not include any even numbered pages. B-205 to B-216. The term “Technical Document” is cut short and the supposed new meaning of the term “Functional Equivalency” is nowhere found. B-208 (§ 1.14) and B-209 to B-210. In addition, the definition of terms between “Flood Event Volume (Fv)” and “Resource Protection Event” are missing. *See* B-209 to B-210. Both §§ 2.0 and 9.0 do not exist, as they were apparently on even numbered pages never formally approved. And portions of §§ 3.0, 4.0, 5.0, 6.0, 7.0, 8.0, and 10.0 are likewise not present, presumably because they too were on the even numbered pages not formally adopted. *Id.*

A notice purporting to publish the 2014 Regulations was contained in the Delaware Register of Regulations’ November 1, 2014 edition. B-217 to B-221. No regulations, however, were published. *Id.* The regulations published via incorporation by reference in 18 DE Reg. 204 differ from those approved by the 2014 Order. The 2014 Regulations differ from the DNREC Start Action Notice

2014-06 dated “8-12-14” and the Proposed Regulations contained in Register Notice SAN #2014-06, which only contained limited amendments and not a complete, second set of regulations. B-222 to B-223 and B-224 to B-230. The issue of failure to comply with other APA regulation-making requirements in adopting the 2014 Regulations was raised during the comment period. B-231 to B-234.

B. The 2014 Regulations Differ From The 2013 Regulations In Several Material Ways³

1. The Technical Document Is The Legal Standard, But It Is Still Not In the Regulations

In § 1.13 of the 2014 Regulations, it provides that DNREC “may also develop and maintain a Technical Document to serve as a guide for the regulated community and Delegated Agencies in complying with [the E&S Act and the 2014 Regulations].” B-238. Under § 1.14.1 of the 2014 Regulations, it provides that “[t]he Technical Document may include policies, procedures, technical specifications and other advisory documents as deemed necessary by the Department to carry out implementation and supervision of the sediment and stormwater program.” *Id.* But the 2014 Regulations do not require adoption of

³ This unofficial document is posted on DNREC’s website, and it appears to be what DNREC intended to adopt in terms of regulatory language but failed to accomplish. Nonetheless, the Appellees will discuss what was apparently intended to be adopted as regulations.

policies and specifications. Nor are policies and specifications contained within the body of the 2014 Regulations.

Section 1.14.2 of the 2014 Regulations provides that the Technical Document and any future revisions or updates need only be adopted pursuant to public notice requirements of 7 *Del. C.* § 6004, not according to the formal APA regulation adoption requirements. B-238. Only requiring public notice per 29 *Del. C.* § 6004 skips the APA requirements that regulations be presented in draft, subjected to a public comment period, and required to receive a formal recommendation and final adoption. *See 29 Del. C.* § 10111 *et seq.*

Section 1.14.3 of the 2014 Regulations provides:

[t]he Technical Document may be utilized as a reference for all activities subject to these regulations. Alternative measures that provide functional equivalency to the policies, procedures, technical specifications and other advisory provisions contained in the Technical Document and meet the provisions of these regulations may be considered on a case-by-case basis following [DNREC] review and approval. B-239.

This establishes that: 1) the Technical Document contains “policies, procedures, and technical specifications”; 2) no alternatives to the Technical Document must necessarily be considered by DNREC; and 3) there is no legal standard in the 2014 Regulations for determining whether such alternative measures will be considered and/or approved by DNREC.

Sections 4.1 and 5.1 of the 2014 Regulations provide:

The Technical Document may be utilized as a reference for the design and preparation of construction site stormwater management plans. Alternative measures that provide functional equivalency may be considered on a case-by-case basis in accordance with § 1.14 of these Regulations. B-245.

and

The Technical Document may be utilized as a reference to the design and preparation of post construction stormwater management plans. Alternative measures that provide functional equivalency may be considered on a case-by-case basis in accordance with § 1.14 of these Regulations. B-246.

