

**BEFORE THE COASTAL ZONE INDUSTRIAL CONTROL BOARD
FOR THE STATE OF DELAWARE**

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| JEANETTE SWAIN, |) | |
| COLLINS PARK CIVIC ASSOC. |) | |
| |) | |
| Appellants, |) | |
| |) | |
| v. |) | |
| |) | CZICB Appeal No. 2021-01 |
| THE STATE OF DELAWARE, |) | |
| DEPARTMENT OF NATURAL RESOURCES |) | |
| AND ENVIRONMENTAL CONTROL, |) | |
| |) | |
| Appellee. |) | |

DECISION AND FINAL ORDER

Pursuant to due and proper notice of time and place of hearing¹ provided to all parties in interest, and to the public, a public hearing was conducted by the Coastal Zone Industrial Control Board (the “Board”) on September 15, 20 and 23 via the Web Ex virtual platform concerning an appeal that challenged the issuance of Secretary’s Order No. 2021-CZ-0019 (the “Secretary’s Order” or “Order”) by the Delaware Department of Natural Resources and Environmental Control (“DNREC”). The Order authorized the issuance of a permit (the “Permit”) to Fuji Imaging Colorants, Inc. (“Fuji” or “Permittee”) under the Coastal Zone Act, 7 *Del. C.* § 7001 et seq. (“CZA”). The Permit authorizes Fuji to construct and operate a new manufacturing plant to produce high-performance aqueous pigment dispersions at an existing building located at Fuji’s facility at 233 Cherry Lane, New Castle, Delaware 19720.

¹ Public notice published and posted in accordance with 7 *Del. C.* § 7007(d), 29 *Del. C.* § 10004(e), 29 *Del. C.* § 10122 and 7 *Del. Admin. C.* § 16.2.2

The appeal, docketed as Appeal No. CZ-2021-01 (“Appeal”), was filed August 13, 2021 by Jeanette Swain and Collins Park Civic Association (collectively the “Appellants”). DNREC, Fuji and Appellants are collectively referred to herein as the “Parties.” The Appeal asked the Board to reverse the Secretary’s Order and deny the permit, or to modify the permit based on the Secretary’s alleged failure to consider and require offsets for all the environmental impacts and effects on neighboring land uses from emissions, identifying Section 7004(a) of Title 7, and subsections 8.3.2, 9.1, and 9.2 of the Regulations Governing Delaware’s Coastal Zone, 7 DE Admin. Code. § 101. (“Regulations”).

The Board consists of a total of nine members, all of whom are voting members.² Six of the nine Board members were present, which constituted a quorum pursuant to 7 *Del.C.* § 7006.³ Board members in attendance were Chairperson Richard A. Legatski (the “Chair”), Pamela Meitner, Esquire, Karen Peterson, Robert Baker, Jeffrey Draper and Jamie Whitehouse. One Board member was absent (but not disqualified), Board member Jordan Schulties disqualified himself and one Board member position is vacant. Deputy Attorney General Kevin P. Maloney represented the Board; Kenneth T. Kristl, Esquire represented the Appellants; Deputy Attorneys General Devera Scott and Jameson Tweedie represented DNREC and the Secretary of DNREC; Robert Whetzel, Esquire and Tyler Cragg, Esquire represented Fuji.

² See 7 *Del. C.* § 7006. Five members are regular members appointed by the Governor and confirmed by the Senate. These regular members are Messrs. Richard Legatski, Jeffery Draper, Robert Baker and Ms. Pamela Meitner. The remaining four serve as ex-officio members and are Messrs., Jordan Sculties (Director of Delaware Division of Small Business) William G. Jester (Chairman of the Kent County Regional Planning Commission), and Jamie Whitehouse (Chairman of the Sussex County Planning and Zoning Commission) and Ms. Karen Peterson (Chairperson of the New Castle County Planning Board)

³ This section provides, in part, that “[a] majority of the total membership of the Board less those disqualifying themselves shall constitute a quorum. Written decision and order is issued by the Board pursuant to 7 *Del. C.* § 7007(b) and 29 *Del. C.* § 10128.

STATEMENT OF THE CASE AND PROCEEDINGS

By way of a brief procedural background, on or about On March 24, 2021, Fuji submitted an application for a coastal zone permit to the Department to construct and operate a new manufacturing plant within an existing building to produce high performance aqueous pigment dispersions at its facility at 233 Cherry Lane, New Castle, Delaware 19720. (Application for a Coastal Zone Permit by Fuji, Joint Exhibit Number 5 (hereinafter referred to as “JE [exhibit number]”).) Fuji had previously submitted a status decision, dated November 24, 2020, which was withdrawn, and an initial permit application on February 23, 2021, which was replaced by the March 24, 2021, application. The Department engaged with Fuji on a variety of matters, including offset proposals, throughout this time. Fuji’s application included an Environmental Impact Offset proposal (JE 5, Attachment G), as required by subsections 8.1.10 and 9 of the Regulations.

