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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANTS' CORRECTED REPLY BRIEF

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NATURE OF THE PROCEEDINGS

Plaintiffs have raised issues in their Answering Brief that were either rejected or ignored by the court below. Included are the bizarre claim (AB 1, 11-13, 15) that the 2014 curative Regulations were reproduced with pages missing,[1] and the claim (AB 3, 31) of confusion (apparently limited to Plaintiffs) as to the effective date of the curative amendments.[2] The court below wisely avoided these non-issues, and declined to rule on them. They form no part of the decision rendered. The Plaintiffs did not file a cross-appeal on these issues. Rule 7(b).

[1] The full text of all revised sections of the Regulations was published in the September 2014 issue of the Register of Regulations: http://regulations.delaware.gov/register/september2014/proposed/18%20DE%20Reg%20204%2009-01-14.htm.

[2] November 11, 2014, as set forth in the full-text published version at: http://regulations.delaware.gov/register/november2014/final/18%20DE%20Reg%20396%2011-01-14.htm.

FACTS

As a threshold matter of procedure, it should be noted that the Plaintiffs' "Statement of Facts" is replete with argument, confusing matters of record with opinions, in violation of Rule 14(b)(v). This failure to distinguish between facts and argument is confusing and counterproductive. Defendants in responding will attempt to correct the record and defer response to argument to the proper section.

The Plaintiffs devote pages 4-8 of their Brief in recounting provisions of the 2013 Stormwater Regulations, as they read prior to the curative amendments enacted in 2014. As the Plaintiffs admit[3], the trial court recognized that the Stormwater Regulations were amended, effective November 11, 2014. Thus, the references to the prior Regulations are now moot. The 2014 Regulations incorporating the curative amendments are the only version at issue here.

The Plaintiffs continue to fall short in their pursuit of facts to support the claim of standing. The Hudson plaintiffs are identified as owners of commercial land parcels "being actively marketed for development with improvements to be constructed *in the future*" [emphasis added], as owners of a residential construction company, past developers of numerous [unnamed] commercial and residential projects, and as being in the process of developing a hotel.[4] Yet nowhere is there any claim that the Hudson brothers have sustained injury, loss, or prejudice of any

[3] AB at 31.
[4] AB at 8-9.

kind in their dealings with DNREC, or from the Stormwater Regulations, or in the application of the Technical Document (hereinafter "TD"). The allegations that the Hudsons "will be required to obtain permits" and "will also be caused to incur additional [construction and engineering] costs [unquantified]"[5] is insufficient to establish that the Hudson plaintiffs have been aggrieved by the Regulations they attack. The Plaintiffs claim only the cost of doing business that any such regulated party would expect to incur as overhead in complying with environmental regulations.

Plaintiff Baker is identified as "a significant landowner" [whatever that means] who has "*previously developed parcels of land*", who "*intends to develop*" other parcels, who "*wishes to redevelop*" [emphasis added] an approved residential development plan.[6] Baker speculates, without factual support or documentation, that the burden of compliance with the Stormwater Regulations will negatively impact land value.[7] As with any regulated developer, he claims [unquantified and undocumented] "impacts and additional costs" as a result of the Regulations. There is no showing as to how any such costs would be greater or different than those of a competitor, nor is there any showing that the regulatory burden has changed as a result of the 2013 or 2014 amendments.

[5] AB at 9.
[6] AB at 9-10.
[7] AB at 10.

Finally, Plaintiff Clark is identified as a contractor who is impacted by the Regulations on a daily basis in the course of his site development work "in a concrete weigh" [sic]. No such sites are mentioned, nor are any dates cited when he was "aggrieved". The Plaintiff complains that he must comply with detailed design criteria, submit plans, and obtain permits for his work.[8] He further complains that he must install and maintain silt fences and temporary stabilization measures, and insure that erosion, sediment control, and stormwater management devices are in place and functioning properly.[9] So must any regulated party. He does not cite a single example of injury sustained as a result of this process, or any fact that would differentiate him from any other regulated party, nor does he offer any instance where he was aggrieved by DNREC or by the Sussex Conservation District, in obtaining permits. Clark does not cite any amount of financial loss sustained that he would attribute to the Stormwater Regulations.

The Plaintiff affidavits on standing are long on generic complaints as to the burden of regulations in general, short on references to the Stormwater Regulations, and devoid of any specifics as to lost revenue, delay, or other harm sustained as a result of the impact of the Regulations on a particular project at a particular site in a particular way. Vague generalities fail to establish a factual record that any Plaintiff has been or would be "aggrieved".