2. No “Handbook” Or “Functional Equivalent Measures”
Legally Exist In The Regulations

In § 6.1.2 of the 2014 Regulations, it provides that a property owner “may refer to the specifications contained in the Handbook or take functional equivalent measures to install and maintain construction site stormwater management BMPs in accordance with the approved plan.” B-248. The “Handbook” is not a defined term. And the term “functional equivalent measures” is also undefined. Once again, the Appellees inartfully crafted the Regulations.

3. “Functional Equivalency” & Technical Document Content Further Cement Its Role As The Non-Regulation Legal Standard

Section 2.0 of the 2014 Regulations defines the term “Functional Equivalency” as “alternative measures that are consistent with the policies, procedures, technical specifications, and advisory provisions found in the Technical Document, and which satisfy these regulations.” B-240. Thus, the Technical Document constitutes a baseline, mandatory requirement; one must either comply with its terms or show an alternative is functionally equivalent to its terms. Either way, the Technical Document is the legal standard.

The 2014 Regulations also impose mandatory requirements in other sections regarding “BMPs,” which is an abbreviated term for “Best Management Practices” as defined in § 2.0. B-239, B-254 to B-256, and B-262 to B-323 (“BMP Standards and Specifications”). The Technical Document contains requirements regarding BMPs, thereby making it an effective component of the 2014 Regulations. Article 3.06 of the Technical Document, entitled “Sediment and Stormwater BMP Standards and Specifications,” requires compliance with BMP standards. B-254 to B-256.

Section 3.06.1 of the Technical Document includes the Delaware Erosion & Sediment Control Handbook (the “Handbook”). B-255. The Handbook contains hundreds of pages of “Standards & Specifications.” *See* B-259 to B-261.

These include “Standard Detail & Specifications” that provide detailed design parameters prescribe specific “Construction Notes” and “Materials.” *See e.g.* B-48 to B-49, B-52 to B-57, B-61 to B-62, B-64, B-66 to B-69, and B-72 to B-77.

DNREC has unilaterally made more than 30 amendments to the Technical Document in a 9 month period during 2014. B-324 to B-326. Public hearings for such amendments are not necessarily conducted. *See Id.*

ARGUMENT

I. THE DECISION CORRECTLY HELD THAT THE APPELLEES HAVE STANDING

A. Question Presented

Do the appellees possess standing to challenge the 2013 and 2014 Regulations where they are conceded by the appellants to be within the “regulated community” and their businesses involve site contracting, general construction contracting, and real estate development, all of which are areas that require compliance with the 2013 and 2014 Regulations? The question was preserved in the Trial Court at page 9 through 12 of “Plaintiffs’ Answering Brief In Opposition To Defendants’ Motion For Summary Judgment And Reply Brief In Support Of Their Motion For Summary Judgment” dated April 2, 2014.

B. Standard and Scope of Review

The Decision’s holding that the Appellees possessed Standing constitutes a legal question which this Court reviews *de novo*. *Barley Mill, LLC v. Save Our County, Inc.*, 89 A.3d 51, 60 (Del. 2014)(en Banc); *Kaung v. Cole Nat’l Corp.*, 884 A.2d 500, 508 (Del. 2005).

C. Argument

1. The Decision Held Standing Was Conceded & Established

The Decision correctly held that the Appellees established Standing to challenge the 2013 and 2014 Regulations, as they are within the “regulated

community” and are directly impacted based upon their businesses and commercial interests in the fields of building, contracting, and land development. Indeed, the Court below accurately observed that if the Appellees do not have Standing to challenge the regulations, then no one would have Standing. Since the Appellees must comply with the 2013 and 2014 Regulations on a regular basis in their business and land development undertakings, they easily satisfy the two part “injury in fact” and “zone of interests” test to establish Standing.