On April 28, 2021, the Department issued the Secretary’s Assessment Report of Fuji’s application, including the proposed impact on the criteria listed in subsection 8.1, as required by subsection 8.5.3. (JE 6.) The Assessment Report found that the proposed project would not impact: [1] water use and wastewater discharge; [2] stormwater runoff; [3] land erosion; [4] disposal of solid and hazardous waste; [5] wetlands or habitat for flora and fauna; [6] glare, heat, noise, vibration, radiation, electromagnetic interference, or obnoxious odors; or [7] threatened or endangered species. In addition, the Assessment Report found that the project would be contained entirely inside an existing building, and all vessels would be fitted with an overflow to prevent over or under pressurization of the two high-efficiency, hot water boilers that would be installed onsite. Any liquid overflow from those boilers would be collected by a sump pump and treated by the onsite wastewater pretreatment system.

The Assessment Report found that the proposed project's only impacts would be caused by the air emissions associated with the operations of two boilers and an HVAC system. There would be no anticipated change in air emissions from mobile sources, as emissions associated with the delivery of raw ingredients would be offset by the elimination of emissions associated with delivering materials from Scotland. The increase in air emissions associated with this proposed project would be offset by Fuji's purchase of three tons of emission reduction credits (ERCs) from the Delaware Division of Small Business, and the completion of an offset project onsite that would replace five existing propane-operated forklifts with two electric forklifts and three electric-powered pallet jacks. The replacement of propane-operated forklifts would eliminate 1.392 tons of carbon monoxide emissions. Overall, Fuji's offset proposal would offset 4.392 tons of emissions, satisfying the 1.1:1 ratio required to more than offset the 3.932 tons of emissions generated by the project.

The Assessment Report found that the Department had conducted a thorough review of Fuji's permit application, and the offset proposal would more than offset the project's negative environmental impact. As a result, the Department publicly noticed the application, and a virtual public hearing, presided over by Hearing Officer Lisa Vest, was convened on May 26, 2021. (JE 4.) The written comment period closed June 10, 2021. Appellants offered no comments, either in writing or at the public hearing, on the application. The Hearing Officer's Report indicated that the Department only received one comment, which was submitted by an individual who supported the project. (JE 3.)

The Hearing Officer's Report also found that Fuji's offset proposal was more than sufficient to offset the air emissions on a 1.1:1 ratio, and that the application satisfied requirements of all applicable statutes and regulations. Balancing the economic and environmental interests of the State, the Hearing Officer recommended that the Secretary grant Fuji a coastal zone permit. On July 23, 2021, the Secretary adopted the Hearing Officer's Report (JE 1), and on July 25, 2021, issued Coastal Zone Permit Number CZA-441P. (JE 2.)

On August 13, 2021, Appellants filed the Appeal which alleged that the Secretary, in issuing the Order and the Permit, erred as a matter of law on the following grounds:

- 1) In issuing the Order and Permit, the Secretary erred as a matter of law and fact in that the Secretary failed to consider all environmental impacts and effects on neighboring land uses.
- 2) In issuing the Order and Permit, the Secretary erred as a matter of law and fact in that the Secretary failed to require the offset of all negative environmental impacts.
- 3) In issuing the Order and Permit, the Secretary erred as a matter of law in that the Secretary failed to require compliance with the requirements for offset proposals and offsets found in sections 9.1 and 9.2 of the CZA Regulations.
- 4) In issuing the Order and Permit, the Secretary erred as a matter of law in that the Secretary failed to require all the offsets necessary to comply with sections 9.1 and 9.2 of the CZA Regulations.

An informal Scheduling Order established timeframes and deadlines for the submission of prehearing memoranda and other filings by the Parties. Pursuant to that Scheduling Order, the Parties made the following filings:

- On September 07, 2021, DNREC filed a “Motion to Dismiss the Appeal” based on the Appellants alleged lack of standing to pursue the appeal.
- On September 07, 2021, Appellants filed their response to the motions to dismiss.
- On September 09, 2021, Appellants filed with the Board a prehearing legal memorandum that set forth their position with respect to the factual and legal issues presented by the Appeal.
- On September 13, 2021, DNREC filed with the Board a legal memorandum that set forth its respective positions on the factual and legal issues presented by the Appeal.
- On September 13, 2021, Fuji filed with the Board a legal memorandum that set forth its respective positions on the factual and legal issues presented by the Appeal.
- On September 13, 2021, the parties jointly filed with the Board their “Joint Final Pre-Hearing Order,” setting forth, *inter alia*, stipulated facts, statements of legal issues presented, and exhibit and witness lists.