[8] AB at 11.
[9] AB at 23.

The Plaintiff account of the adoption of the 2014 curative amendments to the Regulations[10] is unsupported and contrary to the record. The curative amendments were properly noticed[11] and adopted[12], and there is no evidence that they were "incomplete". "Functional equivalency" is defined in Section 2.0[13], and the use of the TD is explained by Sections 4.1 and 5.1, which confirm that the TD "…may be utilized as a reference for the design and preparation of construction site [and post-construction] stormwater management plans." Both Sections confirm that alternative measures that provide "functional equivalency" may be considered on a case-by-case basis by DNREC in approving submitted plans and issuing stormwater permits. This explanation is quoted by the Plaintiffs in their brief,[14] as are Sections 4.1 and 5.1 and Section 6.1.2[15] confirming that a regulated party may utilize the specifications provided **or** take functionally equivalent measures to achieve stormwater "best management practices".

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[10] AB at 11-13.

[11] http://regulations.delaware.gov/register/september2014/proposed/18%20DE%20Reg%20204%2009-01-14.htm.

[12] http://regulations.delaware.gov/register/november2014/final/18%20DE%20Reg%20396%2011-01-14.htm.

[13] The Plaintiffs claim, AB at 15, that "functional equivalent measures" is undefined; and then quote the definition on the next page, AB at 16.

[14] AB at 14.

[15] AB at 15.

In claiming that "the Technical Document is the legal standard"[16] these Plaintiffs ignore the portions of the Stormwater Regulations they have just cited, which make it abundantly clear that the Regulations set the standard for stormwater flow and sediment reduction, while the TD provides a range of practices that would satisfy that requirement, if properly implemented – while leaving open the possibility of a novel approach that is functionally equivalent to the template and yields the result required by the Regulations.

As the Regulations and the TD make clear, "best management practices" are just that, *practices* that achieve the desired result, and thus serve as templates or examples of how to comply with the conservation mandates of the Regulations. Practices are different from requirements or standards or mandates. In order to define and illustrate practices, the handbook lists specifications and notes and materials to guide the builder. Describing one way to achieve compliance is not the same as mandating one way – the only way – to achieve compliance. The Regulation sections cited above make it clear that the TD is intended to provide options, and not requirements; examples, and templates: not mandates.

[16] AB at 16.

ARGUMENT

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

The court below erred in holding that these Plaintiffs were "directly impacted" by the 2013 and 2014 amendments to the Stormwater Regulations. There is no evidence of such impact on any project undertaken by any Plaintiff. Rather, the Plaintiffs' own affidavits complain only of the indirect impact from the Regulations, the burden that is experienced by every regulated party, that does not confer "aggrieved" status, as a matter of law. Contrary to Plaintiffs' claim that "no one would have [s]tanding"[17] under the "aggrieved person" standard, it is closer to the truth to say that everyone would have standing to challenge regulations, under the lower court's holding. It is not enough for the Plaintiffs to rely on the fact that they are within the regulated community, without citing a single instance of injury resulting from the amendments. Under the acknowledged standard of *Nichols v. State Coastal Zone Ind. Cont. Bd.*, 74 A.3d 636, 643 (Del.2013), it is insufficient for the Plaintiffs to show they are "arguably within the zone of interest to be protected or regulated". Plaintiffs must show an "injury in fact" that is "concrete and imminent". *Id.* This they have utterly failed to do. Despite many years of

[17] AB at 19.

experience with stormwater regulations administered by DNREC, in conjunction with the supporting technical advisory materials, they fail to cite any instance of material harm, and fail to quantify any purported cost or loss as a result of regulatory action by the Defendants.

The facts relied on by these Plaintiffs in support of their claim of injury[18] are nothing more than vague, unquantified, non-specific, generic complaints about the overhead costs generally attributed to regulatory compliance. At no point does any Plaintiff cite any loss blamed on any particular application of the Stormwater Regulations to a development project or site. It is unquestionably true that environmental regulations may increase the cost of land development and construction. The General Assembly has said that measures undertaken by Plaintiffs (and every other regulated contractor) to reduce erosion and sediment must be effective. 7 *Del.C.* §4001(b); §4003. There is no "free lunch", when it comes to protecting natural resources. DNREC's stated goal in amending the Stormwater Regulations, and in providing guidance through the supporting technical materials, has been to minimize cost and delay, and to facilitate compliance. These Plaintiffs have not shown that the result of the 2013 and 2014 amendments, or the prior interplay of these materials, caused them (or anyone else) any material harm.

