IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

SIERRA CLUB, CITIZENS COALITION, INC., CITIZENS ACTION FOUNDATION, INC., SOUTHERN NEW CASTLE COUNTY ALLIANCE, INC.,	:	C.A. No. S10A-10-005
Appellants Below, Appellants and Cross-Appellees,	:	
v.	:	
TIDEWATER ENVIRONMENTAL SERVICES, INC.,	:	
Appellant Below, Appellee and Cross-Appellant,	:	
v.	:	
DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL,	:	
Appellee Below, Appellee.	:	

Submitted:August 19, 2011
Decided: October 27, 2011

On Appeal from the Decision and Final Order of the Delaware Coastal Zone Industrial Control Board: MODIFIED IN PART, AFFIRMED

MEMORANDUM OPINION

Kenneth T. Kristl, Esquire, Widener Environmental and Natural Resources Clinic, Wilmington, Delaware, Attorney for Sierra Club, Citizens Coalition, Inc., Citizens Action Foundation, Inc., and Southern New Castle County Alliance, Inc.

Jeremy W. Homer, Esquire, Dover, Delaware, Attorney for Tidewater Environmental Services, Inc.

Robert F. Phillips, Esquire, Wilmington, Delaware, Attorney for Delaware Department of Natural Resources and Environmental Control.

Graves, J.

Procedural Posture and Factual Background

Pending before the Court are cross-appeals from a decision made by the Coastal Zone Industrial Control Board ("the Board"). By way of the Board's Decision and Final Order issued on October 11, 2010 ("the Decision"), the Board affirmed the issuance of Coastal Zone Permit Number 386 ("the Permit") to Tidewater Environmental Services, Inc. ("TESI") for a proposed private wastewater treatment facility to be located in Sussex County, Delaware, known as the Wandendale Regional Wastewater Treatment and Disposal Facility ("the Facility"). The Permit was issued pursuant to the Delaware Coastal Zone Act ("the CZA").[1] Appellants Sierra Club Citizens Coalition, Inc., Citizens Action Foundation, Inc., and Southern New Castle County Alliance, Inc. (collectively, "the Environmental Appellants") seek to have the Court hold the Decision invalid because of the Board's alleged failure to comply with the CZA's requirements for a final decision. They ask the Court to reverse the underlying decision by the Secretary of the Delaware Department of Natural Resources and Environmental Control ("Secretary") to issue the permit. Applicant TESI also appeals the Decision and contends the Board correctly concluded the Facility is neither a "heavy industry use" nor a "manufacturing" use but that the Board's approval of the permit pursuant to Regulation 6.2 of DNREC's Regulations Governing Delaware's Coastal Zone ("the Regulations") was illegal because

[1] 7 *Del. C.* § 7001, *et seq.*

Regulation 6.2 has no statutory basis. In other words, TESI argues no permit process is required at all because DNREC exceeded its authority in creating a new regulatory hurdle.

Statement of Facts

On September 24, 2009, TESI submitted its application to the Delaware Department of Natural Resources and Environmental Control ("DNREC") for a CZA permit for the Facility. On or about March 19, 2010, TESI submitted a revised application. As contemplated by the application, the Facility will serve as a privately-owned sewage treatment plant designed to treat domestic sewage up to 3.0 million gallons per day ("MGD"). The Facility will accommodate existing and new housing subdivisions as an alternative to individual septic tanks. TESI anticipates that, eventually, users of 1600 existing septic tanks and 8400 future septic tanks, or a total of 10,000 Equivalent Dwelling Units, will use the Facility.

The Facility will be built in phases and TESI estimates it could take between twenty and thirty years before the Facility will be able to treat domestic sewage at a rate of 1.45 MGD.[2] Eventually, the Facility will include: (1) a building containing a headworks facility, a few smaller buildings and several underground treatment tanks, having a collective footprint of approximately 2.5 acres; (2) 16 acres of underground rapid infiltration basins ("RIBs") into which some of the treated water will be discharged; (3) two storage ponds; and (4) 150 acres of agricultural fields onto which treated wastewater will be sprayed. The underlying aquifer feeds into the Inland Bays.

[2] Although TESI sought authorization for up to 3.0 MGD, the permit, as issued, allows for treatment up to 1.45 MGD.

On April 23, 2010, the Secretary issued his Environmental Assessment Report ("EAR") on the CZA application as required by the Regulations. As part of its assessment, the Secretary is required to evaluate an applicant's "offset project", if an offset project is required by the Regulations.[3] TESI's application proposed that the Facility itself be considered the offset as the offset would occur coincident with treatment of the waste and prior to its discharge onto the land. In his EAR, the Secretary concluded:

> [The Facility] will treat effluent from residential development to Total Nitrogen and Phosphorus standards that are, under any build-out scenario, more protective of water quality than discharge rates from systems it is designed to replace, thereby satisfying the offset requirements under the regulations.

The issuance of the EAR formally commenced DNREC's CZA review process. In accordance with the CZA, DNREC held a public hearing on May 19, 2010, before a Hearing Officer on the permit application. On July 22, 2010, the Hearing Officer issued his report recommending the issuance of the permit. In his report, the Hearing Officer concluded the Facility was not a heavy industry use under the Act but the Facility was a manufacturing use subject to CZA permit requirements. The Hearing Officer recommended adoption of six special permit conditions.

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[3] The Regulations provide, "Any application for a Coastal Zone permit for an activity or facility that will result in any negative environmental impact shall contain an offset proposal. Offset proposals must more than offset the negative environmental impacts associated with the proposed project or activity requiring a permit." Regulation 9.1.1.

On July 23, 2010, the Secretary adopted the Hearing Officer's Report and incorporated it into the Secretary's Order granting the CZA permit for the Facility. The Secretary ordered that the permit be issued with the same six special conditions recommended by the Hearing Officer. The permit for the "construction and operation of a regional wastewater treatment and disposal facility" was signed by the Secretary on July 30, 2010. The permit is subject to the following special conditions: (1) TESI must submit to DNREC a construction permit application based upon a design limit of 1.45 MGD; (2) TESI must attempt to minimize its environmental footprint, particularly as it relates to deforestation and shall submit to DNREC as part of its construction permit a reforestation plan equal to 130% of the estimated loss of mature forest; (3) TESI must submit to DNREC as part of its construction permit a plan to comply with the recommendations made by the Natural Heritage Program; (4) TESI must submit to DNREC as part of its construction permit an operations plan that uses spray irrigation to the maximum extent practicable to maximize the environmental and agricultural benefit; (5) TESI shall relocate the RIB on the northern portion of the combined parcel to a more appropriate location in consultation with DNREC; and (6) TESI must prepare a surface water assessment report to demonstrate that the project meets Total Maximum Daily Loads established for the surrounding watersheds.