In addition, DNREC provided the Board with an indexed chronology of the complete record prepared by DNREC and considered by the Secretary in issuing the Order (the “Chronology”). The Chronology consisted of the following items:

- 1) Secretary’s Order No. 2021-CZ-0019
- 2) Delaware Coastal Zone Act Permit No. CZA-441P Fuji Imaging Colorants, Inc. permit to operate a 110-tons-per-year plant to produce high-performance aqueous pigment dispersions
- 3) Hearing Officer’s Report
- 4) Hearing Transcript Virtual Public Hearing held before Hearing Officer Lisa Vest
- 5) Application for a Coastal Zone Permit by Fuji
- 6) Secretary’s Assessment Pursuant to Regulations Governing Delaware’s Coastal Zone, 101 Del. Admin. C. § 101-8.5.3.

- 7) DNREC's Public Hearing Presentation
- 8) Fuji's Public Hearing Presentation

PREHEARING MATTER BEFORE THE BOARD

Prior to the Appellants' case in chief, DNREC made a request to the Board in the form of a motion in limine to exclude or limit Appellants' introduction of certain evidence, testimony and exhibits related to the merits of the appeal.⁴ After consideration of DNREC's request and Appellants' response, the Chair denied the request in its entirety in order to allow Appellants to introduce this evidence, if otherwise admissible, at the hearing so that the Board could give it due weight and consideration during deliberations.

In addition, on September 18, 2021 Fuji filed a Motion to Dismiss Collins Park Civic Association. Fuji contended that the Association's Appeal must be dismissed because at the time of the filing of the Appeal the Association was not a legal entity in good standing. The Board denied the Motion as untimely filed. Tr. II at p. 17 (September 20, 2021 hearing date).

MATTERS BEFORE THE BOARD

At its public hearing on September 23, 2021, prior to hearing argument on the merits, the Board first addressed the Appellants' standing. Standing is a threshold jurisdictional issue that must be addressed and decided independently of the merits of the Appeal, and before the Board rules on the merits of the appeal.⁵ A determination as to standing establishes who is a "person aggrieved" by the issuance of the Order and therefore has a right to bring an appeal before this

⁴ DNREC sought to exclude the introductions of appellants' Exhibits 1-6, but the Board denied DNREC's motion.

⁵ *Kearney v. Coastal Zone Indus. Control Bd.*, 2005 WL 3844219 at *5 (Del. Super. Mar. 18, 2005)

Board pursuant to 7 *Del.C.* § 7007(b).⁶ Should the Board rule on any matter involving the merits of the Appeal prior to making a determination as to whether Appellants, individually or collectively, have standing, such ruling might constitute an impermissible advisory opinion that the Board is not statutorily authorized to give.

SUMMARY OF THE EVIDENCE ON STANDING

Summary of the Appellants' Evidence on the Issue of Standing

Appellants' presentation on the issue of standing consisted of Appellants calling Jeanette Swain. Appellants did not call any additional witnesses or introduce any additional documentary evidence to establish standing.

Summary of Jeanette Swain's Testimony on Direct Examination

Ms. Swain testified that:

(1) She has lived at 129 Stanley Lane in New Castle, Delaware since March of 2017. Tr. II at p. 44. (September 20, 2021 hearing date).

(2) One of her hobbies is gardening so she spends a lot of time outside in her backyard. She also plays with her grandchildren and entertains friends in his back yard. Tr. II at p. 44.

(3) Collins Park residents walk their dogs, push babies in carriages, and children play outside and that there is a community park less than a half mile from the Fuji facility. Tr. II at p. 45.

(4) Her house is less than a mile away and approximately a five minute walk from the Fuji facility. Tr. II at p. 46.

⁶ This section states, in part, "[a]ny person aggrieved by a final decision of the Secretary of the Department of Natural Resources and Environmental Control . . . may appeal same under this section."

(5) She has been diagnosed with chronic bronchitis and asthma for which she uses an inhaler on a daily basis and is concerned that the Fuji operation will worsen her conditions and she will be forced to spend less time outdoors. Tr. II at p. 48.

(6) She is currently President of the Collins Park Civic Association which exists to protect and improve the quality of life for Collins Park residents and the Association was formed shortly after a community meeting held on October 19, 2019, and it was filed with the State as Collins Park Civic Association II, Incorporated. Tr. II at p. 48.