In the Decision, the Court noted the undisputed facts that the Appellees were either land developers or contractors who are subject to the Regulations. *Baker v. Delaware Dep’t of Natural Resources and Environmental Control*, 2015 WL 5971784, *11-12, Graves, J. (Del. Super., Oct. 7, 2015). The Court also relied upon: 1) an admission by the Appellants in one of their briefs: regulated parties under the Regulations include developers and contractors; and 2) the Appellees’ “Start Action Notice” for the 2014 Regulations, which conceded that members of the public who would likely be affected included “Land developers, contractors, builders... .” *Id.* Consequently, the Court held that it was obvious as both a matter of fact and law that the Appellees possessed Standing and that the Appellants had effectively admitted that the Appellees had Standing under the circumstances.

2. The Legal Standard: Injury May Cause Harm In The Future, It Need Not Cause Harm Now

Under the APA, the E&S Regulations may be challenged by “aggrieved persons,” which includes any persons who have: 1) suffered an “injury in fact”; and 2) intend to assert an interest “arguably within the zone of interest to be protected or regulated.” *Nichols v. State Coastal Zone Indus. Control Bd.*, 74 A.3d 636, 643 (Del. 2013). While the injury must be concrete and imminent, it is not necessary for actual or physical harm to have already occurred; it is sufficient if it will reasonably cause harm in the future. *Brohawn v. Town of Laurel*, 2009 WL 1449109, *4, Chandler, C. (Del. Ch., May 13, 2009). For example, nearby property owners have been found to possess Standing in the context of land use and zoning challenges. *Id.*; *Dover Historical Society v. City of Dover Planning Com’n*, 838 A.2d 1103, 1114 (Del. 2003); *O’Neill v. Town of Middletown*, 2006 WL 205071, *30-31, Noble, V.C. (Del. Ch., Jan. 18, 2006); *Little Italy Neighborhood Ass’n v. City of Wilmington Zoning Bd. of Adjustment*, 2010 WL 2977989, *3, Silverman, J. (Del. Super., July 30, 2010).

The Appellants ask this Court to establish a new, heightened standard to establish Standing: actual application of the Regulations and actual harm. OB at

11- 16.⁴ But the Appellants fail to explain why the APA contains a right to raise an “as applied” challenge to regulations in § 10141(c) and the “aggrieved” standard in § 10141(a) and (c), which only permits persons to challenge regulations within 30 days of their final publication. It is clear that a person may be “aggrieved” under § 1014(a) before harm is inflicted via the regulations “as applied.” The General Assembly evinced a clear intent for a person to be able to challenge regulations pre-enforcement. Accordingly, the Appellants’ argument is without merit.

3. The Appellees Are Directly Affected By
The Regulations

Neither the 2013 nor the 2014 Regulations contain any specific design criteria or minimum standards and specifications necessary to obtain an erosion, sediment control, and stormwater management plan approval. Instead, the Regulations refer to the non-regulation Technical Document for the requisite standards and criteria.

The Hudsons have to comply with the Regulations in the course of their regular business activities. When they build a new spec house, the Regulations will erode their profit margin based upon the uncertainties and additional costs. The Appellees may change the Technical Document at any time, on a moment’s

⁴ Citations herein to “OB at _” are to the pages contained in Appellants’ Corrected Opening Brief dated December 3, 2015.

notice and without advance warning. Thus, the Hudsons will not know whether they may move forward in accordance with construction schedules, as DNREC could change the requirements mid-project.

Baker too will suffer from the failure of the 2013 and 2014 Regulations to include the statutorily required minimum standards and technical criteria contained in the non-regulation Technical Document, which can be amended at any time. Developing 178 residential building lots will entail compliance with the Regulations during: 1) the plan/permit approval process; 2) the course of construction; and 3) future maintenance. A previously constructed stormwater management pond might have to be modified if the Appellees wake up one day and decide to change standards via their unilateral amendment of the Technical Document. The unknowns and uncertainties abound. This has a direct impact on Baker's ability to make decisions regarding construction of 2 new gas stations and the redevelopment of 4 other properties.