Both the Environmental Appellants and TESI filed appeals of the Secretary's Order. The Board consolidated the appeals and held a mandatory public hearing on the

appeals on September 16, 2010. On September 24, 2010, the five members present all voted for the permit to issue. On October 11, 2010, the required written decision was filed. The Board found the Facility was not a heavy industry use prohibited by the CZA and also determined that the Facility was not a manufacturing use under the CZA, contrary to the Secretary's order. Nevertheless, the Board concluded the Facility was still required to obtain a CZA permit pursuant to the Regulations. The Board agreed with the Secretary that the Facility would produce environmental benefits. The Board found the Secretary had violated two of the Regulations, one requiring an offset schedule be in place prior to the issuance of a CZA permit and one requiring an administratively complete construction permit be filed prior to the issuance of a permit, but the Board concluded the violations did not warrant denial of the permit.

The Environmental Appellants filed an appeal of the Decision on October 29, 2010. TESI filed a cross-appeal. Briefing has been completed and supplemented by oral argument. The matter is now ripe for decision.

Validity of the Board's Final Order

Environmental Appellants first argue that the Decision is not valid because it was signed by only four members of the Board. If the Decision is not valid, the Court must address the Environmental Appellants' assertion the matter should be decided by the Court on the record below. Because the Court concludes the Board's Decision was executed properly, it need not consider whether the Court is the proper entity to engage

in fact-finding of such a hyper-technical nature.

As contemplated by the CZA, the Board consists of nine voting members, five of whom are "regular members" and are appointed by the Governor and confirmed by the Senate.[4] The other four members are the Director of the Delaware Economic Development Office and the chairpersons of the planning commissions of each county.[5] In September of 2010, the regular members on the Board were Christine M. Waisanen, Robert D. Welsh, Pallatheri Subramanian, John S. Burton, Sr., and Robert D. Bewick, Jr. Also serving on the Board were Alan Levin, Director of the Delaware Economic Development Office; Victor Singer, Chairman of the New Castle County Planning Board; Albert W. Holmes, Jr., Chairman of the Kent County Regional Planning Commission; and Robert Wheatley, Chairman of the Sussex County Planning and Zoning Commission.

With regard to TESI's CZA permit application, two Board members, Mr. Burton and Mr. Bewick, disqualified themselves. In addition, two Board members, Mr. Levin and Mr. Welsh, were absent from the public hearing on TESI's application. The remaining five members attended the Board's day-long evidentiary hearing on September 16, 2010, and voted in favor of affirming the Secretary's issuance of the permit in public

[4] 7 *Del. C.* § 7006.

[5] *Id.*

deliberations held on September 24, 2010. Four of the five attending and voting members signed the Board's decision dated October 11, 2010.

The CZA provides, "A majority of the total membership of the Board less those disqualifying themselves shall constitute a quorum. A majority of the total membership of the Board shall be necessary to make a final decision on a permit request."[6] The CZA directs that all appeals of permits issued under the CZA be directed to the Board.[7]

The Board addressed this issue in its decision. Citing § 7006 of the CZA as well as the Superior Court's decision in *Shields v. Keystone Cogeneration Systems, Inc.*,[8] the Board concluded a majority of the total membership less those disqualified was necessary both to establish a quorum and to render a final decision on a CZA permit request. I disagree with the Board's interpretation of the statute and case law and hold five votes are necessary for a permit to issue.

The parties agree that, under the circumstances present at the hearing on TESI's permit application, the Board needed at least four members present to have a quorum.[9] The Court concurs. However, the Court finds the Board and TESI improperly rely upon

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[6] *Id.*

[7] 7 *Del. C.* § 7007.

[8] 611 A.2d 502 (Del. Super. 1991).

[9] "[A] majority of the total membership of the Board", in this case 9, minus "those disqualifying themselves", in this case 2, equals a majority of 7, or 4 members.

the *Shields* holding in concluding it needed only four members to vote in favor of the permit. Pursuant to the plain language of the CZA, the Board needed to have five votes in favor of the permit to render a final decision.[10] In the *Shields* decision, Judge Taylor reviewed the validity of a Board vote and wrote with regard to the language of § 7006 that concerns the voting requirements:

> With respect to the two sentences at issue, I do not find an irreconcilable inconsistency. The first sentence states a customary method for determining a quorum which would apply in ordinary situations. *The latter sentence provides a special requirement governing a final decision on a permit request*. The Board is empowered "to hear appeals from decisions of the Secretary ... made under § 7005." Those decisions include certain regulations and a comprehensive plan and guidelines. 7 *Del. C.* § 7005(b) and (c). *It is understandable that the legislators might provide a stricter standard for dealing with permits involving the application of the Act to a particular use of specific land than would be required for regulations and a comprehensive plan and guidelines.* I conclude that the words "total membership" should be given the same meaning in both sentences, namely, meaning all non-disqualified members of the Board. *Agreement of five Board members is needed to constitute the action of the Board on a permit request.*[11]

TESI argues the statement that "the words 'total membership' should be give the same meaning in both sentences" supports the Board's conclusion that only four votes were needed to approve the CZA permit. However, I find the cited sentence so at odds with the remainder of the paragraph, which clearly acknowledges that the legislators

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[10] "[A] majority of the total membership of the Board", in this case 9, equals 5 members.

[11] *Shields*, 611 A.2d at 504-05 (emphasis added).

intended to create a higher standard for the granting of a permit than that used to conduct other business, that I conclude that sentence must have been intended to be limited to the facts of that case (where there were, in fact, no non-disqualified members) or perhaps mistakenly inserted into the opinion. Nevertheless, the Court embraces Judge Taylor's sound conclusion that the General Assembly intended for a stricter standard to apply to the review of permits.

DNREC, itself, has backed away from the Board's position and has helpfully supplied the Court with copies of drafts of the CZA legislation. Although it is unknown whether Judge Taylor had the benefit of viewing the legislative history of the CZA, it is clear from studying the proposed amendments to the legislation that the General Assembly ultimately decided a majority of the Board's total membership should be required to make a final decision on a permit regardless of whether any members were disqualified from a particular matter.[12]

Having concluded that five votes are needed for a final decision on a permit, the Court turns to the question raised by the Environmental Appellants in its Reply Brief and at oral argument: whether the final order must be authenticated by five signatures. The parties do not dispute, and it is clear from the record, that all five of the attending Board

[12] There were many drafts of the legislation entertained before the final passage of the CZA. These drafts contained various voting requirements. Notably, the House rejected language that would have required a majority, less those disqualifying themselves, vote in favor of a permit request.

members voted in favor of affirming the issuance of the permit at the Board's public deliberations hearing on September 24, 2010.

The Board is subject to the Delaware Administrative Procedures Act ("APA").[13] The APA sets out the manner in which a decision is incorporated into a final order as such:

> (a) The agency shall make its decision based upon the entire record of the case and upon the summaries and recommendations of its subordinates.
> (b) Every case decision of any agency shall be incorporated in a final order which shall include, where appropriate:
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> (1) A brief summary of the evidence;
> (2) Findings of fact based upon the evidence;
> (3) Conclusions of law;
> (4) Any other conclusions required by law of the agency; and
> (5) A concise statement of the agency's determination or action on the case.
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> (c) Every final order shall be authenticated by the signatures of at least a quorum of all agency members, unless otherwise provided by law.[14]

The Environmental Appellants argue that an oral vote is not a final rendering of the Board's decision and that the final order must be authenticated by five signatures because § 7006 of the CZA provides an exception to the APA's requirement of four authenticating signatures. I disagree.