Summary of Cross Examination Testimony of Ms. Swain's by DNREC's Counsel

On cross examination by DNREC's counsel Ms. Swain testified that:

(1) She became aware of the Application when a friend told her about it and it is her position that Fuji can do whatever they want as long as they are not polluting the community and causing harm to human health. Tr. II at p. 61.

(2) She opposes the offset proposal because it doesn't do anything to eliminate pollution in the air that is going to harm humans and particularly herself. Tr. II at p. 62.

(3) She is particularly concerned about the carbon dioxide releases because they directly affect the respiratory system according to the EPA and will injure her respiratory system. Tr. II at p. 72.

(4) She acknowledged that she has no evidence to show that the emissions would be at a level that would harm her because it is DNREC's job to determine what is harmful to humans. Tr. II at p. 74.

Summary of Cross Examination Testimony of Ms. Swain's by Fuji's Counsel

On cross examination by Fuji's counsel Ms. Swain testified that:

(1) She has not talked to anyone from Fuji about her concerns and she cannot tell the Board that emissions from the Fuji project exceed any particular regulatory or health-based standard. Tr. II at p. 95.

(2) The Collins Park Civic Association II was formed as a 501 (c) tax-exempt entity and its certificate states that it is "organized exclusively for charitable, religious, educational, or scientific purposes" and she is pursuing the Appeal to protect the community from harmful pollutants. Tr. II at p. 108.

DNREC'S MOTION TO DISMISS APPEAL FOR LACK OF STANDING

At the conclusion of Appellants' presentation of witness testimony with respect to standing, and DNREC and Fuji's cross-examination of the witness, and counsels' arguments on the evidence, DNREC renewed its Motion to Dismiss the Appeal on the basis that Appellants did not establish standing.

DNREC's Argument Against Standing

In support of its motion to dismiss for lack of standing, DNREC argued that the Appellants have not met their burden to establish standing because all they have shown are hypothetical concerns and issues that are unrelated to the Permit action that is before the Board. Appellants have not shown harm that is both concrete and particularized, and actual or imminent. The alleged harm cannot be conjectural or hypothetical. There must be a connection between the injury and the specific conduct that is being complained about, and the injury must be redressable by some action of the Board. DNREC's counsel further argued that there was no witness testimony showing that,

as a result of this Permit action, there will be an increase in harmful air emissions, and no testimony that any harm would occur as a result of any emissions.

Appellants' Argument in Favor of Standing

In opposition of DNREC's motion to dismiss (and in support of standing), Appellants' counsel argued that the testimony showed Ms. Swain and Collins Park Civic association established standing because the current Fuji operation is causing Appellants' injury-in-fact and increased emissions will injure them even more. The fact that Ms. Swain's residence and Collins Park itself are in such close proximity to the Fuji plant further supports a finding of injury-in-fact.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON STANDING

Following the Board's consideration of the parties' presentations and arguments, and deliberations, the Board made a motion to deny DNREC's motion to dismiss for lack of standing. By a majority vote of 6 to 0, the Board denied DNREC's motion to dismiss the Appeal for lack of standing. The following is the Board's rationale.

The term "standing" refers to the right of a party to invoke the jurisdiction of a court [or an administrative board] to enforce a claim or to redress a grievance. Standing is a threshold question that must be answered by a court [or administrative board] affirmatively to ensure that the litigation before the tribunal is a "case or controversy" that is appropriate for the exercise of the court's judicial powers. The issue of standing is concerned "only with the question of who is entitled to mount a legal challenge and not with the merits of the subject matter in controversy."⁸

In the context of the CZA, the General Assembly has direct that only an "aggrieved party" has standing to file an appeal to this Board. As stated by the Delaware Supreme Court, "[a]ny right [a party] has to appeal the decision of the Secretary of DNREC to grant [a] CZA

Permit is derived from title 7, section 7007 of the Delaware Code. Section 7007(b) states that [a]ny person aggrieved by a final decision of the Secretary of [DNREC] under § 7005(a) of this title may appeal same under this section.”⁷ It is well established that the Appellants, who seek to invoke the jurisdiction of this Board, have the burden of establishing standing.⁸

The Board determined that the evidence established, to its satisfaction, that Ms. Swain lives approximately 1000 feet from the Fuji plant, has been and will be regularly exposed to emissions from the plant, and has the potential to be adversely affected by the increased emissions of a variety of pollutants allowed by the Permit. They concluded that Ms. Swain demonstrated that her quality of life may be impacted by additional pollutants especially being a sensitive individual with chronic bronchitis who enjoys spending time outdoors.

