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

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

FUJIFILM IMAGING COLORANTS INC.'S
PRE-HEARING MEMORANDUM

FujiFilm Imaging Colorants Inc. ("FujiFilm) respectfully submits this pre-hearing memorandum in the appeal of Jeanette Swain and Collins Park Civic Assoc. (together, "Appellants") of Secretary's Order 2021-CZ-0019 (the "Order"), in response to Appellants' September 9, 2021 submission.[1] FujiFilm is the holder of permit number CZA-441P that Appellants contend was improperly issued by the Secretary of the Department of Natural Resources & Environmental Control (the "Secretary").

I. INTRODUCTION

FujiFilm and its parent company, FUJIFILM Corporation, are global manufacturers of printer inks devoted to manufacturing in an environmentally sustainable manner. To that effect, FujiFilm has adopted an environmental policy committed to the protection and preservation of the environment and to the responsible stewardship of natural resources. FujiFilm Ex. 1. This policy is grounded on four principles: Conservation; Continual Improvement; Compliance; and Constant

[1] FujiFilm refers to Appellants' pre-hearing statement of the case herein as "Op. Br."

Awareness. *Id.* This environmental policy has lead FujiFilm to develop more environmentally conscious products manufactured in a more sustainable manner.

II. FACTUAL BACKGROUND

A. Historic Use of the Site

FujiFilm is the long-time owner and operator of the project site, located at 233 Cherry Lane, New Castle, Delaware (the "Plant"). The Plant is located on a portion of the former ICI Americas Atlas Point site, which pre-dates the Coastal Zone Act ("CZA"). Since taking over the Plant, FujiFilm has developed it into one of the world's largest inkjet printer ink manufacturing facilities.

B. FujiFilm Seeks to Source and Manufacture Raw Materials Locally

One line of products that FujiFilm markets at the Plant is aqueous inkjet printer inks. Aqueous inkjet printer inks are more desirable than traditional inks because they are water based, rather than solvent based. By eliminating solvents, these inks are produced with more eco-friendly materials and have fewer negative environmental effects. Currently, some of the raw materials (aqueous pigment dispersions) used at the Plant are manufactured in Scotland and imported via cargo ship to the United States.

FujiFilm determined that it would be desirable to manufacture the pigments used to produce these aqueous inkjet printer inks in the United States. As a result, FujiFilm will convert one of the buildings at the Plant, known as L44, for the manufacture of these pigments (the "Project"). Manufacturing both the pigments and the inks at the same location is desirable because the pigments are predominantly water, meaning that shipping the pigments from Scotland involves transporting large volumes of water via ship across the ocean. By producing the raw material

pigments locally, both the environmental impact and the costs of producing the inkjet products will be significantly reduced.

The Project requires the installation of two low NO_x boilers used to heat water in the pigment manufacturing process. FujiFilm took care to ensure the boilers selected were the most efficient available to service the process. Although the boilers are small enough that an air quality permit is not required, the Plant's location in the coastal zone requires a permit under the CZA. Therefore, FujiFilm submitted a Coastal Zone Act Permit Application (the "Application") to the Department of Natural Resources and Environmental Control ("DNREC"). FujiFilm expended considerable time and resources during the application process to develop an offset package that was acceptable to DNREC.

C. No Objections to the Permit were Received at the Public Hearing

On April 28, 2021, DNREC determined that the Application was administratively complete, and ready for public hearing. A public hearing was held on May 26, 2021. Only one comment from the public was received at the hearing, in favor of the project.

D. The Secretary Determines That FujiFilm Has Offset the Impacts of the Project

Ultimately, after consideration of the Application, the Secretary of DNREC (the "Secretary") concluded that FujiFilm's offset proposal, which consists of purchasing two emission reduction credits ("ERCs") for NO_x and one for VOC, along with the elimination of five propane forklifts, more than offset the Project's negative environmental impacts. As a result, a permit issued on July 23, 2021. Subsequently, Appellants appealed the issuance of the permit on August 13, 2021, claiming that the Secretary failed to account for all negative environmental impacts.

III. STANDARD OF REVIEW

Under the CZA, any aggrieved person may appeal a permitting decision of the Secretary to the Board. 7 *Del. C.* §7007(b). In considering the appeal, the Board may grant, deny, or modify any permitting decision of the Secretary. *Id.*, at §7007(a). However, this Board has found that it should give deference to DNREC in its decisions regarding the enforcement of the CZA. *In the Matter of: The Appeal of the Delaware Audubon Society,* No. 95-1, at 11 (Del. C.Z.I.C.B. Jul. 28, 1995) (citing *Vassallo v. Haber Electric Co.*, Del. Super., 435 A.2d 1048 (1982)) ("DNREC is the agency authorized to administer the statute. Its interpretation of its provisions merit deference, even in the absence of regulations."). Moreover, when reviewing the decision of an agency, a reviewing court may not impose its own construction of the statue and must defer to the delegated agency's interpretation unless it is based on an impermissible construction of the statute. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