Only one of the Appellees needs to establish Standing in order for this Court to affirm the Decision. Appellee John F. Clark, who is a contractor that must comply with the Regulations on a daily basis in the course of his work, is clearly impacted by the 2013 and 2014 Regulations in a concrete weigh. Indeed, the types of erosion, sediment control, and stormwater management measures that are required by the Technical Document are the very essence of what Mr.

Clark does in his earthmoving and site improvement work involved in developing raw land with residential and commercial buildings and improvements. Silt fence and temporary stabilization measures have to be installed and maintained while earthmoving activities are underway. And he must also insure that permanent erosion, sediment control, and stormwater management devices and installations are in place and that they function properly before his work is done. The litany of Technical Document Standards and criteria are part of what Mr. Clark deals with daily.

Clark will be directly and materially affected in a negative way by the Regulations and the non-regulation Technical Document. The unpredictability and uncertainty arising from the failure to know what DNREC will do in the future at its whim to change the Technical Document means that Clark cannot commit to construction schedules with any degree of accuracy. In addition, the inclusion of design detail requisites in the instantaneously amendable Technical Document cause the legal requirements for performing site work to become a moving target.

Finally, it cannot be legitimately questioned that the Hudsons, Baker, and Clark are within the zone of interest intended to be protected by the APA. The APA is expressly intended to require that agencies like DNREC comport with the public regulation-making procedures so that individuals like the Hudsons, Baker,

and Clark, who are affected by the Regulations, have their say in the process. Indeed, if they do not have Standing, then who does? DNREC has admitted that builders and contractors like them are part of the regulated community, which are the only persons who could have Standing.

ARGUMENT

II. THE DECISION CORRECTLY HELD THAT THE REGULATIONS WERE UNLAWFUL SINCE THE TECHNICAL DOCUMENT CONTAINED LEGAL STANDARDS THAT THE APA REQUIRES TO BE PROMULGATED AS REGULATIONS

A. Question Presented

Did the Regulations violate the Administrative Procedures Act by failing to adopt the Technical Document as part of the Regulations where it contains mandatory legal standards? The question was preserved in the Trial Court at pages 13-14 of “Plaintiffs’ Opening Brief In Support Of Their Motion For Summary Judgment” dated February 17, 2014 and at pages 18-20 and 21-22 of “Plaintiffs’ Answering Brief In Opposition to Defendants’ Motion For Summary Judgment And Opening Brief In Support Of Their Motion For Summary Judgment” dated June 3, 2015.

B. Standard and Scope of Review

This Court reviews determinations of legal issues under a *de novo* standard of review. *Barley Mill, LLC v. Save Our County, Inc.*, 89 A.3d 51, 60 (Del. 2014)(en Banc); *Kaung v. Cole Nat’l Corp.*, 884 A.2d 500, 508 (Del. 2005).

C. Argument

1. The Failure To Adopt The Technical Document In The Regulations Violates The E&S Act And The APA

The Appellees established that both the 2013 and 2014 Regulations were “unlawful,” thereby requiring invalidation pursuant to the APA. The 2013 Regulations unlawfully mandated compliance with the non-regulation Technical Document. And the 2014 Regulations established the Technical Document as the standard of compliance, either by direct compliance therewith, or indirectly via use of measures functionally equivalent thereto. Regardless, the Technical Document constituted the baseline legal criteria in order for an applicant to obtain approval of a plan and permit required to disturb and develop land. As a result, the Decision properly held that both sets of Regulations were “unlawful” under the APA.