One Appellant is an organization (i.e. non-person). The legal standard for organizational (also known as associational) standing is well established under Delaware law. An organization must establish all of the three elements of associational standing: (1) the organization must have “members [who] would otherwise have standing to sue in their own right”; (2) the interests the organization seeks to protect “are germane to the organization’s purpose;” and (3) “neither the claim asserted, nor the relief requested requires the participations of the organization’s individual members.”⁹

The Board determined that Collins Park Civic Association had established standing due to the fact that it was prosecuting the Appeal in order to safeguard the concerns of its individual members and their children.

⁷ Nichols v. State Coastal Zone Indus. Control Bd., 74 A.3d 636, 642 (Del. 2013) (internal citations omitted).

⁸ See *Dover Historical Soc. v. City of Dover Planning Com’n*, 838 A.2d. 1103, 1109 (Del. 2003)

⁹ See *Dover Historical Soc’y*, 838 A.2d. at 1115 (quoting *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 343 (1977))

SUMMARY OF THE EVIDENCE ON THE MERITS

Summary of the Appellants' Evidence on the Issue of Legal Error

Appellants rested their case after Ms. Swain's testimony relying on her testimony, Appellants' five exhibits which were the subject of DNREC's Motion in Limine and legal argument.

Summary of DNREC's Evidence on the Issue of Legal Error

DNREC called as a witness Ms. Laura Mensch. Ms. Mensch testified that:

- 1) She has worked for DNREC's Coastal Program Section for approximately two years as the regulatory programs manager. As such she oversees the implementation of the Delaware Coastal Zone Act Program and the Delaware Coastal Management Program. Tr. II at p. 171.
- 2) When DNREC receives a standard permit application under the CZA it meets with the applicant, discusses the nature of the project and the application review process and then discusses potential offset requirements. After determining the sufficiency of the offset proposal the CZA Program drafts a Secretary's Assessment Report which is forwarded to the Secretary. Next the CZA Program conducts a public hearing. The Program next drafts the permit and sends the draft permit to the hearing officer who prepares a package for the Secretary's review and signature. Lastly the CZA Program Manager sends the Secretary's Order and permit, if granted, to the applicant and notifies the applicant if an appeal is received. Tr. II at p. 173.

- 3) Offset projects must more than offset the negative environmental impacts associated with the proposal. We strive to make offsets happen as close to the project as possible and work with DNREC subject matter experts and the applicant to identify the best proposal. Emission Reduction Credits (“ERCs”) are an offset mechanism regulated through DNREC’s Division of Air Quality. The reductions can be achieved through the installation of pollution control equipment, reduced production rates or operational hours, or through the entire shutdown of a facility. Tr. II at p. 175.
- 4) I had extensive communications with Fuji and their consultant as they worked on completing their CZA standard permit application. We received an initial offset proposal from the consultant on February 16, 2021 and consulted with the DNREC Division of Air Quality. Particularly, we sought an offset for carbon monoxide on site so that members of the local community would be exposed to less pollutants. Tr. at p. 181. Historically, the CZA permitting program has not deemed CO₂ a pollutant that is required to be offset. DNREC did however, recognize that there would be a significant reduction of CO₂ from the project as a result of the elimination of trans-Atlantic travel, although the exact level of those reductions were never quantified. Tr. II at p. 185.
- 5) The Division of Air Quality staff were integral in calculating the emissions that are associated with the project, so they verified and ground truth the emissions that were contained in the application. They were also consulted as to what type of offset proposals could occur. The Division of Air Quality staffer also able to look at the different compounds and understand their effect on the environment which

was helpful since Regulation 9.1.5 specifically allows for a pollutant to be offset by a similar pollutant that acts the same way in the environment if not practicable to offset in kind. Tr. II at p. 192.

6) When we went through the application and added up all the pollutants it came to 3.93 tons per year of net increases so using the 1.1 multiplier we concluded that they needed to offset 4.325 tons per year. NOX and VOCs are both considered ozone precursors, so it is appropriate that the pollutants are offset through reductions in ozone precursors like NOX and VOCs. Thus, we determined that the applicant would purchase three tons of ERCs, two NOX and one VOC. In addition, the proposal included the elimination of five propane-powered forklifts resulting in reduction of 1.392 tons per year of carbon monoxide. Tr. II at p. 199.

7) Appellants did not submit any public comments with respect to the project. Tr. II at p. 204.