The CZA does not distinguish between written and oral final decisions on permit requests. The absence of any distinction must be viewed as intentional. The CZA speaks

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[13] 29 *Del. C.* § 10101, *et seq.*

[14] 29 *Del. C.* § 10128.

only to the vote on a permit; it makes no mention of the authenticating requirement of the APA. The requirement of an authenticated written rationale pursuant to the APA does not undo the legal action taken by the vote of the Board at its September 24, 2010, meeting. The Board's ruling on that date constitutes a "case decision" as contemplated by § 10128 of the APA and a "final decision" as contemplated by § 7006 of the CZA. This final decision or case decision is then memorialized as a final order pursuant to § 10128 of the APA and authenticated by four signatures.

The Board did not act as if its actions were anything less than final at its public deliberations. Chairwoman Waisanen began the public deliberations meeting with the statement, "We'll not be taking public comments at this time. But we will discuss the issues and vote on them, whenever there is a motion. But once we do our final vote, that will be it."

The Court also agrees with TESI's observation that to construe the statute otherwise would frustrate the purpose of the Delaware Freedom of Information Act.[15]

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[15] 29 *Del. C.* § 10001, *et seq.* Section 10001 provides the purpose of the Freedom of Information Act as follows:

> It is vital in a democratic society that public business be performed in an open and public manner so that our citizens shall have the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy; and further, it is vital that citizens have easy access to public records in order that the society remain free and democratic. Toward these ends, and to further the accountability of government to the citizens of this State, [the

To hold as the Environmental Appellants urge, a Board member could vote against a project in public deliberations and then change his vote in private. This result is entirely at odds with the legislature's interest in transparency of government action.

The Court rejects the Environmental Appellants' argument that the CZA's requirement a majority of the Board must vote in favor of a permit request for the permit to issue requires that the final order adopting the public vote be authenticated by the majority of the Board under § 10128 of the APA. The Court is satisfied the vote at the September 24, 2010, was a final case decision that was then formally and validly incorporated into a final order in accordance with the APA.

Standard of Review

The only issue on review is "whether the Board abused its discretion in applying standards set forth by [the CZA] and regulations issued pursuant thereto to the facts of the particular case."[16] This Court has the power to affirm, modify or reverse the order of the Board.[17]

The Supreme Court and this Court have repeatedly emphasized the limited appellate review of the factual findings of an administrative agency. The function of the reviewing Court is to determine whether the agency's decision is supported by substantial

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Freedom of Information Act] is adopted, and shall be construed.

[16] 7 *Del. C.* § 7008.

[17] *Id.*

evidence.[18] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[19] The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[20] The Court "shall take due account of the experience and specialized competence of the agency" and determine if the evidence is legally adequate to support the agency's factual findings.[21]

Summary of the Evidence Presented Below

The Board reviewed documentary and demonstrative evidence, in addition to the sworn testimony of live witnesses. The testimony presented below is summarized here.

Bruce Patrick, Vice President of Engineering for TESI testified on behalf of TESI. He is responsible for the planning, permitting and oversight of TESI's capital improvement program. TESI is overseen by the Public Service Commission with respect to rates and areas of operation, by DNREC with regard to permits, and by local agencies with regard to zoning issues.

Mr. Patrick testified that the Facility is located approximately four and a half miles

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[18] *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960); *Johnson v. Chrysler Corp*., 213 A.2d 64, 66-67 (Del. 1965).

[19] *Oceanport Indus., Inc. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994).

[20] *Johnson v. Chrysler*, 213 A.2d at 66.

[21] 29 *Del. C.* § 10142(d).

from the Atlantic Ocean. The site is located near the Marsh Island Golf Course and Love Creek, a popular location for boating and fishing. The Facility would not have a negative impact on these activities. The Facility would treat wastewater to public access standards.

Mr. Patrick stated that the Facility would be constructed in an agricultural style. The main building will resemble a barn. The treatment tanks located nearby would be underground and the fields would remain agricultural. The Facility would also have sixteen acres dedicated to RIBs, and two water storage ponds.

TESI will use a membrane bioreactor to obtain the high end treatment. The treated water will meet the Pollution Control Strategy ("PCS") standards by producing water with 5 mg/liter of nitrogen and .5/liter of phosphorus. Pursuant to the PCS standards, the phosphorus level must be at most 4 mg/liter and the nitrogen level must be at most 10 mg/liter. The Facility will exceed these minimum standards and the treated water will meet drinking water standards. The membrane bioreactor technology has been used in other areas with very good results. The treated water will also meet the applicable provisions of the Inland Bays Pollution Control Strategy. The treated water will then be submitted to ultraviolet disinfection. All of the water will be treated to drinking water standards before going into the RIBs. There are approximately 150 acres available for spray irrigation on the site.

Mr. Patrick also testified that testing has been done to ensure the site soil can handle the proposed water load. Upon request from DNREC, TESI performed a RIB

loading test where they constructed several RIBs and loaded them to see if they would perform as anticipated. They did and the Detailed Soils Investigation Report was deemed satisfactory by DNREC, although DNREC limited TESI to a maximum of 1.45 MGD. Mr. Patrick testified, to his mind, the approval of the report rebuts the contention that the environmental benefits of the RIBs are speculative.

Although TESI cannot require homeowners to hook up to the Facility, homeowners have a financial incentive to do so in part because if and when a septic system fails, the homeowner is required, at his cost, to upgrade his system or seek a connection to a regional or central facility to meet higher water quality standards. The cost associated with such an upgrade is high. Moreover, the quality of water delivered to the homeowner by the Facility will be much better than otherwise available. Mr. Patrick also testified that the Facility would not be placed into operation until it has enough hookups to ensure there is sufficient flow to remove the nutrients. Therefore, the discharges will not be worse than new on-site wastewater treatment and disposal systems. The environmental benefits have not been overstated due to DNREC's limiting the permit to 1.45 MGD. The treatment levels at the Facility are not locked in by the CZA permit but they are locked in by the PCS's regulation of the Inland Bays.

Mr. Patrick admitted on cross-examination that the Secretary's Order noted continued concerns about the appropriateness of RIBs in Sussex County. DNREC will require a rigorous technical review as part of the wastewater construction permit process.

A fair number of the homes served by the Facility will fall outside the Coastal Zone.

Under questioning by the Board, Mr. Patrick opined that, in his experience, wastewater treatment systems do not fail overnight. Mr. Patrick also testified that the proposed system contained redundancies in its design to prevent a massive failure. The Facility would be made up of several small buildings. One building would be the headworks, or the screening facility, with a mechanical bar screen, removing items. Another building would be a small laboratory office and, in the future, there would be another solids processing building. The treatment tanks would be placed underground. Mr. Patrick does not foresee any leakage issues because the tanks will be constructed out of concrete.

On re-direct, Mr. Patrick testified that the houses that lay outside of the Coastal Zone nevertheless currently also drain into the Inland Bays Watershed, as they would if they were connected to the Facility.

Finally, Mr. Patrick stated that the biological treatment of the water would bring the total phosphorous to 3.2 mg/liter. The precipitating phosphorous will be brought down to .5 mg/liter.