[18] AB at 8-11; discussed *infra* at 1-3.

The Plaintiffs are wrong in suggesting that the Defendants seek "a new, heightened standard" for standing.[19] What the Defendants seek is nothing more than the fair application of the prevailing standard to these Plaintiffs. Requiring proof of actual harm from actual application of the Regulations is nothing more than proving the "injury in fact" that this Court mandated in *Nichols, supra.* This is not the same as an "as-applied" challenge to the Regulations that could arise from a permit denial or alleged violation. When any regulation is the subject of an enforcement action, the lawfulness of such regulation may be reviewed by the court as a defense in the action. 29 *Del.C.* §10141(c). Such an appeal is available to any regulated party, in the context of a particular case. 29 *Del.C.* §10142. In order to claim standing for a facial challenge to the entire spectrum of Stormwater Regulations, as here, the Plaintiffs must first make the threshold showing that they have been "aggrieved". 29 *Del.C.* §10141(a).

It is insufficient for Plaintiffs to argue that "the Regulations will erode their profit margin based on the uncertainties and additional costs" in building a "spec house".[20] What spec house? Where? When? What is it that is uncertain to the Plaintiffs? What additional costs? The record is silent. The court below erred in giving weight to such generic complaints as to overhead.

[19] AB at 20.
[20] AB at 21.

It is simply untrue for the Plaintiffs to state that: "A previously constructed stormwater management pond might have to be modified if the [Defendants] wake up one day and decide to change standards via their unilateral amendment of the Technical Document."[21] Dead wrong on two accounts. First, any change would not and could not be applied, retroactively, to a finished (and approved) project. Second, the TD does not establish mandatory compliance standards, but only alternatives for achieving compliance. A departure from the template provided cannot be used as a basis for permit denial or enforcement action, unless it fails to satisfy the criteria of the Regulations. Ongoing changes to the TD are intended to facilitate, not frustrate, compliance, by providing for flexibility in approach in citing examples of successful plans and designs that have satisfied the Regulations.

The Plaintiffs pose the hypothetical question: if they don't have standing, then who does?[22] Fair enough question. Among the potential aggrieved parties with standing to challenge the Regulations would be the following:

- a regulated party who presents evidence (stop work order or a denial of permit) that a project was suspended or interrupted, due to a dispute with DNREC over the interplay of the Regulations and the TD;

[21] AB at 22.
[22] AB at 24.

- a builder, developer, or landowner who lost money due solely to the failure of DNREC to approve a "functionally-equivalent" plan that conformed to the Regulations, without following a template in the TD;
- recipient of a permit denial or target of an enforcement action citing the failure to comply with the TD, rather than the Regulations;
- any builder of "spec" houses, developer of residential or commercial building lots, or earthmoving and site improvement contractor who can point to any harm sustained or injury suffered as a result of DNREC's use of the TD to deny a permit or prevent such a project from proceeding.

The "aggrieved person" standard set forth in 29 *Del.C.* §10141(a) and applied by this Court in *Nichols, supra* is a fair and reasonable standard to distinguish those, such as Plaintiffs, with nothing more than a "sour grapes" gripe about amended regulations, from those who can identify a legally-protected interest that has been or will be injured by the regulations. The standing requirement acts as a screening mechanism to bar those who seek an advisory opinion on a theoretical set of objections. The slack approach advocated by Plaintiffs would open the floodgates to merely hypothetical challenges to any new regulations by unaffected parties. The Plaintiffs' failure to identify tangible harm sustained as a result of the amendments to the Stormwater Regulations is fatal to their claims, and the court below erred in affording them standing in the absence of injury.

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

The Plaintiffs' argument is based on a fallacy concocted to attack the Stormwater Regulations. The argument cherry-picks language from the TD out of context, and asserts that this is evidence that the TD, not the Regulations themselves, can be a basis for enforcement. Plaintiffs assert that the TD can be used in such fashion, without a shred of evidence that DNREC has ever administered the stormwater program in that way, or intends to change the established practice. The program is several decades old, and the body of materials found in the TD were developed over that time, as adjuncts to the Regulations. If the TD had been used to deny a permit, despite compliance with the Regulations, one would expect that the Plaintiffs could cite such cases, but they have not and cannot, because there are no such examples to cite.