Summary of Cross Examination Testimony of Ms. Mensch by Appellants' Counsel

On cross examination by Appellants' counsel Ms. Mensch testified that:

- 1) The project will result in an increase of carbon monoxide in the amount of 2.324 tons per year and you can use a NOX credit to offset the impact of a non-NOX pollutant. Offsetting through the purchase of ERCs of related compounds is a common practice within the CZA offset program and allowable under section 9.1.5 of the regs. Tr. II at p. 213.
- 2) The project's emissions are so low that they do not require a Division of Air Quality permit. If a pollutant acts as an ozone precursor and can be offset by the

removal or elimination of an ozone precursor it satisfies the offset requirement. Tr. II at p. 220.

Summary of Fuji's Evidence on the Issue of Legal Error

Fuji called as a witness Ms. Melissa Toledo. Ms. Toledo testified that:

- 1) She is the General Manager at the Fuji New Castle facility and is responsible for the operation of the site which manufactures a wide range of products that are used in the ink-jet printing industry. Tr. II at p. 247.
- 2) The facility has approximately 75 employees. The project at issue in this case is referred to as the Marconi Project and is designed to build a plant at the New Castle facility for production of ink-jet colorant in ink which is currently manufactured at Fuji's plant in Scotland. Tr. II at p. 252.

Fuji called as a witness Ms. Maureen Concordia. Ms. Concordia testified that:

- 1) She is the facility and EH Manager for Fuji and has been with the company for 17 years and her role in connection with the Marconi project was offering EHS support for the Coastal Zone application process. Specifically she worked with a consultant on the technical analysis and emissions analysis part of the process. Tr. II at p. 258.
- 2) Throughout the application process a number of different alternatives for offset proposals were considered and reviewed with DNREC. The two natural gas fired boilers are the source of the emissions from the project. The table in the permit appli-

cation lists the net increase in tons per year of pollutants as 3.931 and the offset requirement as 4.325. The elimination of five propane forklifts and the purchase of two NOX and one VOC ERCs constituted the approved offset package. Tr. II at p. 263.

Fuji called as a witness Mr. Richard Beringer. Mr. Beringer testified that:

1) He is a Delaware professional engineer who works for Duffield Associates and has 40 years of environmental experience mostly in air permitting and coastal zone permitting. Many of the permitting issues have involved natural gas combustion sources. Tr. III at p. 8 (September 23, 2021 hearing date).

2) He was asked to review the application and the Secretary's decision in this matter and to provide expert testimony, particularly with respect to the air emissions and their offset. He has concluded that the air emissions have been appropriately offset. Tr. III at p. 15. The two natural gas boilers involved in this project are fairly small, 4.6 million BTU and they will be used to provide hot water for the manufacturing process. The boilers will not require their own air permit because they fall under the 15 million BTU threshold. Tr. III at p. 15.

3) The natural gas combustion process is an oxidation process that creates heat and converts the natural gas and methane into other substances via a boiler that results in combustion by-products including nitrogen oxides, volatile organic compounds, carbon monoxide, carbon dioxide and particulate matter which are the by-products that are identified in the Fuji permit application. Tr. III at p. 20.

4) When a particular quantity of natural gas is used a particular quantity of each constituent by-product is generated and if a quantity of natural gas is reduced or eliminated the by-products are similarly eliminated. Tr. III at p. 21.

- 5) Page 33 of Joint Exhibit 5 is a table that was prepared and included in Fuji's application to generate the requirement for necessary offsets. The offsets are focused on NOX, VOCs and carbon monoxide because they are ozone precursors and ozone is traditionally a problem in New Castle County. Tr. III at p. 26.
- 6) An entity that creates an ERC submits them to the State who reviews them and if they appropriately qualify 25 percent are retired resulting in a long-term reduction in pollutants, 25 percent are provided to the State to be used as economic incentives and 50 percent are awarded back to the applying entity for their use or for sale. Tr. III at p. 30.
- 7) The offsets in the Fuji application exceeds the 4.325 tons per year required. The elimination of natural gas combustion resulting from the elimination of the natural gas-powered forklifts will reduce all pollutants in exactly the same ratio as the combustion of natural gas would emit them. Tr. III at pg. 36.
- 8) Historically DNREC has not required offsets for carbon dioxide in the Coastal Zone Program nor does it regulate it under the Clean Air Act or the State's Implementation Plan. The offsets in the Fuji application more than adequately offset the negative environmental impacts from the project. Tr. III at p. 39.

Summary of Cross Examination Testimony of Mr. Beringer by Appellants' Counsel

On cross examination by Appellants' counsel Mr. Beringer testified that:

- 1) The project will occur in an area that is considered to be in non-attainment for the National Ambient Air Quality Standard for ozone. Tr. III at p. 43.