Tom Dwyer also testified on behalf of TESI. Mr. Dwyer is a geologist for Eastern Geosciences, a hydrogeologic consulting firm that specializes in hydrogeologic evaluations for wastewater disposal and water supply. Mr. Dwyer has had experience with both large and small wastewater facilities and has assisted both New Jersey and Delaware in developing guidelines for wastewater disposal. Mr. Dwyer's organization became involved in March of 2007. Essentially, his organization was responsible for conducting a soil study of the site over a three year period. This study involved the installation of more than 50 test wells to measure water levels and the conduction of hydraulic testing. Eastern Geosciences also monitored two RIB tests. The information collected was used to create a ground water flow model for the site, which was then used to evaluate hydraulic capacity of the site. Mr. Dwyer found the site to exhibit favorable characteristics in that sandy soils are located at the surface and there is a large depth to groundwater. In particular, in the area to the south and west (the proposed location of the RIBs) depth to groundwater is in the range of nineteen to twenty feet. The study revealed that the underlying aquifer has the ability to move a lot of water and this fact serves to limit the amount of groundwater collection that can occur when a wastewater discharge is imposed on the flow system. The site's distance from nearby water boundaries provides for long travel times and the sandy sediments permit a high rate of recharge. These two factors allow for the additional benefit of dilution of the water as it travels. The dilution allows for the additional absorption of phosphorous. Mr. Dwyer

testified that, at the time the treated water reaches surface water, the treated water will be indistinguishable from native groundwater. In fact, where agricultural activities have served to raise nitrogen concentrations in groundwater, the treated water would actually dilute existing nitrogen in groundwater. Mr. Dwyer calculated the maximum loading would be 1.6 MGD.

Lee Beetschen testified for TESI. Mr. Beetschen is the president of CABE Associates Consulting Engineers ("CABE"). In the past, he was instrumental in working with DNREC in response to the passage of the Clean Water Act in 1972, among other accomplishments. CABE was retained to assist TESI in obtaining a conditional use land use permit from Sussex County. Subsequently, CABE helped develop the final site plan as well as the CZA permit and construction permit applications. Mr. Beetschen relayed the history of wastewater treatment, and the advances in dealing with the toxins contained therein, in Delaware over the years. The Facility is based on an advanced wastewater prototype. The reduction in nitrogen and phosphorous content in the treated water is important because the loading of them on the Inland Bays' surface waters is essentially killing the Inland Bays Watershed.

Mr. Beetschen testified that the Wilmington public sewage treatment plant in the early 1970s consisted of huge, above-ground tanks. The plant had a general odor associated with it and it processed 120 MGD. Comparing that facility to the proposed Facility, Mr. Beetschen stated that one could not see the Facility unless he was looking

for it and, even if one could see it, the Facility is not identifiable as anything other than part of an agricultural operation. Moreover, there will not be an odor associated with the Facility due to the high quality of the treated water. By design, the membrane bioreactor alleviates a lot of the problems with system failure. Mr. Beetschen is confident there will not be any environmental damage to the wetlands. There will be no facilities located in the wetlands.

Mr. Beetschen told the Board that, during the project's initial phase, biosolids collected from the wastewater will be stored in a tank on-site and hauled off by a hauler licensed by DNREC to a legally disposable site outside the Coastal Zone. As the site grows, a dewatering system will be installed so that a portion of the water will cycle back through the treatment plant and a lower poundage of solids will have to be transported outside the Coastal Zone for disposal.

Mr. Beetschen also testified that any new or replacement community systems would be held to the lower standards established by the PCS for smaller sized facilities. With regard to the Secretary's expressed concern about the benefit of RIBs in Sussex County, Mr. Beetschen noted that the disposal method is not the benefit here, it is the treatment method. Mr. Beetschen also responded to the Environmental Appellants' argument that the offset does not compensate for other impacts at the site (*i.e.*, dust construction, run-off, exhaust fumes from vehicles, etc.) by opining that, in this case, these minimal impacts are offset by the benefits of the Facility. Mr. Beetschen also explained

to the Board that an appendix to the PCS details the benefits of riparian buffers removing nitrogen from wastewater runoff.

Mr. Beetschen responded to the Environmental Appellants' argument that the permit was improperly issued because the construction permit application had not been completed. Mr. Beetschen testified that when he first met with the Coastal Zone staff, TESI staff were told that DNREC does not enforce the Regulation requiring the completion of a construction permit because they recognize that to do so involves a major expense for the permit applicant. In this case, the cost would be that associated with the design of a complete wastewater treatment plant, or approximately $200,000. After the meeting, Mr. Beetschen received a message from the same staff member informing Mr. Beetschen that the agency was going to require the filing of the construction permit prior to a public hearing on the CZA permit application. Mr. Beetschen and the Coastal Zone staff met and finally agreed that, if the design application was reviewed by groundwater treatment staff and if they confirmed the design would "do what TESI claimed it would do," the staff would allow the permit application to proceed to a public hearing.

Mr. Beetschen testified that it was not unusual to have special conditions placed on the permit. The conditions were going to be incorporated into the construction permit where applicable. Discussions with DNREC were ongoing.

On cross-examination, Mr. Beetschen testified that the Facility would use bacteria in the treatment of the wastewater. He is aware of one situation where a sufficient

amount of bacteria died off at the same time rendering the system incapable of operating properly. It is possible this situation could occur at the Facility if the operator allowed the system to become unbalanced. If the treatment efficiency suffered as a result, the system could be stabilized within a matter of hours, depending upon the availability of biomass within driving distance. The chemical to be used at the Facility as a precipitation agent may or may not be stored on-site.

Upon questioning from the Board, Mr. Beetschen testified the spare area in the permit application is designed to be used for spray irrigation. However, it could be used to replace a RIB, if need be. Mr. Beetschen observed that RIBs are not new technology and many have been in place for over a century.

The Environmental Appellants did not present any additional evidence at the Board hearing, choosing to rely on the evidence already in the record.

Ronald Graeber testified on behalf of DNREC. Mr. Graeber is the program manager of the large systems branch for DNREC, responsible for permitting large community on-site programs in Delaware. Mr. Graeber told the Board that, although DNREC is concerned about the use of RIBs in some locations, it is not concerned about the location of the RIBs at the Facility after looking at the technical reports that have been submitted in relation to the project.

Mr. Graeber acknowledged that an application for a wastewater permit had not

been received by DNREC but the CZA permit was issued, nonetheless. The process is a long and thorough multi-step process. The first step is to determine the actual on-site characteristics of the Facility. This requires conducting physical tests at the site. TESI has completed this step. Now that DNREC knows the disposal site can manage 1.45 MGD, the next step is for an engineer to submit detailed plans and specifications. There will be numerous safeguards in place to monitor the success of the RIBs; for example, on-site monitoring and observation wells. Background samples will be collected prior to construction in order to assess the quality of the original ground water and to be used for comparison purposes in the future. The normal levels of nitrogen in the groundwater in the area of the Facility range from non-detectable levels to 10 mg/liter of nitrogen.