In pertinent part, the Trial Court held that the 2013 and 2014 Regulations “set forth requirements, standards, and criteria in the Technical Documents [sic] which govern its decision-making process,” thereby rendering the Regulations unlawful since the Technical Document was not adopted in the Regulations as required by the APA. *Baker* at *15. The 2013 and 2014 Regulations do not contain standards and criteria which, standing alone, enable a party to obtain plan and permit approvals needed in order to develop land. Instead, one must look to

the Technical Document in order to find the guidelines needed in order to prepare a detailed design plan that is necessary to obtain final permit approval.

The Appellants contend that the “unlawful” standard was not the governing legal standard under APA § 10141(c). OB at 18. The Court below properly held “unlawful” was the standard; it is clearly set forth in subsection (c). Because this argument is without any legal support, the Court should reject it.

In the 2013 Regulations, use of mandatory language made it abundantly clear that a person had no option other than to follow the standards and criteria contained in the Technical Document to gain approval. And in the 2014 Regulations a party was given the option of either complying with the Technical Document or, in the alternative, showing that the plans submitted contained measures that were functionally equivalent to the Technical Document’s contents. Either way, the Technical Document had to be followed. Consequently, the Technical Document contains standards and criteria necessary to obtain approvals under the E&S Act and constitutes “regulations” under the APA.

2. Details Of The E&S Act And The APA
Support The Decision’s Invalidation Of
The Regulations

The E&S Act requires persons who wish to engage in land-disturbing activities to submit a Sediment And Stormwater Management Plan (“Plan”) and

obtain a permit prior to proceeding with the work (“Permit”). 7 Del. C. § 4003(a). A Plan is defined as “a plan for the control of soil erosion, sedimentation, stormwater quantity and water quality impacts which may result from any land-disturbing activity.” 7 Del. C. § 4002(6). In addition, the term “Stormwater Management” is defined to include “a system of vegetative, structural, and other measures” that controls stormwater runoff volumes/rates and adverse effects on water quality that “may be caused by land-disturbing activities or activities upon the land.” 7 Del. C. § 4003(9).

Under 7 Del. C. § 4006(c)(7), DNREC must adopt regulations containing, *inter alia*, “[s]pecific design criteria and minimum standards and specifications” (“Criteria & Specifications”). More generally, the regulations adopted by DNREC must include: 1) permit application and approval requirements; 2) maintenance requirements for sediment control during construction; and 3) maintenance provisions for stormwater management structures post-construction. 7 Del. C. § 4006(c)(8) and (12).

The 2014 Regulations do not include Criteria & Specifications, Plan and Permit approval requirements, or maintenance provisions. Instead, the Criteria & Specifications and maintenance provisions are contained in the non-regulation Technical Document. In addition, “Plan Review And Approval” requirements are contained in the Technical Document. B-327 *et seq.* No explanation of the

vegetative, structural, and other measures that need to be depicted on a Plan are within the body of the 2014 Regulations.

Further, the E&S Act mandates that criteria be contained within the Regulations regarding the “level of water quality control.” 7 *Del. C.* § 4003(b). Again, the failure to include any specific criteria addressing this subject in the body of the Regulations renders them legally invalid.

The Technical Document expressly provides that it establishes policies, procedures, and guidelines regarding compliance with the 2014 Regulations, which makes it a “regulation” under the APA. Under APA § 10102(7), any statement of agency policy or procedure formulated as a rule or standard constitutes a “regulation.”

The Court below reviewed the contents of the Technical Document and held that it contained multiple requirements that fell within the definition of “regulations” under the APA. *Baker* at *12-14. The Court also concluded that an applicant could not obtain approval by merely following the 2013 and 2014 Regulations, as “[i]nsufficient information is contained in those regulations to allow for such compliance.” *Id.* at *15. Finally, the Court concluded that the “functional equivalency” alternative contained in the 2014 Regulations establishes “that the Technical Documents’ requirements, standards and criteria are the baseline for determination as to whether the alternative measures comply

with the E&S regulations and statutes.” *Id.* The Court below correctly interpreted the APA and the E&S Act in so holding. As a consequence, the Decision should be Affirmed.