Before an ERC is created there has to be a shutdown or installation of new

control technology or something else that is going to result in the reduction of NOX or VOC emissions. Tr. III at p. 43.

- 2) There is a carbon dioxide banking system that has been established for the electric power industry. Tr. III at p. 43.

SUMMARY OF APPELLANTS' LEGAL ARGUMENTS ON THE MERITS

- 1) Appellants argue that the Secretary improperly issued the CZA permit because emission credits for one pollutant cannot be used to offset another pollutant. Appellants contend that section 9.1.5 of the Coastal Zone Regulations supports its position. It states:

If negative environmental impacts involve the release of a pollutant, the applicant shall attempt to offset the release by eliminating or obtaining credits for the release of the same pollutant, if practicable. If it is not practicable to eliminate or obtain a credit for the release of the same pollutant, the applicant may propose the elimination of a different pollutant that affects humans, wildlife or the environment in a way that is similar to the effects of the pollutant that will be released by the project. 7 Del. Admin. C. 101 § 9.1.5. Appellants claim that § 9.1.5 only recognizes and allows the use of "obtaining credits" when the credit is for a reduction of the same pollutant as the one creating the negative impact from the CZA project.

- 2) Appellants also argue that the Secretary improperly issued the CZA permit because there is no offset for carbon dioxide emissions. Appellants argue that there is nothing in Fuji's offset proposal which attempts to offset the 4,758 TPY

increase in emissions of CO₂. Accordingly, Appellants contend, Fuji has not more than offset the negative environmental impact of its increased CO₂ emissions.

SUMMARY OF DNREC’S LEGAL ARGUMENTS ON THE MERITS

- 1) The Coastal Zone Regulations require that an application for a coastal zone permit include an offset proposal if the activity or facility will result in any negative environmental impact. Appellants contend that the Department improperly issued a coastal zone permit to FujiFilm because the Regulations do not allow the applicant to offset a pollutant by purchasing ERCs for another pollutant.
- 2) The CZA has been consistently applied over many years, since the promulgation of regulations in 1999, to allow for the use of offsets for differing pollutants. This is consistent with the language of the Regulations, which requires that a permit application “shall contain” an offset proposal for negative environmental impacts, but in contrast where those negative environmental impacts are the release of a pollutant the Regulations require that an applicant “shall attempt to offset the release” of the pollutant through elimination of release or credits for the same pollutant.
- 3) The Department worked hard to ensure that the offset credit being used to address these pollutants did, in fact, offset the negative environmental impacts, as required by the Regulations. Here, particular negative environmental impacts resulted from the emission of carbon monoxide, and as a result the Department insisted on a project – the replacement of forklifts – to offset those particular impacts. Other negative environmental impacts, however, such as contribution to the

formation of ozone, can be caused by a variety of pollutants. As a result, the Department required ERCs (representing the elimination of a release of a pollutant) for categories of pollutants that also act as contributors to ozone, VOCs and NOX.

4) The offsets represent the elimination of a release of a pollutant and are primarily associated with the shutdown of facilities and equipment that would otherwise have release numerous pollutants, for example from combustion activities. Although the only pollutants that are specifically documented and banked as credits in Delaware are VOCs and NOx, each of those credits is likely associated with the closing of a facility which would have been producing – like the two boilers in question in FujiFilm’s project – other pollutants. As a result, each credit almost certainly coincided with the elimination of the release of pollutants such as those Appellants demand be eliminated.

5) Appellants seek to apply a standard that would be difficult to implement and may well undermine the purpose of the Statute and the Regulations. Attempting to eliminate the release of each and every pollutant, including in extremely small quantities, such as the release of lead here, would make the program nearly unworkable, would make many projects almost impossible to approve, and would be contrary to the purposes of the CZA.

6) The Appellants’ also contend that the Department improperly issued the coastal zone permit because there is no offset for carbon dioxide emissions. There is no specific exception for carbon dioxide in the CZA. But in fact the Regulations do not define the term pollutant through a list of specific contaminants, so the lack of an exclusion for any substance is not determinative, and

does not obviate the Department's discretion. The Department has not historically required an offset of carbon dioxide emissions, a practice that has been consistent both before and after the 2019 update to the Regulations.