The Arguments

A. Is the Facility a banned "heavy industry use", a "manufacturing use" subject to the permitting process, or neither but still subject to the permitting process pursuant to Regulation 6.2?

The first substantive argument raised by the Environmental Appellants relates to TESI's argument on appeal. That is, can the Facility be characterized as either a "heavy industry use", a "manufacturing use", or neither? If it cannot be characterized as either, as the Board concluded, TESI argues the Facility is not required to go through the permitting process. Specifically, TESI contends the CZA does not provide for the permitting of any use other than a manufacturing use. Because the Court rules the Facility is a manufacturing use subject to the permitting requirements set out in the CZA and the Regulations issued pursuant thereto, the Court need not delve into the merits of TESI's appeal.

The CZA was passed in 1971. The purpose of the CZA is set forth in 7 *Del. C.* § 7001:

> It is hereby determined that the coastal areas of Delaware are the most critical areas for the future of the State in terms of the quality of life in the State. It is, therefore, the declared public policy of the State to control the location, extent and type of industrial development in Delaware's coastal areas. In so doing, the State can better protect the natural environment of its bay and coastal areas and safeguard their use primarily for recreation and tourism. Specifically, this chapter seeks to prohibit entirely the construction of new heavy industry in its coastal areas, which industry is determined to be incompatible with the protection of that natural environment in those areas. While it is the declared public policy of the State to encourage the introduction of new industry into Delaware, the

protection of the environment, natural beauty and recreation potential of the State is also of great concern. In order to strike the correct balance between these 2 policies, careful planning based on a thorough understanding of Delaware's potential and her needs is required. Therefore, control of industrial development other than that of heavy industry in the coastal zone of Delaware through a permit system at the state level is called for....

The purpose of the CZA "is to control the location, extent and type of industrial development that is most likely to pollute Delaware's bays and coastal areas."[22] A heavy industry use not in operation on June 28, 1971, is prohibited in the Coastal Zone.[23] A heavy industry use is statutorily defined as:

> [A]use characteristically involving more than 20 acres, and characteristically employing some but not necessarily all of such equipment such as, but not limited to, smokestacks, tanks, distillation or reaction columns, chemical processing equipment, scrubbing towers, pickling equipment and waste-treatment lagoons; which industry, although conceivably operable without polluting the environment, has the potential to pollute when equipment malfunctions or human error occurs. Examples of heavy industry are oil refineries, basic steel manufacturing plants, basic cellulosic pulp-paper mills, and chemical plants such as petrochemical complexes. An incinerator structure or facility which, including the incinerator, contains 5,000 square feet or more, whether public or private, is "heavy industry" for purpose of this chapter. Generic examples of uses not included in the definition of "heavy industry" are such uses as garment factories, automobile assembly plants and jewelry and leather goods manufacturing establishments, and on-shore facilities, less than 20 acres in size, consisting of warehouses, equipment repair and maintenance structures, open storage areas, office and communications buildings, helipads, parking space and other service or supply structures required for the transfer of materials and workers in support of off-shore research, exploration and development operations; provided, however, that on-shore facilities shall not include tank farms or storage tanks.[24]

The Secretary incorporated the Hearing Officer's report into his Order but did not

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[22] *Kreshtool v. Delmarva Power & Light Co.*, 310 A.2d 649, 651 (Del. Super. 1973).

[23] 7 *Del. C.* § 7003.

[24] 7 *Del. C.* § 7002(e).

specifically address whether the site should be characterized as a "manufacturing use" or a "heavy industry use". However, the Hearing Officer did consider the parties' positions on the Facility's characterization. The Hearing Officer concluded the Facility was not a prohibited heavy industry use under the CZA. In so doing, he noted that the Facility had some physical characteristics of a heavy industry use, as defined by statute, because the Facility arguably (1) consists of more than 20 acres; (2) uses tanks, chemical processing equipment and waste-treatment lagoons; and (3) is in an industry that has a "potential to pollute the environment when equipment malfunctions or human error occurs".[25] The Hearing Officer observed that the total proposed land use in the Coastal Zone would be approximately 272 acres but the actual footprint of the buildings would be less than twenty acres. The Hearing Officer extrapolated, "the Facility's industrial use will not approach the size or have most of the physical characteristics equivalent of a 'heavy industry use'." The Hearing Officer concluded,

> The type of "heavy industry use" prohibited by the CZA was the subject of public comments, including comments that described the CZA's purpose and history as to stem the threat of additional oil refineries and other heavy industrials [sic] using the entire Delaware coastal area. I agree that oil refineries is exactly the type of heavy industry that the CZA prohibits. I find no support for any intent to prohibit generically new sewage treatment plants in the CZ. Moreover, I find that the Facility's small treatment building and the fact that is [sic] will not use any treatment lagoons as compelling support for a finding that the Facility's proposed use is not a prohibited use under the CZA. Instead, the Facility is like the

[25] *See id.*

manufacturing uses that the CZA specifically identifies as allowable.[26]

The Board similarly rejected the characterization of the Facility as a heavy industry use:

> The Facility will not negatively impact tourism or recreational uses, which are the primary uses that the CZA intends to preserve and protect through the prohibition on new heavy industry. In fact, the Facility will preserve existing open space and allow current agricultural and farming uses to continue for decades. No evidence was presented by the Environmental Appellants that the Facility will have above-ground tank farms, smokestacks, scrubbing towers, odors or unfavorable aesthetics that are common attributes of oil refineries and other industries set forth, by example, in § 7002(e) that are incompatible with recreation and tourism. The Board finds that "tanks" and "chemical processing equipment" will be utilized at the Facility but does not find that the RIBs are the equivalent of "waste-treatment lagoons" as that term is used under § 7002(e). In fact, the Facility's wastewater treatment does not occur within the RIBs themselves, but rather in separate underground tanks.
>
> The Board agrees with the Secretary's determination that the CZA ban on new heavy industry use was intended to apply to oil refineries and similar heavy industry endeavors. However, the Wandendale Facility, by its size, scope and design, does not have the characteristics of an oil refinery and does not warrant a classification as a heavy industry under § 7003(d). The Board also agrees with the Secretary's determination that the actual "footprint" of the Facility is well below 20 acres, which is less than the 20 acre characteristic threshold in § 7002(e). The Board does not view this "footprint" size as determinative to the "heavy industry use" issue, but finds that the vast majority of the Facility's site will remain open space consisting of farmland, forest, and RIBs, as opposed to the relatively small area on which the chemical treatment tanks and basins will be located.[27]

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[26] Hearing Officer's Report at p. 19.

[27] Board Decision at p. 41.

On appeal, the Environmental Appellants argue the focus of the inquiry should be on the potential for the Facility to pollute. The Environmental Appellants point to the fact that one purpose of the Facility is to treat waste that is generated in homes outside the Coastal Zone and then dispose of the pollution in the Coastal Zone.

Second, the Environmental Appellants argue that the exclusion of public sewage treatment plants from the definition of heavy industry use prohibited in the Coastal Zone is "strong evidence that the legislature knew sewage treatment plants were heavy industry." Third, Environmental Appellants assert the Facility possesses many of the characteristics specified in the statutory definition of heavy use.