IV. ARGUMENT

A. Appellants Lack Standing to Bring the Appeal

Appellants' lack the necessary standing to pursue this appeal. Although the CZA provides a right to appeal to the Board for "[a]ny person aggrieved by a final decision of the Secretary" that does not mean that any person may bring an appeal before this Board. 7 *Del. C.* § 7007(b). The Delaware Supreme Court has made clear that to bring an appeal under the CZA, an appellant must show that they have standing as would be required for an appeal to the Environmental Appeals Board. *Nichols v. Coastal Zone Industrial Control Board*, 74 A.3d 636, 644 (Del. 2013). This standard requires that Appellants show: (1) that Appellants have suffered an injury in fact that is concrete and particularized, (2) that Appellant's injury is "fairly traceable to the challenged action of the defendant," and (3) that Appellant's injury must be capable of being remedied by a favorable

ruling by the Board. *Food & Water Watch v. Del. Dep't of Natural Res. and Envtl. Control*, 2018 WL 4062112, at *3 (Del. Super. Aug. 24, 2018); *Nichols*, 74 A.3d at 642-44. Appellants cannot satisfy any of the three elements and therefore, the appeal should be dismissed.

1. Appellants cannot establish an injury-in-fact.

First, Appellants fail to identify any injury-in-fact in their Notice of Appeal or their Pre-Hearing Statement of the Case. Appellants "must have suffered an injury in fact, which is the invasion of a legally protected interest within the zone of interest sought to be protected or regulated by the statute." *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 904 (Del. 1994). "The invasion must be a) concrete and particularized, and b) actual or imminent, not conjectural or hypothetical." *Nichols*, 74 A.3d at 643 (internal quotations omitted); *Oceanport Indus.*, 636 A.2d at 904 (same). And, most importantly, the interest must be "distinguishable from the public at large or that they will realize a direct harm from the challenged government action." *Food & Water Watch v. Del. Dep't of Natural Res. and Envtl. Control*, 2018 WL 4062112, at *4 (Del. Super. Aug. 24, 2018).

Appellants fail to identify an injury, let alone a concrete or particularized injury. Appellants raise no health impacts from the Project, nor do Appellants raise economic impacts from the Project. Indeed, nowhere in their Pre-Hearing Statement of the Case do Appellants state that they will suffer any harm. This omission is fatal to the appeal, as Appellants cannot make the threshold showing for standing.

2. Appellants lack organizational standing.

Relatedly, there are additional requirements for Collins Park Civic Assoc. as an organization to demonstrate standing. Organizations bear the burden of proving that 1) the interests to be protected by the suit are germane to the organization's purpose; 2) neither the claim

asserted nor the relief requested requires the participation of individual members; and 3) the organization's members would otherwise have standing. Appellants do not even attempt to carry their burden in this regard. There is no mention of Collins Park Civic Assoc.'s purpose at all, no mention of whether the members must participate and no claim that the members have standing themselves.

3. Appellants are unable to show an injury that is traceable to the challenged action.

Second, Appellants cannot show their injury is in any way linked to the issuance of a permit to FujiFilm. Simply put, Appellants failed to demonstrate any injury and therefore, it is a logical impossibility to show it is linked to the issuance of the permit.

4. Appellants' injury cannot be remedied by a ruling of this Board.

Third, Appellants cannot show their injury may be remedied by this Board. Again, Appellants have failed to demonstrate any injury. Without an injury there can be no remedy, let alone one that can be provided by the Board.

B. The Secretary Addressed All CZA Permit Requirements

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.

1. The Secretary considered the environmental effects, including offsets.

In the Order, the Secretary addressed the potential environmental impacts of increased air emissions, the generation of solid wastes, and the discharge of wastewater from the Project. 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.*

2. The Secretary considered the economic effects.

The Secretary considered the economic effects of the Project and determined that state tax revenues would increase by $365,184 in addition to $32,603 and $93,083 increases in county and school tax revenues. Order at 6. The project would also result in 21 Delaware jobs. *Id.*

3. The Secretary also considered aesthetic effects and effects on neighboring land use.

Further, the Secretary considered the aesthetic effects of the project, which were non-existent because the Project will be entirely inside a building. Order at 6. Likewise, the effect on supporting facilities was limited to one additional boiler as the other necessary facilities are already on-site at the Plant. *Id.* The Project is also consistent with county and municipal planning. *Id.* Finally, because the Plant is already zoned for Heavy Industrial use, there would be no interference with neighboring land use. *Id.*

C. The Secretary Approved the Offsets In The Permit and That Decision Is Entitled to Deference

Appellants challenge to the Secretary's approval of FujiFilm's proposed offsets must fail. At the outset, Appellants misconstrue the CZA and its offsetting requirements. The CZA does not require that every pollutant be offset. And it certainly does not require that each pollutant be offset on a pound for pound basis as Appellants suggest. To the contrary, the CZA requires that negative environmental impacts be offset. 7 *Del. Admin. C.* 101 § 9.1.1.