ARGUMENT

III. THE DECISION PRESUMED THE 2014 REGULATIONS AMENDED THE 2013 REGULATIONS, BUT IT HELD THAT THE TECHNICAL DOCUMENT STILL ESTABLISHED LEGAL STANDARDS THAT MUST BE ADOPTED AS REGULATIONS

A. Question Presented

Where the Appellants adopted a completely new set of Regulations in 2014, which exist in tandem with the 2013 Regulations, but the Trial Court treated the 2014 Regulations as if they were amendments to the 2013 Regulations, is there any issue to challenge on appeal? This issue was never presented or preserved in the Trial Court, and it is not really even an issue for appeal since the Court treated the 2014 Regulations as the Appellants contended. Indeed, the Decision gave the Appellants the benefit of the doubt by assuming that the wholesale second set of Regulations adopted in 2014 was intended to simply amend the 2013 Regulations. Thus, there is no issue for the Supreme Court to decide here.

B. Standard and Scope of Review

No issue is actually before the Court to decide, but to the extent that the Court considers an issue which is not a real appellate issue in controversy then it should apply a *de novo* standard of review on the grounds that it would constitute a legal question.

C. Argument

The Appellants allege that they adopted “curative” amendments in 2014 which resolved all of the issues upon which the Appellees’ challenge to the 2013 Regulations were based. OB at 26-27. The Decision’s rejection of the theory that the 2014 Regulations cured the fatal flaws of the 2013 Regulations was addressed in Argument II hereinbefore. This argument is duplicative. And it should be rejected pursuant to a Mandate affirming the well-reasoned Decision for the reasons set forth in Argument II.

The Appellants simply don’t get it. The 2014 Regulations still rely upon the non-regulation Technical Document to establish the baseline standards for obtaining approval of plans and issuance of permits under the E&S Act and the Regulations promulgated pursuant thereto. Thus, the Technical Document falls within the bounds of the definition of the term “regulation” under the APA, and therefore must be adopted as a formal regulatory enactment.

The Appellants believe that they can have thousands of pages of requirements that they can amend at any time without following the formal public vetting process required by the APA. Indeed, the Appellants have on numerous occasions since the adoption of the 2013 Regulations issued amendments to the Technical Document, announcing the changes *post hoc*, without formal public

notice, public advertisement, public hearing, public comment, and publication requirements mandated by the APA.

The bottom line is that an applicant for approval of a plan that needs the Appellants to issue a permit for erosion, sedimentation control, and stormwater management purposes in the land development process in Delaware must either comply with the specific requisites of the Technical Document or establish that alternative measures satisfy the “functional equivalency” test based upon the Technical Document. The E&S Act states that any standards and criteria that are to be relied upon by the Appellants must be promulgated pursuant to formal regulations. And the plain meaning of the term “regulation” in the APA likewise mandates that any provisions which an applicant for a license must follow as guideposts to obtain approval shall be adopted pursuant to the APA process as formal regulations.

The situation is clear-cut and simple, yet the Appellants continue to deny the obvious: the Technical Document constitutes regulations which must be formally adopted in order to comply with both the E&S Act and the APA. Accordingly, the Court should enter an Order affirming the Decision.

CONCLUSION

Based upon the foregoing, the Appellees respectfully request that this Court Affirm the Superior Court Decision invalidating the 2013 and 2014 Regulations based upon their failure to adopt the mandatory legal standards and criteria contained in the Technical Document as formal Regulations. The Superior Court correctly held that the Appellees have Standing since: 1) the Appellants have admitted they are within the regulated community as contractors and/or land developers; and 2) they are subject to application of the Regulations in their businesses. In addition, it is evident that the detailed specifications contained in the Technical Document, which was not adopted as a part of the 2013 and 2014 Regulations, are mandatory standards. Accordingly, the Decision should be Affirmed.

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