An example of the interplay between the Regulations and the TD can be found in Section 3.0 of the Regulations, "Plan Approval Procedures and Requirements". Subsection 3.3.1 defines what a preliminary sediment and stormwater management plan must include, such as a preliminary site plan, a schematic erosion and sediment control plan, and supporting hydrologic and hydraulic calculations demonstrating compliance. The companion §3.02.2 of the TD provides helpful examples and workflows, including a checklist and sample

procedures for conducting the hydrologic/hydraulic testing. The applicant is free to pursue its own approach, so long as the criteria of the Regulations are met. The integrated process affords considerable flexibility, and allows for the "functional equivalent" of the templates in the TD to be utilized instead.

Another example is found within Section 4.0 or the Regulations, "Performance Criteria for Construction Site Stormwater Management". Subsection 4.5.1 requires soil stabilization within fourteen days of soil disturbance during construction. The complementary section of the TD, §3.4.3, includes sixteen pages of information on vegetative stabilization, including details that may be included in the plan. However, a contractor is free to pursue his or her own methods of soil stabilization, perhaps using the plan review checklists as a guide.

"Performance Criteria for Post Construction Stormwater Management" are covered by Section 5.0 of the Regulations. Included at subsection 5.2 are "Resource Protection Event Criteria", containing limits on runoff from disturbed areas that were wooded, and alternatives for allowable discharge and offsets. The TD at §3.04 provides flow charts to help the designer work through alternatives, a spreadsheet, and background on the methodology used to measure runoff rates. §2.04 of the TD helps with offset provisions. As long as the applicant can show compliance with the runoff criteria of the Regulations through computations using functionally-equivalent measures, the templates need not be used.

The essence of this dispute is captured by this statement in Plaintiffs' Brief:

> "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 approval."[23]

The statement is misleading, but essentially accurate. The standards and criteria of the Regulations, standing alone, can be daunting. In order to facilitate compliance, particularly for new applicants and smaller companies, DNREC has long provided guidelines in the TD to aid in the development of a plan eligible for approval. The use of guidelines to support compliance with regulations violates no law. The Administrative Procedures Act recognizes the distinction between mandatory and voluntary, and between standards and criteria (that must be formally adopted as regulations) and guidelines (which need not be formally adopted as regulations). 29 *Del.C.* §10113. DNREC continued this approach in the 2013 Regulations, and then clarified the distinction in the 2014 curative amendments. As the Plaintiffs further admit:

> "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 measure that were functionally equivalent to the Technical Document's contents."[24]

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[23] AB at 26-27.

[24] AB at 27.

Where the Plaintiffs veer off course is in claiming that "the Technical Document had to be followed."[25] That statement ignores the plain language of the Regulations, which states the opposite, that the TD is only one template for compliance, and specifically allowing the flexibility for other approaches. The TD is not a regulation at all, and failure to conform to the template cannot be used by DNREC as a basis to deny plan approval. To the extent that the adoption of the 2013 amendments to the Regulations afforded an opportunity for Plaintiffs to question this longstanding practice, and for the court below to question certain language in the TD, DNREC acted to clarify the interplay between the Regulations and the supporting materials, and to eliminate any doubt as to the mandatory nature of the Regulations, and the advisory role of the TD. The adoption of the 2014 curative amendments acknowledged and resolved the lower court's concerns, and rejected the allegations of the Plaintiffs.

[25] AB at 27.

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

As the Plaintiffs concede, the court below considered the 2014 curative amendments to have been properly adopted, effectively rejecting the claims of supposed irregularities in the regulatory process, such as the rumor of missing pages, or the allegation of two sets of regulations.[26] But Plaintiffs are wrong in suggesting that there is no issue for the Court to decide, with respect to the effect of the curative amendments. The issue presented is whether DNREC, by acting to clarify the interplay between the Regulations and the TD, in revising the language questioned by the court below, and in confirming that the TD would not be used as a basis for enforcement or permit denial, removed any "cloud" from the Regulations. Contrary to Plaintiffs' view, the adoption of the 2014 curative amendments resolved the very issue they had raised in the court below, by giving them the result they sought, a declaration that the Regulations and not the TD set the standards for compliance. For DNREC, as set forth in the Order adopting the curative amendments[27], the Plaintiffs' attack on the Regulations was a

[26] AB at 31.