The Court finds all three of the arguments raised by the Environmental Appellants to lack merit. The Court first notes that these arguments have been raised by the Environmental Appellants at both public hearings on TESI's application. The Court is well aware of the technical skill and aptitude of the participating DNREC officers and Board members with regard to the science of wastewater treatment. The Court is mindful of the public policy behind the CZA. It is not the purview of this Court to give its own weight to the evidence presented below but rather to ensure that there is substantial evidence on the record to support the findings made by the Board and that the Board has not abused its discretion.

The Environmental Appellants argue that the Board failed to give due consideration to the Facility's potential to pollute when determining whether the Facility is a heavy industry use. However, the Environmental Appellants lose the forest for the trees. The Environmental Appellants cite to DNREC's estimate that the Facility will discharge more than 22,000 pounds of nitrogen each year into the Coastal Zone through its disposal practices and the corresponding amount for phosphorus is over 2,200 pounds per year. TESI challenges the Environmental Appellants' figures. In any event, much of the record below consists of testimony and demonstrative evidence concerning the amount of nitrogen and phosphorous that will be released into the Coastal Zone. The expert testimony revealed that the wastewater would be treated to a higher standard than the law requires. The water would then be released into the Coastal Zone through spray

irrigation and RIBs. Eventually, the water will end up in the Inland Bays. The Environmental Appellants essentially ask the Court to adopt some sort of bright line as to how much pollution is "too much" for the Facility to be characterized as anything but a heavy industry use. But while TESI has presented much evidence with regard to the improvement in the nitrogen and phosphorous levels in the Coastal Zone, the Environmental Appellants have not presented any evidence as to an increase in pollution in the Inland Bays. The Environmental Appellants' argument minimizes the fact that the wastewater is currently being discharged in the Inland Bays – even if it originates outside of the Coastal Zone – but with higher concentration of pollutants. The Court finds the Board was deliberately given the flexibility to determine a facility's potential to pollute by the General Assembly. The record is rife with support for the Board's conclusion that the Facility lacks the characteristics of a heavy industry use even though it will release water containing low levels of pollutants into the Coastal Zone. The Facility consists of tested, high-end technology. The water will be treated to drinking water standards before it is either sprayed or released to the RIBs. There will be no impact on the wetlands. There will be no effect on local recreational activities or tourism. The Facility is designed to replace septic systems treating wastewater to a lesser standard and currently draining into the Inland Bays. In the unlikely event a RIB fails, the site contains room for a replacement RIB to be constructed. There are numerous safeguards in place to prevent system failure. In the event the system did fail, it could be up and running again within

a matter of hours. In addition, the Facility does not interrupt the use of the Coastal Zone for recreation or tourism. Nor does it interfere with the protection of the Inland Bays. The record supports the conclusion that the Facility will, in fact, improve the quality of the wastewater draining into the Inland Bays. This finding weighs heavily against the potential to pollute contemplated by the CZA. The Environmental Appellants argue the Facility's illusory environmental benefit does not save the Facility from heavy use status. However, it is uncontested that the Facility will treat wastewater headed for the Inland Bays under any scenario to a higher level of cleanliness than to which it is currently being treated. The membrane bioreactor technology has been tested and performs well at other sites. Given the unchallenged expert testimony presented by TESI and its engineers, the record supports the Board's conclusion that the Facility "will result in more protective water quality than the septic systems it is designed to replace, and the fact that some environmental impacts may be unquantifiable does not translate into non-compliance with the CZA."[28] The Board did not abuse its discretion in concluding the Facility is not a heavy industry use despite its admitted contribution to polluting, to some degree, the Inland Bays.

With regard to the second argument raised, the Environmental Appellants cite to § 7003 of the CZA, which provides, in relevant part: "Heavy industry uses of any kind

[28] Board Decision at pp. 53-54.

not in operation on June 28, 1971, are prohibited in the coastal zone and no permits may be issued therefor.... Provided, that this section shall not apply to public sewage treatment or recycling plants...."[29] The Environmental Appellants assert the specific exclusion of public sewage treatment plants from prohibited heavy industry proves the General Assembly considered all sewage treatment plants as heavy industry use. I find this position untenable. Following the Environmental Appellants' logic, it is difficult to understand why the General Assembly did not then *include* private sewage treatment plants in its list of examples of heavy industry use. When the CZA was enacted, public sewage plants resembled the Wilmington sewage treatment plant.[30] The General Assembly can be presumed to know, as TESI points out, that wastewater treatment plants must, out of necessity, be located near the water. With knowledge of what large sewage treatment plants looked like, in addition to the general knowledge that wastewater treatment plants must be located near water, the General Assembly's failure to address specifically smaller private plants speaks to its intention to have them evaluated on their individual merits, as was done here. Moreover, the Environmental Appellants' argument defies logic: in their proposed scenario *only* large-scale public sewage treatment plants would be allowed to operate in the Coastal Zone. I conclude the CZA was not intended

[29] 7 *Del. C.* § 7003.

[30] Testimony below revealed that plant treated 120 MGD of wastewater.

to lead to that result.

Third, the Environmental Appellants argue the Facility possesses many of the attributes listed in the statutory definition of heavy industry use. This argument was raised below as well and rejected on the basis of expert testimony concerning the Facility's design and its impact on the Coastal Zone. In support of their position, the Environmental Appellants again cite to the size of the Facility, and assert that the Facility will utilize tanks, chemical processing equipment and waste lagoons. The Board agreed with the Secretary that the footprint of the Facility is well below that of the total acreage but did not find the footprint size to be determinative. The Board did note that the small footprint allows the vast majority of the Facility's site to remain open space. The Board found the Facility to be remarkably different from the type of heavy industry use absolutely banned in the Coastal Zone and observed that the Facility will not negatively impact tourism or recreational uses. The Board concluded the "size, scope and design" of the Facility did not warrant a characterization of the Facility as a heavy industry use. That finding is supported by the facts in the record. TESI sought, in its initial application, to have a relatively small amount of wastewater processed at the Facility.[31] DNREC required that amount to be halved. To the extent the definition of heavy industry use has a "you know it when you see it" component to it, the Facility here will not be noticeable

[31] It is instructive to compare the 3 MGD sought by TESI to the 120 MGD processed at the Wilmington wastewater treatment plant.

to the uninformed eye. The Facility will not look like a plant but will resemble a barn. The Facility will initially consist of two buildings, with plans to expand to one more building. The treatment tanks are, in fact, not wastewater lagoons, and will be located underground. There will be no odor associated with the Facility. The Board's conclusion that the Facility is not a heavy industry use based on its physical characteristics is supported by the record.

The Decision is affirmed to the extent it held the Facility does not constitute a heavy industry use as defined by the CZA.

The question remains whether the Facility may be characterized as a manufacturing use under the CZA and therefore subject to the permitting process as set forth in 7 *Del. C.* § 7004.[32] The CZA elaborates on the concept of manufacturing:

> "Manufacturing" means the mechanical or chemical transformation of organic or inorganic substances into new products, characteristically using power-driven machines and materials handling equipment, and including establishments engaged in assembling component parts of manufactured products, provided the new product is not a structure or other fixed improvement.[33]

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[32] 7 *Del. C.* § 7004 provides, in pertinent part:

> Except for heavy industry uses, as defined in § 7002 of this title, manufacturing uses not in existence and in active use on June 28, 1971, are allowed in the coastal zone by permit only, as provided for under this section.