1. The Offsets Required By The Permit Meet the Requirements of the CZA.

The CZA requires that the Secretary consider the environmental impacts of a proposed project before granting a permit. 7 *Del. C.* § 7004(b)(1). However, the CZA grants the Secretary

broad latitude in its consideration of environmental impacts. 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.*

Appellants argue that the language of Section 9.1.5 does not permit the use of ERCs for other pollutants and only permits emissions reductions in this instance. Op. Br. at 5. This argument is contrary to the plain language of the regulation and must fail. ***First***, the regulation expressly provides for "offset[ing] the release by eliminating or obtaining credits" and this treats elimination and ERCs equivalently. 7 *Del. Admin. C.* 101 § 9.1.5. This makes sense, because an ERC is generated from the elimination of the emission by another source. The only distinction then, is whether it is the applicant or another source who eliminated the pollutant, but either way the pollutant emission is eliminated. Moreover, the elimination of that source for one pollutant will also eliminate other pollutants generated by that source. Here the ERCs were generated through the elimination of a combustion source. Thus, by purchasing ERCs that eliminated NOx through the shuttering of a combustion source, purchased ERCs for an equivalent amount of trace pollutants, as they pollutants were eliminated as well.

Second, when an agency consistently interprets a regulation, that interpretation should prevail. *State v. Barnes*, 116 A.3d 883, 890 (Del. 2015) ("When a statute has been applied by courts and state agencies in a consistent way for a period of years, that is strong evidence in favor of that interpretation."). DNREC has consistently interpreted Section 9.1.5 to permit the use of ERCs, and to allow ERCs to be used for related pollutants. For example, in Order No. 202-CZ-

0010 the Secretary approved the offsetting of SO_2, NO_x, CO, PM, VOC and toluene through the purchase of three tons of NO_x and VOC ERCs. This has been a consistent practice for years. *See* Order No. 2016-CZ-0022 (offsetting increase emission of "salt and other minor emissions" through the purchase of three NO_x ERCs). Therefore, this Board should defer to the technical expertise of the Secretary, and affirm the decision to grant the Permit.

2. CO_2 Offsets Are Not Required Under the CZA.

The CZA states that the negative environmental impacts of a proposed project be offset before a permit will issue. The CZA, however, does not define what constitutes a negative environmental impact. When a legislature explicitly leaves a gap, there is express delegation to the agency to fill it and the agency's interpretation must be given controlling weight unless it is arbitrary, capricious or manifestly contrary to the statute. *Chevron*, 467 U.S. at 843. In implementing the CZA, the Secretary has not required that CO_2 emissions be specifically offset to address negative environmental impacts. *See, e.g.* Order No. 2020-CZ-0010 (granting permit for project generating CO_2 that contained offset proposal for NO_x and VOC); Order No. 2019-CZ-0039 (granting permit generating CO_2 that offset NO_x, VOC, H_2SO_4, 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 CO_2). In fact, DNREC has previously stated that it is not practicable to regulate CO_2 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 CO_2 or required CO_2 emissions to be offset. Moreover, the TRM noted the lack of any commercially available pollution control equipment for CO_2 emissions."); *see also Sierra Club v. Tidewater Enviro. Serv., Inc.*, 2011 WL 5822636, at *13 (Del. Super. Oct. 27, 2011) (agreeing with Board that the CZA is still complied with even when unquantifiable environmental impacts

are not addressed). Thus, the Secretary's consistent interpretation of the CZA has not required CO2 specific offsets to address the negative environmental impacts of a project.

As a result, the Secretary's decision regarding CO_2 emission under the CZA is entitled to deference. The Generally Assembly left for the Secretary to assess and determine the negative environmental impacts of a project, and how they should be offset. In so doing, the General Assembly delegated that authority to the Secretary. Moreover, Appellants have failed to show that the Secretary's decision regarding CO_2 is arbitrary, capricious or manifestly contrary to the statute. As stated above, the Secretary has previously determined that it is not practicable to regulate CO2 under the CZA, and that there is a lack of commercially available means to control CO_2. Therefore, the Board should defer to the Secretary's decision not to require CO_2 specific offsets. To conclude otherwise would ignore the delegation of authority from the General Assembly to the Secretary, and would improperly intrude upon the technical expertise and discretion of DNREC.

D. The Board Cannot Provide the Relief Appellants Request

Appellants request as a potential form of relief that the Board "[m]odify ¶ 4 of the Permit to specifically require that Fujifilm more than offset the emissions of all pollutants that will increase as a result of L44." Op. Br. at 9. Although Section 7007 permits the Board to "modify any permit granted by the Secretary," this does not grant the Board the authority to determine or approve specific offset requirements. That is the purview of the Secretary, to whom the General Assembly delegated the authority to administer the CZA. Therefore, Appellants' requested relief must be rejected as beyond the Board's statutorily granted authority.

V. CONCLUSION

FujiFilm respectfully requests that the Board affirm the CZA Permit issued to FujiFilm.

/s/ Robert W. Whetzel

Robert W. Whetzel (#2288)
Tyler E. Cragg (#6398)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700
whetzel@rlf.com
cragg@rlf.com

Dated: September 13, 2021

Attorneys for Intervenor FujiFilm Imaging Colorants Inc.