[27] http://regulations.delaware.gov/register/november2014/final/18%20DE%20Reg%20396%2011-01-14.htm.

"misunderstanding" of how the advisory materials had historically been used, as a guide and supplement to the previous version of the Regulations. The intent of the curative amendments is made explicit:

> The changes reinforce the Department's stated intent that the TD was not to be a regulation. Instead, the TD was provided and cited in Regulation 5101 in order to provide the regulated community with assistance in understanding and implementing Regulation 5101, particularly in the new provision whereby Sediment & Stormwater Plans may be approved using methods not contained in the TD if they provide "functional equivalency" to achieve the necessary environmental protection from urban stormwater runoff, which also poses a significant risk to public health and safety. *Id.*

With this statement on the official record by the Secretary, the TD simply could not be misapplied as argued by the Plaintiffs, or as suggested by the court below.[28] A "misunderstanding", aided and abetted by the Plaintiffs' allegations, should not form the basis for a ruling that ignores the intent and text of the curative action taken by DNREC to alleviate a result that was never intended in the first place.

Any perceived "flaw" in the 2013 Regulations was neither "fatal" nor incurable, as the Plaintiffs would have this Court believe.[29] DNREC was free to offer amendments to confirm the distinction between the Regulations and the TD, and did so, after due notice, comment, and a hearing, in terms leaving no room for misinterpretation. The standards and criteria for reducing erosion and sedimentation set forth in the Regulations will continue to form the basis for plan

[28] Opinion at 22-25.
[29] AB at 32.

review and approval, just as the prior regulations did, for over two decades. The TD will continue to be updated continuously to reflect "best practices" in use by regulated parties, in order to aid other regulated businesses in complying with the Regulations. Builders and developers are encouraged to devise new practices that are the functional equivalent of past approved measures. As new plans are approved that adopt new strategies, these examples will be added to the TD, for purposes of promoting future compliance with the Regulations. These changes to supporting materials are not "amendments" for purposes of the APA, because the TD is not a "regulation" under the APA. The TD is not a regulation, because it does not establish mandatory standards or criteria for compliance, and cannot be used for purposes of enforcement or denial of approval for a stormwater plan.

Use of the TD in support of the Regulations in this fashion affords DNREC the flexibility to accept new approaches by builders and developers to the reduction of stormwater flow. For example, on a typical construction site, strategies such as silt fences, containment basins, vegetation, and permeable surfaces may be used to obtain the required reductions. A variety of practices may be utilized to reduce the quantity of outflow, and to improve water quality as well. Regulated parties are thus encouraged to innovate, thus creating new "best practices", while retaining the option of relying on the existing templates found in the TD.

DNREC's publication of the TD is akin to a GPS navigation system providing a suggested route for automobile travel. For sure, the turn-by-turn routing will direct a path forward, intended to reduce travel time and cost. But the driver remains free to ignore the (seemingly mandatory) imperative to turn at a particular intersection, in favor of an alternate route that reaches the goal, perhaps with reduced time and cost. In order to take advantage of the TD, a regulated party may have to follow a detailed template. But that party is always free to pursue an alternate route that reaches the same destination. At least until the era of self-driving cars, the driver is free to experiment. The navigation system, like the TD, provides possible paths, not a mandatory path, or the only path. In this analogy, it is the destination, and not the journey, that is important. So long as the goal of the Stormwater Regulations is met, the means of achieving compliance is up to the applicant.

CONCLUSION

The Plaintiffs have failed, in colloquial terms, to demonstrate that they have "any skin in the game" that would afford them the standing that is required to challenge the legality of regulations under the Administrative Procedures Act. Despite claiming to be regulated parties with considerable experience, subject to the Stormwater Regulations and guided by the Technical Document, they cannot point to a single instance of harm sustained as a result of the regulatory process

which they so vehemently attack. In the absence of any showing of prejudice actually suffered, their attack is merely conjectural, and fails to gain traction. They do not represent the interests or the views of those many silent but regulated developers, builders, and homeowners who have successfully proceeded under the Regulations, guided by the technical support materials, for decades. This Court is not a forum for those who have failed to persuade the General Assembly or the Governor on the merits of a statute or a regulation to mount one last attack against Regulations duly adopted and within the legislative authority granted. This is particularly true, where DNREC has proactively cured alleged deficiencies by amending the Regulations to clarify the interplay between binding regulatory standards and optional templates and criteria.

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