[33] 7 *Del. C.* § 7002(d).

The Board concluded the Facility was not engaged in manufacturing. It reasoned as follows:

> Regarding manufacturing use, the Board finds that even though some biosolid by-products will be produced by the Facility, manufacturing will not be the primary purpose of the Facility. The Board is guided by § 7002(d), which states that:
>
> > "[m]anufacturing means the mechanical or chemical transformation of organic or inorganic substance into new products, characteristically using power-driven machines and materials handling equipment, and including establishments engaged in assembling component parts of manufactured products, provided the new product is not a structure or other fixed improvement.
>
> The Board attributes plain meaning to the term "product" because it is not defined by the CZA or the CZ Regulations. In doing so, the Board finds that the term means an item produced for sale commercially. Accordingly, there will [be] no new products manufactured at the Facility; there is no equipment "engaged in assembling component parts of manufactured products" at the Facility. In essence, the process involves transporting wastewater into the Facility where it is chemically treated and transformed into cleaner water; *i.e.*, dirty water in, clean water out, with resulting biosolid by-products, so that the process is more characteristic of a "recycling" use than "manufacturing" one. To that end, the Board disagrees with the Secretary's determination that the Facility's use constitutes a "manufacturing" use because of the generation of "new products" from its reliance on "power-driven machines" and "material handling equipment" and use of chemical and mechanical processes. Furthermore, the Board rejects the Environmental Appellants' argument that the by-products of the treatment process, namely spray irrigation and sludge, are "products," and that the sale of the wastewater treatment process itself to customers is a "product," both of which would warrant a classification of "manufacturing" under § 7002(d).

The Board heard evidence that some form of biosolids from one of TESI's other sewage treatment facilities, located in Milton, Delaware, may

> be used as fertilizer for golf courses, but the witness testified that TESI must pay for the removal of those solids from that facility and, in any event, does not sell them commercially. However, there was no evidence presented by the Environmental Appellants that a commercially saleable product would be produced at the Facility and sold by TESI. No additional evidence was presented by the Environmental Appellants as to why the Facility's use is a "manufacturing" use under § 7002(d).[34]

In this regard, the Decision overturned the Secretary's Order, which adopted the Hearing Officer's rationale for concluding the Facility is a manufacturing use:

> ...I will address the argument that relies on the CZA definition of "manufacturing" as "the mechanical or chemical transformation of organic or inorganic substances into new products." 7 *Del. C.* § 7002(d). I find that the Facility will use in its treatment process "power-driven machines and material handling equipment" and that the treatment process will result in the mechanical and chemical transformation of untreated wastewater into treated wastewater. Thus, the proposed use meets some of the CZA definition of manufacturing.
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> The real issue is whether wastewater treatment is the manufacturing of "new products." Merriam-Webster defines product as "something produced; *especially* : commodity 1 (2) : something (as a service) that is marketed or sold as a commodity." Under this common usage treated wastewater would not be considered "new products" because treated wastewater is not something sold as a commodity. Nevertheless, [DNREC] should liberally interpret the CZA to protect the CZ from uses such as wastewater treatment and require wastewater treatment uses to obtain a CZA permit in order to safeguard the CZ for recreation and tourism uses. Clearly a wastewater treatment plant is not a recreation or tourism use, but the Facility may provide wastewater treatment and sewer utility service that could promote recreation and tourism uses. Consequently, on balance, I find that the fact that the Facility's reliance on "power-driven machines" and "material handling equipment," albeit small in size, and its use of mechanical and chemical processes tip the balance in favor of CZA

[34] Board Decision at pp. 42-43.

> regulation over the Facility. The General [Assembly] properly left the determination of the types of uses to be regulated as "manufacturing" to [DNREC], and the Facility's proposed use is one of the areas where [DNREC] has determined to regulate. Thus, there is support for requiring the Facility's wastewater treatment use to obtain a CZA permit because "new products" from any such an industrial type manufacturing process should be regulated even if they have no commercial value.[35]

The Court agrees with the Hearing Officer's analysis of the definition of manufacturing. The Delaware Supreme Court has concluded that the CZA "should be liberally construed in order to fully achieve the legislative goal of environmental protection."[36] In this case, TESI is taking something that no one wants – wastewater – and converting it to something that can be used – drinking water. In the process, it is producing biosolids that may be used as fertilizer under certain circumstances. The fact that the unusable wastewater results in two types of output, both of which are usable, is enough to constitute "manufacturing" under the CZA. To require that a saleable output result would result in a "pinched construction of the scope of the term 'manufacturing' [in such a way that it] would clearly defeat the legislative purpose of the Act 'to control the location, extent and type of development in Delaware's coastal areas.'"[37]

The Court finds the Board erred as a matter of law in concluding a product must

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[35] Hearing Officer's Report at pp. 20-21.

[36] *Wilmington v. Parcel of Land Known as Tax Parcel No. 26.067.00.004*, 607 A.2d 1163, 1166 (Del. 1992).

[37] *Id*. at 1166-67 (quoting 7 *Del. C.* § 7001).

be able to be sold on the open market and modifies the Decision to reflect the characterization of the Facility's use as manufacturing in accordance with the Secretary's Order.

B. Do the Secretary's technical violations of the permitting process require denial of the permit?

Even though the Court modifies the reason for which the Facility is subject to the permitting process, the permitting process is the same whether the applicant seeks a permit for a new sewage treatment plant or whether the applicant seeks a permit for a new manufacturing facility.[38] Therefore, the Court may consider the Environmental Appellants' challenge to the permitting process. When contemplating the issuance of a permit, the Secretary and the Board are statutorily required to consider the environmental impact, the economic effect, and the aesthetic effect of the proposal.[39] The Secretary and the Board must also consider the number and type of supporting facilities required and the impact of such facilities on the environmental, economic and aesthetic factors; any effect on neighboring land uses; and county and municipal comprehensive plans for the site.[40] The Regulations drafted by the Secretary and adopted by the Board elaborate upon

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[38] Again, because the Court finds the Facility is a manufacturing use, it will not address TESI's contention that the Regulation requiring a permit for a new sewage treatment plant is invalid if the sewage treatment plant is found not to be a manufacturing use.

[39] 7 *Del. C.* § 7004(b).

[40] *Id.*

the process and set forth various requirements that must be met for a permit to issue. One of those requirements is that a permit application for a facility that will result in "any negative environmental impact" must contain an offset proposal.[41] The offset proposal "must more than offset the negative environmental impacts associated with the proposed project or activity requiring a permit."[42] In this case, the Facility itself is the proposed offset. The CZA permit was issued despite TESI's failure to file a construction permit application and its failure to file an offset schedule as required by the Regulations.[43]

TESI argues that the regulations requiring an offset are improper since DNREC is required to conduct a balancing test. The requirement that DNREC conduct a balancing test does not suggest that the balancing must result in a net environmental benefit and, TESI contends, the opposite is suggested. Moreover TESI alleges DNREC has waived its ability to enforce the Regulations because it has not previously required a CZA permit for other wastewater facilities located in the Coastal Zone.