SUMMARY OF FUJI'S LEGAL ARGUMENTS ON THE MERITS

- 1) After consideration of the Application, the Secretary concluded that Fuji's offset proposal, which consists of purchasing two emission reduction credits ("ERCs") for NOx and one for VOC, along with the elimination of five propane forklifts, more than offset the Project's negative environmental impacts.
- 2) To grant a permit under the CZA, the Secretary must consider the following factors: 1) environmental impacts, including but not limited to air and water pollution; 2) economic effects, including the number of jobs created and the income generated through wages; 3) aesthetic effects; 4) the number and type of supporting facilities required; 5) the effect on neighboring lands; and 6) any County and municipal comprehensive plans. 7 Del C. § 7004.
- 3) The Secretary concluded that the only pertinent negative environmental impact was increased air emissions totaling 3.931 tons annually. Order at 7. The Secretary also considered FujiFilm's offset proposal, concluding that it would offset more than 4.325 tons per year of air emissions. Id.
- 4) To effectuate the CZA, DNREC has promulgated regulations stating that permit applications that "will result in any negative environmental impact shall contain an offset proposal." 7 Del. Admin. C. 101 § 9.1.1. But an offset proposal for negative environmental impacts need not offset every pollutant. In fact,

an applicant need only offset a particular pollutant if it is practicable. *Id.*, at 9.1.5. Where it is not practicable to offset a pollutant, the applicant may offset another pollutant with similar effects. *Id.*

5) In implementing the CZA, the Secretary has not required that CO₂ emissions be specifically offset to address negative environmental impacts. See, e.g. Order No. 2020-CZ-0010 (granting permit for project generating CO₂ that contained offset proposal for NO_x and VOC); Order No. 2019-CZ0039 (granting permit generating CO₂ that offset NO_x, VOC, H₂SO₄, CO, and PM); Order No. 2018-CZ-0033 (approving offset proposal to purchase three ERCs because these account for the emissions of natural gas combustion, including CO₂). In fact, DNREC has previously stated that it is not practicable to regulate CO₂ under the CZA. See Order No. 2015-CZ-0034 at 5 (“This explanation stated that the Department’s historical CZA regulation of negative impacts has not included CO₂ or required CO₂ emissions to be offset.

6) The Secretary’s decision regarding CO₂ emission under the CZA is entitled to deference.

BOARD CONCLUSIONS OF LAW ON THE MERITS

By a vote of 5-1 the Board voted to affirm the Secretary's Permit decision. The following is the Board's rationale.

Based on the Board's review of the evidence received and the record below the Board finds that the Secretary complied with the CZA and the CZA regulations. Specifically, the Board places great reliance on the unrequited testimony of Fuji' expert witness regarding the sufficiency of the Permit's offset provisions. The elimination of natural gas combustion processes reduced not only NOX and VOCs but also other combustion by-products that were listed in the permit application. Tr. III, at pg. 20-28 (hearing date September 23, 2021).

On appeal to the Board the Appellant bears the burden of proof.¹⁰ When making factual determinations, the Board "shall take due account of the experience and specialized competence of the agency and the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency."¹¹ Here the testimony, particularly that of Ms. Mensch and Mr. Beringer, far exceeds that standard. Especially important was Mr. Beringer's unrequited expert testimony concluding that CO2 reductions were addressed in the permit's offset provisions.

Delaware Courts counsel that "[a]n administrative agency's construction of

¹⁰ 29 Del. C. § 10125.

¹¹ 29 Del. C. § 10142(d).

its rules are presumptively correct.”¹² A reviewing court will give judicial deference to “an administrative agency’s construction of its rules in recognition of its expertise in a given field.”¹³ Accordingly, a court will not reverse an agency’s interpretation of its own rules unless it is clearly wrong.¹⁴ The Secretary’s Permit decision is not clearly wrong and is **AFFIRMED.**

¹² Ramsey v. Dep’t of Natural Res. and Envtl. Control, 1997 WL 358312, at *4 (Del. Super. Mar. 20, 1997), aff’d, 700 A.2d 736 (Del. 1997)(citing Div. of Social Services v. Burns, 438 A.2d 1227, 1229 (Del. 1981).

¹³ Id.

¹⁴ Id.

IT IS SO ORDERED, this 8th day of October 2021.

Dated: 10/8/2021 /s/ Richard A. Legatski

Richard A. Legatski, Board Member and Chair

Dated: 10/11/2021 /s/ Pamela Meitner, Esquire

Pamela Meitner, Esquire Board Member

Dated: 10/9/2021 /s/ Robert Baker

Robert Baker, Board Member

Dated: 10/8/2021 /s/ Jeffrey Draper

Jeffrey Draper, Board Member

Dated: 10/8/2021 /s/ Jamie Whitehouse

Jamie Whitehouse, Board Member

Dated: 10/8/2021 /s/ Karen Peterson

Karen Peterson, Board Member
(Ms. Peterson did not vote to affirm on the merits)