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[41] Regulation 9.1.1.

[42] *Id.*

[43] *See* Regulation § 9.1.6 ("Where an offset project in itself requires one or more permits from a program or programs within DNREC, the Secretary shall issue the Coastal Zone Permit only after all applicable permit applications for offsetting projects have been received and deemed administratively complete by DNREC.") and Regulation § 9.3.1 ("Coastal Zone permits shall be approved upon the applicant carrying out the proposed offset in accordance with an agreed upon schedule for completion of the offset project. Said schedule will be included in the Coastal Zone permit as an enforceable condition of the permit.").

The Regulations are binding and have the force of law; they are presumed valid.[44] The proper method for challenging the validity of a law is by way of declaratory judgment. TESI has not done so here. Indeed, TESI did not raise this issue in its opening brief on appeal. Critically, as DNREC points out, the Board is not a party to this litigation. As such, I will not entertain TESI's challenge to the Regulations, as a whole, at this time.

The Board concluded the Secretary's failure to abide by the Regulations did not warrant reversal of the permit. The Board found:

> Specifically, regarding Regulation 9.3.1, it is difficult for the Board to envision what such a schedule could be at this point in time. In any event, the omission of the schedules from the Permit does not adversely affect the sufficiency or the specificity of the offset conditions themselves, or the Board's ability to assess them. ... [T]he Board concludes that the Permit was issued in compliance with the CZA, with these two regulatory violations. Those conditions nonetheless remain CZA Permit conditions enforceable by DNREC until completed to DNREC's satisfaction and TESI's noncompliance could warrant revocation of the Permit. Ultimately, the Facility's construction and operation itself is contingent on TESI's compliance with those conditions through its construction permit, regardless of the timing and schedule for completion.
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> Regarding Regulation 9.1.6, the Board considered testimony from TESI's witness regarding the required submission of the construction permit. DNREC representatives initially indicated that the requirement was not necessary due to the major expense associated with the design of a complete wastewater treatment plant prior to issuance of a CZA permit. DNREC reversed its position as indicated by the Secretary's Environmental Assessment Report dated April 23, 2010. However, following further

[44] *Sammons v. Ridgeway*, 293 A.2d 547, 549-50 (Del. 1972).

> discussions with TESI concerning the review of the construction design condition by DNREC's Groundwater Discharges Section, it was agreed the construction permit would not be required. This indicates to the Board that the Secretary's action with respect to the construction permit was not in ignorance of the Regulation, but rather a reasoned decision by DNREC personnel. Regardless of the reasoning, the construction permit will be evaluated by DNREC and subject to public hearing pursuant to 7 *Del. C.* Chapter 60 prior to decision by the Secretary and will address the science and appropriateness of the Facility's RIBs, the reforestation plan, spray irrigation and other environmental impacts of the Facility. Therefore, despite the Secretary's decision not to require the submission of an administratively complete construction permit application prior to issuing the Permit, those matters will be reviewed - and subject to public hearing - at a later date, and this timing issue did not impair the Board's ability to assess the statutory sufficiency of the Permit under the CZA, the primary purpose of which is to safeguard the Coastal Zone for primarily tourism and recreation uses.[45]

The Environmental Appellants contend the Decision finding the Secretary violated the permitting process but upholding the issuance of the permit is contrary to law and should be reversed. TESI counters that the Regulations were not violated because the requirements are incorporated into the CZA permit. That is, the conditions were merely deferred.

The Facility is, by all accounts, a unique project in that the Facility serves as its own offset. As a practical matter, the Court agrees with the Board's conclusion that it is difficult to conceive of how TESI could be expected to produce a realistic schedule of development for the Facility prior to its approval. I agree with TESI that the intent of

[45] Board Decision at pp. 58-59.

Regulation 9.3.1 is to provide some assurance to DNREC that the offset project will be actually implemented. While the failure to require the offset schedule is a technical violation of the Regulation, I find the deferral of the requirement does not insult the spirit of the Regulation. Accordingly, the Board's decision that the violation does not warrant reversal of the Secretary's issuance of the permit is not an abuse of discretion.

Likewise, TESI's failure to file the construction permit application does not offend the notions of fair play and agency oversight. In the first instance, a representative from DNREC made the initial mistake upon which TESI was entitled to rely. In addition, the parties have worked out a plan and are obviously involved in continuing negotiations. The CZA permit is conditional upon the submission of the construction permit application. A public hearing will be held on the construction permit application. The purpose of the CZA permit is to establish the use is proper for the Coastal Zone. Many more factors will need to be considered during the development of this project.

The Environmental Appellants argue it is improper to use permit conditions because the concept that the Facility is an environmental benefit hinges on the Facility's ability to treat wastewater to the levels claimed. The Environmental Appellants rely upon dicta in *Kearney v. Coastal Zone Industrial Control Board*,[46] in which the Superior Court noted in a footnote that the applicant may have "put the cart before the horse" in

[46] 2005 WL 3844219 (Del. Super.).

not preparing a catastrophic incident management plan.[47] The Secretary had placed a special condition on the CZA permit that the applicant do so. As TESI points out, this dicta seems squarely at odds with the Supreme Court's decision in *City of Wilmington*: "the permit may be encumbered with various conditions and environmental restrictions requiring financial expenditures to satisfy."[48] I agree with the Supreme Court and the Board that this permit may be encumbered by conditions, including, under the circumstances presented, one requiring the submission of a construction permit application. The Court observes that DNREC has a number of enforcement tools at its disposal should TESI fail to comply with the permit conditions.[49] The Board did not abuse its discretion in excusing the failure to comply with the Regulation and upholding the issuance of the permit to TESI.

C. Was the Board's approval of the permit pursuant to Regulation 6.2 in violation of the CZA?

The Board found that the Facility was neither a heavy industry use nor a manufacturing use but nevertheless concluded a permit was required pursuant to Regulation 6.2. TESI argues that, if the project was neither heavy industry nor manufacturing, the discussion regarding the need for a permit ends; *i.e.*, no permit is

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[47] *Id.* at *6 n. 22.

[48] *City of Wilmington*, 607 A.2d at 1167.

[49] *See* 7 *Del. C.* §§ 7010, 7011, 7012.

required at all. TESI's position is that Regulation 6.2 is illegal and not based on the CZA. Simply put, TESI contends that DNREC illegally seeks to extend the permitting process to areas not encompassed by the CZA. Since TESI prevailed in the issuance of a permit in this case, its argument seems geared to address future projects. My decision that the Facility is a manufacturing use and therefore subject to the permitting process pursuant to the CZA moots this argument.

Conclusion

For the reasons set forth above, the Board's Decision upholding the issuance of a CZA permit to TESI for the Facility is AFFIRMED. For the reasons stated above, the Board's Decision to the extent it determined the Facility is neither a heavy industry use nor a manufacturing use but is otherwise subject to the permitting process is MODIFIED to reinstate the Secretary's determination that the Facility constitutes a manufacturing use, as contemplated by the CZA.

IT IS SO ORDERED.